OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 16 March 1994 *

Mr President,
Members of the Court,

1. The joined cases before the Court relate to requests for preliminary rulings from the Economic Chamber of the Gerechtshof (Regional Court of Appeal) te 's Hertogenbosch on the compatibility of the Netherlands Winkelsluitingswet of 23 June 1976 [1] (Law on shop closing, hereinafter referred to as 'the Winkelsluitingswet') with Articles 30 to 36 and Article 3(g) in conjunction with Articles 5 and 86 of the EC Treaty. [2] The questions referred for a preliminary ruling were raised in two sets of criminal proceedings pending in the Gerechtshof against Tankstation 't Heukske V. O. F. (hereinafter referred to as ''t Heukske'), on the one hand, and J. B. E. Boermans, on the other.

2. The facts of the two cases are very similar and uncontested. In May 1991, officials of the Netherlands public authorities found that two shops forming part of the ''t Heukske' and 'Boermans' petrol stations, both located in built-up areas, were open to the public without a certified notice being affixed at each public entrance in accordance with Article 2(1) of the Winkelsluitingswet. In addition, the officials found that a number of articles which were not 'for the road' were being offered for sale without being placed in lockable cabinets. Moreover, in at least one of the shops, tobacco products were being sold otherwise than from a vending machine.

3. 't Heukske and Boermans were prosecuted and found guilty by judgments of 6 November 1991 and of 9 March 1992 of the Economische Politierechter (Economic Magistrate) of the Roermond and Maastricht Arrondissementsrechtbanken (District Courts), Roermond and Maastricht. They appealed against that judgment to the Gerechtshof, on the ground, *inter alia*, that the rules on shop closing laid down in the Winkelsluitingswet and the implementing provisions based thereon (in particular the Decrees of 6 December 1977 and 13 December 1988) were contrary to Community law. Following this, the Gerechtshof decided to refer the following questions to the Court for a preliminary ruling:

'1. Do the provisions of the EEC Treaty, including Articles 30 to 36 or Article 86 in conjunction with Article 3(f) and Article 5 militate against rules which are in themselves lawful on the compulsory

* Original language: Dutch.

1 — For the content and origins of and recent amendments to the Winkelsluitingswet, see M. R. Mok, 'De winkeldeur op een kier', *Sociaal-economische wetgeving*, 1993, pp. 30 to 39.

2 — Article 3(g) of the *EC* Treaty corresponds to Article 3(f) of the *EEC* Treaty mentioned in the national court's questions.

closing of shops as laid down in the Netherlands Winkelsluitingswet 1976 and serving as the basis for implementing measures as laid down in the (amended) implementing degree of 6 December 1977 under which operators of *inter alia* petrol stations, shops in station buildings and at airports, shops in hospitals and museums are or continue to be permitted to offer for sale and to sell smoking accessories, beverages, newspapers, music cassettes and foodstuffs whereas others, including specialized shops are considerably more restricted in their opening possibilities?

2. Must the abovementioned provisions or any other provisions of the EEC Treaty be interpreted as precluding the criminal conviction of operators of petrol stations at the side of the public highway on the basis of the Winkelsluitingswet and the abovementioned implementing decree in so far as those provisions lay down rules for shops in petrol stations which:

   (a) in themselves do not affect the opening hours of petrol stations and relate merely to the conditions under which and the times at which certain goods may be offered for sale at those petrol stations;

   (b) make a distinction between petrol stations at the side of rijkswegen (national highways) and petrol stations at the side of other public highways, in so far as the former enjoy more freedom to offer for sale tobacco and tobacco products than the latter?

3. Is it relevant to the answer to Question 2(a) and (b) whether as between the two categories of petrol station distinguished in Question 2(b) there exists a difference between the proportion of normal revenue yielded by motor fuels and by other products in so far as the first category is (substantially) less dependent for its revenue on sales of products other than motor fuels than the second category?

4. Is it relevant to the answer to Question 2(a) and (b) and Question 3 that by governmental rules possibly with the involvement of a committee of representatives of petroleum companies, permits for petrol stations at the side of rijkswegen were granted in such a way that priority was thereby given to petroleum companies having a relatively large share of the market?'

4. It is striking that, in its first question, the national court describes the Winkelsluitingswet as constituting 'rules' which are 'in themselves lawful'. It might be inferred from this that the national court is convinced that national rules on the compulsory closing of shops are in principle compatible with Community law, and is asking simply whether it is compatible with Community law for implementing measures based on such rules to impose heavier burdens on some categories of shopkeepers than on others. In common with the Commission, I consider that all the rules on shop closing, including the law on which the implementing measures are based, should be tested against Community law.

The national court's questions essentially raise two issues. On the one hand, the Gerechtshof wishes to establish whether rules providing for the compulsory closing of shops and making a distinction in that connection as between different categories of economic operators are contrary to Community law, in particular Articles 30 to 36 of the EEC Treaty (Question 1). In fact, as will become clear later in this Opinion, that question is directed towards a very specific type of products, namely tobacco products, the sale of which is more restricted in the case of petrol stations of a particular category than in the case of others (Question 2), whereas it is precisely that category of petrol station which is most dependent for its revenue on the sale of goods other than motor fuels (Question 3). In addition, there is the question whether Community law, in particular Article 86 in conjunction with Articles 3(g) and 5 of the EEC Treaty, precludes rules on the closing of shops which apply the abovementioned distinctions, in particular if those rules are considered in the light of governmental rules on the grant of permits for petrol stations which give a competitive advantage to petroleum companies with a relatively large market share (Question 4).

In this Opinion I shall consider those two issues separately after I have described the national rules in question as precisely as possible in the light of the parties' written observations.

1. Description of the national rules referred to in the national court's questions

1.1. *The Winkelsluitingswet and the decrees adopted to implement it*

5. Article 2(1) of the Winkelsluitingswet prohibits opening a shop [3] to the public:

'(a) in the absence, at each public entrance to the shop, of a notice indicating the

3 — Article 1(1) of the Winkelsluitingswet defines a 'shop' as an 'enclosed space to which the public have access in which goods are sold to private individuals, provided that that space does not form part of a means of transport'.

opening hours; such notice must be affixed in such a way as to be clearly legible from the exterior and must have been certified by or on behalf of the mayor and aldermen;

(b) outside the opening hours indicated ...'.

Article 3(2) of the Winkelsluitingswet, in the version in force at the material time, [4] adds as follows:

'In addition, the notice may not be certified if the opening hours displayed thereon indicate that the shop in question is accessible to the public:

(a) on Sundays;

(b) on working days before 5 am;

(c) on Saturdays after 5 pm;

(d) on other working days after 6 pm;

(e) for more than 52 hours a week.'

6. The Winkelsluitingswet therefore restricts shop opening hours in the Netherlands in three ways: a maximum number of opening hours is laid down *per week* (52 hours at the material time); there are earliest opening hours and latest closing hours *depending on the day of the week* (at the material time: 5 am and 6 pm respectively on working days and 5 am and 5 pm respectively on Saturdays), and compulsory *Sunday* closing. Despite those restrictions, the Winkelsluitingswet leaves shopkeepers a degree of freedom in so far as they can decide how to distribute the maximum number of opening hours per week over the periods during which the law allows shops to open. In order to prevent that freedom leading to non-compliance with the restrictions described above, Article 2(1)(a) of the Winkelsluitingswet requires shopkeepers to affix at each public entrance a certified notice setting out the opening hours.

7. Two decrees adopted pursuant to the Winkelsluitingswet set out *derogations* from the general rules. The Decree of 14 December 1976, [5] which makes it possible to grant

4 — The legislation has been amended with effect from 1 January 1993; at present the maximum number of hours for which a shop may be open each week is 55 and shops may be open from 6 am to 6.30 pm on Monday to Friday and from 6 am to 6 pm on Saturday. Compulsory Sunday closing continues in force unabated.

5 — Decree implementing Article 10(3) of the Winkelsluitingswet 1976.

individual exemptions, [6] is not at issue in this case. In contrast, the Decree of 6 December 1977 'implementing Article 11 of the Winkelsluitingswet 1976' is at issue. Article 11 of the Winkelsluitingswet provides that exemption from the prohibitions laid down in the Law may be granted by 'general administrative rules'. The Decree of 6 December 1977, which is a 'general administrative rule' within the meaning of the Law, grants such exemptions *inter alia* to museums, chemists and shops selling newspapers and periodicals in, for example, stations, airports or hospitals. Under Article 2 of the Decree, they may, in theory, sell a range of products — which may or may not be limited [7] — twenty-four hours a day. For the benefit of road transport, a conditional exemption for petrol stations is also provided for, in accordance with the detailed rules described below.

8. Article 3(1) of the Decree of 6 December 1977, as amended by the Decree of 13 December 1988, [8] provides as follows:

'The prohibitions set out in Article 2(1) of the Law shall not apply to a petrol-station shop situated outside a built-up area within the meaning of Article 8 of the Wegenverkeerswet (Law on road traffic, *Staatsblad*, 1953, p. 554), alongside a dual carriageway or a motorway (auto(snel)weg) within the meaning of Chapter II, section 10, of the Reglement Verkeersregels en Verkeerstekens (Regulation on traffic rules and road signs, *Staatsblad*, 1966, p. 181), provided that, in the said shop, there are no goods offered for sale, sold or supplied other than:

(a) fuels and lubricants for vehicles or vessels;

(b) supplies intended for the use, cleansing or emergency repair of vehicles or vessels or accessories thereof;

(c) articles for personal hygiene, snack foods, ice creams, soft drinks, tobacco, smoking accessories, provided that it is customary to consume such articles while travelling in a vehicle'. [9]

6 — Pursuant to that decree, municipalities may, for example, grant individual exemptions to shops opening in the evening.

7 — Sales by museums are not subject to any restriction as to range of goods which may be offered for sale, on the ground — the Netherlands Government states — that the sale of goods in museums is merely an ancillary activity. The range of goods which may be offered for sale in chemists' shops is not limited either, the assumption being that the sale of medicinal products is the core activity. In addition, chemists' shops operate on the basis of an schedule of opening hours, with the result that they make only limited use of the possibility afforded by the Law to open outside normal opening hours. Lastly, the sale of newspapers and periodicals qualifies for the derogation only on condition that the shop concerned sells only or chiefly such products.

8 — *Staatsblad*, 1988, p. 593. Under Article II of that decree, it entered into force on 1 January 1989, but there was a two-year transitional period after that date. It is common ground that the cases under examination relate to the definitive rules which into force on 1 January 1991.

9 — Before the amendment made by the Decree of 13 December 1988, the range of goods which might be sold around the clock in petrol stations was not listed with that degree of precision. In its written observations to the Court, the Netherlands Government justifies the amendment in the following terms: 'In practice, however, the range of goods sold in the evenings and on Sundays in petrol stations was invariably wider. This gave rise to understandable complaints on grounds of unfair competition from, in particular, the foodstuffs sector and tobacco retailers, which subsequently led to an adjustment of the rules in question.'

Under that provision, *petrol stations situated at the side of dual carriageways or motorways outside built-up areas* [10] and shops connected with them may be open night and day to sell certain articles 'for the road', such as petrol and tobacco products. In contrast, the general rules remain applicable to products which are not 'for the road': such products may be sold only within limited opening hours which have to be indicated at each public entrance to the shop. Outside the opening hours indicated, such products must be kept in a lockable cabinet.

9. Article 3(2) of the Decree of 6 December 1977, also as amended by the Decree of 13 December 1988, sets out the rules applicable to *all other petrol stations*. Its wording is identical to that of Article 13(1), except that it provides in indent (c) that tobacco and smoking accessories may be sold outside normal opening hours only from 'a vending machine'.

In order to justify that — admittedly very limited — difference between petrol stations located outside built-up areas at the side of dual carriageways or motorways and petrol stations not so located, the explanatory memorandum to the Decree of 18 December 1988 states that the grant of an unlimited derogation to all petrol stations for the sale of tobacco products 'would give rise to distortions of competition in relation to the tobacco retail trade'. In its written observations, the Netherlands Government expanded on that aspect as follows:

'The organization of the sector of tobacco retailers considers that the sale of tobacco and tobacco products in petrol stations distorts competition in built-up areas, but not along highways. Maintenance of the *status quo ante*, [11] that is to say, sale from vending machines, did not give rise to problems in the sector. Those objections did not apply in the case of stations located along the network of main roads. Consequently, the sale of tobacco and tobacco products is not prohibited in any petrol station, it is merely the manner of sale which is regulated.'

1.2. *The Netherlands legislation governing the grant of permits to run petrol stations*

10. Since 1972, holders of permits to operate *petrol stations situated at the side of rijks-*

10 — The Gerechtshof and 't Heukske and Boermans refer to such petrol stations as being 'petrol stations at the side of rijkswegen [national highways]'. However, the Netherlands Government rightly points out that 'no distinction is made between rijkswegen and other roads'.

11 — By *status quo ante*, the Netherlands Government manifestly means the situation prior to the entry into force on 1 January 1991 of the Decree of 13 December 1988.

wegen [12] have been designated by the Minister of Economic Affairs at the proposal of a committee known as the 'Commissie Benzinestations langs Rijkswegen' (Committee for petrol stations situated at the side of rijkswegen). [13] [14] After the permit has been granted, the State concludes with the permit-holder a contract governed by private law concerning the use of the State-owned land on which the petrol station is to be built.

In addition to a permit-holder, the Minister of Economic Affairs designates an independent operator for each petrol station to be opened. Following this, the permit-holder and the operator have to conclude a contract known as a 'standard operating contract', [15] which provides that if the operator sells fuel in excess of a pre-determined quantity, he has to pay compensation to the permit-holder. [16] Receipts from sales made in the shop are not covered in any way by the standard operating contract.

12 — Unlike the Winkelsluitingswet and its implementing decrees (see footnote 10), the legislation governing the grant of permits to run petrol stations does employ 'rijkswegen — other roads' as a criterion.

13 — See the last paragraph of Article 5 of the Regels ten aanzien van de uitgifte en exploitatie van benzinestations langs Rijkswegen (Rules governing the licensing and operation of petrol stations situated at the side of national highways): 'Within a reasonable time, the Committee shall submit to the Minister of Economic Affairs a reasoned proposal for allocating an available site. If the Minister finds that he can support that proposal, he shall submit an opinion to the Minister of Transport, Water Control and Construction, who shall be responsible for issuing the permits pursuant to the Rijkswegenreglement (Regulation on national highways). ... If the Minister of Economic Affairs is unable to agree to the Committee's proposal, he shall engage in consultations with the Committee.'

14 — No party to the proceedings has described the precise composition of this Committee. In any event, according to the request for a preliminary ruling, petroleum companies are represented on it. Moreover, the Netherlands Government observes that the 'opinions delivered by the Committee have invariably been endorsed by all the companies concerned'.

15 — Pursuant to Article 4(d) of a communication of 7 November 1972.

16 — Conversely, the permit-holder has to pay compensation to the operator if the latter sells less than the pre-determined quantity.

11. In addition, it appears from the Regels ten aanzien van de uitgifte en exploitatie van benzinestations langs Rijkswegen (Rules governing the licensing and operation of petrol stations situated at the side of national highways), which have been in force since 26 June 1972, that account is taken of would-be permit holders' market shares in granting permits for petrol stations situated at the side of national highways. Sections 2 and 5 of the Rules provide as follows in this respect:

'2. Petroleum-selling companies established in the Netherlands which satisfy the following conditions may obtain a permit to operate petrol stations situated at the side of national highways:

— they must hold at least a 1% share of the Netherlands market in petrol (*market share*);

— they must have a nation-wide distribution network;

— they must be assured of sufficient continuity in the supply of the requisite products.

For the purposes of *determining market share*, the quantity of (normal and super grade) petrol sold in the Netherlands in the preceding calendar year by a company under its own trade name in petrol outlets trading under that name which are freely accessible to the public shall be calculated as a percentage of the total quantity of petrol sold in the Netherlands in the same year.

5. In the event that sites for petrol stations are available for allocation, the Committee for "Benzinestations langs Rijkswegen" (Committee for petrol stations situated at the side of rijkswegen) shall be notified by the Minister of Economic Affairs. The Committee's task shall consist in advising the Minister of Economic Affairs on the allocation of available sites as between participating companies. *That allocation as between participating companies shall be carried out having regard to the market shares determined in accordance with section 2 of these rules.* The Chairman of the Committee for "Benzinestations langs Rijkswegen" may act as a mediator in connection with both the determination of the participating company's market share and the assessment of the expected turnover of the petrol stations which are to be allocated.' (My emphasis).

It also appears from this excerpt that, for the purposes of determining market shares, account is taken solely of the sale of motor fuels and not of any other products which may be sold in the shops.

12. The provinces of the Netherlands decide on the grant of permits for *petrol stations situated at the side of roads other than rijkswegen*. In the case of such petrol stations, relations between the permit-holder and the operator are governed on a contractual basis without any involvement of the public authorities.

2. The scope of Articles 30 to 36 of the EEC Treaty as regards national measures regulating shop opening hours

2.1. *The Court's case-law with regard to national measures applying 'without distinction' prior to the judgment in* Keck and Mithouard

13. In the past, the Court has repeatedly delivered judgments on the compatibility with Articles 30 and 36 of the EC Treaty of national measures regulating shop opening hours. In particular, it has had occasion to consider section 47 of the British Shops Act 1950, which provides that shops have to be closed to the public on Sundays. In its judgment of 23 November 1989 in *Torfaen*

Borough Council v *B & Q ('B & Q I')*, the Court ruled as follows:

'Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting traders from opening their premises on Sunday *where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.*' (My emphasis). [17]

That judgment was interpreted divergently in a number of Member States, resulting in new requests for preliminary rulings. In judgments delivered on 16 December 1992, [18] the Court confirmed its judgment in *B & Q I*, although it did not reiterate the words quoted above in italics. It made those rulings after finding that the various national laws on Sunday trading were not intended to regulate the flow of goods and did not make the marketing of products from other Member States more difficult than the marketing of domestic products. [19] The Court went on to hold as follows:

'Furthermore, ... the Court recognized that the legislation at issue pursued an aim which was justified under Community law. National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the Member States to make those choices in compliance with the requirements of Community law, in particular the principle of proportionality'. [20]

14. The case now before the Court differs from the aforementioned cases in so far as it is not concerned with compulsory Sunday closing — moreover, the offences which gave rise to the criminal proceedings took place on weekdays — but with the way in which general rules on shop closing are applied to a particular category of economic operators.

However, that is not the chief reason for which the case-law cited above cannot be applied *simpliciter* in this case. That reason is to be found in the judgment of 24 November 1993 in *Keck and Mithouard*, [21] in which the Court to some extent altered its case-law on Article 30 of the EC Treaty. In view of the still uncertain nature of this change, I

17 — Judgment in Case C-145/88 *Torfaen Borough Council* v *B & Q ('B & Q I')* [1989] ECR 3851, operative part. See also the judgments of 28 February 1991 in Case C-312/89 *Conforama* [1991] ECR I-997 and in Case C-332/89 *Marchandise* [1991] ECR I-1027, in which the Court held that the prohibition laid down in Article 30 of the EEC Treaty did not apply to national legislation prohibiting the employment of workers, in the one case, on Sundays and, in the other, on Sundays after 12 noon.

18 — Judgments in Case C-304/90 *Payless DIY and Others* [1992] ECR I-6493 and in Case C-169/91 *B & Q II* [1992] ECR I-6635. In Case C-306/88 *Anders*, the Court held that it was not necessary to reply to the questions raised.

19 — Judgment in *B & Q II*, paragraphs 9 and 10.

20 — Judgment in *B & Q II*, paragraph 11.

21 — Judgment in Joined Cases C-267 and 268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.

shall be examining that judgment more closely later in this Opinion. However, as my starting point, I would call to mind the Court's previous case-law.

15. Since the judgment of 11 July 1974 in *Dassonville*, the Court has consistently held that not only discriminatory, but also non-discriminatory, national measures were capable of constituting 'measures having an effect equivalent to quantitative restrictions on imports' within the meaning of Article 30 of the Treaty. In order for this to be so, the measures should be 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. [22] By discriminatory national measures is meant measures applying only to imports or treating imported products differently from domestic products. In contrast, non-discriminatory national measures are measures applicable without distinction to domestic products and to products imported from other Member States. In the remainder of this Opinion I shall refer to such measures as 'measures applicable without distinction'. [23]

Discriminatory measures can be justified only on one of the grounds listed in Article 36 of the EC Treaty. In the absence of harmonized European rules, measures applicable without distinction may also be justified by 'mandatory requirements'. In the judgment of 20 February 1979 in the *Cassis de Dijon* case, this was expressed in the following terms:

'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.' [24]

16. The national measures applicable without distinction to which the Court applied Article 30 in *Cassis de Dijon* and, following on from that, numerous subsequent judgments [25] related to the production or distri-

22 — Judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

23 — The expression 'measures applicable without distinction' is preferable to 'non-discriminatory measures', since, as will be seen later (in section 23), the latter measures may still be caught by the prohibition set out in Article 30 on account of their discriminatory effects.

24 — Judgment in Case 120/79 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8. That judgment did not expressly state that that possibility did not exist in the case of discriminatory measures, although that has been made clear, for example, by the judgment of 17 June 1981 in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraph 11.

25 — Well-known, recent instances include the judgments in Case 174/84 *Commission* v *Germany* [1987] ECR 1227 ('Reinheitsgebot' for beer), Case 216/84 *Commission* v *France* [1988] ECR 793 (ban on the marketing of substitutes for milk powder and concentrated milk), Case 407/85 *3 Glocken and Kritzinger* [1988] ECR 4233 and Case 90/86 *Zoni* [1988] ECR 4285 (both concerned with the obligation to use only durum wheat in the manufacture of pasta) and Case 274/87 *Commission* v *Germany* [1989] ECR 229 (ban on the marketing of meat products containing ingredients other than meat).

bution requirements 'to be met', according to the wording used in the judgment in *Keck and Mithouard*, 'by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging)'. [26] Those requirements, to which I shall refer in the rest of this Opinion as 'product requirements', relate, in other words, to the intrinsic or extrinsic characteristics of the product concerned.

However, in *Keck and Mithouard* itself, the Court did not have to deal with such a product requirement. What was at issue in that case was another category of national measures applicable without distinction, more specifically measures prohibiting or restricting a particular sales promotion method. With regard to that category of measures and measures, treated in the same way in the case-law, prohibiting or restricting certain kinds of advertising, the Court ruled as follows in the judgment of 15 December 1982 in *Oosthoek's Uitgevermaatschappij* (where what was at issue was Netherlands legislation prohibiting the offer of free books to purchasers of encyclopaedias):

'Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that in order to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.' [27]

In other words, what is involved here is national measures relating to sales promotion methods and forms of advertising. [28]

26 — Judgment in *Keck and Mithouard*, paragraph 15. This wording is evidently based on Article 3 of Commission Directive 50/70/EEC of 22 December 1969, based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ, English Special Edition 1970(I), p. 17). According to that provision, Directive 50/70/EEC covers 'measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules'. The Court has referred to Article 3 on numerous occasions: see, in particular, the judgments in Case 62/70 *Bock* [1971] ECR 897, paragraph 17, in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 8, in Case 75/81 *Blesgen* [1982] ECR 1211, paragraph 8, and in *B & Q I*, cited above, paragraph 15.

27 — Judgment in Case 268/81 *Oosthoek's Uitgevermaatschappij* [1982] ECR 4575, paragraph 15.

28 — Among other judgments concerning national measures prohibiting or restricting forms of *advertising* without distinction, one might mention, for example, the following: Case C-362/88 *GB-INNO-BM* [1990] ECR I-667 (prohibition on displaying the price applicable before the promotion), Case C-241/89 *SARPP* [1990] ECR I-4695 (prohibition of any statement in advertising of artificial sweeteners alluding to the word 'sugar'), Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior en Publivía* [1991] ECR I-4151 (prohibition on the advertising of beverages with a high alcohol content) and Case C-126/91 *Yves Rocher* [1993] ECR I-2361 (prohibiting of advertising comparing the current price with a previous price offered by the same trader). Examples of judgments dealing, like the judgment in *Keck and Mithouard*, with national measures restricting *sales methods* without distinction include those in Case 382/87 *Buet* [1989] ECR 1235 (canvassing) and in Case C-239/90 *Boscher* [1991] ECR I-2023 (obligation to register in the commercial register in the case of a public sale). Lastly, paragraph 15 of the judgment in *Oosthoek's Uitgevermaatschappij* was also confirmed in paragraph 50 of the judgment in Case C-369/88 *Delattre* [1991] ECR I-1487 and in paragraph 37 of the judgment in Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547 (both relating to a sales monopoly of pharmacists).

17. Apart from those two categories, namely product requirements and requirements relating to sales promotion and advertising — the only two involved in the judgment in *Keck and Mithouard* —, many other types of national measures applying without distinction have been tested, in the Court's abundant case-law, against Article 30 of the EC Treaty: measures, for instance, which — without making any distinction between domestic and imported products and without constituting genuine product requirements — completely prohibited [29] the sale or marketing [30] of products, or else imposed a complete prohibition in the absence of registration, [31] in the absence of approval [32] or in excess of a given quantity [33] or affected the place or time at which the sale of marketing was carried out, [34] the capacity of the parties involved in the transaction, on the supply or the demand side, [35] or the price level. [36]

I do not intend in this Opinion to examine the impact of Article 30 of the EC Treaty on each of those categories of national measures applicable without distinction (which I have not even listed exhaustively and which cannot be defined precisely) following the judgment in *Keck and Mithouard* (see, however, section 27, below). I assume that the Court will be faced with this question in later cases. Here I simply have to consider the effect of that judgment on the measures at issue in the instant case, namely measures relating to the time of sale and the way in which sales are made. Nevertheless, it seems worthwhile first placing the scope of the judgment in *Keck and Mithouard*, and the change which it has brought about, in a somewhat broader context.

29 — See, for example, the judgment in Joined Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605 (temporary prohibition of the distribution of video cassettes and video discs).

30 — I refer here to sale 'or marketing', since products may also distributed by means, for example, of leasing contracts. See K. J. M. Mortelmans, 'Artikel 30 EG. Verduidelijking van de Dassonville-formule en van de Cassis de Dijon-rechtspraak' (note on the judgment in *Keck and Mithouard*), *Sociaal-Economische Wetgeving*, 1994, p. 115, at p. 122.

31 — See, for example, the judgment in Case 277/82 *Van Bennekom* [1983] ECR 3883 (prohibition on the marketing of vitamins in the absence of prior registration).

32 — See, in particular, the judgments in Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941 (approval procedure for telephone sets with no possible appeal to the courts) and in Joined Cases C-46/90 and C-93/91 *Lagauche and Others* [1993] ECR I-5267 (approval of radio communication apparatus).

33 — In the judgment in Case 190/73 *Van Haaster* [1974] ECR 1123, paragraph 17, the Court held that a national organization having the purpose of rationing production potentially affected the system of trade within the Community and should therefore be regarded as a measure having an effect equivalent to a quantitative restriction. In the judgment in Case 148/85 *Forest* [1986] ECR 3449, it held that a national system of wheat-milling quotas applying to both domestically-produced wheat and to imported wheat did not affect intra-Community trade and was therefore not contrary to Article 30 of the EEC Treaty.

34 — See, in particular, the Sunday trading cases cited in footnotes 17 and 18.

2.2. *The implications of the judgment in* Keck and Mithouard

18. In *Keck and Mithouard*, the Court was called on to interpret Article 30 of the EC

35 — See the recent judgment of 25 May 1993 in Case C-271/92 *LPO* [1993] ECR I-2899 (legislation restricting the sale of certain — domestic and imported — optical products to holders of an optician's/spectacle-maker's diploma).

36 — According to the Court, national price rules which are applicable without distinction to national and imported products may be contrary to Article 30 of the EC Treaty if they mean that imported products cannot be sold at a profit (maximum price too low) or lose their competitive advantage flowing from their lower cost price (minimum price too high). See, in particular, the judgments in Case 64/75 *Tasca* [1976] ECR 291, paragraph 27, in Case 82/77 *Van Tiggele* [1978] ECR 25, paragraph 14, and in Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, paragraph 17.

Treaty in connection with a French law prohibiting resale at a loss. The legislation therefore prohibited a particular method of sales promotion. In its judgment, the Court does not express a desire to diverge from the definition of 'measures having equivalent effect' laid down in the judgment in *Dassonville*, quite the contrary. However, it applied that definition fully only to product requirements and then asked to what extent it was applicable to 'national provisions restricting or prohibiting certain sales arrangements'.

After stating as follows in paragraph 13 of the judgment in *Keck and Mithouard*:

'Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.'

the Court held as follows in paragraph 16:

'However, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is *not* such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment ..., provided that those provisions apply to all relevant traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' [37] (My emphasis).

and concluded as follows in paragraph 17:

'Where those conditions are fulfilled the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.'

19. I would first state that that judgment does not detract from the principle that national measures which discriminate against products from other Member States in comparison with domestic products can be justified only on the grounds listed in Article 36

37 — Footnote concerning only the Dutch version of this passage.

of the EC Treaty. Neither does it detract from the rule in *Dassonville* that national measures applicable without distinction which are *not* such as to hinder directly or indirectly, actually or potentially, trade between Member States are not caught at all by Article 30 of the EC Treaty. [38] Furthermore, the judgment does not change anything as regards *product requirements* applicable without distinction to domestic and imported products. Such requirements fall in principle within the prohibition set out in Article 30 of the EC Treaty, as interpreted in the *Dassonville* and *Cassis de Dijon* case-law, *unless*, in the absence of harmonized rules at the European level, they can be justified on the basis of an 'imperative requirement' recognized by Community law and are proportionate, that is to say, they do not go beyond that which is necessary to satisfy such a requirement.

However, what is novel is that national measures restricting or prohibiting certain selling or marketing methods — or, more broadly, certain selling or marketing arrangements [39] — do not fall within the *Dassonville* case-law and hence are not covered by the prohibition set out in Article 30, *provided that* they apply to all traders carrying out their activities within the national territory and *provided that* they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

20. In the judgment in *Keck and Mithouard*, the Court does not explain *why* the prohibition in principle set out in Article 30 of the EC Treaty henceforward is to affect in a different way product requirements, on the one hand, and legislation, of the sort at issue in that case, on a sales promotion method, on the other. Whereas it goes, as it were, without saying that the former requirements fall within that prohibition in principle (which they may still escape pursuant to a 'rule of reason'), the latter are caught only if it appears that they do not satisfy the aforementioned two conditions introduced by 'provided that'. That distinction can be explained by paragraph 17 of the judgment, which states that, if those conditions are satisfied, the application of the national legislation in question 'to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to *prevent their access to the market or to impede access any more* than it impedes the access of domestic products' (my emphasis).

In the light of this, I understand the distinction made by the Court as follows: whereas

38 — See, for example, the judgments in Case 155/80 *Oebel* [1981] ECR 1993 (prohibition of night work in bakeries), in Case 75/81 *Blesgen* [1982] ECR 1211 (restrictions on the marketing of alcoholic beverages) and in Case C-23/89 *Quietlynn* [1990] ECR I-3059 (prohibition on the sale of pornographic articles in unlicensed shops).

39 — Note concerning solely the Dutch version of this Opinion.

product requirements are *by nature*, as far as imported products are concerned, 'such as to prevent their access to the market or to impede access more than they impede the access of domestic products', that is not the case with national requirements relating to sales promotion measures. Product requirements by nature impede access to the market of the Member State which laid them down, *because* they mean that a product lawfully manufactured and marketed in the Member State of origin must be adapted when it is imported into another Member State in order to suit the product requirements in force there, and therefore have the effect of requiring the product to satisfy the requirements of two different sets of legislation — contrary to the principle, which has been stressed ever since the *Cassis de Dijon* judgment, of the mutual recognition of legislation. In view of the costs entailed by this when the product is imported, the producer has an *additional burden* [40] imposed upon him, which almost certainly has the effect of impeding the imported product's access to the market or even, where those costs are prohibitive, of making access impossible. This is not the case with legislation prohibiting or restricting sales promotion methods: such legislation does not normally mean that the imported *products* to which it applies have to be adapted in point of their intrinsic or extrinsic characteristics in order to satisfy the statutory requirements of the importing State (the fact that differing sales methods have to be used depending on the Member State concerned may admittedly also entail additional costs, but certainly to a lesser degree [41]). It follows that, according to the new case-law, such prohibitions fall in principle outside the prohibition set out in Article 30 of the EC Treaty.

21. Whilst the degree to which access to the market is impeded constitutes the rationale which the Court used in the judgment in *Keck and Mithouard* as the basis for the difference in treatment between product requirements (where a reduction in access is, as it were, presumed) and measures relating to sales methods or arrangements (where a reduction is not presumed but has to be proved), it is also necessary to interpret in the light of that criterion the two conditions introduced by 'provided that' which I mentioned above (in section 19).

This means, as regards the *first* condition — that the measures in question must apply to 'all traders carrying out their activities within the national territory' [42] —, that the wording used has to be interpreted as meaning that, in order to fall outside the prohibition set out in Article 30 of the EC Treaty, the national measures may in no respect impede the

40 — Cf., in the matter of the provision of services under Article 59 of the EC Treaty, the judgment in Joined Cases 62 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraph 9: 'In such a case the legislation of the State in which the service is provided proves in economic terms to be more onerous for employers established in another Member State, who in fact have to bear a heavier burden than those established within the national territory'.

41 — See section 22 of the Opinion of Advocate General Tesauro in *Hünermund* , cited in footnote 56: 'Whilst it may be the case that a prohibition of a particular sales method, such as for example doorstep selling, does not put imported products at a disadvantage, any more than it makes access to the market more difficult for the products as such, it is also true, however, that such a prohibition may compel the trader concerned to *change a sales strategy lawfully used in the Member State of origin to such an extent as to make access to the market of the State in which the prohibition is in force less attractive*, and thereby constitute in that respect *a "barrier" to the movement of products between Member States*' (provisional translation).

42 — Footnote concerning only the Dutch version of the Opinion.

access of traders from other Member States to the relevant market more than they impede the access of domestic traders. In contrast, Article 30 of the EC Treaty does not preclude different treatment of categories of domestic economic operators (for example, importers and manufacturers established and carrying out their activities in the Member State), [43] provided, at least, that the measures in question do not affect the marketing of domestic and imported products differently (this is the aspect covered by the second condition). The national prohibition of resale at a loss which gave rise to the judgment in *Keck and Mithouard* itself involved such a difference in treatment, since it applied to retailers but not to manufacturers. I therefore interpret the judgment as meaning that, although the prohibition of resale at a loss was not applicable to national retailers and manufacturers alike, it nevertheless satisfied the first condition, since it made a distinction which was applicable in the same manner to national importers and manufacturers and to those from other Member States.

22. The *second* condition — that the measures in question must 'affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'— also has to be interpreted in the light of the criterion of access to the market. In that connection, the judgment contains two general observations. First, in paragraph 13, it states that the fact that national legislation may restrict the volume of sales, and hence the volume of sales of products from other Member States, is *not* sufficient to characterize the legislation in question as a measure having an effect equivalent to a quantitative restriction on imports. Secondly, it appears from paragraph 12 of the judgment that whether or not the purpose of the legislation is to regulate trade in goods between Member States *is* relevant. [44] In other words, national measures which restrict the marketing of a product generally — and hence also its importation — cannot be regarded, on that ground alone, as restricting imported products' access to the market more than that of domestic products; in contrast, there is an indication to that effect where the purpose of the measures is to regulate trade in goods between Member States or, in other words, import flows or channels for particular products.

23. As far as the substantive aspects of the second condition are concerned, the question arises as to when measures affect in the same manner, 'in law' and 'in fact', the marketing of domestic and imported products.

In my view, a measure affects the marketing of products in the same manner 'in law' where, depending on its aim and its wording, it applies in the same manner to domestic

43 — Of course, it is not for the Court to decide whether such differential treatment might possibly infringe a principle of equal treatment enshrined in *national law*.

44 — That criterion was already contained in the judgment in *Cinéthèque*, at paragraph 21, cited in footnote 29.

and imported products — by this I mean essentially that it is applicable 'without distinction' — and this continues to be the case where the measure is considered in conjunction with other legal rules. [45]

Through the requirement that the measure should 'affect in the same manner, in fact, the marketing of domestic products', the Court doubtless means that in fact, that is to say, *in point of its effects* , the measure may not give rise to unequal access to the market on the part of domestic and imported products. However, the question is how those effects are to be examined. Does it turn on the effects of a national measure in *individual* situations ('is a situation involved in which the national measure gives rise to unequal treatment of domestic or imported products, or is such a situation conceivable') or, on the contrary — following the example of the Court's case-law on equal treatment of men and women [46] — does it turn on the *overall* effect of the measure ('on an overall view, is the national measure liable to restrict the access to the market of imported products more than that of domestic products') [47]?

In *Keck and Mithouard*, the Court seems to me to have opted for an overall assessment and therefore not for an assessment of individual situations (which should, moreover, for the most part be left to the national court). Whereas in my two Opinions in those cases I argued that the French prohibition of resale at a loss could, in some cases, impede imported products' access to the French market more than that of domestic products, [48] in its judgment the Court simply held that Article 30 of the EC Treaty 'is to be interpreted as not applying to legislation of a Member State imposing a general prohibition of resale at a loss'. [49] The Court was manifestly convinced that, on an overall view, national legislation such as that at issue did not impede the access to the market of imported products more than that of domestic products.

24. If the Court has in fact opted for an overall approach, it is undeniable that in doing so it has diverged to a *certain* extent from the *Dassonville* test (although it still referred to it in paragraph 11 of the judgment as its general starting point and repeated it expressly in paragraph 16). Indeed, at least as regards 'national provisions restricting or prohibiting certain sales arrangements', it can no longer be presumed that *every* national provision capable of hin-

45 — In this case, 't Heukske and Boermans argue, in particular, that the legislation on shop closing is discriminatory in any event when it is examined in conjunction with the legislation on the grant of permits for petrol stations (see section 31, below).

46 — See, most recently, the judgment of 24 January 1994 in Case C-343/92 *Roks* [1994] ECR I-571, paragraph 33 and point 3 of the operative part.

47 — See also, with regard to freedom to provide services, the judgment in Case 15/78 *Koestler* [1978] ECR 1971, paragraph 6 in conjunction with paragraph 4.

48 — The reason is that importers wishing to launch products from another Member State on the French market have to take the prohibition into account, whereas domestic manufacturers selling competing products in France do not have to. See my Opinion of 18 November 1992, [1993] ECR I-6110, paragraph 5, and my Opinion of 28 April 1993, [1993] ECR I-6117, paragraph 9.

49 — Paragraph 18 and the operative part.

dering, directly or indirectly, actually or potentially, intra-Community trade falls within the scope of Article 30 of the EC Treaty. [50]

The question which arises therefore is to*what* extent in the judgment in *Keck and Mithouard* the Court has diverged from the *Dassonville* test as regards requirements other than product requirements and, more specifically, whether the Court intended to reduce the prohibition set out in Article 30 of the EC Treaty to a prohibition of discrimination (in a broad sense). [51] It is not possible to give a definite answer to that question: on the one hand, the Court refers twice to the *Dassonville* test; on the other, it seems, however, to identify that test, as regards the national provision at issue, with a prohibition of discrimination *ratione personae* (as far as the capacity of the economic operators is concerned) or *ratione materiae* (as far as the marketing of products is concerned). The question is perhaps not of very much significance, since — in so far as I have been able to make an overview of the case-law — the bulk, if not all of, the measures considered in the Court's case-law, whether they were product requirements or requirements not relating to products applicable 'without distinction', contained some form or other of 'discrimination in fact', at least if this is understood as meaning any additional burden imposed by the measure when products are imported from other Member States. [52] However, it is not possible to exclude the possibility out of hand that some measures, albeit not discriminatory in the aforementioned broad sense of the word may, nevertheless, be capable, on an overall view, of impeding, actually or potentially, trade between Member States in some other way. [53] For certainty's sake, [54] I shall therefore consider later in this Opinion whether the national legislation at issue, still on an overall view, is discriminatory in law and in fact or impedes intra-Community trade in

50 — Previously, that was in fact the case: even recently in the judgment in *Yves Rocher* (cited in footnote 28), the Court rejected the argument that Article 30 of the EC Treaty is not applicable to national measures 'impeding the free movement of goods only marginally' (paragraph 20) (provisional translation). In that case, the Court also held that Article 30 of the EC Treaty did not 'distinguish between measures capable of being characterized as measures having effects equivalent to quantitative restrictions, depending on the intensity of their effects on intra-Community trade' (paragraph 21) (provisional translation), thereby refusing to apply a *de minimis* rule.

51 — The consequence would seem to be that the measures (other than product requirements) which would then be caught by the prohibition set out in Article 30 of the EC Treaty solely on account of their discriminatory nature would henceforward be capable of being justified only on one of the grounds listed exhaustively in Article 36 of the Treaty and no longer on the basis of a mandatory requirement pursuant to the 'rule of reason'.

52 — *Dassonville* itself was concerned with legislation — which should probably be categorized as a product requirement, since it sought to guarantee the authenticity of the *designation* of origin of whisky — which meant that importers importing Scotch whisky into Belgium via another Member State could less easily obtain the certificate of authenticity required by the national legislation than importers importing directly from the country of origin; in other words, this was discrimination in fact between imported products (and not between domestic and imported products).

53 — If this is accepted, it follows that, in the case of national measures *other than* product requirements (to which the *Dassonville* case-law continues to apply in full for the reasons set out in section 20 above), the judgment in *Keck and Mithouard* has basically effected a *reversal of the burden of proof*. Whereas, before, such measures fell, prima facie, within the prohibition set out in Article 30 of the EC Treaty but might be taken outside it through the application of the 'rule of reason', the new rule would be that such measures, prima facie, do *not* fall within the prohibition contained in Article 30, *unless* it is shown that, on an overall view, they have discriminatory effects or — if the addition to the wording which I made above is accepted — that they impede intra-Community trade (actually or potentially) in some other manner.

54 — If the judgment in *Keck and Mithouard* has resulted in more than a mere reversal of the burden of proof in the case of requirements not relating to products (see the preceding footnote) and if it, more specifically, reduced, as far as those requirements are concerned, the *Dassonville* test to a prohibition of discrimination in a broad sense, the Court ought, in my view, to indicate this clearly in the judgment to be delivered in this case.

some other manner. [55]

2.3. *Applicability of the* Keck and Mithouard *case-law to measures applicable without distinction with regard to shop closing (and to other national measures applicable without distinction)*

25. In the light of the scope, as defined above, of the judgment in *Keck and Mithouard*, it is now possible to examine whether national measures other than measures relating to sales promotion methods fall within the new rules set out in that judgment. That question has been answered in the meantime as regards rules on forms of advertising: in the judgment of 15 December 1993 in *Hünermund*, the Court took over, *mutatis mutandis*, paragraphs 13, 16 and 17 of the judgment in *Keck and Mithouard*, cited above (in section 18 of this Opinion). It did so with regard to a measure which it described in the following terms:

'It should next be observed that the purpose of a rule of professional conduct, laid down by a professional organization, which prohibits pharmacists from advertising parapharmaceutical products outside their shops, is not to regulate trade between Member States. Moreover, such a prohibition has no effect on the possibility for economic operators other than pharmacists to advertise such products'. [56] (provisional translation)

As a result, the Court has gone back on its judgment of 18 May 1993 in Case C-126/91 *Yves Rocher*, [57] which was still entirely consistent with the *Oosthoek's Uitgeversmaatschappij* case-law (see section 16, above).

26. Should the Court's reasoning in the judgments in *Keck and Mithouard* and in *Hünermund* also be applied to national legislation such as the Winkelsluitingswet at issue in this case? If so, such national legislation would not fall within the scope of Article 30 of the EC Treaty so long as it fulfilled the conditions set out in the judgment in *Keck and Mithouard* examined above. In

55 — In investigating the precise scope which should henceforth be given to the *Dassonville* test, one cannot overlook the effect of that test on the prohibitions set out in Articles 59, 48 and 52 of the EC Treaty. In its recent case-law on the application of those prohibitions, the Court has also used a formula of the broad '*Dassonville* type'. Difficulties similar to those raised by product requirements may arise, more specifically in connection with services which are regulated in the various Member States, such as financial services (see, for example, the judgment in Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35, which was delivered one month before the *Cassis de Dijon* judgment).

56 — Judgment in Case C-292/92 *Hünermund* [1993] ECR I-6787, paragraph 19.

57 — See footnote 50.

such a case, contrary to that which the Court has done to date, in particular in the Sunday trading cases, [58] it should no longer be asked whether the legislation is justified by an imperative requirement and by the principle of proportionality as it is applied in that connection.

The national legislation at issue in this case falls into a category of measures relating to the circumstances of time and place in which the goods concerned may be sold to consumers and to the manner in which they may be so sold. In other words, it is concerned with sales arrangements within the meaning of the judgment in *Keck and Mithouard*. It appears from the description set out in sections 5 to 9, above, that that legislation on shop closing prohibits some categories of small traders from offering for sale, during certain hours, a greater or lesser assortment of products or from doing so in the manner which appears most advantageous to them (by obliging them to sell by means of vending machines).

27. In my view, such legislation does indeed fall within the new case-law. The reason is that the legislation does not contain requirements relating to the intrinsic or extrinsic characteristics of the products in question, and therefore does not involve additional production or distribution costs where a product from a Member State in which it was lawfully manufactured and marketed is exported to the Member State that enacted the legislation. Consequently, legislation such as that before the Court could be characterized as a measure having equivalent effect within the meaning of Article 30 of the EC Treaty only if did not satisfy the two conditions set out in the judgment in *Keck and Mithouard* and, as I stated above (in section 24), if there are no other circumstances suggesting that the legislation, on an overall view, impedes intra-Community trade.

I would add in passing that, to my mind, the foregoing suggests that all other national measures applicable without distinction also fall in principle within the new *Keck and Mithouard* case-law, *in so far as*, unlike product requirements, they do not necessitate any adaptation of the intrinsic or extrinsic characteristics of the products imported. This is the case, more specifically, with a measure of the kind at issue in the judgment in *Cinéthèque*, [59] which, it is agreed, gave rise to a more far-reaching application of the *Dassonville* test beyond the bounds of discrimination and, more specifically, also brought marketing prohibitions (applicable without distinction) within that test. [60]

58 — For the justification, see section 13, above. As far as the proportionality test is concerned, see the judgment in *B & Q II*, paragraphs 12 to 16.

59 — Judgment cited in footnote 29.

60 — See M. Waelbroeck: 'Le rôle de la Cour de Justice dans la mise en oeuvre de l'Acte unique européen', *Cahiers de droit européen*, 1989, p. 41 et seq., at pp. 51, 52 and 53, and paragraph 18 et seq. of my Opinion in *B&Q I*, cited in footnote 18. The judgment in *Cinéthèque* went against the Opinion of Advocate General Sir Gordon Slynn, who (at 2661 and 2662) argued that the legislation at issue did not treat imported and domestic products differently in any way. This means that, under the new case-law, that legislation would in any event fulfil the second condition introduced by 'provided that' in the judgment in *Keck and Mithouard*.

28. In order definitively to fall outside the scope of Article 30 of the EC Treaty, the legislation in question must therefore invariably be applicable to all market participants carrying out their activities in the national territory and affect the marketing of domestic products and products from other Member States in the same manner in law and in fact.

It seems to me that this is in fact the case. As far as the first condition is concerned, it appears to me that national legislation of the kind at issue does not make any distinction between economic operators from the Member State concerned and economic operators from other Member States in the sense that the latter are not assured of equal access to the domestic market. As far as the second condition is concerned, it does not appear that, on an overall view, the legislation — the purpose of which, moreover, is not to regulate intra-Community trade flows — affects in another manner, 'in law' or 'in fact', the marketing of products from other Member States, causing those products' access to the domestic market to be impeded or reduced by comparison with that of domestic products. As the Court expressly stated in the judgment in *Keck and Mithouard*, it is not sufficient for this purpose that there is a possibility that the legislation may be liable to restrict the volume of sales of products generally and hence also that of sales of products from other Member States (see section 22, above). Lastly, no more can I see what other circumstances could cause the legislation to be regarded as a measure having equivalent effect. Neither the circumstance mentioned in the national court's third question that the revenue of one category of petrol stations is (substantially) less dependent on the sale of products other than motor fuels than that of another category of petrol station, nor the connection mentioned in the national court's fourth question with the legislation on the grant of permits for petrol stations (which I shall be considering later) seem to me to constitute circumstances suggesting that, on an overall view, the legislation impedes intra-Community trade.

29. In view of the foregoing, I conclude that Article 30 of the EC Treaty has to be interpreted as not being applicable to national legislation on shop closing which, like that at issue in these proceedings, applies equally to all economic operators (including those from other Member States) carrying out their activities in the national territory, affects the marketing of domestic products and products from other Member States in the same manner in law and, on an overall view, also in fact, and, on an overall view, does not impede intra-Community trade in any other manner.

3. The compatibility of the differentiated application of national legislation on shop closing with Articles 3(g), 5 and 86 (or 85) of the EEC Treaty

30. The Netherlands legislation on shop closing provides for exceptions for certain

categories of traders (see section 5 et seq., above), as a result of which it does not impose equally strict restrictions on all shopkeepers with regard to closing or to the range of products which may be sold. The Gerechtshof asks the Court to inform it whether that differentiated application is consistent with Community law.

The reference in the national court's first question to Article 86 of the EC Treaty in conjunction with Articles 3(g) and 5 seems to have been prompted by the claim by 't Heukske and Boermans that the Winkelsuitingswet affords petrol stations whose turnover and profits are the least dependent on the sale of products other than motor fuels — namely those situated outside built-up areas at the side of dual carriageways and motorways — the greatest possibilities for offering such products for sale. Only such petrol stations are entitled to sell tobacco and tobacco products *over the counter* outside normal opening hours. Other petrol stations are not entitled to sell such goods outside normal opening hours except *fromvending machines*, whereas, according to that which the figures produced by 't Heukske and Boermans are alleged to show, [61] it is precisely those petrol stations which are most dependent for their turnover and profits on the same of products other than motor fuels.

61 — At the hearing, the representative of the Netherlands Government denied that the figures were representative.

31. In that regard, 't Heukske and Boermans suggest that the Netherlands legislation on the grant of operating licences for petrol stations situated at the side of rijkswegen (see sections 10, 11 and 12, above) facilitates the abuse of a (collective) dominant position or of a cartel which the major petrol companies agree on the Committee on 'Benzinestations langs Rijkswegen'. It is alleged that those companies share out sites for petrol stations at the side of rijkswegen amongst themselves, and then have the distribution confirmed by the Minister for Economic Affairs.

In my view, the Court cannot entertain that suggestion. In this case, it is the legislation on compulsory shop closing which is at issue and the Netherlands legislation on the grant of permits for petrol stations is only an ancillary issue: the Gerechtshof itself did not provide the Court with any factual or legal data thereon — I obtained the particulars given above (in sections, 10, 11 and 12 and in this section) from the parties' observations submitted to the Court — such as to enable it to rule on the compatibility of that legislation with Articles 3(g), 5 and 86 (or 85, which was not even mentioned by the national court) of the EC Treaty.

32. The question remains as to whether legislation on shop closing which imposes greater restrictions on some categories of economic operators than on others is compatible with Community competition law. In

a whole series of judgments [62] — most recently in the judgments of 17 December 1993 in *Meng*, *Reiff* and *Ohra* [63] — the Court has set out the criteria on the basis of which that question has to be answered.

According to the Court, Articles 85 and 86 of the EC Treaty, in themselves, are concerned with only the conduct of undertakings and not with legislative or administrative measures adopted by the Member States. However, the Court infers from Articles 85 and 85 in conjunction with Articles 3(g) and 5 of the EC Treaty that the Member States may not adopt or maintain in force measures, even in the nature of legislation or regulations, which may undermine the effectiveness of the competition rules applicable to undertakings. In that connection, the Court had already declared as follows in the judgment of 16 November 1977 in *GB-INNO-BM*:

'First, the single market system which the Treaty seeks to create excludes any national system of regulation hindering directly or indirectly, actually or potentially, trade within the Community.

Secondly, the general objective set out in Article 3(f) is made specific in several Treaty provisions concerning the rules on competition, including Article 86 ...

The second paragraph of Article 5 of the Treaty provides that Member States shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

Accordingly, whilst it is true that Article 86 is directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness.

At all events, Article 86 prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision.' [64]

In later judgments, [65] the Court held that it was prohibited, in particular, for Member

62 — Judgments in Case 13/77*GB-INNO-BM* [1977] ECR 2115, paragraphs 28 to 34, in Case 229/83 *Leclerc* [1985] ECR 1, paragraph 14, in Case 231/83 *Cullet* [1985] ECR 305, paragraph 10, in Joined Cases 209 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 71, in Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, paragraph 10, in Case 136/86 *Aubert* [1987] ECR 4789, paragraph 23, in Case 254/87 *L'Aigle distribution ('fixed price for books')* [1988] ECR 4457, paragraph 10, in Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16, and *Marchandise*, cited above, paragraph 22.

63 — Cases C-2/91, C-185/91 and C-245/91, [1993] ECR I-5751, I-5801, I-5851.

64 — Judgment in *GB-INNO-BM*, paragraphs 28 to 31 and 34.

65 — Indications to this effect are already to be found in the judgment in *Leclerc*.

States to *require* or *encourage* the conclusion of agreements contrary to Article 85 of the EC Treaty or the creation of dominant positions contrary to Article 86, or to*strengthen* the effects of such agreements or dominant positions. The Member States are also forbidden to *eliminate* the *State nature* of their own legal provisions by delegating to private undertakings the responsibility for taking decisions to intervene in the economic sphere.

In the following sections, I shall apply the criteria identified by the Court to the instant case.

33. 't Heukske and Boermans' argument that the major petrol companies in the Netherlands occupied and abused a (collective) dominant position and concluded agreements (the charge is to a large degree implied) is couched very vaguely, and they did not even produce prima facie evidence to support it. The Gerechtshof makes no mention at all of possible cartels or dominant positions. Accordingly, there is no reason to consider that a Member State such as the Netherlands might, by passing legislation on shop closing of the type at issue, have strengthened pre-existing cartels or dominant positions or required or encouraged the creation of such agreements or dominant positions contrary to Article 85 or Article 86 of the EC Treaty.

In that connection, attention should be drawn to the restrictive manner in which, in the judgments in *Meng*, *Reiff* and *Ohra*, cited above, [66] the Court interpreted the words 'strengthen' and 'require or encourage'. As regards the term 'strengthen', the Court held as follows in the judgment in *Meng*:

'Legislation applicable to a particular insurance sector cannot be regarded as strengthening the effects of pre-existing competition rules unless it *confines itself to taking over* the elements of an agreement concluded between economic operators in that sector' [67] (my emphasis) (provisional translation).

As regards the terms 'require' and 'encourage', the Court held as follows in the judgment in *Ohra*:

'In this regard, it should be held in the first place that the Netherlands legislation on insurance agents neither requires nor encourages the conclusion of unlawful agreements by insurance intermediaries, *since the prohibition which it lays down is sufficient in itself*' [68] (my emphasis) (provisional translation).

66 — These judgments relate to Article 85 of the EC Treaty, but I can see no reason why the principles set out therein should not also be applied, *mutatis mutandis*, to Article 86 of the EC Treaty.

67 — Judgment in *Meng*, paragraph 19.

68 — Judgment in *Ohra*, paragraph 11.

34. None of the parties has shown, or even argued, that the Winkelsluitingswet merely confirmed pre-existing agreements or abuses of dominant positions, or that the prohibitions set out in that law are not sufficient to attain its aim. Consequently, that legislation cannot be regarded as strengthening, encouraging or requiring, within the meaning given to those terms by the Court in the judgments in *Meng*, *Reiff* and *Ohra*, practices of undertakings which restrict competition.

Lastly, neither can it be argued that the Netherlands legislation on shop closing, which itself contains all the obligations and prohibitions necessary for its implementation, delegates to private undertakings responsibility for decision-taking. [69]

In view of the foregoing, I consider that, in circumstances such as those at issue, national legislation on shop closing which provides for an exemption for certain categories of shopkeepers does not detract from the effectiveness of the prohibitions set out in Articles 85 and 86 of the EC Treaty.

35. I would add the following. In the Sunday trading cases which gave rise to the judgments of 23 November 1989 and 16 December 1992, cited above, [70] it was argued that the Sunday shop-closing rules, whose substance or application were unfavourable to certain individuals or regions, were contrary to Community law. In my Opinion published with the judgment of 16 December 1992, I observed as follows: [71]

'Although I accept that the question of the justification at Community law of a national measure must be decided in the light of the intrinsic characteristics of the measures and their actual application, objections based on the allegedly uneven or inconsistent application of the legislation within the same Member State may well afford a cause of action under national law but — as long as there is no question of deliberate discrimination or disguised restrictions on trade *between Member States* — not under Community law.' [72]

It seems to me that, in this case too, it has not been sufficiently shown that the difference in treatment between different categories of petrol stations was capable of affecting trade between Member States. Admittedly, 't Heukske and Boermans argue that the difference in treatment between petrol stations occasioned by the legislation on shop closing is real — in the sense that it

69 — Cf. the judgment in *Ohra*, paragraph 13.

70 — See footnotes 17 and 18.

71 — Referring to my opinion in *B & Q I* [1989] ECR 3883, section 32. See also my Opinion in *Conforama* and *Marchandise*, cited in footnote 17.

72 — [1992] ECR I-6484, paragraph 33. The Court did not examine that question.

has more than a minimal difference on the turnover and profits of petrol stations [73] —, but that does not mean that the difference in treatment adversely affects trade between Member States within the meaning of Article 85(1) or Article 86 of the EC Treaty.

Conclusion

36. In conclusion, I propose that the Court should answer the questions referred by the Gerechtshof te 's Hertogenbosch, as follows:

(1) Article 30 of the EC Treaty has to be interpreted as not being applicable to national legislation on shop closing which, like that at issue in these proceedings, applies equally to all economic operators (including those from other Member States) carrying out their activities in the national territory, affects the marketing of domestic products and products from other Member States in the same manner in law and, on an overall view, also in fact, and, on an overall view, does not impede intra-Community trade in any other manner.

(2) In circumstances such as those at issue, national legislation on shop closing which provides for an exemption for certain categories of shopkeepers does not detract from the effectiveness of Articles 85 and 86 of the EC Treaty.

73 — I am not convinced that this argument is supported by the facts. From the charts produced to the Court by 't Heukske and Boermans, it appears that the turnover and profits of petrol stations are not affected by more than one-third by the sale of products other than fuel. Only part of that third consists of products 'for the road' and, in turn, only part of those products 'for the road' consist of tobacco products. What is more, only a fraction of those tobacco products is sold outside normal opening hours. Only that part, which is therefore only a fraction of petrol stations' aggregate sales, is affected by the unequal treatment of which 't Heukske and Boermans complain. Even then, the unequal treatment is relatively slight: some petrol stations may sell tobacco products over the counter, whilst others are obliged to sell them from vending machines.