OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 October 1993 *

Mr President,
Members of the Court,

1. Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?

These proceedings provide an opportunity to establish a clear position of principle on the scope of one of the fundamental provisions of the Treaty and raise in particular the question whether a rule in a code of professional conduct which prohibits pharmacists from advertising outside their pharmacies non-medicinal products (also or exclusively) sold in the pharmacies is compatible with Articles 30 and 36 of the EEC Treaty.

2. Paragraph 10(15) of the Professional Code (Berufsordnung), [1] adopted — pursuant to the Law on Professional Associations — by the Landesapothekerkammer Baden-Württemberg (the pharmacists' professional association for the *Land* Baden-Württemberg, hereinafter 'the Professional Association'), lays down a prohibition on 'excessive advertising' for all the non-medicinal products which, under Paragraph 25 of the Apothekenbetriebsordnung (Rules Governing the Operation of Pharmacies) of 9 February 1987, [2] may also be sold in pharmacies, [3] provided that they do not jeopardize the proper operation of the pharmacy (Paragraph 2(4) of the Apothekenbetriebsordnung). In essence, the effect of the provision at issue is to prohibit all forms of advertising outside pharmacies.

It must next be pointed out that the Professional Association, whose task it is in particular to ensure that its members fulfil their professional duties, is a body governed by public law, possessing legal personality and regulated by the State. It is hardly necessary to add, finally, that all pharmacists practising in that *Land* are required to be members of the Professional Association and are therefore subject to the prohibition concerned.

3. A few lines will suffice to set out the facts giving rise to these proceedings. Mrs Ruth Hünermund and the twelve other applicants in the main action, who all own pharmacies in the *Land* Baden-Württemberg in which they sell quasi-pharmaceutical products, have advertised and intend to continue advertising the products at issue. They therefore brought an action before the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg), claiming that Paragraph 10(15) of the Professional Code in

* Original language: Italian.

1 — Berufsordnung of 22 November 1955, as amended on 9 April 1986.

2 — *Bundesgesetzblatt I*, p. 547.

3 — Those are, in particular, foodstuffs and items for the care of babies and the sick, dietetic foodstuffs, toiletries and cosmetics, herbicides and plant-protection products and products for animal feed.

question was incompatible with Community law, in particular with Articles 30 and 36 of the Treaty.

As is clear from the order for reference, the national court, on the basis of the relevant Community case-law, is of the opinion that the disputed provision should be regarded in principle as a measure having equivalent effect prohibited by Article 30. It none the less considered it appropriate to refer the matter to this Court, in order to establish whether the said provision is justified in the light of Article 30 in conjunction with Article 36 of the Treaty.

4. Before dealing with the substance of the question, I must dwell briefly on some preliminary matters raised by the Professional Association.

The latter maintains that the question referred for a preliminary ruling is inadmissible, on the ground that the Court has no jurisdiction to decide on the validity of a provision of national law in the light of Community law. In any event, it considers that that question relates to a hypothetical problem and amounts therefore to a mere request for advice because, far from showing that the reference is necessary, the national court has confined itself to pointing out that it is not impossible for the advertising restrictions to be regarded by the Court as unjustified from the point of view of the free movement of goods.

As regards the first point raised, suffice it to note that, on the basis of settled case-law, although the Court cannot, within the framework of Article 177, give a ruling on the validity of provisions of national legislation, 'it may nevertheless provide the national court with an interpretation on the issues coming within Community law which will enable that court to resolve the legal problem before it'. [4] As for the second point, I shall merely observe that it is sufficiently clear from the order for reference that the national court requires an interpretation of Articles 30 and 36 in order to resolve the dispute pending before it: that is to say, whether or not pharmacists may continue to advertise the products in question.

5. The defendant in the main proceedings also claims that in this case the conditions necessary for the application of Article 30 are not satisfied, since the rule of professional conduct cannot be classified as a State measure for the purposes of Article 30. That conclusion is not invalidated, again according to the defendant, by the fact that in its judgment in *Royal Pharmaceutical Society of Great Britain*, [5] the Court ruled that a measure adopted by a professional body constituted a State measure, since the Royal Pharmaceutical Society had the power to impose disciplinary sanctions, including removal from the register, whereas in the German system that sanction may be imposed only by the competent authorities of the *Land*.

I would first of all point out, in that respect, that this case is not in substance different from that referred to above, since infringements of the rules of the Professional Code by members of the Professional Association are a matter for the disciplinary bodies

4 See, for example, the judgment in Case 111/76 *Van den Hazel* [1977] ECR 901, paragraph 4 of the grounds

5 Joined Cases 266/87 and 267/87 *The Queen* v *Royal Pharmaceutical Society of Great Britain* [1989] ECR 1295, paragraph 14.

which belong to the Association itself and are given powers precisely in order to impose disciplinary sanctions. In any case, the important point here is that the measure in dispute does form part of the rules of professional conduct adopted by a professional organization, but by virtue of authority conferred by the State and subject to control by the State. It cannot therefore be denied that the provision in cause is a State measure, particularly when it is considered that the Landesapothekerkammer, unlike the Royal Pharmaceutical Society, is a body governed by public law.

6. Now we come to the subject-matter of the question submitted to the Court, a question which, as worded, relates solely to whether the disputed measure is justified on the basis of Article 36 or of imperative requirements: the national court is in no doubt that the measure is one that is in principle incompatible with Article 30. [6] It is on the contrary indisputable that it must first of all and in any event be ascertained whether the measure in question displays all the features required for it to be a measure having equivalent effect to quantitative restrictions in so far as it is capable, in the well-known *Dassonville* formula, 'of hindering, directly or indirectly, actually or potentially, intra-Community trade'. [7]

7. The measure at issue, applicable without distinction and completely neutral as regards domestic products and imported products, prohibits a specified class of traders, pharmacists, from advertising a specified class of non-medicinal products which may also be sold in pharmacies. Other operators — manufacturers, importers, and retailers other than pharmacists — are however absolutely free to advertise those same products.

In those circumstances, it might reasonably be thought that the repeal of the disputed measure would lead (possibly and exclusively) to a change in the ratio of the volume of sales by pharmacies (on the one hand) to the volume of sales by other shops (on the other), that is to say, to a different division of the total sales between the various sales channels. [8] It cannot, however, be excluded out of hand that the prohibition on certain advertising activities, as imposed on pharmacists, may adversely affect opportunities to sell the products in question and, even if only in that way, imported products also.

In other words, such a measure may well produce some effect on imports, but only by reason of the fact that, as a result of its imposing restrictions on advertising, it has an adverse effect on demand for the goods to which it applies and (may) thus entail a

6 — See p. 5 and 6 of the order for reference.

7 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

8 — On that point, it is interesting to note that the national court thought that 'it is immaterial whether the rules in question have the effect of reducing the volume of imports of the products concerned or merely shift turnover from pharmacists to other suppliers', since 'the intention is to prevent, in addition to adverse effects on imports in the form of an overall reduction in the volume of imports of certain goods, an alteration of the patterns of trade or a channelling of imports' (p 6 and 7 of the order for reference).

reduction in the volume of sales and, ultimately, as a result of this, in imports as well. [9]

8. Is the resulting reduction in trade — remote, indirect and contingent, and in any case merely hypothetical — sufficient to bring the measure within the ambit of Article 30?

As can be seen, the problem is not a new one and it has, especially in recent years, been the focus of open and very lively debate. [10] We are faced with the now common situation of a potential reduction in imports due neither to a system differentiating between imported and domestic products nor to any disparity between national laws on the requirements as to the product's composition or presentation (as in the 'Cassis de Dijon' case). In the present case, the possible restrictive effects on imports stem from the very existence of the measure concerned, while any disparity with respect to the law of the State of origin of the product is, at least in principle, quite irrelevant: the reduction in sales, assuming it exists, would also occur if the conflicting laws corresponded exactly.

9. In short, the question is whether measures which govern conditions for marketing (who, where, when, how [11]) and which, merely by affecting the supply of (for example, by a channelling of imports) or demand for (by restricting opportunities to advertise) the products concerned, including imports, may bring about a decrease in sales, none the less fall within the scope of Article 30. That is so irrespective of whether there actually is a reduction in imports or whether, on the contrary, and to what extent, repeal of the disputed measure might have a positive effect on sales and consequently on imports.

In order to give a reply to the national court, the first question which must therefore be asked is whether, as regards the concept of a measure having equivalent effect, it is sufficient, in principle at least, for it to not to be impossible for the measure to have some effect on imports, however small and indirect; or whether, on the contrary, the causal link between measure and imports must be such as to cause the conceivable restrictive consequences for imports to be considered sufficiently probable and serious: in other words, whether the measure in question is

9 — The same remarks hold good in fact for all restrictions applicable without distinction which relate to the opportunity to advertise certain goods. Except where they are such as to place imported goods at a disadvantage and thus constitute *de facto* discrimination (see the judgment in Case 152/78 *Commission* v *France* [1980] ECR 2299), restrictions of that type affect the opportunity to sell the products concerned in exactly the same way, whether the goods are domestic or imported.

10 — In addition to Marenco: 'Pour une Interprétation Traditionnelle de Mesure d'effet equivalent à une restriction quantitative', in *CDE*, 1984, p. 291 et seq., and White: 'In search of limits to Article 30 of the EEC Treaty', in *CMLRev*, 1989, p. 234 et seq., see among the latest and most important publications on the matter concerned, Gormely, in *CMLRev*, 1990, p. 141 et seq.; Mortelmans, 'Article 30 of the EEC Treaty and legislation relating to market circumstances: time to consider a new definition?' in *CMLRev*, 1991, p. 115 et seq., Steiner, 'Drawing the line: Uses and abuses of Article 30 of the EEC Treaty', in *CMLRev*, 1992, p. 749 et seq., Chalmers, 'Free movement of goods within the European Community: an unhealthy addiction to Scotch whisky', in *International and Comparative Law Quarterly*, 1993, p. 269 et seq.

11 — A measure concerning product advertising may rightly be included among measures relating to 'how'. It is clear that advertising, since it encourages consumption, constitutes the most effective means of promoting sales and that, for that reason, it may have an appreciable effect on demand and therefore on sales.

such as to 'hinder' intra-Community trade, even if only potentially.

10. When the problem is expressed in those terms, it is clear that the measure at issue cannot constitute a *barrier to trade between Member States*, where barrier means a hindrance, *a difficulty of access to the market such as to affect imports in particular*: when, that is, the measure concerned is one which in some way — at least because it acts as a deterrent — constitutes a 'barrier' to the free movement of goods.

It is plain, on the other hand, that if the *Dassonville* test is to be interpreted as meaning that every national measure, the repeal of which could bring about an increase in sales and in imports, is, purely on that account, incompatible with Community law, unless it is justified by imperative requirements or under Article 36, then the measure in question also falls within the scope of Article 30.

11. The reply to that question clearly calls for a more general consideration of the scope of Article 30 as regards rules such as those at issue, in particular with respect to the criteria which make it possible to classify a certain provision of national law as a measure having equivalent effect. In other words, and even if it means reversing previous opinions expressed on the subject, I believe that it is necessary to consider whether Article 30, and with it the *Dassonville* test, may be construed as including in the concept of measures having equivalent effect the following measures as well:

— those which are applicable without distinction;

— those which relate not to *goods* (composition, labelling, form, packaging, name etc.) but to *commercial activity* (how, where, when and by whom the goods may be sold);

— those which may at most lead to a hypothetical reduction in imports, as *a result solely and exclusively of an equally hypothetical reduction in sales*;

— those with regard to which, on consideration, the alleged reduction *is not caused by disparity between national laws* but only by the fact that the national authorities (of one, several or all of the Member States of the EEC) have adopted trade rules less *liberal* than those wished for by the traders concerned.

The starting-point of such a consideration has to be an outline of the case-law on the subject, case-law which — why conceal it? — is certainly not amenable to systematic interpretation and which, as I pointed out in my Opinion in *Société Laboratoire de Prothèses Oculaires*, [12] where I could not however conceal a certain unease with respect to a mechanical application of the *Dassonville* formula to rules of the kind now before the Court, may be reduced to three types of solution, albeit with some difficulty, owing

12 — Case C-271/92 [1993] ECR I-2899.

to its fragmentary character, to which I have just alluded.

Context of the case-law

12. The first group consists of those decisions in which the Court has considered that the rules in question had no connection whatever with imports and in any case were not capable of hindering trade between Member States. [13] The Court came to that conclusion by stressing the fact that the measures concerned were not designed to control trade, did not concern other forms of marketing the same product or, in any event, left open the possibility of sales through other channels.

In *Oebel*, for example, in which the issue was a rule prohibiting the production and distribution of bread at certain specified hours, the Court held that the provision had no connection with imports since 'trade within the Community remains possible at all times, subject to the single exception that delivery to consumers and retailers is restricted to the same extent for all producers, wherever they are established'. [14] Then, in *Blesgen*, the Court held that a prohibition on the sale for consumption on the premises of certain alcoholic beverages in certain commercial premises did not fall within the scope of Article 30 in so far as it did not concern 'other forms of marketing' [15] the same product.

The reasoning is more or less similar in the judgments in which the Court ruled on provisions prohibiting the sale of sex articles in unlicensed establishments. It pointed out that those provisions 'have no connection with intra-Community trade, since the products covered by the Act may be marketed through licensed establishments and other channels' and 'are therefore not of such a nature as to impede trade between Member States'. [16]

13. In the cases just referred to, the Court therefore regarded as immaterial, for the purposes of the applicability of Article 30, a possible reduction in imports as a result of a reduction in sales opportunities affecting domestic and imported products to the same extent. It goes without saying that the prohibition on consumption on the premises of beverages with a high alcoholic strength (*Blesgen*) or on the sale of sex articles in unlicensed establishments (*Quietlynn*) are undoubtedly such as to be capable of having an adverse effect on demand and thus of affecting the volume of imports, it being (from that point of view) quite irrelevant that the prohibition in question does not concern other forms of marketing of the same product or that sales are possible in licensed establishments.

13 — To that effect, see the judgments in Case 155/80 *Oebel* [1981] ECR 1993; Case 75/81 *Blesgen* [1982] ECR 1211, Case C 23/89 *Quietlynn and Richards* [1990] ECR I 3059, and Case C 350/89 *Sheptonhurst* [1991] ECR I 2387.

14 — *Oebel*, cited above, paragraph 20

15 — *Blesgen*, cited above, paragraph 9

16 — *Quietlynn*, cited above, paragraph 11, to the same effect, see *Sheptonhurst*, cited above.

Such an approach is not, however, confined to rules concerning the marketing arrangements for products. A closer look reveals that many are the other cases in which the Court has not mechanically applied the *Dassonville* principle, to begin with those concerning price-control systems, [17] and also those concerning measures of various kinds but all sharing the common feature of displaying no connection, other than indirectly and vaguely, with imports and of affecting domestic and imported goods in the same way. [18]

14. A second group comprises those judgments in which the Court has recognized that the prohibition under Article 30 applies in principle also to measures of the kind at issue in this case, confining itself however to a rather 'atypical' examination of their proportionality.

I refer in particular to the judgments on 'Sunday trading', [19] in which the Court stated that provisions prohibiting employment of workers (or commercial activity) on Sundays, while not being designed to control trade and although 'it is improbable that the closure (...) on Sundays will cause consumers to refrain altogether from purchasing products which are available on week-days', may none the less 'have negative repercussions on the volume of sales and hence on the volume of imports'. [20]

Those restrictive effects on trade, even though hypothetical and unsubstantiated, have accordingly been held to be sufficient for the relevant measures to be covered by Article 30. [21] The Court seems thus to have recognized that the principle set out in *Dassonville* applies (mechanically) to national provisions of the kind in question, from which it follows that there is a twofold

17 — The Court confines itself to establishing that the prices imposed are not such as to make it impossible or more difficult to sell imported goods, that is to say that they are not such as to put imports at a disadvantage (see, *inter alia*, the judgments in Case 188/86 *Lefèvre* [1987] ECR 2963 and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, concerning maximum price schemes; and also Joined Cases 80/85 and 159/85 *Nederlandse Bakkerij Stichting and Others* v *Edah* [1986] ECR 3359, and Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, concerning minimum price schemes). On the contrary, it is obvious that a mechanical application of the *Dassonville* principle would not preclude a price-control system, affecting the conditions of supply and demand, from being such as to be able to bring about a reduction in the volume of sales and thus (also) in the volume of imports.

18 — Of significance in this respect is *Forest*, in which the issue was a system of quotas at the level of flour production. The Court found that it appeared that such a system 'in fact has no effect on wheat imports and is not likely to impede trade between Member States'. The reason is that, even though a restriction on the quantities of wheat which may be milled may prevent millers from buying wheat, millers are free to buy imported wheat to cover part or all of their requirements (judgment in Case 148/85 *Direction Générale des Impôts* v *Forest* [1986] ECR 3449, paragraph 19). See also the judgments in Case C-69/88 *Krantz* v *Ontvanger der Directe Belastingen* [1990] ECR I-583, paragraph 11, and Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009, paragraph 12, where the Court ruled that any restriction on imports caused by the national measures in question, respectively the power of the tax authorities to seize goods sold with reservation of title and the duty to provide pre-contractual information to purchasers of motorcycles about points relating to the warranty, were too uncertain and indirect to be considered liable to hinder trade between Member States.

19 — Judgment in Case C-145/88 *Torfaen Borough Council* v *B&Q* [1989] ECR I-3851; Case C-312/89 *Conforama and Others* [1991] ECR I-997 and Case C-332/89 *Marchandise and Others* [1991] ECR I-1027; also judgment in Case C-169/91 *Council of the City of Stoke* v *B&Q* [1992] ECR I-6635.

20 — *Conforama*, cited above, paragraph 8.

21 — Here, I cannot however avoid pointing out that the approach under consideration in paragraphs 12 and 13 (measures in themselves outside Article 30) cannot be thought to be rendered obsolete by that development. The *Quietlynn* judgment is in fact more recent than the first Sunday trading judgment and *Sheptonhurst* more recent than the *Conforama* and *Marchandise* judgments: the two approaches thus overlap chronologically, which helps increase confusion.

condition to be satisfied if they are to be compatible with Article 30: (a) the rule in question must pursue an objective which is legitimate with respect to Community law and (b) it must not exceed what is necessary in order to attain that objective, which is the case where the resulting obstacles to trade do not 'exceed the limit of the effects intrinsic to commercial regulation'.

15. Given that the intention of ensuring that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics is legitimate, with respect to Community law, the Court confined itself however in those judgments to stating that 'the restrictive effects on trade which may stem from such rules do not seem disproportionate to the aim pursued', [22] and in its most recent judgment in the matter, went on to make it clear that, in order to verify that the restrictive effects of such rules do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects 'are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products'. [23]

Such an approach would therefore seem to imply *an only marginal review* of the rules concerned, a review directed to the question whether the measure in point is *reasonable*, and more precisely whether it is appropriate with regard to (any) restrictive effects. In other words, instead of undertaking a 'classical' examination designed to ascertain whether the relevant rules satisfy imperative requirements and whether the measures selected are proportionate to the aim in view, the Court appears to look for the existence of a justifying cause, having regard to the *effects* on intra-Community trade which might result from the rules under consideration. That said, there can be no disguising the fact that such an approach, even though characterized by a far gentler, or at least more superficial, appraisal than that usually carried out in the context of Articles 30 and 36, is at variance with the approach inaugurated in the *Oebel* judgment.

16. Finally, there is a third group comprising those decisions in which the Court, because it considered that the provisions concerning sales, while not directly affecting imports, were nevertheless capable of hindering intra-Community trade, in so far as they were liable to affect possibilities for distributing (also) imported goods and hence to lead to a reduction in the volume of imports, undertook the classical examination designed to ascertain, first, whether the measures in question pursued public-interest objectives recognized by the Community legal order (consumer protection, health protection etc., according to the circumstances) and, secondly, whether the measures adopted were

22 — *Conforama* and *Marchandise* judgments referred to above, at paragraphs 12 and 13 respectively.

23 — Judgment in *Council of the City of Stoke-on-Trent*, referred to above, at paragraph 15

proportionate to the (legitimate) objective pursued. [24]

Not, as will be seen, by chance, most of the measures to which that approach has been applied relate to *selling or sales promotion methods*. As regards that class of measures, the Court has held that 'the possibility cannot be ruled out that 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'. [25]

In other words, national legislation, without operating directly and specifically to the detriment of imported goods, may constitute a measure having equivalent effect where, by prohibiting the use of a certain method of selling lawfully used in the Member State of origin, it is such as to make *access to the market more difficult and/or less profitable for traders* in that sector: and this is so, *a fortiori*, as the Court has explained, when the trader realizes almost all his sales by the marketing method in question. [26] The possible reduction in the volume of imports is therefore closely connected, in cases like *Oosthoek* (sales with free gifts), *Buet* (door-to-door sales), *Delattre* (mail-order sales) and *Boscher* (sale by public auction), with the obstacles caused by the legislation in question for a (single) trader in that area. [27]

17. In the same way, certain rules restricting opportunities *to advertise certain products* have been held to fall within the ambit of Article 30 in so far as it cannot be ruled out, as the Court has stressed, that to modify the form or the content of an advertising campaign depending on the Member States in which it is carried out may constitute an obstacle to imports, even if the legislation in question applies to domestic products and imported products without distinction. [28]

24 — To that effect, see Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, which is the first time the approach under discussion was applied to this type of legislation. See also: Case 382/87 *Buet and Another* v *Ministère Public* [1989] ECR 1235; Case C-369/88 *Delattre* [1991] ECR I-1487: Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547; Case C-239/90 *Boscher* [1991] ECR I-2023 and Case C-271/92 *Société Laboratoire des Prothèses Oculaires*, mentioned above. Following the same line of argument, the Court has held provisions of national law prohibiting or restricting certain forms of advertising to be capable of restricting the volume of imports. See in this connection *Oosthoek*, referred to above; Case C-362/88 *GB-INNO-BM* [1990] ECR I-667; Case C-241/89 *SARPP* [1990] ECR I-4695; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151, and Case 126/91 *Schutzverband gegen Unwesen in der Wirtschaft e. V.* v *Yves Rocher* [1993] ECR I-2361.

25 — *Oosthoek*, cited above, at paragraph 15.

26 — See the judgments in *Buet*, *Delattre* and *Boscher*, referred to above, at paragraphs 8, 50 and 14 respectively.

27 — It is worth pointing out that in the *Delattre* and *Boscher* cases, unlike *Oosthoek* and *Buet*, the sales methods were entirely lawful. The relevant legislation was, none the less, an obstacle to trade, either because it required the prior entry of the seller in the trade register at the place of the auction (*Boscher*), or because the kind of products concerned, lawfully marketed in one Member State as foodstuffs or cosmetic products, were classified in the importing Member State as medicinal products, as a result of which they fell within the sales monopoly reserved to pharmacists and could not be sold by mail-order (*Delattre*). That last case, on a true reading, discloses rather a 'Cassis de Dijon' situation, since it actually deals with disparity in legislation which, in the last analysis, affects the very presentation of the product.

28 — See paragraph 15 of the *Oosthoek* judgment, paragraph 29 of the *SARPP* judgment and paragraph 10 of the *Yves Rocher* judgment.

In the same way the following have been held to be incompatible with Article 30: the prohibition of a certain form of advertising, in so far as it affected (also) a chain of supermarkets operating in another (bordering) Member State in which, on the contrary, that type of advertising was entirely lawful; [29] the prohibition of all statements alluding to the word 'sugar' in advertising a certain product, which forced the trader concerned, in view of the disparity between national laws on that point, to alter the actual content of advertisements used in the Member State in which the product at issue was marketed (*SARPP*); and lastly, the prohibition on advertisements showing the old price crossed out and the new one in red next to it, in so far as that form of advertising was lawful in the Member State from which the goods in question came (*Yves Rocher*).

18. To sum up, then, the Court has subjected to verification of their compatibility with Articles 30 and 36 those measures relating to marketing which, because they prohibit a certain method of selling or advertising, are (or can be) such as to *make access to the market more difficult* for the traders concerned, who are obliged to *discontinue a method which they lawfully use in the Member State of origin.*

In such cases, the Court has, therefore, emphasized the *disparity between national laws*, in so far as such disparity constitutes an 'obstacle' for the trader concerned and thus, in the final analysis, for the product marketed. The difference in approach as compared with the case of the rules considered in sections 12 to 15 is, therefore, a result, in situations of this kind, of the role played by disparity between national laws, in conformity with the line of reasoning, let it be understood, adopted in the 'Cassis de Dijon' case-law.

19. The Court arrived, however, at the same result (incompatibility in principle, subject to verifying whether there is justification under Article 36 or whether there are imperative requirements) in the case of rules in relation to which any disparity between laws is irrelevant, both for the product as such and for the trader marketing it.

That is above all the case with regard to those rules which reserve to a single class of traders (pharmacists, opticians) the right to sell certain categories of goods (medicinal products, contact lenses), making it impossible to market such goods except through the channels prescribed by law and thus involving a formal channelling of sales. [30] That is also the case where there is a prohibition, applicable in one part of a Member State and in certain circumstances, on advertising beverages having an alcoholic strength of more than 23 degrees: [31] the only effect on imports might be the result of a more general fall in sales, arising in its turn from the effect of the prohibition in question on demand for the products concerned.

29 — Judgment in *GB INNO*, referred to above. In that judgment, the Court stressed the fact that freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made (paragraph 8).

30 — See the judgment in Case C 60/89 *Monteil and Samanni* [1991] ECR I 1547, and *Delattre* cited above (both concerning the monopoly reserved to pharmacists), and also the most recent judgment in *Societe Laboratoire de Prothèses Oculaires*, cited above, on the opticians' monopoly.

31 — *Aragonesa*, cited above.

General observations on the case-law

20. That, then, is the context of the case-law. If it is desired to draw conclusions, it may be said that the answers given by the Court to one and the same question, that is to say, whether general measures *concerning the manner in which trading activity is pursued* (who sells what, and when, where and how sales can be effected) and having therefore only an indirect connection with imports, nevertheless fall within the scope of Article 30 as measures having equivalent effect to quantitative restrictions on imports, are essentially three in number:

(a) they are not measures having equivalent effect, inasmuch as they are not capable of hindering intra-Community trade;

(b) they are not measures having equivalent effect, in so far as the obstacles to trade resulting from them do not exceed the limit of the effects intrinsic to trading rules;

(c) they are measures having equivalent effect, unless they are justified on grounds of imperative requirements or under Article 36.

Can such divergent results be explained on the basis of the different effects which the measures in question have on imports? It seems to me that all the situations examined are characterized by the same features: restrictions on imports are purely hypothetical and in any event such as to affect domestic products and imported products in exactly the same way, as a consequence (if it exists) solely and exclusively of a reduction in the volume of sales and not, in addition to this, of disparity between conflicting national laws.

21. Of course, it might be thought that the different replies reflect the varying degree of the effects (if any), as though a *de minimis* test were being applied; that, however, is belied by the Court's case-law, according to which 'a national measure does not fall outside the scope of the prohibition in Article 30 merely because the hindrance to imports which it creates is slight and because it is possible for imported products to be marketed in other ways'. [32] Quite recently, moreover, the Court has again affirmed that, with the exception of rules having a purely hypothetical effect on intra-Community trade, it is established that Article 30 does not draw any distinction, according to the degree of their effects on that trade, between measures which can be classified as measures having equivalent effect to a quantitative restriction. [33]

The Court is therefore of the opinion that the only measures which would not fall within the scope of Article 30 are those whose effects on imports are purely hypothetical; it is not, however, clear whether those hypothetical effects would, even on first sight, have to appear to be of little significance (should they ever occur). On that point, suffice it to say that to apply a *de minimis* rule in the field of trade in goods, even within those limits, is, it seems to me, very

32 — See judgment in Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, at paragraph 13 and Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 18.

33 — *Yves Rocher*, cited above, paragraph 21.

difficult, if not downright impossible: quite apart from anything else, proving the degree of hypothetical effects would be a *probatio diabolica*.

22. In any event, it does not seem to me that the problem before us can be delimited and resolved from the point of view of the degree and/or hypothetical nature of the effects, but rather from that of their specific nature, which, when one thinks about it, can be determined only by a disparity between the laws on the matter.

From that viewpoint, I think that, of the measures under discussion, the only ones to merit specific assessment, *where certain conditions exist*, are those concerning methods of sale or of sales promotion, since they may actually be such as to have a clearer and more specific effect on imports. While it is true that the prohibition on using a certain method of selling, such as, for example, door-to-door selling, does not operate to the disadvantage of imported products or make access to the market more difficult for products as such, [34] it is also true that such a prohibition may constrain the trader concerned to *alter a sales plan lawfully put into practice in the Member State of origin*, [35] so as to make entry to the market less attractive in the State where the said prohibition is in force and, accordingly, to constitute from that point of view an *'obstacle' to the movement of goods within the Community*.

To put it another way, even though rules of that kind affect products irrespective of their origin, they may be capable of hindering trade by obliging traders to modify the 'commercial garb' (marketing) of imported products in order to make it comply with the rules of the State of destination. In that case, however, what is important is the *disparity between national laws*, in so far as there is an adverse impact on the operator(s) concerned; when that is the case, one is essentially back within the logical and legal framework of the principle of mutual recognition ('Cassis de Dijon' case-law). And it is precisely in that perspective that the Court's case-law relating to methods of sale and sales promotion may be understood. [36]

23. Over and above such a hypothesis, which would have in any event to be verified case by case, I have to confess to being unable to point to anything which could explain the different approach adopted by the Court in the cases first examined. I would observe that both the prohibition on the sale of sex articles in unlicensed establishments and that on selling medicinal products outside pharmacies lead to a channelling of sales. Again, both the disputed measure in *Oebel* and those challenged in the Sunday trading cases mean that it is not possible to sell at certain hours (or on certain days).

34 — From that viewpoint, it is plain that the effect of rules of that kind is, at most, to channel sales, in so far as product 'X' may be sold only in shops and not by other means.

35 — As a matter of fact, the case law of the Court does not expressly state whether the Member State of origin means that of the product or of the producer. It is likewise evident that the terms of the problem change in relation to one hypothesis or the other.

36 — See sections 16 to 18

It is certainly true that the thread running from the *Oebel* judgment to the judgment in *Sheptonhurst* is not far removed from that running through the Sunday trading cases, and not only in terms of the result at which they arrive. In both cases the Court's answer implies only a marginal review, a prima facie examination concentrating on the reasonableness of the measure in question, taking particular account of the type of connection with imports (only indirect and vague) and of the restrictive effects (if any) on imports. Over and above the differences in the formulas used and the substantive result arrived at, the fact remains that in one case it was considered that the measures concerned did not of themselves constitute measures having equivalent effect and in the other they fell, in principle, within the scope of Article 30.

24. The difference in approach in cases such as Sunday trading, on the one hand, and those concerning pharmacists' and opticians' monopolies, and the advertising ban considered in *Aragonesa* on the other, is even less comprehensible. Starting from the identical premiss (measures capable of reducing the volume of sales and, consequently, of imports, in situations where any disparity of laws is of no importance), the Court has arrived at substantially different results: in the first case, as we have seen, examination centred on the reasonableness of the measure in question having regard to the effects it might have on imports, and in the second, a 'classical' Article 36 verification.

It is as well, then, to clear the field of all exercises in dialectics and to remove from the ambit of Article 30 those national laws which have nothing to do with trade, still less with the integration of the markets.

Limits of the definition of measure having equivalent effect

25. The inconsistency and contradictions pointed out increase the need to achieve clarity by means of criteria that are as precise and unambiguous as possible and, even more importantly, of a conscious and explicit basic choice regarding the need for (or expediency of?) review of the type of measures in point here for their conformity with Article 30. This is necessary, furthermore, in order to prevent confusion arising in the minds of the operators concerned who, as matters now stand, are encouraged to challenge, on the basis of Article 30, all kinds of measures (restrictive, of course, of their freedom to trade), merely because an effect on imports cannot be altogether ruled out.

As for me, I am of the opinion that the *Dassonville* test cannot be construed as meaning that a potential reduction in imports caused solely and exclusively by a more general (and hypothetical) contraction of sales, can constitute a measure having equivalent effect to a quantitative restriction on imports.

I consider that measures, whose subject is the manner in which trading activity is carried on, are in principle to be regarded as falling outside the scope of Article 30, inasmuch as they are not designed to regulate trade itself, and have no connection with the parity or disparity of the national laws in point and, moreover, are not liable to make access to the market less profitable for the

operators concerned and thus, indirectly, to make access more difficult for the products in question. Such a solution, therefore, based on the principle of mutual recognition, reflects the reasoning underlying the 'Cassis de Dijon' approach and does not in any way undermine the truly integrationist inspiration of that approach.

26. Such an interpretation does, admittedly, constitute, in part at least, a change of mind as compared with views I have already expressed on the same subject (Opinions in *Buet, Delattre, Monteil and Samanni, SARPP, Boscher* and *Société Laboratoire de Prothèses Oculaires*).

Today I would invite the Court also to change its mind, and, for this to be useful, to do so clearly and explicitly.

I do not disguise the fact that the interpretation which I suggest today involves overruling some certainly not unimportant judgments; [37] such reconsideration, however, far from being a step backward with respect to the reasonable evolution which took place following the 'Cassis de Dijon' judgment, would restore Article 30, as interpreted in the *Dassonville* case, to its natural role and avoid what appears to me to be an entirely improper use of it.

27. Article 30 would otherwise come to be relied on and used, not for its proper purposes but in order to enable certain traders to avoid the application of *national provisions* which, in regulating a given activity, *restrict freedom to trade*, whether by imposing opening hours on shops, or by requiring prior authorization in order to carry on a given activity (why not, even a simple trading licence), or else by imposing professional requirements (sometimes technical as well) on those intending to sell certain classes of goods.

In that context, I cannot refrain from pointing out that such a use of Article 30 would ultimately render nugatory the Treaty provisions on the free movement of goods and on establishment, or in any event devalue them. Let me explain: a shop-keeper wishing to trade on Sundays too, or a pharmacist seeking to advertise the sale of quasi-pharmaceutical products, are invoking nothing more or less than the *right to the unhindered pursuit of their commercial activity*: and it is therefore only in order to escape certain obligations that they allege that these are incompatible with the provisions on the movement of goods. On closer examination, however, it will be found that the obligations attach rather to services and establishment, that is to say provisions on which those operators cannot rely, simply because the situation in which they find themselves is purely internal.

A significant case here is *Gauchard*, [38] which involved legislation requiring prior authorization for the opening and extension of commercial premises exceeding a certain area. The Court, rightly, did not even rule on a

37 Besides the Sunday trading cases, I refer to *Delattre* and *Monteil and Samanni* for the medicinal products monopoly aspect; the *I.P.O.* judgment on the opticians' monopoly; to the *Aragonesa* judgment. With regard on the other hand to the group of cases on sales promotion methods, I refer to what I said in footnote 35

38 Case 20/87 *Gauchard* [1987] ECR 4879. To the same effect, see Case 204/87 *Bekaert* [1988] ECR 2029.

possible conflict between that legislation and Article 30 (despite the fact that that aspect was extensively dealt with in the Advocate General's Opinion), holding instead that the legislation at issue should be considered from the point of view of the rules on freedom of establishment and concluding that such rules were inapplicable, because the situation involved was purely internal.

28. In short, I am persuaded that the *Dassonville* test neither can nor should be so construed as to include in the definition of measures having equivalent effect even those national laws which, because they affect supply and/or demand and therefore, but on that account alone, the volume of sales, may bring about a reduction in the volume of imports, that is to say, where there exists no obstacle whatsoever to the movement within the Community of the products concerned and no connection whatsoever with the disparity between the laws in question.

I consider that the purpose of Article 30 is to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods; its purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade. It is revealing in this respect that the pharmacists in the case before the Court, in claiming the right to advertise the products concerned, far from asserting that the measure in dispute creates an obstacle to imports, complain that for lack of such a right they are at a disadvantage in comparison with the *other shops* selling the same products.

29. To return to the measure at issue in this case, it remains only to point out in the light of the foregoing observations that such a measure:

(a) is concerned with the advertising of certain products by a certain category of shops;

(b) is applicable without distinction;

(c) makes neither access to the market nor marketing of imported products compared with domestic products more burdensome or more difficult;

(d) may — hypothetically — reduce imports but only because it may — equally hypothetically — reduce sales;

(e) would produce the same result in any event, even if a similar measure were in force in the Member State of origin of the products concerned.

Given the existence of those factors, the measure before the Court must be regarded as falling outside the field of application of Article 30, as it does not constitute an obstacle to trade within the meaning or for the purposes of that provision.

30. If, however, the Court were to find that the measure concerned is such as to hinder trade within the meaning of Article 30, it could not be wholly justifiable on grounds of imperative requirements or of any of the derogations laid down in Article 36. The

justification put forward in this case, namely that it is necessary to protect human health, would in fact appear to be entirely unfounded.

It seems to me that it is impossible to accept the Professional Association's argument that the prohibition on advertising in question is essential in order to ensure a proper supply of medicinal products and to avoid a situation in which the image of pharmacists no longer reflects their traditional activity.

31. It is on the other hand plain that such a prohibition is at least disproportionate to the objective supposedly pursued, since — as is apparent from the documents in the case — the sale of the products concerned is permitted only in so far as it does not jeopardize the proper operation of the pharmacy. The aim in question may, consequently, be attained by, for example, either placing a ceiling on sales of non-medicinal products, or imposing disciplinary measures on those pharmacists who might concentrate their activity on selling those products.

From that viewpoint, the only possible conclusion is that the measure in question is incompatible with Community law.

A further alternative would be to justify the measure in question by recourse to clearly demonstrable formulas which are also to be found in some of the judicial precedents referred to, but, as may be clearly seen from the foregoing considerations, I cannot in the present case subscribe to that proposition either.

32. I therefore propose that the Court reply as follows to the question referred to it by the Verwaltungsgerichtshof Baden-Württemberg:

Article 30 of the EEC Treaty is to be interpreted as meaning that a national rule prohibiting pharmacists from advertising quasi-pharmaceutical products outside the pharmacy does not constitute a measure having equivalent effect to a quantitative restriction on imports.