

JUDGMENT OF THE COURT (Sixth Chamber)

23 November 1989

In Case C-145/88

REFERENCE to the Court under [Article 267 TFEU] by Cwmbran Magistrates' Court, United Kingdom, for a preliminary ruling in the action pending before that court between

Torfaen Borough Council

and

B & Q plc (formerly B & Q (Retail) Limited), Gwent,

on the interpretation of [Articles 34 and 36 TFEU],

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, F. A. Schockweiler, T. Koopmans, G. F. Mancini, M. Diez de Velasco, Judges,

Advocate General: W. Van Gerven

Registrar: D. Loutherman, Administrator

after considering the observations submitted on behalf of

the prosecuting authority, by D. Robinson, solicitor for Torfaen Borough Council,

the defendant in the main proceedings, by D. Vaughan QC, G. Barling, barrister, and A. Askham, solicitor,

the United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department,

the Commission, by E. L. White, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 23 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 June 1989,

gives the following

Judgment

- 1 By order of 25 April 1988, which was received at the Court on 24 May 1988, Cwmbran Magistrates' Court, United Kingdom, referred to the Court for a preliminary ruling under [Article 267 TFEU] three questions on the interpretation of [Articles 34 and 36 TFEU] in order to assess the compatibility with those provisions of national rules prohibiting trading on Sunday.
- 2 The questions were raised in proceedings between Torfaen Borough Council (hereinafter referred to as 'the Council') and B & Q plc, formerly B & Q (Retail) Limited (hereinafter referred to as 'B & Q'), which operates do-it-yourself centres and garden centres.
- 3 The Council alleges that B & Q contravened Sections 47 and 59 of the United Kingdom Shops Act 1950 by causing its retail shop premises to be open for the serving of customers on Sunday other than for the transactions mentioned in the Fifth Schedule to that Act. B & Q is therefore liable to a maximum fine of UKL 1 000.
- 4 The Fifth Schedule to the Shops Act lists the items which, by way of exception, may be sold in shops on Sundays. Those items include intoxicating liquors, certain foodstuffs, tobacco, newspapers and other products of everyday consumption.
- 5 Before the national court, B & Q submitted that Section 47 of the Shops Act was a measure having an effect equivalent to a quantitative restriction on imports within the meaning of [Article 34 TFEU] and that it was not justified under Article 36 [TFEU] or by virtue of any 'mandatory requirement'.
- 6 The Council denied that the ban on Sunday trading constituted a measure having an effect equivalent to a quantitative restriction on the ground that it applied to domestic and imported products alike and did not put imported

products at any disadvantage.

- 7 The national court found that in the instant case the ban on Sunday trading had the effect of reducing B & Q's total sales, that approximately 10% of the goods sold by B & Q came from other Member States and that a corresponding reduction of imports from other Member States would therefore ensue.
- 8 Having reached those findings, the national court took the view that the case raised questions concerning the interpretation of [Union] law. It therefore requested the Court to give a preliminary ruling on the following questions:
 - '(1) Where a Member State prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified items, sales of which are permitted, and where the effect of the prohibition is to reduce in absolute terms the sales of goods in those premises, including goods manufactured in other Member States, and correspondingly to reduce the volume of imports of goods from other Member States, is such a prohibition a measure having equivalent effect to a quantitative restriction on imports within the meaning of [Article 34 TFEU]?
 - (2) If the answer to Question 1 is in the affirmative, does such a measure benefit from any of the exceptions to [Article 34 TFEU] contained in Article 36 [TFEU], or from any other exception recognized by [Union] law?
 - (3) Is the answer to Question 1 or Question 2 above affected by any factor so as to render the measure in question a means of arbitrary discrimination or a disguised restriction on trade between Member States or a measure lacking in proportionality or otherwise unjustified?

- 9 Reference is made to the Report for the Hearing for a fuller account of the legal background to, and the facts of, the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 10 By its first question the national court seeks to establish whether the concept of measures having an effect equivalent to quantitative restrictions within the meaning of [Article 34 TFEU] also covers provisions prohibiting retailers from opening their premises on Sunday if the effect of the prohibition is to reduce in absolute terms the sales of goods in those premises, including goods imported from other Member States.
- 11 The first point which must be made is that national rules prohibiting retailers from opening their premises on Sunday apply to imported and domestic products alike. In principle, the marketing of products imported from other Member States is not therefore made more difficult than the marketing of domestic products.
- 12 Next, it must be recalled that in its judgment of 11 July 1985 in Joined Cases 60 and 61/84 *Cinéthèque SA and Others v Fédération nationale des cinémas français* [1985] ECR 2605, 2618, the Court held, with regard to a prohibition of the hiring of video-cassettes applicable to domestic and imported products alike, that such a prohibition was not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to [Union] trade thereby created did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to [Union] law.
- 13 In those circumstances it is therefore necessary in a case such as this to consider first of all whether rules such as those at issue pursue an aim which

is justified with regard to [Union] law. As far as that question is concerned, the Court has already stated in its judgment of 14 July 1981 in Case 155/80 *Oebel* [1981] ECR 1993 that national rules governing the hours of work, delivery and sale in the bread and confectionery industry constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty.

- 14 The same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of [Union] law, is a matter for the Member States. Furthermore, such rules are not designed to govern the patterns of trade between Member States.
- 15 Secondly, it is necessary to ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view. As is indicated in Article 3 of Commission Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), the prohibition laid down in [Article 34 TFEU] covers national measures governing the marketing of products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.
- 16 The question whether the effects of specific national rules do in fact remain within that limit is a question of fact to be determined by the national court.
- 17 The reply to the first question must therefore be that [Article 34 TFEU] must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on [Union] trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.

The second and third questions

- 18 In the light of the reply given to the first question, it is unnecessary to answer the second and third questions.

Costs

- 19 The costs incurred by the United Kingdom and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by Cwmbran Magistrates' Court, United Kingdom, by order of 25 April 1988, hereby rules:

[Article 34 TFEU] must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on [Union] trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.

Kakouris

Schockweiler

Koopmans

Mancini

Diez de Velasco

Delivered in open court in Luxembourg on 23 November 1989.

J.-G. Giraud

C. N. Kakouris

Registrar

President of the Sixth Chamber