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# The Sunday Trading Ban in the United Kingdom: A Thorn in the European Community's Side

## INTRODUCTION

Since the 1991 Christmas season, in which British consumers reportedly spent \$15 billion less on retail goods than a year before, retailers in the United Kingdom have continued to violate an antiquated British Shops Act that bans Sunday trading.<sup>1</sup> Under section 47 of the Shops Act 1950 (Shops Act or Act), "every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday."<sup>2</sup> Thus, with certain exceptions, it is a criminal offense to trade on a Sunday in England and Wales.<sup>3</sup>

As a member of the European Community (EC or Community),<sup>4</sup> the United Kingdom is bound by the articles of the Treaty of Rome (EEC Treaty).<sup>5</sup> Article 30 of the EEC Treaty states that "[q]uantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States."<sup>6</sup> British retailers have used this article to justify Sunday trading by arguing that the Shops Act prevents them from selling goods imported from other Member States.<sup>7</sup> These retailers claim that the Sunday trading ban is equivalent to a quantitative restriction under article 30.<sup>8</sup>

In light of recent EC decisions pertaining to Sunday work restrictions, the House of Lords and other U.K. courts have asked

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<sup>1</sup> Aileen McCabe, *Church of England Uses Clout in Sunday Shopping Debate*, THE GAZETTE (Montreal), Jan. 5, 1992, at B5.

<sup>2</sup> Shops Act, 1950, 14 Geo. 6, ch. 28, § 47 (Eng.).

<sup>3</sup> *Id.* § 59; Stephen Sidkin & Sally Anne Griffiths, *Trading Law; Short Shelf Life for Sunday Opening; EC Proposals May Force the UK to Enforce National Restrictions on Seven-Day Shopping*, THE INDEPENDENT, Mar. 8, 1992, at 26. The penalty for violating the Shops Act was raised in October 1992 from a maximum fine of 1,000 pounds to a maximum fine of 2,500 pounds. Sidkin & Griffiths, *supra*. Even the Church of England has stepped into the shopping debate, using the clout of its \$5.4 billion retail investment portfolio to persuade companies to stop violating the law. McCabe, *supra* note 1, at B5.

<sup>4</sup> The United Kingdom joined the EC in 1973. *Evolution of a Community*, TORONTO STAR, Sept. 6, 1992, at F1.

<sup>5</sup> See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

<sup>6</sup> *Id.* at art. 30.

<sup>7</sup> Sidkin & Griffiths, *supra* note 3, at 26.

<sup>8</sup> *Id.*

the European Court of Justice (ECJ) to decide whether the Sunday trading laws are valid under the EEC Treaty.<sup>9</sup> Part I of this Comment examines the provisions and objectives of the Sunday trading ban in the Shops Act. Part II explores relevant European Community laws, with particular emphasis on the quantitative restrictions standard of article 30. Part III analyzes a line of English cases that wrestle with the issue of compatibility between section 47 of the Shops Act and article 30 of the EEC Treaty. This section also documents recent developments of the Sunday trading issue. Part IV discusses the upcoming ECJ decision and the opinion of the ECJ's Advocate General. This Comment concludes that Britain's national courts, in line with the Advocate General's opinion, will likely preserve section 47 of the Shops Act until the enactment of legislative reforms.

## I. THE SHOPS ACT

The Shops Act is best noted for its ban on Sunday trading. Laden with numerous and inconsistent exceptions,<sup>10</sup> it is not popular among the British population.<sup>11</sup> According to one opinion poll, a two-to-one majority of the British population is in favor of lifting the Sunday ban.<sup>12</sup> Yet the Sunday shopping ban has remained intact even after 20 parliamentary attempts to repeal or alter the provision.<sup>13</sup> In a recent English High Court case, Justice Hoffmann explained that the Shops Act objective was to provide shopkeepers and shop assistants with a "traditional English Sunday."<sup>14</sup> While some British citizens consider Sunday to

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<sup>9</sup> See *infra* note 68 and accompanying text.

<sup>10</sup> The Shops Act provides exceptions for certain individuals and businesses who may be treated unfairly under the Act. For example, Jewish retailers who close their shops on Saturdays in order to observe Sabbath may be exempted from the Sunday trading ban. Shops Act § 53. Yet the Shops Act has also been criticized for creating an abundance of illogical exemptions. One critic calls the Shops Act "unworkable" because of its many oddities: "Razor blades may be sold for the cutting of corns, but not for shaving; fish-and-chip shops may serve take-away food, so long as it is not fish and chips; gin may be sold, but not baby food; girlie magazines, but not the Bible; and so on." *Absurd Sunday Shopping Laws? In Britain, Too*, TORONTO STAR, Dec. 19, 1991, at A21 (reprinted from THE ECONOMIST (Britain), Dec. 14, 1991) [hereinafter *Absurd Laws*].

<sup>11</sup> *Absurd Laws*, *supra* note 10, at A21.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Stoke-on-Trent City Council v. B&Q plc*, 3 C.M.L.R. 31, 45 (1990) (U.K.) [hereinafter *B&Q-II*].

be the Lord's Day, many others simply view it as a time for relaxation or recreation.<sup>15</sup>

The English High Court stated that the aim of the legislature was not universal because the legislature may have thought that "other trades were not subject to the same pressures or that they had sufficient protection from trade unions or other legislation or simply that other trades were not [the legislature's] concern."<sup>16</sup> The needs of the United Kingdom made certain concessions unavoidable. Under the provisions of the Shops Act, for example, cafes may serve light refreshments and stores may sell perishable groceries on Sundays.<sup>17</sup> Thus, the Shops Act has been criticized by those who view the exceptions as unnecessary and arbitrary.

## II. THE EEC TREATY

When the United Kingdom joined the EC, it accepted the EEC Treaty as the supreme law of the land.<sup>18</sup> Under British practice, however, if there is a conflict between British law and EC law, British law must yield.<sup>19</sup> English courts have been wrestling with the Sunday shopping conflict for several years and are waiting for guidance from the ECJ to finally put the matter to rest.

In deciding whether the Shops Act infringes upon the provisions of the EEC Treaty, the European Court of Justice will have more to examine than just the "quantitative restrictions" standard of article 30.<sup>20</sup> Article 36 of the EEC Treaty, for instance, permits restrictions on imports, exports, and goods in transit, if such restrictions can be justified on grounds of public morality, public policy, or public security, and do not "constitute a means of arbitrary discrimination or a disguised restriction on trade be-

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<sup>15</sup> *Id.* at 45. In fact, before the Shops Act was passed, the sponsor of the bill "painted a picture of other workers spending their summer Sunday going into the country on bicycles or by bus, returning with fruit and flowers and of shop workers denied these delights because owners felt that they could not shut on Sundays for fear of losing trade to rivals who stayed open." *Id.* at 46.

<sup>16</sup> *Id.* at 45.

<sup>17</sup> *Id.*; see Shops Act §§ 48-67.

<sup>18</sup> *B&Q-II*, 3 C.M.L.R. at 34. Justice Hoffmann wrote that "[t]he entry into the Community was in itself a high act of social and economic policy, but which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership." *Id.*

<sup>19</sup> *W.H. Smith Do-It-All Ltd. and Payless DIY Ltd. v. Peterborough City Council*, 2 C.M.L.R. 577, 580 (1990) (U.K.).

<sup>20</sup> EEC TREATY art. 30.

tween Member States."<sup>21</sup> The ECJ could also look to Directive 70/50,<sup>22</sup> which, as interpreted, requires that "[a]ll trading rules enacted by member-states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."<sup>23</sup>

The House of Lords and the English courts, however, appear reluctant to address the quantitative restrictions issue without definitive guidance from the ECJ.<sup>24</sup> As a result, retailers in the United Kingdom have continued to ignore the Shops Act.<sup>25</sup> The treatment of section 47 of the Shops Act and article 30 of the EEC Treaty is best analyzed in light of a line of cases which all involve the same retailer.

<sup>21</sup> *Id.* at art. 36. Examples of permissible import restrictions under article 36 include "the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." *Id.*

<sup>22</sup> Council Directive 70/50, 1970 O.J. SPEC. ED. 17. This Directive states:

. . . Whereas effects on the free movement of goods of measures which relate to the marketing of products and which apply equally to domestic and imported products are not as a general rule equivalent to those of quantitative restrictions, since such effects are normally inherent in the disparities between rules applied by member-states in this respect; Whereas, however, such measures may have a restrictive effect on the free movement of goods over and above that which is intrinsic to such rules. . . .

Article 2.1. This Directive covers measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production. . . .

Article 3. This Directive also covers measures governing the marketing of products which deal, in particular, with size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, which the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules. This is the case, in particular, where:—the restrictive effects on the free movement of goods are out of proportion to their purpose;—the same objective can be attained by other means which are less of a hindrance to trade.

*Id.* at pmb1, arts. 2.1, 3. Directive 70/50 is based upon the provisions of article 33(7) of the EEC Treaty. The article states that "[t]he Commission shall issue directives establishing the procedure and timetable in accordance with which Member States shall abolish, as between themselves, any measures in existence when this Treaty enters into force which have an effect equivalent to quotas." EEC TREATY art. 33(7).

<sup>23</sup> *Peterborough City Council*, 2 C.M.L.R. at 583 (quoting Case 8/74, *Procureur Du Roi v. Dassonville*, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974) (Bel.)). This quotation has become known as the "Dassonville Test," named after a European Court of Justice decision in which a Belgian law requiring certain imported goods to have an accompanying certificate was found to violate article 30.

<sup>24</sup> See *infra* note 68 and accompanying text.

<sup>25</sup> McCabe, *supra* note 1, at B5.

### III. THE B&Q CASES

#### A. *Early Developments*

In *Council of Stoke-on-Trent and Norwich City Council v. B&Q plc (B&Q-I)*,<sup>26</sup> a national chain of do-it-yourself shops, B&Q, argued that injunctions to restrain Sunday trading were invalid under article 30 of the EEC Treaty.<sup>27</sup> B&Q offered to show that 10 percent of its purchases came from Member States, and that closing on Sunday meant that fewer of these goods could be sold.<sup>28</sup> The English High Court ruled that it could not decide whether section 47 infringed upon article 30. The court noted that a trial court had to address the compatibility issue first.<sup>29</sup>

Three months later, the English High Court addressed again the compatibility of the Shops Act with article 30 of the EEC Treaty in *Stoke-on-Trent City Council v. B&Q plc (B&Q-II)*.<sup>30</sup> Using a historical approach, the court analyzed several ECJ decisions, including the well-known *Rewe-Zentral AG v. Bundesmonopolverwaltung Für Branntwein (Cassis De Dijon)* case.<sup>31</sup> This case established a "mandatory requirements" test which permitted disparities between EC and national laws if the disparities were 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."<sup>32</sup> *Cassis De Dijon* dealt with a German law which prohibited the sale of fruit liquor with a low alcoholic content. The law had the effect of blocking the French liquor known as Cassis de Dijon from being imported into the country. The court was unable to deter-

<sup>26</sup> 2 C.M.L.R. 377 (1990) (U.K.) (hereinafter *B&Q-I*).

<sup>27</sup> *Id.* at 379.

<sup>28</sup> *Id.* B&Q had previously brought this case to the ECJ. Case 145/88, *Torfaen Borough Council v. B&Q plc*, 1 C.M.L.R. 337 (1990) [hereinafter *Torfaen*]; see *infra* notes 41-43 and accompanying text. The ECJ ruled that the national court was the proper court to decide whether the restrictive effects of the Sunday trading ban on Community trade did not "exceed the effects intrinsic to rules of that kind." *B&Q-I*, 2 C.M.L.R. at 379 (quoting *Torfaen*, 1 C.M.L.R. at 364, 365). The ECJ did uphold a prior ruling which deemed national rules on opening hours "a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty." *Id.*

<sup>29</sup> *B&Q-I*, 2 C.M.L.R. at 377, 382.

<sup>30</sup> *Stoke-on-Trent City Council v. B&Q plc*, 3 C.M.L.R. 31, 31 (1990) (U.K.) [hereinafter *B&Q-II*].

<sup>31</sup> Case 120/78, 1979 E.C.R. 649 [hereinafter *Cassis De Dijon*].

<sup>32</sup> *B&Q-II*, 3 C.M.L.R. at 38, 39 (quoting *Cassis De Dijon*, 1979 E.C.R. at 662).

mine a legitimate purpose for the law and therefore, held that it infringed upon article 30.<sup>33</sup> Thus, in addition to the categories listed in article 36, the *Cassis De Dijon* principle is often treated as a judge-made exception to article 30.<sup>34</sup>

The *B&Q-II* court also looked at another important case, *Cinéthèque SA v. Fédération Nationale Des Cinémas Français (Cinéthèque)*,<sup>35</sup> which unlike *Cassis De Dijon*, involved a law that had the effect of regulating both imports and domestic goods. According to the French law, a video cassette version of a film could not be marketed until a certain period after the film's cinema release.<sup>36</sup> The ECJ held the protection of the cinema industry by a non-discriminatory measure could be deemed a legitimate objective.<sup>37</sup> The court stated that a provision such as this could be upheld as long as it applied to "domestically produced and imported cassettes alike and any barriers to intra-Community trade to which its implementation [might] give rise [did] not exceed what [was] necessary for ensuring that the exploitation in cinemas of cinematographic works of all origins retain[ed] priority over other means of distribution."<sup>38</sup> The court, however, noted that since Member States operate their film industries differently, the law could create barriers to intra-Community trade.<sup>39</sup> Thus, in principle, the nonmarketing provision came within article 30.<sup>40</sup>

The *B&Q-II* court then examined *Torfaen Borough Council v. B&Q plc*, a prior case involving B&Q.<sup>41</sup> In the *Torfaen* case, the ECJ intended to offer an authoritative interpretation of the Treaty sufficient to enable the national court to resolve the case.<sup>42</sup> Specifically, the ECJ ruled that the validity of the English Sunday trading law depends on whether the aim of the law can be justified with regard to Community law, and whether the effect of the law exceeds measures necessary to achieve its intended result.<sup>43</sup>

<sup>33</sup> *Id.* at 38, 39 (citing *Cassis De Dijon*, 1979 E.C.R. at 664).

<sup>34</sup> *Id.* at 39; see *supra* note 21 and accompanying text.

<sup>35</sup> Joined Cases 60-61/84, *Cinéthèque SA v. Fédération Nationale des Cinémas Français*, 1985 E.C.R. 2605.

<sup>36</sup> *Id.* at 2606.

<sup>37</sup> *B&Q-II*, 3 C.M.L.R. at 40 (citing *Cinéthèque*, 1985 E.C.R. at 2626-27).

<sup>38</sup> *Cinéthèque*, 1985 E.C.R. at 2626-27.

<sup>39</sup> *Id.* at 2626.

<sup>40</sup> *B&Q-II*, 3 C.M.L.R. at 39 (citing *Cinéthèque*, 1985 E.C.R. at 2626).

<sup>41</sup> Case 145/88, *Torfaen Borough Council v. B&Q plc*, 1 C.M.L.R. 337, 337 (1990).

<sup>42</sup> *B&Q-II*, 3 C.M.L.R. at 42 (citing *Torfaen*, 1 C.M.L.R. at 362-65).

<sup>43</sup> *Id.* at 42 (quoting *Torfaen*, 1 C.M.L.R. at 364).

The *B&Q-II* court ruled that the ECJ had answered the first question because non-working hours on Sunday clearly fell within the ECJ requirement that national laws be in accord with national “socio-cultural characteristics.”<sup>44</sup> The *B&Q-II* court, therefore, was left to answer the second question—whether the Sunday trading law went beyond the steps necessary to achieve the intended result. The ECJ specifically stated that this was a question of fact to be determined by the national court.<sup>45</sup>

The B&Q chain based its argument on proportionality tests which measure whether “the restrictive effects on the free movement of goods are out of proportions [sic] to their purpose,” and whether “the same objective can be attained by other means which are less of a hindrance to trade.”<sup>46</sup> B&Q argued that an abolition of Sunday trading restrictions could lead to a 2 percent increase in retail sales.<sup>47</sup> B&Q also argued that the Community loses \$670 million a year in import sales from gardening and do-it-yourself shops which cater to the needs of Sunday shoppers.<sup>48</sup> Furthermore, B&Q pointed out that many employees have come to rely on their part-time Sunday work, and that employers have had no trouble finding individuals to staff their shops.<sup>49</sup>

The *B&Q-II* court wrestled with the question of its role in applying the proportionality tests. Justice Hoffmann wrote that “[i]n my judgment it is not my function to carry out the balancing exercise [or to decide whether] the legislative objective could be achieved by other means.”<sup>50</sup> He further stated that “[t]hese questions involve compromises between competing interests which in a democratic society must be resolved with the legislature. . . . The function of the court is to review the acts of the legislatures but not to substitute its own policies or values.”<sup>51</sup> Justice Hoff-

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<sup>44</sup> *Id.* at 42.

<sup>45</sup> *Id.* at 43 (citing *Torfaen*, 1 C.M.L.R. at 364).

<sup>46</sup> *Id.* at 47. B&Q relied upon the illustrations of lack of proportionality in article 3 of Directive 70/50. See *supra* note 22 and accompanying text.

<sup>47</sup> *B&Q-II*, 3 C.M.L.R. at 48.

<sup>48</sup> *Id.* Of course, this figure assumes that these lost sales would not be recovered during the rest of the week. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 49.

<sup>51</sup> *Id.* In a March 18, 1992 speech, Prime Minister John Major commented that “[t]he new Parliament would be given an opportunity to vote on proposals to allow Sunday shopping, once the European Court of Justice had decided whether English law conflicted with the Treaty of Rome.” Stephen Goodwin, *Election 1992: Major Offers an Open Door to Ownership*, THE INDEPENDENT, Mar. 19, 1992, at 10.



mann explained that his decision was not an abdication of judicial responsibility because the court should not attempt to act as the legislature in cases in which different views are reasonably tenable.<sup>52</sup> Justice Hoffmann ultimately concluded that the court would decide nothing more than “whether it is a reasonably tenable view that preventing shop workers from having to work on Sundays is a sufficiently important objective to justify the consequent reduction in Community trade and that no means other than requiring shops to shut would achieve the same objective with less hindrance to trade.”<sup>53</sup> In Justice Hoffmann’s opinion, the legislation properly balanced these objectives. The Shops Act’s purpose was to permit most citizens to have Sunday free,<sup>54</sup> and no other means would achieve this goal.<sup>55</sup> Thus, the court granted the local authorities an injunction to prevent B&Q from further Sunday trading.<sup>56</sup>

### B. *Recent Developments*

*B&Q-II* did not end the retailer’s pursuit to remain open on Sunday. B&Q found limited success in a Shrewsbury Crown Court decision<sup>57</sup> shortly after the *B&Q-II* ruling. This court allowed an appeal from a Magistrate court because it found that the objective of the Shops Act could be attained through less restrictive means.<sup>58</sup> A few months later, however, the Chancery

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<sup>52</sup> *B&Q-II*, 3 C.M.L.R. at 49. The court also notes that the power to review an Act of Parliament is new to the courts in Britain. The court states that Britain is unlike countries such as the United States, Canada, and Australia, which have “constitutional limitations on the powers of an otherwise sovereign legislation.” *Id.*

<sup>53</sup> *Id.* at 51.

<sup>54</sup> The court does not support the argument that because section 47 was intended to protect Sunday leisure activity, shops should remain open to accommodate those people who find shopping to be a leisure activity. Justice Hoffmann wrote that “[i]t was never the purpose of section 47 to protect shoppers from the pain of having to buy things on Sunday and the fact [that] certain kinds of shopping may be a pleasure is irrelevant. The Act was to protect shop workers and there is not evidence that anyone regards Sunday work, even in a [do-it-yourself] shop, as a leisure activity.” *Id.* at 52.

<sup>55</sup> *Id.* at 52–53. Justice Hoffmann stated that the particular restrictions are necessary, even though other restrictions could be implemented which have a lesser effect on Community trade. *Id.* at 52.

<sup>56</sup> *Id.* at 54. The authorities pursued an injunction because civil penalties had been ineffective in stopping B&Q from opening its doors on Sundays.

<sup>57</sup> *B&Q Limited v. Shrewsbury and Atcham Borough Council*, 3 C.M.L.R. 535 (1990) (U.K.).

<sup>58</sup> *Id.* at 539.

Division of the High Court granted an interim injunction against Sunday trading at another B&Q store.<sup>59</sup>

In April 1991, the Court of Appeal issued *Kirklees Borough Council v. Wickes Building Supplies Ltd.; Mendip District Council v. B&Q plc (Kirklees Borough Council-I)*, which essentially made Sunday trading restrictions unenforceable, because it required local authorities to give a "cross-undertaking in damages" before obtaining a civil court injunction.<sup>60</sup> The court determined that the public authorities were not entitled to an interim injunction partly because they were not prepared to offer compensation if an adverse decision was later issued by the House of Lords or the ECJ.<sup>61</sup> In June 1991, however, the House of Lords overturned this decision.<sup>62</sup> It will now be up to the local authorities to decide whether they will again seek to enforce Sunday closing restrictions before the ECJ reaches its determination on the article 30 issue.<sup>63</sup> In the House of Lords opinion, Lord Goff stated that the British Government, rather than local authorities, might be obligated to compensate traders who were forced to close on Sundays if the ECJ ultimately invalidated the terms of the Shops Act.<sup>64</sup> Despite this decision, chain stores will most likely continue to open their shops on Sundays until the ECJ reaches a final decision.<sup>65</sup>

Near the time of the *Kirklees Borough Council-I* decision, the United Kingdom voiced its opposition to another controversial EC labor issue—a maximum 48-hour work week. In an attempt to legislate minimum standards of social protection across the Community, the EC drafted a directive which, by 1995, establishes a maximum average work week of 48 hours including overtime.

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<sup>59</sup> *Mendip District Council v. B&Q plc*, 1 C.M.L.R. 113 (1991) (U.K.).

<sup>60</sup> 3 C.M.L.R. 282, 288 (1991) (Eng. C.A.) [hereinafter *Kirklees Borough Council-I*]. A cross-undertaking in damages is "a pledge to indemnify retailers for loss of Sunday profits in the event of the traders eventually emerging victorious under EC law." *Judgment Later on Sunday Trading Row*, Press Association Newsfile, Mar. 10, 1992, available in LEXIS, Nexis Library, Intl File [hereinafter *Judgment*]. The cross-undertaking in damages requirement makes Sunday trading restrictions unenforceable because most municipalities cannot afford to compensate retailers for lost Sunday profits if the ECJ invalidates the Shops Act.

<sup>61</sup> *Kirklees Borough Council-I*, 3 C.M.L.R. at 297.

<sup>62</sup> *Kirklees Borough Council v. Wickes Building Supplies Limited*, 2 C.M.L.R. 765 (1992) (U.K.) [hereinafter *Kirklees Borough Council-II*].

<sup>63</sup> Anne Richmond, *Lords Lift Block on Sunday Trading Laws*, Press Association Newsfile, June 25, 1992, available in LEXIS, Nexis Library, Intl File [hereinafter *Lords Lift Block*].

<sup>64</sup> *Id.* (citing *Kirklees Borough Council-II*, 2 C.M.L.R. at 785–86).

<sup>65</sup> David Simpson, *Stores to Open on Sunday Despite Legal Ruling*, Press Association Newsfile, June 26, 1992, available in LEXIS, Nexis Library, Intl File.

In addition, the directive mandates a minimum daily rest period of 11 hours with Sunday “in principle” treated as a day of rest.<sup>66</sup> The British Employment Secretary, Gillian Shephard, however, successfully persuaded other EC members to strike the Sunday rest period provision and to provide for a 10-year opt-out provision from the maximum work week.<sup>67</sup>

#### IV. THE FINAL CONFRONTATION: THE ECJ AND THE SHOPS ACT

In May 1991, the High Court, the Reading and Sonning Magistrates’ Court and the House of Lords referred the Sunday trading issue to the ECJ.<sup>68</sup> The English legislative and judicial bodies wanted to know whether the ECJ’s 1989 *Torfaen* decision had been affected by two 1991 decisions involving France and Belgium.<sup>69</sup> Recalling *Torfaen*, the question whether the Shops Act was incompatible with article 30 raised an issue of proportionality that was to be decided by the national court.<sup>70</sup> These recent ECJ decisions, however, held that national laws imposing restrictions on Sunday working were not incompatible with the EC’s concern of “free movement of goods.”<sup>71</sup> Thus, in light of these decisions, the House of Lords was unsure as to whether the national court

<sup>66</sup> Sarah Lambert, *Britain Mutes Opposition to 48-Hour Week*, THE INDEPENDENT, May 1, 1992, at 11; David Goodhart, *Social Europe: Brussels May Force Clock Watchers into a Re-think—The Implications for British Companies and Their Workers of the EC Directive on Working Time*, FIN. TIMES, Apr. 30, 1992, at 9.

<sup>67</sup> Boris Johnson, *Britain Wins Deal on Work Hours*, DAILY TELEGRAPH, June 25, 1992, at 1. Interestingly, the Sunday trading lobby could now thank a British official for protecting their retail interests. *Id.*

<sup>68</sup> Case 169/91, Council of Stoke-on-Trent and Norwich City Council v. B&Q plc Opinion, Van Gerven, July 8, 1992; Case 304/90, Reading Borough Council v. Payless DIY Ltd. and others; Case 306/88, Rochdale Borough Council v. Stewart John Anders; see *The Week in Luxembourg: UK ‘Net Book’ Agreement Contravenes EC Law*, FIN. TIMES, July 14, 1992, at 14 [hereinafter *Week in Luxembourg*].

<sup>69</sup> Bethan Hutton & John Thornhill, *Lords Decision Adds to Sunday Trade Confusion*, FIN. TIMES, June 26, 1992, at 8; see Case 332/89, Ministère Public v. Marchandise, Feb. 28, 1991, not yet reported; Case 312/89, Union Départementale des Syndicats CGT de L’Aisne v. Societè Internationale de Distribution D’Equipements Familiaux-Conforama, Feb. 28, 1991, not yet reported.

<sup>70</sup> Case 145/88, *Torfaen Borough Council v. B&Q plc*, 1 C.M.L.R. 337, 364 (1990); Ying Hui Tan, *Law Report: Sunday Trading Ban Needs No Damages Undertaking: Kirklees Borough Council v. Wickes Building Supplies Ltd.*, THE INDEPENDENT, June 26, 1992, at 25 [hereinafter *Law Report*]; see *supra* notes 41–43 and accompanying text.

<sup>71</sup> *Id.*; Hutton & Thornhill, *supra* note 69, at 8.

was the appropriate forum to investigate the issue of proportionality.<sup>72</sup>

On July 8, 1992, Walter Van Gerven, the European Court of Justice's Advocate General, announced his position on the Sunday trading issue. He stated that "[l]egislation of a member state which prohibits shops from opening on Sundays pursues an objective which is justified under Community Law."<sup>73</sup> The Advocate General explained that the *Union Départementale des Syndicats CGT de L'Aisne v. Société Internationale de Distribution D'Equipements Familiaux-Conforama* (*Conforama*) and *Ministère Public v. Marchandise* (*Marchandise*) decisions were not inconsistent with *Torfaen*.<sup>74</sup> In *Conforama* and *Marchandise* the ECJ had enough elements to decide the justification issue, but in *Torfaen*, the national court needed to address the factual elements relevant to proportionality.<sup>75</sup> In regard to the new cases referred to the ECJ by Britain, the Advocate General stated that the Sunday trading measure passed the first test: that the Sunday trading rule pursued an objective justified under Community law.<sup>76</sup> National courts, however, must determine a second test: whether the Sunday trading measures were "relevant, essential and proportionate to the objective pursued."<sup>77</sup> In the Advocate General's opinion, the restrictions were indeed proportionate to their objectives.<sup>78</sup> While the Advocate General's report is not legally binding on the full court, the ECJ rarely contradicts the view of the Advocate General.<sup>79</sup>

The ECJ's recent decisions concerning Sunday work restrictions, the Advocate General's preliminary statements, and the fact that many European countries are currently questioning their commitment to the Community, make it appear likely that the ECJ will not ask the United Kingdom to subordinate its own law

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<sup>72</sup> *Law Report*, *supra* note 70, at 25.

<sup>73</sup> Geoff Meade & David Simpson, *Business as Usual after Sunday Ruling*, Press Association Newsfile, July 8, 1992, available in LEXIS, Nexis Library, Intl File.

<sup>74</sup> *Week in Luxembourg*, *supra* note 68, at 14; see Case 332/89, *Ministère Public v. Marchandise*, Feb. 28, 1991, not yet reported; Case 312/89, *Union départementale des Syndicats CGT de L'Aisne v. Société Internationale de Distribution D'Equipements Familiaux-Conforama*, Feb. 28, 1991, not yet reported.

<sup>75</sup> *Week in Luxembourg*, *supra* note 68, at 14.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Chriss Moncrieff, *Euro Ruling Opens Way for Sunday Trading Go-Ahead*, Press Association Newsfile, July 9, 1992, available in LEXIS, Nexis Library, Intl File.

to EC law. Subordination would symbolize a final step in Britain's integration into the EC—a step that Britain may not yet be ready to take.<sup>80</sup> Thus, it appears that the United Kingdom may be able to retain its “traditional English Sunday” after all.

#### CONCLUSION

Section 47 of the Shops Act has guaranteed British citizens a traditional English Sunday for over 40 years. Yet many retailers in the United Kingdom have found it lucrative to open their shops on Sunday, and many citizens have enjoyed the additional shopping time and employment opportunities. Whether Britain can retain the Sunday trading ban is not clear because article 30 of the EEC Treaty prohibits “quantitative restrictions” on imports of Member States. Forcing stores to close on Sundays could have the effect of such a quantitative restriction. Both the ECJ and British courts have wavered on this possible conflict. Uncertainty exists as to which judicial body can decide whether the law is justified.

Recent ECJ decisions, including the opinion of the ECJ Advocate General, seem to indicate that the United Kingdom will have the final word in deciding whether or not the restrictions are proportionate to their objectives. It is unlikely, based upon the longevity of the Shops Act, that the United Kingdom will now find the restrictions disproportionate to their objectives. Thus, section 47 of the Shops Act will probably continue to stand. Yet a legislative compromise, such as a half-day working Sunday, may occur in the near future.<sup>81</sup>

*Darren T. Binder*

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<sup>80</sup> Although Britain recognizes the benefits of membership in the EC, its Sunday trading court decisions have revealed an unwillingness to completely adapt EC law as the supreme law of the country. This is the case despite Justice Hoffmann's comments in *B&Q-II* that “entry into the Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on matters of social and economic policy which it regulated.” *Stoke-on-Trent City Council v. B&Q plc*, 3 C.M.L.R. 31, 34 (1990) (U.K.).

<sup>81</sup> Britain's Home Secretary, Kenneth Clarke, plans to introduce a bill to reform Sunday trading laws. The act would go into effect before Christmas 1992. Valerie Elliott, *Clarke Set to Rush New Bill on Sunday Shop Law Reform*, SUNDAY TELEGRAPH, Sept. 27, 1992, at 2.