

The Law of the EUROPEAN UNION

Teaching Material



THE INTERNAL MARKET:
NON-TARIFF BARRIERS

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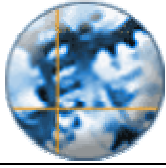
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2004/05

TABLE OF CONTENTS

1.	<i>RELEVANT TREATY PROVISIONS:</i>	1
	Note and Questions	1
2.	<i>RESTRICTIONS ON IMPORTS</i>	5
2.1	From Dassonville to Keck	5
2.1.1	Case 8/74: Dassonville	5
2.1.2	Case 120/78: Cassis de Dijon	7
2.1.3	Case 188/84: Woodworking	10
2.1.3.1	<i>Opinion of AG VerLoren van Themaat</i>	10
2.1.3.2	<i>Judgement of the Court of Justice</i>	13
2.1.4	Case 34/79: Henn and Darby	18
2.1.4.1	<i>Judgement of the Court of Justice</i>	18
2.1.4.2	<i>Opinion of AG Warner</i>	22
2.1.5	Case 145/88: Torfaen Borough	31
2.1.5.1	<i>Opinion of AG van Gerven</i>	31
2.1.5.2	<i>Judgment of the Court of Justice</i>	45
2.1.6	Case 362/88: Inno	47
2.1.7	Joined Cases C-267 and 268/91: Keck	51
2.2	Post-Keck	54
2.2.1	Case C-292/92: Hunermund	54
2.2.2	Joined Cases C-401 and 402/92: Tankstation't Heukske	57
2.2.2.1	<i>Opinion of AG van Gerven</i>	58
2.2.2.2	<i>Judgment of the Court of Justice</i>	63
2.2.3	Case C-412/93: Leclerc	64
2.2.3.1	<i>Opinion of AG Jacobs</i>	64
2.2.3.2	<i>Judgement of the Court of Justice</i>	69
2.2.4	Case C-391/92: Commission v. Greece (Infant Milk)	71
2.2.4.1	<i>Opinion of AG Lenz</i>	71
2.2.4.2	<i>Judgement of the Court of Justice</i>	74
2.2.5	Joined cases C-69/93 and C-258/93: Punto Casa	77
2.2.6	Joined Cases 418 etc. /93, 9 etc. /94: Semeraro	80
2.2.7	Case C-470/93: Mars	86
2.2.7.1	<i>Opinion of AG Leger</i>	86
2.2.7.2	<i>Judgement of the Court of Justice</i>	90
2.2.8	Case C-368/95: Familiapress	91
2.2.9	Case C-265/95: Commission v France (Spanish strawberries)	96
	Note and Questions	96
2.2.10	Case C-122/00: Schmidberger	104
	Note and Questions	104
2.2.11	Joined Cases C-34-36/95: De Agostini	112
2.2.12	Case C-379/98: PreussenElektra AG v. Schleswag AG	117
2.2.13	Case C-120/95: Decker	122
2.2.14	Case C-405/98: Gourmet International	128

3	<i>RESTRICTIONS ON EXPORTS</i>	134
3.1	Case 15/79: Horsemeat	134
3.2	Case 155/80: Oebel	136
3.3	Case C-5/94: Hedley Lomas	139
	Note and Questions	139
3.4	Case C-1/96: ex parte: Compassion in World Farming	142
	Note and Questions	142
3.5	Case C-350/97: Wilfried Monsees	146
	Note and Questions	146
3.6	Case C-388/95: Belgium v Spain	149
	Note and Questions	149
4	<i>ARTICLE 100A (4) [NOW ARTICLE 95]: NATIONAL DEROGATION</i>	159
4.1	Case C-319/97: Antoine Kortas	159
	Note and Questions	159

1. **RELEVANT TREATY PROVISIONS:**



NOTE AND QUESTIONS

Free Movement of Goods

(http://europa.eu.int/comm/internal_market/en/goods/index.htm)

Introduction

Articles 28 to 30 of the EC Treaty establish the principle of free movement of goods under which Member States may not maintain or impose barriers to trade in areas which have not been the subject of Community harmonisation, except in special circumstances. Products which are lawfully marketed in one Member State may be marketed in all the other Member States. Therefore, the authorities of the Member States of destination will acknowledge the standards to which the product conforms in the Member State of origin: this is known as the principle of mutual recognition.

The provision in all the Member States of a broad range of goods from all four corners of the EU must be implemented within a precise framework. Citizens need to be assured that products are safe and that they can obtain compensation for damage caused by defective products. Since 1985, the Single Market has had a product liability regime to deal with these two concerns, as specified in the Directive on liability for defective products.

When a Member State hinders free movement or the marketing of a specific product type, which has been lawfully manufactured or marketed in another Member State, it must notify the Commission of this measure under the provisions of Decision 3052/95/EC.

The Council has set up a rapid intervention mechanism to abolish as quickly as possible certain physical barriers to the free movement of goods which seriously disrupt the proper functioning of the Single Market. (for more information see http://europa.eu.int/comm/internal_market/en/goods/reg267998.htm)

If citizens or businesses consider that a given product is not authorised for circulation - even if it is in line with equivalent standards - they may raise the matter with the Commission department responsible for the free movement of goods.

Articles 28 to 30 of the EC Treaty

The free movement of goods is one of the cornerstones of the Single Market. It is laid down, in particular, by Articles 28, 29 and 30 of the EC Treaty, which prohibit measures which have an effect equivalent to quantitative restrictions in intra-Community trade.

Since the Treaty does not define the concept of measures which have an effect equivalent to quantitative restrictions, the Commission set out a whole range of state measures covering this concept in Directive 70/50/EEC (<http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=lif&SERVICE=all&LANGUAGE=en&DOCID=370L0050>).

There is ample case law of the Court of Justice concerning Articles 28 to 30 of the Treaty. This case law serves as a basis for a practical guide to the concepts and application of Articles 28 to 30 of the EC Treaty.

Certain decisions of the Court of Justice, the development of a Commission doctrine and the rapid changes in the Single Market have led the Commission to issue the following communications:

- Commission interpretative communication on procedures for the type-approval and registration of vehicles previously registered in another Member State
- Communication on environmental taxes and charges in the Single Market
- Communication on parallel imports of proprietary medicinal products for which marketing authorizations have already been granted
- Interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions
- Communication concerning the use of languages in the marketing of foodstuffs
- Interpretative communication on the free movement of foodstuffs within the Community
- Interpretative communication on the names under which foodstuffs are sold
- Communication to the European Parliament and the Council on the Single Market and environment. This communication was followed by two reports from the Council of the European Union to the Helsinki and Gothenburg European Councils on a strategy for integrating environment into EU Policies
- Single Market and Environment

1. The Amsterdam Treaty has repealed the words “without prejudice to the following provisions” from Article 28 (ex Article 30) TEC. It has also repealed Articles 31, 32, 33 and 35 TEC. What consequences, if any, could these changes entail for the case-law of the ECJ?

Treaty establishing the European Community

Article 28 (ex article 30)

– post Maastricht –

Quantitative restrictions on imports and all measures having an equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 28

- post Amsterdam -

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29 (ex article 34)

1. Quantitative restrictions on exports, and all measures having equivalent effect shall be prohibited between Member States.
2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.

Article 30 (ex article 36)

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 94 (ex article 100)

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions in Member States as directly affect the establishment or functioning of the common market.

Article 95 (ex article 100a)

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7a. The Council shall, in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
3. The Commission, in its proposals laid down in paragraph 1 concerning health, safety environmental protection and consumer protection, will take as a base a high level of protection.
4. If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Article 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

5. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.

[...]

2. RESTRICTIONS ON IMPORTS

2.1 From Dassonville to Keck

2.1.1 Case 8/74: Dassonville

Procureur du Roi v Benoit and Gustave Dassonville

Case 8/74

11 July 1974

Court of Justice

[1974] ECR 837

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

In Belgium, the recognition of designations of origin was subject to a declaration by the Belgian Government. In addition, Belgian law prohibited the importation of spirits bearing a recognized designation of origin unless they were accompanied by a document certifying their right to such a designation. The Belgian government had officially recognized "Scotch Whisky" as a designation of origin.

Gustave Dassonville, a wholesaler doing business in France, and his son, Benoit Dassonville, who managed a branch of the business in Belgium, imported into Belgium from France some "Johnnie Walker" and "Vat 69" "Scotch Whisky." Since France had not required a certificate of origin for "Scotch Whisky," the Dassonvilles did not have a certificate from the British authorities. In expectation of importing the whiskey into Belgium, the Dassonvilles attached printed labels with the words "British Customs Certificate of Origin," and added in a hand-written note the number and date of the French excise bond, which was all that was required by French rules.

The Belgian authorities considered the documents insufficient and brought action against the Dassonvilles for violations of Belgian law charging them, among other things, with the failure to have the appropriate documents. The two exclusive importers of "Johnnie Walker" and "Vat 69" also brought a civil action.

The Tribunal de Premiere Instance de Bruxelles requested a preliminary ruling pursuant to Article 177 of the EEC Treaty:

Judgement

1. By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Premiere Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.
2. By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.
3. This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules.
4. It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate only with great difficulty, unlike the importer who imports directly from the producer country.
5. All 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.
6. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member States takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.
7. Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
8. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.
9. Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

2.1.2 Case 120/78: Cassis de Dijon

Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)

Case 120/78

20 February 1979

Court of Justice

[1979] ECR. 649

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 28 April 1978, which was received at the Court on 22 May, the Hessisches Finanzgericht referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30 and 37 of the EEC Treaty, for the purpose of assessing the compatibility with Community law of a provision of the German rules relating to the marketing of alcoholic beverages fixing a minimum alcoholic strength for various categories of alcoholic products.
2. It appears from the order making the reference that the plaintiff in the main action intends to import a consignment of "Cassis de Dijon" originating in France for the purpose of marketing it in the Federal Republic of Germany.

The plaintiff applied to the Bundesmonopolverwaltung (Federal Monopoly Administration for Spirits) for authorization to import the product in question and the monopoly administration informed it that because of its insufficient alcoholic strength the said product does not have the characteristics required in order to be marketed within the Federal Republic of Germany.

3. The monopoly administration's attitude is based on Article 100 of the Branntweinmonopolgesetz and on the rules drawn up by the monopoly administration pursuant to that provision, the effect of which is to fix the minimum alcohol content of specified categories of liqueurs and other potable spirits...

Those provisions lay down that the marketing of fruit liqueurs, such as "Cassis de Dijon", is conditional upon a minimum alcohol content of 25%, whereas the alcohol content of the product in question, which is freely marketed as such in France, is between 15 and 20%.

4. The plaintiff takes the view that the fixing by the German rules of a minimum alcohol content leads to the result that well-known spirits products from other Member States of the Community cannot be sold in the Federal Republic of Germany and that the said provision therefore constitutes a restriction on the free movement of goods between Member States which exceeds the bounds of the trade rules reserved to the latter.

In its view it is a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty.

[...]

5. In order to reach a decision on this dispute the Hessisches Finanzgericht has referred two questions to the Court, worded as follows:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirits content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?

[...]

6. The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether the requirement of a minimum alcohol content may be covered either by the prohibition on all measures having an effect equivalent to quantitative restrictions in trade between Member States contained in Article 30 of the Treaty or by the prohibition on all discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States within the meaning of Article 37.
8. In the absence of common rules relating to the production and marketing of alcohol -- a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 [citation omitted] not yet having received the Council's approval -- it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

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

9. The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.
10. As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.
11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.
12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

15. Consequently, the first question should be answered to the effect that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

[...]

2.1.3 Case 188/84: Woodworking

2.1.3.1 *Opinion of AG VerLoren van Themaat*

**Commission of the European Communities v France
(Woodworking)**

Case 188/84

15 October 1985

AG P VerLoren van Themaat

[1986] ECR 419

<http://www.curia.eu.int/en/content/juris/index.htm>

1. Summary of the case

1.1. General remarks

So far as I have been able to ascertain, these proceedings brought by the Commission against France are the first in which the Court has been called upon to consider, in all their complexity, the restrictions on trade which may result from technical provisions for machines and other technical apparatus and products.

Speaking very generally, so-called "technical barriers to trade" in industrial products can arise in three different ways, of increasing gravity.

In the first place, they may be the practical consequences of divergent technical norms laid down by private-sector standards institutes in the various States. In so far as such technical standards are in practice applied systematically by private customers it is clear that significant restrictions on trade can arise. The Commission's efforts seem to be directed towards the elimination of such private trade barriers by replacing the national standards concerned with European standards. Where it is established that private-sector customers engage in concerted practices aimed at the exclusive application of national standards and that products which meet only the standards of other Member States are kept out, clearly Article 85 of the EEC Treaty may also be applicable.

The restrictive effect of technical standards laid down by private bodies becomes more severe where public authorities, in awarding contracts, require suppliers to comply with such private national standards. If in so doing the authorities cannot rely on one of the exceptions laid down in Article 36 of the EEC Treaty (which will seldom be possible in the case of purely private standards), such restrictions on trade resulting from established administrative practices can be attacked under Article 30 or, in the case of new or more restrictive measures, Articles 31 or 32 of the EEC Treaty.

However, the most serious form of technical barriers to trade results from Government measures which require all domestic and foreign suppliers of certain products to comply with specific technical standards (which may or may not refer to standards drawn up by national standards institutes). These technical barriers to trade are not the result solely of differences between national standards. They may be

exacerbated by the test procedures laid down and by the administrative and financial burdens which they cause, directly or indirectly, for the manufacturers concerned. In general a Member State will consider such provisions necessary for the protection of the safety, health or life of users of the products. In such cases the Commission -- and, if the matter is brought before it, the Court -- must consider the applicability not only of Article 30 but also of Article 36 of the EEC Treaty. Indeed, in these proceedings the key issue seems to be the application to the relevant national provisions of Article 36 of the EEC Treaty.

1.2 The background of the proceedings

These proceedings were brought by the Commission after it received complaints in 1982 and 1983 from the Permanent Representation of a Member State and from a trade organization in another Member State regarding restrictions on trade resulting from a series of new provisions adopted by the French authorities between 1979 and 1981. Those provisions concerned the technical and administrative requirements which must be fulfilled before woodworking machines could be marketed in France. The texts of the provisions are attached as Annexes I and II to the Commission's application. Their scope is defined in Decree No 80-542 of 15 July 1980. The basic thrust of the provisions is indicated by Article R 233-85 of Decree No 80-543 of 15 July 1980, which provides that the machines in question must be so constructed that their operation, adjustment and maintenance present no risks for workers if those operations are carried out under the conditions laid down by the manufacturer or importer. That basic principle is implemented in detail by the decree in a number of specific technical and administrative provisions (Articles R 233-86 to R 233-107).

The technical provisions are supplemented by Decree No 80-544 of 15 July 1980 and further amended by Decrees Nos 81-170, 81-171, 81-172 and 81-173 of 20 February 1981, Decrees Nos 81-408, 81-409, 81-410 and 81-411 of 15 April 1981 and in a number of technical implementing measures promulgated by the Ministers of Labour and of Agriculture on 1, 2 and 3 April and 2 June 1981. All those provisions are annexed to the application.

The administrative testing procedures are laid down in Decree No 79-229 of 20 March 1979. In that decree the most dangerous new machines and their protective equipment are required to undergo prior technical inspection by the Institut Nationale de Recherche et de Securite [National Institute for Research and Safety, hereinafter referred to as "the INRS"]; final approval is however issued by the Minister of Labour. Some types of equipment are required only to undergo technical examination by the INRS, which may issue a certificate of examination under which marketing of the type of product concerned is authorized. Articles R 233-68 and R 233-69 lay down the procedure for equipment in respect of which the manufacturer or importer need only give a declaration of conformity. Detailed rules for such declarations were established by the competent ministries on 28 November 1980 and 15 December 1981. Article R 233-70 et seq of the decree concern the inspection of equipment already in use and are not relevant to these proceedings.

According to the annexes submitted the tariff of fees which manufacturers or importers may be charged by the INRS for the prior technical examination of certain types of woodworking machines is also fixed by the Ministry of Labour; according to the tariff submitted (which is to be updated annually) the fees could vary between FF 1 470 and FF 3 890 depending on the type of machine. If the manufacturer or importer makes use of his right under Article R 233-64 of Decree No 79-229, subject to the consent of the INRS, to have equipment inspected at a place other than the premises of the INRS, the travel expenses of the inspector are added to those fees.

On 29 October 1982 and 29 September 1983, the dates originally set for the entry into force of the obligation of prior inspection were postponed in respect of certain equipment to various dates between 1 May 1983 and 1 January 1985. On 29 September 1983 the date of expiry of authorizations issued without prior inspection under the earlier system in respect of machinery made subject to prior inspection under the new regulations was postponed from 1 October 1983 to 1 January 1985.

During the four administrative stages of the procedure under Article 169 the French Government, in response to the Commission's request for information on 18 June 1982, merely provided it with details of the dates of entry into force of the new regulations and the dates from which the persons concerned would be obliged to comply with the new procedure. On 21 February 1983 the Commission gave the French Government the opportunity to comment on the Commission's view that the provisions in question conflicted with Article 30 of the EEC Treaty; the French Government made no reply. Nor did it reply within the prescribed time-limit of 30 days to the Commission's reasoned opinion issued on 29 August 1983. At a meeting in Paris on 1 and 2 February 1984 the French authorities agreed to provide supplementary information regarding in particular the time required for the processing of applications. Since that information was still not forthcoming on 10 July 1984 the Commission brought the present action.

[...]

2.2 The substance of the application

The applicability of Article 30 is not disputed in this case. The debate between the parties properly concentrated on the application to the provisions at issue of Article 36 of the Treaty. At the hearing the Commission correctly pointed out in that respect that the De Peijper judgment, paragraph 15 of which was relied on by the French Government in support of its point of view, goes on to state in paragraph 17 that "national rules or practices do not fall within the exceptions specified in Article 36 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much". It is not impossible, in my view, that after consulting the Commission and the authorities of the other Member States the French authorities could, while maintaining their basic approach, have found somewhat different solutions, taking more account of the specific difficulties facing importers from other Member States. The assumption that a proper consultation procedure may have such an effect clearly underlies both Article 5 of the EEC Treaty and the 1965 Commission Recommendation as well as the agreement of 28 May 1969 of the representatives of the Member States and the 1983 Directive which I have referred to.

I think the Commission's first submission must nevertheless be rejected. As Community law now stands a Member State which applies the principle that workers must be protected even against their own imprudence cannot reasonably be expected to admit to its market dangerous equipment manufactured in accordance with the provisions of a Member State which adopts the principle that workers will have received adequate training making them aware of the dangers of such equipment. Accident statistics which are said to show that in the Federal Republic of Germany, for instance, accidents are no more frequent than in France do not support the conclusion that the application of the German provisions (which assume well-trained workers) would have the same favourable results in France (which works on a different assumption). If the application of the German approach were to lead to more favourable results, that would at most constitute a reason for the Community legislature to consider a switch to the German system (after a reasonable transition period) throughout the Community.

The Commission's second submission must also, I think, be rejected, since the Commission was not able to provide concrete examples showing that the disputed time-limits caused more than transitional problems, which are in practice unavoidable.

The Commission's third submission, the factual basis of which is moreover disputed by the French Government, is in my view based to such an extent on the assumption underlying its first submission, which I have already held to be incorrect, that on the basis of the information currently available concerning the technical merits of the French provisions it must also be rejected.

The Commission did not support its fourth submission with figures showing the inspection costs charged in other Member States in similar cases. In those circumstances, and because the Commission did not assert that the fees (which are also applied to French manufacturers) are higher than is necessary to cover costs, in my view this submission must also be rejected. The problem of the restrictions on imports

which undoubtedly result from the charging of those costs to manufacturers located at a distance, when for practical reasons their machines can be inspected only at their premises, can in my view satisfactorily be resolved only by the Community legislature. In that respect it might be possible to adopt the rules already applied for agricultural products, which allow inspections to be carried out in the country of export on the basis of the requirements of the country of import. I have not been able to find any basis in the case-law of the Court for a different point of view, and I refer in particular to paragraph 18 of the decision in the De Peijper case. I do agree with the view expressed by a French trade organization, quoted by the Commission, that in a Common Market of 10 Member States (soon to be 12) rules on costs which oblige manufacturers who wish to sell their products throughout the Common Market to pay such costs 10 or 12 times over is contrary to the objectives of a Common Market. As I have already said, however, I think that the Court can give at best a partial solution to that problem, on the basis of comparative data from all the Member States, which have not been provided in this case.

In my view the Commission's fifth submission is also so closely linked to the assumption underlying the first submission, which I have already held to be incorrect, that it must be rejected.

My findings naturally do not exclude the possibility that in certain individual cases the Court might, in proceedings for a preliminary ruling, decide that there was a conflict with Community law.

[...]

2.1.3.2 *Judgement of the Court of Justice*

Commission of the European Communities v France (Woodworking)

Case 188/84

28 January 1986

Court of Justice

[1986] ECR 419

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

The approach to protection

10. While the Commission does not contest the principle of the prior inspection of woodworking machines, it notes in the first place that the rules in question require manufacturers to take into account safety at the stage of the manufacture of the machines. The French legislation is based on the idea that the users of the machines must be protected from their own mistakes and that the machine must be designed so that the users intervention is limited to the strict minimum. In other

Member States, the predominant approach to the protection of users is different. In the Federal Republic of Germany in particular the basic principle is that the worker should receive thorough and continuing training so that he is capable of responding correctly if a machine malfunctions. The Commission considers that, more generally, Articles 30 and 36 of the Treaty require the Member States either to take account in their national rules of such different approaches or to apply their rules only to machines manufactured in their territory; they must not prevent the importation of machines which are designed in accordance with a different approach but which are proved to provide the same level of safety and to give rise to no more accidents than apparatuses which are in conformity with their national rules.

11. As regards the specific details of the French rules, the Commission observes that, at least in certain cases, machines which are manufactured in accordance with the legal requirements of other Member States and which provide at least the same guarantees of safety may not be supplied on the French market. The Commission cites as a specific example the protective device for planing machines required under the German rules. That device is not permitted under the French technical provisions, which allow only one type of protective device. The Commission considers in addition that it is possible to comply with the extremely detailed requirements of the French rules only by manufacturing highly automated machines. Indeed machines which are fully automated do not have to undergo prior inspection.
12. The French Government replies that it is for the Member States to decide what degree of protection of the health and the life of humans they intend to ensure. A Member State may have its own preoccupations and its own approach to prevention. Although it is true that machines which comply with German standards or provisions are not permitted in France, that is because the French safety experts consider that the protection provided by the German provisions is less effective than that existing under the French rules. Finally the automation of machines has never been required although, clearly, the complete automation of certain particularly dangerous apparatuses is sometimes a means of eliminating the risks which they represent.
13. It should be noted in the first place that there are no Community rules governing the safety of woodworking machines and that the national laws on the matter have not been harmonized. Consequently the Member States are entitled to introduce rules for the protection of the health and life of users of those machines.
14. Such rules fall within the scope of Article 30 et seq of the Treaty if, as in this case, they impede directly and actually the importation of machines which are lawfully in free circulation in another Member State.
15. The Court has consistently held that under Article 36 such national rules are compatible with the Treaty only to the extent to which they are necessary for the effective protection of the health and life of humans. Although it is for the Member States to decide what degree of that protection they intend to ensure, that protection must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
16. It follows that whilst a Member State is free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, it is nevertheless under a duty to assist in bringing about a relaxation of the controls existing in intra-Community trade (see judgment of 17 December 1981 in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277). Moreover, it is not entitled to prevent the marketing of a product originating in another Member State which provides a level of protection of the health and life of humans equivalent to that which the national rules are intended to ensure or establish. It is therefore contrary to the principle of proportionality for national rules to require such imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the Member State in question when those imported products afford users the same level of protection.

17. However, as Community law now stands Member States are not required to allow into their territory dangerous machines which have not been proved to afford users on their territory the same level of protection.
18. In that respect it should be noted that the Commission has not cited specific examples showing that the importation into France of machines providing the same level of protection as machines manufactured according to the rules at issue has been prevented. It was not claimed in the complaints which drew the Commission's attention to the new French rules that the machines in free circulation in the other Member States provided the same level of protection as French machines. On the contrary, those complaints commended the French Government's efforts to reduce the risks of accident, whilst expressing opposition to the substantive requirements of the rules regarding safety techniques.
19. In addition, as regards the legal provisions on safety in force in the other Member States, the Commission merely stated that in its view the provisions and measures applying under the French rules were more strict than those prevailing in other Member States. It conceded that, in view of the differences in the fundamental approach to control, it was difficult to determine whether the measures and provisions in force in other Member States were as detailed as those applied under the French rules.
20. With regard to the specific example cited by the Commission concerning the protective device for planing machines, it should be noted that, according to the Commission, the approach to protection prescribed by the German technical provision is different to that of the French rules. It has not been established that the two approaches guarantee users the same level of protection. As far as highly automated machines are concerned, it should be pointed out that the rules in question do not have the effect either of requiring manufacturers to manufacture automated machines or of according preferential treatment to such machines.
21. In connection with the Commission's observation that statistics prove that the machines manufactured in accordance with the approaches to protection adopted by other Member States do not give rise to more accidents than the machines which are in conformity with the French rules, it should be noted that such statistics are not in themselves capable of establishing that other approaches to safety provide the same level of protection as the approach adopted in France. Reference to statistics alone leaves out of account other factors, such as for example the extensive training of users, which preclude a comparative assessment of the levels of protection of the health and life of humans.
22. Consequently, it has not been established that the machines in free circulation in the other Member States provide the same level protection for users.
23. It follows from the foregoing that the first complaint must be dismissed in its entirety.

The period within which the rules became compulsory

24. The Commission claims that the periods between the dates of the publication of the decrees and orders laying down the new rules and the dates on which certificates or approval became compulsory were too short. In many cases the French authorities were unable to process in sufficient time the documents submitted to them in support of applications for certificates or approval. Thus, for instance, it proved impossible to deliver by 1 March 1982 any of the certificates requested for surfacing machines although 125 applications had been submitted.
25. The French Government points out that the objective of the rules required that the time-limits should be as short as possible. The departments concerned were asked to avoid any delay in the inspection procedure. The delays which occurred stemmed solely from the failure of manufacturers

of other Member States to submit the relevant documentation in good time. Applicants for certificates are notified on average within two months from the date of submitting the application.

26. It should be noted that frequent and substantial delays on the part of the supervisory authorities in processing applications for certificates or approval may make importation more difficult and more costly and, accordingly, such delays may constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty.
27. However, it appears from the documents before the Court that the delays affected the applications submitted by French manufacturers as well as those submitted by manufacturers from other Member States. There is no evidence to suggest that the French authorities gave priority to applications from French manufacturers.
28. Consequently the Commission's second complaint must also be dismissed.

The costs of complying with the French rules

29. The Commission's third complaint against the French Government is that the cost for importers of complying with the procedures applicable to machines subject to the requirement of obtaining a certificate or approval serves to discourage applications and therefore to impede potential imports even if the controls are in themselves justified. Where it is necessary to transport the machine to the French national test laboratory or for the engineers from that laboratory to inspect the machine at the manufacturer's premises the amounts which must be paid to the INRS by a manufacturer from another Member State may well also exceed those payable by a French manufacturer. If the other Member States adopted a similar tariff, the costs, at least for small and medium-sized undertakings, would be excessive. In addition, those costs are a greater burden for a manufacturer from another Member State, who sells only part of his output on the French market, than for a French manufacturer who must necessarily submit his machine to a technical inspection.
30. The French Government replies that the costs of the inspection procedures are justified by the thoroughness of the checks carried out. The same rates are applicable to all manufacturers, irrespective of their nationality.
31. As regards the level of costs borne by the applicant for a certificate or approval, the Commission has been able to contest the above-mentioned French statements only by its own assessment that the amounts are considerable and liable to discourage imports. It has neither supported that submission by statistics regarding inspection costs in other Member States nor shown that those costs are more than is necessary to cover the costs of the inspection procedure.
32. In connection with the costs of transporting the machine or of reimbursing the technical examiner's travel expenses, it should be noted, in the first place, that that obligation arises for the manufacturer because the French market has been opened to his products, which are potentially dangerous and in respect of which the Commission does not contest the need for a prior inspection, and, secondly, that the costs incurred by a foreign manufacturer in transporting the machine or reimbursing the examiner's travel expenses are the same as those borne by a French manufacturer who is at the same distance from the test centre.
33. With regard to the cumulative effect of such rules for a manufacturer marketing his goods in the Community if the other Member States were to impose similar tariffs, it should be recalled that the Court has repeatedly held that the authorities of the Member States are not entitled unnecessarily to require laboratory tests where those tests have already been carried out in another Member State and their results are available to those authorities or may at their request be placed at their disposal (judgment of 17 December 1981, cited above, and of 6 June 1984, Case 97/83, *Melkunie* [1984] ECR 2367). In addition, where machines are imported from another Member State, the

national supervisory authorities must always consider whether the effective protection of the life and health of humans requires them to carry out an additional inspection.

34. Consequently the hypothetical argument advanced by the Commission regarding the cumulative effect of the rules in question is not relevant.

35. The third complaint must therefore be dismissed.

The administrative practice followed by the French authorities

36. The Commission's fourth complaint against the French Government is that the above-mentioned delays and the costs of the inspection procedures are liable to increase as a result of the following three factors: the fact that the decision whether or not the documentation is sufficient is at the discretion of the French authorities; the administrative practice of requiring a new certificate or approval procedure even for machines belonging to the same "family" as a machine which has already obtained a certificate or approval and differing from such a machine only in terms of performance; and, finally, the requirement by the French authorities of a separate test procedure for each machine forming part of a composite machine.
37. The French Government contends, in the first place, that the authorities' decision regarding the sufficiency of the documentation is in no way discretionary. Secondly, in so far as possible the examiners group together machines of the same type. Finally, composite machines, which represent special risks, cannot be regarded as assemblies of component machines. It is therefore generally necessary to carry out separate tests.
38. In that respect it should be noted in the first place that if a Member State is entitled to subject a product of the type in question to an inspection, it is also entitled to establish the administrative procedure for that inspection. Even where the precise contents of the documentation which must accompany an inspection are not specified, such an administrative procedure is not in itself such as to impede intra-Community trade. Moreover, the Commission has produced no factual evidence showing that the administrative practices regarding the sufficiency or insufficiency of documentation have created such an impediment.
39. As regards the practice of the French authorities of carrying out a test even where machines belong to the same "family" as a machine which has already been tested or where they form part of a composite machine, the Commission has been unable to cite examples of specific cases in which that practice was superfluous, disproportionate or discriminatory. In those circumstances, the fourth complaint must also be dismissed.

[...]

2.1.4 Case 34/79: Henn and Darby

2.1.4.1 Judgement of the Court of Justice

Regina v Maurice Donald Henn and John Frederick Ernest Darby

Case 34/79

14 December 1979

Court of Justice

[1979] E.C.R. 3795

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Henn and Darby, having attempted to import into the United Kingdom from Rotterdam a consignment of boxes of obscene material (for a more detailed description of the goods in question, see the Advocate General's opinion below), were convicted by the Ipswich Crown Court of a number of offenses including -- and this is the only charge relevant to the proceedings before the Court of Justice -- that of being "knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene Articles, contrary to section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1852."

The conviction was upheld by the Court of Appeals of England and Wales, and, subsequently, the House of Lords granted leave to appeal. After having heard the applicants, the House of Lords referred several questions to the Court of Justice for a preliminary ruling.]

Judgement:

[...]

4. The appellants contended that the United Kingdom had no consistent policy of public morality in regard to indecent or obscene Articles. In that respect they pointed to differences in the law applied in the different constituent parts of the United Kingdom. They contended furthermore that a complete prohibition of the importation of indecent or obscene Articles resulted in the application to importation of stricter rules than those which applied internally and constituted arbitrary discrimination within the meaning of Article 36 of the Treaty.
5. According to the Agreed Statement of Law accompanying the order seeking the preliminary ruling, it is true that, in this field, the laws of the different parts of the United Kingdom, that is to say, England and Wales, Scotland, northern Ireland and the Isle of Man, differ from each other and that each is derived from a number of different sources, some of which are to be found in the common law and others in statute.

6. According to the same statement, the various laws of the United Kingdom recognize and apply two different and distinct criteria. The first, referred to in the statement as "Standard A", relates to the words "indecent or obscene" which appear in the customs legislation and in certain other legislation and are also used to indicate the ambit of the English common law offence of "outraging public decency". These words convey, according to the statement, a single idea, that of offending against recognized standards of propriety, "indecent" being at the lower end of the scale, and "obscene" at the upper end.
7. The second criterion, referred to in the statement as "Standard B", relates to the word "obscene" as used alone in the Obscene Publications Acts, 1959 and 1964, (which apply to England and Wales only) and in describing the ambit of certain common law offences in England and Wales, Scotland and Northern Ireland. According to the statement, this word applies to a more restricted class of material, namely that which tends to "deprave and corrupt" those exposed to the material.
8. The Obscene Publications Acts, 1959 and 1964, create certain offences in regard to the publication of obscene Articles but exclude from their field of application "obscene Articles", as defined therein, if their publication is justified on the ground that it is in the interests of science, literature, art or learning or other objects of general concern.
9. The mere possession, for non-commercial purposes, of Articles which offend against either Standard A or Standard B is not a criminal offence in any part of the United Kingdom.
10. The relevant provisions concerning the importation of pornographic Articles are section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952. They apply throughout the United Kingdom. Put shortly, they provide that indecent or obscene Articles are liable for forfeiture and destruction upon arrival in the United Kingdom and that whoever attempts fraudulently to bring such Articles into the United Kingdom shall be guilty of an offence. The seventh schedule to the Customs and Excise Act, 1952, provides a procedure for testing before a court the liability of goods to forfeiture.

First question

11. The first question asks whether a law of a Member State which prohibits the import into that State of pornographic Articles is a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.
12. That Article provides that "quantitative restrictions on imports and all measures having equivalent effect" shall be prohibited between Member States. It is clear that this provision includes a prohibition on imports inasmuch as this is the most extreme form of restriction. The expression used in Article 30 must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36.
13. The answer to the first question is therefore that a law such as that referred to in this case constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

Second and third questions

14. The second and third questions are framed in the following terms:

"2. If the answer to Question 1 is in the affirmative, does the first sentence of Article 36 upon its true construction mean that a Member State may lawfully impose prohibitions on the importation

of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

(i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

(ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?"

It is convenient to consider these questions together.

15. Under the terms of Article 36 of the Treaty the provisions relating to the free movement of goods within the Community are not to preclude prohibitions on imports which are justified inter alia "on grounds of public morality". In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. In any event, it cannot be disputed that the statutory provisions applied by the United Kingdom in regard to the importation of Articles having an indecent or obscene character come within the powers reserved to the Member States by the first sentence of Article 36.
16. Each Member State is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory, as defined in Article 227 of the Treaty, whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States.
17. The answer to the second and third questions must therefore be that the first sentence of Article 36 upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of Articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.

Fourth, fifth and sixth questions

18. The fourth, fifth and sixth questions are framed in the following terms:

"4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36?

5. If the answer to Question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the Member State or any part of it necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States so as to conflict with the requirements of the second sentence of Article 36?

6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to Question 5?"
19. In these questions the House of Lords takes account of the appellants' submissions based upon certain differences between, on the one hand, the prohibition on importing the goods in question, which is absolute, and, on the other, the laws in force in the various constituent parts of the United Kingdom, which appear to be less strict in the sense that the mere possession of obscene Articles for non-commercial purposes does not constitute a criminal offence anywhere in the United Kingdom and that, even if it is generally forbidden, trade in such Articles is subject to certain exceptions, notably those in favour of Articles having scientific, literary, artistic or educational interest. Having regard to those differences the question has been raised whether the prohibition on imports might not come within the second sentence of Article 36.
20. According to the second sentence of Article 36 the restrictions on imports referred to in the first sentence may not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".
21. In order to answer the questions which have been referred to the Court it is appropriate to have regard to the function of this provision, which is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products. That is not the purport of a prohibition, such as that in force in the United Kingdom, on the importation of Articles which are of an indecent or obscene character. Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or Articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State.
22. The answer to the fourth question must therefore be that if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36.

[...]

2.1.4.2 Opinion of AG Warner

Regina v Maurice Donald Henn and John Frederick Ernest Darby

Case 34/79

25 October 1979

AG Opinion

[1979] ECR 3795

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

This case has the distinction of being the first to come to this Court by way of a reference for a preliminary ruling by the House of Lords. It also has the distinction of being the first in which the Court has been called upon to consider the scope of the exception in Article 36 of the EEC Treaty for prohibitions or restrictions on the free movement of goods between Member States "justified on grounds of public morality".

[...]

The goods to which the relevant charge against the appellants related were part of a consignment of films and magazines brought into England in a lorry that arrived at Felixstowe on the ferry from Rotterdam on 14 October 1975. There were six films and seven magazines named in the charge, all of them of Danish origin. In an Agreed Statement of Facts accompanying the Order for Reference, they are described as follows:

"The films were all 8mm, a size ordinarily used in domestic projectors rather than for commercial exhibition. Each film when shown would last for about ten minutes. They depict detailed and explicit sexual activities between men and women, between men alone, between women and a dog and a man and a pig. They include a number of scenes of violence and aberrant sexual behaviour including urination and defecation.

The magazines were largely composed of photographs. They too depict detailed and explicit sexual activities between men and women, men alone, women alone and between women and a dog and a pony. Two of the magazines contain only photographs of naked girls between about five and fourteen years. There is prominent display of the private parts, in one a suggested recent rupture of the hymen and in the other girls engaged in stimulating and masturbating a man."

The Agreed Statement of Facts goes on to say that, among the criminal offences depicted, are rape, abduction of a woman, buggery (involving humans and animals), indecent assault and acts of gross indecency with or towards children under 14 years of age.

[...]

On 13 July 1978 the Court of Appeal [of England and Wales] delivered judgment dismissing the appeals. [citation omitted]

As regards the appellants' contention based on the EEC Treaty, the Court of Appeal said two things. First it expressed the opinion that the phrase "quantitative restrictions" in Article 30 connoted restrictions "concerned with quantity" and did not apply to a total prohibition on importation such as was in question in the present case. Secondly the Court of Appeal held that, even if the prohibition were caught by Article 30, it was saved by Article 36. It seems, from the Court of Appeal's judgment, that what was particularly argued before it on behalf of the appellants, on this part of the case, was that, according to authorities in this Court, the word "justified" in Article 36 was the equivalent of "necessary" and that, on such a matter, the Court of Appeal should not rely on its own views but should order a reference to this Court. The Court of Appeal rejected the view that it could read Article 36 of the Treaty as if it contained the word "necessary" instead of the word "justified", whilst at the same time expressing a doubt whether "it would have made any difference if we had put in 'necessary'". The Court of Appeal added that it would have referred the problem to this Court if it had had any doubt at all about the solution, but that it had none. "We cannot see", it said, "how a prohibition on the introduction of obscene literature can be other than a prohibition justified on the grounds of public morality and public policy".

Two comments on that judgment are, I think, called for.

The first is that, with great respect to the Court of Appeal, it was plainly wrong in thinking that the reference in Article 30 of the Treaty to "quantitative restrictions" does not include a total prohibition. The point hardly needs to be laboured since no one who took part in the argument before this Court sought to uphold the Court of Appeal's view on it. As was pointed out to us, there is ample authority against that view in judgments of this Court... Moreover, as was also pointed out to us, not only is that view irreconcilable with the use in Article 36 of the phrase "prohibitions or restrictions", but it is irreconcilable also with the very purpose of Title 1 of Part Two of the Treaty which makes the free movement of goods one of the "foundations of the Community". As the United Kingdom Government said in its written observations, in dissociating itself from the view of the Court of Appeal, "It is clear that a total prohibition represents a greater invasion of the fundamental principle of free movement of goods than a partial restraint on imports".

My second comment is that, on the other hand, the Court of Appeal was, in my opinion, plainly right in holding that Article 36 should not be read with the substitution of the word "necessary" for the word "justified". This Court has never held that such a substitution should be made; indeed this Court has no power to alter the words of the Treaty. What this Court has done is to use, in a number of cases, the word "necessary" in explaining what could be justified under Article 36 in the way of prohibitions or restrictions on imports imposed by Member States for certain purposes: the protection of indications of origin [citation omitted]; consumer protection generally [citation omitted]; and the protection of the health and life of humans, animals or plants [citations omitted].

It must, I think, be borne in mind that, although no doubt the opinions of experts may differ on what may justifiably be prescribed for the protection of indications of origin, of consumers generally, and of the health and life of humans, animals or plants, those are matters which, at the end of the day, are susceptible of objective assessment. They are, moreover, matters on which it is, by and large, possible to prescribe a solution applicable uniformly in all Member States. That indeed is why there has been and continues to be a considerable effort on the part of the Community legislative institutions to introduce Community "harmonizing" measures relating to them and thereby eliminate the need for Member States to resort to national prohibitions and restrictions permitted by Article 36 but inimical to the free movement of goods within the Community... It is thus natural in such contexts to say that measures that are unnecessary, or that go beyond what is necessary, for the purpose in question cannot be justified under Article 36. A different approach is, however, in my opinion, inevitable, when the question under consideration is that of the circumstances in which a Member State may be justified in imposing prohibitions or restrictions on imports "on grounds of public morality". The concept of "public morality" is

not one that can be made the subject of objective assessment, or of a Community-wide definition. It is a matter of individual opinion, rather than of expert opinion.

I think that, in deciding upon the right approach to the interpretation of the phrase "justified on grounds of public morality" in Article 36, assistance is to be derived from ... the European Court of Human Rights. ... That Court had,... to consider the proper interpretation of Article 10 of the European Convention on Human Rights, which is about freedom of expression. More precisely it had to consider the proper interpretation of the exception in paragraph 2 of that Article for "such ... restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of ... morals ... The European Court of Human Rights said this:

"In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that ... the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable' ...

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. ...

Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation... The domestic margin of appreciation ... goes hand in hand with a European supervision....

This means, among other things, that every ... 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

Your Lordships see that, in some of the things that are there said, there is an echo of what this Court itself said, in relation to the "public policy" exception in Article 48 of the EEC Treaty in Case 41/74 Van Duyn v. Home Office ... [citations omitted].

The House of Lords, to which Mr Henn and Mr Darby now appeal against the judgment of the Court of Appeal, has referred to this Court [several] questions.

[The First Question]

Clearly [the first question] is intended to elucidate whether the Court of Appeal was right in its view that Article 30 of the Treaty does not apply to a total prohibition. There is, I think, nothing I need add to what I have already said on that question, except this. The wording of the question suggests that a total prohibition cannot be a "quantitative restriction" but may be a measure having equivalent effect to one. In my opinion that is not so. A total prohibition is a quantitative restriction, the quantity being zero. It is like a "nil quota". "Measures having equivalent effect" constitute a much wider and looser concept, comprising *prima facie*, as the Court first held in [Procureur du Roi v Dassonville] and has repeated in many cases since, "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra- Community trade".

Before I turn to the second and subsequent questions referred to the Court by the House of Lords, I must say a word about the complexities of the laws of the United Kingdom on pornography, which to a substantial extent underlie and explain those questions. Those complexities arise in two ways:

(1) because the laws of the different parts of the United Kingdom, namely England and Wales, Scotland, Northern Ireland, and the Isle of Man, are different, and, in each case, derived from a variety of sources rather than from any coherent scheme; and

(2) because nowhere in the United Kingdom is pornography treated quite as strictly internally as on its importation.

[The effect of the relevant provisions of the law of the United Kingdom], shortly stated, is that indecent or obscene Articles are, on arrival in the United Kingdom, liable to forfeiture and destruction, and that, if anyone seeks to smuggle such Articles into the United Kingdom, he is guilty of a criminal offence....

[The Advocate General then reviewed Standard A and Standard B]

... None of the parties sought however, in argument before us, to distil from [the summary of the laws contained in an Agreed Statement of Law] particular respects in which they contended that the disparities between those laws were significant for present purposes. That is perhaps understandable, because the appellants relied on those disparities only in support of their contention that there was in the United Kingdom no clearly defined policy or standpoint as to the requirements of public morality (it being their further contention that, in the absence of such a clearly defined policy or standpoint, a Member State could not rely on the "public morality" exception in Article 36), whilst on behalf of the United Kingdom Government it was contended that such disparities were irrelevant. The Commission for its part annexed to its observations a careful analysis of the summary, but without, so far as I was able to discern, drawing any conclusions from it. It seems to be common ground that the laws of Scotland and of the Isle of Man are more stringent than those of England and Wales, and in particular that the laws of the Isle of Man apply only Standard A. The United Kingdom Government and the Commission also made the point that, in some respects, the laws of the different parts of the United Kingdom differ only in the weight of the penalties that they impose in particular circumstances. As to the different treatment by the laws of the United Kingdom of home-produced pornography and foreign pornography, the main points relied upon by the appellants seemed to be these:

(1) That nowhere in the United Kingdom is the mere possession by a person of Articles offending against Standard A or even Standard B a criminal offence. I took the reference to "mere possession" to mean possession otherwise than with a view to sale, because a number of statutes (e.g. in England and Wales the Obscene Publications Act 1964, in Scotland certain local Acts, in Northern Ireland the Obscene Publications Act 1857, and in the Isle of Man an Act 1907 "for the Suppression of Obscene Publications and Indecent Advertisements") forbid the possession of pornographic Articles with a view to their sale or provide for the seizure and destruction of such Articles if kept for that purpose. Of those statutes, some apply Standard A, some Standard B.

(2) That, at all events in England and Wales, which constitute by far the largest part of the United Kingdom, Articles offending against standard A but not standard B may be sold, provided that they are not exhibited in a street or other public place, or sold in such a place. Such Articles may moreover be sent by private carrier, though not by post.

(3) That, in England and Wales, even Articles offending against Standard B may be published if their publication is "justified as being for the public good" on any of the grounds mentioned in the Obscene Publications Act 1959.

In contrast, the customs legislation imposes a complete ban on the introduction into the United Kingdom of any Article offending against Standard A, let alone Standard B.

The second, third, fourth, fifth and sixth questions referred to the Court by the House of Lords (...) I propose to discuss together (...).

[...]

[They] are all, of course, questions of interpretation of Article 36. In considering them I think it convenient to start with certain general observations.

The first is that, as the parties were at one in saying, on the basis of decisions of this Court so familiar that I need not cite them, Article 36, since it derogates from the fundamental principle of free movement of goods within the Community, is to be interpreted strictly.

The second is that, in my opinion, the "public policy" exception in Article 36 is irrelevant in relation to prohibitions or restrictions on the importation of pornography into a Member State. If such prohibitions or restrictions are to be saved by Article 36 it must be by virtue of the "public morality" exception, which is the more specific and the more apt in their case.

My third observation is that, of the two limbs of the second sentence of Article 36, the only one that can be relevant in this case is that relating to "arbitrary discrimination", for there is nothing "disguised" about the operation of the United Kingdom laws here in question.

My fourth observation concerns the relationship between the first and the second sentence of Article 36. On that the appellants submitted that the second sentence must be interpreted as having an "overriding" effect, in the sense that a prohibition or restriction was not authorized by Article 36 if, although "justified" under the first sentence, it constituted "a means of arbitrary discrimination or a disguised restriction on trade between Member States". The United Kingdom Government, on the other hand, submitted that the two sentences should be read together, the second being a gloss on the first. A measure could not, the United Kingdom Government pointed out, be at once "justified" and "arbitrary", because the two concepts were mutually inconsistent. The views of the Commission seemed to evolve during the case. In its written observations it seemed to agree with the appellants, but at the hearing it seemed to accept the view of the United Kingdom Government that Article 36 should be read as a whole. At all events I have no doubt that the United Kingdom Government is right. The second sentence of Article 36 is intended, in my opinion, to make it clear that a prohibition or restriction that constitutes "a means of arbitrary discrimination or a disguised restriction on trade between Member States" cannot be "justified" within the meaning of what word in the first sentence. "Justified" is not, of course, a synonym of "imposed": a prohibition or restriction may be imposed for a particular purpose without being justified for that purpose...

I would on the other hand reject the submission implicit in the suggestion made on behalf of the United Kingdom Government at the hearing that, in considering whether the customs legislation here in question was authorized by Article 36, one should take into account that it was enacted and applied "bona fide" by the United Kingdom for the purpose of protecting the public against a serious threat and not with any intention to subject importers to a harsher regime than applied to United Kingdom dealers". Although the expression "a means of arbitrary discrimination" in the second sentence of Article 36 may seem at first sight to call for an enquiry into the intentions of those who enacted the measure under consideration, and although there may be cases where their intentions are ascertainable (whether by inference or because those intentions have been expressed), I cannot believe that the authors of Article 36 meant its application to depend on the outcome of such an enquiry, which would manifestly be impracticable, and indeed unrealistic, in most cases.

I would also reject the submission of the United Kingdom Government that the second sentence of Article 36 precludes only discrimination in or restriction of "trade" between Member States, in the sense, if I understood the submission rightly, of transactions by or between traders, and so does not apply to prohibitions or restrictions on imports into a Member State in so far as such prohibitions or restrictions affect only private individuals. That submission, in my opinion, attached undue importance to the use of the phrase "trade between Member States" at the end of Article 36 and moreover attributed an unduly restrictive meaning to the word "trade" in that phrase. There is trade between Member States when an individual imports into a Member State for his own use goods that he has bought in another Member

State. Article 36, it must be remembered, forms part of Title 1 of Part Two of the Treaty, which makes the free movement of goods within the Community, not just free trade in goods in the narrow sense, one of the Community's "foundations". The word "trade" is used in a number of Articles forming part of Title 1. It is even used in Article 9 itself. No one, however, would suggest that, because the word "trade" is occasionally used in Articles 12 to 17, relating to the elimination of customs duties between Member States, private individuals moving their possessions from one Member State to another may still be subjected to customs duties, or that, because that word is occasionally used in Articles 18 to 29, relating to the Common Customs Tariff, private individuals who bring their possessions into the Community from outside it are subject, not to the Common Customs Tariff, but to the erstwhile tariffs of Member States. By a parity of reasoning, Article 30, which is the leading Article on the elimination of quantitative restrictions between Member States, and which does not itself use the word "trade", cannot be interpreted as limited to transactions by or between traders. That being so, since Article 36 operates by way of proviso to Article 30, its second sentence, which, as the United Kingdom Government itself rightly submitted, is only a gloss on the first, cannot be interpreted as so limited.

My last general observation is that some of the submissions of the parties seemed to be expressed in a way that implied that it was for this Court to approve or condemn the United Kingdom customs legislation that is in question. The jurisdiction of this Court under Article 177 of the Treaty is however confined to ruling on the questions of Community law that are referred to it. Here it will be for the House of Lords to decide the case in the light of Your Lordships' rulings, and in particular to say, in the light of those rulings, whether the United Kingdom legislation, at all events in so far as it applies to goods of the kind in question in this case, is compatible with Community law.

So I turn to the points directly raised by the questions referred to the Court by the House of Lords.

(...) [T]his Court [has] held that:

"Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that Article."

(...) Thus, no Member State has an unfettered discretion to impose prohibitions or restrictions on the importation of goods from other Member States "on grounds of public morality".

As however the European Court of Human Rights pointed out in the passage that I cited earlier, views about the requirements of public morality vary from time to time and from country to country, so that Member States must be allowed a measure of discretion in the matter. In [Van Duyn v Home Office] this Court said:

"It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty."

[...]

In my opinion precisely similar considerations apply where the concept of public morality is invoked as justifying a derogation from the fundamental principle of free movement of goods.

It follows in my opinion that, if the laws of a Member State apply the same criteria to home-produced pornography and to foreign pornography, and those criteria are reasonable, any prohibitions or restrictions on imports from other Member States that that State may consequently impose will be permitted by Article 36.

The real difficulty in the present case arises, it seems to me, from the lack of uniformity in the laws of the United Kingdom and in particular from the circumstance that those laws do not entirely apply the same criteria to home-produced goods and to foreign goods. Perhaps the most glaring disparity lies in the fact that, although an obscene book may be lawfully on sale in English bookshops, for instance because its publication is judged to be for the public good on the ground of its scientific value or literary merit, the identical book published in another Member State may not be imported into England. That undoubtedly constitutes discrimination. In a case that was concerned with such a book, it might not be easy to decide whether the discrimination was "arbitrary" or was "justified". From the description we have been given in the Agreed Statement of Facts of the films and magazines with which this case is concerned, it seems improbable that the House of Lords will be confronted here with such a difficult question. It seems more probable that those films and magazines belong to a category of Articles that the laws of the United Kingdom treat in much the same way whether they be home-produced or foreign. Perhaps the only difference lies in the fact that "mere possession" of pornography, however "hard", is not forbidden within the United Kingdom. But a person in possession of such Articles only for his own delectation (if I may use the word) will, almost inevitably, have come into possession of them by means of a transaction constituting a criminal offence by the other party to it. ... Those thoughts, however, do not absolve Your Lordships, nor do they absolve me, from the duty to tackle the problem in all its width, as it has been referred to the Court by the House of Lords.

Essentially that problem lies in distinguishing between the kind of situation in which discrimination is "arbitrary" and the kind of situation in which it is "justified".

As to that cases already decided by this Court provide some guidance.

(...) The Court [has] held ... that the different treatment of imported and home-grown apples could not be regarded as arbitrary discrimination if effective measures were taken in the Member State] to prevent the distribution of contaminated domestic apples and if there was reason to believe, in particular on the basis of previous experience, that there was a risk of [the contamination] spreading if no inspection were held on importation. Obviously that ruling can, *mutatis mutandis*, be applied in the context of the importation of pornography into the United Kingdom. But its application in that context means that a selection should be made at the frontier between pornography of a kind so harmful that its distribution within the United Kingdom is forbidden (the contaminated apples) and pornography of a kind that may lawfully be marketed in the United Kingdom or in a substantial part of it.

(...)[T]he Court [has also] held that "Article 36 cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required".

It was not contended on behalf of the United Kingdom Government before this Court that the prohibition in section 42 of the Customs Consolidation Act 1876 could be justified on the ground that Standard A afforded a test that customs officials were better able to apply than any narrower test. Perhaps it was thought that, in view of the procedure available under Schedule 7 to the Customs and Excise Act 1952, that contention was not sustainable. ... At all events, the contention of the United Kingdom Government in this Court was that one could not transpose to the "frontier situation" all the ingredients, such as public display or sale, that were necessary to constitute an offence internally. The obvious adaptation would be to make confiscation at the frontier dependent on whether a breach of internal law was threatened. That, however, would be often difficult and sometimes impossible to ascertain with any reasonable degree of certainty, so that a customs official would be faced with an enquiry more difficult than that facing a policeman dealing with an internal offence, where the ingredient of, e.g., public display or sale would be a

matter of fact and not one of speculation as to the future. To that it was added that a Member State could not be called upon to invest any significant amount of its financial or manpower resources merely to ensure that, in the suppression of traffic in socially harmful or immoral material, its treatment of foreign and domestic products was completely even handed.

With much of that I agree.

In my opinion the solution of the problem lies in applying the concept of reasonableness referred to by the Court..., or, which comes, I think, to the same thing, that of proportionality referred to by the European Court of Human Rights ... and by this Court in *Commission v. Germany* (12 July 1979... That, in a context such as this, 'reasonableness' and 'proportionality' are the same concept or that, at all events, proportionality is an aspect of reasonableness was shown by Professor L. Neville Brown...

Thus, in my opinion, the test must in each case be whether any element of discrimination inherent in the prohibition or restriction on imports under consideration is, in all the circumstances, reasonable. This it will not be if its effect is disproportionate to any legitimate purpose pursued, be that purpose to prevent, guard against or reduce the likelihood of breaches of the internal law of the Member State concerned, or to avoid excessive administrative burdens and public expenditure, or both. Where the Member State concerned is so constituted that there are variations in the laws of different parts of it, that in my opinion is a factor -- it may be an important factor -- to be taken into account in applying the test.

The test, as I see it, is one to be applied, not by customs officials in examining goods at the frontier, but by the legislature in framing the rules that customs officials are to enforce, and of course by the courts in considering to what extent those rules are compatible with Community law.

I doubt if the application of that test would justify the prohibition of the importation into the United Kingdom of a book that was lawfully on sale in English bookshops. Clearly it would be unreasonable and disproportionate to forbid the importation of such a book just because of the risk that it might be displayed in an English street or put on sale in Scotland or the Isle of Man. Those very same risks flow from the publication of the book in England.

[...]

In a case, however, of a bulk importation of Articles of a kind so obscene and unmeritorious that they may not be published or distributed in any way in any part of the United Kingdom without a criminal offence being committed, it seems to me that the problem does not arise at all. No one can suppose that a man who imports such material in bulk does so only for his private delectation, so that, so it seems to me, there is no element of discrimination in the prohibition of such an importation.

Both the appellants and the United Kingdom Government based arguments on the paragraph in the judgment of this Court in the *Van Duyn* case where the Court held that, where the competent authorities of a Member State had clearly defined their standpoint as to the socially harmful character of certain activities and had taken administrative measures to counteract them, that Member State need not make those activities unlawful before it could rely on the "public policy" exception in Article 48 of the Treaty...

In reliance on that paragraph the appellants submitted (as I mentioned earlier) that a Member State was not entitled to rely on the "public morality" exception in Article 36 unless it had adopted a clearly defined policy or standpoint as to the requirements of public morality, which the complexities of the United Kingdom's laws on the subject showed that it had not done. In my opinion that submission was misconceived. The United Kingdom's attitude to the activities of pornographers (complex though it may be) is defined by its laws. No one suggests that there exists any executive or administrative decision defining it, such as existed in the case of the activities of scientologists, with which the *Van Duyn* case was concerned. The point made by the Court in the paragraph in question is therefore irrelevant here.

The United Kingdom Government, for its part, founded on that paragraph an argument which, if I understood it correctly, was to the effect that the invocation by a Member State of "public morality" to justify a measure under Article 36 did not require the threat of any unlawful activity, so that a Member State was entitled to maintain a prohibition such as that in question in the present case for reasons other than to prevent, guard against or reduce the likelihood of breaches of its domestic law. No doubt, as a general proposition that is correct. But the United Kingdom Government did not point to any such other reasons for section 42 of the Customs Consolidation Act 1876, beyond referring in general terms to the fact that the overall pattern of the laws of the United Kingdom was, and had for a long time been, hostile to indecent or obscene material and activities. It may be that it was because some such argument as that was submitted to the House of Lords, that the House included among its questions paragraph (ii) of question 3, referring to the "national standards and characteristics" of a Member State. That, however, seems to me altogether too vague a concept to be invoked in the present context, nor is it, as the United Kingdom Government itself acknowledged, relevant to the question whether, and if so to what extent, section 42 of the Customs Consolidation Act 1876 is a source of arbitrary discrimination.

[...]

2.1.5 Case 145/88: Torfaen Borough

2.1.5.1 *Opinion of AG van Gerven*

Torfaen Borough Council v B & Q plc

Case 145/88

29 June 1989

AG van Gerven

[1990] 1 CMLR 337

<http://www.curia.eu.int/en/content/juris/index.htm>

1. In this reference for a preliminary ruling the Court must once again consider the scope of Article 30 of the EEC Treaty. It will be required to give a ruling on the question whether the prohibition of measures having an effect equivalent to quantitative restrictions on imports which is contained in that article also applies to a national measure which in principle prohibits the sale of goods on Sunday.

Background

2. The main proceedings are criminal proceedings brought by a United Kingdom local authority, the Torfaen Borough Council (hereinafter referred to as "the Borough Council"), against a large operator of do-it-yourself stores, B & Q plc (hereinafter referred to as "B & Q").

B & Q is charged with having contravened Sections 47 and 59 of the United Kingdom Shops Act 1950 (hereinafter referred to as "the Shops Act") by opening its retail shop premises in Cwmbran to the public on Sundays.

For the wording of the relevant sections of the Shops Act I refer to part I.2. of the Report for the Hearing. As is indicated therein, there are a good many exceptions to the prohibition; furthermore, it is not disputed that the law is disregarded to a considerable extent and that in many places it is enforced only sporadically. It must also be observed that the law is not applicable in Scotland.

3. The parties to the main proceedings are agreed that B & Q has contravened the aforementioned provisions of the Shops Act and that the only possible defence for B & Q's conduct might be found in Article 30 of the EEC Treaty. Nor is there any dispute between the parties about the evidence which B & Q has adduced in support of its arguments concerning the consequences of the ban on Sunday trading for imports from other Member States. The main points which emerge from that evidence and which were accepted as established facts by the Cwmbran Magistrates' Court¹ are as follows:

(1) ... (not relevant).

(2) ... (not relevant).

(3) In the year 1987/88 B & Q purchased from other Member States items worth well in excess of U*£ 40 000 000. *hat amount represents approximately 10% of B & Q's total purchases.

(4) As a result of the enforcement of the ban on Sunday trading there has been a substantial and continuing reduction in sales turnover in a number of B & Q's stores (including the store at

¹ See point 7 of the order for reference.

Cwmbran). The evidence indicates that this loss of sales has not recovered over time but has been maintained. The average loss of sales for the stores in question in the years 1986/87 and 1987/88 is nearly 23 %.

- (5) The reduction in sales is across the board, in the sense that all the items of stock appear to be affected.
 - (6) The reduction in sales has been confirmed by checking the level of orders placed by B & Q with a number of its EEC suppliers. Following the enforcement of the ban on Sunday trading a significant reduction in those orders was observed.
 - (7) ... (not relevant).
 - (8) It follows that the enforcement of the ban on Sunday trading indirectly leads to a reduction in absolute terms in the volume of imports into the United Kingdom from other Member States of many goods sold by B & Q in their shops.
4. In those circumstances the Cwmbran Magistrates' Court decided to refer three questions to the Court concerning the compatibility of the Shops Act with Articles 30 and 36 of the EEC Treaty. Those questions read as follows:
- (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 30 of the Treaty?
 - (2) If the answer to Question 1 is in the affirmative, does such a measure benefit from any of the exceptions to Article 30 contained in Article 36, or from any other exception recognized by Community 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?"

I - The first question

5. In the first question the Court is asked to assume that "the effect of ((the ban on Sunday trading)) is to reduce ... the sales of ... goods manufactured in other Member States, and correspondingly to reduce the volume of imports of goods from other Member States ". That part of the question is based on the factual assumption contained in the order for reference (see paragraph 3 hereof, points 6 and 8) that the enforcement of the ban on Sunday trading leads directly to a reduction in absolute terms of imports into the United Kingdom from other Member States of many goods sold by B & Q in their stores.

The order for reference of the Cwmbran Magistrates' Court is a "consent order", which means that its terms, including the wording of the preliminary questions, have been settled by mutual agreement of the parties. Nevertheless, it appears from the written observations submitted by the Borough Council and the United Kingdom and from the arguments put forward at the hearing that there is still much disagreement about the way in which the first preliminary question is to be understood by the Court.

Should the reference be "reworded"?

6. In the first place, the United Kingdom observes that it is not proven that on the Sunday in question B & Q sold goods originating in other Member States. It also takes the view that, since the Shops Act does not make the selling of goods an offence but simply the keeping open of a shop, B & Q has in any case contravened the law and the preliminary questions are unnecessary for the purposes of the main proceedings. In any event, it requests the Court to make it clear that any question of incompatibility between the relevant provisions of the Shops Act and Community law

can arise only in so far as those provisions are applicable to imported goods.

Secondly, the United Kingdom and the Borough Council point out that it has not been demonstrated that the disputed provisions of the Shops Act actually restrict the total volume of imports into the United Kingdom (see part II.1 and 3 of the Report for the Hearing).

Thirdly, at the hearing the United Kingdom and the Borough Council put forward an additional argument in support of their submission that the Court should not attach any importance to the indirect effect which the national court found that the Shops Act had on imports into the United Kingdom. They take the view that the effect referred to in the order for reference is not relevant because it is only felt by an individual trader and there is no evidence of an effect as against a specific product.

7. I find none of those three arguments convincing. As regards the usefulness of, or the necessity for, this preliminary question, I can be brief. As the United Kingdom itself states, the assessment of the necessity for or the usefulness of a preliminary question is a matter for the referring court alone.²

The proposition that a national measure could be declared incompatible with Article 30 only in so far as such a measure was applicable to imported goods is correct in the sense that Article 30 (or any other provision of Community law) is not applicable in "purely internal" situations.³ In the present case there is no question of the situation being purely internal: from the wording of the first question and the factual background it is clear that there is an "element going beyond a purely national setting".

The second argument seems to me even less compatible with the case-law of the Court. In its judgment in *Dassonville* the Court made it clear, and since then has continuously repeated, that "all trading rules ... which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are to be regarded as measures having an effect equivalent to quantitative restrictions.⁴ In its decisions the Court has accordingly made it clear that a trader who challenges a national measure on the ground that it constitutes a prohibited measure having equivalent effect does not need to demonstrate that the measure actually restricts intra-Community trade or restricts it overall. The Court has rejected attempts to show by means of statistics that imports of the product concerned have increased and disregarded the possibility that other factors might compensate for the hindrance in question.⁵ This is logical: but for the restrictive measure imports could increase still further.

The only cases in which the Court has accepted that a measure was to be regarded as falling outside the scope of Article 30 on account of its effect in practice are those cases in which the Court came to the conclusion that the rules in question could not lead to a restriction of imports and exports between Member States,⁶ or where the measure in question had "in fact no connection with the importation of ... products ...".⁷ The factual context of those judgments was quite specific: each case concerned measures with respect to which the Court, on the basis of an empirical judgment, came to the conclusion that they did not, or could not, have an effect on intra-Community trade. The United Kingdom and the Borough Council suggest that in the present case the Court is faced by the same kind of situation and that those judgments are therefore determinative as regards the answer to be given to the preliminary question. In my view, this is not correct: according to the national court's findings of fact, imports into the United Kingdom have been reduced to some extent

² This principle was accepted by the Court in its earliest decisions and has never been called in question. See, for example, the judgments of 19 December 1968 in Case 13/68 *Salgoil SpA (in liquidation) v Ministry of Foreign Trade, Rome* ((1968)) ECR 453, at p. 459 and of 30 April 1986 in *Joined Cases 209 to 213/84 Ministère public v Asjes* ((1986)) ECR 1457, at p. 1460, paragraph 10. Only in very exceptional cases will the Court depart from this principle. See the judgments of 11 March 1980 in Case 104/79 *Foglia I* ((1980)) ECR 745, paragraphs 6 to 11, and of 16 December 1981 in Case 244/80 *Foglia II* ((1981)) ECR 3045.

³ See, for example, the judgment of 8 December 1987 in Case 20/87 *Ministère public v Gauchard* ((1987)) ECR 4879, paragraphs 10 to 12.

⁴ Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi v Dassonville* ((1974)) ECR 837, at p. 852, paragraph 5 (my emphasis).

⁵ See the judgment of 24 November 1982 in Case 249/81 *Commission v Ireland* ((1982)) ECR 4005, at pp. 4022 and 4023, paragraphs 22 to 27.

⁶ Judgment of 14 July 1981 in Case 155/80 *Sergius Oebel* ((1981)) ECR 1993, at p. 2010, paragraph 20.

⁷ Judgment of 31 March 1982 in Case 75/81 *Joseph Blesgen v Belgium* ((1982)) ECR 1211, at p. 1229, paragraph 9; see also the judgment of 25 November 1986 in Case 148/85 *Direction générale des impôts and procureur de la République v Marie-Louisa Forest and Another* ((1986)) ECR 3449, in which the Court held in paragraph 19: "it therefore appears that such a system ... in fact has no effect on... imports and is not likely to impede trade between Member States".

as a result of the application of the ban on Sunday trading. The Court is therefore asked to assume that there is a causal link between the contested legislation and the reduction in imports; such a link was not found in the Oebel, Blesgen or Forest cases.

8. Nor can I agree with the third argument concerning the "relevance" of the national court's findings of fact. According to the decisions of the Court, even where a trade restriction is found to exist with regard to an individual trader, the measure producing the restriction may fall within the scope of Article 30.⁸ In my view, that is the proper approach. Whilst it is true that an interpretation of Community law given in a preliminary ruling applies erga omnes, judgment is given with reference to the application of national rules to a well-defined factual situation arising in the main proceedings. It is certainly not always possible (nor desirable) that in a preliminary ruling the Court should express its views on application situations which go beyond those arising in the main proceedings and of which the precise facts are not known or insufficiently known.

Finally, I would also hesitate to accept the assertion that in the case now before the Court there is no evidence, on account of the general scope of the provisions of the Shops Act, of a barrier against a specific product. The question which arises in this case is whether the contested rules create a barrier within the meaning of Article 30 with regard to the products in which B&Q deals. This is what the national court clearly finds to be the case.⁹

Does the Shops Act contain "trading rules"?

9. The considerations set out above lead me to the conclusion that there are no convincing reasons to reject the national court's factual assumptions as irrelevant and to re-word the first question.

The question in point is therefore whether, and if so which, national rules found to have a certain restrictive effect on imports may still fall outside the scope of Article 30 of the EEC Treaty. B & Q considers that this possibility does not arise: the contested provisions of the Shops Act must be classified as falling squarely within the principle laid down in Dassonville and therefore prima facie fall within the prohibition laid down in Article 30. The Borough Council as well as the United Kingdom and the Commission have, however, argued that the principle laid down in Dassonville is either inapplicable in this case or does not lead to the conclusion that the contested provisions fall within the scope of Article 30.

10. According to the Borough Council, the contested legislation is not simply a set of "trading rules" within the meaning of the judgment in Dassonville but is an expression of the "police power" which the Member States have retained under Article 30. In the observations of the Borough Council the expression "police power" or "police law" is primarily defined according to the consequences to which such a measure is likely to give rise. They are rules which are too remotely connected with intra-Community trade and whose restrictive effects are the unavoidable consequence of the general regulation of social or commercial life. The Borough Council's contention (which it considers to be borne out by the judgments in Oebel and Blesgen, cited above) is that such rules fall outside the prohibition laid down in Article 30 if they are applied without distinction.
11. Without linking its argument to the term "police measure" the United Kingdom argues that in its case-law on Article 30 of the EEC Treaty the Court makes a distinction between measures applicable to a specific product and measures having general scope. In the case of measures of the first kind, a disparity between the existing bodies of national legislation results almost inevitably in a restriction of inter-State trade. Where, however, measures having general scope are concerned, it appears from the case-law of the Court that these do not fall within the scope of Article 30 of the EEC Treaty unless they are of a discriminatory nature or in practice place imported products in a more unfavourable position than domestic products. Rules regarding working or opening hours, or rules stipulating which goods may be offered for sale in specific sales outlets, do not fall under the general regulation of social or commercial life. Even if they have a certain restrictive effect, they do not prevent the importation or the marketing of imported goods; their effect

⁸ The most recent example is the judgment of 16 May 1989 in Case 382/87 Buet ((1989)) ECR ; see paragraph 7 of that judgment.

⁹ In this regard, see paragraph 3 above, point 8. These findings of fact of the national court are supported in particular by a statement of a Netherlands supplier of B & Q (see Annex 4 to the order for reference), according to which the orders placed by B & Q with that undertaking decreased by 31.5% during the period in which the ban on Sunday trading was enforced.

(if they have any effect at all) cannot be determined precisely.

12. I can see various objections to the approach of the Borough Council and the United Kingdom. The application of the limiting criterion which they propose is certainly not straightforward. What is a "too remote link with intra-Community trade" and what falls under the term "general regulation" or "measures having general scope"? How many products or sectors must a measure be applicable to in order to be regarded and classified as a measure of general scope?

More important, however, is the question whether the aforementioned approach is in fact compatible with the case-law of the Court. For the creation of a new category of (police) measures which, on the one hand, are applicable to the production and marketing of goods but, on the other hand, are not trading rules there is no support at all in the decisions of the Court. That principle has just been confirmed in the Court's judgment of 18 May 1989 in the case of *The Queen v Pharmaceutical Society of Great Britain*,¹⁰ in which it was held that a rule requiring pharmacists to supply only the medicinal products specifically mentioned in the doctor's prescription may constitute a measure having equivalent effect. Yet the measure concerned was a "neutral" rule of professional ethics which had no demonstrable connection with the importation of products. Nevertheless, from the established fact that imports of foreign pharmaceutical products had nearly dried up after the rule had been in force for a short while the Court concluded that the possibility could not be ruled out that the rule formed an obstacle to intra-Community trade; the question whether or not the rule was to be characterized as a trading rule was not considered.¹¹ Another example is provided by the judgment in the *Buet* case¹² in which the Court held that a French rule prohibiting the sale of "educational material" by means of canvassing constituted an obstacle to the importation of reading material for the learning of a foreign language (see paragraphs 7 to 9 of the judgment).

The aforementioned decisions provide an appropriate reminder that an analysis of a national measure with reference to Article 30 of the EEC Treaty should focus on its effects (with regard to the restriction of trade) rather than on its nature (general or concerning specific products). It is true that it is easier to adduce evidence of the existence of an obstacle to trade in the case of a measure applying to a specific product than in the case of a general measure. But I do not see why an obstacle to trade might not just as well arise from a general measure as from a measure directed at a specific product.

The various categories of "measures applying without distinction"

13. Allow me to recall, by way of introduction to this point, the observations submitted by the Commission. The Commission proceeds on the basis of the generally accepted distinction between "discriminatory measures" and "measures applying without distinction". In the second group it distinguishes three different categories according to the nature of the measures in question. The first category consists of measures which regulate the conditions (as to nature or composition, size, shape, packaging, labelling and denomination) which products must satisfy to be admitted to the market. A disparity between the various national rules in this category will inevitably create barriers to trade because goods legally manufactured or brought into circulation in the Member State of exportation have to be adapted in order to be sold in the Member State of importation. A second category of measures are those which prohibit the importation and manufacture (or simply the marketing) of certain products. These measures impose an absolute ban on importation in respect of the products which they concern and as such may be regarded as quantitative restrictions on imports rather than as measures having equivalent effect. The third category of measures relate to the circumstances in which goods may be sold or used (where, when, how and by whom). Restrictions on shop-opening hours clearly fall within this category.

In the case of measures in the third category, the Commission considers that the link with the importation of goods is more remote. They do not prevent imports but may reduce them by imposing restrictions on outlets or uses of the goods falling within their scope (and thus on the

¹⁰ Judgment of 18 May 1989 in Joined Cases 266 and 267/87 *The Queen v Pharmaceutical Society of Great Britain and Others* ((1989)) ECR.

¹¹ See, however, the (different) conclusion of Mr Advocate General Darmon in his Opinion of 10 March 1989, in particular at paragraphs 19 to 28.

¹² Judgment of 16 May 1989, cited above in footnote 8.

demand for those goods). Those barriers are, however, quite different in nature from the barriers which arise from the first two categories: whilst the trade barriers in the first two categories arise from the disparities between the various national rules, the barriers in the third category are created by the very existence of the rules; any disparity is immaterial. In the Court's case-law the Commission has identified three cases in which the Court ruled on measures belonging to the third category: they are the Oebel¹³, Blesgen¹⁴ and Forest¹⁵ cases. In its view, those judgments are also decisive in the present case.

14. Before I come to my own assessment, it would be useful to point out that a clear line of development is evident in the Court's case-law on national measures falling under Article 30 of the Treaty. At the outset it was made clear that a national measure which was discriminatory (in form or, as was quickly emphasized, in substance) towards imported goods was caught by the prohibition laid down in Article 30. In that situation, which does not arise in this case, the Court considered the measure in question to be permissible only on one of the grounds of justification mentioned in Article 36.
15. The Court subsequently considered the prohibition laid down in Article 30 also applicable in the case of measures applying to national and imported products without distinction. This situation involves measures which are not discriminatory in their aims but which are de facto more burdensome for imported products than for domestic products, in other words they place imported products in a disadvantageous position in relation to domestic products. In the famous judgment in the "Cassis de Dijon" case the Court held that in principle such measures also fall under the prohibition laid down in Article 30:

"Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements ...".¹⁶

The main consideration underlying that decision is that such disparities between national laws may result in serious obstacles to intra-Community trade since they may necessitate extra expense or additional efforts in order to make the manufacture or the marketing of the product comply with laws differing from one Member State to another. The rules involved here are either rules relating to the composition, size, shape, weight, presentation, labelling, designation or the packaging of products¹⁷ or rules relating to permissible sales methods.¹⁸ As the Commission has correctly pointed out, in this category there is a causal link between the disparity and the trade barrier. Such measures are therefore not permissible under Article 30, at least where they are not necessary in order to satisfy "mandatory requirements", nor acceptable on the basis of the grounds of justification listed in Article 36. That prohibition applies, of course, only in the absence of common rules and pending the adoption of a harmonizing directive pursuant to Article 100 et seq. of the Treaty.

16. In the present case it is established that the contested United Kingdom legislation does not affect imported products any differently than domestic products. The national court found that the reduction in sales occurring as a result of the enforcement of the ban on Sunday trading is "across the board", that is to say that it affects all the goods offered for sale by B & Q. Moreover, B & Q has not stated that it has to vary its marketing methods as a result of a disparity between the various bodies of national legislation governing closing days. There is therefore no evidence that the production or marketing of the imported products sold by B & Q is more difficult than the production or marketing of domestic products.

¹³ Judgment of 14 July 1981, cited above in footnote 6.

¹⁴ Judgment of 31 March 1982, cited above in footnote 7.

¹⁵ Judgment of 25 November 1986, cited above in footnote 7.

¹⁶ Judgment of 20 February 1979 in Case 120/78 REWE-Zentral AG v Bundesmonopolverwaltung fuer Branntwein ((1979)) ECR 649, at p. 662, paragraph 8.

¹⁷ A notable example is the judgment of 10 November 1982 in Case 261/81 Walter Rau Lebensmittelwerke v De Smedt PvbA ((1982)) ECR 3961, in particular paragraph 13, which concerned Belgian rules which only allowed packaged butter to be sold or imported in cube form.

¹⁸ See, for example, the judgment of 15 December 1982 in Case 286/81 Oosthoek's Uitgeversmaatschappij BV ((1982)) ECR 4575 (in particular at p. 4587, paragraph 15) which concerned a ban on the use of certain forms of advertising and certain means of sales promotion.

In such a case may it still be feared that the aim of Article 30, namely the integration of the national markets, will be jeopardized? In his Opinion in the *Cinéthèque* case¹⁹ Mr Advocate General Sir Gordon Slynn answered that question in the negative:

"... where a national measure is not specifically directed at imports, does not discriminate against imports, does not make it any more difficult for an importer to sell his products than it is for a domestic producer, and gives no protection to domestic producers, then in my view, *prima facie*, the measure does not fall within Article 30 even if it does in fact lead to a restriction or reduction of imports".²⁰

In the case of the French legislation at issue in the *Cinéthèque* case, such an additional difficulty for imports was not demonstrable either. In the words of the Advocate General:

"The importer can in fact import. He is then on exactly the same footing as the domestic trader. The latter gets no extra benefit over the importer; the former suffers no extra detriment over the French trader as a result of the ban on the exploitation of video-cassettes. The factor which would lead a trader in France not to buy from a French video distributor (inability to sell or hire) is the same as that which would lead him not to buy from a distributor in another Member State. In this respect both distributors are subject to the same conditions of trade. They are effectively operating in the same market. Article 30 cannot have been intended in this respect to give the distributor in another Member State better conditions than the domestic distributor. It may be that if it was patently unreasonable to put imports on the same footing as domestic products that the measure could be bad for that reason. That however is not the position here and in my view this law does not fall within Article 30".²¹

The Court did not take that view. Yet in the judgment it was acknowledged that the system of rules in question

"... does not have the purpose of regulating trade patterns; its effect is not to favour national production as against the production of other Member States, but to encourage cinematographic production as such" (paragraph 21).

Even so, the Court considered that the prohibition laid down in Article 30 was in principle applicable:

"Nevertheless, the application of such a system may create barriers to intra-Community trade in video-cassettes because of the disparities between the systems operated in the different Member States and between the conditions for the release of cinematographic works in the cinemas of those States. In those circumstances a prohibition of exploitation laid down by such a system is not compatible with (Article 30) unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law" (paragraph 22 of the judgment).

17. In expressing those considerations the Court made it clear that the prohibition laid down in Article 30 may also be applicable to rules which do not discriminate against imported goods nor make the production or marketing of imported goods more difficult than the production and marketing of domestic goods. In my view, this situation concerns the case where rules, either on their own or as part of an entire legal and economic context, can lead to a national market being screened off, or access to that market being made unacceptably difficult, less profitable or less attractive for economic operators from other Member States.

In fact, this situation arose in the *Cinéthèque* case: the Court found that the French rules imposed a marketing ban which as a rule lasted longer in France than in other Member States.²² This marketing ban meant that access to the French market was (temporarily) closed to undertakings

¹⁹ 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. The issue in this case was whether a French law which in principle imposed a (temporary) ban on the sale or hire of video-cassettes of a film being shown in cinemas was compatible with Article 30 of the Treaty.

²⁰ ((1985)) ECR 2611.

²¹ ((1984)) ECR 2611 and 2612.

²² See paragraph 19 of the judgment.

from other Member States which exploited video-cassettes and which were not subject to such strict rules in the country of exportation. The obstacle to intra-Community trade arising in that situation was due not (so much) to the disparity between legislation (which did exist in that case) but rather to the very existence of the rules. In such a situation the integration of markets was actually in jeopardy and the application of Article 30 was indeed justified.

18. The judgment in the *Cinéthèque* case is in fact a further application of the rule in *Dassonville*, as applied to national rules which, although not involving any detriment for imported products in relation to domestic products, make the entry into and the penetration of new markets by undertakings from other Member States impossible or much more difficult (more costly) or less attractive (unprofitable). In such a situation the relevant comparison is not between imported and domestic products but between national markets. The prohibition of quantitative restrictions laid down in Article 30, which is one of the mainstays of the unity of the common market, implies, of course, that all national markets in the Community should remain sufficiently accessible to undertakings from other Member States. Before clarifying this point further, I will first consider the case-law of the Court in relation to this "new" situation.

A new development in the case-law of the Court

That the judgment in the *Cinéthèque* case was not an isolated decision but introduced a new dimension in the application of Article 30 is clear from various other recent judgments. I am referring here in particular to the case concerning substitutes for milk powder and concentrated milk,²³ the *Warner Brothers* case,²⁴ the *Buet* case²⁵ and the *Pharmaceutical Society* case.²⁶

19. In the case concerning substitutes for milk powder and concentrated milk the Commission challenged a French rule which imposed an absolute prohibition on the marketing and importation of any product intended to replace milk powder or concentrated milk. Although the rule did not protect domestic products or place imported products at a disadvantage, it entirely sealed off the French market with regard to the products to which it applied. Furthermore, the prohibition was not limited in time and was therefore even more far-reaching than the prohibition at issue in the *Cinéthèque* case. Consequently, the Court came to the conclusion on that ground alone that the application of the rule to imported products was compatible with Community law only if it could be justified under Article 36 or on the basis of any mandatory requirement.²⁷
20. The *Warner Brothers* case concerned Danish legislation which entitled the owner of copyright in a musical or cinematographic work to prevent the hiring out of video-cassettes of that work for a specified period. The Court observed that the commercial distribution of video-cassettes (certainly in the case of recorded, rather than blank, cassettes) increasingly took the form of the hiring out of such cassettes. Under those circumstances, the Court found that the Danish ban on hiring might hinder²⁸ intra-Community trade in video-cassettes which had been put into free circulation in another State where they were not subject to the same ban on hiring.²⁹ The approach is therefore identical to that in the *Cinéthèque* case: the rule may prevent undertakings whose business consists of hiring out video-cassettes in a Member State which imposes no restrictions (or restrictions which are not as strict) on the hiring out of video-cassettes from penetrating the Danish market or make it much more difficult for them to do so.

The *Buet* case concerned French legislation which prohibited the sale of educational material by

²³ Judgment of 23 February 1988 in Case 216/84 *Commission v France* ((1988)) ECR 793. This judgment has just been confirmed by the judgment of the Court of 11 May 1989 in Case 76/86 *Commission v Germany* (milk substitutes) ((1989)) ECR. I will deal only with the first-mentioned judgment.

²⁴ Judgment of 17 May 1988 in Case 158/86 ((1988)) ECR.

²⁵ Cited above, in footnote 8.

²⁶ Judgment of 18 May 1989, cited above in footnote 10. This approach could also have been adopted by the Court in the *Oebel*, *Blesgen* and *Forest* cases (cited above in footnotes 6 and 7) if the Court had accepted that an obstacle existed.

²⁷ See paragraph 7 of the judgment. The French Government had not contested the applicability of the prohibition in Article 30: see paragraph 4 of the judgment. In any event the applicability of Article 30 to prohibitions on marketing applying without any temporal limit had already been established. See the judgment of 17 December 1981 in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten BV* ((1981)) ECR 3277.

²⁸ Just as in *Cinéthèque*, it is to be expected that, by the end of the longer prohibition period, interest in video-cassettes of a film will have declined.

²⁹ See paragraph 19 of the judgment.

means of canvassing. Although it did not appear (as in the Oosthoek case³⁰) that there was a disparity between the various national rules as a result of which the production or marketing of imported goods were in fact put at a disadvantage, the legislation could result in keeping out of the French market a seller of reading materials to be used for learning a foreign language; this would certainly be the case if it prevented the seller concerned from using a sales method by which he achieved the greater part of his sales.³¹

In the Pharmaceutical Society case, the Court stated that shortly after the (re-)introduction of the contested ethical rule foreign pharmaceutical products virtually disappeared from the United Kingdom market.³² That may be regarded as sufficient evidence that the practical effect of the contested rule was to make it more difficult to trade in foreign pharmaceutical products than in domestic products. Another, and in my view more exact, interpretation of the judgment is that the disappearance of foreign pharmaceutical products from the market shows that the application of the contested rule had the effect of screening off the United Kingdom market.

Partitioning of the market defined

21. As has been seen, in this recent series of judgments the Court's line of approach was to examine not whether imported products were put at a disadvantage but whether the Community market was partitioned into separate national markets. In this connection it is appropriate to make a comparison with the judgments of the Court on the prohibition of cartels laid down in Article 85. The concepts of the partitioning or compartmentalization of the market are certainly well known in that domain. Furthermore, in its judgment in *Dassonville*, the Court used virtually the same formula as it had previously used to define more precisely the words "affect trade between Member States" appearing in Article 85. Thus in its judgment of 30 June 1966³³ in *Case 56/65 Société technique minière v Maschinenbau Ulm*, the Court stated that a cartel agreement might affect trade between Member States if it was to be feared that the agreement

"might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States" (see the operative part of the judgment on p. 251).

In its judgment in *Dassonville*³⁴ it stated as follows:

"All 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" (paragraph 5).

In fact, in both fields the doctrine of the economic balance of the consequences of the "cartel agreement" or the "trading rules" is rejected.^{35 36}

22. This is not the place to dwell on the comparison between Article 30 and Article 85 as regards the hindering of intra-Community trade, which is mentioned in both articles. The two articles are worded differently, not least because they are addressed to different entities (Member States and undertakings, respectively) and consequently have different types of obstacles (national rules and cartel agreements) in view. In addition, one of the purposes (or, according to some commentators, the only purpose) of the rule in Article 85 that intra-Community trade must be affected is to delimit the field of application of Community law from that of national law.

These differences, however, do not alter the fact that both articles (together with others) pursue the

³⁰ Cited above in footnote 18.

³¹ See paragraphs 7 and 8 of the judgment.

³² See paragraph 18 of the judgment.

³³ See the judgment of 30 June 1966 in *Case 56/65 Société technique minière v Maschinenbau Ulm* ((1966)) ECR 235.

³⁴ Cited above in footnote 4.

³⁵ As regards cartel agreements, see the judgment of 13 July 1966 in *Joined Cases 56 and 58/64 Consten-Gründig v Commission* ((1966)) ECR 299, at pp. 341 and 342; on trading rules, see the judgment of 24 November 1982 in *Case 249/81*, cited above in footnote 5.

³⁶ There are also differences in application. Thus for example in the case of Article 30 no application could be made of the *de minimis* rule (see the judgment of 5 April 1984 in *Joined Cases 177 and 178/82 Van de Haar and Kaveka De Meern* ((1984)) ECR 1797, paragraph 13) That rule does apply in the case of Article 85, in particular as regards the requirement that there must be an appreciable effect on trade between Member States (see the judgment of 9 July 1969 in *Case 5/69 Voelk v Vervaecke* ((1969)) ECR 295).

same fundamental purpose, as laid down in Articles 2 and 3 of the Treaty, which is to establish and maintain the Community market (and to approximate the economic policies of the Member States). For that purpose they prohibit (inter alia) national rules and agreements between undertakings which are responsible in trade between Member States for partitioning the Community market into separate national markets.

In view of this general scheme of the Treaty and in the light of the aforementioned parallels in the terms used by the Court to define obstacles to trade between Member States under Articles 30 and 85, the obvious step is to consult the extensive case-law of the Court on Article 85 in order to understand the concept of "partitioning (or 'compartmentalization') of the market".

23. In the case-law concerning the words "affect trade between Member States" used in Article 85, two situations involving compartmentalization of the market may be distinguished: those in which a horizontal or vertical agreement usually, but not necessarily, concluded between undertakings from different States, in itself screens off a national market, for example by straightforward sharing out of the single market ("chacun chez soi") or by preventing parallel imports from other States; and those in which an agreement, for example a price-fixing agreement, though concluded between undertakings from the same Member State, nevertheless in the light of the whole legal and economic context renders access to a national market more difficult. In the first situation, the prohibition laid down in Article 85(1) applies virtually automatically³⁷, by reason of the absolute territorial protection which by sealing off a national market it affords to the undertakings concerned. In the second situation, the prohibition laid down in Article 85(1) applies only³⁸ if it can be demonstrated, on the basis of the whole "legal and economic context", that the agreement "extending over the whole of the territory of a Member State" by its very nature

"has the effect of reinforcing the compartmentalization of markets on a national basis,"³⁹ thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production ... ((making it)) more difficult for producers or sellers from other Member States to be active in or penetrate the ((relevant national)) market".⁴⁰

It seems to me that a similar distinction between the screening off of national markets and the increasing of barriers to the national markets must be drawn in applying Article 30 to the situation at issue here, which concerns a national rule which is not in fact discriminatory and does not adversely affect imported products but whose very existence may constitute a threat to market integration between Member States (see paragraphs 17 and 18 above).

If the contested national rule itself screens off a national market, then Article 30 is automatically applicable.⁴¹ This is the case with national rules which (as in the *Cinéthèque* case or in the case concerning substitutes for milk powder and concentrated milk) establish a straightforward ban (or a ban limited in time) on marketing (comparable, according to the Commission,⁴² to a quantitative restriction).

If the national rule at issue merely increases the difficulty in penetrating the national market, the prohibition in Article 30 is applicable⁴³ only if it appears from the entire legal and economic context that the economic interweaving of national markets sought by the Treaty is thereby threatened. In such a case, the compartmentalization of the market should be made sufficiently probable by a number of quantitative factors which show that the application of the rule makes it more difficult to

³⁷ Subject of course to the *de minimis* rule and possibly, but only very exceptionally, to the application of Article 85(3).

³⁸ Again subject to the *de minimis* rule and to the application of Article 85(3).

³⁹ Translator's note: The expression used in the authentic Dutch text was "een versterking van de nationale drempelvorming"; for the purposes of the translation of this Opinion, the expression "drempelvorming" (formation of a bar or raising of a threshold) is hereinafter variously translated by the concepts of making access to, or penetration of, a national market more difficult or of increasing barriers to a national market.

⁴⁰ Judgment of 17 October 1972 in Case 8/72 *Cementhandelaren v Commission* ((1972)) ECR 977, paragraphs 29 and 30. That case concerned a horizontal agreement between producers. Previously the Court had already stated that even a vertical agreement with limited scope, namely a brewery agreement between a local brewer and a local client, might, regard being had to the entire legal and economic context, breach the prohibition in Article 85(1). See the judgment of 12 December 1967 in Case 23/67 *Brasserie de Haecht v Wilkin* ((1967)) ECR 407.

⁴¹ Naturally, as is clear from the judgment in *Cinéthèque* and the most recent judgments, subject to the application of Article 36 and of "mandatory requirements".

⁴² Paragraph 13 above.

⁴³ Once again, subject to the application of Article 36 or of "mandatory requirements".

penetrate the market, thereby rendering the market so inaccessible (expensive, unprofitable) that it must be feared that the majority of imported goods will disappear from the market. That was the case, for example, in the Warner Brothers, Buët and Pharmaceutical Society cases. In the Warner Brothers and Buët cases an unacceptable increase in barriers resulted from the fact that an indispensable method of marketing the products concerned was excluded. In the Pharmaceutical Society case it could be shown that the market share of imported products virtually shrunk to nothing a short time after the contested ethical rule had been announced.⁴⁴

24. With regard to the foregoing, three observations should be made. First of all, in the abovementioned case of a national rule which makes penetration of the market more difficult there is naturally no scope for the application of a *de minimis* rule because the application of the prohibition in Article 30 already presupposes a serious, and therefore a more than appreciable, obstruction to trade between Member States. Secondly, in that situation it is for the national courts to evaluate the entire legal and economic context and if necessary to conclude from that evaluation that there is a barrier to greater market penetration covered by the Treaty and therefore prohibited obstruction of trade between Member States. That is not an easy assessment to make, but it is no different from that which is already entrusted to the national courts in the framework of Article 85(1) outlined above. Thirdly, it is clear from the decisions of the Court that in both the aforesaid situations involving market partitioning, that is to say where a market is screened off and where greater penetration of a national market is made more difficult, it may be possible to justify the national rule in question on the basis of the grounds laid down in Article 36 and on the basis of "mandatory requirements".

No market partitioning effect in this case

25. By applying the foregoing considerations to the present case, I reach the conclusion that it does not appear that a rule such as that at issue in the main proceedings screens off the national market or unacceptably increases the difficulty of penetrating that market in the case of the products offered for sale by B & Q. Such a rule certainly contains no prohibition of marketing comparable to a quantitative restriction by which the national market is screened off; nor does it make it so much more difficult to penetrate that market that the economic interweaving of national markets is thereby threatened.

It is true that it has been established that the application of the Sunday trading ban reduces turnover: it reduces sales of products offered for sale by B & Q by approximately 23 %. There is no evidence, however, that such a rule has the effect of partitioning the Community market. Thus it does not make access to (or operating on) the national market much more difficult for undertakings from other Member States (as might appear *inter alia* from the fact that, as in Pharmaceutical Society, the market share of domestic products increases substantially to the detriment of imported products). Nor may it be claimed (as in Warner Brothers or Buët) that such a rule excludes a marketing method which is indispensable for gaining access to or operating on the national market. Even if for do-it-yourself and gardening products it is an efficient sales method to open a sales outlet on Sunday, a ban on Sunday opening does not seem capable of increasing barriers to such an extent that access to the national market is much more difficult (more expensive) or much less attractive (unprofitable) for producers of or traders in products from other Member States.

In those circumstances I conclude that the application of a rule such as that at issue in the main proceedings, even if it has a certain appreciable (adverse) effect on imports of the goods concerned, is not of such a nature as to restrict intra-Community trade so as to warrant the application of Article 30 of the Treaty.

II - In the alternative: the second and third questions

26. Before considering the second and third preliminary questions (which concern grounds on which measures may be justified under Articles 30 and 36), I would make one further remark. It seems to me that the alternative to the aforesaid approach, which ascribes a certain limit to the scope of the Dassonville formula, consists of a "mechanical" application of that formula: any national rule the

⁴⁴ See paragraphs 4 and 18 of the judgment.

removal of which might (directly or indirectly, actually or potentially) lead to an increase in imports is then incompatible with Community law unless it can be justified on the basis of "mandatory requirements" or by virtue of Article 36. This means that, according to that conception, only "reasonable" barriers are still permitted by the Treaty. "Reasonable" means then (according to the decisions of the Court) necessary, proportionate and as unrestrictive as possible.

The great disadvantage of this alternative view is (as will also be seen from my subsequent examination of the grounds of justification) that the Court will inevitably have to decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products.⁴⁵ The question may arise whether excessive demands would not then be put on the Court, which would be confronted with countless new "mandatory requirements" and grounds of justification. In connection with Article 30, national policy decisions would constantly be submitted to it with a request to extend the list of examples of mandatory requirements. It is to be feared that that list would grow constantly and would coincide with a certain residual power of the Member States.⁴⁶ It therefore seems to me preferable, as I have suggested above, to define at the outset the scope and limits of Article 30 on the basis of the general objectives of that article and of the Treaty.

27. In case the Court should decide that a ban on Sunday trading must be regarded as a restriction on intra-Community trade that is covered by Article 30 of the Treaty, I will now consider in the alternative whether such a restriction is necessary in order to satisfy mandatory requirements or one or more of the grounds of public interest listed in Article 36 of the Treaty.

The Borough Council considers that there are various means of justifying the restriction. In its view, the protection of the working environment and the protection of the health and welfare of workers are in this case mandatory requirements which make the contested rule necessary. As regards Article 36, the Borough Council considers the rule justified on grounds of the protection of health and life of humans, of public policy and of public morality.

The United Kingdom's position is more straightforward: in its view, the Shops Act is intended to meet the imperative need to protect the general character of Sunday as a non-trading day; alternatively, the rule is in its view justified under Article 36, on the ground of the protection of public policy. The United Kingdom and the Borough Council consider on the basis of the judgment in *Cinéthèque* that they may draw the conclusion that, once a measure is acceptable as a "mandatory requirement", there is no need for absolute correspondence between the mandatory requirements and the measure at issue.

28. Regardless of what mandatory requirements or grounds may be accepted as justifying the measure in this case, there is a preliminary question which must be answered: may a rule which is enforced by a Member State only sporadically⁴⁷ be relied upon by that State as being necessary in order to comply with mandatory requirements? This is a difficult question. A negative answer would be tantamount to the application of a form of estoppel in the assessment of the acceptability of a mandatory requirement: a Member State would be estopped from departing from Community law on the basis of a "necessity" which the Member State relies on but does not in fact endeavour to meet.⁴⁸ I am inclined to the view that it should not be possible to rely on a mandatory requirement if

⁴⁵ Apart from a restriction on Sunday trading, other examples would be restrictions on the opening of new businesses in the framework of planning legislation (see the judgment in *Gauchard*, cited above in footnote 3), regulations which provide for the confiscation of goods for failure to pay taxes (see Case 69/88, pending before the Court), the imposition of speed limits, and so forth.

⁴⁶ The Court has always confirmed that the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States. See the judgments of 10 July 1984 in Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy* ((1984)) ECR 2727, paragraph 32, and of 12 July 1979 in Case 153/78 *Commission v Germany* ((1979)) ECR 2555, paragraph 5, and the judgments cited there. In my view this principle applies equally to the case of mandatory requirements.

⁴⁷ The Home Office Report entitled "The Shops Act - Late-night and Sunday opening: Report of the Committee of Inquiry into proposals to amend the Shops Acts", presented to Parliament in November 1984 and attached as Annex 2 to B & Q's observations, states that since 1974 enforcement of the Shops Act has been the responsibility of the local authorities. Some authorities have adopted a policy of not enforcing the law at all; many others act only in response to complaints (paragraph 25 of the report). The report also states that very few local authorities prosecute as a matter of policy all traders who open outside the permitted hours (*ibid.*).

⁴⁸ The estoppel principle is referred to in the judgment of 10 February 1983 in Case 230/81 *Luxembourg v Parliament* ((1983)) ECR 255, paragraphs 22 to 26. See also the Opinion of Mr Advocate General Mancini in that case, (1983) ECR 293, at p. 295.

it is established that a Member State entirely fails to make any effort to fulfil such a requirement. That cannot, however, be said of the national rule at issue in this case. It is true that there are indications that the Shops Act is enforced only sporadically or inconsistently (in this regard see paragraph 32 below), but not that it has fallen into disuse (as is shown inter alia by the fact that in 1985 a proposal to repeal the Shops Act was rejected by the United Kingdom Parliament).

29. Let me now consider first whether the grounds relied upon in Article 36 may be accepted. As regards protection of public morality: in the observations of the Borough Council this is described as preventing offence from being taken to the opening of sales outlets on a Sunday. That does not seem to me to fall within the concept of "public morality ". It is true that the Court in its judgment in *Henn and Darby*⁴⁹ accepted that in principle it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. However, the principle that it is not the purpose of Article 36 to reserve certain matters to the exclusive jurisdiction of the Member States⁵⁰ implies that the Court must exercise some control over what is regarded by a Member State as falling within the concept of public morality. The prevention of offence to religious convictions does not seem to me to fall within that concept.

Nor does the protection of public policy seem to me to be applicable here. Reliance on that ground, the scope of which must be interpreted strictly,⁵¹ requires

"the existence ... of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".⁵²

It is not difficult to see that there is no question of such a threat in this case.

30. Next, I must investigate whether the mandatory requirements relied upon are acceptable as such. It cannot be denied that the category of mandatory requirements is not closed (as is the case, however, with the list in Article 36 of the Treaty). The protection of the working environment (which is expressly mentioned in Article 100a of the Treaty) and of the health and well-being of workers or self-employed persons (a subcategory of the "health of persons" referred to in Article 36) may undoubtedly be regarded as a mandatory requirement. I have more difficulty with the idea of "protecting Sunday as a non-trading day". If this is a collective term for the mandatory requirements referred to above, it need not be considered separately. It would, however, be difficult to prove that it is proportionate to the aim pursued (see paragraph 31, below). If, on the other hand, it refers to a separate mandatory requirement and is understood, for example, as a need to give citizens on one and the same day the opportunity to devote their time to all kinds of (non-working and inter alia religious) activities and social contacts, then I myself can accept that, but not without great hesitation: it shows how easy it is to put forward new and prima facie justified mandatory requirements and how difficult it is for the Court to evaluate them in an objective manner.
31. But even if one of the aforesaid mandatory requirements is accepted, it must still be considered whether the contested rule, in its present form, is necessary for the fulfilment of, and proportionate to, the mandatory requirement relied upon.

In the first place, there is the aim of keeping Sunday a day of rest, as a way of protecting the health and welfare of workers and self-employed persons. On this point the Commission has observed that there is a less restrictive means of achieving this aim: by limiting the number of working hours (for persons in employment) or permitting (or obliging) self-employed persons to choose any one closing day rather than imposing Sunday as the closing day. That argument needs to be qualified. No one would deny that the choice of one specific day is more restrictive of personal freedom. The question is, however, whether it restricts trade between Member States more than is necessary. If it is assumed that Sunday, as opposed to other days of the week, is a better day for selling the goods

⁴⁹ Judgment of 14 December 1979 in Case 34/79 *Regina v Henn and Darby* (1979) ECR 3795. See also the judgment of 11 March 1986 in Case 121/85 *Conagate Ltd v HM Customs & Excise* (1986) ECR 1007, in particular paragraphs 14 and 15.

⁵⁰ See the judgments cited above in footnote 46.

⁵¹ Judgment of 27 October 1977 in Case 30/77 *Regina v Bouchereau* ((1977)) ECR 1999, paragraph 33 (with reference to the judgment of 4 December 1974 in Case 41/74 *Van Duyn v Home Office* ((1974)) ECR 1337, at p. 1350).

⁵² Judgment in *Bouchereau*, cited in note 51 above, paragraph 35. See also the Opinion of Mr Advocate General Warner in that case, (1977) ECR 2016, at pp. 2024 to 2026.

concerned in this case,⁵³ then to leave open the choice of a specific day, no matter which, is undoubtedly a less restrictive alternative as far as intra-Community trade is concerned .

The position is different, however, if one accepts (as I have suggested, with great hesitation, in paragraph 30 above) that a ban on Sunday trading meets the desire to encourage all manner of (non-working) activities and social contacts on one and the same day. In that case, the imposition of a general closing or non-trading day on a day already devoted to such activities and contacts by a large part of the population is indeed necessary and proportionate to the aim pursued.

32. So far in my analysis I have not attached much importance to the complexity and inconsistency (both *ratione personae* and *ratione loci*) of the legislation at issue in the main proceedings, which have been criticized in detail by B & Q, or to the sporadic way in which its observance is controlled. I do in fact agree with B & Q's premiss, namely that in deciding whether a rule is justified account should be taken of the factual characteristics of that rule. B & Q's line of argument, however, concerns primarily the effectiveness and consistency of the rule. Community law lays down a different type of requirement: the obstacle which in practice results from the rule must be proportionate to the aim pursued, that is to say no more restrictive for intra-Community trade than is necessary for the intended purpose; whether the rule achieves⁵⁴ its purpose in this respect is irrelevant. The "reasonableness" of a measure is relevant for purposes of Community law only in so far as the measure may not be a means of arbitrary discrimination or a disguised restriction: in this case, this means arbitrary discrimination against goods from other Member States or concealed protection of the Member State's own market. The fact that within a single Member State the rule is not uniformly applicable or enforced may well provide a cause for action under national law, but not under Community law.

In support of the foregoing analysis I would refer to the judgment of the Court in *Henn and Darby*,⁵⁵ which concerned the application of a ban on imports into the United Kingdom of "indecent or obscene articles ". This case also concerned the justification of a provision of English law which was not applied in a uniform manner throughout the territory of the United Kingdom; furthermore, it was apparent that in practice (unlike in the present case) the strictest rule was applied to imported goods. There again, the Court was asked whether there was any arbitrary discrimination or a disguised restriction on trade. On that point the Court stated as follows:

"Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character" (paragraph 21 of the judgment).

In those circumstances the Court reached the conclusion that, although the strictest rule was applied to imported goods, the legislation in question

"... cannot be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State" (*ibid.*).

33. To conclude the foregoing inquiry into possible grounds justifying the measure, I would once again stress the following point: this inquiry in my view strikingly illustrates the fact that a measure which is regarded as necessary by a Member State may often only be appraised if the Court is prepared to concern itself with areas of policy for which Community law provides no, or at any rate few, criteria of assessment. This is the reason why I suggest that such a difficult inquiry relating to national measures such as those at issue here should be avoided as far as possible by interpreting Article 30 in accordance with the intent of the Treaty.

Proposed reply to the preliminary questions

⁵³ Such a finding is made by the court of reference. See point 4 of paragraph 3 above.

⁵⁴ There is considerable doubt on this point: all the grounds relied upon to justify the rule presuppose that shops are closed on Sunday; in fact, however, the Shops Act permits shops to open on Sunday, at least if they open only to sell exempted goods. In practice it is clear that this exception is widely used. See paragraph 22 of the Home Office Report, cited above in footnote 47.

⁵⁵ Cited above in footnote 49.

34. In conclusion, I propose that the Court should reply to the preliminary questions asked by Cwmbran Magistrates' Court as follows:

"A national rule which prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified items, is not covered by the prohibition laid down in Article 30 if the rule does not cause imported goods to be discriminated against or placed at an actual disadvantage compared with domestic goods and if it does not screen off the domestic market of the Member State in question or make access to that market substantially more difficult or unattractive for imported goods to which the rule applies."

In the event that the Court should nevertheless decide that such a rule is in principle a measure caught by Article 30, I propose in the alternative that the Court should answer the preliminary questions as follows:

"Articles 30 and 36 of the Treaty do not preclude a national rule which prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified articles, if the rule does not cause imported goods to be discriminated against or placed at an actual disadvantage compared with domestic goods and if any obstacles to intra-Community trade which may be caused by the application of that prohibition are not greater than is necessary for encouraging non-working activities and social contacts on a specified day which is already devoted to those purposes by a large part of the population."

2.1.5.2 Judgment of the Court of Justice

Torfaen Borough Council v B & Q plc

Case 145/88

23 November 1989

Court of Justice

ECR [1989] 03851

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

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 30 of the Treaty 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 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 Community 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 Community 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 Community 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 Community 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 30 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 30 of the Treaty 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 Community 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.

[...]

2.1.6 Case 362/88: Inno

GB-INNO-BM v Confédération du Commerce

Case 362/88

7 March 1990

Court of Justice

[1990] ECR I-0667

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By judgment of 8 December 1988, which was received at the Court on 14 December 1988, the Cour de cassation of the grand duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty in order to enable it to assess the compatibility with those provisions of national legislation on advertising.
- 2 The question was raised in proceedings between the confederation du commerce luxembourgeois (hereinafter referred to as 'CCL '), a non-profit-making association which claims to represent the interests of Luxembourg traders, and Gb-Inno-Bm, which operates supermarkets in Belgian territory, inter alia in Arlon, near the Belgian-Luxembourg border. The Belgian company had distributed advertising leaflets on Luxembourg territory as well as on Belgian territory and CCL applied to the Luxembourg Courts for an injunction against the company to stop the distribution of those advertising leaflets. CCL claimed that the advertising contained in the leaflets was contrary to the grand-ducal regulation of 23 December 1974 on unfair competition (memorial a 1974, p. 2392), according to which sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices.
- 3 The presiding judge of the tribunal d' arrondissement (district Court), Luxembourg, competent for commercial matters granted the injunction, taking the view that the distribution of the leaflets in question constituted a sales offer prohibited by the grand-ducal regulation of 1974 and an unfair practice prohibited by the same regulation. The cour d' appel upheld the injunction, whereupon Gb-Inno-Bm appealed to the Cour de cassation. It argued that the advertising contained in the leaflets complied with the Belgian provisions on unfair competition and that it would thus be contrary to Article 30 of the EEC Treaty to apply to it the prohibitions laid down in the Luxembourg legislation.
- 4 The Cour de cassation stayed proceedings and submitted the following question to the Court of justice for a preliminary ruling: 'is a legislative provision of a member state whereby the offering of goods for retail sale at a temporarily reduced price, other than in special sales or clearance sales, is permitted only on condition that the offers may not state their duration and that there may be no reference to previous prices contrary to Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty, properly construed?'

- 5 Reference is made to the report for the hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 6 As a preliminary point, an argument that was raised by CCL and the German and Luxembourg governments calls for examination. That argument is to the effect that the provisions of Articles 30, 31 and 36 of the Treaty have no relevance to the subject-matter of the main proceedings, which solely concern advertising, not the movement of goods between Member States. Moreover, it is said, Gb-Inno-Bm sells its wares only on Belgian territory.
- 7 That argument cannot be accepted. The Court has already held, in its judgment of 15 December 1982 in case 286/81 Oosthoek's Uitgeversmaatschappij ([1982] ECR 4575), that legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities.
- 8 Free movement of goods concerns not only traders but also individuals. It requires, particularly in frontier areas, that consumers resident in one member state may travel freely to the territory of another member state to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the Treaty.
- 9 It is therefore clear that the question referred to the Court for a preliminary ruling concerns the compatibility with Article 30 of the Treaty of an obstacle to the free movement of goods resulting from disparities between the applicable national legislation. It is apparent from the documents before the Court that the advertising of sales offers involving a price reduction and stating the duration of the offer and the prices previously charged is prohibited by the Luxembourg legislation but permitted by the provisions in force in Belgium.
- 10 The Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or the fairness of commercial transactions (see, in particular, the judgments of 20 February 1979 in case 120/78 Rewe ([1979] ECR 649), and of 26 June 1980 in case 788/79 Gilli and Andres ([1980] ECR 2071).
- 11 According to CCL and the Luxembourg government, the two prohibitions in question - against stating the duration of a special offer and against specifying the previous price - are justified on the grounds of consumer protection. The purpose of the prohibition concerning the duration of the special offer is to avoid the risk of confusion between special sales and half-yearly clearance sales the timing and duration of which is restricted under Luxembourg legislation. The prohibition against allowing the previous price to appear in the offer is justified, they say, by the fact that the consumer is not normally in a position to check that a previous reference price is genuine. In addition, the marking of a previous price might exert excessive psychological pressure on the consumer. In substance the German government shares that point of view.
- 12 That view is contested by Gb-Inno-Bm and the Commission, who point out that any normally aware consumer knows that annual sales take place only twice a year. As regards comparison of prices, the Commission has submitted an overview of the relevant legislation in various Member States and concludes that, with the exception of the Luxembourg and German provisions, they all allow both prices to be indicated if the reference price is genuine.

- 13 The question thus arises whether national legislation which prevents the consumer from having access to certain information may be justified in the interest of consumer protection.
- 14 It should be observed first of all that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information. Thus the 'preliminary programme' adopted by the council in 1975 (official journal 1975, c 92, p. 1) provides for the implementation of a 'consumer protection and information policy'. By a resolution of 19 May 1981 (official journal 1981, c 133, p. 1), the council approved a 'second programme of the European Economic Community for a consumer protection and information policy' the objectives of which were confirmed by the council resolution of 23 June 1986 concerning the future orientation of the policy of the Community for the protection and promotion of consumer interests (official journal 1986, c 167, p. 1).
- 15 The existence of a link between protection and information for consumers is explained in the introduction to the second programme. There it is stressed that measures taken or scheduled in accordance with the preliminary programme contribute towards improving the consumer's situation by protecting his health, his safety and his economic interest, by providing him with appropriate information and education, and by giving him a voice in decisions which involve him. It is stated that often those same measures have also resulted in harmonizing the rules of competition by which manufacturers and retailers must abide.
- 16 The introduction goes on to specify that the purpose of the second programme is to continue and intensify the measures in this field and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other. To that end the programme sets out five basic rights to be enjoyed by the consumer, amongst which appears the right to information and education. One of the measures proposed in the programme is the improvement of consumer education and information (paragraph 9d). The part of the programme which lays down the principles which must govern the protection of the economic interests of consumers includes passages which aim to ensure the accuracy of information provided to the consumer, but without refusing him access to certain information. Thus, according to one of the principles (paragraph 28(4)), no form of advertising should mislead the buyer; an advertiser must be able to 'justify, by appropriate means, the validity of any claims he makes'.
- 17 As the Court has held, a prohibition against importing certain products into a Member State is contrary to Article 30 where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts (judgments of 9 December 1981 in case 193/80 *Commission v Italy* ([1981] ECR 3019), and of 12 March 1987 in case 178/84 *Commission v Germany* ([1987] ECR 1227).
- 18 It follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.
- 19 In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection. They thus fall under the prohibition laid down in Article 30 of the Treaty. The exceptions to the application of that provision contained in Article 36 are not applicable; indeed, no reliance was placed on them during the proceedings before the Court.
- 20 Since Article 30 is applicable, there is no need to interpret Article 31 of the Treaty, which was also mentioned in the reference for a preliminary ruling.

- 21 The reply to the question posed must therefore be that under Articles 30 and 36 of the EEC Treaty, properly interpreted, advertising lawfully distributed in another member state cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

[...]

2.1.7 Joined Cases C-267 and 268/91: Keck

Criminal proceedings against Bernard Keck and Daniel Mithouard

Joined Cases C-267 and 268/91

24 November 1993

Court of Justice

[1993] ECR I-6097

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.
- 2 Those questions were raised in connection with criminal proceedings brought against Mr. Keck and Mr. Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French law no 63-628 of 2 July 1963, as amended by Article 32 of order no 86-1243 of 1 December 1986.
- 3 In their defense Mr. Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.
- 4 The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

'is the prohibition in France of resale at a loss under Article 32 of order no 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the common market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

(b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?'
- 5 Reference is made to the report for the hearing for a fuller account of the facts of the case, 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.

- 6 It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.
- 7 Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national Court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.
- 8 However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in case 308/86 *Ministère public v Lambert* [1988] ECR 4369).
- 9 Finally, it appears from the question submitted for a preliminary ruling that the national Court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.
- 10 In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring Court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.
- 11 By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.
- 12 National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.
- 13 Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.
- 14 In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.
- 15 It is established by the case-law beginning with '*Cassis de Dijon*' (case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

- 16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
- 17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another member state meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.
- 18 Accordingly, the reply to be given to the national Court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a member state imposing a general prohibition on resale at a loss.

[...]

2.2 *Post-Keck*

2.2.1 Case C-292/92: Hunermund

Hunermund (R) v Landesapothekerkammer Baden-Württemberg

Case C-292/92

15 December 1993

Court of Justice

ECR [1993] I-6787

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 14 May 1992, received at the Court on 1 July 1992, the Verwaltungsgerichtshof Baden-Württemberg (higher administrative Court, Baden-Württemberg, federal republic of Germany) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of the Treaty to enable it to determine whether a rule of professional conduct laid down by the Landesapothekerkammer Baden-Württemberg (the pharmacists' professional association for the Land Baden-Württemberg, hereinafter 'the professional association') which prohibits pharmacists practising in that Land from advertising outside the pharmacy quasi-pharmaceutical products which they are permitted to sell is compatible with those provisions.
- 2 That question was raised in proceedings between several pharmacists from Baden-Württemberg and the professional association concerning the lawfulness of that rule of professional conduct.
- 3 According to the documents before the Court, paragraph 10(15) of the Berufsordnung (professional code) of the professional association prohibits 'excessive advertising' for the non-medicinal products which, under paragraphs 2(4) and 25 of the Apothekenbetriebsordnung (rules governing the operation of pharmacies), may be sold in a pharmacy provided that the sales do not affect the proper operation of the dispensary. It is common ground that in practice that provision of the Berufsordnung prohibits all forms of advertising outside pharmacies for quasi-pharmaceutical products.
- 4 The applicants in the main proceedings, all owners of pharmacies in the Land Baden-Württemberg selling quasi-pharmaceutical products which they would like to advertise outside the pharmacy, brought an action before the Verwaltungsgerichtshof Baden-Württemberg against the professional association seeking a declaration that the prohibition of advertising was invalid. Before that Court the applicants' main submission was that paragraph 10(15) of the Berufsordnung was incompatible with Articles 30 and 36 of the Treaty.
- 5 In those circumstances the Verwaltungsgerichtshof Baden-Württemberg stayed the proceedings in order to refer the following question to the Court:

'is Article 36, in conjunction with Article 30, of the EEC Treaty to be interpreted to the effect that the provisions of a Berufsordnung (professional code) by which a Landesapothekerkammer prohibits

pharmacists within its area of competence from advertising outside their pharmacies, even for the purpose of marketing goods commonly sold in pharmacies (1) within the meaning of paragraph 25 of the Apothekenbetriebsordnung (rules governing the operation of pharmacies), are justified?'

[...]

Article 30 of the Treaty

- 12 Article 30 prohibits quantitative restrictions on imports, and all measures having equivalent effect, between Member States.
- 13 The professional association submitted first that the professional conduct rule at issue before the national Court could not be a 'measure' within the meaning of Article 30 of the Treaty since under German law pharmacists' professional associations had no power to strike off as a disciplinary sanction; that sanction could be applied only by the competent authorities of the relevant Land.
- 14 It is apparent from the order for reference that under German law the professional association is a public law body which has legal personality and is regulated by the State; membership is compulsory for all pharmacists practising in the Land Baden-Württemberg. The professional association also lays down rules of professional conduct applicable to pharmacists and monitors compliance by its members with their professional obligations. Finally, professional conduct committees, which are part of and whose members are nominated by the professional association, may impose disciplinary measures such as fines, disqualification as a member of bodies of the association or withdrawal of the right to vote or be elected to those bodies on pharmacists who have infringed professional conduct rules.
- 15 The Court has already held (see the judgment in joined cases 266/87 and 267/87 the Queen v Royal pharmaceutical society of Great Britain, ex parte association of pharmaceutical importers [1989] ECR 1295, paragraph 15) that measures adopted by a professional body on which national legislation has conferred powers of that nature constitute, if they are capable of affecting trade between Member States, 'measures' within the meaning of Article 30 of the Treaty.
- 16 That ruling is not in any way called in question by the fact that, unlike the professional body to which that judgment relates, the professional association concerned in this case is not empowered to revoke the authorization needed by its members to practise.
- 17 The professional association next submitted that the prohibition on advertising challenged before the national Court was not a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty since it was not capable of impeding intra-community trade in quasi-pharmaceutical goods.
- 18 It is settled case-law that any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-community trade constitutes a measure having an effect equivalent to a quantitative restriction (judgment in case 8/74 Procureur du roi v Dassonville [1974] ECR 837, paragraph 5).
- 19 It is not the purpose of a rule of professional conduct prohibiting pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, drawn up by a professional association, to regulate trade in goods between Member States. Moreover, the prohibition does not affect the right of traders other than pharmacists to advertise those products.
- 20 Such a rule may, admittedly, restrict the volume of sales, and hence the volume of sales of quasi-pharmaceutical products from other Member States, in so far as it deprives the pharmacists

concerned of a method of promoting the sales of such products. But the question remains whether such a possibility is sufficient to characterize the rule in question as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

- 21 The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (cited above), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (joined cases C-267 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraphs 16 and 17).
- 22 In the case of a rule such as that at issue in this case, those conditions are satisfied in relation to the application of a rule of professional conduct, laid down by a professional body in a Member State, which prohibits pharmacists within the area over which it has jurisdiction from advertising outside the pharmacy quasi-pharmaceutical goods which they are authorized to sell.
- 23 That rule, which applies without distinction as to the origin of the products in question to all pharmacists regulated by the professional association, does not affect the marketing of goods from other Member States differently from that of domestic products.
- 24 Accordingly, the reply to be given to the Verwaltungsgerichtshof Baden-Württemberg is that Article 30 of the EEC Treaty is to be interpreted as not applying to a rule of professional conduct, laid down by the pharmacists' professional body in a Member State, which prohibits pharmacists from advertising quasi-pharmaceutical products outside the pharmacy.

[...]

2.2.2 Joined Cases C-401 and 402/92: Tankstation't Heukske

Summary of the facts and procedure

Article 3 of the Winkelsluitingswet (law on shop closing) 1976 lays down a maximum number of opening hours and periods of compulsory closure. Under Article 11 of that law a derogation from that compulsory closure may be granted by way of decree.

Such a decree provided that the prohibitions laid down by the law on shop closing do not apply to a shop in a petrol station which is situated outside a built-up area at the side of a motorway, when the only goods offered for sale in that shop are fuel and lubricants for vehicles or boats, articles for use in or the cleaning or urgent repair of vehicles or boats and their accessories, articles for personal hygiene, snacks, ice creams, non-alcoholic beverages, tobacco, smoking accessories in so far as they are normally consumed on journeys.

Under those provisions petrol stations situated at the side of motorways outside built-up areas and the shops associated with those stations may open day and night and offer certain articles linked to journeys, such as petrol and smoking accessories. On the other hand, the general rules continue to apply to articles not required on journeys, that is to say that those articles can only be sold during lawful opening hours, which must be indicated at each public entrance to the shops. Outside lawful opening hours, articles not linked to journeys are to be kept in a locked cupboard.

In this decree a similar derogation was provided for all other petrol stations on condition that outside normal opening hours, tobacco and smoking accessories are sold only by means of vending machines.

Criminal proceedings were instituted on the ground that, contrary to applicable national law, two shops forming part of the petrol stations of 't Heukske and Mr Boermans were open to the public without the prescribed legal notice indicating opening hours having been affixed to every entrance to those shops. Furthermore, the competent authority found that a number of Articles not linked to road travel were offered for sale and had not been placed in lockable cupboards. Moreover, in one of the two shops it was found that tobacco products were not sold by vending machine.

The Court of appeal, Gerechtshof, referred a number of questions to the Court, asking, in substance, whether Article 30 of the Treaty precludes rules which provide for the compulsory closing of shops, and whether Article 86, in conjunction with Articles 3(f) and 5 of the Treaty, precludes such rules which distinguish between different categories of traders in connection with national provisions concerning the grant of licences for the petrol stations.

2.2.2.1 *Opinion of AG van Gerven*

Tankstation't Heukske vof and J B E Boermans

Joined Cases C-401/92 and C-402/92

16 March 1994

AG van Gerven

[1994] ECR I-2199

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

19. I would first state that that judgment Keck and Mithouard does not detract from the principle that national measures which discriminate against products from other Member States in comparison with domestic products can be justified only on the grounds listed in Article 36 of the EC Treaty. Neither does it detract from the rule in Dassonville that national measures applicable without distinction which are not such as to hinder directly or indirectly, actually or potentially, trade between Member States are not caught at all by Article 30 of the EC Treaty. Furthermore, the judgment does not change anything as regards product requirements applicable without distinction to domestic and imported products. Such requirements fall in principle within the prohibition set out in Article 30 of the EC Treaty, as interpreted in the Dassonville and Cassis de Dijon case-law, unless, in the absence of harmonized rules at the European level, they can be justified on the basis of an 'imperative requirement' recognized by Community law and are proportionate, that is to say, they do not go beyond that which is necessary to satisfy such a requirement. However, what is novel is that national measures restricting or prohibiting certain selling or marketing methods - or, more broadly, certain selling or marketing arrangements - do not fall within the Dassonville case-law and hence are not covered by the prohibition set out in Article 30, provided that they apply to all traders carrying out their activities within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
20. In the judgment in Keck and Mithouard, the Court does not explain why the prohibition in principle set out in Article 30 of the EC Treaty henceforward is to affect in a different way product requirements, on the one hand, and legislation, of the sort at issue in that case, on a sales promotion method, on the other. Whereas it goes, as it were, without saying that the former requirements fall within that prohibition in principle (which they may still escape pursuant to a 'rule of reason'), the latter are caught only if it appears that they do not satisfy the aforementioned two conditions introduced by 'provided that'. That distinction can be explained by paragraph 17 of the judgment, which states that, if those conditions are satisfied, the application of the national legislation in question 'to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products' (my emphasis). In the light of this, I understand the distinction made by the Court as follows: whereas product requirements are by nature, as far as imported products are concerned, 'such as to prevent their access to the market or to impede access more than they impede the access of domestic

products', that is not the case with national requirements relating to sales promotion measures. Product requirements by nature impede access to the market of the Member State which laid them down, because they mean that a product lawfully manufactured and marketed in the Member State of origin must be adapted when it is imported into another Member State in order to suit the product requirements in force there, and therefore have the effect of requiring the product to satisfy the requirements of two different sets of legislation - contrary to the principle, which has been stressed ever since the Cassis de Dijon judgment, of the mutual recognition of legislation. in view of the costs entailed by this when the product is imported, the producer has an additional burden imposed upon him, which almost certainly has the effect of impeding the imported product's access to the market or even, where those costs are prohibitive, of making access impossible. This is not the case with legislation prohibiting or restricting sales promotion methods:

such legislation does not normally mean that the imported products to which it applies have to be adapted in point of their intrinsic or extrinsic characteristics in order to satisfy the statutory requirements of the importing state (the fact that differing sales methods have to be used depending on the Member State concerned may admittedly also entail additional costs, but certainly to a lesser degree). It follows that, according to the new case-law, such prohibitions fall in principle outside the prohibition set out in Article 30 of the EC Treaty.

21. Whilst the degree to which access to the market is impeded constitutes the rationale which the Court used in the judgment in Keck and Mithouard as the basis for the difference in treatment between product requirements (where a reduction in access is, as it were, presumed) and measures relating to sales methods or arrangements (where a reduction is not presumed but has to be proved), it is also necessary to interpret in the light of that criterion the two conditions introduced by 'provided that' which I mentioned above (in section 19). This means, as regards the first condition - that the measures in question must apply to 'all traders carrying out their activities within the national territory' -, that the wording used has to be interpreted as meaning that, in order to fall outside the prohibition set out in Article 30 of the EC Treaty, the national measures may in no respect impede the access of traders from other Member States to the relevant market more than they impede the access of domestic traders. In contrast, Article 30 of the EC Treaty does not preclude different treatment of categories of domestic economic operators (for example, importers and manufacturers established and carrying out their activities in the Member State), provided, at least, that the measures in question do not affect the marketing of domestic and imported products differently (this is the aspect covered by the second condition). The national prohibition of resale at a loss which gave rise to the judgment in Keck and Mithouard itself involved such a difference in treatment, since it applied to retailers but not to manufacturers. I therefore interpret the judgment as meaning that, although the prohibition of resale at a loss was not applicable to national retailers and manufacturers alike, it nevertheless satisfied the first condition, since it made a distinction which was applicable in the same manner to national importers and manufacturers and to those from other Member States.
22. The second condition - that the measures in question must 'affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States' - also has to be interpreted in the light of the criterion of access to the market. In that connection, the judgment contains two general observations. First, in paragraph 13, it states that the fact that national legislation may restrict the volume of sales, and hence the volume of sales of products from other Member States, is not sufficient to characterize the legislation in question as a measure having an effect equivalent to a quantitative restriction on imports. Secondly, it appears from paragraph 12 of the judgment that whether or not the purpose of the legislation is to regulate trade in goods between Member States is relevant. In other words, national measures which restrict the marketing of a product generally - and hence also its importation - cannot be regarded, on that ground alone, as restricting imported products' access to the market more than that of domestic products; in contrast, there is an indication to that effect where the purpose of the measures is to regulate trade in goods between Member States or, in other words, import flows or channels for particular products.

23. As far as the substantive aspects of the second condition are concerned, the question arises as to when measures affect in the same manner, 'in law' and 'in fact', the marketing of domestic and imported products. In my view, a measure affects the marketing of products in the same manner 'in law' where, depending on its aim and its wording, it applies in the same manner to domestic and imported products - by this I mean essentially that it is applicable 'without distinction' - and this continues to be the case where the measure is considered in conjunction with other legal rules. Through the requirement that the measure should 'affect in the same manner, in fact, the marketing of domestic products', the Court doubtless means that in fact, that is to say, in point of its effects, the measure may not give rise to unequal access to the market on the part of domestic and imported products. However, the question is how those effects are to be examined. Does it turn on the effects of a national measure in individual situations ('is a situation involved in which the national measure gives rise to unequal treatment of domestic or imported products, or is such a situation conceivable') or, on the contrary following the example of the Court's case-law on equal treatment of men and women - does it turn on the overall effect of the measure ('on an overall view, is the national measure liable to restrict the access to the market of imported products more than that of domestic products') ? In *Keck and Mithouard*, the Court seems to me to have opted for an overall assessment and therefore not for an assessment of individual situations (which should, moreover, for the most part be left to the national Court). Whereas in my two opinions in those cases I argued that the French prohibition of resale at a loss could, in some cases, impede imported products' access to the French market more than that of domestic products, in its judgment the Court simply held that Article 30 of the EC Treaty 'is to be interpreted as not applying to legislation of a Member State imposing a general prohibition of resale at a loss'. The Court was manifestly convinced that, on an overall view, national legislation such as that at issue did not impede the access to the market of imported products more than that of domestic products.
24. If the Court has in fact opted for an overall approach, it is undeniable that in doing so it has diverged to a certain extent from the *Dassonville* test (although it still referred to it in paragraph 11 of the judgment as its general starting point and repeated it expressly in paragraph 16). Indeed, at least as regards 'national provisions restricting or prohibiting certain sales arrangements', it can no longer be presumed that every national provision capable of hindering, directly or indirectly, actually or potentially, intra-Community trade falls within the scope of Article 30 of the EC Treaty. The question which arises therefore is to what extent in the judgment in *Keck and Mithouard* the Court has diverged from the *Dassonville* test as regards requirements other than product requirements and, more specifically, whether the Court intended to reduce the prohibition set out in Article 30 of the EC Treaty to a prohibition of discrimination (in a broad sense). It is not possible to give a definite answer to that question: on the one hand, the Court refers twice to the *Dassonville* test; on the other, it seems, however, to identify that test, as regards the national provision at issue, with a prohibition of discrimination *ratione personae* (as far as the capacity of the economic operators is concerned) or *ratione materiae* (as far as the marketing of products is concerned). The question is perhaps not of very much significance, since - in so far as I have been able to make an overview of the case-law - the bulk, if not all of, the measures considered in the Court's case-law, whether they were product requirements or requirements not relating to products applicable 'without distinction', contained some form or other of 'discrimination in fact', at least if this is understood as meaning any additional burden imposed by the measure when products are imported from other Member States. However, it is not possible to exclude the possibility out of hand that some measures, albeit not discriminatory in the aforementioned broad sense of the word may, nevertheless, be capable, on an overall view, of impeding, actually or potentially, trade between Member States in some other way. For certainty's sake, I shall therefore consider later in this opinion whether the national legislation at issue, still on an overall view, is discriminatory in law and in fact or impedes intra-Community trade in some other manner.

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

25. In the light of the scope, as defined above, of the judgment in Keck and Mithouard, it is now possible to examine whether national measures other than measures relating to sales promotion methods fall within the new rules set out in that judgment. That question has been answered in the meantime as regards rules on forms of advertising: in the judgment of 15 December 1993 in Hunermund, the Court took over, *mutatis mutandis*, paragraphs 13, 16 and 17 of the judgment in Keck and Mithouard, cited above (in section 18 of this opinion). It did so with regard to a measure which it described in the following terms: 'It should next be observed that the purpose of a rule of professional conduct, laid down by a professional organization, which prohibits pharmacists from advertising para-pharmaceutical products outside their shops, is not to regulate trade between Member States. Moreover, such a prohibition has no effect on the possibility for economic operators other than pharmacists to advertise such products'. As a result, the Court has gone back on its judgment of 18 May 1993 in case C-126/91 Yves Rocher, which was still entirely consistent with the Oosthoek's Uitgevermaatschappij case-law (see section 16, above).
26. Should the Court's reasoning in the judgments in Keck and Mithouard and in Hunermund also be applied to national legislation such as the Winkelsluitingswet at issue in this case? If so, such national legislation would not fall within the scope of Article 30 of the EC Treaty so long as it fulfilled the conditions set out in the judgment in Keck and Mithouard examined above. In such a case, contrary to that which the Court has done to date, in particular in the Sunday trading cases, it should no longer be asked whether the legislation is justified by an imperative requirement and by the principle of proportionality as it is applied in that connection. The national legislation at issue in this case falls into a category of measures relating to the circumstances of time and place in which the goods concerned may be sold to consumers and to the manner in which they may be so sold. In other words, it is concerned with sales arrangements within the meaning of the judgment in Keck and Mithouard. It appears from the description set out in sections 5 to 9, above, that that legislation on shop closing prohibits some categories of small traders from offering for sale, during certain hours, a greater or lesser assortment of products or from doing so in the manner which appears most advantageous to them (by obliging them to sell by means of vending machines).
27. In my view, such legislation does indeed fall within the new case-law. The reason is that the legislation does not contain requirements relating to the intrinsic or extrinsic characteristics of the products in question, and therefore does not involve additional production or distribution costs where a product from a Member State in which it was lawfully manufactured and marketed is exported to the Member State that enacted the legislation. Consequently, legislation such as that before the Court could be characterized as a measure having equivalent effect within the meaning of Article 30 of the EC Treaty only if it did not satisfy the two conditions set out in the judgment in Keck and Mithouard and, as I stated above (in section 24), if there are no other circumstances suggesting that the legislation, on an overall view, impedes intra-Community trade. I would add in passing that, to my mind, the foregoing suggests that all other national measures applicable without distinction also fall in principle within the new Keck and Mithouard case-law, in so far as, unlike product requirements, they do not necessitate any adaptation of the intrinsic or extrinsic characteristics of the products imported. This is the case, more specifically, with a measure of the kind at issue in the judgment in Cinéthèque, which, it is agreed, gave rise to a more far-reaching application of the Dassonville test beyond the bounds of discrimination and, more specifically, also brought marketing prohibitions (applicable without distinction) within that test.

In order definitively to fall outside the scope of Article 30 of the EC Treaty, the legislation in question must therefore invariably be applicable to all market participants carrying out their activities in the national territory and affect the marketing of domestic products and products from other Member States in the same manner in law and in fact. It seems to me that this is in fact the case. As far as the first condition is concerned, it appears to me that national legislation of the kind at issue does not make any distinction between economic operators from the Member State concerned and economic operators from other Member States in the sense that the latter are not assured of equal access to the domestic market. As far as the second condition is concerned, it does not appear that, on an overall view, the legislation of the purpose of which, moreover, is not to

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

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

[...]

[Footnotes mostly omitted]

2.2.2.2 *Judgment of the Court of Justice*

Tankstation't Heukske vof and J B E Boermans

Joined Cases C-401/92 and C-402/92

2 June 1994

Court of Justice

[1994] ECR I-2199

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 10 Under Article 30 of the Treaty quantitative restrictions on imports and all measures having equivalent effect are prohibited between the Member States.
- 11 The Court has consistently held that all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5).
- 12 However, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, cited above, provided that those provisions apply to all relevant traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Where those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see the judgment in joined cases c-267/91 and c-268/91 Keck and Mithouard [1993] ECR I-6097, paragraphs 16 and 17).
- 13 The conditions laid down in the judgment last cited are fulfilled in the case of rules such as those at issue in the main proceedings.
- 14 The rules in question relate to the times and places at which the goods in question may be sold to consumers. However, they apply to all relevant traders without distinguishing between the origin of the products in question and do not affect the marketing of products from other Member States in a manner different from that in which they affect domestic products.
- 15 Consequently, the reply to be given to the Gerechtshof is that Article 30 of the Treaty is to be interpreted as not applying to national rules concerning the closing of shops which apply to all traders operating within the national territory and which affect in the same manner, in law and in fact, the marketing of domestic products and of products from other Member States.

[...]

2.2.3 Case C-412/93: Leclerc

Summary of the facts and procedure

Leclerc-Siplec distributes petrol and other fuels at service stations in France. The service stations are integrated into supermarkets operated by the same group under the name E. Leclerc. Leclerc-Siplec asked the French television advertising companies TF1 publicité and M6 publicité to broadcast an advertisement for its petrol stations on television. TF1 publicité and M6 publicité refused on the ground that a provision of French law - namely Article 8 of decree no 92/280 of 27 March 1992 - prevents the distribution sector from advertising on television. That provision also prohibits the advertising on television of alcoholic beverages with alcohol content in excess of 1.2 degrees, literary publications, the cinema and the press. It appears that one of the main purposes of the prohibition is to protect France's regional daily press by forcing the sectors in question to advertise in regional daily newspapers rather than on television.

Leclerc-Siplec commenced proceedings against TF1 publicité and M6 publicité in the Tribunal de commerce de Paris. The tribunal referred to the Court the question whether Articles 30, 85, 86, 5 and 3(f) of the EEC Treaty and directive 89/552 of 3 October 1989 are to be interpreted as prohibiting a Member State from banning, by statute or by regulation, televised advertising in respect of certain sectors of economic activity, in particular the distribution sector, and more generally whether Article 8 of the decree of 27 March 1992 may be considered compatible with the aforesaid provisions.

2.2.3.1 Opinion of AG Jacobs

Société d'importation Edouard Leclerc-Siplec v TFI Publicité and M6 Publicité

Case C-412/93

9 February 1995

AG Jacobs

[1995] ECR I-0179

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

(c) Application of the judgments in Keck and Hunermund to the prohibition in question

37. Were it not for the judgment in Hunermund, it would perhaps not have been clear that the phrase "national provisions restricting or prohibiting certain selling arrangements" in Keck covered rules on advertising. For the reasons set out above, advertising restrictions may pose a particularly serious threat to the integration of markets. Possibly the Court was influenced in Hunermund by the relatively insignificant nature of the restrictions in issue there, and did not envisage the same test applying to more serious restrictions. If the test laid down in Keck is to be applied to the French rules in issue here, it will be necessary to consider whether those rules "apply to all affected traders operating within the national territory and... affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States". In my view they do. First, just as in Keck the prohibition on resale at a loss applied to all traders reselling goods in an

unaltered state, so too in this case the prohibition on television advertising is a general measure applicable to the distribution sector as a whole. Secondly, except in certain specific cases - not in issue here - such as that of goods sold by the technique of direct television marketing (see paragraph below), the prohibition is likely to have an equal impact on the marketing of domestic and imported goods. As noted below, any decline in sales by the distribution sector as a result of the prohibition would affect domestic and imported goods alike. Consequently, I conclude that, if the test laid down in *Keck* is to be applied, the prohibition falls in principle outside the scope of Article 30.

(d) An alternative analysis

38. I prefer however to take a different approach, even if that approach may lead in this case to the same conclusion. In my view the Court's reasoning - although not the result - in *Keck* is unsatisfactory for two reasons. First, it is inappropriate to make rigid distinctions between different categories of rules, and to apply different tests depending on the category to which particular rules belong. The severity of the restriction imposed by different rules is merely one of degree. Measures affecting selling arrangements may create extremely serious obstacles to imports. For example, a rule permitting certain products to be sold only in a handful of small shops in a Member State would be almost as restrictive as an outright ban on importation and marketing. The point is particularly well illustrated by restrictions on advertising: the type of restriction in issue in *Hunermund* may have had little impact on trade between Member States, but it is difficult to contend that, for example, a total ban on advertising a particular product which can lawfully be sold could fall outside Article 30. As I shall explain below, it would be more appropriate to measure restrictions against a single test formulated in the light of the purpose of Article 30.
39. Secondly, the exclusion from the scope of Article 30 of measures which "affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States" amounts to introducing, in relation to restrictions on selling arrangements, a test of discrimination. That test, however, seems inappropriate. The central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-state trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade. I have difficulty in accepting the proposition that a Member State may arbitrarily restrict the marketing of goods from another Member State, provided only that it imposes the same arbitrary restriction on the marketing of domestic goods. If a Member State imposes a substantial barrier on access to the market for certain products - for example, by providing that they may be sold only in a very limited number of establishments - and a manufacturer of those products in another Member State suffers economic loss as a result, he will derive little consolation from the knowledge that a similar loss is sustained by his competitors in the Member State which imposes the restriction.
40. Equally, from the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion: from that point of view, the fact that a Member State imposes similar restrictions on the marketing of domestic goods is simply irrelevant. The adverse effect on the Community market is in no way alleviated; nor is the adverse effect on the economies of the other Member States, and so on the Community economy. Indeed the application of the discrimination test would lead to the fragmentation of the Community market, since traders would have to accept whatever restrictions on selling arrangements happened to exist in each Member State, and would have to adapt their own arrangements accordingly in each state. Restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty.
41. The question then is what test should be applied in order to determine whether a measure falls within the scope of Article 30. There is one guiding principle which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a

Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market. In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from *Dassonville* through "*Cassis de Dijon*" to *Keck*. Virtually all of the cases are, in their result, consistent with the principle, even though some of them appear to be based on different reasoning.

42. If the principle is that all undertakings should have unfettered access to the whole of the Community market, then the appropriate test in my view is whether there is a substantial restriction on that access. That would of course amount to introducing a *de minimis* test into Article 30. Once it is recognized that there is a need to limit the scope of Article 30 in order to prevent excessive interference in the regulatory powers of the Member States, a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution. Indeed it is perhaps surprising that, in view of the avowed aim of preventing excessive recourse to Article 30, the Court did not opt for such a solution in *Keck*. The reason may be that the Court was concerned lest a *de minimis* test, if applied to all measures affecting trade in goods, might induce national Courts, who have primary responsibility for applying Article 30, to exclude too many measures from the scope of the prohibition laid down by that provision. Caution must therefore be exercised and if a *de minimis* test is to be introduced it will be necessary to define carefully the circumstances in which it should apply.
43. Clearly it would not be appropriate to apply a *de minimis* test to measures which overtly discriminate against goods from other Member States. Such measures are prohibited by Article 30 (unless justified under Article 36) even if their effect on inter-state trade is slight: there is a *per se* prohibition of overtly discriminatory measures.
44. Only in relation to measures which are applicable without distinction to domestic goods and goods from other Member States would it be necessary to introduce a requirement that the restriction, actual or potential, on access to the market must be substantial. The impact on access to the market of measures applicable without distinction may vary greatly, depending on the nature of the measure in issue. Where such a measure prohibits the sale of goods lawfully placed on the market in another Member State (as in "*Cassis de Dijon*"), it may be presumed to have a substantial impact on access to the market, since the goods are either denied access altogether or can gain access only after being modified in some way; the need to modify goods is itself a substantial barrier to market access.
45. Where, on the other hand, a measure applicable without distinction simply restricts certain selling arrangements, by stipulating when, where, how, by whom or at what price goods may be sold, its impact will depend on a number of factors, such as whether it applies to certain goods (as in *Blesgen*, *Buetor Quietlynn*), or to most goods (as in *Torfaen*), or to all goods (as in *Keck*), on the extent to which other selling arrangements remain available, and on whether the effect of the measure is direct or indirect, immediate or remote, or purely speculative and uncertain. Accordingly, the magnitude of the barrier to market access may vary enormously: it may range from the insignificant to a quasi-prohibition. Clearly, this is where a *de minimis* test could perform a useful function. The distinction recognized in *Keck* between a prohibition of the kind in issue in "*Cassis de Dijon*" and a mere restriction on certain selling arrangements is therefore valuable: the former inevitably creates a substantial barrier to trade between Member States, whereas the latter may create such a barrier. But it cannot be maintained that the latter type of measure is not capable of hindering trade contrary to Article 30 in the absence of discrimination. It should therefore be recognized that such measures, unless overtly discriminatory, are not automatically caught by Article 30, as are measures of the type at issue in "*Cassis de Dijon*", but may be caught if the restriction which they cause on access to the market is substantial.
46. It might be objected that the approach advocated above is contrary to a number of judgments in which the Court has expressly rejected the idea that a measure should be excluded from the scope

of Article 30 because its effect on imports is slight. However, in most of those cases the measure in question was plainly discriminatory, as in *Prantl*, (case 16/83 [1984] ECR 1299) *Commission v France* (case 269/83 [1985] ECR 83) and *Commission v Italy*; (case 103/84 *Commission v Italy* [1986] ECR 1759) and in the last case the effect of the measure was in any event recognized to be substantial. It is true that in *van de Haar and Kaveka de Meern* (joined cases 177 and 178/82 [1984] ECR 1797, paragraph 13 of the judgment.) the Court rejected a *de minimis* test in relation to a measure applicable without distinction (namely, a price-fixing regulation); however, it did so purely in the abstract and went on to rule, in the same judgment, that a price-fixing regulation is contrary to Article 30 only if prices are fixed at such a level as to prevent imported goods from being marketed profitably or to cancel out a competitive advantage enjoyed by the manufacturer of imported products. That is not very different, in effect, from saying that Article 30 only comes into play if there is a substantial barrier to market access.

47. A final point that should be noted is that the position is different with the prohibition of charges having equivalent effect to customs duties under Articles 12 and 16 of the Treaty. The Court has rightly held that that prohibition applies to all charges, however small. The scope of that prohibition, however, is far more specific than the scope of Article 30; moreover such charges, however small, necessarily entail impeding the flow of goods by reason of the fact that they cross a frontier, when it is the object of those Treaty provisions to eliminate such frontiers; that rationale does not apply with the same force to the prohibition of measures having equivalent effect under Article 30.
48. In *Keck* itself, the result is consistent with the view taken above. A law which prohibits all retailers of all goods from reselling goods at less than cost price is unlikely to have a significant impact on the marketing of imported goods. It has no significant effect on the global volume of imports and it does not prevent a trader in another Member State from enjoying full access to the market. The same will normally be true of legislation which restricts the opening hours of shops, at least if it is of general application and does not arbitrarily restrict marketing opportunities for a limited range of goods. Such legislation may lead to a slight reduction in the total volume of sales of goods, including imported goods, but it is unlikely to restrict substantially market access for any specific trader's goods, since its impact will be spread across the whole range of goods.

Accordingly, I reach the conclusion that Article 30 should be regarded as applying to non-discriminatory measures which are liable substantially to restrict access to the market.

50. How is that test to be applied to restrictions on advertising - as I have already suggested, in view of the significance of freedom to advertise, a total ban on the advertising of a product which may lawfully be sold in the Member State where the ban is imposed and in other Member States cannot lie outside the scope of Article 30. The effect of such a ban would be that manufacturers in other Member States would find it virtually impossible to penetrate the market in which the ban was imposed, if their products were not already known to consumers in that country. A measure that constitutes such a significant barrier to the entry of goods from other Member States must surely be equivalent in effect to a quantitative restriction on trade between Member States. Even if the discrimination test formulated in *Keck* were applied, the same conclusion would be reached: an advertising ban, far from being neutral in its effects, tends to operate to the particular detriment of imported goods.
51. The measure directly in issue in this case is the prohibition of advertising on television for the distribution sector imposed by the French legislation. But the reality of the barrier to imports which even a partial ban on the advertising of specific products may represent may be illustrated by the example of another prohibition in the same legislation. In France it is against the law to advertise on television alcoholic beverages with an alcohol content in excess of 1.2 degrees. Such a measure might prove to be justified under Article 36 of the Treaty, but it cannot be contended that it falls outside Article 30. If a German brewer whose beers have not hitherto been marketed in France decides to enter the French market, he is unlikely to have a significant impact on the market unless he can promote his products by advertising. Television is recognized as a particularly effective

medium for advertising, especially as regards consumer products intended for a mass market. If the German brewer is prevented from advertising on television, he will find it more difficult to penetrate the French market, which will continue to be dominated by the well-established domestic brands.

52. It is not necessary, however, for the Court to rule on that prohibition. Nor is it necessary to consider whether there is a substantial impact on access to the market as regards the other classes of products excluded from television advertising, namely literary publications, newspapers and magazines. The question in this case is whether a partial ban on advertising for a certain sector of the economy, namely a ban on television advertising by the distribution sector, falls outside the scope of Article 30. The answer to that question must, in my view, depend on the effects of the partial ban. If it creates a substantial barrier to the entry of goods manufactured in another Member State, then it is incompatible with Article 30 unless justified on grounds recognized by Community law. If, on the other hand, a partial ban on advertising has no substantial effect on inter-state trade and does not constitute a barrier to market penetration for imported goods, there is no objection to excluding it from the ambit of Article 30.
53. The effect of the prohibition on television advertising by the distribution sector appears more marginal than the prohibition relating to the advertising of alcoholic beverages. As I have pointed out, it applies to the whole range of goods and is thus not open to the objection that certain categories of goods are targeted arbitrarily. If shops are prevented from advertising on television, the impact on trade will be predominantly - but not exclusively - internal to the Member State in question. Various possible effects could be envisaged: for example, there may be a transfer of advertising revenue from undertakings which operate television stations to undertakings which provide alternative methods of publicity, including proprietors of newspapers (both national and regional); the larger retailers, in particular the owners of chains of supermarkets, who are in practice the most likely users of television advertising, may find that their competitive advantage over small shop-keepers is less than it would otherwise be; and the total volume of sales of goods in general, including imports, may decline slightly if distributors are not able to promote sales by television advertising. None of those effects, however, amounts to a substantial impact on trade between Member States sufficient to bring Article 30 into play.
54. However, although the effects of a restriction applicable only to the distribution sector are generally internal to the Member State concerned, it is possible to imagine situations in which a genuine obstacle to imports may arise. One example is provided by the system of direct television marketing which has become increasingly common in Europe in recent years. A distributor advertises goods on television and then displays telephone numbers through which the goods can be ordered in the various countries in which the television channel is received. If such a system were prohibited in France, the resulting obstacle to trade could hardly be described as insubstantial. That type of obstacle is moreover inimical to the concept of a single market, because it prevents distributors from developing a global marketing strategy. If in such a case a distributor established in another Member State sought to rely on the Treaty, then an issue might well arise under Article 30 or Article 59. Again, it is possible to envisage that an undertaking from another Member State might seek to establish a supermarket chain in France: in that case, the prohibition of televised advertising in the distribution sector might raise an issue under Article 52 of the Treaty.
55. No such issues are raised in the present case. As I have said, the effects of a restriction applicable to the distribution sector, such as in issue here, are primarily internal. The restriction affects only one form of advertising, although the most effective as far as mass consumer goods are concerned; and advertisement of the goods themselves is not affected other than indirectly. As in the case of legislation restricting the opening hours of shops, mentioned above, (46) the measure may result in a slight reduction in the total volume of sales of goods, including imports. But it cannot be said to have a substantial impact on access to the market. It therefore falls in my view outside the scope of Article 30.

[...]

2.2.3.2 *Judgement of the Court of Justice*

Société d'importation Edouard Leclerc-Siplec v TFI Publicité and M6 Publicité

Case 412/93

9 February 1995

Court of Justice

[1995] ECR I-0179

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

Article 30 of the Treaty

- 18 It has been consistently held that all 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 (judgment in case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5).
- 19 A law or regulation such as that at issue in the main proceedings, which prohibits televised advertising in the distribution sector, is not designed to regulate trade in goods between Member States. Moreover, such a prohibition does not prevent distributors from using other forms of advertising.
- 20 Such a prohibition may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives distributors of a particular form of advertising their goods. But the question remains whether such a possibility is sufficient to characterize the prohibition in question as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.
- 21 The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, cited above, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see the judgments in joined cases C-267 and 268/91 Keck and Mithouard [1993] ECR I-6097, paragraphs 16 and 17, and case C-292/92 Hunermund and others [1993] ECR I-6787, paragraph 21).

- 22 A provision such as that at issue in the main proceedings concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution).
- 23 Furthermore, those provisions, which apply regardless of the type of product to all traders in the distribution sector, even if they are both producers and distributors, affect the marketing of products from other Member States and that of domestic products in the same manner.
- 24 The reply should accordingly be that on a proper construction Article 30 of the Treaty does not apply where a Member State, by statute or by regulation, prohibits the broadcasting of televised advertisements for the distribution sector.

[...]

2.2.4 Case C-391/92: Commission v. Greece (Infant Milk)

Summary of the facts and procedure

Greek law provided that, in the Hellenic republic, processed milk for infants may be sold only in pharmacists' shops except in municipalities possessing no pharmacists' shop, in which case that product may be marketed in other shops. The Commission taking the view that this legislation constituted a measure having equivalent effect to a quantitative restriction on imports, prohibited by Article 30 of the Treaty, and exceeded what was necessary to achieve the aims of protecting the health of infants and promoting breast feeding brought an action under Article 169 of the EEC Treaty.

2.2.4.1 Opinion of AG Lenz

Commission of the European Communities v Hellenic Republic

Case 391/92

4 April 1995

AG Lenz

[1995] ECR I-1621

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

I. Applicability of Article 30 of the Treaty

- 14 A preliminary consideration is appropriate in order to resolve the specific case before the Court: it must be assumed that Article 30 goes beyond a mere prohibition of discrimination. Otherwise, all sorts of national measures would be conceivable which - albeit applicable without distinction - might be likely to impede the access to the market of products from other Member States. The aim of Article 30 continues to be to prohibit such measures in order to establish and maintain an internal market.
- 15 Preventing or, in any event, impeding access to the market is also conceivable through the imposition of particular sales conditions. Depending on the type and scope of the provision on sales, it is possible for there to be restrictions which specifically affect imports. To exclude them a priori from the scope of Article 30 seems to me to be inappropriate and also certainly not to have been intended by the judgment in Keck and Mithouard on the face of paragraph 17.
- 16 What is decisive, therefore, is how 'certain' selling arrangements within the meaning of that judgment can be defined or what sales conditions are not covered thereby and to which the

classical test for measures having equivalent effect to quantitative restrictions apply. To my mind, when choosing from among the conceivable approaches that solution should be selected which is most readily to be harmonized with the requirements of the free movement of goods and the former case-law.

- 17 Among the attempts to affect a theoretical grasp of the judgment in Keck and Mithouard, it has been argued that the case-law might be construed as the introduction of a de minimis rule. Others interpret the case-law as a rule relating to the burden of proof.
- 18 Apart from the fact that in its earlier case-law the Court rejected the introduction of a requirement for the measures in question to have an appreciable effect (Cases 16/83 Prantl [1984] ECR 1299, paragraph 20, and C-126/91 Yves Rocher [1993] ECR I-2361, paragraph 21) and there is no support for a rule on the burden of proof in that case-law either (as a result of the broad definition of measures having equivalent effect, there is no need for proof of the restrictive effect of a measure; conversely, it could not avail a Member State to argue and possibly to prove that the measure in question does not in fact impede imports of goods) a concrete way of considering the particular measure at issue is afforded by those two approaches jointly and by the judgment in Keck and Mithouard. What should be determinative is the hindrance to the access to the market of imported goods.

II - The pharmacists' monopoly as a measure having equivalent effect

- 19 The introduction of the pharmacists' sales monopoly for infant formulae should be subjected to a 'preliminary examination' against this background. Admittedly, a sales monopoly effectuated by a state measure is a selling arrangement, but it is capable of guiding and channelling sales. This compulsorily excludes other sales channels, which is certainly capable of adversely affecting imports. Since the use in certain circumstances of proven distribution systems is forbidden, this makes product marketing more onerous and more expensive, which has a direct effect on imports. The development of new manners of marketing may in these circumstances prove more difficult for foreign manufacturers than for domestic ones, who are familiar with conditions on the home market. Rules governing the marketing of a product or a group of products generally are more intensive in their effects than rules governing general conditions of sale.
- 20 Whether import volumes for a class of product differ in absolute terms before and after the introduction of such a measure cannot be decisive in determining whether the measure is to be classed as a measure having equivalent effect, since actual import volumes are also apt to be influenced by substantially different factors, which in turn are affected by the characteristics of the product. In addition, failure of imports to increase, as would otherwise have been possible, would also constitute a restriction.
- 21 In my view, the actual introduction of the sales monopoly is in itself capable of impeding imports and hence it should be assumed that Article 30 is applicable. The establishment of monopolies at the marketing level seems, even according to the Court's estimation after the judgment in Keck and Mithouard, to be a measure having equivalent effect within the meaning of Article 30. In the judgments in Ligur Carni (Judgment in joined cases C-227/91, C-318/91 and C-319/91 Ligur Carni [1993] ECR I-6621) and la Crespelle, (Judgment in case C-323/93 la Crespelle [1994] ECR I-5077) which were concerned with exclusive rights of certain bodies at the marketing stage, the Court considered Articles 30 and 36 without having recourse solely to the Keck and Mithouard case-law.
- 22 According to the Court's case-law both before and after the judgment in Keck and Mithouard, a pharmacists' monopoly must therefore be categorized as a measure having equivalent effect.
- 23 Furthermore, in the instant case there are particular circumstances which alone suggest that the arrangement in question constitutes a measure having equivalent effect to a quantitative

restriction on imports. In Greece no domestic production of infant formulae takes place. The Commission asserted this claim and it was confirmed by the Greek government in response to a question. There are apparently fourteen competing products on the market, coming from other Member States of the Community. Consequently, it is not possible to make a genuine comparison of the restriction of access to the market for domestic and imported products. Accordingly, any increased difficulty resulting from the measure at issue as regards marketing possibilities specifically affects imported products.

- 24 Whilst in the judgment in Keck and Mithouard there is a criterion for excluding 'certain' selling arrangements from the scope of Article 30 which is worded as follows, 'provided that [the sales arrangements] affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States', the converse conclusion can be inferred in this case that since in fact only the marketing of products from other Member States is affected, the measure must be categorized as a measure having equivalent effect.
- 25 For those reasons, there is, to my mind, no doubt that the monopoly arrangement should be assessed as being a measure having equivalent effect within the meaning of Article 30 of the Treaty.

[...]

[Footnotes mostly omitted]

2.2.4.2 Judgement of the Court of Justice

Commission of the European Communities v Hellenic Republic

Case 391/92

29 June 1995

Court of Justice

[1995] ECR I-1621

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 7 In support of its action, the Commission maintains that national legislation which reserves the sale of a certain category of product in principle solely to pharmacies constitutes a measure having equivalent effect prohibited by Article 30 of the Treaty on the ground that the prohibition of certain forms of marketing channels sales and is consequently likely to hinder, albeit indirectly, intra-Community trade in the product concerned. In reply to a question put to it by the Court, the Commission stated that the legislation at issue did not constitute a mere restriction of certain selling arrangements within the meaning of the judgment in joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 but entailed a restrictive effect on trade by making the importation of the product concerned from the other Member States more difficult and more onerous: if that product could be sold in large stores their price would drop, which would lead to an increase in demand and therefore in the volume of imports.
- 8 The Greek government denies that its legislation constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty. According to the Greek government, the only effect of the measure called in question by the Commission is to restrict the commercial freedom of traders and fulfils the conditions which the Court in *Keck and Mithouard*, cited above, stated as having to be satisfied for a measure to fall outside the scope of Article 30. It points out, moreover, that the measure has entailed neither a fall in the consumption of infant milk during the year in which the measure was introduced by comparison with the preceding year, nor an increase in the price of the product concerned, nor problems of supply for consumers.
- 9 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.
- 10 The Court has consistently held that any measure which is capable of, directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (Judgment in case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).
- 11 National legislation which reserves the sale of processed milk for infants solely to pharmacies is not designed to regulate trade in goods between Member States.

- 12 Such legislation may, admittedly, restrict the volume of sales and hence the volume of sales of processed milk for infants originating in other Member States inasmuch as it deprives traders other than pharmacists of the possibility of marketing that product. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports, within the meaning of Article 30 of the Treaty.
- 13 In that respect it should be observed that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, cited above, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see, in particular, the judgments in Keck and Mithouard, cited above, paragraphs 16 and 17, in case c-292/92 Hunermund and others [1993] ECR I-6787, paragraph 21, and in case c-412/93 société d'importation Edouard Leclerc-Siplec [1995] ECR I-0000, paragraph 21).
- 14 So far as concerns the Greek legislation called in question in this case by the Commission, those conditions are fulfilled.
- 15 Thus, that legislation, the effect of which is to limit the commercial freedom of traders irrespective of the actual characteristics of the product referred to, concerns the selling arrangements of certain goods, inasmuch as it prohibits the sale, other than exclusively by pharmacies, of processed milk for infants and thus generally determines the points of sale where they may be distributed.
- 16 Moreover, the legislation objected to by the Commission, which applies, without distinction according to the origin of the products in question, to all of the traders operating within the national territory, does not affect the sale of products originating in other Member States any differently from that of domestic products.
- 17 The fact, invoked by the Commission, that the Hellenic republic does not itself produce processed milk for infants does not undermine those findings. The applicability of Article 30 of the Treaty to a national measure for the general regulation of commerce, which concerns all the products concerned without distinction according to their origin, cannot depend on such a purely fortuitous factual circumstance, which may, moreover, change with the passage of time. If it did, this would have the illogical consequence that the same legislation would fall under Article 30 in certain Member States but fall outside the scope of that provision in other Member States.
- 18 The situation would be different only if it was apparent that the legislation at issue protected domestic products which were similar to processed milk for infants from other Member States or which were in competition with milk of that type.
- 19 In this instance, the Commission has not shown that that was the case.
- 20 It follows from the foregoing considerations that the Greek legislation called in question by the Commission is confined to limiting the places where the product concerned may be distributed by regulating the marketing of that product, without thereby preventing access to the market of products from other Member States or specifically placing them at a disadvantage.

- 21 That being so, the Greek legislation reserving the sale of processed milk for infants in principle exclusively to pharmacies falls outside the scope of Article 30 of the Treaty. The Commission's application must therefore be dismissed.

[...]

2.2.5 Joined cases C-69/93 and C-258/93: Punto Casa

**Punto Casa SpA v Sindaco del Comune di Capena et Comune di Capena and Promozioni
Polivalenti Venete Soc. coop. arl (PPV)**

v

Sindaco del Comune di Torri di Quartesolo and Comune di Torri di Quartesolo

Joined cases C-69/93 and C-258/93

2 June 1994

Court of Justice

ECR [1994] I-2363

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By orders of 16 December 1992 and 22 March 1993, received at the Court on 15 March and 27 April respectively, the Pretura Circondariale di Roma (Rome District Magistrates Court), Sezione Distaccata di Castelnuovo di Porto (Castelnuovo di Porto Division), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30 and 36 of the Treaty, in order to enable it to assess, in the light of those provisions, the Italian legislation on the closure of retail outlets on Sundays.
- 2 Those questions were raised in connection with action taken by the authorities against the operators of two supermarkets for infringing that legislation.
- 3 Italian Law No 558 of 28 July 1971 regulates business opening hours and sale by retail. Article 1(2)(a) of that Law provides for total closure of shops on Sundays and public holidays, other than in the exceptional cases provided for by that Law.
- 4 Article 10 of the Law provides for administrative penalties to be imposed in the event of infringement. Specific provisions concerning opening times are laid down by the regional authorities. Supervision to ensure compliance with the rules in force is entrusted to the mayors of the municipalities concerned, who may impose penalties.
- 5 One of the plaintiffs in the main proceedings operates a supermarket located within the Municipality of Capena, the other operates a shopping centre situated within the Municipality of Torri di Quartesolo. Since both the supermarket and the shopping centre were frequently open on Sundays and public holidays, the mayors of the two municipalities in question imposed administrative penalties on the operators concerned.
- 6 The plaintiffs in the main proceedings thereupon appealed to the competent court, claiming that a substantial part of the turnover achieved related to products from other Member States of the Community. In their view, the national provisions at issue were therefore incompatible with Article 30 of the Treaty.

- 7 In those circumstances the Pretura Circondariale di Roma, Sezione Distaccata di Castelnuovo di Porto, stayed the proceedings and referred to the Court, in Case C-69/93, the following questions for a preliminary ruling:

"(1) Does a provision of national law which (save for certain products) requires retail shops to close on Sundays, but does not prohibit Sunday working, and imposes the penalty of forced closure on shops in breach of that requirement, thus significantly reducing the sales of such shops, including sales of goods produced in other Member States of the Community, with a consequent reduction in the volume of imports from such States, constitute:

- (a) a measure having an effect equivalent on a restriction on imports within the meaning of Article 30 of the Treaty of Rome and subsequent rules of Community law adopted in pursuance of the principles laid down therein; or
- (b) a means of arbitrary discrimination or a disguised restriction on trade between Member States; or
- (c) or a measure which is disproportionate and inappropriate to the aim pursued by the provision of national law; given that:
 - large stores on average sell a greater quantity of products imported from other Member States than that sold by small and medium-sized businesses;
 - the turnover achieved by large stores on Sundays cannot be compensated for by substitute purchases by customers on other days of the week, such purchases being made within a commercial network which in general obtain its supplies from domestic producers?

(2) If the answer to Question 1 is in the affirmative, does the national measure in question fall within the derogations from Article 30 provided for in Article 36 of the Treaty of Rome, or other derogations provided for by Community law?"

- 8 The questions submitted to the Court in Case C-258/93 are in substance identical to those set out above.

Question 1

- 9 The first question seeks to ascertain whether national legislation of the kind at issue in the main proceedings falls within the scope of Article 30 of the Treaty.
- 10 According to Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.
- 11 The Court has consistently held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (judgment in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5).
- 12 The Court has also held that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, within the meaning of the Dassonville judgment, cited above, provided that those provisions apply to all relevant traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Where those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see the judgment in

Joined Cases C-267 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraphs 16 and 17).

- 13 In the case of legislation of the kind at issue, which is concerned with the arrangements whereby goods may be sold to consumers, the conditions set out in that judgment are fulfilled.
- 14 The legislation at issue applies, irrespective of the origin of the products in question, to all the traders concerned and does not affect the marketing of products from other Member States any differently from the marketing of domestic products.
- 15 Accordingly, the answer to the national court must be that Article 30 of the Treaty is to be interpreted as not applying to national legislation on the closure of shops which applies to all traders operating within the national territory and which affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Question 2

- 16 In view of the answer to the first question, there is no need to answer the second question.

[...]

2.2.6 Joined Cases 418 etc. /93, 9 etc. /94: Semeraro

Semeraro Casa Uno Srl and Others v Sindaco del Comune di Erbusco and Others

**Joined Cases 418-421, 460-462 &
464/93, C 9-11, 14-15, 23-24 and 332/94**

20 June 1996

Court of Justice

ECR [1996] I-2975

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By orders of 18 July, 28 October, 11 November, 2 and 16 December 1993, and 10 October 1994, received at the Court between 13 October 1993 and 13 December 1994, the Pretura Circondariale di Roma (Rome District Magistrates' Court), Sezione Distaccata di Castelnuovo di Porto (Castelnuovo di Porto Division), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty questions concerning the interpretation of Articles 30, 36 and 52 of that Treaty, Council Directive 64/223/EEC of 25 February 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade (OJ, English Special Edition 1963-1964, p. 123), and Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75), hereinafter "Directive 83/189".
- 2 The questions were raised in connection with action taken by the public authorities against operators of large shopping centres for infringing the Italian legislation on the closing of retail outlets on Sundays and public holidays.
- 3 Italian Law No 558 of 28 July 1971 regulates the opening hours of businesses and retail outlets. Article 1(2)(a) of that Law provides that shops must close all day on Sundays and public holidays save in the exceptional cases laid down in that Law. Detailed provisions on opening hours are to be laid down by the Regions. Article 10 of the Law provides for administrative penalties for non-compliance. The mayors of the relevant communes are responsible for monitoring compliance and may impose penalties.
- 4 The applicants in the main proceedings (hereinafter "the applicants") operate large shopping centres located in various communes. When these centres stayed open on certain Sundays and public holidays the mayors of the communes concerned imposed administrative penalties on the applicants.
- 5 The applicants then brought proceedings in the national court. They claimed that a significant proportion of the turnover achieved in the shopping centres related to goods from other Member States of the Community. In their view, the national provisions in question were accordingly incompatible with Community law, in particular Article 30 of the Treaty.

- 6 In those circumstances the national court stayed proceedings and referred the following questions to the Court in Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94 and C-24/94:

"1. Does a provision of national law which (save for certain products) requires retail shops to close on Sundays and public holidays, but does not prohibit working in such shops on those days (and imposes the penalty of forced closure on shops in breach of that requirement), thus significantly reducing their sales, including sales of goods produced in other Member States of the Community, with a consequent reduction in the volume of imports from such States, constitute:

- (a) a measure having an effect equivalent to a restriction on imports within the meaning of Article 30 of the Treaty of Rome and secondary rules of Community law adopted in pursuance of the principles laid down therein; or
- (b) a means of arbitrary discrimination or a disguised restriction on trade between Member States; or
- (c) a measure which is disproportionate and inappropriate to the socio-ethical aim pursued by the provision of national law;

given that:

- large-scale distributors and organized distribution centres (the category to which the applicants belong) on average sell a greater quantity of products imported from other Member States than that sold by small and medium-sized traders;
- the turnover achieved by large-scale distributors and organized distribution centres on Sundays cannot be compensated for by substitute purchases by customers on other days of the week, such purchases being made within a commercial network which in general obtains its supplies from domestic producers?

2. If the answer to Question 1 is in the affirmative, does the national measure in question fall within the derogations from Article 30 provided for in Article 36 of the Treaty of Rome, or other derogations provided for by Community law?"

- 7 In Case C-332/94 the national court referred the following questions:

"Whereas

- large-scale distributors and organized distribution centres, which are mostly located on the periphery of, or outside, large towns, offer for sale and sell on average a greater quantity of products imported from other Member States than is offered for sale and sold by small and medium-sized traders, who unlike the former are widely scattered throughout Italy, in both town and country;
- sales by large-scale distributors and organized distribution centres on Sundays alone, in the brief periods in which they are allowed to sell on that day, are greater than sales made by those businesses during the working week;
- sales which large-scale distributors and organized distribution centres cannot make on public holidays are not compensated for by those which they make during the working week, and therefore unsatisfied customer demand is directed towards other trade outlets (made up of small and medium-sized businesses closer to consumers and easy to reach even on public holidays) which, however, in general obtain their supplies only from domestic producers;

Question 1

Does a provision of national law which (save for certain products) requires retail shops to close on Sundays and public holidays, but does not prohibit working in such shops even on those days (and penalizes breach of that requirement by forced closure and withdrawal of licences), constitute:

- (a) a measure having an effect equivalent to a restriction on imports within the meaning of Article 30 of the Treaty of Rome and secondary rules of Community law adopted in pursuance of the principles laid down therein; or
- (b) a means of arbitrary discrimination or a disguised restriction on trade between Member States; or
- (c) a measure which is disproportionate and inappropriate in relation to the socio-ethical aim pursued by the provision of national law; or
- (d) an infringement of Article 52 of the EEC Treaty concerning freedom of establishment and of subsequent Community legislation enacted in implementation of that principle; or
- (e) an infringement of Article 2(2) of Directive 64/223/EEC concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade; or
- (f) an infringement of Directives 83/189 and 88/182 concerning the elimination of technical barriers to trade between the Member States, in view of the fact that the prohibition on Sunday opening of shops is a general prohibition in appearance only, which is in fact subject to exemptions for a series of products which are, except in a very few unavoidable instances, exclusively of domestic origin?

Question 2

If the answer to the first question, in each of its parts, is in the affirmative, does the national measure fall within the derogations from Article 30 provided for in Article 36 of the Treaty of Rome, or within other derogations provided for by Community law?"

- 8 By orders of the President of the Court of 10 November 1993, 27 January 1994 and 23 February 1994, some of the cases were joined for the purposes of the written and oral procedure and of the judgment. By order of the President of the Fifth Chamber of the Court of 19 October 1995 all the cases were joined for the purposes of the oral procedure and of the judgment.

Article 30 of the Treaty

- 9 In its judgment in Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355 the Court gave a ruling on questions from the same national court which were substantively identical to those submitted in the present cases, with the exception of Question 1(d) to (f) in Case C-332/94.
- 10 In that judgment the Court applied its decision in *Keck and Mithouard* (Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097).
- 11 In the latter case, which concerned national legislation imposing a general prohibition on resale at a loss, the Court found that such legislation may restrict the volume of sales and, consequently, the volume of sales of products from other Member States in so far as it deprives traders of a method of sales promotion. The Court then had to decide whether such a possibility was sufficient to characterize the legislation in question as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty (paragraph 13).
- 12 The Court considered that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements was not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of *Dassonville* (Case 8/74 [1974] ECR 837, paragraph 5), so long as those provisions applied to all

relevant traders operating within the national territory and so long as they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (paragraph 16).

- 13 The Court pointed out that, provided those conditions were fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State was not by nature such as to prevent their access to the market or to impede access any more than it impeded the access of domestic products. Such rules therefore fell outside the scope of Article 30 of the Treaty (paragraph 17).
- 14 In its judgment in *Punto Casa* and *PPV*, cited above, the Court held, first, that in the case of legislation of the kind at issue, which was concerned with the circumstances of sale to consumers, the conditions set out in the *Keck* and *Mithouard* judgment were fulfilled (paragraph 13). The Court further found that the legislation at issue was applicable, irrespective of the origin of the products in question, to all the traders concerned and did not affect the marketing of products from other Member States any differently from the marketing of domestic products (paragraph 14).
- 15 In those circumstances the Court held that Article 30 of the Treaty was to be interpreted as not applying to national legislation on the closing times of shops which applied to all traders operating within the national territory and which affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
- 16 Following delivery of the judgment in *Punto Casa* and *PPV*, the Court asked the national court whether it considered that the questions raised in Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94 and C-24/94, which had been stayed until delivery of that judgment, had been answered in full.
- 17 In its reply, the national court asked that the cases pending before the Court should proceed to a ruling, stating essentially that because of the particular features of the Italian commercial market the legislation in question discriminated indirectly against imported goods.
- 18 The national court points out in particular that the Italian market is distinguished, first, by a large number of small businesses catering for a very limited number of customers and, second, by large shopping centres located on the periphery of, or outside, towns. In view of the limited amount of free time available to the consumer on working days, those large centres are not easily accessible to their customers except on Sundays and, because those centres cannot be reached sufficiently easily and frequently, customer demand is diverted towards small businesses closer to the consumer and therefore towards national products, since small businesses do not stock foreign products in the same variety and quantity.
- 19 In those circumstances, the national court considered that the effects of the legislation in question on the marketing of national products and on the marketing of products from other Member States were not in fact the same.
- 20 The national court gave the same reasons and put similar questions in Case C-332/94.
- 21 According to the applicants, the national legislation does indeed have the effects described by the national court so that the conditions laid down in the judgment in *Keck* and *Mithouard* are not fulfilled.
- 22 The *Comune di Terlizzi*, the defendant in Case C-9/94, the Greek Government and the Commission take the view, on the other hand, that the judgment in *Punto Casa* and *PPV* gives a full and proper answer to the question concerning Article 30 raised by the national court.

- 23 In the present cases, the observations made by the national court on the effects of the national rules at issue are identical in substance to those it made in the cases giving rise to the judgment in *Punto Casa* and *PPV*.
- 24 There is no evidence that the aim of the rules at issue is to regulate trade in goods between Member States or that, viewed as a whole, they could lead to unequal treatment between national products and imported products as regards access to the market. In this connection, it must be reiterated that national rules whose effect is to limit the marketing of a product generally, and consequently its importation, cannot on that ground alone be regarded as limiting access to the market for those imported products to a greater extent than for similar national products. As the Court stated in paragraph 13 of *Keck and Mithouard*, the fact that national legislation may restrict the volume of sales generally, and hence the volume of sales of products from other Member States, is not sufficient to characterize such legislation as a measure having an effect equivalent to a quantitative restriction.
- 25 Moreover, the Court has repeatedly recognized that national legislation such as that at issue pursues an aim which is justified under Community law, and that national rules restricting the opening of shops on Sundays reflect certain choices relating to particular national or regional socio-cultural characteristics. It is for the Member States to make those choices in compliance with the requirements of Community law (see Case C-169/91 B & Q [1992] ECR I-6635, paragraph 11).
- 26 The Court went on to rule in that case that Article 30 of the Treaty is to be interpreted as meaning that the prohibition it lays down does not apply to national legislation prohibiting retailers from opening their premises on Sundays.
- 27 No new factor has emerged in these proceedings which might justify an assessment different from that made by the Court in the judgments in *Punto Casa* and *PPV* and B & Q.
- 28 The reply to be given to the national court must therefore be that, on a proper construction, Article 30 of the Treaty does not apply to national rules on the closing times of shops applicable to all traders exercising an activity on national territory and affecting in the same way in law and in fact the marketing of national products and products from other Member States.

Article 52 of the Treaty and Directive 64/223

- 29 In Case C-332/94 the national court also asks whether Article 52 of the Treaty and Directive 64/223, concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade, preclude national rules on the closing times of shops such as those at issue in the main proceedings.
- 30 As far as Directive 64/223 is concerned, the aim of that directive is the attainment, in the field of wholesale trade activities, of freedom of establishment, as guaranteed, with direct effect after the expiry of the transition period, by Article 52 of the Treaty (see the judgment in Case 198/86 *Conradi and Others* [1987] ECR 4469, paragraph 8).
- 31 There is therefore no need to examine Directive 64/223 separately from Article 52 in this instance.
- 32 As far as Article 52 is concerned, suffice it to state that, as has been found above, the legislation in question is applicable to all traders exercising their activity on national territory; that its purpose is not to regulate the conditions concerning the establishment of the undertakings concerned; and that any restrictive effects which it might have on freedom of establishment are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom.

- 33 Accordingly, neither Article 52 of the Treaty nor Directive 64/223 preclude national rules on the closing times of shops such as those at issue in the main proceedings.

Directive 83/189

- 34 In Case C-332/94 the national court seeks to ascertain, lastly, whether Directive 83/189, laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 88/182, applies to national rules on the closing times of shops such as those at issue in the main proceedings.
- 35 Whether or not the directive was applicable at the material time, it does not apply *ratione materiae* to national rules on the closing times of shops such as those at issue here.
- 36 Under Article 8 of the directive, the obligation to give prior notification applies to any draft technical regulation.
- 37 Article 1(5) defines "technical regulation" as "technical specifications, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing or use in a Member State or a major part thereof, except those laid down by local authorities". Under Article 1(1), "technical specification" means "a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marketing or labelling ...".
- 38 The obligation to notify laid down by the directive does not therefore apply to national rules which do not lay down the characteristics required of a product but are confined to regulating the closing times of shops.
- 39 Accordingly, Directive 83/189 is not applicable to national rules on the closing times of shops such as those at issue in the main proceedings.

[...]

2.2.7 Case C-470/93: Mars

2.2.7.1 *Opinion of AG Leger*

Verein gegen Unwesen in Handel und Gewerbe Köln v Mars

Case C-470/93

28 March 1995

AG Leger

[1995] ECR I-1923

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 Since delivery of the judgment in the Keck case on 24 November 1993 national rules applicable without distinction '... restricting or prohibiting certain selling arrangements...' do not constitute measures having an effect equivalent to quantitative restrictions within the meaning of the Dassonville judgment, '... so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. On the other hand, rules making the marketing of products subject to certain conditions (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) are covered by Article 30 of the EEC Treaty.
- 2 What is meant by the term 'selling arrangement'?
- 3 Does it cover rules regulating advertising? Do rules relating to advertising on the packaging of marketed products concern a product characteristic as referred to in paragraph 15 of the Keck judgment or a selling arrangement within the meaning of paragraph 16 of that judgment?
- 4 In his opinion in the Hunermund case, Mr Advocate General Tesauro felt that this distinction, applied to the field of advertising, would give rise to difficulties of interpretation which could only be resolved case by case.
- 5 The question referred to the Court by the Landgericht Köln is an illustration of this.
- 6 The Mars company markets in Germany ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands which it imports from France where they are lawfully produced and packaged with uniform presentation for distribution throughout Europe.
- 7 The packaging is marked '+10%'.
- 8 The Verein gegen Unwesen in Handel und Gewerbe (association against improper practices in trade and businesses) is seeking an injunction against the Mars company pursuant to paragraph 3 of the Gesetz gegen den unlauteren Wettbewerb (law on unfair competition, hereinafter 'the UWG'), which provides that: 'whoever in commercial transactions for the purposes of competition gives misleading information about, in particular, the quality, origin, method of manufacture or price

calculation of specific goods... or of the whole offer, or about price lists, the nature or source of the supply of goods... or about the reason or purpose of the sale, or about the quantity of stocks held may be restrained by action from continuing to provide such information'.

9 It bases its action on two grounds:

1) that that presentation is liable to mislead consumers who would expect the price at which the goods are offered to be the same as that under the old presentation;

2) that the '+10%' marking gives the impression that the product has been increased by a quantity corresponding to the coloured part of the new packaging. The visual highlighting of the '+10%' marking is much greater than the increase in volume which it represents.

10 The question referred by the Landgericht Köln is whether, where 'ice-cream snacks' lawfully produced and marketed in a Member State in the presentation described in the application, the principle of the free movement of goods allows those products to be prohibited from being marketed in that presentation in another Member State on the two grounds raised by the plaintiff association.

11 I will consider two points in turn. Does a prohibition of marketing of ice-cream bars bearing the promotional marking '+10% ice-cream' on their wrappers constitute an obstacle to trade between Member States and does it fall within the scope of application of Article 30 of the Treaty? if this is the case, is such a prohibition justified on the grounds advanced by the plaintiff association?

I - The scope of application of Article 30 of the Treaty

12 Paragraph 3 of the UWG is a rule which is applicable without distinction to national and imported products alike. It allows a prohibition to be imposed on the marketing in Germany of ice-cream bars bearing the advertising which I have mentioned.

13 Does that prohibition relate to the characteristics of the product, within the meaning of paragraph 15 of the Keck judgment, or to selling arrangements within the meaning of paragraph 16 of that judgment?

14 The first case, remember, concerns rules which, in the absence of harmonization, require a product to have a certain presentation, a certain composition or certain intrinsic qualities which are different from those required in the Member State of origin.

15 By requiring an imported product to be repackaged or its substantive qualities to be modified in order for it to be sold in the state of importation, such rules constitute an obstacle to trade by making imports more costly or more difficult and therefore favouring, or creating a competitive advantage for, the domestic industry of that state.

16 In the second case, the national rules have no link with imports and apply to commercial activity in general. They affect imports only indirectly in that they may lead to a reduction or compression of sales but they do not affect the marketing of products from other Member States in a different way than the marketing of domestic products. They do not prevent their access to the market. They impede imports no more than they impede domestic products. I would refer, for example, to rules governing the opening of shops on Sunday. (7)

17 Provisions on advertising are divided between the two cases. Whereas some rules have only an indirect link with free movement and escape application of Article 30 of the Treaty, others are indissociable from the presentation of the product and are caught by that Article.

- 18 The situation is this:
- 19 Some regulate commercial activity in general and have no link with imports. They do not prevent marketing of the product itself under a uniform presentation and with uniform characteristics - those imposed by the Member State of origin - throughout the Community. They do not affect the functioning of the internal market. They reflect a political choice: what are the limits to be placed on advertising?
- 20 Thus, since the Keck judgment, the Court has held in its judgment in the Hunermund case, cited above, that Article 30 of the Treaty does not apply to a rule of professional conduct, laid down by the pharmacists' professional body in a Member State, which prohibits pharmacists from advertising pharmaceutical products outside the pharmacy. Such a rule constitutes a selling arrangement within the meaning of paragraph 16 of the Keck judgment in so far as '... the application of such rules to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products'.
- 21 Similarly, the Court held, on the same grounds, in its judgment of 9 February 1995 in case C-412/93 Société d'importation Edouard Leclerc-Siplec, that the French decree which bans televised advertising in the distribution sector '... concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution) '.
- 22 Other rules on advertising, however, affect sales of imported products to a greater extent than sales of domestic products and are likely to impede intra-Community trade.
- 23 This is certainly the case with a prohibition of advertising appearing on product packaging. First, the importer will be forced to modify the presentation, packaging and promotional markings appearing on the product in order to comply with the legislation of the state of importation, which will mean that he must bear additional costs which are not borne by the domestic producer in that state. Secondly, he will be obliged to arrange separate distribution channels and to make sure that products bearing the promotional words or marks in question are not marketed on the territory of the state in which the prohibition applies.
- 24 Even in the case-law prior to the Keck judgment the principle was clearly laid down that the obligation to mark a product with information, in so far as it might require the manufacturer or the importer to alter the product's presentation, is apt to make the marketing of the product in certain Member States more difficult and therefore has a restrictive effect on trade.
- 25 In its judgment in the Pall case, (case-238/89 Pall[1990] ECR I-4827) the Court held that a prohibition in a Member State against using the symbol (R) beside the trade mark in order to indicate that the trade mark was registered constituted an obstacle '... because it can force the proprietor of a trade mark that has been registered in only one Member State to change the presentation of his products according to the place where it is proposed to market them and to set up separate distribution channels in order to ensure that products bearing the symbol (R) are not in circulation in the territory of Member States which have imposed the prohibition at issue'.
- 26 Recently, in its judgment in the 'Clinique' case, (case C-315/92 Verband sozialer Wettbewerb eV v Clinique laboratoire SNC and Estee Lauder cosmetics GmbH [1994] ECR I-317) the Court held that the name of a product is one of its characteristics within the meaning of paragraph 15 of the Keck judgment. A prohibition of using in the state of importation a name which is lawful in the state of origin constitutes an obstacle to intra-Community trade. The Court held in fact that 'the fact that by reason of that prohibition the undertaking in question is obliged in that Member State alone to

market its products under a different name and to bear additional packaging and advertising costs demonstrates that this measure does affect free trade'.

- 27 The Court went on to conclude that Articles 30 and 36 of the EC Treaty and Article 6(2) of Council Directive 76/768/EEC of 27 July 1976, precludes a national measure which prohibits the importation and marketing of a product classified and presented as a cosmetic on the ground that the product bears the name 'Clinique'.
- 28 The pall and 'Clinique' cases concerned prohibitions of distribution - based, as our case, on the UWG - owing to the different presentation of the products. (20) this is also so in the present case. The '+10% ice-cream' marking is both informative and promotional. It appears on the packaging of the product itself. Some of the wrappers at issue in the main proceedings are printed in five languages. There is therefore no special packaging for the German market. It is only if the '+10%' marking is prohibited by the German legislation that special wrapping for that state is required. Prohibiting such a marking would therefore mean that the product would have to be repackaged and specific packaging and promotional markings used for Germany. The impediment to trade is therefore obvious.
- 29 As one can see, not all rules governing advertising are to be put in the category of those concerning selling arrangements. One can therefore understand why the Keck judgment excludes only certain selling arrangements from the scope of Article 30.
- 30 The distinction made in the Keck judgment strikes down the formula which the Court had applied to many sets of national rules governing advertising:
- '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'.
- 31 That very broad formulation has certainly allowed rules on selling arrangements which, under paragraph 16 of the Keck judgment, now fall outside the ambit of Article 30 of the Treaty, to be caught by that Article.

[...]

[Footnotes mostly omitted]

2.2.7.2 *Judgement of the Court of Justice*

Verein gegen Unwesen in Handel und Gewerbe Köln v Mars

Case C-470/93

6 July 1995

Court of Justice

[1995] ECR I-1923

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 11 The first question to be examined is whether a prohibition of the marketing of goods bearing on their packaging a publicity marking such as that in question in the main proceedings constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.
- 12 According to the case-law of the Court, Article 30 is designed to prohibit any trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see the judgment in case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5). The Court has held that, in the absence of harmonization of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by Article 30, even if those rules apply without distinction to national products and to imported products (judgment in joined cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15).
- 13 Although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such to hinder intra-Community trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs.
- 14 Such a prohibition therefore falls within the scope of Article 30 of the Treaty.

[...]

2.2.8 Case C-368/95: Familiapress

Vereinigte Familiapress Zeitungsverlags- Und Vertriebs GmbH

v

Heinrich Bauer Verlag

Case C-368/95

Court of Justice

26 June 1997

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 15 September 1995, received at the Court on 29 November 1995, the Handelsgericht Wien (Commercial Court, Vienna), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 30 of that Treaty.
- 2 That question was raised in proceedings brought by Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH ('Familiapress'), an Austrian newspaper publisher, against Heinrich Bauer Verlag, a newspaper publisher established in Germany, for an order that the latter should cease to sell in Austria publications offering readers the chance to take part in games for prizes, in breach of the Gesetz über unlauteren Wettbewerb 1992 (Austrian Law on Unfair Competition; 'the UWG').
- 3 Heinrich Bauer Verlag publishes the weekly magazine 'Laura' in Germany, which it also distributes in Austria. The 22 February 1995 issue contained a crossword puzzle. Readers sending in the correct solution were entitled to be entered in a draw for two prizes of DM 500. There were two other puzzles in the same issue, for prizes of DM 1 000 and DM 5 000 respectively, which were also to be awarded by drawing lots among the persons sending in the correct answers. The following issues invited readers to play similar games. Each issue indicated that there would be more puzzles the following week.
- 4 According to the order for reference, that practice is contrary to Austrian law. Paragraph 9a(1)(1) of the UWG contains a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. Paragraph 9a(2)(8) of the UWG authorizes prize competitions and draws for which 'the value of the potential individual entries, obtained by dividing the total number of prizes at stake by the number of entry vouchers (lots) distributed, does not exceed 5 schillings and the total value of the prizes competed for does not exceed 300 000 schillings', this, however, was declared inapplicable to the press by an amending law of 1993. Consequently, there has, since then, no longer been any exception to the prohibition on publishers of periodicals inviting consumers to take part in draws.
- 5 Since there is no provision to the same effect in the German Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition), the Handelsgericht Wien took the view that the prohibition of the sale of periodicals under the UWG potentially affected intra-Community trade. It therefore stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 30 of the EC Treaty to be interpreted as precluding application of legislation of Member State A prohibiting an undertaking established in Member State B from selling in Member State A a periodical produced in Member State B, where that periodical contains prize puzzle competitions or games which are lawfully organized in Member State B?'

- 6 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.
- 7 The Court has consistently held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).
- 8 It should also be borne in mind that, in accordance with the case-law beginning with *Cassis de Dijon* (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649), in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30, even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15).
- 9 By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (*Keck and Mithouard*, paragraph 16).
- 10 The Austrian Government maintains that the prohibition at issue falls outside Article 30 of the Treaty. In its view, the possibility of offering readers of a periodical the chance to take part in prize competitions is merely a method of promoting sales and hence a selling arrangement within the meaning of the judgment in *Keck and Mithouard*.
- 11 The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck and Mithouard*.
- 12 Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 30 of the Treaty.
- 13 The Austrian Government and the Commission argue, however, that the aim of the national legislation in question is to maintain press diversity, which is capable of constituting an overriding requirement for the purposes of Article 30.
- 14 They point out that shortly after the *Gesetz über die Deregulierung des Wettbewerbs* (Law on the Deregulation of Competition) entered into force in Austria in 1992 and liberalized inter alia the organization of prize competitions, fierce competition set in between periodicals publishers, as a

result of their offering larger and larger gifts, in particular the chance to take part in prize competitions.

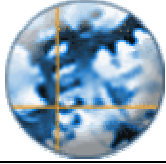
- 15 Fearing that small publishers might not be able to resist that cut-throat competition in the long term, in 1993 the Austrian legislature excluded the press from the application of Paragraph 9a(2)(8) of the UWG which, as mentioned in paragraph 4 of this judgment, authorizes to a certain extent the organization of prize competitions and draws linked to the sale of products or the supply of services.
- 16 In the explanatory memorandum of the relevant bill, the Austrian Government pointed out in particular that, given the relatively low selling price of periodicals, especially of daily newspapers, there was a risk, in spite of the limits to prizes set by Article 9a(2)(8) of the UWG, that consumers would attach more importance to the chance of winning than to the quality of the publication (explanatory memorandum of the Government bill, RV 365 Blg No 18. GP).
- 17 The Austrian Government and the Commission also point to the very high degree of concentration of the press in Austria. The Austrian Government states that in the early 1990s the market share of the largest press group was 54.5% in Austria, as compared with only 34.7% in the United Kingdom and 23.9% in Germany.
- 18 Maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (see Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraph 30, and Case C-148/91 *Vereiniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 10).
- 19 However, the Court has also consistently held (*Cassis de Dijon*, cited above; Case C-238/89 *Pall* [1990] ECR I-4827, paragraph 12, and Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 15) that the provisions of national law in question must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade.
- 20 Admittedly, in Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 61, concerning freedom to provide services, the Court held that the special features of lotteries justify allowing national authorities a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. The Court therefore considered that it was for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.
- 21 Games such as those at issue in the main proceedings are not, however, comparable to the lotteries the features of which were considered in *Schindler*.
- 22 The facts on which that judgment was based were concerned exclusively, as the Court expressly pointed out, with large-scale lotteries in respect of which the discretion enjoyed by national authorities was justified because of the high risk of crime or fraud, given the amounts which could be staked and the winnings which could be held out to players (paragraphs 50, 51 and 60).
- 23 By contrast, such concerns for the maintenance of order in society are not present in this case. The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine; and under Austrian legislation, draws are prohibited only in the press.

- 24 Furthermore, it is to be noted that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43).
- 25 Those fundamental rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ERT, paragraph 44).
- 26 A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v Austria Series A No 276).
- 27 In the light of the considerations set out in paragraphs 19 to 26 of this judgment, it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.
- 28 To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.
- 29 It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market.
- 30 In carrying out that study, it will have to define the market for the product in question and to have regard to the market shares of individual publishers or press groups and the trend thereof.
- 31 Moreover, the national court will also have to assess the extent to which, from the consumer's standpoint, the product concerned can be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising on the title page referring to the chance of winning a prize, the likelihood of winning, the value of the prize or the extent to which winning depends on a test calling for a measure of ingenuity, skill or knowledge.
- 32 The Belgian and Netherlands Governments consider that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition on the distribution of newspapers which afford the chance of winning a prize, such as blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize.
- 33 The documents before the Court suggest that the prohibition in question would not constitute a barrier to the marketing of newspapers where one of the above measures had been taken. If the national court were nevertheless to find that this was the case, the prohibition would be disproportionate.
- 34 In the light of the foregoing considerations, the answer to be given to the national court's question must be that Article 30 of the EC Treaty is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an

undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means. This assumes, *inter alia*, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

[...]

2.2.9 Case C-265/95: Commission v France (Spanish strawberries)



NOTE AND QUESTIONS

Following this case, the Council adopted a new procedure in order to address Member State failures regarding Article 28 faster than by the traditional way of bringing an action under Article 226 (formerly 169) of the EC Treaty - Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, Official Journal L 337, 12/12/1998 p. 0008 - 0009

Commission of the European Communities v French Republic

Case C-265/95

9 December 1997

Court of Justice

ECR [1997] I-06959

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By application lodged at the Court Registry on 4 August 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to take all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Republic has failed to fulfil its obligations under the common organization of the markets in agricultural products and Article 30 of the EC Treaty, in conjunction with Article 5 of that Treaty.
2. The Commission states that for more than a decade it has regularly received complaints concerning the passivity of the French authorities in face of violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States. Those acts consist, inter alia, in the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and the damaging of those goods when on display in shops in France.
3. The Commission has noted that as from 1993 certain groupings of French farmers, including an organization known as 'Coordination Rurale', launched a systematic campaign to restrict the supply of agricultural products from other Member States, which takes the form in particular of threats to wholesalers and retailers in order to induce them to stock exclusively French products, the

imposition of a minimum selling price for the products concerned, and the organization of checks to verify whether those traders are complying with the instructions given.

4. Thus, from April to July 1993 that campaign was directed particularly at strawberries originating in Spain. In August and September 1993 tomatoes from Belgium were treated in the same way.
5. In 1994 the same type of action, involving threats against shopping centres and destruction of goods and means of transport, was directed against Spanish strawberries in particular. Violent incidents took place on two occasions at the same place within a period of two weeks but the police who were present took no action to provide effective protection for the lorries and their loads.
6. The Commission also refers to other cases of vandalism which have hindered the free movement in France of agricultural products originating in Italy and Denmark.
7. After the Commission had raised the matter on several occasions with the French authorities, it took the view that, by failing to take all necessary and proportionate measures in order to prevent the free movement of agricultural products from being obstructed by criminal acts of private individuals, the French Republic had failed to fulfil its obligations under the common organizations of the markets in agricultural products and Article 30 of the EC Treaty, in conjunction with Article 5 of that Treaty. Consequently, by letter of 19 July 1994, the Commission gave the French Government formal notice under Article 169 of the Treaty to submit its observations within a period of two months on the failure to fulfil obligations with which it was charged.
8. In a letter dated 10 October 1994 the French Government replied that it had always strongly condemned the acts of vandalism committed by French farmers. It stated that the preventive measures which it had taken by way of surveillance, protection and the gathering of information had brought about a notable reduction in incidents between 1993 and 1994. Moreover, the fact that public prosecutors had systematically conducted criminal investigations showed the French authorities' determination to bring prosecutions in respect of all criminal conduct aimed at obstructing imports of agricultural products from other Member States. However, unpredictable commando-type operations conducted by small, highly mobile groups made it extremely difficult for the police to intervene and explained the often unsuccessful nature of the criminal proceedings initiated. Lastly, the practices of 'Coordination Rurale' that aimed to regulate the market for agricultural products through threats and destruction were the subject of proceedings before the Conseil de la Concurrence (Competition Council).
9. None the less, on 20 April 1995 further serious incidents occurred in the south west of France, in the course of which agricultural products from Spain were destroyed.
10. On 5 May 1995 the Commission therefore delivered a reasoned opinion under the first paragraph of Article 169 of the Treaty. In that opinion it stated that, by failing to take all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Republic had failed to fulfil its obligations under the common organizations of the markets in agricultural products and Article 30 of the EC Treaty, in conjunction with Article 5 of that Treaty. Pursuant to the second paragraph of Article 169 of the Treaty, the Commission called upon the French Republic to adopt the measures necessary in order to comply with that opinion within a period of one month from the date thereof.
11. On 16 June 1995 the French Government stressed that it had adopted all the measures open to it in order to ensure the free movement of goods on its territory and that the means of deterrence introduced had substantially contained the number of acts of violence committed in 1995. At national level, joint action to combat the recurrence of acts of vandalism had been agreed between the ministries concerned. This included, in particular, increased surveillance and instructions to prefects and the police to take firm action. Moreover, at the local level, an early-warning scheme

consisting of a system of close surveillance of premises at risk had enabled a number of incidents to be prevented. Although it was impossible to prevent all risk of destruction, since the actions concerned were unforeseeable, isolated acts, whose perpetrators were very difficult to identify, in 1994 the Tribunal Correctionnel de Nîmes (Criminal Court, Nîmes) had convicted 24 farmers on charges of damage to property. Since the entry into force on 1 March 1994 of Article 322-13 of the new Criminal Code, prosecution and punishment for threats of damage to property had been made more effective. Finally, responsibility for the damage caused was assumed by the State and instructions had been given to expedite settlement of compensation for the loss or damage sustained by the economic operators concerned.

12. According to the Commission, however, in 1995 the French Minister for Agriculture stated that, although he disapproved of and condemned the violence by the farmers, he in no way contemplated any intervention by the police in order to put a stop to it.
13. On 3 June 1995 three lorries transporting fruit and vegetables from Spain were the subject of acts of violence in the south of France, without any intervention by the police. At the beginning of July 1995 Italian and Spanish fruit were once again destroyed by French farmers.
14. The Commission therefore brought the present action.
15. By orders of 14 and 27 February 1996 respectively, the Court granted the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain leave to intervene in support of the form of order sought by the Commission.
16. In support of its application the Commission claims that Article 30 of the Treaty and the common organizations of the markets in fruit and vegetables, which are based on the same principle of the elimination of obstacles to trade, prohibit quantitative restrictions on imports between the Member States and any measures having equivalent effect. Furthermore, in accordance with Article 5 of the Treaty, the Member States are required to take all appropriate measures to ensure fulfilment of their obligations arising out of that Treaty.
17. Consequently, the interception of means of transport and the damaging of agricultural products originating in other Member States, and also the climate of insecurity caused by the threats made by various farmers' organizations against distributors of fruit and vegetables from those States, which have been found to have taken place in France, constitute an obstacle to intra-Community trade in those products, which the Member States are required to prevent by adopting appropriate measures, including measures against private individuals who imperil the free movement of goods.
18. In the present case, the fact that, year after year, serious incidents continued to hinder the importation and transit in France of fruit and vegetables originating in other Member States shows that the preventive and penal measures to which the French Government refers in defence are in practice neither adequate nor proportionate for the purpose of deterring the perpetrators of such offences from committing and repeating them. Moreover, it is clear from the factual evidence before the Commission that the French authorities have persistently abstained from taking effective action to prevent violent acts by farmers in France or to prosecute and punish them for the commission of such acts.
19. The United Kingdom Government and the Spanish Government support the form of order sought by the Commission.
20. On the other hand, the French Government contends that there is no foundation for the Commission's action.

21. Thus, it claims that it put into effect, under conditions similar to those applicable to comparable breaches of domestic law, all necessary and appropriate means to prevent actions by private individuals that impeded the free movement of agricultural products and to prosecute and punish them for such actions. The surveillance measures implemented in 1993 enabled the number of
22. However, in view of the large number of lorries transporting agricultural products in France and the wide variety of their destinations, on the one hand, and the unforeseeable nature of actions by farmers acting in small, commando-type groups, on the other, it is not possible to eliminate all risk of destruction. The latter reason also explains why it is very difficult to identify the perpetrators and to prove their individual participation in the acts of violence so as systematically to prosecute and punish such persons. Six more persons have, however, been convicted or placed under investigation since 1994. Moreover, the police must be allowed a discretion in deciding whether they should intervene in order to safeguard public order. In any event, the State compensates the victims of the offences on the basis of liability without fault on the part of the public authorities. Thus, a sum in excess of FF 17 million was paid by way of damages in respect of the years 1993, 1994 and 1995.
23. The French Government adds that the dissatisfaction of French farmers is due to the considerable increase in exports of Spanish products since the accession of the Kingdom of Spain, which has led to a substantial fall in prices magnified by the competitive devaluation of the peseta and the dumping prices charged by Spanish producers. The French market for fruit and vegetables was seriously disrupted by the fact that the transitional period provided for on that accession had not been accompanied by any mechanism for monitoring the export prices charged by Spanish producers. The French Government also states that, far from having adopted a protectionist attitude, in this case it had demonstrated its constructive approach by taking steps in the Council to resolve the difficulties on the market for fruit and vegetables and in conferring with the Spanish authorities.
24. In order to determine whether the Commission's action is well founded, it should be stressed from the outset that the free movement of goods is one of the fundamental principles of the Treaty.
25. Article 3(c) of the EC Treaty provides that, for the purposes set out in Article 2, the activities of the Community are to include an internal market characterized by the abolition, as between Member States, of, inter alia, obstacles to the free movement of goods.
26. Pursuant to the second paragraph of Article 7a of the EC Treaty, the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.
27. That fundamental principle is implemented by Article 30 et seq. of the Treaty.
28. In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.
29. That provision, taken in its context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to flows of imports in intra-Community trade.
30. As an indispensable instrument for the realization of a market without internal frontiers, Article 30 therefore does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.

31. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.
32. Article 30 therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.
33. In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.
34. It is therefore not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories.
35. However, it falls to the Court, taking due account of the discretion referred to above, to verify, in cases brought before it, whether the Member State concerned has adopted appropriate measures for ensuring the free movement of goods.
36. It should be added that, by virtue of the combined provisions of Articles 38 to 46 and Article 7(7) of the EC Treaty, the foregoing considerations apply also to Council regulations on the common organization of the markets for the various agricultural products (see Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, paragraphs 53 and 54, and Case C-228/91 *Commission v Italy* [1993] ECR I-2701, paragraph 11, relating to regulations on the common organization of the markets in fishery products).
37. As regards more specifically the present case, the facts which gave rise to the action brought by the Commission against the French Republic for failure to fulfil obligations are not in dispute.
38. The acts of violence committed in France and directed against agricultural products originating in other Member States, such as the interception of lorries transporting those products, the destruction of their loads and violence towards drivers, as well as threats to wholesalers and retailers and the damaging of goods on display, unquestionably create obstacles to intra-Community trade in those products.
39. It is therefore necessary to consider whether in the present case the French Government complied with its obligations under Article 30, in conjunction with Article 5, of the Treaty, by adopting adequate and appropriate measures to deal with actions by private individuals which create obstacles to the free movement of certain agricultural products.
40. It should be stressed that the Commission's written pleadings show that the incidents to which it objects in the present proceedings have taken place regularly for more than 10 years.
41. It was as long ago as 8 May 1985 that the Commission first sent a formal letter to the French Republic calling on it to adopt the preventive and penal measures necessary to put an end to acts of that kind.
42. Moreover, in the present case the Commission reminded the French Government on numerous occasions that Community law imposes an obligation to ensure de facto compliance with the

principle of the free movement of goods by eliminating all restrictions on the freedom to trade in agricultural products from other Member States.

43. In the present case the French authorities therefore had ample time to adopt the measures necessary to ensure compliance with their obligations under Community law.
44. Moreover, notwithstanding the explanations given by the French Government, which claims that all possible measures were adopted in order to prevent the continuation of the violence and to prosecute and punish those responsible, it is a fact that, year after year, serious incidents have gravely jeopardized trade in agricultural products in France.
45. According to the summary of the facts submitted by the Commission, which is not contested by the French Government, there are particular periods of the year which are primarily concerned and there are places which are particularly vulnerable where incidents have occurred on several occasions during one and the same year.
46. Since 1993 acts of violence and vandalism have not been directed solely at the means of transport of agricultural products but have extended to the wholesale and retail sector for those products.
47. Further serious incidents of the same type also occurred in 1996 and 1997.
48. Moreover, it is not denied that when such incidents occurred the French police were either not present on the spot, despite the fact that in certain cases the competent authorities had been warned of the imminence of demonstrations by farmers, or did not intervene, even where they far outnumbered the perpetrators of the disturbances. Furthermore, the actions in question were not always rapid, surprise actions by demonstrators who then immediately took flight, since in certain cases the disruption continued for several hours.
49. Furthermore, it is undisputed that a number of acts of vandalism were filmed by television cameras, that the demonstrators' faces were often not covered and that the groups of farmers responsible for the violent demonstrations are known to the police.
50. Notwithstanding this, it is common ground that only a very small number of the persons who participated in those serious breaches of public order has been identified and prosecuted.
51. Thus, as regards the numerous acts of vandalism committed between April and August 1993, the French authorities have been able to cite only a single case of criminal prosecution.
52. In the light of all the foregoing factors, the Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in this case, cannot but find that, having regard to the frequency and seriousness of the incidents cited by the Commission, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them.
53. That finding is all the more compelling since the damage and threats to which the Commission refers not only affect the importation into or transit in France of the products directly affected by the violent acts, but are also such as to create a climate of insecurity which has a deterrent effect on trade flows as a whole.
54. The above finding is in no way affected by the French Government's argument that the situation of French farmers was so difficult that there were reasonable grounds for fearing that more

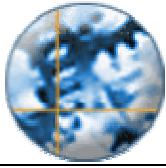
determined action by the competent authorities might provoke violent reactions by those concerned, which would lead to still more serious breaches of public order or even to social conflict.

55. Apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly (see, to that effect, Case C-52/95 *Commission v France* [1995] ECR I-4443, paragraph 38).
56. It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators.
57. In the present case the French Government has adduced no concrete evidence proving the existence of a danger to public order with which it could not cope.
58. Moreover, although it is not impossible that the threat of serious disruption to public order may, in appropriate cases, justify non-intervention by the police, that argument can, on any view, be put forward only with respect to a specific incident and not, as in this case, in a general way covering all the incidents cited by the Commission.
59. As regards the fact that the French Republic has assumed responsibility for the losses caused to the victims, this cannot be put forward as an argument by the French Government in order to escape its obligations under Community law.
60. Even though compensation can provide reparation for at least part of the loss or damage sustained by the economic operators concerned, the provision of such compensation does not mean that the Member State has fulfilled its obligations.
61. Nor is it possible to accept the arguments based on the very difficult socio-economic context of the French market in fruit and vegetables after the accession of the Kingdom of Spain.
62. It is settled case-law that economic grounds can never serve as justification for barriers prohibited by Article 30 of the Treaty (see, *inter alia*, Case 288/83 *Commission v Ireland* [1985] ECR 1761, paragraph 28).
63. As regards the suggestion by the French Government, in support of those arguments, that the destabilization of the French market for fruit and vegetables was brought about by unfair practices, and even infringements of Community law, by Spanish producers, it must be remembered that a Member State may not unilaterally adopt protective measures or conduct itself in such a way as to obviate any breach by another Member State of rules of Community law (see, to that effect, Case C-5/94 *R v MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, paragraph 20).
64. This must be so a fortiori in the sphere of the common agricultural policy, where it is for the Community alone to adopt, if necessary, the measures required in order to deal with difficulties which some economic operators may be experiencing, in particular following a new accession.
65. Having regard to all the foregoing considerations, it must be concluded that in the present case the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.

66. Consequently, it must be held that, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Government has failed to fulfil its obligations under Article 30, in conjunction with Article 5, of the Treaty and under the common organizations of the markets in agricultural products.

[...]

2.2.10 Case C-122/00: Schmidberger



NOTE AND QUESTIONS

This is an important decision where the Court has to deal with a clash between the free movement of goods and human rights.

For an even more recent decision on this issue see also Case C-36/02: Omega in Unit 7. Can human rights - or morality and human dignity, as was the case in Omega - represent an exception to the free movement of goods and services?

Eugen Schmidberger, Internationale Transporte und Planzüge

Case C-112/00

12 June 2003

Court of Justice

ECR [2003] I-000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Transitforum Austria Tirol, an association for the protection of the environment, organised a demonstration from 12 to 13 June 1998 on the Brenner motorway to bring to the attention of the public the problems caused by the increase in traffic on that route and to call upon the Austrian authorities to take corrective measures. On 15 May 1998, it duly informed the competent administrative authorities (the Bezirkshauptmannschaft in Innsbruck) and the media of the demonstration, which passed on the information to Austrian, German and Italian road-users. That demonstration, which the Austrian authorities found to be lawful as a matter of national law, took place peacefully on the appointed date and caused the complete closure of the Brenner motorway to road traffic for 30 hours.

Schmidberger, a company specialising in transport between Italy and Germany, brought an action before the Austrian courts seeking compensation from Austria, which it considered to be liable for a restriction of the free movement of goods contrary to Community law. It claimed damages of ATS 140 000 (EUR 10

174.20) because five of its heavy-goods vehicles were immobilised for four consecutive days (the day before the demonstration was a bank holiday and the two following days fell at the weekend, during which lorries may not, in principle, operate).

The Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court), Innsbruck stresses that the requirements of Community law must be taken into account. More particularly, in its view, it is necessary to determine whether the principle of the free movement of goods requires Member States to ensure free access to major trunk routes and whether that obligation prevails over fundamental rights, including the freedoms of expression and assembly in issue in this case. It is on this point, in particular, that it seeks the guidance of the Court of Justice.

Judgement:

[...]

- 46 It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.
- 47 First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.
- 48 On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.
- 49 Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.
- 50 In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

Whether there is a restriction of the free movement of goods

- 51 It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.
- 52 Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2

of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to inter alia the free movement of goods.

- 53 The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.
- 54 That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.
- 55 In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.
- 56 It is settled case-law since the judgment in Case 8/74 Dassonville [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 Commission v France [1997] ECR I-6959, paragraph 29).
- 57 In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (Commission v France, cited above, paragraph 30).
- 58 The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (Commission v France, cited above, paragraph 31).
- 59 Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (Commission v France, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.
- 60 Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.
- 61 Paragraph 53 of the judgment in Commission v France, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.
- 62 It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by

individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.

- 63 It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.
- 64 In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Whether the restriction may be justified

- 65 In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.
- 66 However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.
- 67 Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.
- 68 In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.
- 69 It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.
- 70 In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.
- 71 According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by

international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25).

- 72 The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (Bosman, cited above, paragraph 79). That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'
- 73 It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, inter alia, ERT, cited above, paragraph 41, and Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14).
- 74 Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.
- 75 It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, inter alia, Case 12/86 Demirel [1987] ECR 3719, paragraph 28).
- 76 In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.
- 77 The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.
- 78 First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649.
- 79 Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 26, Case C-60/00 Carpenter [2002] ECR I-6279, paragraph 42, and Eur. Court HR, Steel and Others v. The

- 80 Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).
- 81 In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.
- 82 The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.
- 83 As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.
- 84 By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.
- 85 Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France*, cited above.
- 86 Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.
- 87 Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic

operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

- 88 Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*, cited above.
- 89 Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.
- 90 The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.
- 91 An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.
- 92 In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.
- 93 Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.
- 94 In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

The conditions for liability of the Member State

- 95 It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.

- 96 In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

[...]

2.2.11 Joined Cases C-34-36/95: De Agostini

Konsumentombudsmannen (KO) and De Agostini (Svenska) Förlag AB (C-34/95),
and

Konsumentombudsmannen (KO) and TV-Shop i Sverige AB (C-35/95 and C-36/95)

Joined cases C-34/95, C-35/95 and C-36/95

9 July 1997

Court of Justice

[1997] ECR I-3843

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure:

In the three cases, the television advertising in question was retransmitted to Sweden by satellite from the UK and shown on TV 3 and TV 4 without having been previously broadcasted from another Member State. While TV 3 is a company established in the UK, broadcasting television programmes by satellite from the UK to Denmark, Sweden and Norway, TV 4 is a channel operating in Sweden under license in accordance with the Swedish broadcasting law.

The Consumer Ombudsman brought an action for an order prohibiting De Agostini, a Swedish company, from marketing a children's magazine on dinosaurs, on the ground that its advertising on television through the channels of TV 3 and TV 4 is designed to attract the attention of children less than 12 years of age, in a way contrary to the Swedish Broadcasting Law.

TV Shop presents products in television spots of channel TV 3, where after the customer can place an order for the product by telephone. Sales servicing and contact with customers take place in the various countries of reception; the products are delivered by post. Again, the Ombudsman brought an action against TV Shop for use of certain marketing practices prohibited by Swedish law.

In those circumstances, the Swedish court asked the ECJ about the compatibility of the Swedish legislation with Articles 30 and 59 of the EC Treaty and of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member states concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p.23).

Judgment:

[...]

- 27 In order to ensure freedom to provide television broadcasts, Article 2 of the Directive provides that all broadcasts emanating from the Community and intended for reception within the Community, in particular those intended for reception in another Member State, must comply with the legislation of the originating Member State applicable to broadcasts intended for the public in that Member State and with the provisions of the Directive. The corollary of this is that, subject to the power accorded to them by Article 2(2), Member States must ensure freedom of reception and must not impede

retransmission on their territory of television broadcasts coming from other Member States for reasons which fall within the fields coordinated by the Directive.

- 28 Further, according to the 13th recital of the preamble to the Directive, the Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting and therefore does not affect the responsibility of the Member States with regard to the organization and financing of broadcasts and the content of programmes. It is clear from the 17th recital that the Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy overriding considerations of consumer protection, fair trading and competition.

[...]

- 31 The Directive also covers the content of television advertising. Thus, Article 12 provides that television advertising must not prejudice respect for human dignity, include any discrimination on grounds of race, sex or nationality, be offensive to religious or political beliefs, encourage behaviour prejudicial to health or to safety or encourage behaviour prejudicial to the protection of the environment. Articles 13 and 14 lay down an absolute prohibition of television advertising for cigarettes and other tobacco products and of television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls. Article 15 lays down a number of restrictions concerning television advertising for alcoholic beverages. Article 16 lays down a number of principles regarding, more particularly, the protection of minors, which is also dealt with in Chapter V by Article 22.
- 32 Consequently, it follows that, as regards the activity of broadcasting and distribution of television programmes, the Directive, whilst coordinating provisions laid down by law, regulation or administrative action on television advertising and sponsorship, does so only partially.
- 33 Although the Directive provides that the Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes.
- 34 Thus the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.
- 35 Consequently, where a Member State's legislation such as that in question in the main proceedings which, for the purpose of protecting consumers, provides for a system of prohibitions and restraining orders to be imposed on advertisers, enforceable by financial penalties, application of such legislation to television broadcasts from other Member States cannot be considered to constitute an obstacle prohibited by the Directive. (...)

As regards Article 30 of the Treaty

- 39 In paragraph 22 of its judgment in *Leclerc-Siplec*, cited above, the Court held that legislation which prohibits television advertising in a particular sector concerns selling arrangements for products belonging to that sector in that it prohibits a particular form of promotion of a particular method of marketing products.
- 40 In *Joined Cases C-267/91 and C-268/91 Keck and Mithouard* [1993] ECR I-6097, at paragraph 16, the Court held that national measures restricting or prohibiting certain selling arrangements are not covered by Article 30 of the Treaty, so long as they apply to all traders operating within the national

territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

- 41 The first condition is clearly fulfilled in the cases before the national court.
- 42 As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.
- 43 Although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it is to be noted that in its observations De Agostini stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.
- 44 Consequently, an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, is not covered by Article 30 of the Treaty, unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.
- 45 In the latter case, it is for the national court to determine whether the ban is necessary to satisfy overriding requirements of general public importance or one of the aims listed in Article 36 of the EC Treaty if it is proportionate to that purpose and if those aims or requirements could not have been attained or fulfilled by measures less restrictive of intra-Community trade.
- 46 Further, according to settled case-law, fair trading and the protection of consumers in general are overriding requirements of general public importance which may justify obstacles to the free movement of goods (Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') [1979] ECR 649, paragraph 8).
- 47 Consequently, the answer to the question must be that, on a proper construction of Article 30 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States, are necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 of the Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade.

As regards Article 59 of the Treaty

- 48 As was held in Case 352/85 Bond van Adverteerders [1988] ECR 2085, advertising broadcast for payment by a television broadcaster established in one Member State for an advertiser established in another Member State constitutes provision of a service within the meaning of Article 59 of the Treaty.
- 49 Consequently, it must be examined whether domestic rules such as those in question in the cases before the national court constitute restrictions, prohibited by Article 59 of the Treaty, on freedom to provide services.
- 50 Provisions such as those in question in the main proceedings, where they restrict the possibility for television broadcasters established in the broadcasting State to broadcast, for advertisers established in the receiving State, television advertising specifically directed at the public in the receiving State, involve a restriction on freedom to provide services.

- 51 Where the rules applicable to services have not been harmonized, restrictions on the freedom guaranteed by the Treaty in this field may result from application of national rules affecting any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation (Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 12).
- 52 In such a case, it is for the national court to determine whether those provisions are necessary to meet overriding requirements of general public importance or one of the aims laid down in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether the aims or overriding requirements could have been met by less restrictive means.
- 53 Further, according to settled case-law, fair trading and the protection of consumers in general are overriding requirements of public interest which may justify restrictions on freedom to provide services (see, in particular, *Collectieve Antennevoorziening Gouda*, cited above, paragraph 14, and Case C-384/93 *Alpine Investments* [1995] ECR I-1141).
- 54 The answer to be given must therefore be that, on a proper construction of Article 59 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims mentioned in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

The second question

- 55 By its second question the Marknadsdomstol asks the Court for an interpretation of Community law with regard to a provision of a domestic broadcasting law which provides that advertisements broadcast during commercial breaks on television must not be designed to attract the attention of children under 12 years of age.
- 56 Application of such a domestic provision to advertising broadcast by a television broadcaster established in the same State cannot be contrary to the Directive since Article 3(1) of that provision does not contain any restriction as regards the interests which the Member States may take into consideration when laying down more strict rules for television broadcasters established in their territory. However, the situation is not the same where television broadcasters established in another Member State are concerned.
- 57 In Articles 16 and 22, the Directive contains a set of provisions specifically devoted to the protection of minors in relation to television programmes in general and television advertising in particular.
- 58 The broadcasting State must ensure that those provisions are complied with.
- 59 This certainly does not have the effect of prohibiting application of legislation of the receiving State designed to protect consumers or minors in general, provided that its application does not prevent retransmission, as such, in its territory of broadcasts from another Member State.
- 60 However, the receiving Member State may no longer, under any circumstances, apply provisions specifically designed to control the content of television advertising with regard to minors.
- 61 If provisions of the receiving State regulating the content of television broadcasts for reasons relating to the protection of minors against advertising were applied to broadcasts from other

Member States, this would add a secondary control to the control which the broadcasting Member State must exercise under the Directive.

- 62 It follows that the Directive is to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.

[...]

2.2.12 Case C-379/98: PreussenElektra AG v. Schleswag AG

PreussenElektra AG v Schleswag AG

Case C-379/98

13 March 2001

Court of Justice

ECR [2001] I-02099

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

PreussenElektra is an electricity supplier which operates more than 25 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network.

A German statute dating from 1990 and amended in 1994 and 1998 (the Stromeinspeisungsgesetz) requires public electricity supply undertakings (which may be either public sector or private sector) to purchase electricity produced within their area of supply from renewable sources, including wind energy, at minimum prices which are higher than the real economic value of that type of electricity. When the German Government notified the initial draft law to the Commission in 1990, the latter authorised it, holding it to be in accordance with the energy policy aims of the Communities. That system was amended in 1998: a mechanism for allocating extra costs due to that purchase obligation between electricity supply undertakings and upstream electricity network operators was established.

Schleswag, which is a regional electricity supply undertaking in the Land Schleswig-Holstein, is required to purchase electricity produced within its area of supply from renewable energy sources. That purchase obligation involved an additional cost which rose from DEM 5.8 million in 1991 to about DEM 111.5 million in 1998. Pursuant to the allocation mechanism laid down by the German statute, Schleswag applied to PreussenElektra for payment of certain sums which it had already spent in accordance with its purchase obligation.

PreussenElektra brought an action before the Landgericht Kiel (Regional Court, Kiel) for recovery of DEM 500,000, representing the sum paid to Schleswag in compensation for the additional costs caused by the purchase of wind electricity. PreussenElektra considers that that payment was contrary to Community law since it amounted to applying an amended system of State aid that had not been notified to the Commission.

The Landgericht Kiel asked the ECJ whether the amendment of the statutory system did indeed constitute an amendment of aid within the meaning of Community law, and whether, moreover, the system thus established was contrary to the prohibition on quantitative restrictions on trade.

Judgement:

[...]

- 54 It should be noted as a preliminary observation, first, that there is no dispute that an obligation to purchase electricity produced from renewable energy sources at minimum prices, such as that laid down by Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence.
- 55 In addition, as the reply by the German Government to a written question of the Court shows, the public authorities have a majority shareholding in only two of the eight main German undertakings which produce electricity and operate high-tension transmission networks, one of which is PreussenElektra. That reply also shows that PreussenElektra is a wholly-owned subsidiary of another company which is 100% privately owned. Moreover, as stated in paragraph 19 of this judgment, Schleswig is held as to 65.3% by PreussenElektra and as to only 34.7% by certain municipal authorities of Land Schleswig-Holstein.
- 56 In the light of the above, the first question referred should be understood as asking, essentially, whether legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, constitutes State aid within the meaning of Article 92(1) of the Treaty.
- 57 It should be recalled in that respect that Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.
- 58 In that connection, the case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (see Case 82/77 Van Tiggele [1978] ECR 25, paragraphs 24 and 25; Sloman Neptun, paragraph 19; Case C-189/91 Kirsammer-Hack [1993] ECR I-6185, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97 Viscido [1998] ECR I-2629, paragraph 13; Case C-200/97 Ecotrade [1998] ECR I-7907, paragraph 35; Case C-295/97 Piaggio [1999] ECR I-3735, paragraph 35).
- 59 In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.
- 60 Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.
- 61 In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.

- 62 That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, *Sloman Neptun*, paragraph 21, and *Ecotrade*, paragraph 36).
- 63 In the alternative, the Commission maintains that, in order to preserve the effectiveness of Articles 92 and 93 of the Treaty, read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which, like those laid down by the amended *Stromeinspeisungsgesetz*, are decided upon by the State but financed by private undertakings. It draws that argument by analogy from the case-law of the Court of Justice to the effect that Article 85 of the EC Treaty (now Article 81 EC), read in conjunction with Article 5 of the Treaty, prohibits Member States from introducing measures, even of a legislative or regulatory nature, which may render the competition rules applicable to undertakings ineffective (see, in particular, *Case C-2/91 Meng* [1993] ECR I-5751, paragraph 14).
- 64 In that respect, it is sufficient to point out that, unlike Article 85 of the Treaty, which concerns only the conduct of undertakings, Article 92 of the Treaty refers directly to measures emanating from the Member States.
- 65 In those circumstances, Article 92 of the Treaty is in itself sufficient to prohibit the conduct by States referred to therein and Article 5 of the Treaty, the second paragraph of which provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, cannot be used to extend the scope of Article 92 to conduct by States that does not fall within it.
- 66 The answer to the first question referred must therefore be that a statutory provision of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distributes the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 92(1) of the Treaty.
- 67 In the light of that answer, there is no need to reply to the second question referred, which was raised only in so far as the obligation to purchase at minimum prices did constitute State aid, whereas the allocation of the resulting financial burden did not.

Interpretation of Article 30 of the Treaty

- 68 In its third question, the referring court asks in substance whether the rules concerned are compatible with Article 30 of the Treaty.
- 69 In that respect, it must first be borne in mind that, according to the case-law of the Court, Article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (*Case 8/74 Dassonville* [1974] ECR 837, paragraph 5).
- 70 Secondly, the case-law of the Court also shows that an obligation placed on traders in a Member State to obtain a certain percentage of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product by preventing those traders from obtaining supplies in respect of part of their needs from traders situated in other Member States

(see, to that effect, Case 72/83 *Campus Oil* [1984] ECR 2727, paragraph 16; Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 11).

- 71 In this case, Paragraphs 1 and 2 of the amended *Stromeinspeisungsgesetz* expressly state that the purchase obligation imposed on electricity supply undertakings applies only to electricity produced from renewable energy sources within the scope of that statute and within the respective supply area of each undertaking concerned, and is therefore capable, at least potentially, of hindering intra-Community trade.
- 72 However, in order to determine whether such a purchase obligation is nevertheless compatible with Article 30 of the Treaty, account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market.
- 73 The use of renewable energy sources for producing electricity, which a statute such as the amended *Stromeinspeisungsgesetz* is intended to promote, is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.
- 74 Growth in that use is amongst the priority objectives which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change, approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 (OJ 1994 L 33, p. 11), and by virtue of the Protocol of the third conference of the parties to that Convention, done in Kyoto on 11 December 1997, signed by the European Community and its Member States on 29 April 1998 (see *inter alia* Council Resolution 98/C 198/01 of 8 June 1998 on renewable sources of energy (OJ 1998 C 198, p. 1), and Decision No 646/2000/EC of the European Parliament and of the Council of 28 February 2000 adopting a multiannual programme for the promotion of renewable energy sources in the Community (Altener) (1998 to 2002) (OJ 2000 L 79, p. 1)).
- 75 It should be noted that that policy is also designed to protect the health and life of humans, animals and plants.
- 76 Moreover, as stated in the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies. The Treaty of Amsterdam transferred that provision, in a slightly modified form, to Article 6 of the Treaty, which appears in Part One, headed 'Principles'.
- 77 In addition, the 28th recital in the preamble to Directive 96/92 expressly states that it is 'for reasons of environmental protection' that the latter authorises Member States in Articles 8(3) and 11(3) to give priority to the production of electricity from renewable sources.
- 78 It should also be noted that, as stated in the 39th recital in its preamble, the directive constitutes only a further phase in the liberalisation of the electricity market and leaves some obstacles to trade in electricity between Member States in place.
- 79 Moreover, the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced.
- 80 In that respect, the Commission took the view, in its Proposal for a Directive 2000/C 311 E/22 of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market (OJ 2000 C 311 E, p. 320), submitted on 10 May 2000, that the implementation in each Member State of a system of certificates of origin for electricity

produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice.

- 81 Having regard to all the above considerations, the answer to the third question must be that, in the current state of Community law concerning the electricity market, legislation such as the amended Stromeinspeisungsgesetz is not incompatible with Article 30 of the Treaty.

[...]

2.2.13 Case C-120/95: Decker

Nicolas Decker v Caisse de Maladie des Employés Privés

Case C-120/95

28 April 1998

Court of Justice

ECR [1998] I-01831

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By decision of 5 April 1995, received at the Court on 7 April 1995, the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Council), Luxembourg, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 30 and 36 of that Treaty.
2. That question was raised in proceedings between Mr Decker, a Luxembourg national, and the Caisse de Maladie des Employés Privés (hereinafter 'the Fund') concerning a request for reimbursement of the cost of a pair of spectacles with corrective lenses purchased from an optician established in Arlon, Belgium, on a prescription from an ophthalmologist established in Luxembourg.
3. By letter of 14 September 1992, the Fund informed Mr Decker that it would not reimburse him the cost of those spectacles, on the ground that they had been purchased abroad without its prior authorisation.
4. Mr Decker contested that decision, relying in particular on the Treaty rules on the free movement of goods. Upon hearing his complaint, the Fund maintained its position by decision of its managerial committee of 22 October 1992 and so rejected his claim.
5. Mr Decker submitted an application to the Conseil Arbitral des Assurances Sociales, which rejected it by order of 24 August 1993.
6. By application of 8 September 1993, Mr Decker appealed against that order to the Conseil Arbitral des Assurances Sociales, which dismissed the appeal by decision of 20 October 1993, on the ground in particular that the matter was connected not with the free movement of goods but with social security law, that is, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (see the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1).
7. Mr Decker appealed to the Cour de Cassation (Court of Cassation). By judgment of 12 January 1995, the contested decision was set aside and the case was remitted to the Conseil Arbitral des Assurances Sociales. By judgment of 5 April 1995, it held that Article 60 of the Code des Assurances Sociales (Social Insurance Code) and Article 58 of the statutes of the Union des Caisses de Maladie des Salariés (hereinafter 'UCM') applied to the dispute.

8. Article 60 of the Luxembourg Code des Assurances Sociales, in the version in force at the material time, provided in particular: 'Insured persons shall be entitled to approach the doctor, dentist, pharmacist, hospital or medical auxiliary of their choice. Only the following may provide treatment and services on the territory of the Grand Duchy:

1. doctors, dentists, pharmacists, hospitals, midwives, medical auxiliaries authorised to practise their profession in all or part of the Grand Duchy;

2. foreign doctors consulted in the Grand Duchy with the agreement of the attending doctor and the medical adviser, without prejudice to wider international arrangements.

However, insured persons may obtain treatment abroad only with the consent of their sickness fund, except in the case of initial treatment in the event of accident or illness occurring abroad.

The sickness fund may not refuse consent if the treatment abroad is recommended by the doctor attending the insured person and a medical adviser, or if the treatment needed is not available in the Grand Duchy.'

9. Reimbursement of the cost of spectacle frames and corrective lenses was governed at the material time by Article 78 of the UCM statutes and by the collective agreement of 30 June 1975 concluded pursuant to Article 308 bis of the Code des Assurances Sociales between the UCM and the professional grouping representing opticians.

10. Article 78 of the UCM statutes states:

'The cost of spectacles and other visual aids shall be borne by the sickness fund up to the amounts stated in the tariffs and in accordance with the conditions determined in the agreements or decisions in lieu thereof in accordance with Article 308 bis of the Code des Assurances Sociales.'

11. Article 2 of the collective agreement of 30 June 1975 provides that, without prejudice to Community and international provisions concerning social security of migrant workers and persons treated as such, spectacles are to be supplied to insured persons, in so far as they are permanently or actually resident in Luxembourg, by opticians who are registered in the Luxembourg register of trades and established in the Grand Duchy.

12. Under those provisions, reimbursement was on a flat-rate basis with a ceiling of LFR 1 600 for frames.

13. For corrective lenses, the reimbursement tariffs were fixed in Annex A to the collective agreement of 30 June 1975. Under Article 12 of that agreement, the amounts capable of reimbursement for corrective lenses fixed in Annex A were to be adjusted up or down by reference solely to the price lists of the firms Zeiss and American Optical.

14. The Code des Assurances Sociales and the UCM statutes were substantially amended in 1992. However, the principle set out in the old Article 60 of the Code des Assurances Sociales, relating to prior authorisation by the sickness fund for all medical treatment abroad, was incorporated in the new Article 20 of the code.

15. Article 22 of Regulation No 1408/71 provides in particular:

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

[...]

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

2. [...]

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.

3. The provisions of paragraphs 1 and 2 shall apply by analogy to members of the family of an employed or self-employed person.

[...]

16. Since it was uncertain whether those national provisions were compatible with Community law, more particularly with Articles 30 and 36 of the Treaty, the Conseil Arbitral des Assurances Sociales stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 60 of the Luxembourg Code des Assurances Sociales, under which a social security institution of Member State A refuses to reimburse to an insured person, who is a national of Member State A, the cost of spectacles with corrective lenses, prescribed by a doctor established in Member State A but purchased from an optician established in Member State B, on the ground that all medical treatment abroad must be authorised in advance by the above social security institution, compatible with Articles 30 and 36 of the EEC Treaty in so far as it penalises in general the importation by private individuals of medicinal products or, as in this case, spectacles from other Member States?'

17. Mr Decker and the Commission submit that national rules under which an insured person is denied reimbursement of the cost of products normally reimbursed, unless prior authorisation has been granted by the insured person's social security institution, constitutes an unjustified barrier to the free movement of goods.
18. The Luxembourg, Belgian, French and United Kingdom Governments, on the other hand, submit that rules such as those at issue in the main proceedings do not fall within the scope of Articles 30 and 36 of the Treaty, in that they concern social security. They submit, in the alternative, that those

provisions do not in any event preclude such rules from being maintained. The German, Spanish and Netherlands Governments agree with the alternative submission.

19. Having regard to the observations submitted, the questions to be considered concern first the application of the principle of freedom of movement in the field of social security, then the effect of Regulation No 1408/71, and finally the application of the provisions on the free movement of goods.

Application of the fundamental principle of freedom of movement in the field of social security

20. The Luxembourg, Belgian, French and United Kingdom Governments submit, primarily, that the rules at issue in the main proceedings, which concern reimbursement of the cost of treatment, do not fall within the scope of Article 30 of the Treaty, in that they concern a particular branch of social security.
21. It must be observed, first of all, that, according to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems (Case 238/82 *Duphar and Others v Netherlands* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395, paragraph 27).
22. In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme (Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, paragraph 12, and Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 15) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira v Bundesanstalt für Arbeit* [1997] ECR I-511, paragraph 36).
23. As the Advocate General observes in points 17 to 25 of his Opinion, the Member States must nevertheless comply with Community law when exercising those powers.
24. The Court has held that measures adopted by Member States in social security matters which may affect the marketing of medical products and indirectly influence the possibilities of importing those products are subject to the Treaty rules on the free movement of goods (see *Duphar and Others*, cited above, paragraph 18).
25. Consequently, the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot exclude the application of Article 30 of the Treaty.

Effect of Regulation No 1408/71

26. The Luxembourg Government submits that Article 22 of Regulation No 1408/71 lays down the principle that prior authorisation is required for any treatment in another Member State. In that Government's view, to challenge the national provisions relating to reimbursement of the cost of benefits obtained abroad amounts to calling into question the validity of the corresponding provision in Regulation No 1408/71.
27. It must be stated that the fact that a national measure may be consistent with a provision of secondary legislation, in this case Article 22 of Regulation No 1408/71, does not have the effect of removing that measure from the scope of the provisions of the Treaty.
28. Moreover, as the Advocate General observes in points 55 and 57 of his Opinion, Article 22(1) of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution to go to another Member State to receive there treatment appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the

provisions of the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure.

29. On the other hand, Article 22 of Regulation No 1408/71, interpreted in the light of its purpose, is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of the cost of medical products purchased in another Member State, even without prior authorisation.
30. Consequently, the Court must examine the compatibility of national rules such as those at issue in the main proceedings with the Treaty provisions on the free movement of goods.

Application of the provisions on the free movement of goods

31. It is necessary to examine whether rules such as those at issue in the main proceedings are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).
32. Mr Decker and the Commission submit that a system under which reimbursement of the cost of medical products, in accordance with the conditions laid down by the State of insurance, is subject to prior authorisation by the competent institution of that State where the products are supplied in another Member State constitutes a restriction on the free movement of goods within the meaning of Article 30 of the Treaty.
33. The Member States which have submitted observations argue essentially that rules such as those at issue do not have the purpose or effect of restricting trade flows, but merely lay down the conditions for the reimbursement of medical expenses. Such rules do not have the effect of prohibiting the import of spectacles, nor do they have any direct influence on the possibility of purchasing them outside the national territory. They do not prohibit Luxembourg opticians from importing spectacles and corrective lenses from other Member States, processing them and selling them.
34. It must be observed that the rules at issue encourage persons insured under the Luxembourg social security scheme to purchase their spectacles from, and have them assembled by, opticians established in Luxembourg rather than in other Member States.
35. While the national rules at issue in the main proceedings do not deprive insured persons of the possibility of purchasing medical products in another Member State, they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation. Costs incurred in the State of insurance are not, however, subject to that authorisation.
36. Such rules must be categorised as a barrier to the free movement of goods, since they encourage insured persons to purchase those products in Luxembourg rather than in other Member States, and are thus liable to curb the import of spectacles assembled in those States (see Case 18/84 *Commission v France* [1985] ECR 1339, paragraph 16).
37. The Luxembourg Government submits, however, that the free movement of goods is not absolute and that the rules at issue, the purpose of which is the control of the health expenditure which must necessarily be taken into consideration, are justified on that basis.
38. Mr Decker, on the other hand, claims that if his purchase were reimbursed, the financial burden on the Fund's budget would be the same, as it reimburses only a flat-rate sum for both frames and

corrective lenses sold by an optician. Since that flat rate is fixed independently of the costs actually incurred, there is no objective reason why the Fund should refuse reimbursement if the purchase is made from an optician established in another Member State. The rules at issue therefore cannot be justified by the need to control health expenditure.

39. It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods. However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.
40. But, as the Luxembourg Government acknowledged in reply to a question from the Court, it is clear that reimbursement at a flat rate of the cost of spectacles and corrective lenses purchased in other Member States has no effect on the financing or balance of the social security system.
41. The Belgian, German and Netherlands Governments have also submitted that the right of insured persons to have access to quality treatment constitutes a justification for the rules at issue, on the ground of the protection of public health, as provided for by Article 36 of the Treaty. The Belgian Government adds that spectacles must be supplied by persons authorised by law to pursue the profession. If they are supplied in another Member State, supervision to ensure that this has been carried out properly is seriously called into question, or even impossible.
42. It must be observed that the conditions for taking up and pursuing regulated professions have been the subject of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25) and Commission Directive 95/43/EC of 20 July 1995 (OJ 1995 L 184, p. 21), which amended Annexes C and D to Directive 92/51.
43. This means that the purchase of a pair of spectacles from an optician established in another Member State provides guarantees equivalent to those afforded on the sale of a pair of spectacles by an optician established in the national territory (see, with reference to the purchase of medicinal products in another Member State, Case 215/87 *Schumacher v Hauptzollamt Frankfurt am Main-Ost* [1989] ECR 617, paragraph 20, and Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 18).
44. Furthermore, in the present case the spectacles were purchased on a prescription from an ophthalmologist, which guarantees the protection of public health.
45. It follows that rules such as those applicable in the main proceedings are not justified on grounds of public health in order to ensure the quality of medical products supplied in other Member States.
46. In those circumstances, the answer must be that Articles 30 and 36 of the Treaty preclude national rules under which a social security institution of a Member State refuses to reimburse to an insured person on a flat-rate basis the cost of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, on the ground that prior authorisation is required for the purchase of any medical product abroad.

[...]

2.2.14 Case C-405/98: Gourmet International

Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)

Case C-405/98

8 March 2001

Court of Justice

ECR [2001] I-01795

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 18 September 1998, received at the Court on 16 November 1998, the Stockholms Tingsrätt (Stockholm District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 30, 36, 56 and 59 of the EC treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC).
2. The two questions have been raised in the context of an application made by the Konsumentombudsman (the Swedish ombudsman responsible for consumer protection, hereinafter 'the Consumer Ombudsman') for an injunction restraining Gourmet International Products AB (hereinafter 'GIP') from placing advertisements for alcoholic beverages in magazines.

National legislation

3. Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law 1978:763 laying down provisions on the Marketing of Alcoholic Beverages, as amended, hereinafter 'the Alkoholköklagen'), which entered into force on 1 July 1979, is, according to Article 1, applicable to the promotion of alcoholic beverages to consumers by manufacturers and retailers. Pursuant to the Alkoholköklagen 1994:738 (Swedish Law on Alcohol), alcoholic beverages are beverages containing more than 2.25% of alcohol by volume. Those beverages comprise spirits, wines, 'strong beer (containing more than 3.5% of alcohol by volume) and 'beer (containing between 2.25% and 3.5% of alcohol by volume).
4. Article 2 of the Alkoholköklagen provides:

In view of the health risks involved in alcohol consumption, alcoholic beverages should be marketed with particular moderation. In particular, advertisements or other marketing measures must not be insistent, involve unsolicited approaches or encourage alcohol consumption.

Advertising may not be used to market alcoholic beverages on radio or television. The same prohibition applies to satellite broadcasts subject to Law 1996:844 on Radio and Television.

Advertising may not be used to market spirits, wines or strong beers either in periodicals or in other publications subject to the Regulation on Press Freedom and comparable to periodicals by reason of their publication schedule.

That prohibition does not however apply to publications distributed solely at the point of sale of such beverages. Law 1996:851.

5. It is apparent from the order for reference that, owing to the object of the Alkoholreklamlagen, which is to restrict the possibilities of marketing alcoholic beverages to consumers, the prohibition on advertisements in periodicals does not apply to advertisements in the specialist press, meaning the press aimed essentially at traders, that is to say, in particular, at manufacturers and restaurateurs.
6. It is also apparent from the order for reference that advertising on the public highway and the direct mailing of advertising material to individuals, in particular, are regarded as contrary to the obligation to exercise moderation laid down by the Alkoholreklamlagen.

Main proceedings

7. GIP publishes a magazine entitled Gourmet. Issue No 4 (August-October 1997) of the edition intended for subscribers contained three pages of advertisements for alcoholic beverages, one for red wine and two for whisky.

Those pages did not appear in the edition sold in shops. According to the order for reference, 90% of the magazine's 9 300 subscribers are traders, manufacturers or retailers, and 10% are private individuals.

8. The Consumer Ombudsman applied to the Stockholms Tingsrätt for an injunction, and imposition of a fine in the event of failure to comply therewith, restraining GIP from contributing to the marketing of alcoholic beverages to consumers by means of such advertisements, which were contrary to Article 2 of the Alkoholreklamlagen.
9. GIP contended that the application should be dismissed. It argued, in particular, that the proceedings brought against it were based on legislation that was contrary to Community law.
10. When examining the application, the Tingsrätt was unsure, in particular, whether national rules imposing an absolute prohibition on certain advertisements might be regarded as having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty and, if so, whether, in view of their object, they might be regarded as lawful under Article 36 of the Treaty. It was also unsure whether such national rules were compatible with the freedom to provide services.
11. The Stockholms Tingsrätt considered that an interpretation of the relevant provisions of the Treaty seemed necessary. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 30 or Article 59 of the EC Treaty to be interpreted as precluding national legislation entailing a general prohibition of alcohol advertising, such as the prohibition laid down in Article 2 of Alkoholreklamlagen?

2. If so, can such a prohibition be regarded as justified and proportionate for the protection of life and health of humans?

12. The Consumer Ombudsman lodged an appeal against the order for reference before the Marknadsdomstolen, Sweden, which dismissed the appeal by decision of 11 March 1999.

Free movement of goods

13. By the questions referred to the Court, which can be considered together, the national court is asking essentially, first, whether the provisions of the Treaty on the free movement of goods preclude a prohibition on advertisements for alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.
14. The Consumer Ombudsman and the intervening Governments accept that the prohibition on advertising in Sweden affects sales of alcoholic beverages there, including those imported from other Member States, since the specific purpose of the Swedish legislation is to reduce the consumption of alcohol.
15. However, observing that the Court held in paragraph 16 of its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, the Consumer Ombudsman and the intervening Governments contend that the prohibition on advertising in issue in the main proceedings does not constitute an obstacle to trade between Member States, since it satisfies the criteria laid down by the Court in that judgment.
16. GIP contends that an outright prohibition such as that at issue in the main proceedings does not satisfy those criteria. It argues that such a prohibition is, in particular, liable to have a greater effect on imported goods than on those produced in the Member State concerned.
17. Although the Commission takes the view that the decision as to whether, on the facts of the case, the prohibition does or does not constitute an obstacle to intra-Community trade is a matter for the national court, the Commission expresses similar doubts as to the application in the present case of the criteria referred to in paragraph 15 above.
18. It should be pointed out that, according to paragraph 17 of its judgment in *Keck and Mithouard*, if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article 30 of the Treaty, they must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products.
19. The Court has also held, in paragraph 42 of its judgment in Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, that it cannot be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.
20. It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.
21. Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.
22. The information provided by the Consumer Ombudsman and the Swedish Government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported,

in comparison with other products such as vodka, which is mainly of Swedish origin, does not alter that conclusion. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have been greater; second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption.

23. Furthermore, although publications containing advertisements may be distributed at points of sale, Systembolaget AB, the company wholly owned by the Swedish State which has a monopoly of retail sales in Sweden, in fact only distributes its own magazine at those points of sale.
24. Last, Swedish legislation does not prohibit 'editorial advertising, that is to say, the promotion, in articles forming part of the editorial content of the publication, of products in relation to which the insertion of direct advertisements is prohibited. The Commission correctly observes that, for various, principally cultural, reasons, domestic producers have easier access to that means of advertising than their competitors established in other Member States. That circumstance is liable to increase the imbalance inherent in the absolute prohibition on direct advertising.
25. A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 30 of the Treaty.
26. However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by Article 36 of the Treaty.
27. In that regard, it is accepted that rules restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflects public health concerns (Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 17, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 15).
28. In order for public health concerns to be capable of justifying an obstacle to trade such as that inherent in the prohibition on advertising at issue in the main proceedings, the measure concerned must also be proportionate to the objective to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.
29. The Consumer Ombudsman and the intervening Governments claim that the derogation provided for in Article 36 of the Treaty can cover the prohibition on advertising at issue in the main proceedings. The Consumer Ombudsman and the Swedish Government emphasise in particular that the prohibition is not absolute and does not prevent members of the public from obtaining information, if they wish, in particular in restaurants, on the Internet, in an 'editorial context or by asking the producer or importer to send advertising material. Furthermore, the Swedish Government observes that the Court of Justice has acknowledged that, in the present state of Community law, Member States are at liberty, within the limits set by the Treaty, to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved (*Aragonesa de Publicidad Exterior and Publivia*, cited above, paragraph 16). The Swedish Government maintains that the legislation at issue in the main proceedings constitutes an essential component of its alcohol policy.
30. GIP claims that the outright prohibition on advertising laid down by the legislation at issue in the main proceedings is disproportionate, since the protection sought could be obtained by prohibitions of a more limited nature, concerning, for example, certain public places or the press aimed at children and adolescents. It must be borne in mind that the Swedish policy on alcoholism is already catered for by the existence of the monopoly on retail sales, by the prohibition on sales to persons under the age of 20 years and by information campaigns.

31. The Commission submits that the decision as to whether the prohibition on advertising at issue in the main proceedings is or is not proportionate is a matter for the national court. However, it also states that the prohibition does not appear to be particularly effective, owing in particular to the existence of 'editorial publicity and the abundance of indirect advertising on the Internet, and that requirements as to the form of advertising, such as the obligation to exercise moderation already found in the Alkoholreklamlagen, may suffice to protect the interest in question.
32. It should be pointed out, first, that there is no evidence before the Court to suggest that the public health grounds on which the Swedish authorities rely have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or to protect certain national products indirectly (Case 34/79 Regina v Henn and Darby [1979] ECR 3795, paragraph 21, and Aragonesa de Publicidad Exterior and Publivia, cited above, paragraph 20).
33. Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.
34. The answer to the question must therefore be that, as regards the free movement of goods, Articles 30 and 36 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

Freedom to provide services

35. By the questions it has referred to the Court, the national court is essentially asking, second, whether the Treaty provisions on freedom to provide services preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.
36. The Consumer Ombudsman, GIP, the Swedish Government and the Commission agree that provision of advertising space may constitute a provision of cross-border services falling within the scope of Article 59 of the Treaty. The other intervening Governments, on the other hand, contend that Article 59 does not apply in the main proceedings.
37. In that regard, as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova [1994] ECR I-1783, paragraph 30, and Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 30).
38. That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States.
39. A measure such as the prohibition on advertising at issue in the proceedings before that court, even if it is non-discriminatory, has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services

within the meaning of Article 59 of the Treaty (see, in that regard, *Alpine Investments*, cited above, paragraph 35).

40. However, such a restriction may be justified by the protection of public health, which is a ground of general interest recognised by Article 56 of the EC Treaty, which is applicable to the provision of services in accordance with Article 66 of the EC Treaty (now Article 55 EC).
41. As observed in paragraph 33 above, in relation to obstacles to the free movement of goods, it is for the national court to determine whether, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the prohibition on advertising at issue in the main proceedings meets the condition of proportionality required in order for the derogation from the freedom to provide services to be justified.
42. The answer to be given must therefore be that, as regards freedom to provide services, Articles 56 and 59 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the *Alkoholreklamlagen*, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

[...]

3 RESTRICTIONS ON EXPORTS

3.1 Case 15/79: Horsemeat

Groenveld (P B) BV v Produktschap voor Vee en Vlees

Case 15/79

8 November 1979

Court of Justice

ECR [1979] 3409

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By an order of 26 January 1979, which was received at the Court Registry on 2 February 1979, the College van Beroep voor het Bedrijfsleven referred to the Court under Article 177 of the EEC Treaty a preliminary question on the interpretation of Article 34 of the EEC Treaty in order to establish whether Article 3 (1) of the Verordening Be- en Verwerking Vlees 1973 [Processing and Preparation of Meat Regulation 1973], adopted on 5 September 1973 by the Produktschap voor Vee en Vlees [Cattle and Meat Board], which prohibits, subject to express exceptions, any manufacturer of sausages from having in stock or processing horsemeat, is compatible with Community law.
2. That question was raised in the course of proceedings instituted by a wholesaler of horsemeat, who wished to extend his operations to the manufacture of sausages from horsemeat, against the refusal of the Produktschap, the defendant in the main action, to exempt him from the prohibition set out in Article 3 (1) of the above-mentioned regulation.
3. The order for reference, in particular Point 7, shows that the regulation in question was adopted for the purpose of protecting Netherlands exports of meat products both to Member States and to non-member countries which constitute important export markets and where there are objections to the consumption of horsemeat or indeed where the importation of products containing horsemeat is prohibited. As it is practically impossible to determine the presence of horsemeat in meat products the sole means of ensuring that such products do not contain horsemeat is to prohibit manufacturers of meat products from having in stock, preparing or processing horsemeat. Thus exports of meat products to the United States must be accompanied by a certificate that the products in question meet requirements at least equivalent to those laid down by United States rules in that field, whereby a similar prohibition is imposed. Article 3 (1) of the above-mentioned regulation applies solely to the industrial manufacture of meat products but not to the stocking or retail sale of horsemeat by butchers. The file further establishes that the regulation in question does not affect imports or re-exports of horsemeat originating in other Member States or non-member countries.

[...]

5. As a preliminary observation it should be pointed out that the market affected by the national measure in question, that in horsemeat, is not governed by any specific Community regulation.

Council Directive No 79/99/EEC of 21 December 1976 [citation omitted] on health problems affecting intra-Community trade in meat products, cited by the Commission in its observations, concerns a problem entirely distinct from that which forms the subject-matter of the national measure in question. It follows that the compatibility of a measure of the kind referred to in the main action with Community law must be settled solely on the basis of Article 30 et seq. of the Treaty.

6. Article 34 of the EEC Treaty provides that "quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".
7. That provision concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition like that in question which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export.
8. The foregoing appreciation is not affected by the circumstance that the regulation in question has as its objective, inter alia, the safeguarding of the reputation of the national production of meat products in certain export markets within the Community and in non-member countries where there are obstacles of a psychological or legislative nature to the consumption of horsemeat when the same prohibition is applied identically to the product in the domestic market of the State in question. The objective nature of that prohibition is not modified by the fact that the regulation in force in the Netherlands permits the retail sale of horsemeat by butchers. In fact that concession at the level of local trade does not have the effect of bringing about a prohibition at the level of industrial manufacture of the same product regardless of its destination.
9. The reply to the question submitted must therefore be that in the present state of Community law a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article 34 of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.

[...]

3.2 Case 155/80: Oebel

Sergius Oebel

Case 155/80

14 July 1981

Court of Justice

ECR [1982] 1993

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

A German law concerning night work in bakeries prohibited a person from working on the making of ordinary or fine bakers' wares between the hours of 10 p.m. and 4 a.m. The same law also prohibited the transportation of bakers' wares for delivery to consumers or retail outlets between 10 p.m. and 5:45 a.m. The prohibition on transport did not apply to delivery to wholesalers, intermediaries, distributors or undertaking's own warehouses. The law was designed to protect workers in medium sized bakeries against permanent night work, but was extended to large undertakings to protect the small family run businesses from competition.

Sergius Oebel was charged with permitting workers to work at 2:00 a.m. In the proceedings against Mr. Oebel the Amtsgericht Wiesbaden considered that the German law might be incompatible with Community law -- specifically Articles 7, 30 and 34 of the EEC Treaty -- because it prevented the timely delivery of fresh bakers' wares to bordering Member States. The Amtsgericht Wiesbaden, pursuant to Article 177, requested a preliminary ruling from the Court of Justice and referred the several questions to the Court of Justice including the following:

Must Articles 30 and 34 of the EEC Treaty be interpreted as meaning that the effects of Article 5 of the Gesetz über die Arbeitszeit in Backereien [Law on working hours in bakeries] in regard to the export and import of fresh bakers' wares are to be regarded as measures equivalent to quantitative restrictions on imports or quantitative restrictions on exports?

Judgement:

[...]

- 11 BY THE SECOND QUESTION THE NATIONAL COURT ASKS WHETHER THE EFFECTS OF DOMESTIC LEGISLATION ON WORKING HOURS IN BAKERIES, SUCH AS THE GERMAN LAW IN ISSUE, IN REGARD TO THE EXPORT AND IMPORT OF FRESH BAKER'S WARES ARE TO BE REGARDED AS MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS OR EXPORTS WITHIN THE MEANING OF ARTICLES 30 AND 34 OF THE TREATY.

THE RESTRICTION ON PRODUCTION

- 12 IT CANNOT BE DISPUTED THAT THE PROHIBITION IN THE BREAD AND CONFECTIONERY INDUSTRY ON WORKING BEFORE 4 A.M. IN ITSELF CONSTITUTES A LEGITIMATE ELEMENT OF ECONOMIC AND SOCIAL POLICY, CONSISTENT WITH THE OBJECTIVES OF PUBLIC INTEREST PURSUED BY THE TREATY. INDEED, THIS PROHIBITION IS DESIGNED TO IMPROVE WORKING CONDITIONS IN A MANIFESTLY SENSITIVE INDUSTRY, IN WHICH THE PRODUCTION PROCESS EXHIBITS PARTICULAR CHARACTERISTICS RESULTING FROM BOTH THE NATURE OF THE PRODUCT AND THE HABITS OF CONSUMERS.
- 13 FOR THESE REASONS, SEVERAL MEMBER STATES OF THE COMMUNITY AS WELL AS A NUMBER OF NON-MEMBER STATES HAVE INTRODUCED SIMILAR RULES CONCERNING NIGHTWORK IN THIS INDUSTRY. IN THIS REGARD IT IS APPROPRIATE TO MENTION CONVENTION NO 20 OF THE INTERNATIONAL LABOUR ORGANIZATION OF 8 JUNE 1925 CONCERNING NIGHTWORK IN BAKERIES WHICH, SUBJECT TO CERTAIN EXCEPTIONS, PROHIBITS THE PRODUCTION OF BREAD, PASTRIES OR SIMILAR PRODUCTS DURING THE NIGHT.
- 14 THE ACCUSED MAINTAINS THAT THE PROHIBITION ON THE PRODUCTION OF ORDINARY AND FINE BAKER'S WARES BEFORE 4 A.M. CONSTITUTES AN EXPORT BARRIER PROHIBITED BY ARTICLE 34 OF THE TREATY. THIS IS ALLEGED TO BE THE CASE PARTICULARLY WITH REGARD TO PRODUCTS WHICH HAVE TO BE DELIVERED FRESH IN TIME FOR BREAKFAST AND WHICH MUST THEREFORE BE PRODUCED DURING THE NIGHT BEFORE THE DAY ON WHICH THEY ARE OFFERED FOR SALE.
- 15 HOWEVER, AS THE COURT HAS ALREADY DECLARED IN ITS JUDGMENT OF 8 NOVEMBER 1979 (CASE 15/79 GROENVELD (1979) ECR 3409), ARTICLE 34 CONCERNS NATIONAL MEASURES WHICH HAVE AS THEIR SPECIFIC OBJECT OR EFFECT THE RESTRICTION OF PATTERNS OF EXPORTS AND THEREBY THE ESTABLISHMENT OF A DIFFERENCE IN TREATMENT BETWEEN THE DOMESTIC TRADE OF A MEMBER STATE AND ITS EXPORT TRADE, IN SUCH A WAY AS TO PROVIDE A PARTICULAR ADVANTAGE FOR NATIONAL PRODUCTION OR FOR THE DOMESTIC MARKET OF THE STATE IN QUESTION.
- 16 THIS IS CLEARLY NOT THE CASE WITH RULES SUCH AS THOSE IN ISSUE, WHICH ARE PART OF ECONOMIC AND SOCIAL POLICY AND APPLY BY VIRTUE OF OBJECTIVE CRITERIA TO ALL THE UNDERTAKINGS IN A PARTICULAR INDUSTRY WHICH ARE ESTABLISHED WITHIN THE NATIONAL TERRITORY, WITHOUT LEADING TO ANY DIFFERENCE IN TREATMENT WHATSOEVER ON THE GROUND OF THE NATIONALITY OF TRADERS AND WITHOUT DISTINGUISHING BETWEEN THE DOMESTIC TRADE OF THE STATE IN QUESTION AND THE EXPORT TRADE.

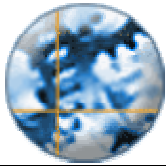
THE RESTRICTIONS ON TRANSPORT AND DELIVERY

- 17 THE ACCUSED ALSO CHALLENGES THE PROHIBITION, INCLUDED IN THE RULES ON NIGHTWORK AT ISSUE BEFORE THE NATIONAL COURT, ON THE TRANSPORT AND DELIVERY OF ORDINARY AND FINE BAKER'S WARES TO CONSUMERS OR RETAIL SHOPS BEFORE 5.45 A.M. HE SUBMITS THAT THIS PROHIBITION CONSTITUTES A MEASURE HAVING AN EFFECT EQUIVALENT TO RESTRICTIONS ON BOTH IMPORTS AND EXPORTS, BECAUSE, ON THE ONE HAND, IT PREVENTS PRODUCERS ESTABLISHED IN OTHER MEMBER STATES FROM DELIVERING THEIR WARES IN TIME TO CONSUMERS AND RETAIL SHOPS IN THE FEDERAL REPUBLIC OF GERMANY, WHILST, ON THE OTHER HAND, PRODUCERS ESTABLISHED IN THE FEDERAL REPUBLIC OF GERMANY ARE PREVENTED FROM DELIVERING IN TIME TO THE OTHER MEMBER STATES.

- 18 ACCORDING TO THE GERMAN GOVERNMENT, THE SOLE PURPOSE OF THE PROHIBITION ON TRANSPORT AND DELIVERY BEFORE 5.45 A.M. IS TO ENSURE COMPLIANCE WITH THE PROHIBITION ON PRODUCTION AT NIGHT, WHICH MIGHT OTHERWISE ESCAPE EFFECTIVE CONTROL ON THE PART OF THE AUTHORITIES. IT IS ALLEGED TO BE ESSENTIAL TO EXTEND THE PROHIBITION TO COVER PRODUCTS COMING FROM OTHER MEMBER STATES BECAUSE OTHERWISE PRODUCERS ESTABLISHED IN GERMANY WOULD BE AT A DISADVANTAGE IN RELATION TO COMPETITION FROM ABROAD , WHICH WOULD BE CONTRARY TO THE PRINCIPLE OF EQUALITY. THEREFORE, IF PRODUCTS FROM OTHER MEMBER STATES WERE TO BE EXEMPT FROM SUCH A PROHIBITION, IT WOULD BE IMPOSSIBLE NOT ONLY TO MAINTAIN THE PROHIBITION FOR DOMESTIC PRODUCTS, BUT ALSO TO MAINTAIN THE RESTRICTIONS ON PRODUCTION TIMES.
- 19 IN THIS REGARD, IT MUST BE NOTED THAT THE RESTRICTIVE EFFECT OF THE RULES CONTROLLING THE TIMES FOR THE TRANSPORT AND DELIVERY OF ORDINARY AND FINE BAKER'S WARES, IN CONNECTION WITH THE CONTROL OF THE HOURS WHEN THOSE PRODUCTS MAY BE MANUFACTURED, MUST BE EVALUATED IN THE LIGHT OF THEIR SCOPE.
- 20 IF SUCH RULES ARE CONFINED TO TRANSPORT FOR DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS ONLY, WITHOUT AFFECTING TRANSPORT AND DELIVERY TO WAREHOUSES OR INTERMEDIARIES, THEY CANNOT HAVE THE EFFECT OF RESTRICTING IMPORTS OR EXPORTS BETWEEN MEMBER STATES. IN THIS CASE, INDEED, 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. UNDER THESE CIRCUMSTANCES, SUCH RULES ARE NOT CONTRARY TO ARTICLES 30 AND 34 OF THE TREATY.
- 21 THE REPLY TO THE SECOND QUESTION MUST THEREFORE BE THAT ARTICLES 30 AND 34 OF THE EEC TREATY DO NOT APPLY TO NATIONAL RULES WHICH PROHIBIT THE PRODUCTION OF ORDINARY AND FINE BAKER ' S WARES AND ALSO THEIR TRANSPORT AND DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS DURING THE NIGHT UP TO A CERTAIN HOUR.

[...]

3.3 Case C-5/94: Hedley Lomas



NOTE AND QUESTIONS

A Council Directive on the slaughtering of animals, which, in the view of the UK, was not being implemented properly in Spain. The UK therefore refused to issue exports licenses. For the facts, see Unit IV.

The Queen v MAFF ex parte Hedley Lomas

Case C-5/94

23 May 1996

Court of Justice

[1996] ECR I-2553

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 13 Taking the view that the case before it necessitated the interpretation of Community law, the High Court of Justice decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"(1) Does the existence of a harmonizing directive (Directive 74/577/EEC), which does not contain any sanctions or procedures for non-compliance, prevent a Member State (Member State A) from relying on Article 36 of the EEC Treaty to justify measures restrictive of exports in circumstances where an interest specified in that article is threatened by the failure of another Member State (Member State B), as a matter of fact, to secure the results required by the directive?

If the answer to Question 1 is in the negative,

(2) In the circumstances described in Question 1, does Article 36 entitle Member State A to prohibit the export of live sheep to Member State B for slaughter

(i) generally; or

(ii) in a case where the stated destination of the sheep is a slaughterhouse in Member State B in respect of which Member state A does not have evidence that the provisions of the Directive are not complied with?

If the answer to Question 1 is in the affirmative, or if the answer to Question 2 is in the negative, and in the circumstances of this case:

[...]

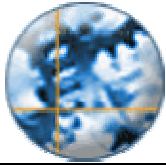
The first and second questions

- 14 The first question must be understood as asking whether Community law precludes a Member State from invoking Article 36 of the Treaty to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a Community harmonizing directive which pursues an objective which Article 36 is intended to protect, but does not lay down either any procedure for monitoring their application or any penalties in the event of their breach.
- 15 Before the substance of the question is addressed, it must be observed, as is clear from the order for reference, that in the present case the United Kingdom authorities' general refusal to grant export licences for Spain was based solely on the conviction that a certain number of Spanish slaughterhouses were not complying with the requirements of the Directive itself and that there was at least a significant risk that animals exported to Spain would undergo, upon slaughter, treatment contrary to the Directive.
- 16 It is against that factual background that the first question asked by the national court must be answered.
- 17 The refusal by a Member State to issue export licences constitutes a quantitative restriction on exports, contrary to Article 34 of the Treaty.
- 18 Article 36 of the Treaty allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognized by Community law. However, recourse to Article 36 is no longer possible where Community directives provide for harmonization of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision.
- 19 This exclusion of recourse to Article 36 cannot be affected by the fact that, in the present case, the Directive does not lay down any Community procedure for monitoring compliance nor any penalties in the event of breach of its provisions. The fact that the Directive lays down no monitoring procedure or penalties simply means that the Member States are obliged, in accordance with the first paragraph of Article 5 and the third paragraph of Article 189 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law (see, in particular, the judgment in Case 68/88 Commission v Greece [1989] ECR 2965, paragraph 23). In this regard, the Member States must rely on trust in each other to carry out inspections on their respective territories (see also the judgment in Case 46/76 Bauhuis v Netherlands [1977] ECR 5, paragraph 22).
- 20 A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law (judgment in Joined Cases 90/63 and 91/63 Commission v Luxembourg and Belgium [1964] ECR 625 and judgment in Case 232/78 Commission v France [1979] ECR 2729, paragraph 9).

- 21 The answer to the first question must accordingly be that Community law precludes a Member State from invoking Article 36 of the Treaty to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a Community harmonizing directive which pursues the objective which Article 36 is intended to protect but does not lay down either any procedure for monitoring their application or any penalties in the event of their breach.
- 22 In view of the reply given to the first question, it is unnecessary to reply to the second question.

[...]

3.4 Case C-1/96: *ex parte: Compassion in World Farming*



NOTE AND QUESTIONS

This case deals with the very contentious issue of the export of veal calves. What message is the Court sending to the Member States?

**The Queen v Minister of Agriculture, Fisheries and Food,
ex parte Compassion in World Farming Ltd.**

Case C 1/96

19 March 1998

Court of Justice

[1998] ECR I-1251

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

The CIWF is an animal welfare body with a particular interest in the prevention of cruelty to farm animals in the UK. They asked the Minister to prohibit or restrict the export of calves for rearing in veal crates. They contended that the United Kingdom Government had power under Community law to restrict the export of veal calves to other Member States where the system described above was likely to be used, contrary to the standards in force in the United Kingdom and the international standards laid down by the Convention to which all the Member States and the Community had agreed to adhere.

Since the Minister replied that the United Kingdom had no power to restrict the export of veal calves and that in any event, for policy reasons, he was not minded to impose a ban even if he had the power to do so, the CIWF applied to the High Court for judicial review.

Judgment

[...]

- 38 By its first question, the national court asks whether a Member State which has implemented the Recommendation, drawn up to apply the principles of the Convention, may rely on Article 36 of the Treaty and, in particular, on the grounds of public morality, public policy or the protection of the health or life of animals referred to in that provision in order to justify restrictions on the export of live calves with a view to preventing them from being reared in the veal crate systems used in other Member States which have implemented the Directive but which do not apply the Recommendation.
- 39 First of all, a ban or restriction on the export of live calves from one Member State to other Member States constitutes a quantitative restriction on exports contrary to Article 34 of the Treaty.
- 40 CIWF does not dispute this but maintains that such a restriction would be justified having regard to Article 36 of the Treaty and thus compatible with Community law.
- 41 It should be noted at the outset that, where there is a regulation on the common organisation of the market in a given sector, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it (see, in particular, Case 148/85 *Direction Générale des Impôts v Forest* [1986] ECR 3449, paragraph 14). Rules which interfere with the proper functioning of a common organisation of the market are also incompatible with such common organisation, even if the matter in question has not been exhaustively regulated by it [references omitted].
- 42 Under Article 1 of Regulation No 805/68, live animals of the domestic bovine species are covered by a common organisation of the market and, in accordance with the second indent of Article 22(1) thereof, they must be able to move freely between the Member States since quantitative restrictions and measures having equivalent effect are prohibited in the internal trade of the Community.
- 43 Furthermore, the Court has held that, in particular, any provisions or national practices which might alter the pattern of imports or exports by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State, on the conditions laid down by Community rules are incompatible with the principles of a common organisation of the market (Case 83/78 *Pigs Marketing Board v Redmond* [1978] ECR 2347, paragraph 58).
- 44 In this case, a ban on the export of calves would, as the United Kingdom Government has pointed out, affect the structure of the market and, in particular, would have a considerable impact on the formation of market prices, which would interfere with the proper functioning of the common organisation of the market.

[...]

- 47 Next, while Article 36 of the Treaty allows the maintenance of restrictions on the free movement of goods, justified on grounds of public morality, public policy or the protection of the health and life of animals, which constitute fundamental requirements recognised by Community law, recourse to Article 36 is nevertheless no longer possible where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision (see, in particular, Case C-5/94 *The Queen v MAFF ex parte Hedley Lomas* [1996] ECR I-2553, paragraph 18). In such a case, the appropriate checks must be carried out and protective measures adopted within the framework outlined by the harmonising directive (see Case C-323/93 *Centre d'Insémination de la Crespelle v Coopérative de la Mayenne* [1994] ECR I-5077, paragraph 31). In that regard, the Member States must rely on mutual trust to carry out checks on

their respective territories (see, most recently, *The Queen v MAFF ex parte Hedley Lomas*, paragraph 19).

48 It must therefore be established whether the Directive provides for the harmonisation of the measures necessary for the protection of the health of calves, which would be the primary objective of reliance upon Article 36.

49 As the Court has held in previous cases, in interpreting provisions of Community law it is necessary to consider not only their wording but also the context in which they occur and the objectives of the rules of which they are part (see, in particular, *Case C-128/94 Hönig v Stadt Stockach* [1995] ECR I-3389, paragraph 9).

[...]

54 Thus, it follows from the wording of the Directive, its context and the objectives which it pursues that it lays down minimum common standards for the protection of calves that are confined for the purposes of rearing and fattening.

55 CIWF asserts, however, that the broad discretion accorded to the Member States to grant derogations for very long periods, in accordance with Article 3(4) of the Directive, shows that the Directive is not a full harmonisation measure excluding recourse to Article 36.

56 As to that, the Court holds that in adopting the Directive the Community legislature laid down exhaustively common minimum standards as described above.

57 Furthermore, the Member States are required to implement those standards within their territory, in accordance with a precise timetable, in order to ensure the well-being of veal calves. The temporary derogations allowed are themselves laid down exhaustively in the Directive.

58 It cannot be argued that, under Article 11(2) of the Directive, the Member States may, in compliance with the general rules of the Treaty, maintain or apply within their territories stricter provisions for the protection of calves than those laid down in the Directive.

59 It is indeed clear from the wording of Article 11(2) of the Directive, first, that the measures permitted on that basis, which are limited to strictly territorial boundaries, may relate only to cattle-farms falling within the jurisdiction of the Member State in question and, second, that such measures may be adopted only in compliance with the general rules of the Treaty.

60 As the United Kingdom Government has correctly observed, it follows from the express terms of that provision that the Member States are not entitled to adopt stricter measures for the protection of calves other than provisions applying within their own territory.

61 In adopting the Welfare of Livestock Regulations 1994 and the Welfare of Livestock Regulations (Northern Ireland) 1995, the United Kingdom has, in accordance with Article 11(2) of the Directive, applied within its territory stricter provisions than those laid down in the Directive.

62 However, a ban on exports imposed on account of conditions prevailing in other Member States which have in fact implemented the Directive would fall outside the derogation allowed by Article 11(2). A ban on exports such as that called for by CIWF would strike at the harmonisation achieved by the Directive.

63 In those circumstances, the fact that the Member States are authorised to adopt within their own territory protective measures stricter than those laid down in a directive does not mean that the

Directive has not exhaustively regulated the powers of the Member States in the area of the protection of veal calves (see, to that effect, Case C-169/89 Van den Burg [1990] ECR I-2143, paragraphs 9 and 12).

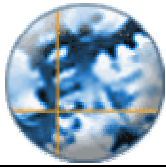
- 64 It follows that a Member State cannot rely on Article 36 of the Treaty in order to restrict the export of calves to other Member States for reasons relating to the protection of the health of animals, which constitutes the specific objective of the harmonisation undertaken by the Directive.

[...]

- 65 It remains to be examined whether a Member State may rely on Article 36 in order to restrict the export of calves to other Member States for reasons relating to the protection of public policy or public morality, which are not the subject of the Directive.
- 66 CIWF supports recourse to those justifications simply by drawing attention to the views and reactions of a section of national public opinion which believes that the system put in place by the Directive does not adequately protect animal health. So, in reality, public policy and public morality are not being invoked as a separate justification but are an aspect of the justification relating to the protection of animal health, which is the subject of the harmonising directive.
- 67 In any event, a Member State cannot rely on the views or the behaviour of a section of national public opinion, as CIWF maintains, in order unilaterally to challenge a harmonising measure adopted by the Community institutions.
- 68 Therefore, reliance on Article 36 for the protection of public order or public morality in circumstances such as those involved in the instant case is also ruled out.
- 69 It follows that a Member State which has implemented the Recommendation drawn up to apply the principles of the Convention cannot rely on Article 36 of the Treaty and, in particular, on the grounds of public morality, public policy or the protection of the health or life of animals laid down in that article, in order to justify restrictions on the export of live calves with a view to preventing those calves from being reared in the veal crate systems used in other Member States which have implemented the Directive but which do not apply that recommendation.

[...]

3.5 Case C-350/97: Wilfried Monsees



NOTE AND QUESTIONS

After the Community has totally harmonised an area Member States may no longer derogate from Article 28 [ex 30] by relying on Article 30 [ex 36].

The facts in this case occurred after one of the harmonising directives was adopted but before the expiration of the deadline for its transposition by the Member States.

Wilfried Monsees and Unabhängiger Verwaltungssenat für Kärnten

Case C-350/97

11 May 1999

Court of Justice

ECR [1999] I-02921

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Mr Monsees, a haulage contractor, intended to transport cattle from Germany to Turkey. He was charged with an offence under Austrian legislation for transporting cattle through Austria without bringing the animals to the nearest suitable abattoir in Austria, and for continuing the journey, without authorisation, beyond the maximum time and distance laid down by the national legislation. In the course of the proceedings, Mr Monsees contended that the effect of the national legislation was to prevent any cattle being transported eastwards out of Germany unless it was accepted that their journey would necessarily end at the nearest suitable abattoir in Austria. He submitted that the national legislation cannot be justified under Article 30(36) of the EC Treaty since the adoption of Directives 91/628 and 95/29.

Judgment:

[...]

21. According to the Austrian Government, even if Paragraph 5(2) of the TGSt constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty, it is justified under Article 36 as it serves to protect the health of animals. Since Directive 95/29 was not yet applicable when the facts in the main proceedings arose, the Austrian legislation should be examined solely by reference to Article 36. The Austrian Government maintains that Paragraph 5(2) of the TGSt is necessary in order to avoid the mistreatment of animals when transported by road.

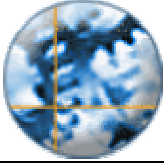
[...]

23. The Court finds that, in so far as it lays down short maximum journey times and distances for the transport of animals for slaughter and also provides that all such transport in Austria must end at the nearest suitable abattoir in order for the animals to be killed, Paragraph 5(2) of the TGSt constitutes an obstacle to international transport as regards both journeys to or from Austria and transit through that country. That provision therefore constitutes a measure having an effect equivalent to a quantitative restriction, on both imports and exports, prohibited by Articles 30 and 34 of the Treaty.
24. Before considering whether there is a justification based on the protection of animals under Article 36 of the Treaty, it is first necessary to establish whether harmonising directives applied in this area. While Article 36 allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognised by Community law, recourse to Article 36 is no longer possible where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision (Case C-5/94 *The Queen v MAFF ex parte Hedley Lomas* [1996] ECR I-2553, paragraph 18).
25. Directive 91/628 does not lay down any limit on journey time or distance for the transport of live animals by road. Article 13(1) merely required the Commission to draw up a report before 1 July 1992 dealing, *inter alia*, with that matter and gave it the opportunity to put forward proposals.
26. Directive 95/29, on the other hand, contains a number of specific provisions regarding maximum journey times, conditions of transport, animals' feeding and watering intervals, minimum rest periods and loading densities.
27. However, while that directive was adopted before the facts of the main proceedings arose, the time-limit for its transposition had still not expired as the Member States had, in principle, until 31 December 1996 to comply with it. Until that date, therefore, a Member State was entitled to rely on Article 36 of the Treaty in order to retain restrictions on the free movement of goods justified on grounds of the protection of health and life of animals.
28. It must accordingly be determined whether the national legislation was suitable for achieving the objective of protecting the health of animals and whether it went beyond what was necessary to achieve it (see, to that effect, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 57).
29. The effect of Paragraph 5(2) of the TGSt is, in fact, to make all international transit by road of animals for slaughter almost impossible in Austria.

30. Furthermore, measures appropriate to the objective of protecting the health of animals and less restrictive of the free movement of goods were conceivable, as the provisions contained in Directive 95/29 demonstrate.
31. In view of the considerations set out above, the answer to the question submitted to the Court must be that, on a correct interpretation of Articles 30, 34 and 36 of the Treaty, a Member State is prevented from restricting the transport by road of animals for slaughter by requiring such transport to be carried out only as far as the nearest suitable abattoir within national territory and under conditions such that, upon observance of the motor vehicle and traffic regulations, a total journey time of six hours and a distance of 130 kilometres are not exceeded, account being taken of only half of the kilometres actually travelled on a motorway.

[...]

3.6 Case C-388/95: *Belgium v Spain*



NOTE AND QUESTIONS

While studying this case pay attention to the type of judicial action under which Belgium brought an action against Spain, as you have seen in unit II, there are very few ECJ cases where the action is brought under article 227 of EC Treaty (ex article 170).

Kingdom of Belgium v Kingdom of Spain

Case C-388/95

16 May 2000

Court of Justice

ECR [2000] I-03123

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By application lodged at the Registry of the Court on 13 December 1995, the Kingdom of Belgium brought an action under Article 170 of the EC Treaty (now Article 227 EC) for a declaration that, by maintaining in force Real Decreto 157/1988, por el que se establece la normativa a que deben ajustarse las denominaciones de origen y las denominaciones de origen calificadas de vinos y sus respectivos Reglamentos (Royal Decree No 157/88 laying down the rules governing designations of origin and controlled designations of origin for wines and regulations implementing it, BOE No 47 of 24 February 1988, p. 5864, hereinafter 'Decree No 157/88) and in particular Article 19(1)(b) thereof, the Kingdom of Spain has failed to fulfil its obligations under Article 34 of the EC Treaty (now, after amendment, Article 29 EC), as interpreted by the Court of Justice of the European Communities in its judgment of 9 June 1992 in Case C-47/90 Delhaize v Promalvin [1992] ECR I-3669, and Article 5 of the EC Treaty (now Article 10 EC).

[...]

12. Article 5 of the Treaty provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

13. Under Article 34(1) of the Treaty, quantitative restrictions on exports and all measures having equivalent effect are to be prohibited between Member States. Article 36 of the EC Treaty (now, after amendment, Article 30 EC) provides that Article 34 of the Treaty is not to preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of, inter alia, the protection of industrial and commercial property.

The provisions of secondary Community law applicable when the action was brought

14. Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84, p. 59), as amended most recently by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter Regulation No 823/87), lays down a framework of Community rules governing the production and control of quality wines produced in specified regions ('quality wines psr'). The fourth recital in the preamble thereto states that it was adopted in pursuance of a policy of encouraging quality production in agriculture and especially in wine growing.
15. Pursuant to Article 15 of Regulation No 823/87, only wines to which that regulation or other specific regulations or implementing regulations are applicable and which comply with the requirements laid down by the national rules may have applied to them the Community terms laid down by Regulation No 823/87, such as 'quality wine psr', or any specific term traditionally used in wine growing Member States to designate particular wines, such as, in Spain, the term 'denominación de origen' or 'denominación de origen calificada'.
16. The first paragraph of Article 18 of Regulation No 823/87 provides:

'Producer Member States may, taking into account fair and traditional practices:

 - ...
 - in addition to the other provisions laid down in this Regulation, lay down any additional or more stringent characteristics or conditions of production, manufacture and movement in respect of the quality wines psr produced in their territory.
17. The 22nd recital in the preamble to Regulation No 823/87 states that the purpose of the latter provision is to preserve the particular quality characteristics of quality wines psr.
18. Article 15a of Regulation No 823/87 provides for a procedure for the downgrading of a quality wine psr where it has undergone a change during storage or transport which has caused its properties to deteriorate or alter or where it has been the subject of prohibited treatments or is not legally described as a quality wine psr.
19. In addition, the wine growing sector is governed in particular by:
 - Council Regulation (EEC) No 2048/89 of 19 June 1989 laying down general rules on controls in the wine sector (OJ 1989 L 202, p. 32);
 - Commission Regulation (EEC) No 2238/93 of 26 July 1993 on the accompanying documents for the carriage of wine products and the relevant records to be kept (OJ 1993 L 200, p. 10), which repealed and replaced Commission Regulation (EEC) No 986/89 of 10 April 1989 on the

accompanying documents for carriage of wine products and the relevant records to be kept (OJ 1989 L 106, p. 1);

- Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989L 232, p. 13), as amended most recently by the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (hereinafter 'Regulation No 2392/89');
- Commission Regulation (EEC) No 3201/90 of 16 October 1990 laying down detailed rules for the description and presentation of wines and grape musts (OJ 1990 L 309, p. 1), as most recently amended by Commission Regulation (EC) No 2603/95 of 8 November 1995 (OJ 1995 L 267, p. 16).

The Delhaize judgment

20. In Delhaize, the Court, in response to a request from the Tribunal de Commerce (Commercial Court), Brussels, for a ruling on the compatibility with Article 34 of the Treaty of national legislation such as Decree No 157/88 and the Rioja Rules adopted under it, held that national provisions applicable to wine of designated origin which limited the quantity of wine that might be exported in bulk but otherwise permitted sales of wine in bulk within the region of production constituted measures having equivalent effect to a quantitative restriction on exports which were prohibited by Article 34 of the Treaty.
21. The Court found, first (paragraphs 12 to 14 of the judgment), that national rules which limited the quantity of wine available for export in bulk to other Member States but imposed no quantitative restriction on sales of wine in bulk between undertakings situated within the region of production had the specific effect of restricting patterns of exports of wine in bulk and, in particular, of procuring a special advantage for bottling undertakings situated in the region of production.
22. As regards the Spanish Government's contention that the obligation to bottle the wine in the region of production, as a condition for the grant of the designation of 'denominación de origen calificada' to that wine, constituted protection of industrial and commercial property within the meaning of Article 36 of the Treaty, the Court stated (paragraph 16) that, as Community law then stood, it was for each Member State to define, within the terms of Council Regulation (EEC) No 823/87, the conditions applicable to the use of a name of a geographical area within its territory as a registered designation of origin for a wine from that area. However, it stressed that, in so far as those conditions constituted one of the measures referred to by Article 34 of the Treaty, they were not justified on grounds of the protection of industrial and commercial property within the meaning of Article 36 of the Treaty unless they were needed in order to ensure that the registered designation of origin fulfilled its specific function.
23. The Court observed (paragraphs 17 and 18) that the specific function of a registered designation of origin was to guarantee that the product bearing it came from a specified geographical area and displayed certain particular characteristics and that, consequently, an obligation like that at issue would be justified by a concern to ensure that the designation of origin fulfilled its specific function only if bottling in the region of production endowed the wine originating in that region with particular characteristics, of such a kind as to give it individual character, or if bottling in the region of production were essential in order to preserve essential characteristics acquired by that wine. The Court then found (paragraph 19) that it had not been shown that the bottling of the wine in question in the region of production was an operation which endowed it with particular characteristics or was essential in order to maintain the specific characteristics acquired by it.
24. The Spanish Government's argument that the supervisory powers vested in the Rioja Governing Council were limited to the region of production, making it necessary for the wine to be bottled in the region of production, was rejected by the Court on the ground that Regulation (EEC) No 986/89 had established a system for verifying that the authenticity of the wine was not affected during transport (paragraph 21).

25. The Court then held (paragraphs 22 and 23) that the justification claimed by the Spanish Government that the rules at issue formed part of a policy to improve the quality of wine could not be upheld since it had not been established that the confinement of bottling to a specified area was, in itself, capable of affecting the quality of the wine.
26. Finally, it held (paragraphs 25 and 26) that, even though under Article 18 of Regulation No 823/87 the Member States might, taking into account fair and traditional practices, lay down additional or more stringent conditions of movement than those laid down in Regulation No 823/87, that article could not be interpreted as authorising the Member States to impose conditions contrary to the Treaty rules on the movement of goods.

The present proceedings

27. In 1994, the Belgian Government drew the Commission's attention to the fact that the Spanish rules at issue in *Delhaize* were still in force, despite the interpretation of Article 34 of the Treaty given by the Court in that judgment, and called on it to act. On 14 November 1994, the competent member of the Commission replied that the Commission considered it 'inappropriate to persist with Treaty-infringement cases.
28. On 8 March 1995, the Belgian Government sent the Commission a letter in which it expressed its intention to commence Treaty-infringement proceedings under Article 170 of the Treaty against the Kingdom of Spain for infringement of Article 34 of the Treaty.
29. On 12 April 1995, the Commission gave notice of that letter to the Kingdom of Spain, which submitted its written observations on 5 May 1995.
30. On 31 May 1995, the two Member States each submitted their own case and their observations on the other party's case orally to the Commission in accordance with Article 170 of the Treaty. Since the Commission did not issue a reasoned opinion, the Kingdom of Belgium commenced the present Treaty-infringement proceedings.
31. By orders of the President of the Court of 21 June 1996, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the Kingdom of Belgium, and the Italian Republic, the Portuguese Republic and the Commission were granted leave to intervene in support of the Kingdom of Spain.

Substance

32. The Belgian Government and the Danish, Netherlands, Finnish and United Kingdom Governments, intervening in its support, claim that, by not amending Decree No 157/88 in order to comply with the *Delhaize* judgment, the Kingdom of Spain has failed to fulfil its obligations under Article 5 of the Treaty.
33. In its defence, the Spanish Government contends that, in the *Delhaize* judgment, the Court did not rule on the compatibility of the Spanish provisions with the Community law. It asserts that there are provisions similar to those examined by the Court in the laws of almost all wine-producing Member States. In its view, the Spanish legislation in force is in conformity with the Court's interpretation of Article 34 of the Treaty in the *Delhaize* judgment and fully complies with Community legislation.
34. In those circumstances, since this is an action to establish a failure to fulfil a Treaty obligation, the Court must examine the pleas thus raised in order to determine whether the Kingdom of Spain has in fact failed to fulfil its obligations under Article 34 of the Treaty.

35. As regards the latter provision, it necessary to consider, having regard to the pleas and arguments of the parties, whether, in the circumstances of this case, the obligation to bottle wine in the region of production in order to be able to use the designation of origin (hereinafter 'the contested requirement') constitutes a restriction on the free movement of goods and, if so, whether it is authorised by the Community rules concerning quality wines psr or whether it is justified by an aim in the general interest such as to override the requirements of the free movement of goods.

The existence of a restriction on the free movement of goods

36. The Belgian Government and the Governments intervening in its support claim that the contested requirement results in a quantitative limitation on exports of Rioja wine in bulk within the meaning of Article 34 of the Treaty, as already held by the court in Delhaize.
37. The Spanish Government, supported by the Italian and Portuguese Governments, submits that the Spanish legislation at issue does not in any way limit the quantity of wine produced in the Rioja region which may be exported in bulk. Its sole purpose and effect is to prohibit any improper and uncontrolled use of the Rioja 'denominación de origen calificada'. The Spanish Government emphasises that the sale of wine in bulk within the region is not authorised on a general basis, in that any dispatch of wine within the region must be authorised in advance by the Rioja Governing Council and be sent exclusively to bottling undertakings authorised by it. In the region there are undertakings which are not authorised and have chosen to engage in the marketing of wines produced in the region but not protected by the 'denominación de origen calificada'. Thus, in this case, the Spanish rules do not correspond to the situation considered by the Court in Delhaize. That case concerned national rules applicable to wines bearing a designation of origin which limited the quantity of wine permitted to be exported in bulk while allowing sales of wine in bulk within the region of production.
38. It is important to bear in mind that a consequence of the requirement at issue is that wine produced in the region, which fulfils the other conditions laid down for eligibility for the Rioja 'denominación de origen calificada', can no longer be bottled outside the region without being deprived of that designation.
39. Although the fact that the bulk transport of wine qualifying for use of that designation is, to some extent, also limited within the actual region of production may be a factor to be taken into consideration in examining any justification for the contested requirement, it cannot be relied on to show that that requirement has no restrictive effects.
40. That requirement means, in any event, that wine transported in bulk within the region retains entitlement to the 'denominación de origen calificada' when it is bottled in authorised cellars.
41. It is thus a national measure which has the effect of specifically restricting patterns of exports of wine eligible to bear the 'denominación de origen calificada' and thereby of establishing a difference of treatment between trade within a Member State and its export trade, within the meaning of Article 34 of the Treaty.
42. Accordingly, the Spanish rules at issue constitute a measure having an effect equivalent to quantitative restrictions on exports within the meaning of Article 34 of the Treaty.

The scope of Article 18 of Regulation No 823/87

43. The Spanish Government, supported by the Italian and Portuguese Governments, states that the Community legislation on quality wines psr is not exhaustive and allows the Member States to lay down more stringent national rules. It cites Article 18 of Regulation No 823/87, which authorises the Member States to lay down additional or more stringent conditions for the production and

movement of wines within their territory. The use in that provision of the term 'movement is particularly significant since the contested requirement undeniably forms part of the provisions on the movement of quality wines psr.

44. The Belgian Government states that, in *Delhaize*, the Court rejected the argument based on Article 18 of Regulation No 823/87. It also maintains that the contested requirement is contrary to fair and traditional bottling practice in the Member States which import wine.
45. It must be borne in mind that in *Delhaize* the Court held (in paragraph 26) that Article 18 of Regulation No 823/87 could not be interpreted as authorising the Member States to impose conditions contrary to the Treaty rules on the movement of goods. That provision cannot therefore by itself render the contested requirement lawful.
46. Conversely, and contrary to the Belgian Government's contention, it does not in itself prohibit an obligation that wine be bottled in the region of production merely because it authorises additional national requirements 'taking into account fair and traditional practices. The term 'taking into account does not have the more restrictive sense of an expression indicating a positive requirement, such as the term 'provided that there is, or an expression indicating a prohibition, such as 'without prejudice to. In circumstances like those of this case, characterised at the date of adoption of Decree No 157/88 by the coexistence, not contested by the parties, of the practice of bottling in the region of production and the practice of exporting wine in bulk, the wording of Article 18 of Regulation No 823/87 merely implies that those practices are to be taken into consideration. This might entail a comparative assessment of the interests involved, after which preference might be accorded, having regard to certain objectives, to one practice rather than another.

Justification for the contested requirement

47. The Spanish, Italian and Portuguese Governments, and also the Commission, consider that bottling forms an integral part of the process of wine production. It is a stage in the processing of the product and therefore only a wine bottled in the region can truly be regarded as having originated in that region.
48. It follows, they submit, that a wine bottled outside the region of La Rioja bearing the Rioja 'denominación de origen calificada infringes the exclusive right to use that designation, which is vested in the entire group of producers in the region whose wine fulfils the conditions for its use, including that of being bottled in the region. Thus, the restrictive effects of the requirement at issue are justified on grounds relating to the protection of industrial and commercial property referred to in Article 36 of the Treaty. The requirement is needed in order to ensure that the 'denominación de origen calificada fulfils its specific function, which is, in particular, to guarantee the origin of the product.
49. For the purpose of giving judgment in these proceedings, rather than determining whether or not bottling in the region of production of a wine which may qualify for a 'denominación de origen calificada should be regarded as a stage in the process of producing that wine, it is necessary to appraise the reasons for which, according to the Spanish Government, that operation should be carried out in the region of production. Only if those reasons are in themselves capable of justifying the requirement at issue may that requirement be regarded as compatible with the Treaty, notwithstanding its restrictive effects on the free movement of goods.
50. As far as those reasons are concerned, the Spanish Government refers to the specific nature of the product and the need to protect the good reputation attaching to the Rioja 'denominación de origen calificada by preserving, by means of the requirement at issue, the quality and guarantee of the origin of Rioja wine. That requirement is therefore justified by virtue of the protection of industrial and commercial property with which Article 36 of the Treaty is concerned.

51. It is true, as the Belgian Government and the Governments intervening in its support have pointed out, that the Court took the view in *Delhaize* that it had not been shown that bottling in the region of production was an operation needed to preserve particular characteristics of the wine (paragraph 19) or to guarantee the origin of the wine (paragraph 21) or that the confinement of bottling to a specified area was, in itself, capable of affecting the quality of the wine (paragraph 23).
52. However, in the present proceedings, the Spanish, Italian and Portuguese Governments and the Commission have produced new information to demonstrate that the reasons underlying the contested requirement are capable of justifying it. It is necessary to examine this case in the light of that information.
53. Community legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through, *inter alia*, the use of designations of origin which enjoy special protection. That general tendency has become apparent in the quality wines sector, as has been pointed out in paragraphs 14 and 17 of this judgment. It has also emerged in relation to other agricultural products, in respect of which the Council adopted Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1). The eighth recital in the preamble to that regulation makes it clear that the latter is to apply without prejudice to existing Community legislation on wines and spirits, 'which provide for a higher level of protection.
54. Designations of origin fall within the scope of industrial and commercial property rights. The applicable rules protect those entitled to use them against improper use of those designations by third parties seeking to profit from the reputation which they have acquired. They are intended to guarantee that the product bearing them comes from a specified geographical area and displays certain particular characteristics (*Delhaize*, paragraph 17).
55. They may enjoy a high reputation amongst consumers and constitute for producers who fulfil the conditions for using them an essential means of attracting custom (see to that effect, in relation to indications of provenance, Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 28).
56. The reputation of designations of origin depends on their image in the minds of consumers. That image in turn depends essentially on particular characteristics and more generally on the quality of the product. It is on the latter, ultimately, that the product's reputation is based.
57. It must be observed that a quality wine is a very specific product, a fact not in any event contested in relation to Rioja wine. Its particular qualities and characteristics, which result from a combination of natural and human factors, are linked to its geographical area of origin and vigilance must be exercised and efforts made in order for them to be maintained.
58. The rules governing the Rioja '*denominación de origen calificada*' are designed to uphold those qualities and characteristics. By ensuring that operators in the wine growing sector of the Rioja region, at whose request the designation of origin was granted, control bottling as well, they pursue the aim of better safeguarding the quality of the product and, consequently, the reputation of the designation, for which they now assume full and collective responsibility.
59. Against that background, the requirement at issue must be regarded as compatible with Community law despite its restrictive effects on trade if it is shown that it is necessary and proportionate and capable of upholding the considerable reputation incontestably enjoyed by the Rioja '*denominación de origen calificada*'.
60. The Spanish Government, supported by the Italian and Portuguese Governments, and by the Commission, submits that, without this requirement, the reputation of the Rioja '*denominación de*

origen calificada might in fact be undermined. Transport and bottling outside the region of production would, in its view, put the quality of the wine at risk. The requirement at issue contributes decisively to safeguarding the particular characteristics and the quality of the product in that its effect is to entrust the producers and the Rioja Governing Council, that is to say those who have the necessary knowledge and know-how and a fundamental interest in preserving the reputation acquired, with the implementation of, and monitoring of compliance with, all the rules concerning transport and bottling.

61. In the present case, it is undisputed that the bottling of wine is an important operation which, if not carried out in accordance with strict requirements, may seriously impair the quality of the product. Bottling does not involve merely filling empty containers but normally entails, before filling, a series of complex oenological operations (filtering, clarifying, cooling, and so on) which, if not carried out in accordance with the prescribed rules of the trade, may adversely affect the quality and alter the characteristics of the wine.
62. Nor is it contested that bulk transport of wine may seriously impair its quality if not undertaken under optimum conditions. If the conditions of transport are not perfect, the wine will be exposed to oxidation reduction, which will increase with distance and may impair the quality of the product. It will also be subject to the risk of variations in temperature.
63. The Belgian Government and the Governments intervening in its support assert that those risks exist whether the wine is transported and bottled in the region of production or outside it. In their opinion, the bulk transport and bottling of wine outside the region may be carried out under conditions such as to safeguard its quality and reputation. In any event, existing Community legislation contains adequate rules to control the quality and authenticity of wines, in particular those which have been granted a 'denominación de origen calificada'.
64. On the basis of the information produced to the Court in this case, it must be accepted that, in the best conditions, a wine's characteristics and quality may indeed be maintained when it has been transported in bulk and bottled outside the region of production.
65. However, in the case of bottling, the best conditions are more certain to be assured if bottling is done by undertakings established in the region of those entitled to use the designation and operating under their direct control, since they have specialised experience and, what is more, thorough knowledge of the specific characteristics of the wine in question which must not be impaired or lost at the time of bottling.
66. As regards bulk transport of wine, whilst it is true that the phenomenon of oxidation reduction may also occur during bulk transport in the region of production, even though the distance covered is usually less, restoration of the initial characteristics of the product will in those circumstances be entrusted to undertakings which offer all the guarantees of know-how and, again, the most thorough knowledge of wine.
67. Moreover, as the Advocate General has stressed in points 28 to 31 of his Opinion, controls undertaken outside the region of production in accordance with the Community rules provide fewer guarantees as to the quality and authenticity of the wine than those carried out in the region in compliance with the monitoring procedure referred to in paragraph 5 of this judgment.
68. It is to be noted that, in the context of Regulation No 2048/89, controls as to the quality and authenticity of the wine are not required to be carried out systematically in all the Member States. Article 3(2) of that regulation in fact provides that controls are to 'be carried out either systematically or by sampling.

69. As regards Regulation No 2238/93, this does not, as the Commission observes, guarantee either the origin or the original condition of wine carried in bulk or preservation of its quality during transport since the control for which it provides is essentially documentary control of the quantities transported.
70. As far as Regulation No 2392/89 is concerned, Article 42 provides that the competent authorities of a Member State may call on the competent authorities of another Member State to require the bottler to furnish proof of the accuracy of the information used in the description or the presentation of the product concerning its nature, identity, quality, composition, origin or provenance. However, that mechanism, which is a matter of direct cooperation, is not systematic in character in that it necessarily involves requests being made by the competent authorities concerned.
71. In contrast, the Spanish rules at issue provide that each consignment of wines permitted to bear a 'denominación de origen calificada must be subjected to organoleptic and analytical examinations (Article 20(4) of Decree No 157/88 and, for Rioja wine, Article 15 of the Rioja Rules).
72. In addition, under the Rioja Rules:
- every bulk despatch of Rioja wine within the region must first be authorised by the Rioja Governing Council (Article 31);
 - bottling may be undertaken only by bottling undertakings authorised by the Rioja Governing Council (Article 32);
 - the installations in such undertakings must be quite separate from those in which wines not entitled to bear the 'denominación de origen calificada are produced and stored (Article 24).
73. It thus appears that, for Rioja wines transported and bottled in the region of production, the controls are far-reaching and systematic and are the responsibility of the totality of the producers themselves, who have a fundamental interest in preserving the reputation acquired, and that only consignments which have been subjected to those controls may bear the 'denominación de origen calificada.
74. It can be inferred from the foregoing that the risk to which the quality of the product finally offered to consumers is exposed is greater where it has been transported and bottled outside the region of production than when those operations have taken place within the region.
75. Accordingly, it must be accepted that the requirement at issue, whose aim is to preserve the considerable reputation of Rioja wine by strengthening control over its particular characteristics and its quality, is justified as a measure protecting the 'denominación de origen calificada which may be used by all the producers concerned and is of decisive importance to them.
76. Finally, it must be recognised that the measure is necessary for attainment of the objective pursued, in that there are no less restrictive alternative measures capable of attaining it.
77. In that regard, the 'denominación de origen calificada would not enjoy comparable protection if operators established outside the region of production were placed under an obligation to inform consumers by means of appropriate labelling that the wine had been bottled outside that region. Any deterioration in the quality of a wine bottled outside the region of production, resulting from materialisation of the risks associated with transport in bulk or subsequent bottling operations, might harm the reputation of all wines marketed under the Rioja 'denominación de origen calificada, including those bottled in the region of production under the control of the group of producers entitled to use that designation. More generally, the very coexistence of two different bottling processes, inside or outside the region of production, with or without systematic monitoring by that group, might reduce the degree of consumer confidence in the designation based on the conviction

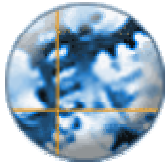
that the production of quality wines psr must at every stage be carried out under the control and responsibility of the relevant group of producers.

78. In those circumstances, it must be concluded that the contested requirement is not contrary to Article 34 of the Treaty. Consequently, the action must be dismissed.

[...]

4 ARTICLE 100A (4) [NOW ARTICLE 95]: NATIONAL DEROGATION

4.1 Case C-319/97: Antoine Kortas



NOTE AND QUESTIONS

Article 100a (4) allowed a Member State to notify to the Commission if it wished to maintain in force its own national provisions following adoption of a Community act. For this to be permitted the Member State had first to rely on one of the reasons listed in Article 36 [now 30] or seek to protect the environment or the working environment and secondly the Commission had to give its assent. This case concerns the effect of this Article on the direct effect of directives as well as the Commission's obligations under Article 100a (4). In what way does the Treaty of Amsterdam change this? What are the dangers of a system like Article 100a (4) [now Article 95]?

Criminal proceedings against Antoine Kortas

Case C-319/97

1 June 1999

Court of Justice

[1999] ECR I-3143

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Criminal proceedings have been introduced against Mr Kortas for having sold in his shop in Sweden confectionery products imported from Germany and containing a colorant called E 124, or 'cochineal red'. According to the national guidelines, the use of E 124 as an additive in confectionery was not permitted. Pursuant to Article 30 of the Swedish Law on foodstuffs, contravention of that prohibition is a punishable offence. However, E 124 is one of the colorants approved by the EC-Directive for use in confectionery. Furthermore, the directive provides less severe penalties than the national legislation. The facts occurred before the expiry of the deadline for the transposition of the Directive into national law. The Directive was based on Article 100a of the EC-Treaty. Article 100a(4) provides:

"If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36 [of the EC Treaty (now, after amendment, Article 30 EC)], or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Articles [226 and 227 EC (ex Articles 169 and 170)], the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.”

Sweden submitted a request for derogation to the Commission pursuant to Article 100a(4) of the Treaty, and advised the Commission of its intention to maintain in force the provisions of national law concerning E 124. It argued that in Sweden the use of certain colorants approved by the Directive could pose health risks. At the time of the national proceedings, the Commission had not yet replied to the Swedish Government's notification. The national court is asking the Court of Justice about the direct effect of a directive adopted under Article 100a of the EC – Treaty.

Judgment:

[...]

20. By its first question, the national court essentially asks whether a directive can have direct effect even though its legal basis is Article 100a of the Treaty and Article 100a(4) allows Member States to request a derogation from the implementation of that directive.
21. The Court has consistently held [references omitted] that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly.
22. It is not decisive, in determining whether or not a directive has direct effect, that its legal basis allows Member States to apply to the Commission for a derogation from its implementation if they consider this necessary. The general potential of a directive to have direct effect is wholly unrelated to its legal basis, depending instead on the intrinsic characteristics referred to in paragraph 21 above.
23. The answer to the first question must therefore be that a directive can have direct effect even though its legal basis is Article 100a of the Treaty and Article 100a(4) allows Member States to request a derogation from the implementation of that directive.
24. By its second and third questions, which it is appropriate to consider together, the national court essentially asks whether the direct effect of a directive, where the deadline for its transposition into national law has expired, is affected by the notification made by a Member State pursuant to Article 100a(4) of the Treaty, seeking confirmation of provisions of national law derogating from the directive.

[...]

27. The aim of the procedure under that provision is to ensure that no Member State applies national rules derogating from the harmonised legislation without obtaining due confirmation from the Commission.

28. As the Court has consistently held (Case C-41/93 France v Commission [1994] ECR I-1829, paragraphs 29 and 30), measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which are such as to hinder intra-Community trade would be rendered ineffective if Member States retained the right unilaterally to apply national rules derogating from those measures and a Member State is not, therefore, authorised to apply the national provisions notified by it under Article 100a(4) until after it has obtained a decision from the Commission confirming them.
29. The national court asks whether an exception to that principle arises where the Commission does not respond to the notification of measures by a Member State.

[...]

33. It must be noted that Article 100a(4) of the Treaty is silent as to the time within which the Commission must adopt a position with regard to provisions of national law which have been notified. The Commission's freedom from temporal constraints is further substantiated by the fact that the Community legislature found it necessary, in the Treaty of Amsterdam, to limit to six months the time available to the Commission for verification of such provisions. However, it is common ground that no such time-limit was in operation at the time when the Kingdom of Sweden notified to the Commission its request for derogation from the Directive.
34. However, the fact that there was no time-limit could not absolve the Commission from the obligation to act with all due diligence in discharging its responsibilities, particularly as Article 100a(4), first paragraph, of the Treaty concerns provisions of national law which a Member State considers to be justified by major needs referred to in Article 36 of the Treaty or relating to protection of the environment or the working environment.
35. In those circumstances, implementation of the notification scheme provided for in Article 100a(4) requires the Commission and the Member States to cooperate in good faith. It is incumbent on Member States under Article 10 EC (ex Article 5) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force. The Commission, for its part, must demonstrate the same degree of diligence and examine as quickly as possible the provisions of national law submitted to it. Clearly, this was not the case with respect to the examination of the notified provisions at issue in the main proceedings.
36. Although failure on the part of the Commission to act with due diligence following a notification effected by a Member State under Article 100a(4) may therefore constitute a failure to fulfil its obligations, it cannot affect full application of the directive concerned.
37. If the Member State considers the Commission to be in breach of its obligations, it may, in accordance with the provisions of the Treaty, in particular Article 232 EC (ex Article 175), bring proceedings before the Court for a declaration to that effect and, where appropriate, may apply for interim relief.
38. The answer to the second and third questions must therefore be that the direct effect of a directive, where the deadline for its transposition into national law has expired, is not affected by the notification made by a Member State pursuant to Article 100a(4) of the Treaty seeking confirmation of provisions of national law derogating from the directive, even where the Commission fails to respond to that notification.

[...]