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The System of the Free Movement of Goods in the European Community

INTRODUCTION

The abolition of customs duties and quotas, the two classic instruments of protectionism, and also of the increasing mass of substitute measures involving tax discrimination or the grant of subsidies are a fundamental concern of both international and regional economic groupings. Such action is the result of efforts, motivated by the growing inter-dependence of the world's economies, to supplant the nation-state, which is oriented towards the domestic market, with larger-scale economic units.

The code of conduct of the General Agreement on Tariffs and Trade (GATT) and the Additional Agreement which have been "provisionally applicable" since 1 January 1948, established for the first time the basic conditions under international law for free trade throughout the world. The General Agreement on Tariffs and Trade is founded on the basic premise that quantitative restrictions for the protection of the domestic economy and discrimination against foreign goods on the domestic market are in principle prohibited (Articles XI and III respectively) and that customs barriers are gradually to be dismantled by means of multilateral negotiations (for example, the Kennedy Round 1964 and the Toyko Round 1968) (Article XXVIII a).[1] Although the Agreement has largely contributed to the liberalization of international trade by harmonizing the instruments of commercial policy, it has failed in its attempt to de-politicize such trade. In view of the failure to express in sufficiently concrete terms the occasionally ambiguous concepts which it contains, the function of the Agreement has scarcely evolved beyond providing guidelines.

The inadequacy of world-wide organizational structures combined with the political polarization of the world has led to the establishment of a broad range of regional systems of economic integration which extend from ordinary economic policy co-operation agreements concern-

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1. Petersmann, "Protektionismus als Ordnungsproblem, und Rechtsproblem," 47 *RabelsZ* 478 (1983).

ing the creation of free-trade areas[2] and customs unions[3] to the Common Market.[4] Those systems have all declared war in one form or another on customs duties and charges having equivalent effect as well as on quantitative restrictions and measures having equivalent effect. For the most part, they also contain a supplementary prohibition of internal taxation of a discriminatory or protectionist character.

By comparison with all other regional economic groupings, the European Community constitutes a legal and institutional innovation. It is more than a customs union of the classic type, i.e. an economic area in which customs duties and quantitative restrictions are abolished between the member countries and trade restrictions against non-member countries are harmonized by means of a common external tariff. The core of the European Community is a common market which has achieved a high degree of integration. That market consists of a union of national economies forming a uniform economic area which is free from distortions of competition, within which obstacles to the free movement of goods, persons, and capital and to the freedom to provide services have to a large extent been abolished and whose international relations are conducted by an independent entity under public international law with limited powers to conclude treaties.[5] The Court of Justice has defined it as follows:[6]

> The concept of a common market . . . involves the elimination of all obstacles to intra-Community trade in order to merge the

2. For example, the Agreement of 4 January 1960 establishing a European Free-Trade Association (EFTA); Treaty of Montevideo of 18 February 1960, establishing a Latin American Free-Trade Association (LAFTA).

3. For example, the 1964 Treaty establishing a Central African Economic and Customs Union (UDEAC), text in: 1965 *Int'l Leg. Mat.*, 699.

4. For example, the Treaty of Managua of 13 December 1960 establishing a Central American Common Market (CACM); Treaty of 5 May 1966 establishing an East-African Economic Community (ECEA); Treaty of 2 April, 1968 establishing a Central African Union (UCAS); Treaty of Chaguaramas of 4 July 1973 establishing a Caribbean Community and a Caribbean Common Market (which dissolved the CARIFTA Free-Trade Association of December 1965 and May 1968).

5. See Opinion 1/75 of 11 November 1975, "Local Cost Standard" [1975] ECR 1355; Opinion 1/76 of 26 April 1977, "Laying-up Fund for Inland Waterway Vessels" [1977] ECR 741 and Opinion 1/78 of 4 October 1979, "International Agreement on Natural Rubber" [1979] ECR 2871. See also the judgments of 31 March 1971 in Case 22/70 AETR [1971] ECR 263 and of 14 July 1976 in Joined Cases 3, 4 and 6/76 "Biological Resources of the Sea" [1976] ECR 1279. See also in that regard: Dauses, "Rechtliche Probleme der Abgrenzung der Vertragsabschlussbefugnis der EG und der Mitgliedstaaten und die Auswirkungen der verschiedenen Abgrenzungsmodelle," in Ress (ed.), *Souveränitätsverständnis in den Europäischen Gemeinschaften* 171 (1980); Dauses, "Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrechtsübereinkommen," 1979 *Europarecht* 138; Everling, "Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?," in *Festschrift Mosler* 173 (1983).

6. Judgment of 5 May 1982 in Case 15/81 Gaston Schul [1982] ECR 1409 (para. 33 of the decision); see also the Judgment of 9 February 1982 in Case 270/80 Polydor [1982] ECR 329 (para. 16 of the decision).

national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.

The innovation however consists less in the comprehensive economic-policy objectives pursued by the Community and in its increased institutional cohesion than in the unprecedented extent to which its basic principles have been given specific content and rendered justiciable by the Court of Justice in its case-law. In its decisions the Court has by no means interpreted the attainment of the Common Market as a mere programmatical statement or as a non-binding objective but as a fundamental legal concept which lies beyond the reach of the political decision-makers, the core of which must remain sacrosanct. In particular, the dynamic and evolutionary interpretation[7] which is oriented towards the objectives of the EEC Treaty and the coherent development of the structural principles specific to the Community, with direct effect and primacy of Community law,[8] have increased the force of the provisions of the Treaties and conferred upon them a new legal quality which unmistakably distinguishes them from the basic structural principles of other economic unions, notwithstanding the identical formulation of some of the concepts employed.

In the following pages the two central sets of provisions concerning the prohibition against levying of customs duties and charges having equivalent effect (Articles 9 to 17 of the EEC Treaty) and the prohibition of quantitative restrictions and measures having equivalent effect (Articles 30 to 36 of the EEC Treaty) will be considered in the light of the judgments of the Court. At the same time, attention will be given in particular to trends in the development of case-law and to questions still in need of clarification. The distinction between the prohibition of the levying of custom duties and of internal taxation of a discriminatory or protectionist character (Articles 95 to 99 of the EEC Treaty) will also be touched upon.

I. Prohibition of Customs Duties and Charges Having Equivalent Effect (Articles 9 to 17)

Customs Duties

Customs duties have long since been abolished in intra-Community trade except in the case of Greece, a new Member State. Duties were to be abolished as between the original six Member States of the Commu-

7. See in that regard: Kutscher, *Methods of Interpretation as Seen by a Judge at the Court of Justice* (1976) (Publications of the Court of Justice of the European Communities); Bleckmann, "Zu den Auslegungsmethoden des Europäischen Gerichtshofs," 1982 *NJW* 1177.

8. For example, Judgment of 5 February 1963 in Case 26/62 Van Gend & Loos [1963] ECR 1; Judgment of 15 July 1964 in Case 6/64 Costa v. ENEL [1964] ECR 585; Judgment of 17 December 1970 in Case 33/70 SACE [1970] ECR 1213; Judgment of 19 January 1982 in Case 8/81 Becker [1982] ECR 53.

nity in accordance with a procedure laid down in Articles 13 to 16 of the EEC Treaty by the end of the first stage of the transitional period (31 December 1961) in the case of customs duties on exports, and by the end of the transitional period (31 December 1969) in the case of customs duties on imports. In fact import duties on commercial goods had already been abolished on 1 July 1968 by a so-called "acceleration" decision of the Council.[9]

The concept of import and export duties does not give rise to any legal difficulties. Customs duties are charges levied at rates specified in a customs tariff when goods cross a frontier. In the early years there were only a few judgments which had to deal with customs duties in trade between the Member States. Currently the decisions which the Court is called upon to give are in practice concerned only with customs problems arising in external trade and involve for the most part the classification of certain products for tariff purposes.

The early leading judgment in the *van Gend & Loos* case deserves attention, for in that case it was held *inter alia* that there is also a breach of the standstill obligation under Article 12 of the EEC Treaty where there is a re-arrangement of the tariff resulting in the classification of the product in question under a more highly taxed heading.[10]

Charges Having Equivalent Effect

More difficult to grasp from a legal point of view is the concept of a charge, having an effect equivalent to a customs duty, which is often regarded as including fiscal or parafiscal charges that are not customs duties in the classic sense but, like customs duties, are levied on goods on the occasion of or in connection with the crossing of a frontier; since they render those goods more expensive they have a protectionist or discriminatory effect similar to that of customs duties. A judicial definition of such charges is to be found in the *Marimex* judgment:[11]

> . . . all charges demanded on the occasion or by reason of importation which, imposed specifically on imported products and not on similar domestic products, alter their cost price and thus produce the same restrictive effect on the free movement of goods as a customs duty.

The prohibition of charges having equivalent effect, which was originally conceived by the authors of the Treaty merely as a means of preventing circumvention of the prohibition of customs duties, has in a

9. Council Decision No. 66/532/EEC of 26 July 1966 on the abolition of customs duties and the prohibition of quantitative restrictions between the Member States and on the collection of duties under the Common Customs Tariff for the products not listed in Annex II to the Treaty, *Journal Officiel* 2971 (1966).

10. Supra n. 8.

11. Judgment of 14 December 1972 in Case 29/72 Marimex [1972] ECR 1309.

coherent body of case-law been constantly broadened in scope and has acquired the character of a "general clause". It now constitutes an all-embracing, directly applicable basic rule which includes the prohibition of customs duties in the classic sense virtually only as a sort of specific subdivision.

That trend in the case-law was already indicated in the Court's early judgment in the *"Gingerbread"* case. According to that judgment the prohibition of charges having an effect equivalent to customs duties, "far from being an exception to the general rule prohibiting customs duties, is on the contrary necessarily complementary to it and enables that prohibition to be made effective."[12] The phrase "necessarily complementary" must, according to the Court's general rules of interpretation, be construed broadly. Exceptions to the prohibition are permissible only in so far as they are clearly stipulated and do not interfere with the essential nature of the free movement of goods.

Although the *Gingerbread* judgment turned essentially on the factor of "discriminatory or protective results", the Court rapidly moved away from that criterion in its later decisions. Now the only requirement stipulated in the case-law of the Court is the existence of a pecuniary charge imposed unilaterally, irrespective of its nature and severity and regardless of its description or the manner in which it is collected.[13] Thus an (Italian) statistical levy was classified as a charge having equivalent effect,[14] as was a compulsory contribution to a social fund for diamond workers which was exclusively for the benefit of the domestic (Belgian) economy.[15]

The latter decision is remarkable in several respects. To begin with, it loosened the link between the imposition of the charge on the goods and the crossing of a frontier with the result that even a loose factual connection between those two events is sufficient. Furthermore, the Court expressly stated in that decision that even negligible pecuniary charges could fall within the prohibition and that—in contrast to Community competition law (Articles 85 and 86 of the EEC Treaty)—nothing turns on whether the influence on cross-frontier patterns on trade was "appreciable".[16] Finally, it is clear from that decision that the concept of a charge having equivalent effect does not require the charge

12. Judgment of 14 December 1962 in Joined Cases 2 and 3/62 Commission v. Luxembourg and Belgium [1962] ECR 869.

13. For example, Judgment of 22 March 1977 in Case 78/76 Steinike & Weinlig [1977] ECR 595.

14. Judgment of 1 July 1969 in Case 24/68 Commission v. Italy [1969] ECR 193.

15. Judgment of 1 July 1969 in Joined Cases 2 and 3/69 Sociaal Fonds voor de Diamantarbeiders [1969] ECR 211.

16. See also: Judgment of 19 June 1973 in Case 77/72 Capolongo [1973] ECR 611; Judgment of 26 February 1975 in Case 63/74 Cadsky [1975] ECR 281; Judgment of 18 June 1975 in Case 94/74 IGAV [1975] ECR 699.

to be imposed for the benefit of the State or the product liable to the charge to be in competition with any domestic products.

In several later decisions, the Court shifted the focus of the argument to the mere hindrance of trade by means of administrative formalities bound up with the levying of the charge, as in the case of a (relatively small) unloading charge in respect of imported goods unloaded in Italian ports.[17] It is evident, however, that the criterion of a pecuniary charge is necessary in conceptual terms for the purposes of a charge having equivalent effect, since otherwise it might be described as a *measure* having equivalent effect (Articles 30 to 36 of the EEC Treaty).[18]

Fees

The EEC Treaty prohibits in intra-Community trade only the imposition of customs duties and charges having equivalent effect, but not the collection of fees. In accordance with a distinction commonly found in the administrative law of all the Member States of the Community, fees—in contrast to charges—are levied in return for the performance of a specific service by the administration.

However, fees which are in principle permissible may become prohibited charges if they are levied as payment for an administrative service performed when goods cross a frontier. In such cases the Court has laid down stringent requirements which must be satisfied if the fee is to be regarded as permissible. Only an administrative service for which a fee is payable and which is for the benefit of individual importers lies outside the scope of Articles 9 to 17 of the EEC Treaty, but not services provided by the authorities in the public interest. The relevant decisions concerned a statistical levy on imports or exports of the goods in question,[19] a fee levied in respect of quality controls for exports of fruit and vegetable products[20] and storage fees levied on the occasion of the customs processing of goods from other Member States.[21]

An important group of cases in practice are those concerned with veterinary and public health inspection levies on imports. In principle these are charges having equivalent effect since the inspections are carried out in the public interest and cannot therefore be regarded as a

17. Judgment of 10 October 1973 in Case 34/73 Variola [1973] ECR 981.

18. For example, Judgment of 22 March 1983 in Case 42/82 Commission v. France [1983] ECR 1013. The decision, which was based on Art. 30 of the EEC Treaty, concerned the delay resulting from systematic, administrative verifications carried out free of charge by the French customs authorities during customs clearance of Italian wines ("wine war between France and Italy").

19. Judgment of 1 July 1969 in Case 24/68 Commission v. Italy [1969] ECR 193.

20. Judgment of 26 May 1975 in Case 63/74 Cadsky [1975] ECR 281.

21. Judgments of 17 May 1983 in Case 132/82 Commission v. Belgium and in Case 133/82 Commission v. Luxembourg [1983] ECR 1649, 1669.

benefit actually conferred on an individual importer.[22] In concrete terms this means that although the carrying out of an inspection may, where appropriate, be covered by the exceptional provisions of Article 36 of the EEC Treaty (see below), the absence of a comparable exception in the field of the law on charges having equivalent effect precludes the levying of fees in respect of such inspections and the cost thereof must therefore be borne by the Member State concerned.

From the line of judgments in this field it is possible to elicit the following criteria which must be satisfied concurrently if a pecuniary charge unilaterally imposed on goods when they cross a frontier is not to fall under the prohibition of customs duties and charges having equivalent effect:

(a) it must constitute the consideration of a service actually provided by the administration;
(b) the service must be provided by the administration for the benefit of the individual importer and not only in the public interest;
(c) the fee must be proportionate to the actual value of the service provided and be based on the costs incurred by the administration (the principle of covering costs).

It is hard to fit into this scheme the requirement laid down in the recent judgment in *Donner*[23] that the importer must have a genuine option to perform the service provided by the administration. That case concerned a charge imposed by the Netherlands postal administration for administrative formalities in connection with the levying of turnover tax on imports in such a way as to present the recipient with a *fait accompli* upon delivery of the consignment. It follows from that judgment that the possibility of performing the task oneself in the case of "sensitive" verifications of imports or exports is excluded by the very nature of such verifications. Moreover, it seems doubtful whether the criterion established by the Court may be regarded as another independent criterion of permissibility or whether it is to be regarded merely as evidence that the service provided is in fact for the obvious benefit of the importer. In any event, that judgment has clearly repudiated the paternalistic concept of a *negotiorum gestio* by the Member States without regard to the real or supposed intentions of the party concerned.

A special legal position pertains to fees charged for inspections, in

22. Judgment of 14 December 1972 in Case 29/72 Marimex, supra n. 11; Judgment of 11 October 1973 in Case 39/73 Rewe-Zentralfinanz [1973] ECR 1039; Judgment of 5 February 1976 in Case 87/75 Bresciani [1976] ECR 129; Judgment of 15 December 1976 in Case 35/76 Simmenthal [1976] ECR 1871. In that regard, see: Boest, "Veterinärrechtliche Kontrollen und Untersuchungsgebühren nach der EuGH-Rechtsprechung," 1982 *Europarecht* 345.

23. Judgment of 12 January 1983 in Case 39/82 Donner [1983] ECR 19.

particular public-health inspections, carried out uniformly by the Member States pursuant to provisions of Community law. The Court of Justice has not classified them as charges having equivalent effect provided that the principle of covering costs is complied with. The reason for their privileged position is that they are not imposed unilaterally by the Member States in order to safeguard their own interests but are imposed in the interests of the Community precisely for the purpose of abolishing unilateral measures of the same kind and thus facilitating free trade.[24]

Internal Taxation[25]

Internal taxation within the meaning of Articles 95 to 99 of the EEC Treaty is a pecuniary charge, like customs duties and charges having equivalent effect, which is not imposed to pay for a specific service provided by the administration.

The EEC Treaty allowed the Member States in principle to retain sovereignty over internal taxation but made such taxation subject to the requirements of Community law. Whereas customs duties and charges having equivalent effect are simply prohibited in intra-Community trade, all that is asked of internal taxation is that it should be in a form consistent with the principle of neutrality in competition. No internal taxation may be imposed directly or indirectly on products from other Member States in excess of that imposed on similar domestic products (first paragraph of Article 95 of the EEC Treaty), and it may not be of such a nature as to afford indirect protection to domestic products (second paragraph of Article 95). The distinction between internal taxation on the one hand and customs duties and charges having equivalent effect on the other is therefore not only a matter of legal theory but is also of great practical importance, since it follows from the difference in legal consequences that one and the same pecuniary charge cannot belong simultaneously to both categories.[26]

According to a common distinguishing criterion, internal taxation cannot, unlike customs duties and charges having equivalent effect, be levied on the occasion or by reason of the crossing of a frontier. However, that rule of thumb is of no further assistance where a system of internal taxation such as the—now partially harmonized—system of turnover tax (value added tax) is linked both to exclusively internal chargeable events (such as supplies and services provided for a consider-

24. Judgment of 25 January 1977 in Case 46/76 Bauhuis [1977] ECR 5.

25. See generally Wohlfahrt, "Steuerliche Diskriminierung im Gemeinsamen Markt," in Schwarze (ed.), *Das Wirtschaftsrecht des Gemeinsamen Marktes in der Aktuellen Rechtsentwicklung* 141 (1983); Wägenbaur, "Die Beseitigung Steuerlicher Diskriminierungen im Innergemeinschaftlichen Warenverkehr," 1980 *RIW/AWD* 121.

26. Judgment of 18 June 1975 in Case 94/74 IGAV [1975] ECR 699; Judgment of 22 March 1977 in Case 78/76 Steinike & Weinlig, supra n. 13.

ation within the State) and to situations involving the crossing of a frontier (such as the importation of products).[27]

According to the now well-established case-law of the Court, such pecuniary charges are to be regarded as—in principle permissible—internal charges if they are "financial charges within a general system of internal taxation applied systematically to domestic and imported products according to the same criteria."[28] One of the Treaty's objectives is in fact to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products.

A necessary complement to that rule is that an internal charge which forms part of a general system of charges is also to be classified as a charge having equivalent effect if it has the "purpose of financing activities for the specific advantage of the taxed domestic product"[29] (for example, in the case of a compensation fund), since in those circumstances the charges imposed on the domestic product are made good by that fund, while there is no such compensation for the imported product. A system of that kind, therefore, is non-discriminatory in appearance only.

For a long time it was unclear whether a general system of internal taxation "applying systematically to domestic and imported products according to the same criteria" is also acceptable in the absence of similar domestic products since in such a case the system in fact applies only to imported products. The Court has recently closed this gap by in principle answering the question in the affirmative after some hesitation at the outset. Since the Member States enjoy sovereignty over internal taxation, such a system of taxation is permissible if it is based on objective criteria and pursues legitimate economic policy objectives.[30]

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27. See Arts. 2, 5, 6 and 7 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes—Common system of value-added tax: uniform basis of assessment, *Official Journal*, No. L. 145, at 1 (1977).

28. Judgment of 22 March 1977 in Case 78/77 Steinike und Weinlig, supra n. 13; see also: Judgment of 14 December 1972 in Case 29/72 Marimex, supra n. 11. Judgment of 11 October 1973 in Case 39/73 Rewe-Zentralfinanz, supra n. 22; Judgment of 18 June 1975 in Case 94/74 IGAV, supra n. 26; Judgment of 15 December 1976 in Case 35/76 Simmenthal, supra n. 22; Judgment of 25 January 1977 in Case 46/76 Bauhuis, supra n. 24; Judgment of 28 January 1981 in Case 32/80 Kortmann [1981] ECR 251.

29. Judgments of 25 May 1977 in Case 77/76 Cucchi [1977] ECR 987 and in Case 105/76 Interzuccheri [1977] ECR 1029; see also the Judgment of 1 July 1969 in Joined Cases 2 and 3/69 Sociaal Fonds voor de Diamantarbeiders, supra n. 15; Judgment of 23 January 1975 in Case 51/74 Hulst [1975] ECR 79.

30. Judgments of 14 January 1981 in Case 140/79 Chemial Farmaceutici [1981] ECR 1 and in Case 46/80 Vinal [1981] ECR 77; Judgment of 3 February 1981 in Case 90/79 Commission v. France [1981] ECR 283.

II. Prohibition of Quantitative Restrictions and Measures Having Equivalent Effect (Articles 30 to 36)[31]

Prohibition under Articles 30 and 34

(a) Quantitative restrictions

Unlike customs duties, quantitative restrictions (quotas and the like) have long since been abolished in trade between Member States, except in the case of Greece. In accordance with the procedure laid down in Articles 31 to 35 of the EEC Treaty, as between the original six Member States of the Community, import quotas were to be abolished by the end of the first stage of the transitional period (31 December 1961) and export quotas by the end of the transitional period (31 December 1969). However, as a result of two "acceleration" decisions adopted by the representatives of the governments of the Member States meeting in the Council,[32] export quotas in respect of industrial products were abolished by the end of the first stage of the transitional period.

The definition of the concept of quantitative restrictions, like that of customs duties, does not give rise to any legal difficulties. They include all national measures restricting imports or exports of goods by reference to value or quantity or prohibiting them in whole or in part. Compliance with quotas is normally ensured by the administrative authorities by means of a system of import and export licenses. Only a few cases involving quantitative restrictions on intra-Community trade have been brought before the Court and they are unimportant in terms of legal history.

(b) Measures having equivalent effect

Article 30 et seq. of the EEC Treaty provide that not only quantitative restrictions in the strict sense but all measures having equivalent effect are in principle prohibited in trade between Member States.

The many-faceted concept of a measure having equivalent effect can assume a very wide variety of legal and factual forms, such as social,

31. In that regard see generally Funck-Brentano, "Der Grundsatz des Freien Warenverkehrs im Recht der Europäischen Wirtschaftsgemeinschaft," 1980 *RIW/AWD* 779; See Moench, "Der Schutz des Freien Warenverkehrs im Gemeinsamen Markt," 1982 *NJW* 2689; Oliver, *Free Movement of Goods in the EEC under Articles 30 to 36 of the Rome Treaty* (1982); Oliver, "Measures of Equivalent Effect: A Reappraisal," 19 *C.M.L.R.* 217 (1982); "Barents, "New Developments in Measures having an Equivalent Effect," 18 *C.M.L.R.* 271 (1981); Evans, "Economic Policy and the Free Movement of Goods in EEC Law," 32 *I.C.L.Q.* 577 (1983).

32. Decision of 12 May 1960 of the representatives of the governments of the Member States of the European Economic Community meeting in the Council on accelerating the attainment of the objectives of the Treaty, *Journal Officiel* 1217 (1960); Decision of 15 May 1962 of the representatives of the governments of the Member States of the European Economic Community meeting in the Council on further accelerating the attainment of the objectives of the Treaty, *Journal Officiel* 1284 (1962).

sanitary, technical, economic, pricing or public policy provisions and practices. The Member States have time and again displayed an astonishing range of imagination and inventiveness in introducing such non-tariff barriers to trade especially where they needed to make good their balance-of-trade deficit.

The classic, and still valid, definition of measures having equivalent effect was first given in the leading judgment in *Dassonville* which is noteworthy also because the Court recognized that the prohibition of measures having equivalent effect was directly applicable. The definition is as follows:[33]

> . . . all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade . . .

That is a remarkably wide definition. In particular, the concept of actual or potential hindrance is capable of including virtually every national measure of a legal or factual nature. It has been clear from the outset that the Court's abstract definition can be understood only in conjunction with the individual circumstances of each case. There are however a number of general propositions which can be elicited from that judgment.

To begin with, the crucial factor is not whether an obstacle to intra-Community trade actually exists or even whether there is an intention to restrict trade. Furthermore, the seriousness (appreciability) of the obstacle is not a factor either. Thus, for example, a system of import and export licenses can constitute a prohibited measure having equivalent effect even where such licenses are always granted upon application, because even a mere formality can constitute a barrier to intra-Community trade by reason of the delay which it involves and its dissuasive effect on traders.[34] The same holds true as regards the carrying out of excessive systematic verifications of imports.[35] The Court has also held that a measure does not have to consist of trading rules in the traditional sense in order to constitute a measure having equivalent effect. Thus, "any national system,"[36] any "national rules or practices"[37] or "a national measure"[38] may be sufficient.

However, if the concept of a measure having equivalent effect is to apply, the contested rules or practice must be attributable to the Mem-

33. Judgment of 11 July 1974 in Case 8/74 Dassonville [1974] ECR 837. The decision concerned a national measure under which parallel importers were required to produce a certificate of origin issued in the place of origin in respect of imports from other Member States.

34. Judgment of 16 March 1977 in Case 68/76 Commission v. France [1977] ECR 515.

35. Judgment of 22 March 1983 in Case 68/76 Commission v. France, id.

36. Judgment of 30 October 1974 in Case 190/73 Van Haaster [1974] ECR 1123.

37. Judgment of 20 May 1976 in Case 104/75 De Peijper [1976] ECR 613.

38. Judgment of 12 October 1978 in Case 13/78 Eggers [1978] ECR 1935.

ber State in its capacity as a sovereign authority. A practice carried on by an individual in restraint of trade would not fall within Article 30 et seq. of the EEC Treaty but might at most be assessed in the light of the competition rules of the EEC Treaty (Articles 85 to 90). In any event, the Court has drawn the dividing line between the two sets of provisions not by reference to formal legal criteria but in the light of the factual circumstances. Thus, in Treaty infringement proceedings against Ireland concerning an advertising campaign to promote sales of Irish products ("Buy Irish"), the Court considered it established that the Irish Government could be held accountable for the activities complained of which, in formal legal terms, were carried on by a company incorporated under private law.[39]

At first the Court left open the question whether the prohibition of measures having equivalent effect also applied to national rules or practices applied without distinction to imported and domestic products. The solution to that problem was the result of a gradual and tentative legal process.

In its earlier decisions the Court's main concern was the prevention of overt discrimination. A particularly striking illustration is provided by the *Sekt-Weinbrand* case decided in 1975.[40] In that judgment the Court held that it was not permissible to reserve the generic appellations *"Sekt"* and *"Weinbrand"* which enjoyed a high reputation amongst German consumers solely for domestic products.

In the second stage, the aim was to eliminate not only overt but also disguised discrimination. That kind of discrimination covers measures which, according to formal criteria, are applicable without distinction to domestic and imported products, but in fact place imported products at a disadvantage because of the special nature of the market. In that connection mention should be made of measures concerned with the formation of prices, such as the fixing of maximum or minimum prices which are calculated in such a way that either the imported products cannot be marketed profitably or the competitive advantage conferred by the lower cost price is neutralized.[41]

A major step towards a comprehensive grasp of the concept of measures having equivalent effect came with the leading judgment of 20 February 1979 in the *Cassis de Dijon* case.[42] In that decision, which was

39. Judgment of 24 November 1982 in Case 249/81 Commission v. Ireland [1982] ECR 4005.

40. Judgment of 20 February 1974 in Case 12/74 Commission v. Germany [1975] ECR 181.

41. Judgments of 26 February 1976 in Joined Cases 88-90/75 Sadam [1976] ECR 323 and in Case 65/75 Tasca [1976] ECR 291; Judgment of 24 January 1978 in Case 82/77 Van Tiggele [1978] ECR 25.

42. Judgment of 20 February 1979 in Case 120/78 Rewe-Zentral A.G. [1979] ECR 649. The reference for a preliminary ruling concerned the German rule on wine to the effect that fruit juice liqueurs had to have a minimum alcohol content of 25%. Thus the popular

viewed by specialists as decidedly revolutionary, the Court held that obstacles to intra-Community trade resulting from national marketing provisions applicable without distinction to domestic and imported products were permitted only

> in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

Thus, an important step was made towards achieving the free movement of goods since the judgment contains an unequivocal rejection of the view which prevailed in academic legal writing, namely that obstacles to the free movement of goods based on non-discriminatory marketing provisions must be accepted as long as the field in question has not been "harmonized".

In legal literature the *Cassis de Dijon* decision was regarded in some respects as extending and in others as restricting the definition given in the *Dassonville* judgment. Upon a proper view, it should be seen as a specific realization of the possibilities set out in the broad basic formula laid down in the *Dassonville* judgment. That is apparent in particular from the fact that the more recent decisions on Article 30 et seq. of the EEC Treaty begin as a rule by referring to both formulae.

The Member States brought part of their legislation and administrative practices largely into line with the new criteria, and the more recent decisions of the Court have centered on the problems relating to the consolidation of the basic rules and the definition of their scope.

In the initial enthusiasm generated by the introduction of that innovation, the fact that Article 36 of the EEC Treaty (see below) already takes account of health protection was evidently overlooked. Hence it was made clear in later decisions that, notwithstanding the redundant *Cassis de Dijon* criterion, health protection may—also in relation to rules or practices applicable without distinction to domestic and imported products—be taken into consideration only in connection with the grounds of justification under Article 36 of the EEC Treaty. This means that measures in restraint of trade which are adopted in the interests of health protection must in fact always be classified as measures having equivalent effect.

It may be considered unsatisfactory from a legal point of view that

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French liqueur *Cassis de Dijon* was excluded from the German market. See the commentaries by Millarg, in 1979 *Europarecht* 420; Wyatt, "State Monopolies of a Commercial Character," [1980] E.L.R. 213; Wyatt, "Article 30 EEC and Non-discriminatory Trade Restrictions," [1981] E.L.R. 185; Kovar, 1981 *J. Dr. Int.* 106; Mattera, "L'Arrêt 'Cassis de Dijon': une Nouvelle Approche pour la Réalisation et le Bon Fonctionnement du Marché Intérieur," 1980 *Rev. Marché Commun* 505 ff. (1980); Barents, *Sociaal-economische Wetgeving* 750 (1979); Timmermanns, 1981 *Sociaal-economische Wetgeving* 381.

the criteria of "fair trading and consumer protection" developed by the Court *praeter legem* must be taken into consideration in connection with the basic prohibition, i.e., as factors precluding its operation. It would have been more appropriate to treat them as merely grounds of justification by analogy with the matters listed in Article 36 of the EEC Treaty.

Also in need of classification was the question of which "mandatory requirements" relating to fair trading or consumer protection and referred to in the *Cassis de Dijon* judgment were relevant. In that connection it should be pointed out that under the preliminary ruling procedure national courts increasingly request concrete form to be given to non-specific basic rules. Legal writers have frequently attempted to classify cases into different categories which do not purport to be exhaustive.[43] However, the Court of Justice has refrained from adopting any such classification and has always decided each case on its merits by weighing all the relevant circumstances and in particular the severity of the restriction on trade. In each case it undertakes, on the basis of the principle of "proportionality" (rule of reason), an appraisal of values and interests as between the requirements of the free movement of goods and the legitimate protective purpose of the contested national measure.

According to the well-established case-law of the Court, the principle of proportionality requires a Member State which has a choice as to the means by which an objective may be achieved to "choose the means which least restrict the free movement of goods."[44] Thus, for example, the importation of a product may not be prohibited on grounds of consumer protection if the consumer can be provided with sufficient information by means of appropriate labelling.[45] It is sufficient for the imported goods to be labelled in accordance with the relevant provisions of the country of manufacture, if the description printed on the label contains information of equivalent value to that required by the importing country and is intelligible to the consumer in that Member State.[46]

Several recent judgments are characterized by the tendency to resist an unlimited extension of the concept of a measure having equivalent effect. The reason lies in the view that the Community's powers are in practice subject to limitations and that cases which are purely and simply of an internal character and do not involve the cross-frontier movement of goods are outside the scope of the EEC Treaty.

The turning point came with the ruling in the *Horse Meat* case at

43. See Moench, supra n. 31 at 2695.

44. Judgment of 10 November 1982 in Case 261/81 Rau [1982] ECR 3961.

45. Id.

46. Judgment of 16 December 1980 in Case 27/80 Fietje [1980] ECR 3839; Judgment of 22 June 1982 in Case 220/81 Robertson [1982] ECR 2349.

the end of 1979.[47] In its judgment, the Court established the criterion of "the specific restriction of export patterns", if only in relation to restrictions on exports, as a further criterion of definition. In the Court's opinion, that criterion was not satisfied in the case of a (Netherlands) rule imposing a general prohibition on the storage and processing of horse meat. If a critical approach to that judgment (of the Second Chamber of the Court) is adopted, it is legitimate to ask whether the overriding principle of proportionality did not require a distinction to be drawn between the prohibition of storage and processing for domestic consumption, which is clearly unobjectionable under Community law, and the export prohibition which might be objectionable under Community law.

Three years later, the Court adopted the reasons for its ruling in the *Horse Meat* case essentially unchanged in its decision on the *prohibition* (in the Federal Republic of Germany) of night work in bakeries.[48] The regulation of working hours was clearly a legitimate economic and social policy decision of the national legislature. But it was also liable to restrict exports at least indirectly, particularly in the case of fresh products which had to be prepared and delivered in good time for breakfast.

The *Blesgen* case[49] proved to be the test case on the question whether the criterion of the specific restriction of export patterns established by the *Horse Meat* judgment also applied by analogy to restrictions on imports. Those proceedings for a preliminary ruling concerned a (Belgian) law to combat alcoholism, which prohibited the consumption and stocking of spirituous beverages in all places open to the public and particularly in restaurants. The contested rules did not entail or involve the crossing of a frontier, although they could undoubtedly have at least a marginal effect on the volume of imports. Surprisingly enough, the Court refused to rely on the criterion of the specific restriction of import patterns. It avoided giving an unequivocal dogmatic ruling and sought the justification for its decision purely and simply in the facts of the case. Since the prohibition related only to sale for immediate consumption on the premises in places open to the public and not to sale in shops, in reality it had no connection with the importation of the products and for that reason was not of such a nature as to restrict trade between the Member States. By implication, that reasoning rejected the proposition that the concept of a measure having equivalent effect has the same scope and content as regards both restrictions on imports and those on exports.

However, in an *obiter dictum* in the *Blesgen* judgment the Court

47. Judgment of 8 November 1979 in Case 15/79 Groenveld [1979] ECR 3409.
48. Judgment of 14 July 1981 in Case 155/79 Oebel [1981] ECR 1993.
49. Judgment of 31 March 1982 in Case 75/81 Blesgen [1982] ECR 1211.

left the door open for constructive development of that concept. Proceeding on the basis of Article 3 of Commission Directive No. 70/50/EEC,[50] the Court found that the contested rules—which were not discriminatory—did not have a restrictive effect on intra-Community trade over and above that which was intrinsic to such rules ("*effets propres*").

Exception under Article 36

Quantitative restrictions and measures having equivalent effect within the meaning of Articles 30 to 34 of the EEC Treaty are not prohibited in so far as they are "justified on grounds of public morality, public policy and 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" (first sentence of Article 36). The scope of those grounds of justification is in turn curtailed by the prohibition of "arbitrary discrimination or a disguised restriction on trade between Member States" (second sentence of Article 36).

According to the consistent case-law of the Court, Article 36 does not constitute a reservation of sovereignty to the Member States but rather, regard being had to the objectives of the Community constitution, an exemption which is to be interpreted strictly and must in no circumstances lead to circumvention of the basic prohibition on measures in restraint of trade.[51] In particular, it cannot be construed as a safeguard clause against the economic effects of the opening-up of markets or even as an invitation to disguised protectionism since it covers only "eventualities of a non-economic kind which are not liable to prejudice the principles laid down by Articles 30 to 34."[52]

Here too the principle of proportionality plays a dominant rôle. Although the Member States are at liberty to adopt measures to safeguard the interests listed in Article 36 in accordance with their own political objectives and conceptions and, in particular, to determine the level of protection and the rigor of controls,[53] that power is subject to Community law. Accordingly, only measures which "satisfy mandatory

50. Commission Directive No. 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (*Official Journal*, English Special Edition (I), at 17 (1970). Art. 3 of that regulation includes among "measures which have an effect equivalent to quantitative restrictions on imports" measures governing the marketing of products which are equally applicable to domestic and imported products, where their restrictive effects on the free movement of goods exceed "the effects intrinsic to trade rules". The Court of Justice has on several occasions referred to this directive as a useful guideline whilst refusing to regard it as binding. Accordingly it may be seen merely as clarification of the Commission's programme.

51. Judgment of 15 December 1976 in Case 35/76 Simmenthal, supra n.22 at 1871; Judgment of 5 October 1977 in Case 5/77 Tedeschi [1977] ECR 1555.

52. Judgment of 19 December 1961 in Case 7/61 Commission v. Italy [1961] ECR 317.

53. Judgment of 20 May 1976 in Case 104/75 De Peijper, supra n. 37 at 613.

requirements"[54] and are "strictly necessary"[55] to attain the objective pursued are justified. In effect this means that of the measures which are in themselves appropriate, the least drastic one must be adopted, i.e. the one least detrimental to intra-Community trade (principle of minimum interference), and the restriction imposed must be proportionate to the objective pursued (prohibition of over-reaction).

As it is, the Court has held that Article 36, as an exceptional provision, may not be extended by analogy to matters other than those exhaustively listed in it. Therefore measures designed to ensure consumer protection and fair trading may not be based on that provision. Those interests may be taken into consideration only in connection with the criterion specified in the *Cassis de Dijon* judgment in respect of rules or practices applicable without distinction to domestic and imported products. In other words, discriminatory rules or practices can in no circumstances be justified on grounds of fair trading or consumer protection.[56]

In recent years a substantial body of case-law has grown up concerning the protection of health within the meaning of Article 36. The Court has recognized that the concept is relative, may vary in content from country to country and may evolve in the course of time. It has however always maintained that in principle it is subject to review by the Court. This can occasionally—particularly in connection with the preliminary ruling procedure under Article 177 of the EEC Treaty—create the following dilemma: on the one hand, the question whether a product is harmful to health is a question of fact the answer to which in proceedings involving a reference for a preliminary ruling is a matter for the national court; on the other hand, however, the principle of cooperation between the Court of Justice and the court making the reference requires the former at least to assist the latter in reaching its decision.

A first step towards determining the scope and definition of the indeterminate legal concept of health protection for the purposes of Community law was taken by the Court in the *Nisin* case (prohibition of the addition of nisin to cheese)[57] and the *Sandoz* case (prohibition of the addition of vitamins to foodstuffs).[58] In both of those cases, it was made clear that in the context of a policy for the prevention of disease the Member States may also take account of unresolved uncertainties in scientific assessment. The *Sandoz* judgment is particularly revealing inasmuch as a (Netherlands) prohibition of the addition of vitamins to

54. Judgment of 20 February 1979 in Case 120/78 Rewe-Zentral A.G., supra n. 42.
55. Judgment of 15 December 1976 in Case 41/76 Donckerwolcke [1976] ECR 1921.
56. Judgment of 17 June 1981 in Case 113/80 Commission v Ireland [1981] ECR 1625; judgment of 20 April 1983 in Case 59/82 Weinvertriebs GmbH [1983] ECR 1217.
57. Judgment of 5 February 1981 in Case 53/80 Eyssen [1981] ECR 409.
58. Judgment of 14 July 1983 in Case 174/82 Sandoz [1983] ECR 2445.

foodstuffs was considered permissible under Community law, in so far as the Member State concerned allowed such foodstuffs to be put on the market if the addition of the vitamins met a genuine need, in particular of a technological or nutritional nature. The question whether Article 36 permits the adoption of measures in restraint of trade not only in the grey area of potential damage to health but also in the interests of a balanced and natural diet (in accordance with the views expressed by the Netherlands and Danish Governments) remained unresolved.

In the absence of harmonization, the Member States are in principle at liberty to apply their own investigation and authorization procedures to products already authorized in another Member State. In such a case, however, the principle of proportionality requires the authorities of the importing State to rely as far as possible on the results of chemical analyses or laboratory tests which have already been carried out in another Member State in order to avoid unnecessary duplication of controls.[59]

As has already been stated, the prohibition or restrictions authorized in principle by the first sentence of Article 36 may not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. In a consistent line of decisions the Court has interpreted the criterion of "arbitrary discrimination" as any instance of unjustified inequality of treatment without giving the adjective "arbitrary" an independent meaning. On the other hand, it has construed the criterion of a "disguised restriction" as an expression of prohibition of abuse and has in particular subsumed under that criterion instances of circumvention.

It follows from the broad interpretation of the restriction contained in the second sentence of Article 36 that the Member States retain very little room for manoeuvre in relation to any measures which are not applicable without distinction to imported and domestic products. It is probable that, at most, such measures can be justified under Article 36 only in exceptional situations which rarely arise. It would seem that the Court has so far arrived at that conclusion in only one case (the *Importation of Pornographic Material* judgment).[60] The outcome of the comprehensive appraisal carried out in that case was that the form of the prohibition of imports to a large extent coincided with the corresponding prohibition of production and sales in the Member State.

An important field of application of Article 36 is concerned with industrial property rights whose limited territorial effect involves fragmentation and isolation of national markets.[61] This constitutes a source

59. Judgment of 17 December 1981 in Case 272/80 Biologische Produkten [1981] ECR 3277.

60. Judgment of 14 December 1979 in Case 34/79 Henn and Darby [1979] ECR 3795.

61. Industrial property rights have not yet been harmonized. Proposals have been made for uniform Community rules for patents and trademarks. The Community Patent

of frequent conflicts between the principle of the free movement of goods and the safeguarding by the various national legal systems of rights deserving of protection. The Court's early decisions on this point caused some concern, but its *Terrapin-Terranova* judgment[62] gave for the first time a coherent statement of its doctrine in this area.

According to the now well-established case-law, although the EEC Treaty does not affect the "existence", that is to say the essential nature of rights recognized by national legislation in matters of industrial and commercial property, the exercise of such rights may be affected by the prohibitions laid down by the Treaty, since Article 36 authorizes restrictions on the free movement of goods only to the extent to which they are justified for the purpose of safeguarding the specific subject-matter of those rights.[63] Rights are improperly exercised in the following four cases:

> Where the proprietor of the industrial property right, who enjoys parallel rights in a number of Member States, prohibits the importation of a product which has lawfully been marketed in another Member State by the proprietor himself or with his consent;[64]
>
> Where the right relied on is the result of the subdivision, by voluntary act or as a result of public constraint, of an industrial property right which originally belonged to one and the same proprietor;[65]
>
> Where the exercise of the right is the purpose, the means or the result of an agreement prohibited by the Treaty;[66]
>
> Where the exercise would constitute a disguised restriction on trade between the Member States. Such is the case in particular when the assertion of the right by the proprietor "having regard to the marketing system which he has adopted, will contribute to the artificial partitioning of the markets between Member States.[67]

Convention ("Convention for the European Patent for the Common Market") of 15 December 1975 (*Official Journal*, No. L 17, at 1 (1976)) laying down the law relating to patents for invention common to the Member States with unitary and autonomous effect is not yet in force. As regards trade-marks, in 1980 the Commission submitted two proposals for a Council regulation on the Community trade-mark and a first Council directive to harmonize the trade-mark law of the Member States.

62. Judgment of 22 June 1976 in Case 119/75 Terrapin v. Terranova [1976] ECR 1039.

63. Judgment of 3 July 1974 in Case 192/73 Hag [1974] ECR 731; Judgment of 31 October 1974 in Case 15/74 Centrafarm v. Sterling Drug [1974] ECR 1147; Judgment of 22 June 1976, supra n. 62.

64. Judgment of 31 October 1974, id.; Judgment of 22 June 1976, id.; Judgment of 14 September 1982 in Case 144/81 Keurkoop [1982] ECR 2853.

65. Judgment of 3 July 1974, supra n. 63. Judgment of 22 June 1976, supra n. 62.

66. Judgment of 22 June 1976, supra n. 62; Judgment of 14 September 1982, supra n. 64.

67. Judgment of 23 May 1978 in Case 102/77 Hoffmann-La Roche v. Centrafarm [1978] ECR 1139.

That basic pattern for the relationship between the free movement of goods and industrial or commercial property rights has been systematically confirmed in recent judgments in respect of copyrights[68] and "product imitation".[69] Moreover the Court has held in the *GEMA* case that "exhausted" copyrights can also not be relied upon to demand payment of additional fees based on the difference between the usual royalties paid in the country of importation and the lower royalties paid in the producer country.[70]

SUMMARY AND FURTHER REFLEXIONS

In its case-law the Court of Justice has further developed the principles of the free movement of goods into an extensive network of rules. It seems characteristic of the present state of Community law that the weight of the "classic" prohibitions of customs duties and quantitative restrictions has shifted perceptibly to the complementary prohibitions of charges or measures having equivalent effect. The Court has by no means construed them as mere secondary rules designed to cover cases of circumvention, but has attributed to them the status of general provisions.

This "integrationist" case-law is the result of a system of interpretation displaying the characteristics of constitutional law rather than those of international law. The specific Community pattern of rule and exception, whereby the basic pillars of the system of integration are given a broad interpretation, while exceptions thereto and derogations therefrom are interpreted restrictively, has reversed the traditional maxims of interpretation derived from public international law which were most clearly expressed in the much quoted dictum in the *Lotus* judgment of the Permanent Court of International Justice to the effect that "restrictions upon the independence of States cannot . . . be presumed."[71] That reversal has enabled the Court, in appraising values and interests as between the requirements of the free movement of goods and the restrictive effects on trade of national policies, to give precedence to the former over the latter.

While it may be inappropriate to describe the case-law of the Court as bearing the imprint of a particular concept of commercial or economic policy, there is no doubt that the wealth of cases decided in accordance with the theory of a market economy has contributed to the attainment of a degree of trade liberalization which comes close to the ideal of a uniform internal market. Thus the economic benefits of com-

68. Judgment of 20 January 1981 in Joined Cases 55/80 and 57/80 GEMA [1981] ECR 147; Judgment of 22 January 1981 in Case 58/80 Dansk Supermarked [1981] ECR 181.

69. Judgment of 2 March 1982 in Case 6/81 Beele [1981] ECR 707.

70. Judgment of 20 January 1981, supra n.68.

71. P.C.I.J. Series A, No. 10 (1927).

petition in a market economy and in particular the possibility of making optimum use of the factors of production throughout the Community have been assured. This means greater rationalization and efficiency of the basic structural principles of the Treaty, transparency with regard to access to markets and greater legal certainty and legal protection for individual citizens in the Common Market.

In particular, the Court's pioneering judgment in the *Cassis de Dijon* case and its subsequent decisions clarifying it and extending its scope represent a quantum leap towards the achievement of the objectives of the Treaty and have anticipated countless harmonization directives. Nevertheless, various problems raised by that landmark decision still await clarification.

It is questionable whether not only rules and practices applicable without distinction to domestic and imported products but also measures which, while not being applicable without distinction to such products, are not discriminatory, can escape the application of the prohibition laid down by Articles 30 and 34 of the EEC Treaty. It is common knowledge that the concept of discrimination is narrower than that of different treatment since, according to the established case-law of the Court, it applies only to instances of objectively unjustified dissimilar treatment of similar situations.[72] Logically, the criterion established by the *Cassis de Dijon* judgment should be further developed so as to cover measures of any kind which are not discriminatory. In any event, only in exceptional situations is it possible to imagine instances of objectively justified unequal treatment arising which are not in one form or another tantamount to disguised restrictions designed to protect domestic production. One should bear in mind, for example, the borderline cases in which what in formal terms constitutes unequal treatment actually leads, on account of the particular nature of the market, to placing imported products and domestic products on the same footing. That can occur only in a very small number of cases, as was very clearly shown in two recent decisions where the argument advanced by the Member States to the effect that the different treatment was in the interests of effective consumer protection fell on deaf ears.[73]

The relationship between the rules on the free movement of goods

72. For example, Judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 Quellmehl [1977] ECR 1753 and in Joined Cases 124/76 and 20/77 "Maize groats and meal" [1977] ECR 1795.

73. Judgment of 17 June 1981 in Case 113/80 Commission v. Ireland, supra n. 56; under the contested Irish legislation imported souvenirs which in appearance were likely to be taken as souvenirs from Ireland were required to bear an indication of the country of origin; Judgment of 29 November 1983 in Case 181/82 Roussel Laboratories, [1983] ECR 3849: this case was concerned with Netherlands legislation on the prices of medicines in which the purchase price of domestically-produced medicines was based on the price of such medicines at a given date whilst that of imported products was based on the selling price of such products in the country of manufacture.

and the provisions for the approximation of laws contained in Articles 100 to 102 of the EEC Treaty has not yet been clarified conclusively. Some contradictions and some degree of overlapping between the two sets of rules are inevitable. In accordance with the consistent case-law of the Court, recognition of the powers vested in the political institutions of the Community in the matter of harmonization must not lead to a situation in which, in the absence of directives on the approximation of laws, obstacles to the free movement of goods are allowed to persist. In no circumstances may the essential nature of the free movement of goods be interfered with.

That seems plausible enough, but it may lead to difficulties when applied to individual cases since it is obvious that the integration of national markets pursued by the Treaty cannot be achieved only by the direct application of the basic rules governing the free movement of goods. The *domaine réservé* of the exceptions set forth in Article 36 of the EEC Treaty and further extended in the *Cassis de Dijon* judgment can be contained within reasonable limits only if the protective aims of domestic rules on production and marketing and the means used for the attainment of those aims are at least substantially co-extensive.

In the first place, it must not be forgotten that in the nature of things there are limits to the finding of the law by the Court notwithstanding the far-reaching effects which that process has in the shaping of the law. Pragmatic decisions untainted by ideology can rectify errors and close gaps, but they cannot be a substitute for Community legislation.

Second, it becomes apparent precisely in times of crisis that responsibility for safeguarding the level of integration achieved must not be left exclusively to the political institutions of the Community. It is to the credit of the Court of Justice that in this area of tension between political co-responsibility and judicial self-restraint, it has always unswervingly adhered to the ultimate goal of a unified market. This is brought out most forcefully in a recent judgment concerning an infringement of the Treaty:[74]

> The fundamental principle of a unified market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there should first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher . . . The elimination of quantitative restrictions and measures having an equivalent effect, which is unreservedly affirmed in Article 3(a) of the Treaty and carried into effect by Article 30, may not therefore be made dependent on measures which,

74. Judgment of 9 December 1981 in Case 193/80 Commission v. Italy [1981] ECR 3019 at 3033.

although capable of promoting the free movement of goods, cannot be considered to be a necessary condition for the application of that fundamental principle.