DAVID T. KEELING*

The Free Movement of Goods in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities**

I. The Basic Rules

The cornerstone of the European Community is the principle of the free movement of goods. That principle requires that goods placed on the market in any Member State may be traded freely throughout the Community. No customs duties or charges having equivalent effect may be levied on trade between Member States; nor may such trade be subject to quantitative restrictions—meaning quotas and prohibitions—or to measures having equivalent effect. The principle of free movement applies not only to goods produced in a Member State, but also to goods originating in nonmember countries once they have been duly imported into a Member State and any customs duties payable under the Common Customs Tariff have been accounted for.[1]

This article focuses on the elimination of quantitative restrictions between Member States, since that is the area in which some of the most difficult—and also the most interesting—legal problems have arisen. The relevant provisions are contained in articles 30 to 36 of the EEC Treaty. Article 30 prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect . . . between Member States." Article 34 makes similar provision in relation to exports. Article 36 qualifies that basic principle of free movement by expressly

*Law Clerk at the Court of Justice of the European Communities. The views expressed in this article are entirely personal to the author.

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1. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 9(2), 10(1), 298 U.N.T.S. 11, 19 [hereinafter EEC Treaty].

authorizing prohibitions and restrictions justified on a number of grounds, notably public morality, public health, and the protection of industrial and commercial property.

The case law on these provisions is voluminous. Since 1963 the Court has delivered 460 preliminary rulings[2] related to the free movement of goods. In addition, it has given judgment in 102 actions brought by the European Commission under article 169 of the EEC Treaty for a declaration that a Member State has failed to fulfill its Treaty obligations in connection with the free movement of goods.

One brief point should be made before embarking on a review of that case law. Although the language of articles 30 and 34 is virtually identical, the Court has always taken a less rigorous attitude towards restrictions on exports than towards restrictions on imports, presumably on the ground that Member States are far less likely to impede exports. The Court considers that article 34 applies only to measures that have as their specific object or effect the restriction of exports and thus establish a difference in treatment between a Member State's domestic trade and its export trade. In *Groenveld v. Produktschap voor Vee en Vlees*[3] the Court held that article 34 was not infringed by a Dutch law that prohibited sausage manufacturers in the Netherlands from stocking or processing horsemeat. Obviously the law affected exports in a sense, since it prevented Dutch sausage makers from manufacturing horsemeat sausages for export to other Member States. However, the nondiscriminatory nature of the law meant that it was not contrary to article 34.

In relation to measures restricting imports, the Court has been far more stringent. It has opted for an extremely wide definition of the concept of measures having equivalent effect to a quantitative restriction on imports. The leading case is *Procureur du Roi v. Dassonville,*[4] in which the Court held that: "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."[5]

The breadth of that definition of measures having equivalent effect has been amplified by a ruling in *Van de Haar and Kaveka de Meern*[6] to the effect that even a slight hindrance to imports is sufficient to bring article 30 into play. Thus, at least in theory, even a measure that causes a slight, indirect, potential hindrance to trade between Member States offends against article 30.

2. Judgments delivered up to and including February 12, 1992, are included.

3. Case 15/79, Groenveld v. Produktschap voor Vee en Vlees, 1979 E.C.R. 3409, [1979–1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8617 (1979).

4. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 14 C.M.L.R. 436 (1974).

5. *Id.*, 14 C.M.L.R. at 453–54.

6. Joined Cases 177 and 178/82, Public Prosecutor v. Jan van de Haar and Kaveka de Meern, 1984 E.C.R. 1797, [1983–1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,094 (1984).

II. The *Cassis de Dijon* Principle

The greatest obstacles to trade between Member States are due to disparities between national legislation regarding, for example, technical standards, the composition of foodstuffs, sizes, packaging, labeling, and so forth. Obviously the best solution to such obstacles to trade is to strike at the root of the problem by eliminating the disparities in national legislation. To that end, article 100 of the EEC Treaty (now supplemented by article 100a) empowers the Council of Ministers to adopt directives harmonizing legislation that directly affects the establishment or functioning of the common market. Many such directives have been issued.

But harmonization is a slow process and may not even be perceived as desirable by everyone. It follows that obstacles resulting from disparities in national legislation will continue to hamper trade between Member States for a long time to come. Initially, it was thought by many that, provided a Member State applied its legislation without distinction to domestic goods and to goods produced in other Member States, there was no breach of article 30. In other words, it was believed that article 30 only prohibited discriminatory measures. That myth was shattered in 1979 by the Court's judgment in *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein.*[7] In that case the German authorities refused to authorize the marketing in Germany of a French liqueur known as Cassis de Dijon on the ground that the liqueur did not comply with a German provision under which such beverages must have a minimum alcohol content of 25 percent. The German authorities argued that since the German provision applied without distinction to domestic and imported products it was not caught by the prohibition laid down in article 30. The Court rejected that argument and held that obstacles to trade caused by disparities in national laws were permitted only in so far as the provisions in question were necessary to satisfy mandatory requirements[8] relating in particular to the effectiveness of fiscal supervision, the protection of public health, fair trading, and consumer protection.

Cassis de Dijon—as the case became known—was indeed a landmark judgment. As a result of the decision, many of the obstacles to trade resulting from disparities in national legislation were swept aside, whereas it had previously been thought that such obstacles could only be removed by harmonization of national laws. But in another sense the judgment was a backward step because the Court recognized a new catalogue of exceptions to the principle of free movement, additional to those expressly listed in article 36 of the Treaty. The exact relationship between the article 36 exceptions and the mandatory requirements recognized in *Cassis de Dijon* and in subsequent judgments has been the

7. Case 120/78, Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8543 (1979).

8. A better expression in English would have been "*imperative* requirements."

subject of considerable debate—more debate perhaps than the issue is worth. Three points should be noted:

First, the mandatory requirements recognized in *Cassis de Dijon* can only save measures that apply without distinction to domestic and imported goods, whereas article 36 may save measures that do not satisfy that test, provided that they do not constitute arbitrary discrimination or a disguised restriction on trade.[9]

Secondly, the Court has consistently held that, since article 36 derogates from a fundamental principle of the Treaty, it must be construed narrowly. Thus the grounds listed in article 36 justifying restrictions on free movement are exhaustive.[10] On the other hand, the list of mandatory requirements recognized in *Cassis de Dijon* is not a closed category, as is proved by the fact that the Court has occasionally added to it.

Thirdly, whatever ground is invoked as justification for a measure restricting free movement, whether it be an interest mentioned in article 36 or a mandatory requirement under *Cassis de Dijon*, the measure in question will be tested against the principle of proportionality. The measure will only be upheld if (a) it is an appropriate means of attaining the objective in question (for example, the protection of public health or fair trading) and (b) the objective could not be attained by other means less restrictive of trade between Member States.

Since 1979 the Court has delivered many judgments confirming the principle that goods manufactured and marketed in a Member State in accordance with the local legislation may be imported into any other Member State unless some mandatory requirement justifies their exclusion. The Court has for instance condemned a Belgian law requiring margarine to be sold only in cube-shaped packets,[11] a German law prohibiting the use of additives in beer,[12] and an Italian law permitting only durum wheat to be used for the manufacture of pasta.[13] On the other hand, the court has upheld a Danish law prohibiting the use of nonreturnable bottles, thus recognizing the protection of the environment as an additional mandatory requirement.[14]

It is sometimes suggested that goods originating in nonmember countries cannot benefit from the *Cassis de Dijon* principle.[15] That view does not accord

9. *See* Joined Cases C-1/90 and C-179/90 Aragonesa de Publicidad Exterior v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, para. 13 (Judgment of July 25, 1991) (not yet published).

10. *See, e.g.*, Case 95/81, Commission v. Italy, 1982 E.C.R. 2187, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8846 (1982).

11. Case 261/81, Rau Lebensmittelwerke v. De Smedt, 1982 E.C.R. 3961, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8979 (1982).

12. Case 178/84, Commission v. Germany, 1987 E.C.R. 1227.

13. Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. 4233.

14. Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607.

15. Eric L. White, *In Search of the Limits to Article 30 of the EEC Treaty*, 20 COMM. MKT. L. REV. 235, 259–80 (1989). *Contra* Laurence W. Gormley, *"Actually or Potentially, Directly or Indirectly"? Obstacles to the Free Movement of Goods*, 9 Y.B. EUR. L. 197, 204 (1989).

with the wording of article 9(2) of the Treaty or with the case law of the Court of Justice, which holds that, once such goods have been duly imported into a Member State and any customs duties payable have been accounted for, they must be treated in the same way as goods originating in the Community.[16] If the goods comply with one Member State's legislation and have been placed on the market there *bona fide*, their admission to other Member States may be restricted only on the grounds mentioned in article 36 or in order to satisfy some other mandatory requirement.

III. Legislation Governing the Circumstances in Which Goods May Be Marketed

A. The Nature of the Problem

All the cases referred to in the previous section had one thing in common: the Member State concerned prohibited the sale of goods not manufactured in accordance with certain rules governing the physical characteristics of goods. The obstacles to trade resulting from such legislation are manifest. Laws regulating the composition and presentation of goods, or prescribing technical standards for goods, have an obvious capacity to impede trade between Member States if applied to imported goods. They would rapidly lead to what is sometimes called the "balkanization" of the economy.

In recent years the Court has been faced with a number of cases in which article 30 and the *Cassis de Dijon* principle have been invoked, not in relation to legislation governing the physical characteristics of goods, but in relation to legislation governing the circumstances in which goods may be marketed—rules as to where, when, by whom, how, or at what price goods may be sold, or rules on the advertising of goods.

Such legislation may impede trade between Member States, but the obstacles are much less obvious than in the case of legislation of the type in issue in *Cassis de Dijon*. For example, a law restricting the sale of alcohol to certain types of establishments impedes trade less than a law prohibiting the sale of alcohol altogether. As a result the Court has had great difficulty when confronted with rules governing marketing circumstances, and it has not always been consistent in its approach to the concept of measures having equivalent effect. Two conflicting strains are evident in the case law: the *Oebel* strain and the *Oosthoek* strain.

In cases belonging to the *Oebel* strain the Court adopts a narrow construction of the concept of measures having equivalent effect and excludes a particular measure from the scope of article 30, even though the measure has an undeniable

16. Case 41/76, Donckerwolke v. Procureur de la République, 1976 E.C.R. 1921, 20 C.M.L.R. 535 (1976) (paras 17–18); Case 125/88, Nijman, 1989 E.C.R. 3533, 60 C.M.L.R. 92 (1988) (para. 11).

capacity to affect trade between Member States. In cases belonging to the *Oosthoek* strain the Court adopts a broad construction of the concept of measures having equivalent effect, assumes that a particular measure may in principle be caught by article 30, and then proceeds to examine whether it is justified. In the course of that examination the Court sometimes gives the impression that it is laboring to avoid undue interference in areas for which the Member States are primarily competent.

B. THE *OEBEL* STRAIN

In *Oebel*[17] the Court ruled that German legislation prohibiting the transport and delivery of bakers' wares to consumers and retailers between 10:00 P.M. and 5:45 A.M., the object of which was to ensure compliance with a prohibition on night work in bakeries, could not have the effect of restricting imports or exports between Member States. That statement cannot be taken at face value. Since transport and delivery to wholesalers was excluded from the prohibition, the effect on intra-Community trade was admittedly slight. But some effect must have existed, especially in frontier zones. The *Oebel* ruling must be read in light of the facts of the case. Mr. Oebel, the manager of a bakery in Wiesbaden, Germany, was prosecuted for allowing his staff to work at night. Such a prosecution was unlikely to affect imports from other Member States. It would have been a different matter if a baker from Strasbourg had been apprehended at 5:00 A.M. while on his way to deliver bread to shops in Karlsruhe.

In *Blesgen v. Belgium*[18] a Belgian restaurant owner was prosecuted for stocking and selling spirits of an alcoholic strength exceeding twenty-two degrees. In Belgium, although such goods could be sold in shops, their sale for consumption on the premises in bars and restaurants was prohibited at that time by a law designed to combat alcoholism.[19] Mr. Blesgen argued that the law was contrary to article 30 of the Treaty inasmuch as it affected the importation and sale of spirits imported from other Member States. The Belgian Court of Cassation asked the Court of Justice whether such legislation amounted to a measure having equivalent effect under article 30 and, if so, whether it was justified on grounds of the protection of health under article 36.

In a much-criticized[20] judgment the Court held that legislation of the type described was not caught by article 30. The Court observed, somewhat implausibly, that the legislation "has no connection with the importation of products

17. Case 155/80, Oebel, 1981 E.C.R. 1993, [1979–1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8767 (1981).

18. Case 75/81, Blesgen v. Belgium, 1982 E.C.R. 1211, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8823 (1982).

19. The law in question has since been repealed.

20. *See, e.g.*, Anthony M. Arnull, *Cassis de Dijon: Growth Stunted?*, 7 EUR. L. REV. 393 (1982); D. Waelbroeck, 1983 CAHIERS DE DROIT EUROPÉEN [CAHIERS DR. EURO.] 241; N. Annecchino, 1983 IL FORO ITALIANO [FORO IT.] IV col. 348.

and for that reason is not of such a nature as to impede trade between Member States."[21] That statement was highly tendentious because Belgium, although the home of a substantial brewing industry, is not a noted producer of strong liquor; obviously the spirits that people would have drunk in Belgian bars and restaurants, if the law had allowed them to, would to a large extent have been imported from other Member States. Moreover, many customers of bars and restaurants in Belgium who were denied the chance to drink Scotch whisky or French cognac doubtless ended up consuming Belgian beer. Hence, whatever the object of the law might be, it was discriminatory and protectionist in effect.

It is of course arguable that, if the Belgian law had been found to be contrary to article 30, it would have been saved by article 36 as being justified on grounds of the protection of health. A curious feature of some of the Court's case law on the free movement of goods is that, though most of the judgments are defensible as to the result, the reasoning by which the result is reached is sometimes defective. The measure at issue in *Oebel* might have been defended on the ground that it was an appropriate means of protecting the health of workers in the baking industry.

For some years *Oebel* and *Blesgen* were regarded as something of an anomaly. It was thought that they were isolated examples of a narrow interpretation of article 30. *Oebel* and *Blesgen* have recently made something of a comeback in a series of judgments concerned with a British Act of Parliament restricting the operation of sex shops. Under the British Act such establishments may in certain circumstances be subjected to a licensing requirement. *Quietlynn v. Southend Borough Council*[22] concerned a prosecution for operating an unlicensed sex shop. The defendants argued that the licensing requirement, which resulted in their being excluded from the main shopping areas, was contrary to article 30 since much of their merchandise was imported from other Member States and the effect of the Act was to reduce their sales of such goods. The English court found that the legislation indirectly reduced in absolute terms the volume of imports from other Member States. The Court of Justice nonetheless refused to entertain the suggestion that such legislation might be a measure having equivalent effect within the meaning of article 30. The Court observed that the Act applied without distinction to domestic and imported products. It cited *Oebel* and *Blesgen,* stated that such legislation had no connection with intra-Community trade, since the products in question could be marketed through licensed sex shops and other channels, and concluded that the Act was not intended to regulate trade in goods within the Community and was not therefore of such a nature as to impede trade between Member States.

Once again the Court's judgment is defensible in the result since the public morality exception in article 36 would almost certainly have saved the British

21. *Blesgen,* Common Mkt. Rep. ¶ 8823 at 7745.
22. Case C-23/89, Quietlynn v. Southend Borough Council, 1990 E.C.R. I-3059.

legislation, but the reasoning is questionable. The fact that national legislation is not intended to regulate trade in goods within the Community does not necessarily mean that it cannot impede trade between Member States. Exactly the same could have been said of the German law prohibiting the sale of Cassis de Dijon with less than 25 percent alcohol. Nor should the nondiscriminatory nature of the legislation necessarily remove it from the scope of article 30. It has been axiomatic since the *Cassis de Dijon* judgment that nondiscriminatory measures do not automatically escape the prohibition laid down by article 30.

C. THE *OOSTHOEK* STRAIN

Oebel, Blesgen, and *Quietlynn* are all the more surprising if compared with the judgments representing the *Oosthoek* strain. The first example of that strain is *Oosthoek's Uitgeversmaatschappij.*[23] A Dutch law prohibited the practice of promoting sales by means of offering gifts. Oosthoek marketed in the Netherlands, Belgium, and part of France Dutch-language encyclopedias printed partly in the Netherlands and partly in Belgium. The company was prosecuted by the Dutch authorities for offering gifts such as an atlas or a dictionary to promote sales of its encyclopedias. Oosthoek raised a defence based on article 30 and the matter was referred to the Court of Justice. On the face of it, the interference with interstate trade was minimal, but the Court nevertheless held, perhaps a little surprisingly in view of what it had said in *Blesgen* a few months earlier, that legislation that forced a trader to abandon a particular marketing method might be contrary to article 30. The Court then proceeded to enquire whether the Dutch legislation was justified on grounds of consumer protection and held that it was.

In a sense of course, the result was the same as in *Oebel, Blesgen,* and *Quietlynn,* because the restrictive measure adopted by a Member State was found to be compatible with Community law, but the means by which that result was reached were very different. In *Oebel, Blesgen,* and *Quietlynn* the Court maintained, rather unconvincingly, that trade between Member States could not be affected by the national measure and therefore excluded all possibility of a breach of article 30. In *Oosthoek* the Court recognized that the national measure might infringe article 30, even though arguably the effect on trade between Member States was less significant than in the other cases, and then found that the measure was justified.

In *Buet*[24] the Court had to consider a French law that prohibited the door-to-door selling of educational material. Mr. Buet managed a company that used such methods to sell English-language teaching material manufactured in Belgium. He was prosecuted and sentenced to a term of imprisonment. In his appeal

23. Case 286/81, Oesthoek's Uitgeversmaatschappij, 1982 E.C.R. 4575, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8895 (1982).

24. Case 382/87, Buet v. Ministère Public, 1989 E.C.R. 1235.

he argued that the French law was contrary to article 30, and the case was referred to the Court of Justice.

Citing *Oosthoek,* the Court ruled that to deprive a trader of a method of marketing whereby he realized almost all his sales might constitute an obstacle to imports even though the legislation in question applied to domestic and imported products without distinction. Adopting a classical *Cassis de Dijon* approach, the Court then enquired whether that obstacle to free movement was necessary to satisfy mandatory requirements such as consumer protection or fair trading. The Court observed that measures restricting free movement must be proportionate to the aim pursued, and that if a Member State had at its disposal less restrictive means of attaining the same aims it must use them. Observing that the consumer could normally be adequately protected by means of a statutory right to cancel a contract concluded at home, the Court went on to state that the risk of an ill-considered purchase increased when the product in question was educational material since the potential customers, who were often behind with their education and anxious to catch up, were particularly vulnerable. On that basis the Court held that it was permissible for a national legislature to prohibit canvassing at private residences.

Two recent judgments appear to confirm that the *Oosthoek* strain is dominant and that the *Oebel* strain is on the wane, notwithstanding *Quietlynn.* In *GB-INNO-BM v. Confédération du Commerce Luxembourgeois*[25] the Court was asked to give a preliminary ruling in proceedings that arose out of an attempt by an organization representing Luxembourg shopkeepers to prevent the owners of a supermarket situated in Arlon, just across the Belgian border, from distributing advertising matter to households in Luxembourg. The advertising did not comply with the Luxembourg law on unfair competition, according to which sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices. The advertising did, however, comply with Belgian law.

The Court found that the application of the Luxembourg legislation to the Belgian supermarket's advertising was capable of breaching article 30. Observing that the obstacle to trade was due to disparities between national laws, the Court proceeded to examine—under the *Cassis de Dijon* approach—whether the restriction on trade was justified as being necessary in order to satisfy mandatory requirements relating to consumer protection. The Court held that there was no such justification, essentially on the ground that Community policy, as laid down in a program adopted by the Council of Ministers, requires that consumers should have access to information so that they can make their purchasing decisions in full knowledge of the facts; a regulation that denies consumers access to a particular type of information, even though the information is perfectly accurate, cannot be justified in the name of consumer protection.

25. Case C-362/88, GB-INNO-BM v. Confédération du Commerce Luxembourgeois, 1990 E.C.R. I-667.

The recent judgment in *Aragonesa de Publicidad Exterior v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*[26] also dealt with a restriction on certain forms of advertising. The parliament of Catalonia, one of the autonomous regions of Spain, passed a law prohibiting the advertising of beverages containing more than twenty-three degrees of alcohol in cinemas, on public transport, and along streets and roads. Two advertising agencies were charged with infringing that law. They contended that the law was contrary to article 30, since it restricted the advertising of products originating in other Member States. The Court of Justice was asked to give a preliminary ruling.

The Court stated unequivocally that such legislation must in principle be regarded as a measure having equivalent effect under article 30. However, it went on to hold that the restriction on trade was justified, under article 36, on grounds of the protection of public health. The case provides a good illustration of how an article 36 analysis works in practice. In order for the Catalan legislation to enjoy the benefit of article 36 it was necessary to establish: (a) that the legislation contributed to its stated goal of protecting public health; (b) that the restriction on trade caused by the legislation was not disproportionate in relation to that goal; and (c) that the legislation did not constitute arbitrary discrimination or a disguised restriction on trade, within the meaning of the second sentence of article 36. As regards the first two points, the acceptability of the legislation was never in much doubt. On the third point it was argued that the legislation was discriminatory because it permitted the advertising of the typical products of Catalonia (still and sparkling wine) and prohibited the advertising of typical imported products (whiskey and cognac). The Court rejected that argument, observing that Catalonia is in fact a substantial producer of alcoholic drinks that exceed the threshold of twenty-three degrees. The Court might also have noted that the threshold is based on an objective criterion, since strong liquor is in principle more harmful to health than less alcoholic beverages. On that basis the case could have been distinguished from an earlier case, *Commission v. France*,[27] in which the Court condemned a French provision that banned the advertising of spirits made from grain but permitted the advertising of spirits made from wine. The legislation at issue in *Blesgen* could have been upheld on the same basis if the Court had found it contrary to article 30 and proceeded to enquire whether it could be saved by article 36.

D. The Sunday Trading Cases

Against this background of conflict between cases belonging to the *Oebel* strain and cases belonging to the *Oosthoek* strain we must examine the Court's case law on Sunday trading.

26. *See* source cited *supra* note 9.

27. Case 152/78, Commission v. France, 1980 E.C.R. 2299, [1979–1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8691 (1980).

In many European countries the law restricts or prohibits the opening of shops on Sundays. On the face of it, nothing in the EEC Treaty suggests that the regulation of shop opening hours is anything other than a matter for the national legislatures. Nor is it immediately obvious that laws requiring shops to close on Sundays are an obstacle to trade between Member States. However, some years ago a chain of do-it-yourself stores called "B & Q" started opening on Sundays in England in defiance of the British Shops Act 1950. When prosecuted, it contended that the British statute was contrary to article 30, arguing that its total sales would decline if it were forced to close on Sundays and that, since some of the goods it sold were manufactured in other Member States, the effect was to reduce the volume of imports. Cwmbran Magistrates' Court sought a preliminary ruling from the Court of Justice.

It is evident from reading the judgment in *Torfaen Borough Council v. B & Q*[28] that the Sixth Chamber of the Court had some difficulty in dealing with what must have struck most observers as a particularly fanciful attempt to mount a challenge on a national statute by means of Community law. The Court appears to have been mesmerized by a finding of fact by the national court to the effect that the volume of imports was reduced by the ban on Sunday trading (though a similar finding of fact by the national court in *Quietlynn* does not seem to have troubled the Court in the same degree).

But the Court seems to have been reluctant to state openly that a ban on Sunday trading might be a measure having equivalent effect within the meaning of article 30. Instead it began by citing the *Cinéthèque* judgment,[29] in which the Court had held that a French ban on the sale or hire of videocassettes during the first twelve months after a motion picture's release was not compatible with the principle of free movement unless any obstacle to Community trade thereby created did not exceed what was necessary to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law.

The Court had no difficulty in holding that the second criterion was satisfied in the case of legislation restricting Sunday trading: Rules regarding the opening hours of retail premises "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 sociocultural characteristics, and that, in the present state of Community law, is a matter for the Member States."[30]

So far the Court's judgment is unobjectionable. In relation to the other criterion—namely, whether the obstacle to trade exceeded what was necessary to attain the aim in question—the Court's performance is less satisfactory. For some

28. Case 145/88, Torfaen Borough Council v. B & Q, 1989 E.C.R. 3851, 59 C.M.L.R. 455 (1989).

29. Joined Cases 60/84 and 61/84, Cinéthèque S.A. v. Federation Nationale des Cinémas Francais, 1985 E.C.R. 2605, [1985–1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,220 (1985).

30. *B & Q*, 1989 E.C.R. at 3889.

reason it resurrected a rather obscure legislative provision adopted in 1969, namely article 3 of Commission Directive 70/50.[31]

That directive was based on article 33(7) of the Treaty, which empowered the Commission to issue directives establishing the procedure and timetable for abolishing measures having equivalent effect. In 1969 the Commission took the view that nondiscriminatory measures relating to the marketing of goods did not normally constitute measures having equivalent effect.[32] The directive therefore required, by article 2, the abolition of all discriminatory measures that hinder imports and, by article 3, the abolition of:

> [M]easures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.

Since that approach had long since been rejected by the Court in *Cassis de Dijon*, it is a little surprising that the Court should have placed such reliance on it in the *B & Q* case and held that the test for assessing the compatibility with the Treaty of the Sunday trading law was whether "the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules."[33] What is even more surprising is that the Court then held that the question whether specific national rules in fact remain within that limit was a question of fact to be determined by the national court. The result was a preliminary ruling of almost Delphic obscurity that gave the national court little guidance as to the compatibility of the national legislation with the Treaty. The matter has inevitably been the subject of much further litigation in the English courts, culminating in another reference to the Court of Justice.

In the meantime the Court has given a second judgment on the issue of Sunday trading, pursuant to references for a preliminary ruling from French and Belgian courts.[34] In France and Belgium the employment of workers on Sundays is prohibited, subject to certain exceptions. A number of large stores decided to open on Sundays and employed staff for that purpose in defiance of the national laws. When proceedings were taken against them, the cases were referred to the Court of Justice.

The resulting judgments are interesting to compare and contrast with the *B & Q* judgment delivered only fifteen months earlier. In *Conforama* and *Marchandise* the Court expressly recognized that the legislation in question might have a negative effect on imports and recalled that in *B & Q* it had held that a ban on Sunday trading was not compatible with the principle of the free movement of

31. 1970 O.J. SPEC. ED. I 17.

32. *See id.* eighth recital in preamble.

33. *B & Q*, 1989 E.C.R. at 3889.

34. *See* Case C-312/89, Conforama (Judgment of Feb. 28, 1991) (not yet reported); Case C-332/89, Ministère Public v. Marchandise (Judgment of Feb. 28, 1991) (not yet reported).

goods unless the resulting obstacle to Community trade did not exceed what was necessary to attain the objective in question and unless that objective was justified with regard to Community law. As in *B & Q*, the Court held that the objective pursued by the legislation was justified. But the *Conforama* and *Marchandise* judgments differed from *B & Q* when it came to assessing whether the obstacles to Community trade exceeded what was necessary to attain the objective in question. No reference was made to Directive 70/50, and the judgments gave no suggestion that the matter was a question of fact to be determined by the national court. Instead the Court simply observed that the restrictive effects on trade resulting from the legislation in question did not appear excessive with regard to the objective pursued. Accordingly, the Court ruled that the prohibition laid down in article 30 did not apply to national legislation prohibiting the employment of workers on Sundays.

The apparent conflict between *B & Q* and the later rulings has not escaped the attention of the English courts. The House of Lords has recently referred questions to the Court of Justice, asking in substance whether the clear determination of compatibility with article 30 made in *Conforama* and *Marchandise* also applies to the English provisions on Sunday trading.[35]

E. Conclusions

If the object of this article were to defend the Court of Justice against a charge of inconsistency, it would be easy to point out that the measures at issue in *Oosthoek, Buet, GB-INNO-BM* and *Aragonesa de Publicidad Exterior* were all caught by the principle—first formulated in paragraph 15 of the *Oosthoek* judgment—that "Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products."[36] A similar statement occurs in the other three judgments belonging to the *Oosthoek* strain. The measures at issue in *Oebel, Blesgen, Quietlynn,* and the Sunday trading cases, on the other hand, do not fall so squarely within that formula.

It is submitted, however, that an attempt to distinguish the two groups of cases on that basis would be futile. In the first place, the measures at issue in *Blesgen* and *Quietlynn* did in fact restrict "certain means of sales promotion" inasmuch as they prevented goods from being marketed through certain channels. But the overwhelming objection to such a distinction is that it would be entirely devoid of logic. To pretend that a law prohibiting the advertising of strong alcoholic drinks in certain places may affect intra-Community trade, whereas a law pro-

35. *See* Case C-169/91, Stoke-on-Trent Council v. B & Q (referred to the Court of Justice by order of 19 June 1991).

36. Case 286/81, Oosthoek's Uitgeversmaatschappij, 1982 E.C.R. 4575, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8895, at 8546 (1982).

hibiting the sale of strong alcoholic drinks in certain establishments can have no such effect, is simply ludicrous. If any distinction at all is to be made between the two types of measure, it is the prohibition on sale—rather than the prohibition on advertising—that should be treated more sternly by the Court, since it inevitably affects trade to a greater degree. Similarly, it would make no sense to argue that a law prohibiting the door-to-door selling of certain products is in principle caught by article 30 but that a law prohibiting the sale of certain products in bars and restaurants lies entirely outside the scope of article 30.

It is submitted therefore that the Court should in future attempt to be more consistent in its approach to measures governing the circumstances in which goods may be marketed. Two avenues are open to it: Either it may in all cases adopt the broad approach of *Oosthoek* and apply the *Dassonville* formula more or less literally; or it may look for a modified version of that formula that would catch all measures that genuinely interfere with trade between Member States, to the exclusion of measures whose effect on such trade is remote and contingent. But the search for such a formula is perilously difficult and for that reason it may be preferable for the Court to construe the concept of measures having equivalent effect broadly, as in the *Oosthoek* strain of case law, and to be correspondingly generous in examining whether a particular measure is justified either under article 36 or by reference to "mandatory requirements."

On the question of justification, a striking feature of the Sunday trading judgments and of the earlier *Cinéthèque* judgment is that they do not use the expression "mandatory requirements." Instead they simply require that the measure restricting trade should be "justified with regard to Community law." That seems to imply a lower standard of justification. The objectives pursued by the measures in question do not have to be mandatory (that is, imperative or overriding); they merely have to be consistent with Community policy or at least not repugnant to it. The application of a lower standard of justification in such cases is not without logic, since the measures in question are less restrictive of intra-Community trade than the type of measure at issue in *Cassis de Dijon* and similar cases. However, if the Court is applying a lower standard of justification it should say so openly and explain why. It should also apply the same standard in all cases relating to measures that regulate the circumstances in which goods may be marketed, as opposed to measures governing the physical characteristics of goods, for which the criteria laid down in *Cassis de Dijon* remain valid.

IV. The Judgment in *HAG II*

No survey of recent case law on the free movement of goods would be complete without mentioning the judgment in *CNL Sucal v. HAG AG* (known as *HAG II*).[37] The case was concerned with one of the grounds expressly mentioned

37. Case C-10/89, SA CNL Sucal NV v. HAG GF AG, 1990 E.C.R. I-3711, 59 C.M.L.R. 571 (1990) [hereinafter *HAG II*].

in article 36 as justifying exceptions to the principle of free movement, namely the protection of industrial and commercial property. The judgment is important for two reasons: first, because the Court reappraised the misguided negative attitude towards trademarks displayed in some of its earlier judgments, and secondly, because the Court expressly overruled, for the first time in its history,[38] one of its previous judgments.

At the beginning of the century a German company (HAG Bremen) began producing decaffeinated coffee under the trademark "HAG," which it registered in Germany. Later it also registered the mark in Belgium and Luxembourg and transferred those registrations to a Belgian subsidiary that it had established. After the Second World War the assets of the Belgian subsidiary, including the trademark "HAG," were confiscated as enemy property. In 1947 they were sold to the Van Oevelen family, which subsequently assigned the mark to a firm called Van Zuylen. The result was that in Belgium and Luxembourg the mark was owned by Van Zuylen, whereas in Germany and other countries the mark was still owned by HAG Bremen. In 1971 HAG Bremen started to sell coffee in Luxembourg under the HAG mark. Van Zuylen's attempt to obtain an injunction restraining HAG Bremen's infringement of its trademark failed after the Court of Justice had stated in a preliminary ruling that:

> To prohibit the marketing in one Member State of a product legally bearing a trademark in another Member State for the sole reason that an identical trademark, having the same origin, exists in the first State, is incompatible with the provisions for the free movement of goods within the Common Market.[39]

The principle thus enunciated became known as the doctrine of common origin. From the outset it was ferociously attacked by a host of critics and had few defenders. Its implications were disturbing. The doctrine appeared to mean, for example, that, where an undertaking had disposed of a trademark by assignment in one country—even years before the EEC was created—but retained an identical mark in another country, the assignor and assignee could each use the mark in the other's territory, notwithstanding the confusion thus engendered for the consumer. The doctrine of common origin would also mean, if the 1974 ruling were construed literally, that the owner of the mark in Belgium and Luxembourg could use it in Germany, where the registration still belonged to the original owner, HAG Bremen. That is exactly what came to pass.

In 1979 the firm Van Zuylen fell into the hands of the Swiss company Jacobs Suchard AG (of which CNL Sucal was a wholly owned subsidiary). Jacobs Suchard AG was the market leader for coffee products in Germany, except for

38. It is true that in Case C-70/88, European Parliament v. Council, 1990 E.C.R. I-2041, the Court effectively overruled its earlier decision in Case 302/87, European Parliament v. Council, 1988 E.C.R. 5615. However, the Court did not on that occasion expressly recognize that it was overruling one of its previous decisions.

39. Case 192/73, Van Zuylen v. HAG, 1974 E.C.R. 731, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8230 (1974) [hereinafter *HAG I*].

decaffeinated coffee; that sector was dominated by HAG Bremen. The mark "HAG" is in fact almost a synonym for decaffeinated coffee in Germany. Jacobs Suchard AG thus had an obvious interest in acquiring the Belgian and Luxembourg registrations of the HAG trademark and supplying decaffeinated coffee under that mark to the German market. That is precisely what it began doing in 1985. When HAG Bremen applied to the German courts for an injunction to restrain the infringement of its trademark, the matter was eventually referred to the Court of Justice.

The Court was faced with three choices. It could: (1) extend the scope of the doctrine of common origin and allow the acquirer of the expropriated mark to use it in the territory of the original owner; (2) distinguish the two cases on the ground that the acquirer of the expropriated mark, like a party to an assignment, voluntarily participates in the fragmentation of the mark or at least knows that he is acquiring a fragmented mark, whereas the victim of the expropriation does not consent to the fragmentation of the mark; or (3) abandon the doctrine of common origin completely and recognize that following the subdivision of a trademark, at least a subdivision that took place before the EEC had even been conceived of, each proprietor is entitled to the exclusive use of the mark in its own territory.

The first option, which was of course the one favored by CNL Sucal, was most unlikely to be accepted because it would have given extraterritorial effect to the expropriation that took place in Belgium and would have deprived HAG Bremen of the exclusive use of the mark in Germany even though it had never consented to the fragmentation. That would hardly have been consistent with the Court's case law as it had developed subsequent to *HAG I*.[40]

The second option was based on the assumption that, where a trademark comes into divided ownership as a result of an assignment, the assignor who retains the mark in one Member State and the assignee who acquires it in another Member State may use the mark in each other's territory. The Court's judgment in *Sirena v. Eda*[41] supports that assumption. If the assumption *were* correct, it would be logical to treat the purchaser of the expropriated mark in the same way as an assignee, but it would not be logical to treat the victim of the expropriation in the same way as the assignor, since it did not consent to the operation.

The Court chose the third option—rightly, it is submitted—and expressly overruled *HAG I*. It did so after a radical reappraisal of the importance of trademarks, which in some earlier judgments had been treated rather contemp-

40. *See* Case 19/84, Pharmon v. Hoechst, 1985 E.C.R. 2281, [1985–1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206 (1985) in which the Court held that the proprietor of a patent may oppose imports of products manufactured with the patented process in another Member State by a person who has obtained a compulsory license under a parallel patent held by the same proprietor. It would not be logical to treat a person whose trademark was expropriated without compensation less favorably than a patent-holder against whom a compulsory license was issued.

41. Case 40/70, Sirena v. Eda, 1971 E.C.R. 69, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101 (1971).

tuously by the Court. The negative attitude had been initiated by Advocate General Dutheillet de Lamothe who, in his Opinion in *Sirena v. Eda,* made a far-fetched comparison between a brand of shaving cream and penicillin in an attempt to prove that patents are more worthy of protection than trademarks.

In *HAG II,* by way of contrast, the Court recognized that trademarks constitute "an essential element of the system of undistorted competition which the Treaty seeks to establish and maintain." A trademark could only perform its essential function of guaranteeing to the consumer that all goods on which it is placed have the same commercial origin if the proprietor retained the exclusive right to use it. That conclusion was not affected by the fact that the mark in question having originally belonged to a single person in two Member States and that person having been deprived of it in one of those States as a result of an expropriation before the creation of the EEC. After the expropriation the mark continued to fulfil its function, independently in each of the territories concerned, of guaranteeing that all goods bearing the mark came from the same source.

Although it was not strictly necessary for the Court to overrule *HAG I,* it is submitted that it was right to do so because of the unacceptable confusion that would ensue for consumers if entirely separate persons, between whom there is no legal or economic link, were allowed to use the same trademark in the same territory. A degree of confusion is of course inevitable when a trademark belongs to different persons in different countries, especially in an age of international travel. Such confusion is regrettable—the more so in a common market—but it cannot be eliminated by allowing each proprietor of the mark to use it in the territory of the other. It must also be remembered that the Van Oevelen family gave valuable consideration for the purchase of the Belgian and Luxembourg marks in 1947 and were entitled to assume that, as the law stood then, the transaction was valid and they were obtaining an exclusive right. They could not have known that the EEC Treaty would come into existence twelve years later. The judgment in *HAG II* thus corrected an injustice perpetrated by the Court in *HAG I.*

HAG II is also important, in a more general sense, because it demonstrates an enlightened attitude towards the relative value of precedent. The Court of Justice, following the tradition of civil law countries, had never before expressly overruled one of its previous decisions. It had occasionally ignored a precedent that it apparently wished to depart from, but it had never expressly indicated that it considered a previous decision wrong. From that point of view also, *HAG II* is a welcome development.