CURRENT DEVELOPMENTS

EUROPEAN COMMUNITY LAW

Edited by Karl Newman*

I. FREE MOVEMENT OF GOODS

A. The Limits of Article 30

The European Court's efforts to locate the outer limits of Article 30's control of national measures have been discussed before in these surveys of current developments in EC law.[1] The Court was tempted to use Article 30 to catch a wide range of measures that affected trade even where the rules applied in an even-handed manner to all traders. The most notable example of this expansionist trend was found in the so-called Sunday trading cases, in which Article 30 was exploited to challenge rules restricting commercial activity in England and Wales even though the rules did not put cross-border strategies at any particular disadvantage. The Court pursued an erratic course before finally ruling the laws compatible with Article 30.[2] Academic comment, though nuanced in its detailed appreciation of the Court's stance, was largely convinced that Article 30 had been extended beyond both its intent and necessary function in the process of market integration.[3]

The expectation that the Court would raise the threshold that must be crossed before a rule falls within the ambit of Article 30 was realised in *Keck and Mithouard*.[4] Malcolm Jarvis has written in this journal on the impact of this decision in England and Wales,[5] so the purpose of this comment is simply to provide a summary and a pointer to future developments. Keck and Mithouard had resold goods at a loss in violation of a French law forbidding such practices. The traders submit-

* This section covers at half-yearly intervals developments in selected areas of European Community law over the preceding two years. The present notes follow up notes on the same topics in the January 1994 issue of the *Quarterly* (Vol.43, Part 1: Free Movement of Goods) and the July 1994 issue (Vol.43, Part 3: the three other notes).

1. E.g. (1991) 40 I.C.L.Q. 215, (1992) 41 I.C.L.Q. 719, (1994) 43 I.C.L.Q. 207.
2. Case C-169/91 *Stoke-on-Trent and Norwich City Councils* v. *B & Q* judgment of 16 Dec. 1992, [1993] 1 C.M.L.R. 426.
3. E.g. Chalmers, "Free Movement of Goods within the European Community: an Unhealthy Addiction to Scotch Whisky?" (1993) 42 I.C.L.Q. 269; Wils, "The Search for the Rule in Article 30 EEC: Much Ado about Nothing?" (1993) 18 E.L.Rev. 475.
4. Joined cases C-267 and C-268/91 [1993] E.C.R. I-6097.
5. (1995) 44 I.C.L.Q. 451.

ted that the law restricted the volume of sales of imported goods and that it was incompatible with Article 30. It was plain that any restriction on commercial freedom was felt equally by all traders and had no special relevance to imported goods. The circumstances prompted the Court to re-examine its case law. It stated:

> The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] E.C.R. 837), provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

The insistence on the demonstration of a legal or factual inequality in the application of measures increases the burden cast on traders wishing to deploy Article 30 as a means of enhancing their commercial freedom. As a corollary, the Court's firmer emphasis on the need to identify market fragmentation, rather than merely a suppression of sales generally, signals a shift in favour of the power of States to regulate their markets without scrutiny based on Article 30, provided that the test of legal and factual equality of application is respected. This test will be tricky to apply and for this and other reasons the Court's abrupt change of direction has attracted critical comment.[6] As a general observation, *Keck* reflects a judicial mood of unwillingness to plug gaps in the Treaty in order to acquire a general power of review over local regulatory initiatives that are not shown to imperil the realisation of economies of scale in an integrating market.[7] Community trade law has limits.

The European Court has adopted the *Keck* formula in subsequent decisions in which it has found that national measures escape the reach of Article 30. In *Hünermund and others* v. *Landesapothekerkammer Baden-Württemberg*[8] the Court repeated its *Keck* formula in rejecting an attempt to rely on Article 30 to challenge rules prohibiting pharmacists from advertising products outside their premises. Such restrictions doubtless affected the volume of sales, but all goods were equally affected irrespective of origin. In *Tankstation 't Heukske vof and J. B. E. Boermans*[9] the Court deployed its new approach to reject an ambitious attempt to challenge Dutch rules relating to the compulsory closing of petrol stations at stipulated times. Once again, the rules applied in an even-handed fashion to the marketing of all goods. However, the Court has also had occasion to reject *Keck*-inspired submissions that national rules are untouched by Article 30. Justification is still required for rules that partition the market by imposing regulatory specifications on imports that are different from those with which they are expected to comply in their State of origin. In *Keck* terms such disparity between national laws causes factual inequality in the treatment of products according to origin. *Verband Sozialer Wettbewerb eV* v. *Clinique Laboratories SNC*[10] involved a challenge to

6. E.g. Gormley, "Reasoning Renounced? The Remarkable Judgment in *Keck and Mithouard*" [1994] Euro.Bus.L.Rev. 63; Chalmers, "Repackaging the Internal Market—the Ramifications of the *Keck* judgment" (1994) 19 E.L.Rev. 385.

7. Cf. Case C-2/91 *Meng* judgment of 17 Nov. 1993, in which the ECJ cautiously declined an invitation to extend the use of Arts.5 and 85 in reviewing national rules.

8. Case C-292/92 judgment of 15 Dec. 1993.

9. Case C-401/92 and C-402/92 [1994] E.C.R. I-2199.

10. Case C-315/92 [1994] E.C.R. I-317.

German rules forbidding the use of the name "Clinique" for cosmetics. The Court observed that this prohibition forced the trader in goods that were lawfully marketed in other member States under that name to alter it for Germany, thereby incurring additional packaging and advertising costs. It then fell to Germany to justify the rule, itself an interesting aspect of the decision, examined below.

B. Justifying Rules which Restrict Trade

Assuming an adequate impact on inter-State trade is shown to flow from a national measure, it falls to the regulating State to justify its rule. Since its *Cassis de Dijon* ruling the Court has frequently been drawn into an assessment of the compatibility with Article 30 of national measures of market regulation that obstruct cross-border trade. Several such cases have been discussed in previous contributions to this journal[11] and further illustrations continue to emerge.

In *Verband Sozialer Wettbewerb eV* v. *Clinique Laboratories SNC* justifications advanced by Germany for its suppression of the name "Clinique" for cosmetic products related to the risk that consumers would be misled into believing that the items had medicinal properties. "Clinique" sounds like the German word, *Klinik*, meaning hospital. However, the Court was unprepared to accept that the unusually restrictive pattern of German unfair competition law could be justified in so far as it impeded market integration. The Court observed that cosmetics are not available in pharmacies; that "Clinique" products are not presented as medicinal products; and that the use of the "Clinique" name did not mislead consumers in other countries. This led the Court to conclude that the rules were not necessary to satisfy the requirements of consumer protection. Free movement of goods should prevail. It is especially interesting to observe that the European Court has a notion of a consumer who is able to look after him- or herself that is more robust than the German assumption of a rather gullible individual.[12]

In *Criminal proceedings against Ludomira Neeltje Houtwipper*[13] the Court had the opportunity to consider the relationship between hallmarking of precious metals, practised for centuries, typically according to distinct national traditions, and the process of European market integration. The proceedings concerned gold and silver rings lacking the required Dutch hallmark. Mindful of the potential collision with Article 30 where importers were confronted by the particular demands of Dutch law, the national court made an Article 177 preliminary reference. Once again the European Court was confronted by the need to resolve the collision between the general interest in integration and the particular interests underlying national rules in an area where Community legislation had not established common rules. The Court accepted that a hallmarking system is in principle capable of ensuring effective consumer protection and the promotion of fair trading. Consumers cannot inform themselves about the purity of a metal and may be misled in an unregulated market. However, the Court considered that a State is not able to require that a fresh hallmark be affixed to products imported from a member State

11. E.g. (1989) 38 I.C.L.Q. 689, (1992) 41 I.C.L.Q. 719.

12. In finding the German market over-regulated, the decision compares with that in Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft* v. *Rocher GmbH* judgment of 18 May 1993, examined at (1994) 43 I.C.L.Q. 207.

13. Case C-293/93 [1994] E.C.R. I-4249.

in which they have been lawfully marketed and hallmarked in accordance with the home State's legislation and where the information conveyed by the hallmark is equivalent to that prescribed by the State of importation and intelligible to consumers of that State. The Court thus set limits to the extent to which national hallmarking rules may be enforced in the integrating market. The corollary of this formula is that hallmarking requirements may be imposed, despite their anti-integrative effect, where, for example, inadequate intelligible information is conveyed via the hallmark. However, the Court considered that the detailed examination of the adequacy of home-State hallmarking was a matter for national courts.

C. Harmonisation—Recent Legislation

In its first annual report on the subsidiarity principle, the Commission promised fewer but better-targeted legislative initiatives.[14] As 1992, the Treaty date for the completion of the internal market,[15] recedes, attention has begun to focus more on the implementation of existing rules than on the preparation of ambitious new initiatives. However, laws connected with the internal market process continue to be adopted. For example, provisions governing trade in "dual-use" goods—those capable of both civil and defence applications—have been introduced in order to eliminate the need for border controls over such sensitive items. Action taken under both the EC and the Common Foreign and Security Policy pillars of the Union Treaty has combined to put in place a common system for controlling export of dual-use goods. Authorisation by a member State is required and the same criteria are to be followed by all the member States in dealing with applications for authorisation.[16] There have also been initiatives designed to remove checks aimed at preventing removal of treasures from national territory. Regulation 752/93 implements Regulation 3911/92 on the export of cultural goods.[17] It establishes a common system of export licences for cultural goods leaving the Community, so that there is no weak link within the Community which exporters may exploit. Directive 93/7 governs the return of illegally exported cultural items to the member State from which they have been exported.[18]

D. Challenging the Validity of Harmonisation Legislation

A notable aspect of recent activity has been the growth of challenges to the validity of Community legislation in the field of free movement of goods. Disquiet among national politicians about the breadth of Community competence has tended in the past to be concealed beneath the practice of unanimous voting in Council. But since the rise of qualified majority voting in Council consequent on the entry into force of the Single European Act in 1987 and the Treaty on European Union in 1993, defining the scope of Community competence has become an issue of real practical significance for States faced with the prospect of being outvoted. The tensions associated with these trends can be traced throughout Community law;

14. COM(94)533.
15. Art.7a EC.
16. Reg.3381/94 and Council Decision 94/942/CFSP (1994) O.J. L367.
17. (1993) O.J. L77/24, (1992) O.J. L395/1 respectively.
18. (1993) O.J. L74/74.

the subsidiarity principle is a reflection of anxiety about the imprecise allocation of competence between States and Community.[19] In the realm of the free movement of goods, the growing willingness of States to seek judicial review of measures that they consider to lie beyond the Community's competence surfaced in the challenge instituted by Germany to the General Directive on Product Safety.[20]

The Directive was made on the basis of Article 100a. Germany did not object to the basic notion of harmonising safety standards, but it challenged Article 9 of the Directive in so far as it empowered the Commission to adopt decisions requiring the member States to take named measures in respect of products. The Commission's power is subject to stringent preconditions, but nevertheless Germany submitted that Article 9 lacked a legal base and, second, that it violated the principle of proportionality. The first ground was novel. Germany claimed that all that could be drawn from Article 100a was a power conferred on the Commission to check whether provisional national measures comply with Community law and not to adopt measures itself. The German view was conditioned by a narrow view of the scope of Article 100a and an emphasis on the primacy of implementation at national level. In this context Germany mentioned that Article 9 granted more power to the Commission than would be allowed the *Bund* at the expense of the *Länder* under the German federal division of power. The Court rejected the German application. After a careful examination of the nature and purpose of the Directive it concluded that action at Community level of the type envisaged by Article 9 is justified in order to protect the health and safety of consumers and to ensure the proper functioning of the market. The Court pointed out that Article 100a empowers the Council to take measures aimed at the establishment and functioning of the internal market. Approximation of laws alone may not be adequate to achieve this objective in some sectors, in particular that of product safety. The Court therefore accepted that measures within the meaning of Article 100a "must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products". In response to the academically intriguing question of comparative federalism suggested by the German submissions, the Court understandably contented itself with the observation that the relationship between the Community and its member States is not the same as that between *Bund* and *Länder*. The more familiar submissions relating to proportionality were also rejected by the Court. It determined that the powers conferred were appropriate to achieve the objectives pursued and did not go beyond what was necessary in relation to those objectives. The litigation reveals sensitivity about extending the Community's competence to build institutional structures in support of the process of market integration. The Court was here prepared to uphold the validity of the use of Article 100a.

Most Article 30 cases before the Court have involved commercial challenges to national measures alleged to obstruct inter-State trade, but in *Meyhui NV* v. *Schott Zwiesel Glaswerke AG*[21] the Court confirmed that measures adopted at Com-

19. These trends are explored at length in my *Law and Integration in the European Union* (1995), esp. chap. 5.

20. Directive 92/59 (1992) O.J. L228/24, see comment at (1994) 43 I.C.L.Q. 207.

21. Case C-51/93 [1994] E.C.R. I-3879.

munity level are also subject to the Article 30 regime. The Court's review provides an interesting implication that the standards against which Community acts are measured are less exacting than those to which national measures are subjected. *Meyhui* was an Article 177 preliminary reference from a Belgian court concerning the validity and interpretation of Council Directive 69/493 on the approximation of laws relating to crystal glass. The measure requires member States to take steps to suppress use of inaccurate descriptions. In an explanatory note in the Directive it is stated that for some categories of product: "Only the description in the language or languages of the country in which the goods are marketed may be used."

Schott, a German glass producer, and Meyhui, an importer, were in dispute over Schott's refusal to affix to its glassware the description in the language of the State of marketing, *in casu* Belgium. Questions concerning the compatibility of the explanatory note with Article 30 were referred to Luxembourg. The Court accepted that the language prohibition in question inhibited cross-border trade in so far as producers were obliged to affix different labels for different markets, thereby incurring additional costs. In focusing on whether the obstacle could be justified, the Court chose to pay careful attention to the function of the Directive not simply as a means of integrating the market but also as a method of regulating the market at Community level in order to protect both buyer against fraud and honest manufacturer against unfair competition. The Court took the view that differences in the quality of crystal glass were not readily apparent to "the average consumer for whom the purchase of crystal glass products is not a frequent occurrence".[22] The Court drew from this a need for the provision of clear information to preclude consumer confusion between items of varying quality. This then led the Court to conclude that information in the language of the State of marketing "is therefore an appropriate means of protection".

The ruling seems more permissive towards such obstacles to trade than that delivered in *Piageme* v. *Peeters*,[23] where the Court concluded that a national law requiring the exclusive use of a specific language for labelling foodstuffs, without permitting use of other methods for informing purchasers, violated Article 30. In *Meyhui* the Court's dismissal of the practicality of other means of information provision was remarkably terse: "the hypothesis referred to by the national court that another language may be easily comprehensible to the purchaser is of only marginal importance".[24] Advocate General Gulmann was troubled by the blanket nature of the rules and would have found the restriction invalid, leaving it to States to protect consumers where particular descriptions are shown to be liable to mislead them, pending further action at Community level. But the Court did not explore these matters. It found the language requirement necessary to protect consumers and ruled it valid.

The case provides an intriguing insight into the legal sensitivity that flows from the effort to develop a multilingual single market. For the Community lawyer, the

22. *Idem*, para.18 of the judgment. Cf. text at *supra* n.12 on the ECJ's appreciation of consumer capability.

23. Case C-369/89 [1991] E.C.R. I-2971. The Commission issued a communication in the light of this judgment, COM(93)532.

24. *Supra* n.21, at para.19 of the judgment.

case may be taken as an example of the growth of Community rules which regulate while achieving gradual integration, rather than leaving such matters to national rules. So, although *Meyhui* represents a noticeably less rigorous application of the proportionality principle than has been the norm in reviewing national laws, perhaps a milder approach to the review of Community rules against the standards of Article 30 can be supported in order to allow the Community legislature a discretion in its evolving harmonisation programme that is more flexible than that conceded to national authorities.

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II. TRANSPORT

THE arrival of Neil Kinnock, in January 1995, as the new Commissioner in charge of the transport portfolio, has led to particular emphasis on three objectives: improvement of the quality of the European transport system; integration of the transport policy into the single market; and negotiations with non-Community countries.[1] During the last 18 months, the main legal developments continue to be concerned primarily with infrastructure, safety, negotiations with non-Community countries and improving the competitiveness of the industry by adopting liberalising measures and enforcing the EC competition rules.

A. Trans-European Networks (TENs)

Following the recommendations of a special group set up to report on the progress towards the creation of TENs, the Council adopted a common position on a regulation laying down general rules for the granting of Community financial aid to TENs in June 1995.[2] In addition, agreement on a Council decision[3] setting out Community guidelines for the development of trans-European *transport* networks has almost been reached. The guidelines are aimed at *all* transport infrastructures, thus replacing the former separate guidelines for roads, inland waterways, the TGV and combined transport. The master plan for TENs is based on a combination of all modes of transport, unlike the earlier guidelines which were based on single modes of transport.

B. Safety Measures

A number of measures have been adopted in all sectors. As far as road safety is concerned a Council directive has been adopted on the approximation of laws concerned with the international and national transportation of dangerous goods by road.[4] The Council is also considering another directive which seeks to harmon-

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1. COM(95)302. In June 1995 the Commission adopted a communication setting out an action programme for transport policy from 1995 to the year 2000.
2. (1994) O.J. C89/8.
3. Amended proposal COM(95)298 Final.
4. Council Directive 94/55 (1994) O.J. L319/7. A similar proposal for carriage by rail is under consideration.