



FACULTY OF LAW  
University of Lund

Carina Olofsson

The Mandatory Requirements in  
the EC-law on the Free  
Movement of Goods

Master thesis  
20 points

Peter Gjörtler

EC-law

Spring 2003

# Contents

<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 Background	4
1.2 Purpose and Method	4
1.3 Delimitations	5
<b>2 THE MANDATORY REQUIREMENTS</b>	<b>6</b>
2.1 Measures Relating to the Internal Taxation of the Member States, Especially the Prevention of Tax Frauds	6
2.2 Measures Relating to Fair Trading and the Prevention of Unfair Competition	7
2.2.1 Certain Designations and Generic Appellations	8
2.2.2 Property Rights	11
2.2.3 Labelling Requirements	13
2.3 Consumer Protection	13
2.3.1 Consumer Information	14
2.3.2 Origin Marking	22
2.3.3 Language Requirements	23
2.3.4 Certain Designations and Generic Names	27
2.3.5 Hallmarks	32
2.3.6 Restrictions on Advertising	34
2.4 The Improvement of Working Conditions	37
2.5 Maintaining Press Diversity	38
2.6 The Preservation of the Financial Balance of Social Security Systems (the control of health expenditure)	39
2.7 The Protection of the Environment	41
2.8 Road Safety	46
2.9 The Encouragement of Cinematographic Production	48
2.10 The Protection of the Public Network and its Proper Functioning	48
<b>3 SUMMARY AND CONCLUSION</b>	<b>50</b>
<b>BIBLIOGRAPHY</b>	<b>53</b>



# Preface

This Masters Thesis is called the mandatory requirements in the EC-law free movement of goods and forms the last and conclusive part of my Masters of Law degree at the University of Lund, Sweden. As a part of my degree I have specialised in European Community law and therefore chose to do so for my thesis as well.

I find Community law to be very interesting due to the fact that this area of law is still developing since its “birth” half a century ago. A proposal for a constitution of the European Union is, in this moment, prepared and an interesting referendum in Sweden is planned for September of this year regarding the European Monetary Union. I feel inspired and lucky to be able to study this field during this interesting time of development.

I would like to thank my family for all the support during my education; you have been a true source of inspiration and I dedicate this thesis to you. I would also like to dedicate my degree to my grandfather, who has and will always be in my thoughts.

Carina Olofsson

Lund, June 2003

# Abbreviations

EC	European Community
ECJ	European Court of Justice
E.C.R.	European Court Reports
EeLR	European Environmental Law Review
ELR	European Law Review
EU	European Union
OJ	Official Journal

# 1 Introduction

## 1.1 Background

The mandatory requirements of Community law is a concept developed through the case law of the ECJ. The Treaty of the European Community, henceforward called "the Treaty", establishes in its first title the free movement of goods. This includes rules on the customs union and a prohibition against quantitative restrictions between Member States. In article 28 the Treaty establishes that "[Q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". National measures that in any way discriminates against imported goods so as to create a quantitative restriction on import is therefore prohibited and can only be justified by one of the grounds in article 30 of the Treaty. In 1979 the ECJ delivered one of its most important rulings which is still well debated and developing, which will be seen below. The court stated in *Cassis de Dijon*<sup>1</sup> that even if a national measure is not discriminating in any way it may still create barriers to the free trade due to the fact that goods in one Member State, lawfully produced and marketed there may not be so in the Member State of importation due to disparities between the national laws. The barriers that may be created due to different national legislation may only be justified if the Member State can show that the rule is "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". It can be said that what the court did in *Cassis de Dijon* was to extend the scope of article 28 to include even national measures that apply without distinction to imported and domestic goods, i.e. non-discriminating national measures. In doing this, however, the court also extended the scope of article 30 and the possible justifications of barriers to trade. It did this by introducing the mandatory requirements, which may serve to justify only measures that are applicable without distinction. It must be said that the list of mandatory requirements created by the court is non-exhaustive since the court states that they include *in particular* the four mandatory requirements mentioned. It has also been shown through the case law of the court that this is so.

## 1.2 Purpose and Method

The purpose of this thesis is to find, compile and organise the national interests that has been approved by the court as mandatory requirements capable of justifying barriers to trade. I will also try to see what limitations, if any, there are regarding the different mandatory requirements. In doing

---

<sup>1</sup> Case 120/78.

this I have done a thorough examination of the case law of the court regarding measures applicable without distinction in the free movement of goods. The search for interesting cases have been done through the homepage of the European Union at [www.europa.eu.int/eur-lex](http://www.europa.eu.int/eur-lex) which provides for a comprehensive data base with all the cases of the ECJ, later reported in the E.C.R.

All references to articles in the treaty are made according to the renumbering following the Treaty of Amsterdam even if the court at the time of delivering of a case used the "old" numbering. When citing the court I have chosen, for natural reasons, to use the numbering used by the court with the renumbering in brackets.

### 1.3 Delimitations

I have chosen to examine the mandatory requirements concerning only the free movement of goods. The other three of the four Community freedoms (persons, services and capital) is therefore, in general, outside the scope of this thesis. In some aspects the other freedoms might be referred to but this is only due to the fact that they then are used to illustrate the application of the free movement of goods.

As has been stated above, *Cassis de Dijon* was the first case where the ECJ mentioned the concept of mandatory requirement and also gave four examples of such requirements. The second of these, the protection of public health, is also recognised by the Treaty under article 30 as a justification of barriers to trade and I have therefore chosen not to further develop this area even though public health clearly is a mandatory requirement.

Many times when the court has been called upon to deliver a ruling regarding justifications of barriers to trade, Member States have invoked several grounds to serve as such justifications. One argument that has frequently been rejected by the court is that national rules might be justified if they are necessary in order to give full effect to the common organisation of the market. The court has frequently stated that "once the Community has established a common market organization in a particular sector, the Member States must refrain from taking any unilateral measure even if that measure is likely to support the common policy of the Community. It is for the Community and not for a Member State to seek a solution to the problem (...)"<sup>2</sup> Any benevolence of the Member States to find a solution to Community problems has therefore not been recognised as a mandatory requirement capable of justifying barriers to trade. In this thesis I have chosen not to list these efforts by the Member States in the investigation of the mandatory requirement, precisely due to the fact that it does not constitute one. It is, however, important to note the fact that it has been brought up by the ECJ under the discussion on the mandatory requirements.

---

<sup>2</sup> See cases 216/84, 407/85, 76/86, 90/86 and 274/87.

# 2 The Mandatory Requirements

## 2.1 Measures Relating to the Internal Taxation of the Member States, Especially the Prevention of Tax Frauds

The first mandatory requirement mentioned by the court in *Cassis de Dijon* is the effectiveness of fiscal supervision. Later case law, however, mentions only the internal taxation of the Member States or the prevention of tax frauds, implicating that the scope of the mandatory requirement has extended from its original meaning.

In case *GB-Inno v. ATAB*<sup>3</sup> the Belgian ‘Court de Cassation’ asked the court for a preliminary ruling under article 234 in a case pending before it. The case concerned taxes that might affect the consumption of tobacco because selling prices were fixed. The court starts by quoting the Commission’s directive 70/50/EEC on measures of an equivalent effect to a quantitative restriction on import<sup>4</sup>. It then concludes that the directive does not include “measures which (...) are specifically referred to elsewhere in the Treaty, in particular as fiscal measures, or are per se permitted as being the visible or hidden expression of powers retained by the Member States.” The court then states that a system as the Belgian one “generally has exclusively internal effects”. It then leaves it up to the national court to decide the case.

In case *Commission v. Italy*<sup>5</sup> the court developed its reasoning from *GB-Inno v. ATAB*. The case was delivered eight months after *Cassis de Dijon* and concerned the Italian ‘Testo Unico delle Disposizioni Legislative in Materia Doganale’ (Consolidated Text of the Legislative Provisions in Customs Matters) which prescribed certain rules regarding customs agents. These agents were to make declarations regarding the customs transaction in the name of the owner of the goods when he could not deliver the declaration himself. The Commission considered these rules to be contrary to Community law due to the fact that they prevented the owner to freely choose his representative since he had to use a specially approved customs agent. This involved costs that made the importation of goods more expensive and therefore constituted an obstacle to the free trade. The court states that frontier controls are justified “only in so far as they are necessary either for the implementation of the exceptions to free movement referred to in article 36 (30) of the Treaty; or for the levying of internal taxation within the meaning of article 95” (90).

In case *Carciati*<sup>6</sup> the court was called upon to deliver a preliminary ruling on an Italian law that prohibited persons resident within its territory to drive

---

<sup>3</sup> Case 13/77.

<sup>4</sup> OJ L 13 1970, p.29.

<sup>5</sup> Case 159/78.

<sup>6</sup> Case 823/79.



motor vehicles used for temporary importation from another country. These vehicles were exempted from payment of value added tax specifically because they were to be used temporarily. An Italian national, Mr Carciati, lived in Ravenna and was charged with smuggling since he had driven a German-registered car in Italy in contravention of the said provisions and therefore tax-free. The court states that “Member States (thus) retain broad powers to take action in respect of temporary importation, specifically for the purpose of preventing tax frauds.” So long as the proportionality principle is fulfilled meaning that the measures should not be excessive, they are compatible with the principle of the free movement of goods.<sup>7</sup> The Italian prohibition is held to be an effective way of preventing tax frauds and to ensure that taxes are paid in the country of destination of the goods and it is therefore so justified.

In case *Abbinck*<sup>8</sup> the court confirmed its ruling in *Carciati* and added that the national prohibition, in this case a Dutch one, is justified even if it makes no exception for cases where vehicles are used without the intention of evading tax. This is due to the fact that legislation to prevent tax evasion must be based on objective, verifiable criteria and the intention of a person is not such a criteria.

## 2.2 Measures Relating to Fair Trading and the Prevention of Unfair Competition

*Cassis de Dijon* calls this mandatory requirement “the fairness of commercial transactions” but the expressions used most frequently by the court later on is the ensurance of fair trading and the prevention on unfair competition. I have therefore chosen to use these terms.

As seen below, most of the cases concerning unfair competition also concern the question of consumer protection. In cases where the court has made a principally important statement regarding the justification of fair trading, they have also been considered important to illustrate this mandatory requirement. In cases where the fair trading argument has been rejected quite easily by the court, the cases have often been excluded from this chapter. These cases are instead to be found under Consumer Protection.

In case *Commission v. Germany*<sup>9</sup> the court mentions unfair competition for the first time. The case was, however, delivered before *Cassis de Dijon* and does not mention the concept of mandatory requirements, but merely article 28. The case concerned German legislation on indications of origin on wine. The German law on vine products and the regulation on sparkling wines and spirits reserved the appellations ‘Sekt’, ‘Weinbrand’ and ‘Prädikatssekt’ to German products or to foreign products if they contained at least 60 % of German grapes. The Commission brought proceedings against Germany,

---

<sup>7</sup> Cp. case 176/84 *Commission v. Greece*.

<sup>8</sup> Case 134/83.

<sup>9</sup> Case 12/74.

claiming that it failed to fulfil its obligations under the Treaty, especially as regards the free movement of goods. It argued that the terms mentioned above are generic appellations, which Germany has tried to transform into indirect indications of origin and the domestic products are therefore favoured to the detriment of foreign goods and producers. The court states, regarding indications of origin, that the geographical area of origin must confer on the product a specific quality and characteristics of such a nature as to distinguish it from all other products. This statement has been repeated by the court in many cases where it had to deliver a ruling regarding origin marking, whether this concerned the justification of fair trading or consumer protection. The court continues, stating that if appellations are protected by law they must satisfy the objectives of such a protection. This is so particularly concerning the need to ensure that the interests of the producers are safeguarded against *unfair competition*, but also that consumers are protected against misleading information.

### 2.2.1 Certain Designations and Generic Appellations

The first time the court actually established that fair trading is a mandatory requirement was in case *Prantl*<sup>10</sup>. Mr Prantl, an Italian national and importer of beverages into Germany, was prosecuted for having infringed the German Weingesetz (Wine Law) by improper use of the ‘Bocksbeutel’ bottles due to the selling in such bottles of Italian wine. In Italy this kind of bottle had been used for several centuries. The German government contended that the special shape of the ‘Bocksbeutel’ was an indication of the wine’s geographical origin and could therefore only be used by wine from a special region. The court then makes a principally important statement when it establishes that the fairness and the traditions used in the different Member States regarding a certain product has to be taken into consideration in determining whether the generic appellation may be reserved as in the national legislation. It states that “(...) in the system of the common market consumer protection and fair trading (...) must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.” The court observes that bottles similar to the ‘Bocksbeutel’ were used in Italy in accordance with a fair and traditional practice there. An exclusive right to use certain bottles can therefore not be used to ban imports from other Member States.

The principle established in *Prantl* was soon repeated in case *Miro*<sup>11</sup>, which concerned a Dutch rule governing the marketing of Jenever. Only product with certain characteristics could use the name “Jenever” when sold in the Netherlands. Miro, a Dutch business, was prosecuted for having infringed the ‘Verordening Benaming Van Jenever’ (Regulation on the appellation of Jenever) by selling Belgian Jenever that did not meet the characteristics prescribed for in the regulation. The court examines the fair trading argument particularly in view of the competitive advantage enjoyed by

---

<sup>10</sup> Case 16/83.

<sup>11</sup> Case 182/84.

foreign manufacturers on the Netherlands market owing to the price differences due to the fact that excise duties and taxes are proportional to alcohol content. It refers to its judgement in *Prantl* and the principle of fairness and traditional practices. It states that “it cannot (...) be regarded as an essential requirement of fair trading for national rules fixing the minimum alcohol content of a traditional beverage to be complied with by products of the same kind imported from another Member State if they are lawfully and traditionally manufactured and marketed under the same appellation in the Member State of origin and the purchaser is provided with proper information.” The Prantl-principle is therefore established in the case law of the court. The additional reasoning in this case on proper information is frequently used in regard of national measures justified under the mandatory requirement of consumer protection.

The fact that imported products might have a price advantage due to national taxes and duties was deemed to be irrelevant. The court states that differences of this kind belong to the conditions of competition, which every trader may take advantage of, provided that purchasers are given information so that they choose based on the quality and the price of the products.

The Prantl-principle was once again used by the ECJ in case *Commission v. Germany*<sup>12</sup> where the commission brought an action against Germany under article 226 for infringement of article 28. The German ‘Weingesetz’ (Wine law) contained a prohibition on marketing of beverages other than champagne and sparkling wine in traditional champagne-type bottles. The French drink ‘Petillant de Raisin’ was a partially fermented grape juice that had been sold in France since its beginning in 1956 in champagne-type bottles with a wired mushroom-shaped stopper at the top. This drink was now, according to the German Wine law prohibited and its marketing in German therefore impossible. Producers who wished to export ‘Petillant de Raisin’ would actually be obliged to change their bottle specifically for the German market, which would be more difficult and costly for them. The German government pleaded the mandatory requirements of consumer protection and fair-trading. After referring to *Prantl* and the fairness and traditional practices-principle, the court examines the fair trading argument. It concludes that “the marketing of ‘Petillant de Raisin’ on the German market in the bottle in which it has been continuously and lawfully marketed since it came into the market 30 years ago must be regarded as satisfying the requirements arising from the need to have regard on all sides for the fair and traditional practices observed in the various Member States (...).”

The principle of fairness and traditional practices established in *Prantl* can be said to tighten up the principle of mutual recognition once established in *Cassis de Dijon*. It states that goods lawfully produced and marketed in one Member State shall not be subject to measures in the importing state of an effect equivalent to quantitative restrictions on import, unless it is necessary to satisfy a mandatory requirement. When justifications are made under the fair trade argumentation to justify a rule protecting certain designations or

---

<sup>12</sup> Case 179/85.

generic appellations, it is not sufficient, for goods to benefit from the principle of mutual recognition, that they are lawfully produced and marketed in the Member State of origin; they also have to be used in that state according to a fair and traditional practice.

Case *Drei Glocken*<sup>13</sup> concerned an Italian rule regarding durum wheat in pasta. It prohibited the selling and marketing of pasta made not only from durum wheat but also from common wheat or from a mixture of them. *Drei Glocken*, a German manufacturer of pasta made of a mixture of common wheat and durum wheat, was imposed an administrative penalty for infringing the Italian law on pasta products. The Italian government claimed that the rule was justified under, inter alia, fair trading. They claimed that it was not possible to check the amount of durum wheat actually used due to the analytical techniques used at the time of the ruling and therefore the producer of pasta could state a higher proportion of durum wheat than actually used. Since durum wheat was more expensive than common wheat producers could charge the consumers a higher price than was justified by the proportion of durum wheat actually used. It was argued that only a prohibition on pasta made from common wheat could prevent such misrepresentation. The court rejects this argument and states that less restrictive means of ensuring fair trading exist. The Italian government could, through legislation, restrict the description ‘pasta made from durum wheatmeal’ to pasta made exclusively from durum wheat. This would enable the consumers to choose the product that they preferred. The Italian rule is therefore held not to be justified on fair trading grounds since it does not fulfil the proportionality principle on this account.

In case *Commission v. Germany*<sup>14</sup> products not in conformity with the traditional German recipe for hollandaise and béarnaise sauces had to bear an additional statement that ingredients had been used other than the ones traditionally used. According to the German ‘Lebensmittel- und Bedarfsgegenständegesetz’ (Law on foodstuffs and products for human consumption) this applied although the ingredient was already included in the list of ingredients. The German government invoked consumer protection and fair trading in order to justify the rule. Regarding the fair trading argument they claimed that consumers do not sufficiently distinguish between the various methods of manufacture and therefore certain producers may derive competitive advantages from the use of less expensive ingredients in their products. The court states that this argument can not be accepted since for consumers who are “heedful for the composition of a product, sufficient information is available by way of the list of ingredients” which must appear on the labelling pursuant to Council directive 79/112/EEC on the labelling and presentation of foodstuffs<sup>15</sup>. In any case producers are free to draw the attention of these consumers to the fact that traditional ingredients have been used.

---

<sup>13</sup> Case 407/85, see also chapter 2.3.4 Consumer protection; certain designations and generic names.

<sup>14</sup> Case C-51/94, see also chapter 2.3.1 consumer protection; consumer information.

<sup>15</sup> OJ 1979 L 33, p. 1.

## 2.2.2 Property Rights

As stated above, the fair trading argument is often used along with a justification based on consumer protection. However, in *Dansk Supermarked*<sup>16</sup> the question arose on justification merely on this ground, independently of consumer protection. The Højesteret (Danish Supreme Court) asked the court for a preliminary ruling in a case pending before it between Dansk Supermarked A/S and A/S Imerco. The latter commissioned in the United Kingdom a china service with Danish royal castles on; its sale was reserved for members of Imerco exclusively. It was agreed between Imerco and the British manufacturer that the latter could sell a certain amount of the service in Great Britain but must not export any to the Scandinavian countries. However, Dansk Supermarked in Denmark was able to obtain a number of services marketed in Great Britain and offered them for sale in Denmark at prices appreciably lower than Imerco's. Two Danish courts prohibited Dansk Supermarked such selling as a breach of the 'Lov om markedsføring' (Danish law on marketing). Dansk Supermarked claimed that the Community provisions relating to the free movement of goods precluded the application of the Danish law on marketing under which the service in question had been prohibited. The ECJ first of all establishes that whilst the Treaty does not affect the existence of rights recognised by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of those rights may be restricted by the prohibitions of the Treaty. Then the court uses the Prantl-principle regarding fairness and traditional practices in a reversed sense and in a slightly different wording. It states that "(...) the marketing of imported goods may be prohibited if the conditions on which they are sold constitutes an infringement of the marketing usages considered proper and fair in the Member State of importation." It is therefore, in this case, not the goods of importation that might benefit from the additional requirements of the principle of mutual recognition, but the national measure that needs to be justified. However, the court then adds that "the actual fact of the importation of goods which have been lawfully marketed in another Member State cannot be considered as an improper or unfair act since that description may be attached only to offer or exposure for sale on the basis of circumstances distinct from the importation itself." It therefore follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon in order to classify the marketing as an improper or unfair commercial practice.

Case *Beele*<sup>17</sup> concerned Netherlands competition rules' compatibility with community law. These rules prohibited imitations of another producer's product that might cause confusion. In the national dispute a Netherlands undertaking called Bv Industrie Diensten Groep, brought proceedings

---

<sup>16</sup> Case 58/80.

<sup>17</sup> Case 6/81.

against another Netherlands undertaking called J. A. Beele Handelmaatschappij BV claiming that the latter marketed and sold in the Netherlands cable ducts identical to the cable ducts sold by the former. It was held that this was contrary to the law on imitations. The court states that the protection of consumers and the fairness in commercial transactions are mandatory requirements. It goes on to say that a national law that prohibits the precise imitation of a product which is likely to cause confusion may both protect consumers and promote fair trading. As long as the national rules fulfil the proportionality principle, which it is held to do, the measure is compatible with the Community rules on the free movement of goods.

Case *Pall v. Dahlhausen*<sup>18</sup> was brought to the court for a preliminary ruling by the regional court ('Landgericht') of Munich I. It concerned the use of the letter "R" in a circle after the trademark "Miropore" on blood filters. P. J. Dahlhausen & Co imported from Italy blood filters that it marketed in Germany. The Italian producer placed the trademark 'Miropore' on the filters followed by ®. The trade mark was registered in Italy, but not in Germany and another company called Pall Corp. brought proceedings against Dahlhausen for infringement of the German 'Gesetz gegen den unlauteren Wettbewerb' (Law on unfair competition). It argued that by the use of the symbol ®, which was not prescribed for by legislation, Dahlhausen was using misleading advertising since the trademark was not registered in Germany, but in Italy. The German law prohibited misleading statements regarding the origin of a product or its source. The Landgericht considered that questions on the compatibility with Community law arose and referred to the court two questions for a preliminary ruling. The court states that a rule such as the German one might impede trade in that it force the proprietor of a trade mark to change the presentation of the product in order to market it in a special Member State where the trade mark is not registered. The German government pleads the mandatory requirements of consumer protection and fair trading as a justification. Regarding the fair trading argument it argues that the practice of using the symbol ® even though the trade mark is not registered in the Member State of marketing constitutes unfair competition vis-à-vis competitors and also, if the registration of a trade mark in any Member State was sufficient be able to use the symbol manufacturers could elect to register their trade marks in the States with the least demanding requirements. The court rejects the arguments stating that "prudent economic operators" that wish to know whether a trademark is registered can easily do this at the public register. Besides, it is held that the principal aim of registering a trade mark in a particular State is to obtain legal protection in that State. The symbol ® (...) is, in relation to that legal protection of an "ancillary or supplementary nature". It is clear that "prudent economic operators" are protected less against misleading information and practices than consumers are. Unlike consumers, they are required to search for the right information in order not to be misled by any information appearing on a product. Consumers shall

---

<sup>18</sup> Case C-238/89, see also chapter 2.3.1 consumer protection; consumer information, cp. case C-313/94 Graffione v. Ditta Fransa.

be provided with all the information they need to make their purchases based on full knowledge of the facts.<sup>19</sup>

### 2.2.3 Labelling Requirements

In many cases, Member States have adopted rules prescribing certain labelling requirements for different products. The purpose of this might be to inform the consumers of the quality or ingredients of the product. However, the labelling requirements might force producers to alter the product to such an extent that additional cost might be incurred due to different rules in different Member States. National labelling requirements might therefore be a hindrance to the free trade and can only be justified by a mandatory requirement if it fulfils the proportionality principle.

In case *Denkavit*<sup>20</sup> the court considers the justifications of protection of health and life of humans and animals, consumer protection and fair trading at the same time. The case concerned the compatibility of the German legislation on compound feedingstuffs with the provisions on the free movement of goods. The German legislation prescribed that compound feedingstuffs intended for stock farming had to bear an indication of all the ingredients in descending order of their proportion. Denkavit was a Dutch company who lawfully sold and marketed compound feedingstuffs in Holland, without any rule regarding the descending order of the ingredients. The German provision clearly made it more difficult for Denkavit to market their goods in Germany and the court therefore states that the German provision is a measure equivalent in effect to a quantitative restriction and the question is therefore whether it is justified. When answering this question the court examines the purpose of the labelling requirement and finds that it was imposed, in particular, in order to ensure that stock farmers were made aware of the type and quantity of the raw materials contained in the compound feedingstuffs. This objective is compatible with the purpose of Council directive 79/373/EEC on the marketing of compound feedingstuffs<sup>21</sup>, which tries to ensure that stock farmers are informed objectively and as accurately as possible as to the composition and use of feedingstuffs. The court therefore, shortly, states that “in the light of those considerations it must be accepted that the requirement (...) is conducive to ensuring the protection of health and life of humans and animals, within the meaning of Article 36 (30) of the Treaty, and, at the same time, consumer protection and fair trading.”

## 2.3 Consumer Protection

This mandatory requirement has given rise to a comprehensive body of case law from the court and it is the far most invoked mandatory requirement.

---

<sup>19</sup> See to this extent chapter 2.3 Consumer protection.

<sup>20</sup> Case C-39/90.

<sup>21</sup> OJ 1979 L 86, p. 30.

*Cassis de Dijon* calls this mandatory requirement the defence of the consumer but considering the case law of the court it is clear that the proper appellation is consumer protection.

In *Cassis de Dijon* the German government claimed that their rules on alcohol content in different categories of alcoholic products were necessary to protect the consumers against unfair practices on the part of producers and distributors of alcoholic beverages. The court, for the first time, states that if appropriate labelling is sufficient to inform the consumers of the nature of the product, the product in question can not be prohibited under the justification of consumer protection. This is due to the principle of proportionality stating that the means with the least restrictive effect on the free trade shall be chosen. It is a constantly recurrent element in the case law of the court both regarding consumer protection and, as has been seen above, fair trading.

### 2.3.1 Consumer Information

Case *Gilli & Andres*<sup>22</sup> is a short but informative ruling that follows the ruling in *Cassis de Dijon* and the principle established therein regarding appropriate labelling. It was a reference to the court for a preliminary ruling by an Italian court asking whether the national rule prohibiting the marketing of products containing acetic acid not derived from the acetic fermentation of wine, i.e. apple vinegar, constituted an measure equivalent in effect to a quantitative restriction and whether it could be justified. The court, delivering its ruling one and a half year after *Cassis de Dijon* starts by referring to its precursor and the *Cassis* statement on the mandatory requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer. The court shortly summarises that the receptacles containing the vinegar are provided with a sufficiently clear label indicating that it is in fact apple vinegar. The possibility that consumers might confuse it with wine vinegar is thereby avoided and the consumer protection justification is held to have failed.

Case *Kelderman*<sup>23</sup> concerned the compatibility of provisions of the Netherlands 'Broodbesluit' (Bread Order) with the provisions of the free movement of goods. The Netherlands rule provided that the quantity of dry matter in a loaf of bread had to fall within specified sets of limits. The Netherlands government claimed that the national rule was justified due to consumer protection. The rule introduced a clear delimitation between the various shapes and weights of bread and helped to prevent consumers from being misled as to the actual quantity of bread which was being offered to them. The court rejects this argument and states that "the provision of suitable information for consumers may easily be ensured by appropriate means, such as requiring labelling showing, for example, the weight and specific composition of an imported product."

---

<sup>22</sup> Case 788/79.

<sup>23</sup> Case 130/80.



Case *Rau v. De Smedt*<sup>24</sup> concerned a Belgian provision requiring margarine to be sold in a cubic form of packaging. The question arose whether this provision was compatible with the provisions on the free movement of goods under Community law. The Belgian government contended that its rule was necessary for consumer protection in order to prevent confusion between butter and margarine. The court recognises that a rule, like the Belgian one, may be justified under consumer protection in order to avoid confusion. However, the requirement of a specific kind of packaging considerably exceeds the requirements of the object. The court states that “[C]onsumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less.”

In case *Commission v. France*<sup>25</sup> the latter had prohibited the importation and sale of substitutes for milk powder and concentrated milk in order to protect the consumers from being confused as to the difference between milk and milk substitutes. The court states that the will to protect the consumers from confusion is a mandatory requirement that may restrict the free movement of goods as long as it fulfils the proportionality principle. Once again, the court finds that adequate labelling dealing with the nature, the ingredients and the characteristics of the product would equally protect the consumers.

In case *GB-Inno*<sup>26</sup> a Belgian company near the Belgium-Luxembourg border had distributed advertising leaflets in both Belgium and Luxembourg. The ‘Confédération du commerce luxembourgeois’, a non-profit-making association claiming to represent the interests of Luxembourg traders, applied to the Luxembourg courts for an injunction against the company to stop the distribution. The confederation claimed that the advertising was contrary to the Luxembourg Regulation 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. This kind of behaviour was permitted in Belgium where the goods were sold. The confederation and the Luxembourg government invoked consumer protection to justify the prohibition. They claimed that the purpose of the provision was to avoid the risk of confusion and to protect consumers, which are normally not in a position to check that the previous reference price is genuine. In addition, they contend that the marking of a previous price might exert excessive psychological pressure on the consumer. The court states, first of all, that the Community policy on this subject establishes a close link between protecting the consumer and providing the consumer with information. It refers to the “Second programme of the European Economic Community for a consumer protection and information policy”<sup>27</sup> and states that the right to information and education is a basic right for the consumer. This means that no form of advertising should mislead the buyer and that an advertiser must be able to justify the validity of claims he makes. The court then states that a

---

<sup>24</sup> Case 261/81.

<sup>25</sup> Case 216/84, see also case 76/86 *Commission v. Germany*.

<sup>26</sup> Case C-362/88.

<sup>27</sup> OJ 1981 C 133, p. 1.

prohibition on certain products is contrary to article 28 where the aim of such a prohibition may be attained by appropriate labelling which would enable the consumer to make his choice in full knowledge of the facts. The court therefore draws the conclusion that the provision of information to the consumer is considered one of the principal requirements and, therefore, article 28 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.

In case *Denkavit*<sup>28</sup> the court considered the compatibility of German legislation on compound feedingstuffs with the provisions on the free movement of goods. The German legislation prescribed that compound feedingstuffs intended for stock farming had to bear an indication of all the ingredients in descending order of their proportion. Denkavit was a Dutch company who lawfully sold and marketed compound feedingstuffs in Holland, where no such provision existed. The court states that the German provision is a measure equivalent in effect to a quantitative restriction since it made marketing in Germany more difficult for companies like Denkavit and the question is therefore whether it is justified. The court observes that the purpose of the labelling requirement is to ensure that stock farmers are made aware of the type and quantity of the raw materials contained in the compound feedingstuffs. This objective is compatible with the purpose of Council directive 79/373/EEC on the marketing of compound feedingstuffs<sup>29</sup>, which tries to ensure that stock farmers are informed objectively and as accurately as possible as to the composition and use of feedingstuffs. The German measure may therefore be justified under the mandatory requirement of consumer protection. Regarding the proportionality of the measure the court states that the requirement of labelling of ingredients in descending order of their proportion clearly is proportionate since it is accepted that labelling is one of the means that least restricts the free movement of goods.

In case *Van der Laan*<sup>30</sup> a Netherlands company manufactured and lawfully marketed in the Netherlands meat-based products called 'Lupack', 'Bristol' and 'Benti'. A German company called Bentheimer Fleischwarenvertriebs GmbH distributed the products in Germany. Mr Van der Laan was imposed a fine, as the manager of the Netherlands company by the 'Landkreis Grafschaft Bentheim' (Grafschaft Bentheim District Local Authority) for infringement of the German 'Lebensmittel- und Bedarfsgegenstände-gesetz' (Law on Foodstuffs and Items of Daily Use), which was adopted for consumer protection. The German law gave detailed prescriptions on compositions of products in order to use certain names and the infringement consisted, on the one hand, of insufficient labelling on the meat-based products and, on the other hand, of different composition of products then normal under the commercial practice. This differentiation made marketing

---

<sup>28</sup> Case C-39/90, see also chapter 2.2.3 Fair trading; labelling requirements.

<sup>29</sup> OJ 1979 L 86, p. 30.

<sup>30</sup> Case C-383/97, cp. cases 274/87 *Commission v. Germany* and 52/88 *Commission v. Belgium*.

under a certain name no longer possible. Proceedings were brought in the 'Amtsgericht Nordhorn' (Nordhorn Local Court), which decided to stay the proceedings and refer to the court, for a preliminary ruling, questions on the interpretation of article 28 of the Treaty. Regarding the justification of the rules in question the court shortly states that "it must be stated that (consumer protection) can be guaranteed by means which do not hinder the importation of products (...) in particular by suitable labelling giving the nature of the product sold."

It is clear that all national rules will not fail to be justified merely because the consumer might be misled by the characteristics of a product. It seems that the mandatory requirement of consumer protection can not serve to justify barriers to trade when the misleading information is of a trivial character, if the consumers may find the information they need to make their purchase by other means. In other words, the misleading element has to be sufficiently serious.

In case *De Kikvorsch*<sup>31</sup> the court considered the compatibility of the Netherlands beer order ('bierverordening') with Community law. The beer order contained a prohibition of statements of strength of the original wort of beer on the label of the beerbottle. The object of the prohibition was to avoid the risk of confusion between the strength or the original wort and the alcohol strength, which both normally are expressed in percentages. The court states that article 28 in no way prevent a Member State from protecting its consumers against misleading labelling. The protection may entail a prohibition of certain information on the product, particularly if the consumer may confuse that information with other information required by the national rules. For a prohibition to be legal, though, the label must actually be of such a kind as to give rise to confusion. The question of whether such a risk of confusion exists is a matter of fact for the national court to decide.

In case *Pall v. Dahlhausen*<sup>32</sup> referred to above, the question on misleading consumer information came up. It was stated that the use of the symbol ® misleads consumers if the trademark is not registered in the country in which the goods are marketed. The court states: "Firstly, it has not been established that in practice the symbol ® is generally used and understood as indicating that the trade mark is registered in the country in which the product is marketed. Secondly, even assuming that consumers, or some of them, might be misled on that point, such a risk cannot justify so considerable an obstacle to the free movement of goods, since consumers are more interested in the qualities of a product than in the place of registration of the trade mark." In the summary of the judgement it is stated that "in order to justify such a prohibition it is not possible to rely on the imperative requirements relating to consumer protection, since, assuming that consumers are misled, it can only be as to the place of registration of the trade mark, which is a secondary concern, and not as to the quality of the product, which is a prime concern (...)." In this case the court therefore

---

<sup>31</sup> Case 94/82.

<sup>32</sup> Case C-238/89, see chapter 2.2.2 Fair trading- property rights.

decided on the question on the seriousness of the confusion rather than leaving this for the national court to decide.

In case *Clinique*<sup>33</sup> cosmetics under the name of 'Clinique' were prohibited from being marketed under the German 'Lebensmittel- und Bedarfsgegenstaendegesetz' (Law on Foodstuffs and Consumer Items). According to this law the marketing of cosmetic products using misleading names or packaging were prohibited, as well as the attribution of properties which the products do not possess. A German trade association brought an action against the cosmetic company Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH in order to stop the marketing of the latter's product called 'Clinique' since the former considered that the name could mislead consumers into believing that the product had medicinal properties. The Landgericht Berlin referred to the court for a preliminary ruling a question on the compatibility of the German law with the provisions on the free movement of goods. Since 'Clinique' was lawfully produced and marketed in other Member States, the German prohibition meant additional costs for the cosmetic company and thereby it affected free trade. On the question of justification under consumer protection the court states that the product is not sold in pharmacies but rather in perfumeries and cosmetic departments of large stores and it is not presented as a medicinal product. Besides, the product is sold in many other Member States and apparently not misleading consumers there. From this the court draws the conclusion that the German prohibition does not appear necessary to satisfy the requirement of consumer protection. "The clinical or medical connotations of the word 'Clinique' are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances." Once again the court settles the degree of seriousness of the misleading element by itself.

Case *Commission v. Germany*<sup>34</sup> concerned labelling on foodstuffs. According to Council directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer<sup>35</sup>, foodstuffs should be labelled with an obligatory list of ingredients. According to the German 'Lebensmittel- und Bedarfsgegenstände-gesetz' (Law on foodstuffs and products for human consumption) it was required that goods marketed in Germany which contained an ingredient not in conformity with the traditional German recipe, stated that the non-traditional ingredient had been used although this ingredient was already included in the list of ingredients. The case concerned hollandaise and béarnaise sauces imported from other Member States and not produced according to the traditional German recipe. These products were required to carry an additional statement because they were made from vegetable fats. Germany contended that the products in question had to be prohibited on consumer protection ground since otherwise consumers were led to believe that the products in question had

---

<sup>33</sup> Case C-315/92, cp. case C-77/97 Österreichische Unilever.

<sup>34</sup> Case C-51/94.

<sup>35</sup> OJ 1979 L 33 p.1.

been made with butter and eggs in accordance with the recipe traditionally followed in Germany. The court states that “consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the directive.” Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue.

In case *Graffione v. Ditta Fransa*<sup>36</sup> the court, once again, states that the misleading character of the product has to be sufficiently serious in order to justify barriers to trade under consumer protection. However, the court also states that in determining the seriousness of the misleading element it might take into consideration the linguistic, cultural or social differences of the Member State, since what is considered misleading in one Member State might not be so in another. The Italian court of Appeal in Milan (Corte d' Appello di Milano) had prohibited the marketing of the trademark ‘Cottonelle’ in a dispute between two Italian companies. The court had declared the trademark void on the ground that it infringed the Italian Trade Mark Law because it could mislead consumers into thinking that the products in question actually contained cotton when in fact, it did not. The Italian company Graffione had obtained these products from one of the companies in the first trial when the trade mark was prohibited and therefore now stopped selling these products in its stores in Italy. After the judgement of the court of appeal, Fransa begun selling products under the Cottonelle trademark in Italy. The products were imported from Member States where the trademark in question was not prohibited. Graffione brought proceedings against Fransa for an interim relief that Fransa should be ordered to refrain from marketing the products in question. In these proceedings the question arose on the compatibility of the Italian prohibition with Community law. The court starts by stating that a prohibition of a trademark due to its misleading nature is not precluded by the fact that the trademark is not considered to be misleading in other Member States. This is because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may do so in another. However, in order to be justified, a national measure has to be proportionate to its objective and the court states that “the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious.” It is up to the national court to examine whether this is the case and in doing so it has to take into account “the circumstances in which the products are sold, the information set out on the packaging of the products and the clarity with which it is displayed, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned.” So it has been established that the court might take the linguistic, cultural and social differences in the Member States into consideration to determine the misleading character of a product or information given to consumers. It

---

<sup>36</sup> Case C-313/94.

is, however also clear from *Tusky*<sup>37</sup> that the court has to presuppose that the consumers act and think in a certain way when it considers whether the misleading character is sufficiently serious. The case concerned German marketing standards for eggs. The German ‘Amt für Lebensmittelüberwachung’ (The Office for Supervision of Foodstuffs) in Steinfurt had complaints about the way in which Mr Tusky and his company marked their eggs. They claimed that Mr Tusky infringed the ‘Lebensmittel- und Bedarfsgegenständegesetz’ (Foodstuffs and Consumer Goods Law) under which misleading descriptions were prohibited. Mr Tusky had marked his packs of eggs ‘6-Korn - 10 frische Eier’ (six-grain - 10 fresh eggs) and stated that this was to indicate that the hens were given 60% of their feeding from the six-grain mix. The Office for Supervision of Foodstuffs claimed that the marking was misleading to the consumers since they were led to believe that the feed given to the hens consisted exclusively of the six-grain mix. The ‘Bundesverwaltungsgericht’ (Federal Administrative Court) took the view that the outcome of the proceedings depended on the interpretation of Council Regulation (EEC) No 1907/90 on certain marketing standards for eggs<sup>38</sup> and the interpretation of the concept of consumer to be used as a standard for determining whether a statement designed to promote sales of eggs is likely to mislead the purchaser. It therefore stayed the proceedings and referred three questions to the ECJ, which made a few principally important statements in answering the questions. The first was as to the concept of the consumer to be used in assessing whether the consumers were likely to be misled or not. The court states that in several cases the court has had to decide on whether a description, trademark or promotional text is misleading to consumers. In doing this, it “took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect”.

Another principally important statement made by the court in this case concerned the question on when it is for the national court to decide the case as matters of fact and when it is for the ECJ to do so. The case law before this case was, as seen above, not clear on this point. The court obviously felt that it had to explain itself and its attempts are welcomed even if one might criticise its conclusions. “Whenever the evidence and information before it (the court) seemed sufficient and the solution clear, it has settled the issue itself rather than leaving the final decision for the national court (...). In other cases in which it did not have the necessary information at its disposal or where the solution was not clear from the information before it, the Court has left it for the national court to decide whether the description, trade mark or promotional description or statement in question was misleading or not.” In this case the court obviously did not find that it had the necessary information at its disposal since it leaves it up to the national court to decide the case. The question emerges why the court finds it necessary to judge on the misleading element of a product or description even when it has all relevant information to do so. Since the purpose of the EJC is to judge on

---

<sup>37</sup> Case C-210/96.

<sup>38</sup> OJ 1990 L 173, p. 5.

questions on Community law and not that of national law, it would seem more rational that the court left these matters as a whole for the national court to decide, which in any case seems to have better prerequisite to rule on the matter.

In case *Estée Lauder*<sup>39</sup> the court was examining a misleading name of a cosmetic product. The company Estée Lauder claimed in a German court that one of its competitors, Lancaster, was in breach of the German ‘Gesetz gegen den unlauteren Wettbewerb’ (Law against Unfair Competition and the ‘Lebensmittel- und Bedarfsgegenständegesetz’ (Federal Law on Foodstuffs and Consumer Items) since they marketed a product called ‘Monteil Firming Action Lifting Extreme Creme’. They claimed that the use of the word ‘lifting’ was misleading to consumers because it gives them “the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting, whereas this is not the case so far as the cream in point is concerned.” The court refers to *Tusky* and states that, in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it has to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect. Then the court uses the same reasoning as in *Graffione v. Ditta Fransa* regarding social, cultural or linguistic factors that might mean that the term ‘lifting’ used on a firming cream means something different to the German consumer as opposed to consumers in other Member States. The court establishes that this is up to the national court to decide as well as it is for that court to decide whether the instructions for the use of the product are sufficient to make it clear that the effects of the cream are short-lived and thereby that no misleading element exists. In order to do that it might find it “necessary to commission an expert opinion or a survey of public opinion (...) to determine (...) the percentage of consumers misled by that description or statement which would appear to it sufficiently significant to justify prohibiting its use.” The court never establishes how many percentages they consider to be a sufficiently significant group of consumers in order to justify a prohibition of the term in question.

Case *Bulmer*<sup>40</sup> concerned the marketing of liquids in bottles with a different volume than those approved by Council directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids<sup>41</sup>. Under Belgian law it was prohibited to sell cider in 0.33l bottles. A company called Stassen, registered in Belgium, and one called Bulmer, registered in the United Kingdom, sold, despite the prohibition, cider in this kind of bottles to consumers. Another company specialised in ciders, Ruwet, sought an order restraining the others from marketing the cider in 0.33l bottles. The court establishes that the Belgian prohibition is contrary to article 28 of the Treaty in that it prohibits bottles lawfully produced and marketed in other Member States and

---

<sup>39</sup> Case C-220/98.

<sup>40</sup> Case C-3/99.

<sup>41</sup> OJ 1975 L 42, p. 1.

therefore impedes the free movement of goods. The Belgian Government contends that its rule is necessary to protect consumers from being misled by excessively close nominal volumes of bottles actually approved under Belgian law. The court states that the national court must determine whether there is a risk that consumers be misled by bottles of a volume not stated in the directive. On reference to *Estée Lauder* the court states that in order to determine this the national court has to “take account of all relevant factors, taking as its reference point the average consumer, reasonably well informed and reasonably observant and circumspect”.

### 2.3.2 Origin Marking

National legislation might reserve the use of certain packaging or prescribe for compulsory origin marking of products. These rules are held to constitute measures of an effect equivalent to a quantitative restriction on import since they might render the importation of goods more difficult and costly. This is due to the fact that the rules might force the producer to alter the description of his product when marketed in that Member State even if the product in question is lawfully produced and marketed in the Member State of exportation.

In case *Prantl*<sup>42</sup> the German Wine Law (‘Weingesetz’) prescribed that the ‘Bocksbeutel’ bottles, with a characteristic bulbous shape, could only be used for wine produced in certain German areas. However, the bottle had also been used in Italy for a long time. An Italian national, Mr Prantl, was prosecuted for having infringed the Wine Law by importing and having for sale Italian wine in the Bocksbeutel. During the proceedings the question arose on the compatibility of the German Wine Law and Community law. The German government contended that the special shape of the ‘Bocksbeutel’ was an indication of the wine’s geographical origin and could therefore only be used by wine from a special region. Otherwise, consumers might be misled if wines from different regions used the same type of bottle. The court admits that legislation aiming at preventing the consumers from confusing wines of different origin and quality may be so justified, especially since traditions and peculiarities play an important role regarding wine. However, secondary Community legislation, especially Council Regulation no 355/79 laying down general rules for the description and presentation of wines and grape musts<sup>43</sup>, is particularly comprehensive and able to avoid the feared confusion. Appropriate labelling in accordance with the Regulation is therefore held to be sufficient to avoid confusion on behalf of consumers.

In *Commission v. United Kingdom*<sup>44</sup> the latter had prohibited the sale of certain products imported from other Member States unless they were marked with or accompanied by an indication of origin. According to the

---

<sup>42</sup> Case 16/83, see also chapter 2.2.1 Fair trading; certain designations and generic appellations.

<sup>43</sup> OJ 1979 L 54 , p. 99.

<sup>44</sup> Case 207/83.



Commission this prohibition imposed a not inconsiderable burden upon the retailer of the product and, in the end, on the manufacturer of the product which would get higher production costs and thereby a more expensive product. The court finds that the United Kingdom measure is of equivalent effect to a quantitative restriction, prohibited under article 28 of the Treaty. The United Kingdom relies on the mandatory requirement of consumer protection and states that according to a survey amongst United Kingdom consumers it is clear that they associate the quality of certain goods with the countries in which they are made. The court firmly rejects that argument and states that the national measure is “applicable without distinction to domestic and imported products only in form because, by their very nature they are intended to enable the consumer to distinguish between those two categories of products, which may thus prompt him to give his preference to national products.” It goes on to state that the protection of consumers is sufficiently guaranteed by rules which enable the use of false indications of origin to be prohibited, which would be in accordance with the Treaty. In case *Commission v. Germany*<sup>45</sup> a German rule contained in the Law on Wine (‘Weingesetz’) prescribing that only champagne and sparkling wine could be marketed in traditional champagne-type bottles was held to be justified under the mandatory requirement of fair trading. However, the court also had to deal with an argument made by the German government concerning justification on consumer protection grounds since the use of other champagne-type bottles for beverages other than champagne and sparkling wine were able to mislead consumers. The court, almost identically, repeats its statements made in *Prantl* regarding the secondary Community legislation being “exceptionally detailed and thus should prevent the confusion that is feared.” In accordance with the secondary Community legislation it is sufficient, in order to prevent confusion in the minds of consumers, that the labels on the bottles of beverages show the exact nature of the product, regarding what kind of beverage it is and its alcoholic strength.

### **2.3.3 Language Requirements**

As has been seen above the court takes into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect when determining whether products or information on products may mislead consumers. It has also been stated that the court in this respect might take the social, cultural or linguistic factors into consideration. This is particularly relevant when deciding whether national language requirements might be misleading to the consumers since the language of information on a product obviously may be misleading in one Member State but not in another.

---

<sup>45</sup> Case 179/85, see also chapter 2.2.1 Fair trading; certain designations and generic appellations for a fuller information on the background of the case.

In case *Fietje*<sup>46</sup> the Netherlands ‘Likeurbesluit’ (Decree on Liqueurs) was questioned as to its compatibility of the Community provisions on the free movement of goods. The provision prescribed that all beverages mentioned therein had to be labelled with the word ‘Likeur’ followed by the alcohol percentage of the drink. Fietje, who was a dealer in beverage, was under criminal proceedings in the Netherlands for having supplied beverages from Germany without the use of the word in question even though the type of beverage sold was mentioned in the Likeurbesluit. The court states that the national rule is a measure with an effect equivalent to a quantitative restriction on imports and therefore forbidden under article 28 of the Treaty. It then turns to the question of whether it is justified under consumer protection and states that it may be necessary to impose a national rule stating that a sufficiently precise description should be used to inform the consumers of the nature of the product in order to avoid confusion. This may even be so in relation to imported goods that may lead to alterations of labels and thus making importation more difficult. However, the court states, “there is no longer any need for such protection if the details given on the original label of the imported product have as their content information on the nature of the product and that content includes at least the same information, and is just as capable of being understood by consumers in the importing state, as the description prescribed by the rules in that state.” Whether such equivalence exists is a matter for the national court to decide. It is quite obvious that the national court has to take as its point of departure the nationals in the importing state since these are the consumers that might be misled by a different language on products than they can understand. However, when the court for the first time stated that it had to take the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect there was nothing to indicate that this would mean the average consumers of one Member State and not the consumers of the Community as a whole. Which is more accurate probably has to be determined in every case depending on the matter of the case so that, for example, in national rules concerning language requirement the point of departure, for self-evident reasons, has to be the consumers in the Member State in question. How this is to be determined is a question left open by the court.

Case *Bonfait (Piageme)*<sup>47</sup> concerned the compatibility of a Belgian rule of the Royal Decree with the provisions on the free movement of goods and Council Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer<sup>48</sup>. The Belgian rule in question prescribed for goods to be labelled in the language of the Flemish-speaking region to be marketed and sold there. The defendant in the main proceedings, Peeters, sold mineral water in the Flanders region, labelled only in French and German contrary to the Royal Decree. The plaintiff in the

---

<sup>46</sup> Case 27/80.

<sup>47</sup> Case C-369/89.

<sup>48</sup> OJ 1979 L 33, p. 1.

main proceedings were a number of mineral water companies who claimed to have suffered damage due to Peeters's business of non-Flemish labelled bottles. They contended that Peeters's actions were contrary to article 14 of the directive and also to the provisions on the free movement of goods. Peeters, on the other hand, pleaded that it was the Belgian legislation that was incompatible with the said provisions. The directive prescribed that the label should be in a language easily understood by consumers and Peeters contended that French or German is such a language in the Flanders region. The court states that the only obligation imposed on the Member States, according to the directive, is to prohibit the sale of products whose labelling is not easily understood by the consumers rather than to require the use of a particular language. This was so even if that language might be the one most easily understood in a specific region. It concludes that to impose a stricter obligation than the use of a language easily understood, as in this case, or not to ensure that consumers are informed by other means goes beyond the requirements of the directive. The obligation in this case to use the language of the Flemish-speaking region is held to be contrary to article 28 of the Treaty.

Case *Meyhui*<sup>49</sup> concerned the validity and interpretation of another Council directive, namely Council directive 69/493/EEC concerning the approximation of laws of the Member States relating to crystal glass<sup>50</sup>. Meyhui was a Belgian company who imported crystal glass from Germany. The manufacturer of the glass was German and used descriptions in English, French and German. Meyhui requested the manufacturer to use descriptions in Dutch, French and German but the manufacturer refused to do this. In the main proceedings the question arose whether his refusal was well founded under the directive or not. It prescribed that for certain products mentioned the descriptions should be stated in the language or languages of the country in which the goods are marketed in order for consumers to decide the quality of the product. Since the languages mentioned all are spoken in Belgium the question arose as to the validity of the Council directive under article 28 of the Treaty. The court states that the prohibition in the directive on affixing products' description in a language other than the language or the languages of the Member State in which those goods are marketed constitutes a barrier to intra-Community trade in so far as products coming from other Member States have to be given different labelling causing additional packaging costs. It then turns to the question on whether it is justified on consumer protection grounds. The court takes it upon itself to conduct an examination regarding the terms used in the directive in different languages to see if the consumers easily understand them. Regarding the word 'crystal glass' in English the court finds that the word is so different (cristallin, vetro sonoro superiore, kristallglass, kristallynglas, sonoorglas, crystal glass, cristallin, vidrio sonoro superior, vidro sonoro superior, verre sonore, vetro sonoro, vidrio sonoro, vidro sonoro) that to an average consumer the quality of the product is not easily discernible. The provisions of the directive that

---

<sup>49</sup> Case C-51/93.

<sup>50</sup> OJ 1969 L 326, p. 36.

consumers should be informed in the languages of the country are therefore held to be an appropriate means of protection. The difference in this case from the others concerning language requirements is that the court conducts the examination of languages by itself rather than leaving this to the national court, which often is more suitable to decide these matters. The only explanation to this is that this case ultimately concerned the compatibility with the provisions on the free movement of goods and a legislative act enacted by one of the institutions of the Community. Clearly only the ECJ has the jurisdiction to judge on this matter.

In case *Goerres*<sup>51</sup> the German ‘Verordnung über die Kennzeichnung von Lebensmitteln’ (Regulation of the labelling of foodstuffs) prescribed that different information on goods (i.e. the list of ingredients and the sell by date) were to be written in German on the packaging or on a label at a clearly visible point. Another easily intelligible language might be used if the information to the consumer is not adversely affected thereby. Mr Goerres ran a food market in Germany where he sold different products labelled in English, French or Italian but not in German. The ‘Oberkreisdirektor des Kreises Aachen’ (the Chief Executive for the administrative district of Aachen) imposed on him a penalty for breach of the Regulation mentioned above. Mr Goerres contended that the German provision was contrary to Community directive 79/112/EEC. The court states that the German legislation in this case, unlike the legislation in *Piageme*, is not contrary to the directive since it also allows for other easily understandable languages to be used. The court then states that “it is for the national court to assess, in light of all the circumstances of each individual case, the ease with which the information supplied can be understood” to decide whether the other languages used are easily understandable or not. This case shows that what the court did in *Meyhui* is to be seen as an isolated phenomenon due to the fact that that case concerned the legislation of the Community and not the national one. In this case the court, again, refers the question on examination of understanding of a language to the national court.

From case *Colim*<sup>52</sup> it is clear that a requirement that a certain language must be used to inform consumers may not exclude that the consumers are informed by other practical means, such as designs or symbols. The case concerned a company in the Netherlands was prosecuted for offering for sale a number of products that did not carry any particulars in Dutch although described so in the ‘Wet betreffende de Handelspraktijken en de Voorlichting en Bescherming van de Consument’ (Law on Trade Practices and Consumer Information and Protection). The court refers to *Meyhui* and states that where no Community rules exists it is up to the Member States to legislate on language labelling requirements. However, these requirements must not infringe the provisions on the free movement of goods and has to be proportionate. Therefore, a measure requiring the use of a language which consumers can readily understand must not “exclude the possible use

---

<sup>51</sup> Case C-385/96.

<sup>52</sup> Case C-33/97.

of other means of informing them, such as designs, symbols or pictograms.” It is for the national court to determine whether the labelling, in whatever the form, is such as to give consumers full information in order to make their purchase.

In case *Geffroy*<sup>53</sup> French provisions part of the French Consumer Code were held to be incompatible with article 28 of the Treaty. These provisions required that the labelling of foodstuffs must not give rise to confusion regarding the foodstuff’s characteristics and that certain labels had to be written in French. The court refers to *Piageme* and *Goerres* and states that article 28 precludes a national law from requiring the exclusive use of a specific language for the labelling of foodstuffs, without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other means. It also precludes a Member State from requiring the use of the language most widely spoken in the area where the product is offered for sale, even if the use at the same time of another language is not excluded. However, article 28 does allow national legislation which prescribes the use of a specific language but which also permits the use of another language easily understood by purchasers. In the present case the national rule prescribed the use of French without permitting the use of English and it did not either ensure that the consumers were informed by other means.

### 2.3.4 Certain Designations and Generic Names

Member States may, through legislation, try to reserve a well-known name to products produced in a certain way or containing certain ingredients. This might impede the free trade since products might be lawfully produced and marketed under that name in the Member State of exportation without the criterias used in the Member State of importation. The producer then will be forced to alter his product to comply with the legislation in that Member State. This may involve additional costs for the producer and thereby be to the detriment of the free movement of goods. The Member States often tries to justify these rules by consumer protection but usually the court finds that appropriate labelling is a sufficient protection and the measures will therefore be held to be disproportionate.

Case *Eggers*<sup>54</sup> was delivered some four months before *Cassis de Dijon* and therefore does not mention the concept of mandatory requirements but it can still provide useful information on the use of generic names. The case was a reference for a preliminary ruling made by the ‘Verwaltungsgericht of the Freie Hansestadt Bremen’ (Administrative Court, Bremen) in proceedings between a German manufacturer of spirits (Eggers) and the competent authority of the city of Bremen. Eggers had been prohibited from using the designations ‘Qualitätsbranntwein’ and ‘Weinbrand’ in connection with its products made from wine distillates imported from another Member State. These designations were reserved, under the German ‘Weingesetz’

---

<sup>53</sup> Case C-366/98.

<sup>54</sup> Case 13/78. Cp. Case 12/74, chapter 2.2 Fair trading.

(Winelaw) for German spirits of a certain alcohol percentage. The court states that the Member States are empowered to make the use of designations of quality subject to compliance with certain standards as long as the standards and designations are not linked to a requirement that the production process for the products has to be carried on within the country. Instead the decisive factor shall be the existence of the intrinsic objective characteristics which give the products the special quality required by law.

Case *Commission v. Italy*<sup>55</sup> concerned vinegar and an Italian provision prescribing that the only goods to use the designation of 'vinegar' was wine vinegar. The Italian law prohibited fermented vinegar made of alcohol, cider or malt although this kind of vinegar is produced and marketed in other Member States under that name. The Italian government claims that the prohibition is necessary for protection of the consumers since people in Italy by tradition treat all vinegars as wine vinegars. The consumers thus run the risk of being misled as to the essential nature of the raw material used and of the end product. The court replies to this that 'vinegar' is a generic term and that it is not compatible with Community law for national legislation to be able to restrict a generic term to one national variety alone to the detriment of other varieties produced in other Member States. Secondly, the court states that even if the Italian consumers are used to the fact that the term 'vinegar' is used only in cases of wine vinegar and it would be a legitimate justification for the Italian Government to protect its consumers from being misled this protection might be achieved with less restricted means, e.g. appropriate labelling. Yet again the appropriate labelling approach is taken by the court meaning that the consumers run a risk of being misled to a certain extent but that this risk is insufficiently serious to allow a prohibition on a product, when appropriate labelling might give the consumers the information they need in order to make their purchase.

Case *Commission v. Germany*<sup>56</sup> concerned the German Law on Beer Duty ('Biersteuergesetz') and its compatibility with Community law. The provision stated beer purity and prescribed that it may only be manufactured from malted barley, hops, yeast and water in order to be marketed under the designation 'Bier'. Germany contended that the provisions were necessary in order to protect consumers since they associate the designation 'Bier' with a beverage manufactured from only the raw materials listed in the Biersteuergesetz. Therefore it is necessary to prevent them from being misled as to the nature of the product by being led to believe that a beverage called 'Bier' complies with the provisions against additives when that is not the case. The court states that the legislation of a Member State may not crystallise given consumer habits so as to consolidate an advantage acquired by national industries. It is clear that the German designation of 'Bier' is lawfully produced and marketed in other Member States with or without the purification established in the 'Biersteuergesetz'. The designation of that drink may therefore not be restricted to beers manufactured in accordance with the rules in Germany. Although it is legitimate to make the consumers

---

<sup>55</sup> Cases 193/80 & 281/83.

<sup>56</sup> Case 178/84, cp. case 176/84 *Commission v. Greece*.

aware of the fact that a certain drink may be produced in different ways and by different materials this may be ensured by less restrictive means, such as appropriate labelling, which would enable the consumer to make his choice in full knowledge of the facts.

In case *Drei Glocken*<sup>57</sup> an Italian rule regarding pasta was at issue. The national rule prohibited the selling and marketing of pasta made not only from durum wheat but also from common wheat. Drei Glocken, a German manufacturer of pasta made of a mixture of common wheat and durum wheat, was imposed an administrative penalty for infringing the Italian law on pasta products. The object of the Italian prohibition was, according to the Italian government, to guarantee the quality of pasta. The court refers to *Commission v. Italy (vinegar)* and *Commission v. Germany (beer)* and states that it is admittedly legitimate to seek to enable consumers who attribute specific qualities to pasta products made exclusively from durum wheat to make their choice in the light of that consideration. However, that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, by the compulsory affixing of suitable labels giving the nature of the product sold.

Case *Deserbais*<sup>58</sup> concerned a French rule prohibiting the marketing of cheese of a fat content less than 40% under the name 'Edam'. Mr Deserbais imported a kind of cheese from Germany, which was lawfully produced and marketed there under that name but with a fat content of only 34.4%. Mr Deserbais was fined for the offence of unlawful use of a trade name and appealed the decision to the Court d'Appel which stayed the proceedings and referred for a preliminary ruling questions concerning the compatibility of the national provision to the court. The court declares that the designation 'Edam' is not an appellation of origin in that it does not describe a product from a specific geographical area. It is merely the name under which a type of cheese is sold. The court then affirms its previous case law stating that a Member State can not prevent the importation of cheese where adequate information for the consumer is ensured. However, then the court examines the question from a different point of view stating that the same does not always have to apply. It is held that when a product presented under a particular name is so different, regarding its composition or production, from the products generally known by that name that it can not be regarded as falling within the same category, the prohibition might be justified. Later case law has confirmed this statement and also added that whether or not the difference is of such an importance that a prohibition might be justified, this is up to the national court to decide.

Case *Smanor*<sup>59</sup> concerned the compatibility of a French provision with article 28 of the Treaty. The rule prohibited the use of the word 'yoghurt' unless the product was fresh and not frozen. Smanor was a French company

---

<sup>57</sup> Case 407/85, see also chapter 2.2.1 Fair trading; certain designations and generic appellations. See also case 90/86 Zoni.

<sup>58</sup> Case 286/86, cp. case C-196/89 Nespola, which concerned the cheese 'Emmenthal', and case C-210/89 Commission v. Italy.

<sup>59</sup> Case 298/87.

who specialised in the frozen yoghurt market but were forbidden under the French law to use this term and instead obliged to use the name 'deep-frozen fermented milk'. The product that Smanor sold was lawfully produced and marketed in other Member States under the name 'deep-frozen yoghurt'. The court starts by stating that the term 'fermented milk' is less familiar to consumers and the question is therefore whether the French prohibition is justified. Regarding consumer protection the court states that it is legitimate for a Member State to ensure that consumers are properly informed about the products offered to them. However, such information may be given effectively without prohibiting the use of the name 'yoghurt'. Once again the court is referring to adequate labelling that can inform the consumers of the particular treatment which the products have undergone. Applying *Deserbais* the court states that the situation would only be otherwise if "the yoghurt, having undergone deep-freezing, no longer had the characteristics which the consumer expects when buying a product bearing the name 'yoghurt'." Whether this is the case or not is a matter left to the national court to decide.

In case *Commission v. France*<sup>60</sup> French legislation prescribing minimum foie gras content in a number of products were examined. The products containing foie gras had to comply with certain content and manufacturing processes. The Commission brought proceedings against the French legislation claiming that it was contrary to the free movement of goods since the legislation did not contain a free movement clause and thereby hindered the free movement of goods between the Member States. The French government claimed that the national provision was necessary in order to prevent offences with respect to false descriptions. The court refers to *Deserbais* and states that the court then did not exclude the possibility for Member States to require producers to alter the denomination of a foodstuff where the product could not be regarded as falling within the same category as goods generally known as falling under that category. However, the court then seeks to remind us that it takes quite a lot to consider a product so different that it can not be considered to fall under the same category as products generally known under a certain name. It states that "[N]one the less, the mere fact that a product does not wholly conform to the requirements laid down in national legislation on the composition of certain foodstuffs with a particular denomination does not mean that its marketing can be prohibited." The court concludes that the risk that a product coming from another Member State that contain foie gras may not wholly satisfy the conditions as to the foie gras content or the manufacturing process laid down in national rules, is not in itself capable of justifying a total prohibition of the sale of such a product. Such a national rule must be held to be disproportionate when the product complies with the rules enacted in the Member State of exportation.

Case *Guimont*<sup>61</sup> concerned a French rule prohibiting the marketing of a cheese without a rind under the designation of Emmenthal. Mr Guimont was

---

<sup>60</sup> Case C-184/96.

<sup>61</sup> Case C-448/98.



prosecuted in France for having held for sale, selling or offering Emmenthal with a deceptive labelling. He held in his defence that Emmenthal was a generic name widely used throughout the Community without any requirements as to the existence of a rind. He argued that, by reserving the designation Emmenthal for cheeses with a rind, the national rule had an effect equivalent to a quantitative import restriction incompatible with article 28 of the Treaty. The court refers to *Geffroy* and states that a Member State may, for the purpose of i.e. consumer protection, require alteration of the description of a foodstuff where a product is so different in terms of its composition or production, that it may be confused with products generally understood as falling within the category. However, the court states, where the difference is of minor importance, appropriate labelling should be sufficient to provide the consumer with the necessary information. In this case, therefore, it would be sufficient for the products to be accompanied by appropriate information concerning the difference of the products. The absence of rind cannot be regarded as a characteristic justifying refusal of the use of the Emmenthal designation for goods from other Member States where they are lawfully manufactured and marketed under that designation. Case *Commission v. Italy*<sup>62</sup> concerned the composition of chocolate. According to Italian law chocolate had to compose of certain ingredients in order to be called just that. Products containing vegetable fats other than cocoa butter were to be called 'chocolate substitute' instead. In several of the other Member States products were lawfully produced and marketed as 'chocolate' if its vegetable fats content did not exceed 5 %. The Commission brought proceedings against Italy since the obligation on foreign producers to alter the name of the product when marketed in Italy involved additional labelling and packaging costs. Besides, it considered that the use of the term 'chocolate substitute' serves to devalue the products in question in the minds of consumers. The Italian government considered their legislation to be justified by consumer protection. They claimed that consumers need to be given the correct information as to the true nature of the foodstuff and what distinguishes it from other foodstuffs with which it might be confused. The court establishes that a national rule, such as the Italian one, might impede Community trade because it forces producers to adjust the presentation of their products, which incurs additional packaging costs. Besides, by forcing the producers to use the name 'chocolate substitute', the Italian legislation may adversely affect the consumer's perception of the products in question, since "it denotes substitute, and therefore inferior, products". The court then refers to *Deserbais*, *Geffroy*, *Guimont*, *Bonfait* and *Van der Laan* and states that a Member State may require alteration of descriptions of products where it is so different from other products known under that description that it cannot be regarded as falling within the same category. However, where the difference is of minor importance, appropriate labelling should be sufficient to provide the consumer with the necessary information. The court then, contrary to its previous case law conducts an investigation to see whether the addition of

---

<sup>62</sup> Case C-14/00, see also the almost identical case C-12/00 *Commission v. Spain*.

vegetable fats alters the products to such an extent that they no longer can be regarded as falling under the category 'chocolate'. This kind of examination has previously been held to be a matter for the national court to decide. In this case, however, the court states that the characteristic element of chocolate products is the presence of a minimum cocoa and cocoa butter content. The addition of vegetable fats other than cocoa butter to cocoa and chocolate products which satisfy the minimum contents required by Council directive 73/241/EEC on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption<sup>63</sup> can therefore not substantially alter the nature of those products to the point where they are transformed into different products. The Italian measure is therefore held to be disproportionate since the labelling of the products would be sufficient to avoid confusion on the part of the consumers. It remains to be seen whether this is a new approach made by the court to these kind of questions or whether this case, like *Meyhui*, will be overruled by later case law, leaving the examination of similar products for the national court to conduct.

### 2.3.5 Hallmarks

In case *Robertson*<sup>64</sup> criminal proceedings were raised in Belgium against a number of importers for selling silver-plated cutlery from other Member States whose hallmarks did not fulfil the requirements of the Belgian law. According to the law, silver-plated cutlery had to be stamped with two hallmarks, one being the manufacturer's own hallmark and the other bearing a numeral indicating the number of grams of pure silver. For both of the hallmarks specific rules existed as to how the hallmark was to be displayed. The Belgian court stayed the proceedings and referred to the court for a preliminary ruling a question on the compatibility of the Belgian rules to the provisions on the free movement of goods. The court establishes that the Belgian rule is of an equivalent effect to a quantitative import restriction and therefore prohibited under article 28 of the Treaty, since it renders the marketing of product from other Member States more difficult and more expensive. The question is if it is justified on consumer protection grounds. The court states that the obligation under the Belgian law to stamp silver-plated articles is in principle capable of affording effective protection to consumers and of promoting fair trading since they by their very nature are capable of being confused with articles made of solid silver. The hallmark as to weight enables the consumer to acquire a sufficiently accurate knowledge of the nature and the quality of the product and to distinguish it from other products with which it might be confused. However, the court states that the need for such protection does no longer exist where goods are imported from another Member State in which they have been lawfully produced and marketed when they are already hallmarked in accordance with the legislation of that state. The principle of mutual recognition is therefore held

---

<sup>63</sup> OJ 1973 L 228, p. 23.

<sup>64</sup> Case 220/81.

to play an important role regarding hallmarks on condition however that the indications provided by the hallmarks in the Member State of exportation contain information equivalent to those provided for in the Member State of importation and that this information is intelligible to the consumers. Whether or not such equivalence exists is left for the national court to decide.

The findings in *Robertson* was repeated in *Houtwipper*<sup>65</sup> which concerned the Netherlands 'Waarborgwet' (Law on guaranteed standards for precious metals). The law prescribed that goods of precious metal had to have certain quantities of pure precious metal and that the guarantee of this fineness is a hallmark affixed in accordance with the Netherlands law. The court states that this kind of legislation, which in practice requires an additional hallmark for imported goods, renders the imports more difficult and costly. The question is therefore whether the Netherlands rule is justified. The court then states that this requirement is, in principle, of a nature such as to ensure effective protection for consumers since the consumer is not able to determine, by touch or by eye, the exact degree of purity of an article of precious metal and therefore might be misled as to the quality of the product. Citing *Robertson* the court states that a Member State cannot require a fresh hallmark to be affixed to products where the information provided by that hallmark is equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State. Once again, it is for the national court to decide whether such equivalence exists.

In case *Commission v. Ireland*<sup>66</sup> the Commission brought proceedings against Ireland for failing to fulfil its obligations under the Treaty on several different accounts concerning precious metals. These included the prohibition for goods to be marketed in Ireland without an Irish hallmark or sponsor's mark affixed by a public, independent body. The court first refers to *Houtwipper* and states that national legislation which requires goods imported from other Member States, in which they are lawfully traded and hallmarked, to be given an additional hallmark in the importing Member State, renders the imports more difficult and costly. This requirement, however, is in principle of a nature such as to ensure effective protection for consumers. The court then repeats the equivalence criteria stated in *Robertson* and *Houtwipper* and states that an additional hallmarking may not be required where the hallmark in the exporting Member State is equivalent to that of the importing Member State. However, as opposed to the rulings in *Robertson* and *Houtwipper* the court this time, again without any apparent reason, does not leave it to the national court to determine the equivalence between the different hallmarks. In doing this it claims to take the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect as established in *Tusky*. However, it is not the average consumer of the Community that is considered but rather the average Irish consumer. Shortly, the court states that a consumer familiar with the Irish hallmarking system is given

---

<sup>65</sup> Case C-293/93.

<sup>66</sup> Case C-30/99, cp. case C-84/00 *Commission v. France*.

equivalent and intelligible information by a hallmark from another Member State, since they all indicate the fineness of the metal in parts per thousand. The question still remains why the court considers itself to be more suitable to make this decision than the Irish court. One can only deprecate the court's overconfidence in itself and hope that later case law in this area will confirm the court's case law as it stood before the ruling in this case.

### 2.3.6 Restrictions on Advertising

Case *Oosthoek's*<sup>67</sup> concerned a Netherlands prohibition of the offering of free gifts for sales promotion purposes, with the exception of the criterion of related consumption or use. The case was a reference for a preliminary ruling from the 'Gerechtshof, Amsterdam' (the Regional Court, Amsterdam) concerning the compatibility of the Netherlands 'Wet Beperking Cadeaustelsel' (Law on the restriction of free gift schemes) with the provisions on the free movement of goods. Proceedings were raised in the Netherlands against Mr Oosthoek for infringing the above mentioned law. He distributed encyclopaedias in the Dutch language and offered a dictionary, a universal atlas or a small encyclopaedia as a free gift to all subscribers to an encyclopaedia. In Belgium it was allowed for Oosthoek to promote his sales by giving free gifts without these having to be related to the consumption or the use of his encyclopaedias. Regarding the effect on trade the court states that legislation that restricts or prohibits certain forms of advertising and certain means of sales promotion may restrict the volume of imports because it affects marketing opportunities. The question is therefore whether the Netherlands rule is justified or not. Regarding consumer protection the court states that the offering of free gifts may mislead consumers as to the real value of the product they are purchasing. The criterion that the free gifts have to be related to the consumption or the use of the product is not unrelated to the objective of consumer protection and a national rule of this kind does not exceed what is necessary for the attainment of consumer protection.

Case *Buet*<sup>68</sup> concerned a French prohibition on canvassing in connection with the sale of educational material. Mr Buet was the manager of a French company called Educational Business Services, which sold door-to-door English-language teaching material. The court refers to *Oosthoek* and states that when a trader is forced to adopt advertising or sales promotion schemes that differ from one Member State to another it may constitute an obstacle to imports. This applies a fortiori when the rules deprive traders of the possibility of using not a means of advertising but a method of marketing that they normally use. The question is therefore whether the measure is justified. The court states that the French legislation at hand is adopted to protect consumers against the risk of ill-considered purchases and is therefore capable of protecting consumers. However, to avoid this risk the court finds that it is sufficient to ensure that purchasers have the right to cancel a contract concluded in their home, for example by legislation

---

<sup>67</sup> Case 286/81.

<sup>68</sup> Case 382/87.

regarding cooling-off periods. The French prohibition would therefore seem to be disproportionate but the court continues. “It is necessary, however, to point out that there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects.” The court therefore, at last, concludes that it is permissible for the national legislator to ban canvassing at private dwellings. It is therefore clear that the concept of the average consumer who is reasonably well-informed and reasonably observant and circumspect does not always have to be used. In certain cases at least the court might find another relevant selection of consumers that needs to be protected due to special characteristics that makes the risk of misleading greater and therefore more in need of protection.

In case *GB-Inno*<sup>69</sup> a rule of the Luxembourg Grand-Ducal Regulation on unfair competition was considered as to its compatibility with Community law. The Law prohibited sales offers that involved a temporary price reduction to state the duration of the offer or refer to previous prices. A Belgian company near the Belgium-Luxembourg border had distributed advertising leaflets in both Belgium and Luxembourg. A non-profit-making association claiming to represent the interests of Luxembourg traders, applied to a Luxembourg court for an injunction against the company to stop the distribution. The confederation claimed that the advertising was contrary to the above-mentioned Regulation. Belgian law had no restrictions of the present kind and *GB-Inno* was therefore free to use its advertising methods in Belgium. The court starts by referring to *Oosthoek* and states that advertising restrictions may affect marketing opportunities. It goes on to state that the free movement of goods concerns not only traders but also individuals. Consumers resident in one Member State may therefore travel to another Member State to shop under the same conditions as the local population. That freedom is compromised if they are deprived of access to advertising available in the country where purchases are made. The Luxembourg government invoked consumer protection to justify the prohibition. They claimed that the purpose of the provision was to avoid the risk of confusion and to protect consumers, which are normally not in a position to check that the previous reference price is genuine. In addition, they contend that the marking of a previous price might exert excessive psychological pressure on the consumer. The court states that a prohibition that denies consumers certain information, such as the Luxembourg one does, is contrary to the free movement of goods. The object of the prohibition, i.e. to protect consumers from misleading information may be attained by appropriate labelling which would enable the consumer to make

---

<sup>69</sup> Case C-362/88, see also chapter 2.3.1 Consumer protection; consumer information, cp. case C-126/91 Yves Rocher and case C-470/93 Mars.

his choice in full knowledge of the facts. The Luxembourg restriction on advertising is therefore held to be disproportionate.

In case *SCP*<sup>70</sup> the sale of second-hand goods in public auctions was scrutinised under the Community provisions on the free movement of goods. It concerned a dispute between SCP, a firm of auctioneers operating in Paris, and SA British Motors Wright and Others, which sold luxury second-hand cars. According to the French Law on Public Auction Sales it was prohibited to sell goods on auctions unless the trader of the second-hand goods had been registered for at least two years in the Trade Register at the place where the auction were to take place. The SCP commissioned in Paris for a German firm to auction a couple of second-hand vehicles owned by the firm. The SA British Motors Wright made an application for an interim order prohibiting the sale due to the fact that the German firm had not been registered in the Trade Register. The French Court de Cassation in Paris decided to stay the proceedings and refer a couple of questions on the compatibility of the French legislation with Community law. The court starts by referring to *Oosthoek, Buet* and *GB-Inno* and states that when a trader is forced to discontinue a promotion scheme, which he considers to be particularly effective due to different legislation in different Member States, that may constitute an obstacle to the free trade. That is so especially when the legislation in one Member State deprive a trader of the possibility of using not a means of advertising but a method of marketing. Besides, legislation that forces traders to have a representative in the importing Member State constitutes a measure of an equivalent effect to a quantitative restriction. The French government invoked consumer protection as a justification and held that the rules on registration in the trade register was necessary to provide adequate safeguards for the consumers as to the origin and condition of goods when they have no period of reflection to think about their purchase. The court states that the system of public auctions usually involves buyers who are specially informed and therefore sufficient safeguard does exist for the consumers. In any event, less restrictive means exists in order to protect consumers. What these mean consist of is left open by the court. Yet again, the court uses a different concept of consumers than the average well-informed and reasonably observant and circumspect. In this case it is not a weaker group of consumers it takes into consideration but a group of consumers who normally is more than well-informed and therefore does not need as high level of protection as the normal consumer would.

Following the court's ruling in *Keck*<sup>71</sup> national restrictions on advertising will normally be held to fall outside the scope of article 28. This is due to the fact that the court in that case held that "national provisions restricting or prohibiting certain selling arrangements is not such as to hinder (...) trade between Member States". Restrictions on advertising therefore does not have to be justified by mandatory requirements since they do not constitute a measure of an effect equivalent to a quantitative restriction on import to

---

<sup>70</sup> Case C-239/90.

<sup>71</sup> Case C-267-8/91.

begin with. However, the court held in *De Agostini*<sup>72</sup> that the exception in *Keck* is not applicable concerning an outright ban of a type of promotion for a product since this might have greater impact on products from other Member States. The case concerned advertising directed at children made by a company called De Agostini that marketed an encyclopaedic magazine in Sweden called 'Allt om dinosaurier!' which contained information about dinosaurs and a related model dinosaur. The Swedish Consumer Ombudsman ('Konsumentombudsmannen') brought proceedings against De Agostini for having infringed the Swedish Broadcasting Law ('Radiolagen') and its prohibition on commercial designed to attract the attention of children under the age of 12. Since the exception in *Keck* was held to be inapplicable, the Swedish rule needed to be justified under consumer protection. The court states that it is for the national court to determine whether the ban is necessary to satisfy mandatory requirements, whether it is proportionate to that purpose and if those aims or requirements could not have been attained or fulfilled by measures less restrictive of intra-Community trade.

## 2.4 The Improvement of Working Conditions

In case *Oebel*<sup>73</sup> the court first stated that the improving of working conditions is a mandatory requirement. The case concerned nightwork in bakeries and the German law on working hours in bakeries ('Gesetz über die Arbeitszeit in Bckereien und Konditoreien'). This law prohibited working in bakeries on working days between 10pm and 4am and the delivery to consumers or retail outlets between 10pm and 5.45am. The German Government contended that the rule was necessary to protect workers in small and medium sized bakeries, which do not have enough staff to be able to arrange work in shifts, against permanent night-work which might damage their health. The court states that a prohibition on working before 4 am constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty. This kind of prohibition is designed to improve working conditions. The court goes on to state that the prohibition does not provide a particular advantage for national production or for the domestic market since the prohibition in question is part of economic and social policy and apply by virtue of objective criteria to all the undertakings without any differences in treatment.

Case *Torfaen*<sup>74</sup> concerned a British prohibition on trading on Sundays in the United Kingdom Shops Act. The British company B&Q was prosecuted for having infringed that law since their do-it-yourself centres and garden centres were opened on Sundays. The court refers to *Oebel* and states that national rules regulating the hours of work, delivery and sale in the bread

---

<sup>72</sup> Case C-34/95.

<sup>73</sup> Case 155/80.

<sup>74</sup> Case 145/88, cp. case C-312/89 Conforama, case C-332/89 Marchandise and case C-169/91 Stoke-on-Trent.

and confectionery industry constitute a legitimate part of economic and social policy, consistent with the objectives of the Treaty. The same applies, according to the court, to opening hours of retail premises since these rules reflect “certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States.” It is held that such rules are not designed to govern the patterns of trade between Member States.

As has been stated above the court’s ruling in *Keck* excepted certain selling arrangements from the scope of article 28. It can be assumed that the judgements in *Torfaen*, *Conforama*, *Marchandise* and *Stoke-on-Trent* would be decided otherwise if they were delivered after *Keck*. National rules governing the opening of stores must certainly be considered to be a selling arrangement in the name of *Keck* since they cannot be considered as rules laying down requirements to be met by goods in the name of the court’s ruling in *Cassis de Dijon*. This is apparent from the court’s ruling in *Punto Casa*<sup>75</sup>, which also concerned Sunday trading but with a different outcome than its precursors. Italian law contained provisions on the closure of retail outlets on Sundays. The Italian ‘Pretura Circondariale di Roma’ (Rome District Magistrates Court) asked the court for a preliminary ruling on the compatibility of the Italian rule with the provisions on the free movement of goods. The court refers to *Keck* and states that the Italian rule in question concerns such selling arrangements and apply, in law and in fact, equally to domestic and imported goods and therefore the measure falls outside the scope of article 28 and the question on justification therefore becomes irrelevant.

It can be said that the rulings mentioned above have lost some of their importance after *Keck* but it still is obvious that the improvement of working conditions, and especially then national rules on working hours, is one of the mandatory requirements capable of justifying barriers to trade. Later case law of the court will show how common this will be regarding the free movement of goods.

## 2.5 Maintaining Press Diversity

In case *Familiapress*<sup>76</sup> a newspaper publisher established in Germany, called Heinrich Bauer Verlag, published a weekly magazine called ‘Laura’, which it also distributed in Austria. In the magazine readers could find crossword puzzles with awards for up to 5000 DM. An Austrian newspaper publisher called ‘Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH’ instituted proceedings against Bauer since it considered that its actions were contrary to the ‘Gesetz über unlauteren Wettbewerb’ (Austrian Law on Unfair Competition). Under this law it was prohibited to offer consumers

---

<sup>75</sup> Case C-69/93, cp. joined cases C-401-402/92 Boermans.

<sup>76</sup> Case C-368/95.



free gifts linked to the sale of goods or the supply of services. No such prohibition existed in Germany and the national court therefore asked the court for a preliminary ruling on the interpretation of article 28 of the Treaty. The Austrian Government contended that its prohibition fell outside the scope of article 28 since it constituted a selling arrangement in the name of the court's ruling in *Keck*. The court states that although the national provision concerns sales promotion, in this case, however, it concerns the actual content of the product since the competitions in question constitute an integral part of the magazine. Therefore the provision constitutes a measure with an equivalent effect to a quantitative restriction on imports. The Austrian Government and also the Commission argue that the provision is justified by the mandatory requirement of maintaining press diversity. They mean that the offering of gifts as prizes lead to fierce competition since the different newspapers offered more and more expensive gifts to their readers. It was the fear that small publisher might not be able to survive this development that the Austrian prohibition was adopted. The court states that "maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order". The court then states that when a Member State wishes to rely on a mandatory requirement to justify a national measure, this justification must be interpreted in the light of general principles of law and in particular of fundamental rights. Once again the court takes the European Convention for the Protection of Human Rights and Fundamental Freedoms into consideration. The article on the freedom of expression also permits derogations for the maintenance of press diversity, in so far as they are prescribed by law and are necessary in a democratic society. In the light of these consideration the proportionality of the measure has to be examined. Doing this, the national court has to take in consideration whether real competition actually exists between the prize-giving newspapers and the smaller publishers and whether the prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand. The national court also has to define the market for the product in question, have regard to market shares of different publishers and the exchangeability of the product.

## **2.6 The Preservation of the Financial Balance of Social Security Systems (the control of health expenditure)**

In case *Duphar*<sup>77</sup> 23 pharmaceutical undertakings brought an action against the Netherlands government claiming that the 'Besluit Farmaceutische Hulp Ziekenfondsverzekering' (the Sickness insurance fund Order) was contrary

---

<sup>77</sup> Case 238/82.

to several provisions of the Treaty, including article 28. The objective of the order was to enhance the quality of pharmacotherapeutical services and to eliminate the considerable deficit of the Netherlands health-care scheme. The order listed several pharmaceuticals not to be supplied to persons insured under the compulsory health-care system in the Netherlands. These pharmaceuticals were excluded based on their price and the fact that other pharmaceuticals were on the market with the same therapeutic effect but at lower prices. The court states that Community law does not detract from the powers of Member States to organise their social security systems and to adopt provisions intended to govern the consumption of pharmaceutical preparations in order to promote the financial stability of their health-care insurance schemes. Therefore it is not in principle incompatible with Community law for Member States, which tries to limit their costs to prepare limitative lists excluding certain products from the reimbursement scheme. Legislation of the same kind as the Netherlands one can not be considered to be contrary to Community law as long as it is non-discriminating.

In case *Decker*<sup>78</sup> the question of compatibility of a certain part of the Luxembourg social security system with the free movement of goods emerged. Mr Decker had, on a prescription from an ophthalmologist established in Luxembourg, purchased a pair of spectacles with corrective lenses, in Belgium. Mr Decker requested that the 'Caisse de Maladie des Employés Privés' (the Social Security Fund) should reimburse him for his purchase but the Fund rejected his claim on the ground that the purchase was made without the Fund's prior consent, which was prescribed for in the 'Code des Assurances Sociales' (Social Insurance Code). Mr Decker found that provision to be contrary to the provisions of the free movement of goods. The court starts by referring to *Duphar* and states that Community law does not detract from the powers of the Member States to organise their social security systems and it is therefore up to each Member State to determine the conditions of their systems. However, when exercising these powers the Member States must nevertheless comply with the provisions of Community law. This is important since national rules governing social security may affect the marketing of pharmaceuticals and, thereby, the free movement of goods. The Luxembourg government maintains that their rule is justified since it is necessary for controlling health expenditure. The court starts by stating that aims of a purely economic nature cannot justify a barrier to the free movement of goods. "However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind." In this case, however, the financial burden on the Luxembourg system would be the same since it reimburses only a flat-rate sum for spectacles and that sum is fixed independently of the costs actually incurred and the place of purchase would therefore be of no interest. The reimbursement of the cost of Mr Decker's spectacles and corrective lenses therefore had no effect on the financing or balance of the social

---

<sup>78</sup> Case C-120/95.

security system and therefore there was no risk of the social security system to be expeditured. The Luxembourg rule in question therefore could not be justified on the mandatory requirement of control of the health expenditure. What the court did in *Decker* was to establish that in order to be justified under the mandatory requirement of control of health expenditure a real danger of expenditure of the social security system has to exist. Since the reimbursement at a flat rate of the cost of products purchased in other Member States has no effect on the financing or balance of the social security system the national rule is held not to be justified. Whether a real danger exists or not is a matter of fact that should be decided by the national court instead of by the ECJ since the ECJ only deliver rulings on questions on the interpretation of Community law. Whether a real danger of expenditure exists is not such an interpretation.

## 2.7 The Protection of the Environment

As seen below it is well established in the case law of the court that the protection of the environment is a mandatory requirement. However, what is interesting regarding the case law is that it often concerns national rules that are prohibited under article 29 of the Treaty, which is the equivalence to article 28 concerning exports. Under this article measures applicable without distinction to imported and domestic goods are not prohibited as under article 28, but merely discriminating measures. The question of justification under a mandatory requirement therefore should never have to emerge regarding article 29. However, implications in the case law of the court might be taken to indicate that the court is willing to extend the justification of environmental protection even to discriminating measures or that the court wishes to extend the scope of article 30 and the possible exceptions for barriers to trade.<sup>79</sup> Be that as it is, the case law is at least clear on one point; the protection of the environment may serve to justify restrictions on the free movement of goods as a mandatory requirement.

In case *Kramer*<sup>80</sup> several Netherlands fishermen were prosecuted for having infringed a law aimed at ensuring the conservation of the stocks of sole and plaice in the northeast Atlantic. The infringed provisions were adopted by the Netherlands to fulfil certain duties under the North-east Atlantic Fisheries Convention, signed at London on 24 January 1959, to which the Netherlands was a party. The provisions in question imposed fishing quotas, which the fishermen had exceeded. The case mainly concerned external relations but the court also touches on the application of article 28. Since this case was delivered two and a half years before *Cassis* the court does not talk about 'mandatory requirements' or even 'measures applicable without distinction' but merely if the contested Netherlands measure is covered by article 28 or not. In the light of *Cassis de Dijon* however, this discussion would rather be whether the measure was justified since it clearly constitutes

---

<sup>79</sup> See regarding this discussion Han Somsen EeLR 1992 page 107, Geert Van Calster ELR 1999 page 178 and Nicola Nitro EeLR 2000 page 304 and ELR 2000 page 467.

<sup>80</sup> Case 3,4 and 6/76.

a measure that is applicable without distinction to domestic and imported goods. Be that as it is, the court starts by stating that the nature and the circumstances of the production, in this case fish, has to be taken into consideration when deciding the question. In this connection, the court states that the Netherlands measures aim at preventing fish production from being used up, which would jeopardise supplies to consumers in the long run. “Therefore, the fact that such measures have the effect, for a short time, of reducing the quantities that the states concerned are able to exchange between themselves, cannot lead to these measures being classified among those prohibited by the treaty, the decisive factor being that in the long term these measures are necessary to ensure a steady, optimum yield from fishing.” The possibility of justifying certain measures by the protection of the environment is therefore acknowledged by the court for the first time.

Case *ADBHU*<sup>81</sup> further built on the implications made by the court in *Kramer*. It concerned the disposal of waste oils. A French decree prohibited the use of these oils as fuel and the question arose of the compatibility of the decree with the provisions on the free movement of goods. The ‘Association de défense des brûleurs d’huiles usagées’ (Association for the defence of the interests of burners of waste oils, ADBHU) claimed that the aim and objects of the French Decree were unlawful. Since the Decree was adopted to implement Council directive 75/439/EEC on the disposal of waste oils<sup>82</sup> the validity of the directive under Community law was called in question regarding, inter alia, the principle of freedom of trade. The court states that this principle is not to be seen in absolute terms but is subject to certain exceptions justified by objectives of general interest provided that the principle is not substantively impaired. This reasoning seems to be the same as regarding the mandatory requirements and the proportionality principle. The court then states that the questioned objective must be seen in the light of environmental protection, which is “one of the Community’s essential objectives”. Since the directive also ensures that the principles of proportionality and non-discrimination is observed it can not be held to be incompatible with the provisions on the freedom of trade.

The first time the court actually mentions the environment as a mandatory requirement is in case *Commission v. Denmark*<sup>83</sup>. It concerned a deposit and return system set up in Denmark. According to Danish law all containers for beer and soft drinks had to be returnable under one system. This meant that all producers had to market their bottles in re-usable containers approved by the National Agency for the Protection of the Environment. The Agency could refuse approval of a container if it did not fulfil the requirements. Later the Danish rule was slightly amended to mean that non-approved containers could be used if a deposit-and-return system was established, but only in quantities not exceeding 3000 hectolitres a year per producer. The Danish government contended that their rule was justified by a mandatory requirement relating to the protection of the environment. The court starts by

---

<sup>81</sup> Case 240/83, cp. case 172/82 *Inter-huiles* and case 295/82 *Rhône-Alpes Huiles*.

<sup>82</sup> OJ 1975 L 194 , p . 23.

<sup>83</sup> Case 302/86.

referring to *ADBHU* and its conclusion in that case that protection of the environment is one of the Community's essential objectives, which may justify certain limitations of the principle of the free movement of goods. The court then states that "in view of the foregoing, it must (...) be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 (28) of the Treaty." The Danish rule is therefore in principle capable of being justified by protection of the environment and the court states that the obligation to establish a deposit-and-return system is an indispensable element of a system intended to ensure the re-use of containers and therefore proportionate to its aims. However, the requirement that a producer could sell 3000 hectolitres if a deposit-and-return system was set up does not pass the proportionality test. This is so since, although non-approved containers could only be returned to the retailer who sold the beverage, the new established deposit-and-return system "is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports." Therefore, the court concludes, a restriction of the quantity of products that may be marketed does not fulfil the proportionality principle and is therefore not justified.

Case *Walloon waste (Commission v. Belgium)*<sup>84</sup> concerned a Belgian rule that prohibited the storage, tipping and dumping in the region of Wallonia, of waste originating in another Member State. The Belgian government sought to justify its rule as being necessary in order to protect the environment. The court starts by stating that "waste is matter of a special kind". This is because accumulation of waste is a danger to the environment considering the limited capacity of each region for waste reception. In Wallonia the inflow of waste was particularly large-scaled. The Belgian argument of justification due to the mandatory requirement of environmental protection therefore had to be considered to be well founded. The Commission, had nothing to object to the fact that the waste constituted a danger to the environment, but it still opposed to the fact that the national rule could be justified under the mandatory requirement. This was due to the fact that the Belgian rule discriminated against imported goods. To this the court states that it is true that mandatory requirements only were applicable to measures applying without distinction to imported and domestic products. However, in order to decide the discriminatory character of the Belgian rule, it was necessary to take the special character of waste into consideration. The source principle implied that it was the duty of each region to take the appropriate measures in order to ensure the disposal of its own waste. The court then concluded that when taking the differences of waste produced in different places into account and the connection with their place of production, the Belgian rule should not be considered discriminatory at all.

---

<sup>84</sup> Case C-2/90.

In case *Safety Hi-Tech*<sup>85</sup> the use of hydrochlorofluorocarbons (HCFCs) used for firefighting, amongst other things, was at issue. The Giudice di Pace (Justice of the Peace), Genoa, referred to the court for a preliminary ruling a question on the interpretation and validity of Council Regulation no 3093/94 on substances that deplete the ozone layer<sup>86</sup>. Under this regulation, which was adopted to fulfil the Community's obligations under inter alia, the Vienna Convention for the Protection of the Ozone Layer, HCFCs were prohibited except for use in some areas such as refrigerants and research. The question arose in proceedings between two companies concerning the performance of a contract between them for the sale of a product composed of HCFCs. Since the use of HCFCs was restricted the question arose in the Italian court whether the Regulation was contrary to the provisions on the free movement of goods. The court starts by stating that it is settled case law that the provisions on the free movement of goods applies also to the Community institutions. The court then refers to *ADBHU* and *Commission v. Denmark* and states that the protection of the environment is one of the Community's essential objectives and a ground for justification as a mandatory requirement. Since HCFCs are of an extremely high toxicity and there are useful alternatives regarding firefighting, such as water, powder and inert gases, the prohibition in question can not be held to be disproportionate.

Case *Dusseldorp*<sup>87</sup> concerned a Dutch prohibition on export of oil filters. To comply with Council directive 75/442/EEC on waste and with Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community<sup>88</sup>, the Dutch government had adopted the Long-term Plan for the Disposal of Dangerous Waste. This legislation provided, inter alia, that the exportation of oil filters was prohibited unless the processing of those filters abroad was superior to that performed in the Netherlands. A Netherlands company called Dusseldorp applied for authorisation to export oil filters and related waste to Germany and a company called Factron. The Netherlands Ministry of the Environment rejected the company's claim on the ground that the processing that Factron performed was not of a higher quality than that performed by the Netherlands waste processing and management undertaking, AVR Chemie. Dusseldorp brought an action before the Raad van State seeking an annulment of the Minister's decision, which they contended was contrary to Community law. The national court referred a question to the court for a preliminary ruling on, inter alia, the compatibility of the Long-term plan with the free movement of goods, especially article 29. The court starts by stating that it is clear that the object of the Netherlands prohibition on export of oil filters, unless the processing abroad is superior, is to restrict exports and to provide an advantage for national production. The Netherlands government contends that their rule is justified under the mandatory

---

<sup>85</sup> Case C-284/95. See also case C-341/95 which also concerned HCFCs. Cp. case C-389/96 *Aher-Waggon*.

<sup>86</sup> OJ 1994 L 333, p. 1.

<sup>87</sup> Case C-203/96.

<sup>88</sup> OJ 1975 L 194, p. 39 and OJ 1993 L 30, p. 1.

requirement of protection of the environment. This is because otherwise AVR Chemie would not be able to operate profitably since the absence of sufficient supply would force the company to use a less environmentally friendly fuel or to obtain other fuels that are equally friendly to the environment but involve additional costs. The court firmly and shortly rejects the Netherlands argument. “Even if the national measure in question could be justified by reasons relating to the protection of the environment, it is sufficient to point out that the arguments put forward by the Netherlands Government, concerning the profitability of the national undertaking AVR Chemie and the costs incurred by it, are of an economic nature. The Court has held that aims of a purely economic nature cannot justify barriers to the fundamental principle of the free movement of goods.”

In case *Sydhavnens Sten & Grus*<sup>89</sup> a Danish rule on non-hazardous building waste was at issue. Proceedings were ongoing in the Østre Landsret (Eastern Regional Court) between the Danish company Sydhavnens Sten & Grus ApS and Københavns Kommune (the Municipality of Copenhagen) concerning the system for the collection of non-hazardous building waste organised by the Municipality. The background to the conflict was that Sydhavnens applied for approval to recycle environmentally non-hazardous building waste in the form of concrete, brick and asphalt in the Municipality of Copenhagen. The approval was necessary under the ‘Miljøbeskyttelseslov’ (the Danish Law on Protection of the Environment). The Municipality of Copenhagen rejected the request for approval and declared that the processing of building waste produced within its boundaries should primarily take place in a processing station at Grøften. This was because it was considered necessary to limit the number of processing plants for reasons of investment and profitability in order to obtain the best-quality recycled product. The Regional Court that asked for a preliminary ruling wanted to know if the Danish rule could be justified on the basis, inter alia, environmental protection. The court refers to *Dusseldorf* and states that “the protection of the environment cannot serve to justify any restriction on exports (...). That is so a fortiori where (...) environmentally non-hazardous building waste is involved.” It has not been argued that the waste in question is harmful to the environment and therefore the Danish rule can not be justified by the protection of the environment.

Case *PreussenElektra*<sup>90</sup> concerned a German obligation on electricity suppliers to purchase electricity produced from renewable energy sources in their area of supply. The rules were contained in the ‘Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz’ (Law on feeding electricity from renewable energy sources into the public grid) and a dispute arose in the Landgericht Kiel regarding these provisions between PreussenElektra AG and Schleswig AG. The Landgericht referred several questions to the court regarding the provisions on state aid and the free movement of goods. The court notes, first, that an obligation to

---

<sup>89</sup> Case C-209/98.

<sup>90</sup> Case C-379/98.

purchase a certain percentage of their supplies from national suppliers limits the possibility of importation of that product and thereby restricts the free trade between Member States. However, in order to decide whether such a provision may nevertheless be compatible with article 28 account must be taken of the aim of the provision in question and of the particular features of the electricity market. The court then comes up with several reasons to why a provision such as the German in question, should be justified. It starts by stating that a provision such as the German one protects the environment since it contributes to the reduction in emissions of greenhouse gases which “are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.” The court then refers to the integration principle enshrined in article 6 of the Treaty under the heading ‘Principles’. Also, Parliament and Council directive 96/92/EEC concerning common rules for the internal market in electricity<sup>91</sup>, which the German legislation in question sought to implement, states the importance of environmental protection. Besides, “the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced.” The court therefore supports the Commission in its opinions stated in its proposal for a new directive regarding the promotion of electricity from renewable energy sources in the internal electricity market, in which the Commission states that “the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice.” Having regard to all the above considerations legislation such as the German one is not incompatible with Article 28 of the Treaty.

## 2.8 Road Safety

In case *Van Schaik*<sup>92</sup> questions on the compatibility of the Netherlands *Wegenverkeerswet* (Road Traffic Law) with Community law arose. Mr Van Schaik was convicted for driving a motor vehicle without a valid test certificate, contrary to the Netherlands law, and now applied for a review of his conviction. He claimed that the Netherlands law was incompatible with Community law. The law prescribed that certificates for vehicles in the Netherlands could only be issued after garages established in the Netherlands had done a test. Although Mr Van Schaik claimed that the law was contrary to article 28 and the free movement of goods the court found this provision to be of less importance in this case. Instead the applicable provision was article 49 and the freedom to provide services, but the court’s discussion on the mandatory requirement is still of interest. The court states

---

<sup>91</sup> OJ 1997 L 27, p. 20.

<sup>92</sup> Case 55/93, cp. case 406/85 *Gofette and Gilliard* where the justification of road safety was considered under article 30.



that legislation, such as the Netherlands, might lead car owners to prefer the Netherlands garages, even if the prices there are higher than abroad. This is because it is more practical and less expensive to have maintenance and repairs undertaken in a garage that also can carry out the test for a valid certificate. However, such legislation may be justified by the “requirements of road safety, which constitute overriding reasons relating to the public interest”. The court then states that the requirement that vehicles undergo a periodic test serves the interests of road safety. The effectiveness of these tests is assured by supervision, which can only be undertaken on Netherlands territory and by the Netherlands authorities. The Netherlands provision is therefore held not to be contrary to Community law.

In case *Snellers Auto*<sup>93</sup> the same Netherlands Road Traffic Law was at issue but this time the court actually ruled on the question in relation to goods. The Traffic Law prescribed for rules as to the date on which a vehicle was first to be authorised for use on the public highway. *Snellers Auto's BV*, a Netherlands company, bought a BMW motor car from a German company who had got that car registered at the Vehicle Registration Office in Germany. *Snellers* took the car to be registered in the Netherlands as new. However, the Netherlands registration office stated that the date of first authorisation for use on the public highway was the date of the German registration. This was because the Netherlands law prescribed that an imported vehicle should be authorised on the date on which its registration certificate was issued but only where the vehicle had not been registered for more than two days in another Member State. This was the case of the BMW in question and *Snellers'* car therefore did not get authorisation on the date when the registration certificate was issued. *Sneller* complained against the decision since it lowered the value of the car. Proceedings were brought in the Netherlands Raad van State, which brought to the court for a preliminary ruling questions on the interpretation of, inter alia, article 28 of the Treaty. The court states that national rules, such as the Netherlands, constitutes a measure of an equivalent effect to a quantitative restriction, prohibited under article 28 of the Treaty. The question is therefore whether it can be justified. The court refers to *Van Schaik* and states that restrictions on the free movement of goods may be justified by mandatory requirements such as road safety. “It cannot be precluded that national rules which define criteria for the determination of the date on which a vehicle was first authorised for use on the public highway (...) may be justified.” It is for the national court to decide whether that is the case taking into consideration the proportionality principle.

---

<sup>93</sup> Case C-314/98.

## 2.9 The Encouragement of Cinematographic Production

In many cases concerning the freedom to provide services the court has stated that this is a mandatory requirement.<sup>94</sup> Regarding the free movement of goods the court has ruled on this once in case *Cinéthèque*<sup>95</sup>, which concerned a French prohibition of simultaneous exploitation of films in cinemas and in video-cassette form. The prohibition was contained in the law on audio-visual communication which prescribed that no cinematographic work shown in cinemas may simultaneously be exploited in the form of recordings, such as videocassettes, intended for sale or hire, before the expiration of a period of between six and 18 months. The case concerned the two films 'Fyrrio' and 'Le Marginal' both shown in cinemas in France. Two French companies, Cinéthèque SA and Editions Rene Chateau Sarl, had been granted a licence to produce and sell videocassettes of the films but the Fédération nationale des cinémas français (National federation of French cinemas) sought an interim order for the seizure of all videos of the films. The Federation considered that the two companies were acting in breach of the law on audio-visual communication. The two companies therefore brought actions before the 'Tribunal de grande instance, Paris', against the decision of the Federation since they considered the provisions of the French law to be contrary to the Community provisions on the free movement of goods. The French court stayed the proceedings and referred to the court questions on the interpretation of the relevant Community provisions. The court starts by stating that a legislation such as the French one, applies without distinction to domestic and imported goods, does not have the purpose of regulating trade patterns and does not have the effect of favouring national production. Instead it seeks to encourage cinematographic production as such. Nevertheless, such legislation may create barriers to intra-community trade and is not compatible with Community law unless its object is justified with regard to Community law. The court then states: "It must be conceded that a national system which, in order to encourage the creation of cinematographic works irrespective of their origin, gives priority, for a limited initial period, to the distribution of such works through the cinema, is so justified."

## 2.10 The Protection of the Public Network and its Proper Functioning

In case *RTT v. GB-Inno-BM SA*<sup>96</sup> the court held that this could be a mandatory requirement capable of justifying restrictions on trade. The Belgian company Régie des Télégraphes et des Téléphones, RTT, were,

---

<sup>94</sup> See cases C-154/89, C-180/80, C-288/89, C-353/89, C-148/91, C-17/92, C-274/96 (persons).

<sup>95</sup> Case 60 & 61/84.

<sup>96</sup> Case C-18/88.

under Belgian law, given a monopoly over the establishment and operation of telegraph and telephone lines and offices for use by the public. This meant, amongst other things, that RTT had to approve all telephones before they were connected to the circuits of the network. The decision of the RTT could not be challenged before a court. GB-Inno-BM sold in its shops non-approved telephones for use as second telephones to be connected to an existing installation, at prices far lower than those charged by the RTT for such equipment. The RTT brought proceedings in the 'Tribunal de Commerce' (Commercial Court), Brussels, against GB-Inno-BM SA claiming that the latter was encouraging consumers to connect to the network the non-approved telephones, which might impair the functioning of the network. The national court asked the court for a preliminary ruling regarding the rules on competition and the free movement of goods. Regarding the latter the court asked whether it was contrary to article 28 of the Treaty that a public undertaking had been given the power to approve telephone equipment when its decisions could not be challenged before the courts. The court states that legislation such as the Belgian one might hinder the free trade. This is because the requirement of an approval before telephones are connected to the network render the sale more difficult or more onerous since it means that manufacturers in other Member States have to take the criteria for type-approval laid down in the Member State of importation into account. Besides, this necessarily entails delay and expense. However, it is for each Member State, in the absence of Community rules on the subject, to lay down technical regulations that telephone equipment must meet in order to be connected to the public network. It is also for each Member State to examine whether the equipment is fit to be connected "in order to satisfy the imperative requirements regarding the protection of users as consumers of services and the protection of the public network and its proper functioning."

### 3 Summary and Conclusion

Studying the case law of the court it is clear that ten mandatory requirements have been approved by the ECJ. These are: measures relating to the internal taxation of the Member States, measures relating to fair trading and the prevention of unfair competition, consumer protection, the improvement of working conditions, maintaining press diversity, the preservation of the financial balance of the social security system, the protection of the environment, road safety, the encouragement of cinematographic production and the protection of the public network and its proper functioning.

The mandatory requirement most frequently invoked by the Member States is consumer protection and a rich body of case law therefore exists on this matter. The court has stated that it, or the national court whenever the ECJ does not have sufficient information to decide the matter itself, has to take the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect in order to decide whether the labelling of a product or the product itself is of a misleading character. In most cases the court took the average consumer of the European Union into consideration but in some cases it did not. These cases were usually ones concerned with language differences and it therefore seems reasonable for the court to take the expectations of a consumer in that state into consideration in order to decide whether or not a misleading element exists as to the information on a product.

The court also has established that in order for a national rule to be justified under consumer protection, the misleading character of, i.e. the information of a product, has to be sufficiently serious. If the consumers easily can find the information they need in order to make their purchases then the national rule will fail to be justified. This might be the case if a product is sold in a special place or way (*Clinique* and *Graffione v. Ditta Fransa*) or if the product in question contains the information needed by other means, i.e. by designs or symbols (*Colim*) or if the information already exists on the product in different wording (*Commission v. Germany [hollandaise and béarnaise sauces]*).

Regarding the practice by the Member States to reserve certain designations or generic names to packages or products containing special ingredients or produced in a special way the court has frequently held that appropriate labelling will be sufficient in order to protect consumers. When the Member States has invoked the mandatory requirement of fair trading to justify this kind of rules the court has used its conclusions from *Prantl* stating that in order for a national rule to be justified when it reserves a designation or a generic name to a product of a special character, regard must be had to the fair and traditional practices observed in the various Member States meaning that if a product or package is produced and used in another Member State according to a fair and traditional practice in that state, then a national rule cannot reserve the name of the product or a certain package and justify it under the mandatory requirement of fair trading. It can be said that the court

by its test established in *Prantl* has extended the meaning of mutual recognition as created by the court in *Cassis de Dijon* in the sense that for products to be protected from national rules making the importation into a Member State more difficult it is not sufficient that the product in question is lawfully produced and marketed in the Member State of exportation; it also has to be used in that state according to a fair and traditional practice.

Following the court's ruling in *Keck* it is clear that the national rules justified under the improvement of working conditions, concerning the opening of stores, must now be considered a selling arrangement and therefore fall outside the scope of article 28 and do not need to be justified by a mandatory requirement. However, it is reasonable to believe that the improvement of working conditions still might serve as a mandatory requirement, especially concerning working hours as shown in *Oebel*. The future will show if its area of application will expand further.

Many of the mandatory requirements (maintaining press diversity, the preservation of the financial balance of social security systems, road safety, the encouragement of cinematographic production and the protection of the public network and its proper functioning) have been established through a relatively small group of cases, or even just one. This might mean that the concept and scope of these mandatory requirements may develop and change over the years along with new cases to be decided by the court, but it does not mean that they do not exist. They have, at least once been recognised by the court as mandatory requirements and should not be considered otherwise until the opposite is proven.

Regarding the mandatory requirement of preservation of the financial balance of social security systems it is clear that a real danger of expenditure of the social security system or a risk of seriously undermining the financial balance of the system has to exist in order for the national rule to be justified. This conclusion made by the court is probably a result of its previous statements that aims of a purely economic nature cannot serve to justify barriers to trade. The financial balance of a social security system is, in the long run, an aim of a purely economic character and should, as such, not be capable of justifying national rules. However, the social security system normally constitutes a huge part of the Member States' budgets and if that system is not in control a situation would emerge where the citizens of the Member States would be in great discomfort or even in danger. Considering the possible grounds of justification under article 30, such as public health and public security, this is certainly not in the interests of the European Union.

It must be stated that the environment is an area of special concern within the Community. In *Commission v. Denmark (deposit and return system)* the court stated that the protection of the environment is a mandatory requirement capable of justifying barriers to trade. The development after this clearly shows the importance of this subject, even if it may seem as if the court does not entirely know how to handle this. In *Walloon waste (Commission v. Belgium)* the court held that the special character of waste should be taken into consideration when deciding the discriminating character of an export restriction. This led the court to conclude that the

Belgian rule was not discriminating at all and therefore, due to the environment did not have to be justified. In *Dusseldorp* the court had to judge on a Dutch export prohibition that clearly was discriminating. The court implied that the prohibition could be justified under protection of the environment but dismissed this because the Dutch government's argument was held to be of an economic nature. In *Sydhavnens Sten & Grus* the court held that the protection of the environment cannot serve to justify any export restriction. Apparently it can serve to justify some export restrictions and that is remarkable since export restrictions by their very nature are discriminating and therefore should not be able to be justified by a mandatory requirement but merely by one of the grounds in article 30.

The case law of the court shows the special concern that exists for the environment within the Community. It is not certain what the statement made by the court should be interpreted as. It could be taken to indicate that the mandatory requirement of protection of the environment is of a special character within Community law and may as such serve to justify even discriminating measures. The future case law of the court may hopefully give us an answer to this.

At last it is important to note that the original "list" of mandatory requirements made in *Cassis de Dijon* was a non-exhaustive list, which is evident from the fact that the ECJ has added seven mandatory requirements to that list over the years. Following the development in the EU and in trade in general it is an educated guess that the list will enlarge over the years to come.

# Bibliography

## Community Legislation, Information and Notice

- Council Directive 69/493/EEC concerning the approximation of laws of the Member States relating to crystal glass. OJ 1969 L 326, page 36
- Commission Directive 70/50/EEC on measures of an equivalent effect to a quantitative restriction on import. OJ L 13 1970, page 29
- Council Directive 73/241/EEC on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption. OJ 1973 L 228, page 23
- Council Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain pre-packaged liquids. OJ 1975 L 42, page 1
- Council Directive 75/439/EEC on the disposal of waste oils. OJ 1975 L 194, page 23
- Council Directive 75/442/EEC on waste. OJ 1975 L 194, page 39
- Council Directive 79/112/EEC on the labelling and presentation of foodstuffs. OJ 1979 L 33, page 1
- Council Directive 79/373/EEC on the marketing of compound feedingstuffs. OJ 1979 L 86, page 30
- Council Regulation (EEC) No 355/79 laying down general rules for the description and presentation of wines and grape musts. OJ 1979 L 54, page 99
- Second Programme of the European Economic Community for a Consumer Protection and Information Policy. OJ 1981 C 133, page 1
- Council Regulation (EEC) No 1907/90 on certain marketing standards for eggs. OJ 1990 L 173, page 5
- Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community. OJ 1993 L 30, page 1
- Council Regulation (EEC) No 3093/94 on substances that deplete the ozone layer. OJ 1994 L 333, page 1
- Council Directive 96/92/EEC concerning common rules for the internal market in electricity. OJ 1997 L 27, page 20

## Literature

- Han Somsen                      European Court of Justice Report, European  
Environmental Law Review 1992 page 107
- Geert Van Calster              European Law Review 1999 page 178
- Nicola Notaro                    European Environmental Law Review 2000 page  
304
- Nicola Notaro                    European Law Review 2000 page 467



# Table of Cases

- 12/74** Commission v. Germany [1975] E.C.R. 181  
**3,4 & 6/76** Cornelis Kramer and others [1976] E.C.R. 1279  
**13/77** SA GB-INNO-BM v. ATAB [1977] E.C.R. 2115  
**13/78** Joh Eggers Sohn & Co v. Freie Hansestadt Bremen [1978] E.C.R. 1935  
**120/78** Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein “Cassis de Dijon” [1979] E.C.R. 649  
**159/78** Commission v. Italy [1979] E.C.R. 3247  
**788/79** Criminal Proceedings against Gilli and Andres [1980] E.C.R. 2071  
**823/79** Criminal Proceedings against Carciati [1980] E.C.R. 2773  
**27/80** Criminal Proceedings against Fietje [1980] E.C.R. 3839  
**58/80** Dansk Supermarked A/S v. A/S Imerco [1981] E.C.R. 181  
**130/80** Criminal Proceedings against Kelderman BV [1981] E.C.R. 527  
**155/80** Summary Proceedings against Oebel [1981] E.C.R. 1993  
**193/80 (281/83)** Commission v. Italy [1981] E.C.R. 3019  
**6/81** Industrie Diensten Groep BV v. JA Beele Handelmaatschappij BV [1982] E.C.R. 707  
**220/81** Criminal Proceedings against Robertson and others [1982] E.C.R. 2349  
**261/81** Walter Rau Lebensmittelwerke v. De Smedt PVBA [1982] E.C.R. 3961  
**286/81** Criminal Proceedings against Oosthoek’s Uitgeversmaatschappij BV [1982] E.C.R. 4575  
**94/82** Criminal Proceedings against De Kikvorsch Groothandel-Import-Export BV [1983] E.C.R. 947  
**172/82** Syndicat National des Fabricants Raffineri d’Huiles de Graissage v. “Inter-Huiles” and others [1983] E.C.R. 555  
**238/82** Duphar BV and others. v. The Netherlands [1984] E.C.R. 523  
**295/82** ”Rhône-Alpes Huiles” and others v Syndicat National des Fabricants Raffineurs d’Huile de Graissage and others [1984] E.C.R. 575  
**16/83** Criminal Proceedings against Prantl [1984] E.C.R. 1299  
**94/83** Criminal Proceedings against Heijn [1984] E.C.R. 3263  
**134/83** Criminal Proceedings against J.G. Abbink [1984] E.C.R. 4097  
**207/83** Commission v. United Kingdom and Ireland [1985] E.C.R. 1201  
**240/83** Procureur de la République v. ADBHU [1985] E.C.R. 531  
**281/83** Commission v. Italy [1985] E.C.R. 3397  
**60 & 61/84** Cinéthèque SA v. Fédération Nationale des Cinémas Français [1985] E.C.R. 2605  
**176/84** Commission v. Greece [1987] E.C.R. 1193  
**178/84** Commission v. Germany [1987] E.C.R. 1227  
**182/84** Criminal Proceedings against Miro BV [1985] E.C.R. 3731  
**216/84** Commission v. France [1988] E.C.R. 793  
**54/85** Ministère Public v. Mirepoix [1986] E.C.R. 1067  
**179/85** Commission v. Germany [1986] E.C.R. 3879

**406/85** Procureur de la République v. Daniel Gofette and Alfred Gilliard [1987] E.C.R. 2525  
**407/85** 3 Glocken GmbH and Gertraud Kritzinger v. USL Centro-Sud and Provincia Autonoma di Bolzano [1988] E.C.R. 4233  
**76/86** Commission v. Germany [1989] E.C.R. 1021  
**90/86** Criminal Proceedings against Zoni [1988] E.C.R. 4285  
**286/86** Ministère Public v. Deserbais [1988] E.C.R. 4907  
**302/86** Commission v. Denmark [1988] E.C.R. 4607  
**274/87** Commission v. Germany [1989] E.C.R. 229  
**298/87** Proceedings for Compulsory Reconstruction against Smanor SA [1988] E.C.R. 4489  
**382/87** Buet v. Ministère Public [1989] E.C.R. 1235  
**18/88** Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA [1991] E.C.R. I-5941  
**52/88** Commission v. Belgium [1989] E.C.R. 1137  
**145/88** Torfaen Borough Council v. B&Q Plc [1989] E.C.R. 3851  
**C-362/88** GB-INNO-BM v. Confédération du Commerce Luxembourgeoise [1990] E.C.R. I-667  
**C-154/89** Commission v. France [1991] E.C.R. I-659  
**C-180/89** Commission v. Italy [1991] E.C.R. I-709  
**C-196/89** Criminal Proceedings against Nespoli and Crippa  
**C-210/89** Commission v. Italy [1990] E.C.R. I-3697  
**C-238/89** Pall Corp v. P.J. Dahlhausen & Co [1990] E.C.R. I-4827  
**C-288/89** Strichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media [1991] E.C.R. I-4007  
**C-312/89** Union Départementale des Syndicats CGT de l'Aisne v. Sidef Conforama [1991] E.C.R. I-997  
**C-332/89** Criminal Proceedings against Marchandise, Chapuis and SA Trafitec [1991] E.C.R. I-1027  
**C-353/89** Commission v. The Netherlands [1991] E.C.R. I-4069  
**C-369/89** Piageme and others v BVBA Peeters [1991] E.C.R. I-2971  
**C-1/90 & C-176/90** Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña [1991] E.C.R. I-4151  
**C-2/90** Commission v. Belgium [1992] E.C.R. I-4431  
**C-39/90** Denkavit Futtermittel GmbH v. Land Baden-Württemberg [1991] E.C.R. I-3069  
**C-239/90** SCP Boscher, Studer and Fromentin v. SA British Motors Wright and others [1991] E.C.R. 2023  
  
**C-126/91** Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH [1993] E.C.R. I-2361  
**C-148/91** Vereniging Veronica Omroep Organisatie v. Commissariat Voor de Media [1993] E.C.R. I-487  
**C-169/91** Council of the City of Stoke-on-Trent v. B&Q Plc [1992] E.C.R. I-6635

**C-267 & 268/91** Criminal Proceedings against Keck and Mithouard [1993] E.C.R. I-6097

**C-17/92** Federación de Distribuidores Cinematográficos v. Estado Español et Unión de Productores de Cine y Televisión [1993] E.C.R. I-2239

**C-315/92** Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC et Estée Lauder Cosmetics GmbH [1994] E.C.R. I-317

**C-401 & 402/92** Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans [1994] E.C.R. I-2199

**C-51/93** Meyhui NV v. Schott Zwiesel Glaswerke AG [1994] E.C.R. I-3879

**C-55/93** Criminal Proceedings against Van Schaik [1994] E.C.R. I-4837

**C-69/93 & C-258/93** Punto Casa SpA v. Sindaco Del Comune di Capena [1994] E.C.R. I-2355

**C-293/93** Criminal Proceedings against Houtwipper [1994] E.C.R. I-4249

**C-470/93** Verein Gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH [1995] E.C.R. I-1923

**C-51/94** Commission .v Germany [1995] E.C.R. I-3599

**C-313/94** F.lli Graffione SNC v. Ditta Fransa [1996] E.C.R. I-6039

**C-34/95** Konsumentombudsmannen v. De Agostini [1997] E.C.R. I-3843

**C-120/95** Decker v. Caisse de Maladie des Employés Privés [1998] E.C.R. I-1831

**C-284/95** Safety Hi-Tech Srl v. S.&T. Srl. [1998] E.C.R. I-4301

**C-341/95** Gianni Bettati v Safety Hi-Tech Srl. [1998] E.C.R. I-4355

**C-368/95** Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag [1997] E.C.R. I-3689

**C-184/96** Commission v. France [1998] E.C.R. I-6197

**C-203/96** Chemische Afvalstoffen Dusseldorp BV v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [1998] E.C.R. I-4075

**C-210/96** Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt [1998] E.C.R. I-4657

**C-274/96** Criminal Proceedings against Bickel and Franz [1998] E.C.R. I-7637

**C-385/96** Criminal Proceedings against Goerres [1998] E.C.R. I-4431

**C-389/96** Aher-Waggon GmbH v. Germany [1998] E.C.R. I-4473

**C-33/97** Colim NV v Bigg's Continent Noord NV [1999] E.C.R. I-3175

**C-77/97** Österreichische Unilever GmbH v. Smithkline Beecham Markenartikel GmbH [1999] E.C.R. I-431

**C-383/97** Criminal Proceedings against Van der Laan [1999] E.C.R. I-731

**C-209/98** Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune [2000] E.C.R. I-3743

**C-220/98** Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH [2000] E.C.R. I-117

**C-314/98** Snellers Auto's BV v. Algemeen Directeur van de Dienst Wegverkeer [2000] E.C.R. I-8633

**C-366/98** Criminal Proceedings against Geffroy and Casino France SNC [2000] E.C.R. I-6579

**C-379/98** PreussenElektra AG v. Schleswag AG [2001] E.C.R. I-2099

**C-448/98** Criminal Proceedings against Guimont [2000] E.C.R. I-10663  
**C-3/99** Cidrerie Ruwet SA v. Cidre Stassen SA and HP Bulmer Ltd [2000]  
E.C.R. I-8749  
**C-30/99** Commission v. Ireland [2001] E.C.R. I-4619  
**C-12/00** Commission v. Spain (not yet officially rep)  
**C-14/00** Commission v. Italy (not yet officially rep)  
**C-84/00** Commission v. France [2001] E.C.R. I-4553