Northwestern Journal of International Law & Business

Volume 3
Issue 2 *Fall*

Fall 1981

Prohibiting Restriction of Free Trade within the Community: Articles 30-36 of the EEC Treaty

P. VerLoren van Themaat

L.W. Gormley

Prohibiting Restriction of Free Trade within the Community: Articles 30-36 of the EEC Treaty*

*P. VerLoren van Themaat***
*L.W. Gormley****

The problem of accommodating the tensions of power between the European Economic Community and individual Member States is particularly acute in the area of prohibitions on restriction of free trade within the Community. Professor van Themaat and Mr. Gormley analyze key aspects of this problem in select decisions of the Court of Justice concerning Articles 30-36 of the EEC Treaty. The areas of discussion include the extent to which Articles 30-36 affect internal economic regulations of Member States, the difference between trading within an established Community organization and trade in an area where no organization exists, and the relation of Articles 30-36 to other provisions of the Treaty. The authors conclude with a consideration of the prospects for federalization within the Common Market in light of the cases discussed earlier.

---

* This article is the result of a common effort of both authors, sitting at their academic desks in Utrecht and Liverpool in the years 1979 and 1980. It, therefore, covers the case law up to and including 1980. For cases decided in 1981, see note 162 *infra*. A few months afterwards the governments of the Member States appointed Professor van Themaat an Advocate General at the Court of Justice of the European Communities. He, therefore, must leave open the possibility that after having listened to arguments of parties before the Court he will change opinions as expressed in this article. With this caveat, Professor van Themaat nevertheless accepts the full responsibility for the final text of this article, and has relied upon the editors for the final documentation.

** Professor of Economic Law, University of Utrecht (The Netherlands).

*** Barrister, Lecturer in Law, University of Liverpool (England).

I. INTRODUCTION

The Place of Articles 30-36 in the System of the EEC Treaty

Articles 30-36 of the EEC Treaty are central to the structure of the Community. They illustrate the division of competence between the European Economic Community and the Member States.[1] The far-reaching influence of these Articles has become particularly apparent since the leading case of *Dassonville*.[2] Judgments of the Court of Justice of the European Communities (hereinafter the Court of Justice) have covered such diverse fields of law as patents and trademarks, price regulations, food and drug legislation, unfair competition legislation, pharmaceutical legislation and other more general areas of public health control. The judgments also covered law concerning public morality, taxation, the environment, agriculture and fishing. This catalog, based on the existing case law, is by no means an exhaustive list of the areas of national law that potentially may be affected by these Articles.

Under the well-known basic formula set forth in *Dassonville*, a national law is incompatible with Articles 30-36 if it falls into the category of "trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[3] Such an incompatible national law is a forbidden measure having an effect equivalent to a quantitative restriction on imports or exports. The concept of a "trading rule," according to case law, must be interpreted broadly enough to encompass even those measures that only indirectly or potentially affect trade in goods.[4] Thus the effect of the relevant measure, and not its aim, is important. The interpretation of the "trading rule" concept creates certain fringe difficulties. Prior to examining these fringe difficulties and Articles 30-36 in detail, it is desirable to make several general observations about the role of Articles 30-36 relative to other Articles within the EEC Treaty system.

Article 2 of the Treaty[5] lists the general tasks of the Community as: promoting a harmonious development of economic activities

---

[1] The significance of the development of case law on this part of the Treaty in assessing the more or less "federative" character of the European Communities has been discussed in detail in the recent reports on this subject by Van Empel and Slot for the Dutch Association for European Law in *Tijdschrift voor Europees en Economisch Recht*, [1980] SOCIAAL-ECONOMISCHE WETGEVING [S.E.W.] 244.

[2] Procureur du Roi v. Dassonville, [1974] E. Comm. Ct. J. Rep. 837, [1974] 2 Comm. Mkt. L.R. 436.

[3] *Id.* at 852, [1974] 2 Comm. Mkt. L.R. at 453-54.

[4] *Id.* at 852, [1974] 2 Comm. Mkt. L.R. at 436.

[5] Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, 15 (*entered in force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

throughout the Community, promoting a continuous, balanced expansion and increase in economic stability, achieving an upward acceleration of the standard of living and developing closer relations between the Member States. Article 2, however, is not merely a list of tasks; it also indicates the Community's two main intermediate objectives that must be attained to accomplish these general tasks: first, the establishment of a common market and second, the progressive approximation of the economic policies of Member States. More simply stated, Article 2 reveals a fundamental polarity in the structure of the EEC Treaty between trust in market forces on one hand, and on the other hand, reliance on regulation and planning through government intervention to correct imbalances of market forces. This polarity is commonly found in various forms in the policies governing the economic structure of the Member States of the Community.[6]

Significantly, the EEC Treaty does not specify *a priori*—any more than does any national constitution of the Member States—where the precise balance between the two poles of "market forces" and "government intervention" must lie. Instead, the choice of the desired economic order, in practice, is left to the outcome of discussions essentially political in nature. Because of the political nature of this balance, it is gratifying that the European Communities have had a directly-elected Parliament at their disposal since 1979.[7] The Parliament offers a better forum for discussing and deciding questions concerning the most desirable economic order than do the hundreds of meetings of Community and national technocrats presently used. Even the politically answerable ministers have more than a marginal influence in only a relatively small number of cases. Although the eventual balance between "market forces" and "government intervention" depends on the policy choices of the relevant institutions, some important guidelines representing aspects of both poles are contained in the general specifications of Article 3 of the Treaty.

The most important elements necessary to achieve the first intermediate objective, the establishment of a common market, are (1) the free movement of goods, persons, services and capital, (2) the introduction of a system that protects competition in the common market from distortion, and (3) in the view of some legal writers, the approximation

---

[6] *See, e.g.*, the Seven National Reports on the economic laws of the Member States in the EEC Studies series on competition and harmonization of laws No. 20, Brussels 1973-77 and the concluding report for Belgium. *See also* VAN GERVEN, LEERBOEK HANDELS-EN ECONOMISCH RECHT (1978-79).

[7] Council Decision 76/787, 19 O.J. EUR. COMM. (L 278) 1 (1976).

of the laws of the Member States to the extent required for the proper functioning of the common market.[8] According to other legal writers, however, the approximation of laws also can be used to support corrections of market forces in pursuance of the second intermediate objective: the progressive approximation of the economic policies of the Member States. Considering the rather neutral wording of Article 100 it seems improbable that this difference of opinion can be resolved other than through political discussions. Since the text of the Treaty is broad enough to justify either interpretation of the approximation of law process, the Court of Justice will not opt quickly to choose one view over the other.

As mentioned above, the Treaty does not clearly choose which economic system is the most desirable. Yet it is certain that the free movement of goods, among other things, must be achieved within the whole territory of the Community. This free movement of goods is to be realized through the Treaty provisions that abolish customs duties and charges having an equivalent effect,[9] through the vehicle of Articles 30-36, and through the competition provisions contained in Articles 85 and 86. Although it is not examined in this writing, the Article 37 restrictions on state trading monopolies are also relevant to the free movement element. In addition, Article 3 indicates the principal forms that the progressive approximation of the economic policies of the Member States can take. These forms are first, a common Community policy (specified further with respect to external trade policy, agriculture and transport),[10] second, "the application of procedures[11] by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied,"[12] and third, Community financial support measures (the European Social Fund and the European Investment Bank are specifically mentioned in Article 3, while Community Decisions have added others).[13]

Given Article 38 on agriculture, Articles 61 and 74, and the case law of the Court of Justice on transport, it appears that even a Community policy must respect the intermediate objective for a common mar-

---

8 *See generally* EEC Treaty, *supra* note 5, at arts. 100-02.

9 *Id.* at arts. 12-17.

10 *Id.* at art. 3(d), (e).

11 The term "procedures" is somewhat confusing. Based on Article 103 of the Treaty (conjunctural policy), among others, it seems that the Community can also lay down compulsory measures of community law in this area. Therefore, the concept of coordination procedures must be understood in a wide sense, such that it includes the contents of all instruments of Community law.

12 EEC Treaty, *supra* note 5, at art. 3(g).

13 *Id.* at art. 3(i), (j).

ket with free movement of goods and services, and undistorted and effective competition. It must be assumed that the same respect for the common market objective applies to the approximation of laws and the coordination of national economic policies. This point is significant for the purposes of this article because it must, for example, lead to the conclusion that the common agricultural policy, the approximation of laws, and the conjunctural policies of the Community alike may not erode the prohibitions imposed by Articles 30-36 of the Treaty.

The Commission in its Twelfth General Report[14] expressed the opinion, based on cases 80-81/77,[15] that the above view of the common market objective also has been adopted by the Court of Justice. If this conclusion is correct, then it would add important weight to the view that the Communities are already exhibiting features similar to those of federalist state systems. Certainly both non-centralized single states and federal states differ from loose groups of states, since the former two seek free movement of goods throughout their territory. As Slot has shown,[16] the Communities have gone further in this respect than has the United States of America. This assessment is also true of States with various degrees of economic planning. Therefore, the principle of the free movement of goods seems to be compatible with all systems of integration, whether "liberal" or not. Thus, socialists and other interventionists need not oppose the free movement of goods. Rather, they should basically seek further development of community policies and greater coordination of national intervention policies in the directions indicated by the Treaty. In this regard Articles 30-36 indicate that problems always have to be solved at a level where the causes of existing ills can be effectively countered; to solve these problems the national level is far too low. The Community level, however, offers at least a better chance of success.

Further Characteristics of Articles 30-36

Article 3, expanded in this respect by Articles 9-37 of the EEC Treaty, requires the "free" movement of goods. What exactly is meant by this concept of "freedom" must be established. In examining this concept, it is unnecessary to deal in detail with those varying views advanced by the Commission and by academic writings prior to 1974.[17]

---

14 TWELFTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 283 (Brussels, Luxembourg 1979).

15 Société Les Commissionnaires Réunis, [1978] E. Comm. Ct. J. Rep. 927.

16 *See* note 1 *supra*.

17 The most important of these views is discussed by Ehlermann in KOMMENTAR ZUM E.W.G.-VERTRAG 253-92 (2d ed. Von der Groeben, von Boeckh & Thiesing eds. 1974).

At that time it was still generally held that Articles 30-36 concerned only restrictions on imports and exports caused by State measures. As will soon become apparent even that view is no longer clearly accepted. Moreover, it was agreed that measures that restricted either only imports or only exports were included under the relevant prohibitions in every case. The only significant difference of opinion concerned the attitude toward measures that restricted the domestic market as well as imports or exports. The broad view, first propounded by VerLoren van Themaat,[18] and later by Waelbroeck,[19] proclaimed that, in principle, these measures restricting the domestic market as well as imports or exports, also fell under the prohibition of Articles 30-36. The narrow view, on the other hand, represented by Graf,[20] and slightly less extremely by Meier,[21] asserted that the only measures caught by the prohibition were those that restricted imports or exports and discriminated against them by placing them at a disadvantage as compared with domestic products.

In Directive 70/50/EEC,[22] the Commission adopted a stance somewhere in between the broad and narrow views. It decided that measures equally applicable to both domestic and imported goods would fall under the prohibition only if their restrictive effect on the free movement of goods between Member States exceeded their effects intrinsic to trade rules. In other words, a criterion of proportionality was created. Article 2 of Directive 70/50/EEC explained that this inclusion under the prohibition occurred especially when the restrictive effect on trade was disproportionate in relation to the aim of the relevant measure, or if that aim also could be achieved in a way that would be less restrictive on trade. Since Article 34 of the Treaty, dealing with restrictions on exports and measures having an equivalent effect, was not dealt with in the Commission's Directive (which was based on Article 33), the Directive does not contain a more precise definition of either quantitative restrictions on exports, or of measures having that equivalent effect. This midway view of the Commission was attacked by academicians from both sides. Another midway position somewhat

---

18 *Bevat Artikel 30 van het E.E.G. Verdrag slechts een non-discriminatiebeginsel ten aanzien van invoerbeperkingen*?, 1967 S.E.W. 632.

19 Megret, et al., 1 LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEENE 102 (1970).

20 GRAF, DER BEGRIFF MASSNAHMEN GLEICHER WIRKUNG WIE MENGENMASSIGE EINFUHRBESCHRANKUGEN IN DEM E.W.G.-VERTRAG (1972).

21 *See* Ehle-Meier, *E.W.G.-Warenverkehr*, 1971 RDNR. B. 103.

22 Commission Directive 70/50 of Dec. 22, 1969 O.J. EUR. COMM. 17 (Spec. Ed. 1970(I)).

different from the Commission's was advocated by Ulmer,[23] but that position generally, is not now discussed.[24] It, like the other views, was quickly overtaken by the case law of the Court of Justice.

It is still useful, however, to examine the Commission's Directive for definitions of national measures that in the Commission's opinion are always forbidden. For this same purpose, the Court of Justice also often refers to the Directive. In addition, the principle of proportionality used by the Commission plays a large role in the case law of the Court of Justice, although it is developed differently. The Court of Justice, however, does not seem to share the Commission's basic view that equally applicable measures do not, in principle, fall under the prohibition of Article 30; nonetheless, the Court of Justice is indeed arriving at a gradually clearer midway point in the controversy over the interpretation of Article 30. This midway point differs as much from the Commission's view as from all the views put forward by the academicians prior to 1974. As far as Article 34 is concerned, the case law of the Court to date leaves somewhat more room for uncertainty. The views expressed in this article on this area of the law, therefore, will be unavoidably less assertive.

The Aims of This Article

Because the Court of Justice does not regard itself as being bound by the Commission's transitional Directive,[25] this article will not deal with the Directive as such.[26] The Directive, however, will be indirectly examined to the extent that the case law of the Court of Justice agrees with it. This article, therefore, deals principally with the case law of the Court of Justice. Since a complete study of the sixty or so judgments concerning Articles 30-36 would require a book,[27] a certain degree of selectivity here is unavoidable. Although the *Dassonville* case[28] gave everyone, including the Commission, the impression that it applied to

---

23 Ulmer, *Zum Verbot Mittelbarer Einfuhib Eschränkungen in Enga-Vertrag*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS [A.W.D.] 349.

24 *E.g.*, it is not discussed in Ehlermann's treatment of the subject. *See* note 17 *supra*.

25 Directive 70/50, note 22 *supra*.

26 For a detailed treatment of the most important Directives, see van Themaat's discussion in [1970] S.E.W. 258.

27 For a detailed discussion of the cases up to July, 1979, see Gormley, *Articles 30-36 of the E.E.C. Treaty: the cases and some problems with special reference to their relationship with the Articles of the Treaty concerning competition* (a dissertation for the Middle Temple, London, written under the supervision of Verloren van Themaat, Aug., 1979).

28 Procureur du Roi v. Dassonville, [1974] E. Comm. Ct. J. Rep. 837, [1974] 2 Comm. Mkt. L.R. 437.

Article 34 as well as Article 30, it is now clear from the *Groenveld* case[29] that it does not. Thus, *Dassonville* will be reexamined. After an overview of the main points of the case law relating to Article 30 in Part 2 of this article, Part 3 will deal with the cases concerning Article 34. In Part 4 the case law on Article 36 will be examined, and Part 5 will address the question of whether the Member States alone or the Member States together with the Community, are the addressees of Articles 30-36. Part 6 deals with the relationship of Articles 30-36 with other parts of the Treaty, while in Part 7 a summary and evaluation of the most important conclusions can be found.

II. THE CASE LAW ON ARTICLE 30

The Basic Principle in Dassonville *and the Rule of Reason*

Although there were some cases prior to *Dassonville*, it was only with this judgment that the case law on Article 30 came to life. Since the most important elements of the subsequent case law were set forth in *Dassonville*, examination of the case law will begin from there. As mentioned above, *Dassonville* set forth the basic principle that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[30] *Dassonville* involved scotch whisky purchased in France and imported into Belgium without an accompanying British customs certificate of origin as required by Belgian Law. The basic principle in the judgment, however, was clearly not restricted to the facts of the case. It seemed to apply equally to quantitative restrictions on exports and measures having that equivalent effect. But as was mentioned above, since the judgment in *Groenveld* this view is no longer tenable in all circumstances.

It is intended below to return to the general application of the principle in *Dassonville*. At this stage, however, it should be noted that the Court of Justice—differing here from the Commission—made no exception in principle for measures equally applicable to both domestic and imported goods. To this extent at least, it seems that the Court followed the wider interpretation, propounded by Waelbroeck and VerLoren van Themaat, of the concept of measures of equivalent effect

[29] P.B. Groenveld BV v. Produktschap Voor Vee en Vlees, [1979] E. Comm. Ct. J. Rep. 3409, [1981] 1 Comm. Mkt. L.R. 207.

[30] Procureur du Roi v. Dassonville, [1974] E. Comm. Ct. J. Rep. at 852, [1974] 2 Comm. Mkt. L. R. at 453-54.

to quantitative restrictions.[31]

In *Dassonville*, however, the Court of Justice went on to qualify its statement of a basic principle adding a newly formulated exception:

> In the absence of a community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is, however, subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hinderance to trade between Member States and should, in consequence, be accessible to all Community nationals.[32]

This rule of reason, nevertheless, was limited by the assertion that "whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[33] The Court of Justice, in later cases,[34] added a principle of proportionality. This principle provided that reasonable measures resulting in trade barriers, could be no broader than needed to accomplish the reasonable purpose for which the measures were introduced.

Certain observations can be made about this rule of reason. First, this rule of reason is applicable only when the reasonable aim pursued by the national measure, is not governed by a Community measure. This restriction is explicable when it is remembered that where a Community measure exists, the relevant national measure is tested, on the one hand, against the basic principle in *Dassonville* and, on the other, against the Community measure. This assertion is based first on the *de Peijper* case,[35] where the Court of Justice asserted that harmonizing Directives based on Article 100 of the Treaty did not, and could not, intend to relieve the Member States of their rather important residual competence in the field of public health left to them by Article 36. However, where harmonizing Directives have been adopted in the technical and administrative fields, as well as with respect to other obstacles to trade, and where Community rules have been provided, the Court of Justice has held that recourse to the provisions of Article 36 is no longer justified. The Court of Justice further held that the appropri-

---

31 *See* notes 18-19 *supra*.

32 Procureur du Roi v. Dassonville, [1974] E. Comm. Ct. J. Rep. at 852, [1974] 2 Comm. Mkt. L. R. at 454.

33 *Id.*, [1974] 2 Comm. Mkt. L. R. at 454.

34 *See, e.g.*, Officier van Justitie v. Adriaan de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976] 2 Comm. Mkt. L. R. 271; Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

35 *See* note 24 *supra*.

ate controls or protective measures must conform to the scheme set forth in the Community Directive concerned.[36] Nevertheless, harmonizing directives do not and cannot aim at extending the very considerable powers left to Member States in the field of public health by Article 36. This confirms that the restriction in the rule of reason in *Dassonville*, that applies only when no community measure exists, can only mean that where a Community measure does exist, the general principle applies once more and any further requirements of Community law must be respected. Further support for this assertion can be found in the wide-ranging case law of the Court of Justice concerning Article 30, and the common organization of the market in certain argricultural sectors and the consequent further limitation of national competence.

The Court of Justice, as mentioned above, has expressly stated in an agricultural case, that even the Community as such is bound by the rules on the free movement of goods. Even this principle, however, is not without certain exceptions. The Treaty provides, for example, in Articles 103(4), 108 and 115, several express and implicit opportunities for Community institutions to derogate from the provisions on the free movement of goods. It seems from *Les Commissionaires Réunis* that these exceptions must be strictly interpreted. The possibility, however, cannot be *a priori* ruled out that in certain circumstances, the Court of Justice might accept a system if set forth in a harmonizing Directive that liberalized trade further than the *Dassonville* rule of reason, but nonetheless did not go so far as to fulfill completely the strict requirements of the basic principle of *Dassonville*. The wording of the rule of reason it seems, leaves some room for such a view. The judgment in *de Peijper* seems to exclude only those systems that would be more permissive for the Member States, than is the rule of reason.

The second general observation that can be made about the rule of reason concerns other aspects of its contents. *Dassonville* in effect, dealt with a measure for the prevention of unfair competition. Barents has pointed out[37] that the prevention of unfair competition, as well as two other national policy aims can, in principle, benefit from the rule of reason. Those other policy aims are the effectiveness of fiscal controls and the protection of consumers. This list, however, is by no means

---

36 Pubblico Ministero v. Tullio Ratti, [1979] E. Comm. Ct. J. Rep. 1629, [1980] 1 Comm. Mkt. L.R. 96. *See* notes 37, 103 *infra*.

37 [1979] S.E.W. at 750. *See also* Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L. R. 464; Gilli & Andres, [1980] E. Comm. Ct. J. Rep. 2071, [1981] 1 Comm. Mkt. L. R. 146.

exhaustive. Environmental protection and the conservation of biological resources, for example, also could be added.[38] Nevertheless, it seems clear from the case law on Article 36, *inter alia*, that national economic policy measures for regulating the market should not be brought within the ambit of the rule of reason.[39] Such a wide interpretation of the rule of reason would be unreasonable since the Treaty, for example, in Articles 43, 75, 103 and 235, allows the Community itself ample opportunity to take economic control measures that will serve acceptable national policy aims, without giving rise to quantitative restrictions between the Member States. The criterion of reasonableness formulated by the Court of Justice in its exception to the basic principle in *Dassonville*, as has been suggested above, seems to indicate that trade must not be restricted further than is required to accomplish the purpose regarded as reasonable. The exception further indicates that arbitrary discrimination between domestic products and imports, or against imports from different Member States, will not be tolerated.

There have been two recent cases concerning details of the rule of reason. In the first case, *E.C. Commission v. Belgium*,[40] the Commission took Belgium to the Court of Justice over the same Regulations that had been at issue in *Dassonville*. The Court of Justice, however, held that Belgium had in fact amended the Regulations sufficiently to satisfy the criterion of reasonableness.[41] The second case, *Fietje*,[42] concerned the labelling of liqueurs. There the Court of Justice examined a prohibition of the sale of alcoholic drinks imported from other Member States under a designation different from that required by national law. The original labels were legally acceptable in the exporting Member State. The prohibition, however, had the effect of necessitating alterations to the label on the imported drinks. The Court of Justice held that such a prohibition could indeed fall within the ambit of Article 30 in those cases where the original labels provided information equivalent to that demanded by the national legislation in question. The Court of Justice also reaffirmed its view, that even an "all exemptions granted" attitude on the part of the national authorities, would

38 Cornelius Kramer, [1976] E. Comm. Ct. J. Rep. 1279, [1976] 2 Comm. Mkt. L. R. 440. *See also* Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

39 *Contra* Van Empel, *supra* note 1, at 222.

40 E.C. Commission v. Belgium, [1979] E. Comm. Ct. J. Rep. 1761, [1980] 1 Comm. Mkt. L.R. 216.

41 *Id.* at 1786-87, [1980] 1 Comm. Mkt. L.R. at 224.

42 Fietje, [1980] E. Comm. Ct. J. Rep. 3839.

not suffice to make the prohibition acceptable.[43]

Applying the Dassonville *Basic Principle in Areas Where no Common Organization Exists: Certain Other Aspects*

Generally in areas where no common organization of the market exists, the cases fall into two major groups (various other groups are discussed with particular reference to Article 36 below). The first group concerns straight import bans. In several notable cases,[44] the Court of Justice has held import restrictions on such varying products as bananas, potatoes and lamb that originated in other Member States, incompatible with Community law. Since the end of the transitional period, any national market rules still existing absent a Community common organization of the market, may not derogate from the Treaty provisions on the free movement of goods.

The second general group of cases concerns national price-regulatory measures. There is a certain amount of difficulty here because in most of these cases a common agricultural organization did indeed exist. Consequently, it is sometimes unclear to what extent the relevant national measures were incompatible with Article 30, and additionally, to what extent those same measures were incompatible with the scheme for common organization of the market. For the moment, therefore, only cases not involving a common agricultural policy will be discussed.

The leading case of *INNO v. ATAB*[45] is most instructive here. In Belgium, as commonly occurs on the Continent, manufactured tobacco is retailed bearing tax labels. Belgian law prohibited the sale of tobacco at any price other than that printed on the label, because that label price determined the tax on domestically produced and imported tobacco products. With respect to the Belgian law, the Court of Justice stated that:

> Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic

---

[43] *Id.* at 3854.

[44] Charmasson v. Minister for Economic Affairs & Finance, [1974] E. Comm. Ct. J. Rep. 1383, [1975] 2 Comm. Mkt. L.R. 208; E.C. Commission v. United Kingdom, [1979] E. Comm. Ct. J. Rep. 1447, [1979] 2 Comm. Mkt. L.R. 427; Meijer v. Department of Trade, [1979] E. Comm. Ct. J. Rep. 1387, [1979] 2 Comm. Mkt. L.R. 398; E.C. Commission v. France, [1979] E. Comm. Ct. J. Rep. 2729, [1980] 1 Comm. Mkt. L.R. 418.

[45] NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak, [1977] E. Comm. Ct. J. Rep. 2115, [1978] 1 Comm. Mkt. L.R. 283.

products.[46]

Similarly, national price label restrictions would generally have only internal effects, if prices were freely chosen by the manufacturer or importer, and imposed on the consumer by a national legislative measure without distinction between domestic and imported products. The possiblity could not be excluded, however, that in certain circumstances such a system might be capable of affecting intra-Community trade.

Furthermore, the Court of Justice stated that the effect of Article 5 prevented Member States from enacting measures that would enable private undertakings to escape from the provisions of Articles 85-94.[47] In any event, even if national legislative provisions encouraged abuse of a dominant position, these provisions also would generally be incompatible with Articles 30-34 of the Treaty.[48]

While *INNO v. ATAB* concerned maximum prices and the Court's attitude toward fixed prices (imposed by the State on private enterprise) having a restrictive or distorting effect on competition, the *van Tiggele* case[49] involved minimum prices fixed for Dutch gin and *vieux*. In *van Tiggele*, the fixed minimum price applied to domestic and imported products without distinguishing between the two. Nevertheless, the Court of Justice noted that such a fixed minimum could place imported products at a disadvantage as compared with domestic products. The Court of Justice then held, that a fixed minimum price of this kind, to the extent that it prevented the lower cost of imported products from being reflected in the retail price of those products, would be regarded as a measure having an effect equivalent to a quantitative restriction.[50] Even the possibility of exemption for imported goods would not make the fixed minimum price incompatibile with the basic principle of the free movement of goods, because the necessary administrative procedures would still constitute a hindrance to trade.[51]

Although these preliminary rulings did not actually address the issue, it clearly can be seen that Article 30 forbids national price regulatory measures and restrictions on competition imposed on companies by the State to the extent that: (1) they permit a lower profit margin for imported products than for domestic products (in the case of maximum prices); (2) they hinder consumers taking advantage of lower cost prices

---

46 *Id.* at 2148, [1978] 1 Comm. Mkt. L.R. at 284.

47 *Id.* at 2145, [1978] 1 Comm. Mkt. L.R. at 315-16.

48 *Id.* at 2148, [1978] 1 Comm. Mkt. L.R. at 316.

49 Openbaar Ministerie of the Kingdom of the Netherlands v. van Tiggele, [1978] E. Comm. Ct. J. Rep. 25, [1978] 2 Comm. Mkt. L.R. 528.

50 *Id.* at 39, [1978] 2 Comm. Mkt. L.R. at 546.

51 *Id.* at 40, [1978] 2 Comm. Mkt. L.R. at 547.

for imported products (in the case of minimum prices); or (3) they could lead to restriction or distortion of competition that could adversely affect trade between Member States (as has been shown in cases relating to Articles 85 and 86 of the Treaty).

Finally on this point there is the *Danis* case[52] involving a Belgian price-notification decree. Part of the scheme there included the power to suspend price rises for a period of two months in certain circumstances.[53] The defendants claimed that the duty of notification imposed on them by the ministerial order in question, amounted to a measure forbidden under Article 30.[54] The Court of Justice held that the system of price control involved in *Danis* constituted such an Article 30 forbidden measure "to the extent to which it [made] the marketing of products imported from another Member State either impossible or more difficult than that of national products or [had] the effect of favouring the marketing of national products to the detriment of imported products."[55]

After the above look at some of the important cases on price regulations outside commonly-organized sectors, one can appreciate that the Court of Justice does not share the Commission's view that measures equally applicable to domestic and imported products should not, *in principle*, fall within the ambit of Article 30.[56] Instead it is the very nature of price regulatory measures—and especially of maximum-price regulations—that causes them not to be *per se* incompatible with Article 30. Unless actual provisions of particular maximum-price regulations lead to a different conclusion, they always leave open the possibility that domestic and imported products may be sold at lower prices unimpeded. The chances of competition then, depend on normal market forces. An actual restriction of trade, however, could result either from measures that actually had the effect of limiting profit margins for imported products, or from fixing prices that leave no satisfactory profit-margin for higher quality imported products that cost more to produce. It seems that this train of thought is not incompatible with

52 Openbaar Ministerie v. Danis, [1979] E. Comm. Ct. J. Rep. 3327, [1980] 3 Comm. Mkt. L.R. 492.

53 *Id.* at 3330, [1980] 3 Comm. Mkt. L.R. at 494.

54 *Id.* at 3332-33, [1980] 3 Comm. Mkt. L.R. at 495-96.

55 *Id.* at 3340, [1980] 3 Comm. Mkt. L.R. at 507.

56 This would certainly seem to be the case as far as trading rules in general are concerned. Where obstacles to intra-Community trade resulting from differences between national laws which have not yet been harmonized are concerned, the Court of Justice seems more willing to adopt a criterion based purely on discrimination. *See* S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiseaux de la Haute-Saône et du Territoire du Belfort, [1979] E. Comm. Ct. J. Rep. 897, 906, [1980] 3 Comm. Mkt. L.R. 337, 375.

the basic principle in *Dassonville*. Fixed minimum prices by their nature, nevertheless, are far more likely to be deemed incompatible with Article 30, since such fixed minimums could hinder lower cost imports.[57]

Complications in the Agricultural Sector

Interpreting case law on Articles 30 and 34 in the agricultural sector is complicated by the fact that whenever a common organization of the market exists, the national measures are tested cumulatively against both Article 30 (or Article 34 depending on the case) and the relevant agricultural Regulations. There are differences of opinion as to how relevant this large body of case law is in sectors other than agriculture. These differences of opinion stem from the fact that it is often unclear to what extent the Court of Justice based its judgment on Article 30 or 34, and to what extent it based its judgment on the incompatibility of the national measure with the relevant scheme of common organization. Primarily with respect to Article 34, legal thinking—including that of the Commission—has been along wrong lines, as will be shown below. The following discussion of agricultural case law will be limited to only those cases relating to the interpretation of Article 30.[58]

That case law had already started by the time of *Dassonville* with the *International Fruit* case.[59] In *International Fruit*, the Court of Justice held that Articles 30 and 34 prohibited—apart from the exceptions provided for by Community law itself—the application of a national provision requiring, even as a formality, import or export licences or any other similar procedure to intra-Community trade.[60] Even a system where licences were automatically granted upon request without being subjected to policy considerations, was within this prohibition unless expressly or implicitly permitted by primary or secondary Community law.[61] This judgment, based only on Articles 30-34, is also of

---

57 For further discussion of the problems associated with price regulations, see MESTMAECKER, VEREINBARHEIT VON PREISREGELUNGEN AUF DEM ARZNEIMITTELMARKT MIT DEM RECHT DER EUROPAISCHEN WIRTSCHAFTSGEMEINSCHAFT (1979); WAELBROECK, LES REGLEMENTATIONS NATIONALES DE PRIX ET LE DROIT COMMUNAUTAIRE (1975); and the reaction to Waelbroeck by VAN THEMAAT, *De Gemeenschapsrechtelijke grenzen van het nationale prijsbeleid*, 1976 S.E.W. 401.

58 One particular technical point should be mentioned here. Before the end of the transitional period, agricultural regulations incorporated the wording of Articles 30 and 34. This was because Article 30 was not yet directly applicable. Since the end of the transitional period, such repetition is unnecessary and is no longer found in the Regulations.

59 International Fruit Company NV v. Produktschap voor Groenten en Fruit, [1971] E. Comm. Ct. J. Rep. 1107.

60 *Id.* at 1116.

61 *Id.*

significance outside the agricultural sector. On the basis of *Les Commissionaires Réunis*, it seems that secondary Community law could only authorize such action if it were based firmly on primary Community law, for example Article 103(4).

Price regulatory measures have been the subject of a large number of judgments inside the agricultural sector as well as out.[62] An overview of these judgments gives a clear impression that even the Court of Justice itself has come to give greater weight both to Article 30 and to the system of agricultural organization. Indeed, a clear evolution can be seen in the case law. In *Galli*,[63] the Court of Justice accepted the proposition that in areas where a common organization of the market existed—and in particular whenever this was based on a common price system—the Member States no longer had the power to intervene through unilateral provisions in the mechanism of price formation set up by the Community system. Thus, since the common organization of the market effectively excluded the competence of the Member States, any testing of the contents of the national measures against either Article 30 or the relevant system common organization became superfluous. This question regarding to what extent the working of the common agricultural policy excludes any national interference in the regulation of the market is also important in matters other than those of price regulation. As far as price regulatory measures are concerned, however, it seems that the Court of Justice retreated from this extreme position in *Tasca*[64] and *SADAM*.[65] From these two cases forward, the Court of Justice tested national measures against Article 30 (or its equivalent in the relevant agricultural Regulation), as well as against the system of the agricultural Regulation concerned.

In testing the national measure against the system of the agricultural Regulation, the Court of Justice looks at whether the national price-measure jeopardizes the Community system—for example the payment of agreed minimum prices for sugarbeets or the sale of certain agricultural produce at agreed intervention prices—directly or even in-

62 *See, e.g.*, Galli, [1975] E. Comm. Ct. J. Rep. 47, [1975] 1 Comm. Mkt. L.R. 211; Tasca, [1976] E. Comm. Ct. J. Rep. 291, [1977] 2 Comm. Mkt. L.R. 183; Società SADAM v. Comitato Interministeriale dei Prezzi, [1976] E. Comm. Ct. J. Rep. 323, [1977] 2 Comm. Mkt. L.R. 183; Procureur du Roi v. Dechmann, [1978] E. Comm. Ct. J. Rep. 1573, [1979] 1 Comm. Mkt. L.R. 562; Grosoli, [1979] E. Comm. Ct. J. Rep. 2621; Procureur Général v. Hans Buys, [1979] E. Comm. Ct. J. Rep. 3203, [1980] 3 Comm. Mkt. L.R. 493; Gaetano Toffoli, and Others v. Regione Veneto, [1979] E. Comm. Ct. J. Rep. 3301; Openbaar Ministerie v. Danis and Others, [1979] E. Comm. Ct. J. Rep. 3327, [1980] 3 Comm. Mkt. L.R. 492.

63 [1975] E. Comm. Ct. J. Rep. 47, [1975] 1 Comm. Mkt. L.R. 211.

64 [1976] E. Comm. Ct. J. Rep. 291, [1977] 2 Comm. Mkt. L.R. 183.

65 [1976] E. Comm. Ct. J. Rep. 323, [1977] 2 Comm. Mkt. L.R. 183.

directly. An important development, also of significance outside the agricultural sector, can be perceived when testing price-measures against Article 30. The Court of Justice in *Tasca*, after repeating the basic principle of *Dassonville*, held that a maximum price, to the extent it applied to imported products, was incompatible with Article 30 whenever that price was fixed at such a low level, that tradesmen wishing to import the product into the relevant Member State could do so only at a loss. Since the judgment in *Dechmann*,[66] this "loss-price criterion" has been strengthened by the further requirement that the maximum price (*in casu* a maximum profit margin for retailers) takes sufficient account of the retailer's costs as well as ensure that the retailer obtain fair recompense for his activities. If the profit margin failed to meet these conditions and maximum retail selling prices were frozen, then the common organization's price mechanism could be affected at prior stages. Additionally, intra-Community trade could be affected by reduced imports. This, then, is a fine example of testing price measures by reference to Article 30, on the one hand, and to the Common organization affected on the other. It should be noted, however, that national maximum retail profit margins are more likely to affect the common organization at prior economic stages, than they are to lead to a reduction in imports. The *Dechmann* case illustrates that testing by reference to the common organization affected, will more likely produce further restrictions on the national competence to regulate prices, than will testing by reference to Article 30. The criterion of a sufficient profit margin would seem to apply *mutatis mutandis* to the application of Article 30 to price regulatory measures aimed at wholesalers, since they are more important than retailers as far as imports are concerned. The significance of this may indeed extend well beyond the agricultural sector, despite the fact that the criterion is based on both Article 30 and the common organization of the market.

The case law of the Court of Justice in this field has continued to develop further. In its recent judgment in *Buys*,[67] concerning the effects of a price-freeze on milk-feed products, the Court of Justice reaffirmed its *SADAM*,[68] *Dechmann*[69] and *Grosoli*[70] judgments. Furthermore, it held that the rules on the free movement of goods contained in Articles 30-34, prohibited the application of certain national price-freeze rules to the products concerned if they came under the common

[66] [1978] E. Comm. Ct. J. Rep. 1573, [1979] 1 Comm. Mkt. L.R. 562.
[67] [1979] E. Comm. Ct. J. Rep. 3203, [1980] 3 Comm. Mkt. L.R. 493.
[68] [1976] E. Comm. Ct. J. Rep. 323, [1977] 2 Comm. Mkt. L.R. 183.
[69] [1978] E. Comm. Ct. J. Rep. 1573, [1979] 1 Comm. Mkt. L.R. 562.
[70] [1979] E. Comm. Ct. J. Rep. 2621.

organization of the relevant agricultural market. The national price-freeze rules prohibited were those that excluded the possibility of passing on in selling prices any increase in the purchase prices of raw materials or finished products imported from another Member State when, as a result of that freeze, prices were at such a level that the marketing of the imported products became either impossible or more difficult than that of national products. Thus, it became clear that the criterion was not restriced to only those circumstances where a loss would be incurred. However, the Court of Justice altered its position in *Toffoli*.[71] This case arose from a national measure that fixed the regional producer price for cow's milk.[72] The decision to fix the milk price had been made by the chairman of the Regional Council of Veneto, Italy. The Court of Justice did not examine whether this national measure was compatible with Articles 30-34. Instead, it proceeded to examine whether this national measure was compatible with the provisions of the common organization involved. Even more recently in *Kefer & Delmelle*,[73] the Court of Justice confirmed the views it adopted in such cases as *Dechmann* and *Grosoli*.

The other judgments in the agricultural sector that also concern Article 30 cover a variety of subjects. A number of these cases, especially those concerning inspection rules, can be better examined in connection with Article 36 below.

The rule of reason in *Dassonville* played a very definite part in the French wine cases.[74] In those cases, French wine rules were upheld in view of the lacunae in the Community rules with respect to the over-alcoholization of wines. The Court of Justice deemed these French rules reasonable subject to two conditions: first, that the presumption of over-alcoholization be rebuttable, and second, that the presumption be applied in such a way as not to disadvantage wines from other Member States.

The rule of reason in *Dassonville*, therefore, need not always exclude a complementary national measure. The contention may have to be modified in light of the judgment in *Vriend*.[75] The rule of reason

---

71 [1979] E. Comm. Ct. J. Rep. 3301.

72 *Id.* at 3303.

73 Procureur du Roi v. Kefer, [1980] E. Comm. Ct. J. Rep. 103.

74 Procureur Général à la Cour d'Appel, Bordeaux v. Arnaud, [1975] E. Comm. Ct. J. Rep. 1023, [1975] 2 Comm. Mkt. L.R. 490; Procureur de la République à la Court d'appel Aix-en Provence et Fédération nationale des producteurs de vins de table et de vins de pays v. Lahaille, [1975] E. Comm. Ct. J. Rep. 1053.

75 [1980] E. Comm. Ct. J. Rep. 327, [1980] 3 Comm. Mkt. L.R. 473.

also played a part in the *Kramer* judgment.[76] The Court of Justice in *Kramer*, deemed national North Sea fishing quotas, set in anticipation of Community action, temporarily justified because the quotas sought to conserve fish stocks in the North Sea.

In its second *Rivoira* judgment,[77] the Court of Justice decided that under Regulation 2513/69, the power to fix quotas on imports from third countries only applied to imports coming directly from those third countries. Furthermore, this power did not apply to goods already in free circulation within the Community (since that would be contrary to basic principles) unless the Commission, acting under Article 115, had expressly authorized such action. Following its first *Rivoira* judgment,[78] the Court of Justice added that an importer could indeed be asked certain questions regarding the country of origin. It limited the inquiry of the importer, however, to questions indicating origin in so far as the importer knew it, or could reasonably be expected to know it. Finally, any further penalties for non-compliance could not be disproportionate to the purely administrative nature of the offense. A comparison in this last respect may be drawn with the judgment in *Criel*,[79] which did not concern the agricultural sector.

III. The Case Law on Article 34

Case Law Outside the Agricultural Sector

When the Court of Justice formulated the basic principle in *Dassonville*, it was thought that it would apply also to Article 34. With the benefit of hindsight, however, following the *Bouhelier* judgment[80] concerning Article 34 in a non-agricultural context, there should have been some doubt about this. In *Bouhelier*, the Court of Justice held that the words "quantitative restrictions and measures having equivalent effect" in Article 34

> must be understood as applying to rules adopted by Member States which require in respect only of the export of certain goods either a licence or a standards certificate which is issued in place of such licence and may be refused if the quality does not conform to certain standards laid down by

---

76 Kramer, [1976] E. Comm. Ct. J. Rep. 1279, [1976] 2 Comm. Mkt. L.R. 440.

77 Procureur de la République v. Rivoira, [1979] E. Comm. Ct. J. Rep. 1147, [1979] 3 Comm. Mkt. L.R. 456.

78 Cayrol v. Rivoira, [1977] E. Comm. Ct. J. Rep. 2261, [1978] 2 Comm. Mkt. L.R. 253.

79 Criel v. Procureur de la République, [1976] E. Comm. Ct. J. Rep. 1921, [1977] 2 Comm. Mkt. L.R. 535.

80 Procureur de la République de Basançon v. Bouhelier, [1977] E. Comm. Ct. J. Rep. 197, [1977] 1 Comm. Mkt. L.R. 436. *See also* Procureur de la République de Basançon v. Bouhelier, [1979] E. Comm. Ct. J. Rep. 3151, [1980] 2 Comm. Mkt. L.R. 541.

> the body issuing the said certificate even if such certificate does not give rise to the imposition of a charge.[81]

However, since the case did not concern measures *equally* applicable to domestic and imported products as well as those products destined for export, it perhaps may be understandable that doubts about the application of the basic principle in *Dassonville* did not arise at the time.

Case Law Involving the Agricultural Sector

The first judgment of the Court of Justice in the agricultural sector involving Article 34 was the *van Haaster* case.[82] This case in fact concerned such equally applicable measures referred to above, and in particular related to a national regulation restricting the cultivation of hyacinth bulbs. The system in issue was held incompatible with Article 10 of the relevant Community Regulation.[83] Interestingly, when compared with the later judgment in *Dassonville*, *van Haaster* scrutinized a restriction of production rather than an equally applicable restriction on distribution. The Court of Justice viewed this restriction on production consistently with the later *Dassonville* criteria as able to affect trade between Member States, even if only indirectly or potentially. A restriction on production by its very nature can always restrict the opportunities for export, especially in the bulbs sector where there is a great deal of export trade. An analogous judgment concerning poultry was set forth in *van den Hazel*.[84] In this case, the Court of Justice held that the relevant national measure was incompatible with the Community system. The national measure was viewed as "constituting quantitative restrictions capable of affecting, potentially at any rate, the system of trade as it has been set up by the organization or the market."[85]

The adverse effect present in *van den Hazel* seemed to be inherently a potential hindrance to exports, bearing in mind the formulation of the judgment. Because of this, the case apparently drew even more of an analogy with the basic principle in *Dassonville*. In fact, the Court of Justice seemed to be expanding the basic principle of *Dassonville* in paragraph 22 of its judgment[86] where it brought discrimination be-

---

81 [1977] E. Comm. Ct. J. Rep. at 205, [1977] 1 Comm. Mkt. L.R. at 445.

82 Officier van Justitie v. Van Haaster, [1974] E. Comm. Ct. J. Rep. 1123, [1974] 2 Comm. Mkt. L.R. 521.

83 *Id.* at 1135, [1974] 2 Comm. Mkt. L.R. at 534.

84 Officier van Justitie v. van den Hazel, [1977] E. Comm. Ct. J. Rep. 901, [1980] 3 Comm. Mkt. L.R. 12.

85 *Id.* at 910, [1980] 3 Comm. Mkt. L.R. at 22.

86 *Id.* at 911, [1980] 3 Comm. Mkt. L.R. at 23.

tween producers and consumers, and distortions in trade within the concept of quantitative restrictions capable of affecting trade.

In 1979 in the *Groenveld* case,[87] the Court of Justice dealt with a prohibition on the processing of horsemeat. There the Commission and the Advocate-General had arrived at a conclusion, as far as incompatabililty with Article 34 was concerned,[88] similar to the one adopted in both the *van Haaster* and *van den Hazel* cases. In *Groenveld*, however, the Court of Justice declined to follow these cases. Instead, it held that a national regulation prohibiting meat-products producers from stocking, dealing in or processing horsemeat was not, in the present state of Community law, incompatible with Article 34, as long as this compatibility was further conditioned on the requirement that there be no discrimination in treatment between produce destined for export and that destined for home use.[89] The reasoning set forth in *Groenveld* offers little indication of the motives that led the Court of Justice to the above conclusion regarding Article 34. Nevertheless, the judgment certainly showed that the Court was departing from the line it had taken in *van Haaster* and *van den Hazel*. In *Groenveld*, the Court of Justice initially pointed out that the horsemeat sector, unlike the plant and poultry sectors, was not subject to a specific Community Regulation.[90] Had the horsemeat sector been subject to such a Regulation, depending on its content, the Court of Justice might well have decided *Groenveld* differently. The language in the case, "in the present state of Community law," would seem to support this view.

Whenever a common organization of the market exists, all market conditions must be the same for all participants in that market throughout the Community and must thus comply both with Articles 30-34, as interpreted in the *Dassonville* formula (the first condition for application of the rule of reason was being fulfilled) and with the more or less interventionist system of the common organization. For other cases the judgment in *Groenveld* offers only a very general reason for the restrictive interpretation of Article 34. In paragraph 7 of the *Groenveld* judgment, for example, the Court of Justice stated that Article 34

> concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a *difference* in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for

---

87 P.B. Groenveld BV v. Produktschap voor Vee en Vlees, [1979] E. Comm. Ct. J. Rep. 3409, [1979] 1 Comm. Mkt. L.R. 207.

88 *Id.* at 3415-16, [1979] 1 Comm. Mkt. L.R. at 214.

89 *Id.* at 3416, [1979] 1 Comm. Mkt. L.R. at 214.

90 *Id.* at 3415, [1979] 1 Comm. Mkt. L.R. at 213.

> natural production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition like that in question which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export.[91]

Thus it can be seen that the Court of Justice made a significant deviation from the broad view of restrictions on trade taken in the *Dassonville* judgment, in favor of the rather narrow criterion of discrimination. No precise reasons for this change of view were given in the judgment. Although *Groenveld* was a judgment of the Second Chamber rather than of the full Court, it is no less authoritative.

Perhaps the explanation lies in the fundamental difference between the situations existing under Article 34 and the situations possible under Article 30. This particular explanation has already been suggested elsewhere.[92] Equally applicable measures that restrict distribution and affect imports, by their nature, can in fact be disguised restrictions on imports, or at least produce the same restrictive effect. Thus, the aim is to be especially vigilant against protectionism. Nevertheless, it is true that production restrictions "irrespective of the country of destination," similarly by definition, always restrict exports.[93] A restriction on production irrespective of the product's destination, however, is not usually designed to protect producers or even consumers. In principle, only measures that applied solely, or mainly to products bound for export could have such effects.

Since a prohibition of the relevant processing ban in *Groenveld* could have caused a real restriction of exports, (paragraph 8 of the judgment) it is preferable, based on the general formulation of paragraph 7 quoted above, to refrain from drawing too many general conclusions from this case. Nevertheless, if the United Kingdom or the Netherlands, for example, during a general shortage of either oil, or natural gas production or distribution (whether for domestic or foreign use), raised prices for North Sea oil or gas, irrespective of whether the oil or gas concerned was for domestic or foreign use, they could quite reasonably rely on *Groenveld* and thus resist any damage action for losses resulting from the price increase.

Although *Groenveld* is potentially of great importance outside the

---

91 *Id.* at 3415, [1979] 1 Comm. Mkt. L.R. at 213 (emphasis added).

92 This explanation has been suggested by van Themaat in [1980] S.E.W. at 142.

93 *See, e.g.*, Officier van Justitie v. van Haaster, [1974] E. Comm. Ct. J. Rep. 1123, [1974] 2 Comm. Mkt. L.R. 521; Officier van Justitie v. van den Hazel, [1977] E. Comm. Ct. J. Rep. 901, [1980] 3 Comm. Mkt. L.R. 12.

agricultural sector, it must be emphasised that a certain degree of caution should be exercised before too many general conclusions are drawn from it. Even the above example from the field of energy shows that the application of the *Groenveld* doctrine to other sectors may have certain disadvantages for consumers in other Member States, even though there is no discrimination involved as to the country of destination.

The judgments in *Pigs Marketing Board v. Redmond*[94] and *Pigs & Bacon Commission v. McCarren & Co.*[95] concern, *inter alia*, the problem of whether national market regulations in the same sector as an existing common organization are either incompatible with Articles 30-34, on the one hand, or with the common organization as such on the other. In both cases, the Court of Justice held that the abolition of restrictions on intra-Community trade formed an integral part of the relevant Community legislation, but that the national measures were also incompatible with the common organization. The examination regarding Article 34, therefore, was incorporated with the examination of the whole system of the common organization, just as was done in the *van Haaster* and *van den Hazel* cases.

An even more recent case, *Vriend*,[96] exhibits a still greater similarity to *van Haaster* and *van den Hazel*. In that case a Dutch magistrate for Economic Matters convicted Vriend for selling chrysanthemum cuttings while not registered with the N.A.K.S. (the Dutch plant-testing service).[97] According to the Dutch legislation that set up the N.A.K.S., the right to produce (other than for one's own use), deal in or offer for export any "cultivated plant" could be made dependent on registration with an approved supervisory body.[98] Vriend appealed to the Regional Court of Appeal at Amsterdam which then made a reference for a preliminary ruling under Article 177 of the EEC Treaty. Just as in the *van Haaster* case, there existed a common organization of the market regarding the regulation of quality norms and trade in the products involved. In its preamble, the relevant Community Regulation stated that the common organization of the market involved the internal removal of all obstacles to the free movement of the goods in question.[99] Because of this, Treaty articles regarding the lifting of tariff and trade restrictions (and in particular Articles 30-34) were regarded as an inte-

94 [1978] E. Comm. Ct. J. Rep. 2347, [1979] 1 Comm. Mkt. L.R. 177.
95 [1979] E. Comm. Ct. J. Rep. 2161, [1979] 3 Comm. Mkt. L.R. 389.
96 [1980] E. Comm. Ct. J. Rep. 327, [1980] 3 Comm. Mkt. L.R. 473.
97 *Id.* at 329, [1980] 3 Comm. Mkt. L.R. at 473.
98 *Id.* at 329-31, [1980] 3 Comm. Mkt. L.R. at 473.
99 *Id.* at 338-39, [1980] 3 Comm. Mkt. L.R. at 484.

gral part of the common organization concerned. Paragraph 8 of the judgment in *Vriend* concluded that the relevant common organization was based on the freedom of trade and, therefore, prohibited any national trade measure that restricted, even if only indirectly or potentially, intra-Community trade.[100] Thus paragraph 9 of the judgment regarded trading in cultivated plants that was dependent on registration with a body such as the N.A.K.S., as definitely incompatible with the common organization.[101]

Three comments may be made about *Vriend*. First, this judgment confirms, that even after *Groenveld*, when a common organization of the market exists, the principle of *van Haaster* and *van den Hazel* will be maintained. Thus paragraph 8 of the judgment literally adopts the formulation of the basic principle in *Dassonville*, even as far as Article 34 is concerned. In fact, the Court of Justice dropped the *Dassonville* limitation of "trading rules" and spoke merely of "any national measure." It cannot be stated, however, that the Court of Justice in *Vriend* (this time in plenary session unlike in *Groenveld*), has overruled *Groenveld*, because in *Vriend* there existed a common organization of the market. Nevertheless, the judgment does fall into the line of authority laid down in *van Haaster* and *van den Hazel*.

Second, it should be noted that it was not obligatory membership as such that was held incompatible with Community law. Instead, incompatibility arose from the fact that capacity to trade in the relevant products had been made dependent on membership. This would *not* mean, however, that an arrangement would provide an acceptable national system, if there existed obligatory membership, along with the capacity to trade in the relevant products subject to compliance with the national quality norms laid down in pursuance of Community law. It is clear from *van Haaster* as well as from the reasoning in *Vriend*, that the incompatibility with Community law might remain even in such an alternative situation as that outlined above. Thus a large part of the Dutch agricultural quality legislation might be open to question, at least in those areas where a common organization of the market exists. Thus, only more detailed Community implementing regulations seem compatible with this judgment; certainly national implementing measures anticipating Community measures would be unacceptable. Both the Commission and the Dutch Government argued in favor of the Dutch quality regulations, but the Court of Justice declined to adopt their submissions.

---

100 *Id.* at 339, [1980] 3 Comm. Mkt. L.R. at 485.

101 *Id.*, [1980] 3 Comm. Mkt. L.R. at 485.

The third observation regarding the *Vriend* judgment follows directly from the above. As stated above, obligatory membership as such was not condemned; merely making the capacity to trade dependent on membership, however, was condemned. The existence of the Dutch public organizations (regulatory agencies called *produktschap*) was, therefore, not under attack as such. However even the rules of autonomous producers or company associations may be affected by the developing case law of the Court of Justice, at least whenever they concern areas where a common organization of the market exists.

IV. The Case Law Concerning Article 36

Article 36 in its entirety provides that:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

It follows clearly from the wording of Article 36 that in principle, legislation in the fields specified therein can fall within the prohibitions laid down by Articles 30-34. If this were not the case then Article 36 would be superfluous. Furthermore, the exceptions mentioned are only permitted to the extent that the prohibitions or restrictions on imports, exports or goods in transit are justified on the grounds set out in Article 36. For this reason the exceptions are strictly interpreted. Thus, the Court of Justice held in *Commission v. Italy*[102] (the first *Art Treasures* case) that Article 36, unlike Article 226, is concerned solely with measures of a non-economic nature. As was mentioned earlier, this view is also clear from the rule of reason in *Dassonville*. The concept of public policy in Article 36, therefore, includes neither the economic systems of Member States, nor the legislation designed to implement such systems. Examples of such legislation include price regulatory measures, economic legislation (both generally and in periods of shortages) and also distribution laws. Such measures of a significantly interventionist nature can indeed hinder either directly or indirectly imports or exports. Thus Articles 30-34 apply to these measures in full force, save only for the emergency situations provided for in Articles 103, 108, 109, 223 and 224. The force of the judgment in the first *Art Treasures* case would

[102] [1961] E. Comm. Ct. J. Rep. 317, [1962] Comm. Mkt. L.R. 39.

seem to exclude reliance on Article 36 as the justification for legal restrictions placed on activities such as giving presents, to the extent that such restrictions affected the giving of presents by firms in other Member States. Indeed, the judgment would even seem to exclude attempts to justify other measures aimed at ensuring orderly economic transactions or consumer protection. In these latter two instances, however, the effect of the rule of reason in *Dassonville* may be such as to allow these measures to be upheld.

It is settled law that the provisions of Article 36 cannot be used to escape from the basic rules of any Treaty articles other than Articles 30-34. Particular attempts via Article 36 have been made to evade Articles 12 (abolition of customs duties and charges having an equivalent effect), 85, 86, 92, 95 and 100. With respect to Article 100 it is clear that any technical obstacles to trade removed from the ambit of Articles 30-34 by the operation of Article 36, might remove most of the effectiveness of any harmonization provisions based on Article 100. In other words, the harmonization Directives based on Article 100 cannot expand any competence left to the Member States through the operation of Article 36.[103] The Directives, however, in the interest of liberalizing trade, can further restrict or remove, the competence of Member States under Article 36 to maintain in force certain restrictions on imports and exports. Article 36, therefore, does not give reserved powers to Member States.

Recently, certain developments in the case law in this field have excited particular interest. In connection with German rules requiring a minimum alcohol content for alcoholic drinks, the Court of Justice in *Rewe-Zentrale A G v. Bundesmonopolverwaltung fur Branntwein*[104] stated quite uncontroversially, that absent common rules governing the production and marketing of alcoholic beverages, Member States could deal with these matters themselves. However, the Court of Justice continued:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of pub-

---

[103] *See* Officier van Justitie v. de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976] 2 Comm. Mkt. L.R. 271; Tedeschi v. Denkavit, [1977] E. Comm. Ct. J. Rep. 1555, [1978] 1 Comm. Mkt. L.R. 1; Denkavit v. Minister für Ernahrung, [1979] E. Comm. Ct. J. Rep. 3369, [1980] 3 Comm. Mkt. L.R. 513.

[104] [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494. *See also* Gilli & Andres, [1980] E. Comm. Ct. J. Rep. 2071, [1981] 1 Comm. Mkt. L.R. 146.

lic health, the fairness of commercial transactions and the defence of the consumer.[105]

It is absolutely clear that the above notion must be subject to the application of the second sentence of Article 36. This follows from basic principles. Should additional authority, however, be needed to support this view, it can be found in the fact that the Court of Justice went on to hold that where alcoholic beverages lawfully produced and marketed in one Member State were affected by a minimum alcohol content rule in another Member State, the latter rule could not be compatible with Community law to the extent that it affected the importation of such beverages.[106] The Court of Justice deduced that Article 36 would not aid the alcohol content rules involved, since as they could not be said to be justified by any of the purposes set forth in Article 36. This judgment induced the Commission to issue a statement,[107] basically in response to questions in the European Parliament, regarding the directions that future harmonization activities by the Commission would have to take. The statement also addressed the circumstances where a prohibition of importation and sale in one Member State of a product lawfully produced and marketed in another Member State, would be incompatible with Community law. The Commission's statement provided that where such a product suitably and satisfactorily fulfils the legitimate objective of a Member State's own rules (such as was mentioned in the above quotation from the judgment in *Rewe*), a prohibition by the importing country of its sale cannot be justified by claiming that the imported product fulfils the objective of the national rules in a way different from that in which domestic products do.[108] It would require another article to comment on all the possible implications of this important statement.

Most of the case law on Article 36 has been concerned with patents, trademarks, copyright and analogous matters; other cases have concerned the exceptions based on public health, animals and plants[109]

---

105 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. at 662, [1979] 3 Comm. Mkt. L.R. at 508-09.

106 *Id.* at 674, [1979] 3 Comm. Mkt. L.R. at 510.

107 23 O.J. EUR. COMM. (No. C 256) 1 (1980).

108 *Id.* at 2.

109 Rewe-Zentralfinanz v. Landwirtschaftskammer, [1975] E. Comm. Ct. J. Rep. 843, [1975] 1 Comm. Mkt. L.R. 599; Officier van Justitie v. de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976] 2 Comm. Mkt. L.R. 271; Bauhuis v. The Netherlands State, [1977] E. Comm. Ct. J. Rep. 5; Commission v. Kingdom of the Netherlands, [1977] E. Comm. Ct. J. Rep. 1355, [1978] 3 Comm. Mkt. L.R. 650; Tedeschi v. Denkavit, [1977] E. Comm. Ct. J. Rep. 1555, [1978] 1 Comm. Mkt. L.R. 1; Denkavit v. Minister fur Ernahrung, [1979] E. Comm. Ct. J. Rep. 3369, [1980] 3 Comm. Mkt. L.R. 513. *See also* Barents, [1979] S.E.W. 218.

and one case involved pornography.[110] Since the judgment in *Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmarkte*,[111] significant developments have taken place in the field of industrial and intellectual property.[112] The possible areas of conflict between industrial, commercial and analogous property rights, on the one hand, and the Community provisions on the free movement of goods on the other, arise from actions recognized by national law for any infringement of patents, trademarks and the like, granted by one state's laws that may occur when persons other than the holder trade or attempt to trade in the protected product. To the extent that national laws permit such actions without restrictions, they would enable patent and trademark holders to divide the Community into different national markets and thus, for example, to pursue a different pricing policy in each country. Also, whenever a protected product was put on the market by the patent or trademark holder, or with his permission (e.g., under a license arrangement), in one Member State, he could always seek to prevent its importation into other Member States.

From the economic viewpoint, the danger is that anti-competitive practices by firms may develop in such instances. Therefore, it was no surprise when these intellectual and commercial property problems arose in cases concerning Article 85 of the Treaty.[113] It rapidly became apparent, however, that these infringement actions could be brought against those who imported products legally marketed elsewhere, even though such actions were not the result of any anti-competitive agreements. Regarding these actions, the Court of Justice stated that the mere ownership of a patent or trademark did not of itself necessarily lead to a position of economic strength, and thus could not be the sole basis for an action under Article 86 of the Treaty.

Since most of these actions were brought under national patent or trademark laws, it was obvious that the Court of Justice would examine the national laws in light of Article 36. The doctrine developed through the cases by the Court of Justice is summarized next. Article 36 leaves those rights granted in the sphere of industrial and commerical property by national law, intact as such. Thus, the existence of

110 Regina v. Henn & Darby, [1979] E. Comm. Ct. J. Rep. 3795, [1980] 1 Comm. Mkt. L.R. 246.

111 [1971] E. Comm. Ct. J. Rep. 487, [1971] Comm. Mkt. L.R. 631.

112 *See, e.g.*, Ludding, *Het Mededingingsrecht in de EEG en de rechten van industriele en commerciele eigendom*, DEVENTER (1979). *See also* Musik-Vertrieb Membran GmbH & K-Tel Int'l v. GEMA, [1981] E. Comm. Ct. J. Rep. 147, [1981] 2 Comm. Mkt. L. R. 44.

113 *See* Consten & Grundig-Verkaufs v. Commission, [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418; Parke, Davis v. Probel & Centrafarm, [1968] E. Comm. Ct. J. Rep. 65, [1968] Comm. Mkt. L.R. 47.

those rights is not incompatible with Articles 30-34.[114] The following analogy, therefore, can be drawn with property rights in general: just as Article 222 of the Treaty leaves the regulations of property rights in general to the Member States, it can be deduced from Article 36 that the regulation of industrial and commercial property rights is also left in the hands of the Member States by the Treaty.[115] In principle, only community legislation based on Articles 100 or 235 of the Treaty could affect such national legislation.[116] The patent or trademark holder, for example, can seek to prohibit the importation of the patented products by a firm from another Member State that has imitated a patented product in the importing Member State without the holder's permission, or similarly a firm that has illegally affixed his mark or a similar mark to his products.

The analogy with the regulation of property rights can be carried further. The fact that the Treaty leaves unaffected the regulation of property rights in goods, does not prevent Articles 30-34 from affecting national measures that concern *trade*. Indeed, Article 36 does not prevent Articles 30-34 from affecting certain aspects regarding the *exercise* of patent or trademark rights. Specifically, the basic principle in *Dassonville*, covers rights that are exercised in a manner likely to hinder trade between Member States. Moreover, the *disposal* of patent and trademark rights by agreement can fall within the ambit of Article 85, whenever the conditions required by that Article are fulfilled. The case law of the Court of Justice seeks to eliminate from the specific object of patent and trademark rights, any disposal or exercise of these rights that cannot be said to be properly part of that specific object. The Court of Justice in the *Sterling Drug* case,[117] regarded the specific object of a patent, either directly or through license agreements, as the exclusive right of the holder or licensee to use the invention concerned for the manufacture of products, to be the first to market the same, and to bring actions seeking to prevent infringements of these rights. As far as trademarks were concerned, in *Winthrop*,[118] the Court of Justice viewed the specific object as the grant to the holder of the exclusive

---

114 *See* Centrafarm v. Sterling Drug Inc., [1974] E. Comm. Ct. J. Rep. 1147, [1974] 2 Comm. Mkt. L.R. 480; Centrafarm v. Winthrop, [1974] E. Comm. Ct. J. Rep. 1183, [1974] 2 Comm. Mkt. L.R. 480.

115 *See, e.g.*, Hauer v. Land Rheinland-Pfabz, [1979] E. Comm. Ct. J. Rep. 3727, [1980] 3 Comm. Mkt. L.R. 42.

116 *Compare* Terrapin Overseas Ltd. v. Terranova Industrie, [1976] E. Comm. Ct. J. Rep. 1039, [1976] 2 Comm. Mkt. L.R. 482 *with* notes 114-15 and accompanying text *supra*.

117 [1974] E. Comm. Ct. J. Rep. 1147, [1974] 2 Comm. Mkt. L.R. 480.

118 Centrafarm v. Winthrop, [1974] E. Comm. Ct. J. Rep. 1183, [1974] 2 Comm. Mkt. L.R. 480.

right to use the trademark, the right to first market a product. This view, therefore, would protect the holder from competitors who could lower the position and reputation of the trademark, through its misuse or false application to other products. However, further rights recognized by the laws or case law in Member States, such as the right to prevent importation from another Member State where products were sold by the holder of such rights or with his permission, were viewed as not being covered by the first sentence of Article 36.

Various complications can arise when two totally independent firms are entitled to use the same trademark, or easily confusable trademarks. These situations were present in *Van Zuylen Freres v. Hag AG*[119] and *Terrapin (Overseas) Ltd. v. Terranova Industrie*.[120] Further complications can arise from the repackaging of products by other firms, for example, when a large consignment is split up into many smaller units. Two important judgments on this particular problem are *Hoffman-La Roche v. Centrafarm Vertrebsgesellschaft*[121] and *Centrafarm BV v. American Home Products Corp.*[122] In the latter case a further problem arose since the company used different trademarks for the same product in different countries. In all these cases, it can be deduced from the definition of the specific object in *Winthrop*[123] that the trademark holder may, in principle, bring an action for infringement against a party that affixes the holder's, or a similar mark, to his products and then markets them. Thus, even a prohibition on importation is justified in principle under the first sentence of Article 36. This justification, based in principle on the grounds of the specific object, however, does not exclude the possibility that the misuse of such an exercise of rights can be forbidden. When such a misuse occurs, therefore, the second sentence of Article 36 applies and the exercise can be seen as an arbitrary discrimination, or as a disguised restriction on trade between Member States.

The second sentence of Article 36 has been interpreted in several important cases[124] and, as mentioned above,[125] the analogy of the rule of reason in *Dassonville* is of interest here, even though the rule of rea-

---

119 [1974] E. Comm. Ct. J. Rep. 731, [1974] 2 Comm. Mkt. L.R. 127.

120 [1976] E. Comm. Ct. J. Rep. 1039, [1976] 2 Comm. Mkt. L.R. 482.

121 [1978] E. Comm. Ct. J. Rep. 1139, [1978] 3 Comm. Mkt. L.R. 217.

122 [1978] E. Comm. Ct. J. Rep. 1823, [1979] 1 Comm. Mkt. L.R. 327.

123 [1974] E. Comm. Ct. J. Rep. 1183, [1974] 2 Comm. Mkt. L.R. 480.

124 *See, e.g.*, Officier van Justitie v. de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976] 2 Comm. Mkt. L.R. 271; Hoffmann-La Roche v. Centrafarm Vertriebsgesellschaft, [1978] E. Comm. Ct. J. Rep. 1139, [1978] 3 Comm. Mkt. L.R. 217; Centrafarm v. American Home Products Corp., [1978] E. Comm. Ct. J. Rep. 1823, [1979] 1 Comm. Mkt. L.R. 327.

125 *See generally* section II of this article.

son also contains certain other criteria such as the temporary nature of exceptions from the basic principle, lasting only until Community regulations deal with the matters involved. The case law on Article 36, however, shows that the Court of Justice will allow restrictions on imports and exports based on Article 36, only to the extent such restrictions are really necessary to further the interests specified in Article 36. Where these interests can be protected by measures that are less restrictive on trade, then only such measures will be permitted, with the borderline being that the reasonable needs of normal administrative procedures must be kept in mind.[126] It also seems that the Court of Justice will examine whether the second sentence of Article 36 does in fact prohibit measures, only after examining whether the hindrances to trade can in principle be justified under the first sentence of Article 36. This is because even measures that, in principle, can be justified, are subject to misuse. The following open question remains however: when a justified import ban on one product may have side-effects on the possibilities of importing other products, does the second sentence of Article 36 apply, and could it operate to prevent the justification from being effective? Such questions may well arise concerning tie-in sales of one product protected by a patent or trademark, to another product not so covered. It would seem to follow from the narrow interpretation principle of Article 36 that even such a tie-in sale may be seen as a disguised restriction on trade, if in fact the possibility of importing the non-protected product is restricted. This problem is primarily of interest in cases where proceedings under Article 85 or 86 are impossible.

V. Who are the Addressees of Articles 30-36?

It has already been stated that Articles 30-36, although addressed to the Member States, also bind the Community Institutions themselves unless otherwise provided by the Treaty.[127] In this regard, certain problems in connection with Article 103 will be discussed in part VI, *infra*.

The case law provides that affected individuals may rely on Articles 30, 34 and 36 whether they are plaintiffs or defendants in civil, criminal or administrative proceedings; indeed, many preliminary rulings under Article 177 have arisen from such proceedings. It is still an

[126] *See* Officier van Justitie v. de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976] 2 Comm. Mkt. L.R. 271. *But cf.* Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

[127] *See* Société Les Commissionnaires Réunis, [1978] E. Comm. Ct. J. Rep. 927.

open question, however, as to whether in certain circumstances Articles 30 and 34 may impose duties on as well as confer rights to individuals. In other words the question is whether these Articles, together with the exceptions provided for in Article 36, also apply to private (as opposed to State) restrictions on trade. One example of such private restrictions might be a collective boycott of imports by employees seeking to resist any threat to their jobs posed by imports. Another example might be a collective refusal by employees, acting in sympathy with colleagues striking in another Member State, to handle products destined for export. A third example might be private behavioral standards for industrial products.

Certainly the wording of Articles 30-36 would not seem to exclude their application to such actions. An analogy can perhaps be drawn from the judgment of the Court of Justice in *Walrave & Koch v. Association Union Cycliste Internationale*.[128] That case concerned Articles 48-49 of the Treaty, which seek to achieve a freedom of movement for persons and services similar to the freedom of goods sought by Articles 30-36. Indeed, in *Defrenne v. SABENA*[129] concerning Article 119 and the principle of equal pay for men and women for equal work, the Court of Justice again came to an analogous result. It is by no means clear, however, whether the Court of Justice has adopted the above suggested analogy. Van Gerven,[130] indeed, argues that it has. Van Gerven's argument is based on the judgments in *Sterling Drug* and *Winthrop*[131] concerning individuals' patent and trademark rights, respectively. In these judgments, however, the Court of Justice can be said to have taken the patent and trademark legislation itself, and classified it as a measure having an effect equivalent to that of a quantitative restriction. The "equivalent effect" of these measures comes from the fact that the legislation allows individuals (with the aid of the Judge) to bring about a state of affairs that would be incompatible with the principle of free movement of goods enshrined in Community law.[132] Therefore, the question relating to private restrictions on imports or exports that are not indirectly aided by a State measure must

128 [1974] E. Comm. Ct. J. Rep. 1405, [1975] 1 Comm. Mkt. L.R. 320.

129 [1976] E. Comm. Ct. J. Rep. 455, [1976] 2 Comm. Mkt. L.R. 98.

130 Van Gerven, *The Recent Case Law of the Court of Justice Concerning Articles 30 and 36 of the EEC Treaty*, 14 COMM. MKT. L. REV. 5 (1977).

131 Centrafarm v. Sterling Drug Inc., [1974] E. Comm. Ct. J. Rep. 1147, [1974] 2 Comm. Mkt. L. R. 480; Centrafarm v. Winthrop, [1974] E. Comm. Ct. J. Rep. 1183, [1974] 2 Comm. Mkt. L.R. 480.

132 *See* Ehlermann in KOMMENTAR ZUM E.W.G.-VERTRAG 276 (2d ed. Von der Groeben, von Boeckh & Thiesing eds. 1974).

remain completely open. However, remembering the analogous cases just cited, it seems that an affirmative answer is certainly possible. The objection that the first sentences of Articles 31 and 32, Articles 33(1) and 34(2) expressly concern only State measures, will not prevail. The standstill-provision of Article 62 on the freedom to provide services (which is analogous to the provisions of the first sentence of Article 31), did not prevent the Court of Justice from accepting the proposition that Article 59 applied to private restrictions on the freedom to provide services.[133] Indeed, the very wording of the central Articles—30 and 34(1)—and their central role in the Treaty, may indicate that they extend to cover private restrictions on trade. Even though State measures are obviously those first thought of in the context of quantitative restrictions on imports and exports, the very extension of the prohibition to measures having an equivalent effect, shows that any attempted evasion by means of collective action must in fact fall within the prohibition. The rule of reason in *Dassonville*, nevertheless, would permit certain reasonable hindrances on imports or exports for non-economic purposes.

VI. The Relationship of Articles 30-36 with some of the Other Articles of the Treaty

In order to show in more detail the importance of Articles 30-36 in the system created by the Treaty, it is necessary to discuss their relationship with Articles 52, 85, 86, 90, 92, 100 and 103-109. The application of Articles 30-36 to the common agricultural policy has already been discussed above.

Article 52

The relationship of Articles 30-36 with Article 52 is important, because the freedom of establishment provided for in Article 52 includes the right to take up and *pursue* activities as self-employed persons, and the right to set up and manage undertakings under conditions laid down by the law of the country for its own nationals. The principle of equal treatment for the self-employed foreigner *vis-a-vis* nationals of the particular Member State concerned has been enshrined in Article 52. This same principle has been negotiated in agreements between States since the middle ages. It would appear from the inclusion of the word "pursue" in Article 52, that the above principle of equal treat-

133 Walrave & Koch v. Association Union Cycliste Internationale, [1974] E. Comm. Ct. J. Rep. 1405, [1975] 1 Comm. Mkt. L.R. 320.

ment applies to the pursuit of economic activities by self-employed foreigners, and not merely to the establishment of such activities. As far as Article 30 is concerned, this view of the principle of equal treatment does not give rise to demarcation problems since Article 30 does not concern the foreigner's exercise of his activities but rather only the importation of goods. With respect to Article 34, however, there may well be demarcation problems with Article 52. Indeed, if the basic principle in *Dassonville* were to be applied without more, then every law concerning establishment could be incompatible with Article 34 because of its inherent potential or indirect effect on exports.[134] Such an interpretation would render the whole Chapter of the Treaty dealing with the right of establishment pointless. In addition to Article 52, the co-ordination provisions in Article 57 clearly contemplate provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons. Thus, legislation that does not discriminate against nationals of other Member States, when those nationals are in pursuit of their activities as self-employed persons, must be compatible with Article 52 even if the legislation leads indirectly to restrictions on exports. A rational interpretation of the Treaty system must then lead to the conclusion that such legislation also is not incompatible with Article 34. As a *lex specialis*, Article 52 must take priority over the general prohibition of Article 34 in those cases where legislation compatible with the former might be incompatible with the latter. This interpretation of Article 52 supports the conclusion that *Groenveld*[135] is indeed of more general significance. An exception to this general argument, however, must be made if there are sectors where a common organization of the market exists. Such a common organization gives rise to criteria in addition to those supplied by Articles 30, 34 and 52 against which national legislation must be judged. This view is supported by the *van Haaster*, *van den Hazel* and *Vriend* cases.[136]

---

134 *See, e.g.*, Officier van Justitie v. van Haaster, [1974] E. Comm. Ct. J. Rep. 1123, [1974] 2 Comm. Mkt. L.R. 521; Officier van Justitie v. van den Hazel, [1977] E. Comm. Ct. J. Rep. 901, [1980] 3 Comm. Mkt. L.R. 12; Pieter Vriend, [1980] E. Comm. Ct. J. Rep. 327, [1980] 3 Comm. Mkt. L.R. 473.

135 P.B. Groenveld BV v. Produktschap voor Vee en Vlees, [1979] E. Comm. Ct. J. Rep. 3409, [1981] 1 Comm. Mkt. L.R. 207.

136 The recent judgments of the Court of Justice in the cable television cases, *Procureur du Roi v. Debauve* and *S.A. Coditel v. S.A. Cine Vog. Films* (not yet reported), are most instructive in this context as the Court of Justice did not adopt the view of the Commission and the Advocate-General that the provisions on services were comparable to the prohibitions of Articles 12 and 30. Thus the Court of Justice rejected a broad interpretation of the services provisions in the Treaty. These judgments confirm the relevance of the provisions of Article 36 and the case law on this

Articles 85-90

In many of the cases that discussed Article 30, the actual subject-matter of each case concerned either anti-competitive agreements between companies (Article 85), or possible abuses of a dominant position within the meaning of Article 86. Precisely because anti-competitive agreements or practices, together with legal or administrative rules concerning imports, can constitute "measures having an equivalent effect," it was necessary for the interpretation of Articles 30, 85 and 86 to be consistent. This same need for consistency exists whenever it is accepted that anti-competitive practices do not themselves legally constitute "measures having an equivalent effect." Thus it is scarcely surprising that the basic principle in *Dassonville* adopted the criteria of interpretation laid down by the Court of Justice when it examined the notion of affecting trade between Member States in Article 85.[137] The question of how far the interpretation of the exceptions contained in Article 85(3) may be relevant towards the interpretation either of the rule of reason in *Dassonville*, or of the provisions of Article 36, has been examined elsewhere.[138] It is sufficient for our purposes here to state that the criteria in Article 85(3) (of proportionality and of competition with respect to a substantial part of the products in question not being eliminated) seem to be of significance for the interpretation of Article 36. However, this significance cannot be too firmly asserted in light of the positive-justification criteria of Article 85(3), where the case law supports the narrower view advanced above.

The judgment in *INNO v. ATAB*[139] provides that the connection between Articles 80 and 86, on the one hand, and Articles 30-36, on the other, can be of the greatest significance. In *INNO v. ATAB*, the Court of Justice made it clear that although Article 86 was directed at undertakings, the Treaty explicitly prohibited Member States from taking measures that could jeopardize the attainment of its objectives. It imposed on them a duty, therefore, not to adopt, or maintain in force, any measures that could deprive Article 86 of its effectiveness. Therefore, the Court of Justice stated that a national measure having the effect of

article to the services provisions. *See* Bennett, *The Debauve and Coditel Cases*, 5 EUR. L. REV. 224 (1980).

137 Establissements Consten SARL & Grundig—Verkaufs—GmbH v. Commission, [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418; Société Technique Miniere v. Maschinenbau ulm GmbH, [1966] E. Comm. Ct. J. Rep. 235, [1966] Comm. Mkt. L.R. 357; Volk v. Establissements Vervaeke, [1969] E. Comm. Ct. J. Rep. 295, [1969] Comm. Mkt. L.R. 273.

138 van Themaat, *Zum Verhaltnis Zwischen Artikel 30 and Artikel 85 EWG-Vertrag*, WETTBEWERB IN WADEL (Gutzler, Herior & Kaiser eds. 1976).

139 [1977] E. Comm. Ct. J. Rep. 2115, [1978] 1 Comm. Mkt. L.R. 283.

facilitating activities that breached Article 86, generally would be incompatible with the provisions of Articles 30 and 34.[140] Similar considerations obviously apply with respect to measures facilitating a breach of Article 85. Since the Court of Justice made it quite clear that it would not tolerate measures enabling private undertakings to escape from the effects of the provisions of Treaty Articles 85-94, the Court of Justice proceeded in *INNO v. ATAB* to examine certain problems regarding Article 90, in particular, but found that the problems could be solved by holding that Article 90 was only a particular application of a general principle and, therefore, covered by the statements already made.

Article 92

Article 92, which proclaims in principle that State aids are incompatible with the common market, is also covered by the passages from *INNO v. ATAB* quoted above. National aids that place the production of national undertakings in a better position on the domestic market than do imports from other Member States, without more, could be *per se* regarded as measures having an effect equivalent to a quantitative restriction on imports. Again, however, Article 92 takes the form, with respect to measures having an equivalent effect, of a *lex specialis*, and thus has precedence over Article 30. An accurate borderline, therefore, has to be drawn between Articles 30 and 92, and drawing such a line is by no means always easy in practice. Unlike the delimitation between Articles 34 and 52 of the Treaty, the significance of the borderline between Articles 30 and 92 lies as much in the fact that a national judge cannot apply Article 92 directly (although he can apply Article 30), as in the fact that Article 92 (unlike Article 30 but similar to Article 85) provides for exceptions on economic grounds. In cases of significant subsidies and of exemptions from fiscal, social or other government-imposed burdens, the borderline should not create great problems. However, if national firms were to be accorded privileged status by government purchases despite the fact that they charged higher prices then problems could indeed arise. Economically, the payment of the higher prices could be comparable with a subsidy to the relevant firm. In the opinion of the present writers, however, the correct view in such a case must be that the stronger provisions of Article 7 and 30 take precedence whenever these Articles are applicable in circumstances

[140] *Id.* at 2144-45, [1978] 1 Comm. Mkt. L.R. at 316.

where there is also discrimination based on nationality or a measure having an equivalent effect to a quantitative restriction involved.

Article 100

As discussed above,[141] neither Article 100 nor harmonization Directives based on it can detract from the strict principles of Articles 30-36. They also serve to limit the applicability of Article 36. In addition to the harmonization Directives on technical and administrative obstacles to trade,[142] another good example is Directive 77/62[143] on co-ordination procedures for public supply contracts. A harmonization Directive, however, need not necessarily lead to such a strict application of the basic principle in *Dassonville*, when applied to cases falling within the ambit of Article 34. This can be seen in connection with the common agricultural policy. The basic rule of *Dassonville* can be invoked for purposes of interpreting Article 34, only if the harmonization Directive expressly so provides. This conclusion should also apply to production limits, quality rules and other provisions that are applicable to domestic production. Such regulation of commercial behavior which can, by its very nature, also lead to export restrictions would not seem to fall within Article 34 on its own.[144]

Applying the basic principle in *Dassonville* to the interpretation of Article 34, therefore, would seem to be appropriate only in situations that involve a common organization of a particular market. Harmonization Directives have less far-reaching consequences with respect to Community policy than do the Regulations providing for common organization. It would seem, therefore, that less severe conclusions should be drawn with respect to harmonization Directives, than were drawn in common organization cases such as *Vriend*. As stated above, even as far as Article 30 is concerned, both the rule of reason in *Dassonville* and the exceptions in Article 36 may be displaced by a stricter requirement which is, nevertheless, not as severe as the basic principle in *Dassonville* itself. In fact, a harmonization Directive will always achieve its aims to the extent that it facilitates further liberalization, otherwise impossible without the Directive.

---

141 *See* notes 35-36 and accompanying text *supra*.

142 *See* P. SLOT, TECHNICAL AND ADMINISTRATIVE OBSTACLES TO TRADE IN THE EEC (1975).

143 20 O.J. EUR. COMM. (No. L 13) 1 (1977).

144 *Cf.* Officier van Justitie v. van Haaster, [1974] E. Comm. Ct. J. Rep. 1123, [1974] 2 Comm. Mkt. L.R. 521; Officier van Justitie v. van den Hazel, [1977] E. Comm. Ct. J. Rep. 901, [1980] 3 Comm. Mkt. L.R. 12; P.B. Groenveld BV v. Produktschap voor Vee en Vlees, [1979] E. Comm. Ct. J. Rep. 3409, [1981] 1 Comm. Mkt. L.R. 207.

Articles 103-109

In cases presenting difficulties or serious threat of difficulties regarding a Member States' balance of payments, the Commission, acting under the provisions of Article 108(3), can authorize the Member State involved to take such protective measures as the Commission determines. These protective measures may even go so far as to make inroads on the provisions of Article 30. Similarly, where a sudden balance of payments crisis occurs the Member State itself, under the provisions of Article 109, may take such protective measures as it deems necessary, although the Commission and the Council may change them afterwards. These measures could also include derogations from Article 30. It should be remembered, however, that attempts to justify unilateral short-term economic policy measures restricting imports or exports by reference to Article 103 (dealing with the coordination of short-term economic policies) have been expressly rejected by the Court of Justice.[145]

Nevertheless, it is still undecided just how far the Community itself is bound by Articles 30 and 34 in the application of Article 103, apart from the case of supply difficulties expressly mentioned in Article 103(4). It would seem from *Les Commissionnaires Réunis*[146] that, in principle, the Communities must be so bound. It is also not easy to understand why short-term economic policy Directives, Regulations or Decisions should induce measures having an effect equivalent to that of quantitative restrictions on imports or exports, except in a situation such as that mentioned in Article 103(4).

Generally, short-term economic policy measures will affect the macro-economic policies of the Member States. However, to the extent that short-term economic policy Directives from the Council could lead to restrictive budget policies, it can be appreciated that a restrictive budget policy could lead to a credit squeeze that could damage imports. At first, it might be thought that such a Directive would have to comply with the basic principle in *Dassonville* on the ground that it could always restrict imports indirectly. Despite this thought, the basic principle may well be inapplicable because such a Directive (and even a restrictive budget policy itself) would not restrict imports in a specific manner and bind businesses in the way that rationing provisions or other quantitative restriction on imports would. Despite its wide-ranging and diffuse effects on imports, a Directive or restrictive budget pol-

145 *See, e.g.*, SADAM v. Comitato Interministeriale de Prezzi, [1976] E. Comm. Ct. J. Rep. 323, [1977] 2 Comm. Mkt. L.R. 183.

146 Société Les Commissionnaires Réunis, [1978] E. Comm. Ct. J. Rep. 927, 947.

icy of the type under discussion should not be viewed as falling within the set of measures covered by Article 30. Even the indirect restrictive effect of a general measure controlling wages on credit and imports seems far too wide-ranging and diffuse to be comparable to the effects of a rationing measure. Unlike the legislation considered in the case-law of the Court of Justice, a measure controlling wages also does not affect the production or distribution of goods. Presently, connecting Directives issued under Article 103 with the provisions of Articles 30 and 34, primarily is of practical interest with respect to energy-saving measures. It is obviously preferable, therefore, to base such Directives expressly on Article 103(4) since it allows as much deviation from Articles 30 and 34 as may be necessary. However, as observed above, any unilateral deviation from these Articles on the part of a Member State—i.e., without the express authorization of the Council—that is justified on the grounds of energy shortages and Article 103, will not be tolerated.

Finally, it may be asked whether a strict application of Articles 30 and 34, based on the case law of the Court of Justice, would remove the danger of frequent attempts by the Member States to invoke Article 103 improperly. This point, however, has been dealt with sufficiently above. Apart from the shortage situation provided for in Article 103(4), therefore, it seems that even the Council is bound by the provisions of Articles 30 and 34 when applying Article 103. *Les Commissionnaires Réunis* seems to indicate that any abuse of Article 103, that allows Member States to make inroads into the fundamental principle of the free movement of goods, will be prohibited. Nevertheless, there may well be significant practical problems to face should the Council decide to use the provisions of Article 103 in the present economic crisis in a manner differently than they have so far. Such might be the case, for instance, if there were a co-ordinated use of government purchasing power to encourage spending in certain sectors, or if other crisis measures were taken as matters of sectoral policy.

VII. CONCLUSIONS

Summary of the Most Important Points

It seems that apart from agricultural matters, the Court of Justice recently has been preoccupied with the free movement of goods and the customs union.[147] In fact, in 1979 the number of cases concerning Arti-

147 *Cf.* THIRTEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 283 (Brussels, Luxembourg 1980).

cles 30-36 exceeded the total number of judgments relating to Articles 85 and 86. The case law of the Court of Justice on Articles 30-36 is developing a more significant and coherent pattern, and indeed the judgments in *Groenveld* and *Vriend* have elucidated the limits of the application of the basic principle in *Dassonville* with respect to Article 34.

The main threads of the case law on Articles 30-36 can be summarized as follows. First, the basic principle in *Dassonville* applies with its full force to Article 34, as well as to Article 30, whenever the market involved is subject to common organization. National measures are then examined cumulatively against these Articles and the provisions of the particular common organization. Second, in cases where there is no common organization of the market involved, the basic principle in *Dassonville* (except for the rule of reason) is confined to Article 30. As far as Article 34 is concerned a material discrimination criterion is applied. Thus, Article 34 applies only when exports are affected more than products marketed at home. Conflict with the provisions of Article 52, therefore, is avoided by this deviation from the *Dassonville* principle. Third, although the situation regarding qualitative rules for proper economic intercourse is uncertain, the rule of reason in *Dassonville*, probably like the exceptions in Article 36, applies only to reasonable measures that do not have economic-policy motives.[148]

A fourth point is that while the rule of reason does not apply at all in circumstances involving a common organization of the market, it is less certain whether or not the rule applies in the presence of a harmonization Directive. The case law would seem to leave open the possibility that a less far-reaching exception to the basic principle, set forth in the harmonization Directive concerned, could supplant the rule of reason. Fifth, the case law on Article 36, to a large extent, can be viewed as a simple application of the principle—exceptions must be construed strictly.[149] More particularly, with respect to the case law on intellectual property rights, this view led to the distinction between the

[148] For a discussion of the compatibility of measures designed to prevent tax frauds (where the temporary tax-free importation of certain products is concerned) with Article 30, see the recent case of *Giovanni Carciati*, [1980] E. Comm. Ct. J. Rep. 2773, [1981] 2 Comm. Mkt. L.R. 274.

[149] A further example of this can be seen in the judgment of the Court of Justice in *Commission v. French Republic*, [1980] E. Comm. Ct. J. Rep. 2299, [1981] 2 Comm. Mkt. L. R. 743, in which certain discriminatory restrictions on the advertising of alcoholic beverages were held to be incompatible with Article 30. The Court of Justice recognized the importance of the public health arguments but held nevertheless that the rules constituted an arbitrary discrimination within the meaning of the second sentence in Article 36 and therefore could not be permitted.

perfectly justified *existence* of such rights, and the fact that in certain circumstances their *exercise* could be prohibited. Finally, the case law exhibits clear guidelines that are consistent with the Treaty system for determining the dividing line between Articles 30-36 and other articles of the Treaty. These consistent guidelines apply just as much to articles concerning the achievement of a common market, as to those articles dealing with the progressive approximation of the economic policies of the Member States. Thus, an extremely far-reaching common economic system, such as that for agriculture, is made splendidly compatible with the concurrent principle of the free movement of goods. Extensive planning and unity of the market, therefore, can indeed coexist peacefully. This fact might be of great significance for new areas of integration in the future.

The Significance of the Case Law in Assessing the State of the Process of Integration

As Van Empel and Slot have argued,[150] the case law reveals a highly developed notion of federalization of the Communities. The competence of the Member States, Slot contends, is more restricted than the competence of individual States in the United States of America.

It is significant, however, that Van Empel and Slot draw very divergent conclusions from this proposition regarding the federalization of the Communities. Van Empel feels that the Court of Justice goes too far, and that in the current state of the process of integration, the Court of Justice should allow more room for national economic planning measures in accordance with the principle of alternatives.[151] Additionally, he contends that the case-law does not provide complete certainty for those affected since the outcome of the derogation arguments in any specific case is not completely predictable.[152] He expects, therefore, first, that the tension will increase between three elements, namely, the common market, conscious economic planning and a federative organization, and second, that the maintenance of the common market in particular will come under severe strain.[153] Van Empel claimed support for this contention from an article by Ehlermann, written in 1979.[154] In that article, Ehlermann contended that if the Court of Justice maintains

150 *See* Van Empel & Slot, note 1, *supra*.

151 *Id.* at 225.

152 *Id.* at 230-31.

153 *Id.* at 231-32.

154 Ehlermann, *Das Verbot der Massnahmen gleicher Wirkung in der Rechtsprechung des Gerichtshofs*, HAMBURG, DEUTSCHLAND, EUROPA (Stadter & Thieme eds. 1979).

its wide definition of measures that have an effect equivalent to that of quantitative restrictions on imports or exports, it will soon find itself faced with a dilemma. The dilemma is whether to restrict it *de facto*, despite formally maintaining the broad definition, or to interpret Article 36 broadly. Ehlermann suggested that in the judgment of the Court of Justice in *Kramer*,[155] there were indications of the first approach, whereas in *Dassonville*, there were indications of the second. Furthermore, Ehlerman implicitly recognizes that it is impossible, given political realities, to estimate the extent of the growing need for economic planning measures in connection with the co-ordination of economic policies.

Slot, however, takes a more positive view of the case law and states that there is no need for anxiety about the supervisory role of the Court of Justice over the removal of trade restrictions. Such a role, according to Slot, is necessary given past experiences in federal systems. Thus, the example of the United States of America's federal legislative process is authority for the proposition that positive legal powers at the federal level, even when granted by majority decisions, are no panacea against restrictions on trade at the State level. Positive legal powers, therefore, are not a useful alternative to the role of case law in this regard. The example of the United States does show, however, that the mere existence of trade restrictions need not be absolutely disastrous with respect to the development of a common market.[156] Nevertheless, he does acknowledge that in the European Communities, with its diverse cultural, policy and legal traditions, stricter vigilance is necessary to ensure that a common market is achieved and maintained, than was needed in the United States of America.

The fact that the case law of the Court of Justice in this field can lead to increased tension within the Communities can be demonstrated, for example, by the reaction of the French. The French, for quite some time, refused to implement the judgment of the Court of Justice concerning restrictions on the import of lamb prior to the establishment of a common organization for mutton and lamb. Another example was the British reluctance to implement the judgment on the use of tachographs in the face of deep-seated opposition on the part of the trade-unions.

Slot, however, accepts, perhaps too easily, that the European Communities already can be said to possess a federative character. Nevertheless, it should be questioned whether it would have been possible for

155 Cornelius Kramer, [1976] E. Comm. Ct. J. Rep. 1279, [1976] 2 Comm. Mkt. L.R. 440.
156 *See* Van Empel & Slot, *supra* note 1, at 262-63.

the Court of Justice to develop a more flexible system of interpretation given the wording and structure of the Treaty. The wording and the structure of the Treaty on quantitative restrictions on the free movement of goods are not that different from those of Article XI of the General Agreement on Tariffs and Trade (GATT). If the maintenance of the system of the GATT were entrusted to a judge, he might come to conclusions similar to those of the Court of Justice in order to achieve a consistent system of interpretation of the system of rules.[157] The fact that the free movement of goods principle is combined with the existence of a Court of Justice, and the fact that citizens have the right to maintain relevant provisions of the Treaty, necessarily must lead to the sort of interpretation that the Court of Justice has given. Thus, the actual existence of the Community Court of Justice, rather than its case law, causes tension in the current tendency to disintegration. As a practical matter, the interpretation by the Court of Justice of Article 30 does not differ that much from the rather more restrained formula of the Commission's Directive 70/50.[158] This Directive, to our knowledge, has not been seriously challenged by any national government, and certainly no Member State has challenged it before the Court of Justice.

Primarily, the imminent planning deficiency must be compensated for by giving concrete shape to the coordination of economic policies. This is consistent with the view advanced by Slot. It must be admitted, however, that the political realities do not offer much hope of this being achieved. Certain propositions, nevertheless, may be advanced. First, national macro-economic policies are hardly, if at all, affected by Articles 30-36. Second, the interpretation of Articles 30-36 in practice, leaves enough room for compulsory regulatory measures having non-economic objectives because of the proviso allowing for ultimately overriding interests. Third, not all compulsory economic regulatory measures as such are incompatible with Articles 30-36. Examples include price control measures, and controls on establishment and investment. Fourth, modern means of planning such as support grants are subject to a much more flexible Community system because of the possibility of exemption on economic grounds. Also, purely indicative planning remains legally wholly unaffected by these Articles. Finally, and most importantly, the possibility that effective national planning

[157] A judge would certainly not go nearly as far as the Court of Justice, because of the fact that GATT is not aimed at a common market. In this connection, see the very interesting recent ruling of the Court in *Polydor Ltd. v. Harlequin, Case 270/80* (unreported), where the notion of measures with equivalent effect was less strictly interpreted in the Free Trade Treaty with Portugal.

[158] Commission Directive 70/50 of Dec. 22, 1969, O.J. EUR. COMM. 17 (Spec. Ed. 1970(I)).

measures will be taken, ultimately is much more restricted by the fact that imports and exports depend on the economic development and policies of other Member States and indeed of third countries, than it is by the legal restrictions that arise from the Treaty. Even France, with its initially nationalistic policies, has recognized this last contention in the formulation (liberalization) of its national economic policies since the sixties. The possibilities of national planning policies are restricted to the extent that imports from, and exports to, other countries are free and, therefore, cannot be planned. Principally, it is the unwillingness to recognize the truth of this last contention as a pre-condition for national economic policies, that has caused great political tension in countries such as Denmark, the Netherlands and the United Kingdom.

There are no apparent signs of any turnaround in the direction of the case law of the Court of Justice on Articles 30-36. Indeed, with respect to some matters it might well be argued that the Court of Justice has gone further than it needs to maintain a consistent judicial policy in the interpretation of the Treaty system.[159] It remains unclear why the Court of Justice in the *Vriend* case deviated from the flexible policy it adopted in the French wine cases[160] and again advanced the dangerous principle of exclusivity with respect to the Common Agricultural Policy it enunciated in *Galli*[161] and later seemed to forsake.[162]

---

159 *See* notes 96-102 and accompanying text *supra*.

160 [1975] E. Comm. Ct. J. Rep. 1023, [1975] 2 Comm. Mkt. L.R. 490.

161 [1975] E. Comm. Ct. J. Rep. 47, [1975] 1 Comm. Mkt. L.R. 211.

162 In 1981 the following thirteen new cases on Articles 30-36 were decided by the Court of Justice: Officier van Justitie v. Kortmann, [1981] E. Comm. Ct. J. Rep. 251; Officier van Justitie v. Eyssen, [1981] E. Comm. Ct. J. Rep. 409; Membran GmbH and K-tel Int'l v. GEMA, [1981] E. Comm. Ct. J. Rep. 147, [1981] 2 Comm. Mkt. L. R. 44; Dansk Supermarked v. Imerco, [1981] E. Comm. Ct. J. Rep. 181, [1981] 3 Comm. Mkt. L.R. 590; Kelderman, [1981] E. Comm. Ct. J. Rep. 527; Weigand v. Schutzverband Deutscher Wein, [1981] E. Comm. Ct. J. Rep. 583; United Foods v. Belgian State, Case 132/80, Apr. 7, 1981 (unreported), [1982] 2 Comm. Mkt. L.R. 273; Commission of the European Communities v. Ireland, Case 113/80, June 17, 1981 (unreported); Merck v. Stephar and Stephanus, Case 187/80, July 14, 1981 (unreported), [1981] 3 Comm. Mkt. L.R. 463; Re Sergius Oebel, Case 155/80, July 14, 1981 (unreported); Pfizer, Case 1/81, (transcript) [1982] 1 Comm. Mkt L.R. 406 (Dec. 3, 1981); and Biological Products, Case 272/80, Dec. 17, 1981 (unreported). On the whole, these new decisions and the important preliminary ruling of Mar. 2, 1982 on "passing of" (*Beele*, 6/81) follow the lines of the case law analyzed in this article. Cases 55/80, 57/80 and *Dansk* extend the ruling on patent law, however, to copyrights and, in *Beele* it was decided that "passing of" does not come under Article 36, but has to be judged along the lines of *Dassonville* and *Rewe*.