

Northwestern Journal of International Law & Business

Volume 9
Issue 2 *Fall*

Fall 1988

Commission v. Germany and Article 36 Protection of Human Life and Health

Mimi Y. Lee

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Food and Drug Law Commons](#), [Health Law Commons](#), and the [International Trade Commons](#)

Recommended Citation

Mimi Y. Lee, *Commission v. Germany and Article 36 Protection of Human Life and Health*, 9 *Nw. J. Int'l L. & Bus.* 444 (1988-1989)

This Note is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

NOTE

Commission v. Germany and Article 36 Protection of Human Life and Health

I. INTRODUCTION

Free movement of goods is a fundamental principle of the European Community.¹ This principle is embodied, in part, in Article 30 of the Treaty Establishing the European Economic Community (“EEC Treaty”).² Article 30 prohibits restrictions on goods traded between Member States of the European Community. Specifically, the Article provides that “quantitative restrictions on imports and all measures having equivalent effect” are prohibited.³

Article 36 of the EEC Treaty, however, provides important exceptions to the principle of free movement of goods as embodied in Article 30.⁴ Article 36 states:

The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, *the protection of human or animal life or health*, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade be-

¹ The other fundamental principles of the European Community are the free movement of persons, the free movement of capital, and the freedom to provide services. L. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 1 (1985).

² Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 26, art. 30 [hereinafter EEC Treaty]. Article 30 provides: “Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.” Article 34 of the EEC Treaty prohibits restrictions on exports between Member States.

³ *Id.* at 26, art. 30.

⁴ *Id.* at 29, art. 36.

tween Member States.⁵

Because Article 36 permits derogations from a fundamental principle of the European Community, it is strictly construed and addresses only non-economic issues.⁶ Foremost among the Article 36 exceptions to the principle of free movement of goods are restrictions justified on grounds of protection of human life and health.⁷

Recently, the Court of Justice of the European Community ("Court of Justice" or "Court")⁸ has begun to develop a significant body of case law on the protection of human health exception of Article 36.⁹ This development coincides with the increasing public interest in consumer protection law, particularly with regard to the production of food-stuffs.¹⁰

Commission of the European Communities v. Federal Republic of Germany presents the Court's most recent attempt to define the protection of human health exception.¹¹ In *Commission v. Germany*, the Court

⁵ *Id.* (emphasis added)

⁶ *W.J.G. Bauhuis v. The Netherlands State*, 1977 E. Comm. Ct. J. Rep. 5; *Commission v. Italy*, 1961 E. Comm. Ct. J. Rep. 317.

⁷ *Officier van Justitie v. De Peijper*, 1976 E. Comm. Ct. J. Rep. 613.

⁸ The Court of Justice of the European Communities consists of eleven judges, who are appointed by common accord of the governments of the Member States. P. MATHIJSSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 56 (1985). Its most important functions "are to ensure that the law is enforced, irrespective of political considerations . . . ; to act as referee between the Member States and the Community, as well as between the Community institutions *inter se*; and to protect the rights of the individual from the infringement by the Brussels bureaucracies." T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 26 (1981).

⁹ *E.g.*, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E. Comm. Ct. J. Rep. 649; *Officier van Justitie v. Sandoz B.V.*, 1983 E. Comm. Ct. J. Rep. 2,445; *In re Leon Motte*, 1985 E. Comm. Ct. J. Rep. 3887; *Public Prosecutor v. Claude Muller*, 2 Common Mkt. Rep. (CCH) ¶ 14,329 (1987).

¹⁰ Loschelder identifies two reasons for the increased public interest in consumer protection law: (1) a significant percentage of annual income is spent on food, and (2) changing lifestyles and heightened public concern for health. Loschelder, *Consumer Protection in the Federal Republic of Germany: A Brief Look at the German Law of Food*, 6 ST. LOUIS PUB. L. REV. 131 (1987).

¹¹ *Commission of the European Communities v. Federal Republic of Germany*, [1988] 25 Common Mkt. L.R. 780, 4 Common Mkt. Rep. (CCH) ¶ 14,417 (1988). The text of the original decision is in German. The case has not yet been officially reported in the Report of Cases Before The Court of Justice. An official English translation, Judgment of the Court, is not yet available from the Court of Justice. The English translation reported the Common Market Reporter is unofficial. An abbreviated, provisional translation is contained in the Proceedings of the Court of Justice of the European Court of Justice of the European Communities No. 6/87 (Mar. 9-13, 1987). Quotations and citations used in this Note are from the Common Market Reporter.

See also, *Commission of the European Communities v. Hellenic Republic*, 1987 E. Comm. Ct. J. Rep., 4 Common Mkt. Rep. (CCH) ¶ 14,418 (1988) issued on the same day as *Commission v. Germany*. The Court of Justice held that the Greek beer purity laws, which are very similar to those in Germany, violated Article 30 and were not justified by Article 36. The Court did not cite *Commission v. Germany* in this case, nor did it cite this case in *Commission v. Germany*. Nevertheless, the Court used identical language in both cases to strike down the Greek and German beer purity

held that the *Reinheitsgebot* or beer purity laws of the Federal Republic of Germany ("Germany") violated Article 30 and could not be justified under the Article 36 protection of human health exception.¹² The purity laws allow beers containing only barley malt, hops, yeast, and water to be marketed in Germany. The Court concluded that since beers from other Member States contain additives, the purity laws effectively bar their importation into Germany.¹³

The purity laws are based on a royal decree issued in 1516 by Duke Wilhelm IV of Bavaria.¹⁴ Although the laws are regarded as the world's oldest health regulation, their original purpose was to preserve wheat for bread by specifying that only ingredients other than wheat could be used in beer.¹⁵

The purity laws as challenged by the Commission¹⁶ are comprised of several provisions. Article 9 of the *Biersteuergesetz* ("BSG") provides that the very popular bottom-fermented beer may be produced only from barley malt, hops, yeast, and water. Top-fermented beer may be produced from the same four ingredients, plus certain other malts and sugars.¹⁷ Article 10 of the BSG provides that only fermented beverages in compliance with Article 9 may be produced or imported in Germany under the designation "bier".¹⁸ Thus, Member States can import into Germany beverages containing other ingredients, but cannot market them as "bier".¹⁹

The specific ban on the sale of beers containing additives is provided

laws. *Commission v. Hellenic Republic* received less legal and public attention than did *Commission v. Germany* and did not advance any legal definitions not already advanced by *Commission v. Germany*.

¹² *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,910. This Note will use "Germany" to refer exclusively to the Federal Republic of Germany and to be consistent with the EEC use of the term.

¹³ *Id.* at 17,909-10.

¹⁴ *Beer Ruling Breaks German Barrier*, Chicago Tribune, March 15, 1987, § 7 at 12C, col. 1 [hereinafter *Beer Ruling*]. Regulation of food quality began in Germany in the Middle Ages. Enforcement laws were fairly unscientific. Inspectors tested the quality of beer by pouring the drink on top of a stool and sitting down. The quality of the beer was measured by the degree to which the beer caused the inspector's leather pants to stick to the stool. Loschelder, *supra* note 10, at 132.

¹⁵ Opinion of Advocate General Slynn in Case 178/84 *Commission v. Germany*, delivered Sept. 18, 1986.

¹⁶ The Commission of the European Communities is one of three political institutions of the European Community. The others are the Council and the European Parliament. The Commission consists of fourteen appointed members, and its purposes are to express Community interest and promote integration of the member States. T. HARTLEY, *supra* note 8, at 8. In fulfilling its purposes, the Commission may bring suit before the Court of Justice. *Id.* at 35.

¹⁷ *Biersteuergesetz* (Law on Beer Excise Tax), March 14, 1952, *Bundesgesetzblatt*, Part I at 148 [hereinafter BSG].

¹⁸ *Id.*

¹⁹ *Id.*

in the *Lebensmittel-und-Bedarfsgegenstandegesetz* ("LMBG").²⁰ According to the LMBG, additives are "substances which are intended to be added to foodstuffs in order to alter the characteristics of such foodstuffs or to give them specific properties or produce special effects."²¹ The LMBG prohibits the use of unauthorized additives in the commercial production or processing of foodstuffs, including beer. Additionally, the LMBG authorizes regulations which are "compatible with consumer protection from the point of view of technological, nutritional and dietary requirements" and which limits the amount of additives for specific foodstuffs or uses or in general.²²

This Note examines *Commission v. Germany* for the legal definition it gives to the Article 36 exception for the protection of human health. Further, this Note studies the way in which *Commission v. Germany* raises questions concerning the degree of success the European Community has had in attempting to realize a barrier-free common market. Section II of this Note presents the Court's opinion, and Section III compares the opinion to relevant Court of Justice decisions. Section IV reports reactions to *Commission v. Germany* and places the decision in the context of the current condition of the European Community. Finally, Section V evaluates how effective both the Court of Justice in *Commission v. Germany* and other institutions of the European Community have been in advancing the common market ideal.

II. COMMISSION V. GERMANY

A. Issues Before the Court

In 1982, a French exporter complained to the Commission that the purity laws prohibited the sale of his beer in Germany, because his product contained additives.²³ The Commission found substance in the complaint and sought to convince Germany to amend its legislation in order to permit the sale of foreign beers. When Germany did not respond, the Commission brought a direct action²⁴ against it before the Court of

²⁰ *Lebensmittel-und Bedarfsgegenstandegesetz* (Law on Foodstuffs and Consumer Goods), Aug. 15, 1974, *BSB*, Part I, 1974, at 1946 [hereinafter LMBG].

²¹ *Id.*

²² *Id.*

²³ *Beer Ruling*, *supra* note 14.

²⁴ There are two general categories of cases which may come before the Court of Justice—direct actions and preliminary rulings. A direct action challenges the legality of: (1) regulations enacted by a Member State; (2) directives or decisions by the Commission; or (3) directives or decisions by the Council, another political institution of the European Community. Member States, the Commission, the Council, or a natural or legal person may bring a direct action. Toepke, *The European Economic Community—A Profile*, 3 *NW. J. INT'L L. & BUS.* 640, 651 (1981).

Justice.²⁵

Before reaching the substance of *Commission v. Germany*, the Court of Justice resolved procedural matters which could have resulted in a dismissal of the direct action.²⁶ Prior to bringing a direct action before the Court, the Commission may deliver a "reasoned opinion" or "letter" regarding application of the relevant European Community Treaty to the matter at hand. The Member States, whose obligation to the Treaty is being challenged, may submit a "reply to the reasoned opinion." The Commission determines whether to file suit based on this reply.²⁷

The procedural issue involved in *Commission v. Germany* centered on which regulations comprising the purity laws the Commission could properly challenge.²⁸ In its reasoned opinion, the Commission cited only one regulation of the purity laws, Article 9 of the BSG. Subsequently, Germany addressed only Article 9 in its reply to the reasoned opinion. Additionally, the Commission discussed only Article 9 in its application. Germany, however, argued in its defense that the Commission had failed to name the legislation relevant to the suit. Germany contended that the Commission should have challenged the LMBG, which specifically restricted the use of additives in foodstuffs; therefore, the direct action should be dismissed.²⁹

The Court of Justice found that the direct action concerned regulations in both the BSG and the LMBG.³⁰ The Court explained that the Commission had consistently objected to the restrictions on beer imports from other Member States and had referred to Article 9 of the BSG as merely an example of the purity laws that it opposed. Furthermore, the Court noted that although the Commission did not cite the LMBG, it had argued in its reasoned opinion that the blanket ban on additives was disproportionate to Germany's objectives to protect the life and health of its citizens. Finally, the Court stated that Germany also had indirectly referred to the LMBG by defending its restrictions on additives and raising the health and life justifications in its defense.³¹

Upon resolution of the procedural issue, the Court identified two substantive issues: the permissiveness of Article 10 of the BSG, which prohibits use of the designation "bier" for beers that do not comply with Article 9 of the BSG, and whether the blanket ban on beers containing

²⁵ *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,905.

²⁶ *Id.* at 17,905-06.

²⁷ J. USHER, EUROPEAN COURT PRACTICE 4, 29 (1983).

²⁸ *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,905-06.

²⁹ *Id.*

³⁰ *Id.* at 17,906.

³¹ *Id.*

additives is justified by Article 36 of the EEC Treaty on grounds of protection of human health.³²

B. The Designation "Bier"

The Court first noted that Article 9 of the BSG, which permits only the four ingredients of malt, hops, yeast, and water in beer, applied only to German breweries. Consequently, Article 9 does not restrict imports in violation of Article 30 of the EEC Treaty.³³ However, as the Court explained, Article 10 of the BSG applies both to products made in Germany and those imported from other Member States, and it refers to Article 9. Therefore, because German breweries are largely the only producers of beer solely containing the four ingredients of Article 9, Article 10 effectively reserves the designation "bier" solely for German-manufactured beer.³⁴

Germany argued that Article 10 is merely a rule of designation, which is exclusively intended to protect consumers.³⁵ According to Germany, German citizens associate the term "bier" with beverages made exclusively from the four ingredients listed in Article 9. The restrictions of Article 10 are necessary so that Germans will not be misled about the product they consume.³⁶

The German government further maintained that the purity laws are not protectionist in their aim. Any trader from any country can market a product that complies with Article 9 as "bier". Thus, Article 10 does not violate Article 30 of the EEC Treaty.³⁷

The Court soundly rejected Germany's contentions, finding that Article 10 violates Article 30 of the EEC Treaty for two reasons.³⁸ First, Article 10 "crystallizes" consumer conceptions about the meaning of the term "bier." Second, "bier" is a generic term whose use cannot be reserved by a Member State.³⁹ In discussing the first reason, the Court noted the European Community has "harmonized" or implemented common rules governing all Member States in certain areas.⁴⁰ However,

³² *Id.* at 17,906, 17,908.

³³ *Id.* at 17,906.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 17,906-07. It should be noted that Article 36 of the EEC Treaty was not relevant to this portion of the case, because Germany argued that Article 10 of the BSG did not violate Article 30 of the EEC Treaty. Article 36 would have been at issue if Germany had conceded that Article 10 violated Article 30 but was justified under the protection of human health exception of Article 36.

³⁸ *Id.* at 17,907.

³⁹ *Id.*

⁴⁰ Harmonization is achieved, in part, through Directives issued by the Council of the European

in the absence of harmonization, Member States may enact national legislation subject to certain requirements. With respect to such national health regulations, a Member State must recognize that consumers' conceptions change.

[C]onsumer conceptions which vary from one Member State to another are likely to evolve over time within a Member State. The establishment of the Common Market is, it should be added, one of the factors that may play a major contributory role in that development. Whereas rules protecting consumers against misleading practices enable such a development to be taken into account . . . [Article 10 of the BSG prevents] it from taking place. As the Court of Justice has already held in another context [in *Commission v. United Kingdom*], the legislation of a Member State may not "crystallize given consumer habits so as to consolidate an advantage acquired by national industries."⁴¹

The Court concluded that Article 10 violates Article 30 of the EEC Treaty because "bier" is a generic term.⁴² Therefore, Germany cannot reserve the term for beverages made in accordance with Article 9 of the BSG. Indeed, as the Court pointed out, Germany appeared to have contradicted itself because certain paragraphs of Article 9 use the designation "bier" to refer to beverages that do not meet German purity standards.⁴³ The Court also suggested that appropriate labelling of ingredients adequately protects consumers. Thus, Germany may establish labelling requirements to identify beers from other Member States, but such labelling cannot present negative impressions about imported beers.⁴⁴

C. The Absolute Ban on Beers Containing Additives and the Principle of Proportionality

The second substantive issue before the Court involved the absolute ban on foodstuffs. Germany conceded that its purity laws effectively ban all beers made in other Member States and hence violate Article 30 of the EEC Treaty. However, Germany argued, the purity laws are justified under Article 36 on grounds of protection of human health.⁴⁵

In its attempt to justify the purity laws, Germany emphasized the dangers of using additives when their long-term effects are unknown,

Community. Four Directives have been issued regarding additives. However, none of the Directives specifically apply to regulations like the beer purity laws. See *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,894 for a list of the four Directives on additives.

⁴¹ *Id.* at 17,907.

⁴² *Id.*

⁴³ *Id.* at 17,907-08.

⁴⁴ *Id.*

⁴⁵ *Id.* at 17,908.

particularly the accumulative effect of additives in the body and their interaction with substances such as alcohol. Importation of beers containing additives presents a particularly high risk to German public health, because Germans consume a large quantity of beer.⁴⁶ Indeed, Germany emphasized, the use of additives is not “technologically necessary” and can be avoided by following Article 9 of the BSG.⁴⁷

In initial support of Germany’s argument, the Court cited three of its earlier decisions, *Officier van Justitie v. Sandoz B.V.*, *In re Leon Motte*, and *Public Prosecutor v. Claude Muller*. These cases establish that, in the absence of Community harmonization of national laws, Member States may decide the appropriate degree of protection of human health, while still having regard for the requirement of free movement of goods. Further, such legislation may require prior authorization by the recipient State for products containing additives.⁴⁸

However, the Court cautioned, a Member State that prohibits goods containing additives, even though the goods are authorized by other Member States, must comply with Article 36, as interpreted by the Court. In the instant case, the purity laws should be interpreted using the “principle of proportionality” as based on the second sentence of Article 36.⁴⁹ Furthermore, Germany had the burden of proof because it was the Member State which enacted the challenged law.⁵⁰

The second sentence of Article 36 provides that prohibitions or restrictions on importation, exportation, or transit of goods “shall not . . . constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.”⁵¹ The principal of proportionality sets forth criteria to determine if a prohibition arbitrarily discriminates or is a disguised restriction on trade. Citing *Sandoz, Motte*, and *Muller*, the Court defined the principle of proportionality in two parts. First,

prohibitions on the marketing of products containing additives authorized in the Member State of production but prohibited in the Member State of importation must be restricted to what is actually necessary to secure the protection of human health. . . . [A]lso the use of a specific additive which is authorized in another Member State must be authorized in the case of a product imported from that Member State where, in view, on the one hand,

⁴⁶ *Id.* Germans consume 148 liters or 39 gallons a year. Beer accounts for almost one-third of the nutrients consumed by the average German. Consumption in Bavaria is 250 liters or 66 gallons annually. *Beer Ruling*, *supra* note 14.

⁴⁷ *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,908.

⁴⁸ *Id.* at 17,908-909.

⁴⁹ *Id.* at 17,909.

⁵⁰ *Id.*

⁵¹ EEC Treaty, *supra* note 2.

of the findings of international scientific research, . . . and, on the other hand, of the eating habits prevailing in the importing Member State, the additive in question does not present a risk to public health and meets a real need, especially a technological one.⁵²

Next, the principle of proportionality requires that Member States provide importers of goods containing additives with an accessible and reasonably expedient procedure for obtaining permission to bring goods into the country.⁵³

Applying the above definition, the Court held that Germany's blanket ban on beer containing additives violated the principle of proportionality as based on the second sentence of Article 36.⁵⁴ Not only did the purity laws fail to provide an application procedure for traders,⁵⁵ but Germany had not justified the blanket ban of the purity laws on international research or the eating habits of its citizens. Instead, Germany had simply referred to unknown potential risks of additives and to the heavy consumption of beer by its citizens. Indeed, rather than establishing a need for the blanket ban, Germany had submitted evidence that it permits some additives that are used in foreign beers to be used in drinks other than beer.⁵⁶

The Court strongly criticized Germany's arguments that the purity laws meet a real need, particularly a technological one.⁵⁷ Germany had contended that there is no real need for additives in beer because it can be manufactured in compliance with Article 9 of the BSG. Hence, by Germany's definition, ingredients that met a "real need" were only those indispensable to the manufacturing process. The Court responded that mere reference to the fact that beer can be made without additives did not preclude the possibility that some additives may meet a technological need. "The concept of technological need must be assessed in light of the raw materials utilized and bearing in mind the assessment made by authorities of the Member State where the product was lawfully manufactured and marketed.⁵⁸ Rather than make such an assessment, Germany had enacted purity laws which favor national production methods and constitute a disguised restriction of trade in violation of Article 30.⁵⁹

⁵² Commission v. Germany, 4 Common Mkt. Rep. (CCH) ¶ 14,417, at 17,909.

⁵³ *Id.*

⁵⁴ *Id.* at 17,909-10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 17,910.

⁵⁹ *Id.*

III. RELEVANT DECISIONS OF THE COURT OF JUSTICE

A. The Additives Cases: Proportionality and the "Risk and Real Need" Standard

Article 36 of the EEC Treaty attempts to address an inherent contradiction in the common market ideal: the basic principle of free movement of goods between all Member States weighed against the imperative noneconomic interests of individual Member States.⁶⁰ Article 36 functions in two parts. The first sentence enumerates restrictions to free movement which nevertheless are justified because of national interests, particularly restrictions protecting human health. A measure that is found to be justified by the first sentence of Article 36 must then comply with the second sentence.⁶¹ The second sentence states that a restriction justified by the first sentence cannot constitute "a means of arbitrary discrimination or a disguised restriction on trade between Member States"⁶² In order to determine whether a restriction constitutes a means of arbitrary discrimination or a disguised restriction, the Court has inferred from the second sentence the principle of proportionality.⁶³

The principle of proportionality, in its barest form, permits restrictions only to the extent necessary to protect a relevant interest.⁶⁴ The Court has developed the law on the principle of proportionality in four cases regarding the use of additives in foodstuffs: *Sandoz*, *Motte*, *Muller*, and most recently, *Commission v. Germany*.

Sandoz involved the prosecution of an importer who sold foodstuffs containing added vitamins, without first obtaining required authorization from Dutch officials.⁶⁵ Unlike the Netherlands, Germany and Belgium had authorized the marketing of foodstuffs containing added vitamins. The Netherlands conceded their measure violated Article 30 of the EEC Treaty, but argued that the measure was justified under Article 36 on public health grounds.⁶⁶

The Court recognized that excessive consumption of vitamins has long-term harmful effects and that it is difficult to assess a safe level of vitamin intake. But, the Court noted, the foodstuffs involved did not contain harmful amounts of vitamins and did not alone threaten human

⁶⁰ L. GORMLEY, *supra* note 1 at 220.

⁶¹ *Id.* at 210-11.

⁶² EEC Treaty, *supra* note 2.

⁶³ *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,909.

⁶⁴ L. GORMLEY, *supra* note 1, at 125.

⁶⁵ *Sandoz*, 1983 E. Comm. Ct. J. Rep. at 2,458.

⁶⁶ *Id.* at 2,459.

health.⁶⁷ The Court explained that, in the absence of harmonization of national rules, Member States have wide discretion in determining the degree of protection of human health that they want to ensure, as long as they uphold the principle of free trade. Moreover, Member States "must, in order to observe the principle of proportionality, authorize marketing when the addition of vitamins meets a real need, especially a technical or nutritional one."⁶⁸

Thus, the Court in *Sandoz* presented an initial definition of the principle of proportionality: although Member States have wide discretion in public health regulation, a Member State must authorize the use of an additive that meets a real need. *Motte* and *Muller* further developed the definition of the principle of proportionality.

In *Motte*, Belgium refused to allow potted fish roe containing artificial coloring to be imported from Germany.⁶⁹ Similarly, in *Muller*, French authorities prosecuted the defendant for importing German pastries containing an emulsifying agent.⁷⁰

The Court of Justice found that both the Belgian and French governments had violated Article 30 and that Article 36 did not justify their actions.⁷¹ Citing *Sandoz*, the Court recognized in both cases that the principle of proportionality provides that, in the absence of harmonization, Member States are able to enact public health regulations. However, the principle of free movement of goods must be recognized and national authorities should assess whether a particular additive meets a real need.

The Court in *Motte* and *Muller* then further defined the principle of proportionality.⁷²

It is for the Member States to consider, in the context of factual assessments which they must undertake in that regard, whether the marketing of foodstuffs containing additives *may present a risk to public health and whether there is a real need* for the additives in the particular foodstuffs. In applying those criteria, they must take account of the results of *international scientific research* and in particular of the work of the Community's Scientific Committee for Food viewed in light of *the eating habits prevailing in the importing Member State*.⁷³

⁶⁷ *Id.* at 2,460-61.

⁶⁸ *Id.* at 2,463-64.

⁶⁹ *Motte*, 4 Common Mkt. Rep. (CCH) ¶ 14,280 at 16,710.

⁷⁰ *Muller*, [1986] 2 Comm. Mkt. L.R. at 479, 4 Common Mkt. Rep. (CCH) ¶ 14,329 at 17,070.

⁷¹ *Motte*, 4 Common Mkt. Rep. (CCH) ¶ 14,280 at 16,714; *Muller*, [1987] 2 Comm. Mkt. L.R. at 485, 4 Common Mkt. Rep. (CCH) ¶ 14,329 at 17,073.

⁷² *Motte*, 4 Common Mkt. Rep. (CCH) ¶ 14,280 at 16,713; *Muller*, [1987] 2 Comm. Mkt. L.R. at 483, 4 Common Mkt. Rep. (CCH) ¶ 14,329 at 17,072.

⁷³ *Muller*, [1987] 2 Comm. Mkt. L.R. at 484, 4 Common Mkt. Rep. (CCH) ¶ 14,329 at 17,073.

Moreover, the Court noted in *Muller* that a real need includes needs of a technological or economic nature.⁷⁴ The Court thus expanded the principle of proportionality to require that a Member State consider not only whether an additive meets a real need, but also whether it presents a risk to public health. Moreover, the risk and real need of an additive should be determined in light of international research and the eating habits of the country.

In *Commission v. Germany*, the Court relied on the principle of proportionality to determine that the beer purity laws constituted a disguised restriction on trade between Member States. The Court noted that the principle of proportionality, as developed in *Sandoz*, *Motte*, and *Muller*, requires that an additive authorized in one Member State but prohibited in another must be allowed in the prohibiting State if international research and the eating habits in the prohibiting State indicate that the additive does not present a public health risk and “meets a real need, especially a technological one.”⁷⁵

The Court next defined the term “technological need”. The Court declared that the term is not so restrictive as to mean that the mere feasibility of producing a foodstuff without the additive eliminates the possibility of a technological need. Rather, “technological need” requires a Member State to assess an additive used in foreign beers, in light of the raw materials used with the additive and the conclusions reached by authorities in the other States where the additive is permitted.⁷⁶

The Court’s discussion of the risk and real need standard is significant. It is the Court’s most expansive definition to date of the principle of proportionality as applied to cases regarding additives in foodstuffs. *Commission v. Germany* reaffirms the principle of proportionality as defined in *Motte* and *Muller*, and explains the term “technological need”. It is important to note that the Court’s requirements that an additive cannot present a public health risk and must meet a real need, especially a technological need, does not preclude the possibility that other non-technological, real needs would be permitted. Indeed, in *Sandoz* and *Muller*, the Court identified nutritional, technical, and economic needs as permissible non-technological, real needs. Furthermore, neither party in *Commission v. Germany* raised the issue of whether additives in beer met real needs other than technological needs.

The Court’s articulation of the principle of proportionality in *Commission v. Germany* also makes it more difficult for a Member State to

⁷⁴ *Id.* at 483, [1986] 4 Common Mkt. Rep. (CCH) ¶ 14,329 at 17,072.

⁷⁵ *Commission v. Germany*, 4 Common Mkt. Rep. (CCH) ¶ 14,417 at 17,909.

⁷⁶ *Id.* at 17,909-10.

justify a restriction on free movement of goods under Article 36. According to the principle of proportionality, a Member State that prohibits the marketing of a foodstuff containing additives has the burden of proving that the additive does not meet the risk and real need standard. By widening the scope of the risk and real need standard, the Court increased the burden placed on a defending Member State. Thus, in order for a defending Member State to prevail, it must show that an additive poses a risk to public health *and* does *not* meet a real technological, economic, or nutritional need.

This expansive definition of the principle of proportionality is consistent with the Court's efforts to advance free movement of goods under Article 30. By increasing the burden of proof for defending a measure that impedes free movement, the Court narrowed the scope of measures justified under Article 36. In narrowing the scope of Article 36, the Court correspondingly widened the reach of Article 30.

B. Consumer Habits of the Member States

With the exception of *Commission v. Germany, Muller* is the Court's most recent discussion of the Article 36 exception for the protection of human life and health. Comparison of the two cases reveals the Court's inconsistent treatment in recognizing the individuality of Member States, particularly with regard to unique eating habits.

In *Muller*, the Court interpreted Article 36 to mean that the ideal of a common market must nevertheless recognize the cultural differences of the individual members to the extent that human life and health need protection. Specifically, the eating habits of a country must be tolerated to some degree because of overriding health concerns. In *Commission v. Germany*, the Court cited *Muller* with approval, stating that the eating habits of a country help determine if an additive meets a real need under the principle of proportionality. The Court, however, contradicted its toleration on national eating habits in another section of its opinion. In its discussion of the designation "bier", the Court conclusively stated national legislation cannot crystallize consumer habits.⁷⁷ Because eating habits are one form of consumer habit, national legislation, which identifies a particular eating habit and thus justifiably protects public health under Article 36, necessarily crystallizes a consumer habit. Yet, according to the Court, such crystallization is prohibited.

One could argue that the Court's apparent contradiction can be re-

⁷⁷ *Id.* at 17,907.

solved by its ruling in *Officier van Justitie v. Albert Heijn B.V.*⁷⁸ In *Albert Heijn*, the Court held that, determination of acceptable levels of pesticide should take into account, among other factors, the dietary habits of a national population. However, such determination of permissible levels cannot be static. For example, a new use of a pesticide might require an adjustment of its permissible level.

Applying the ruling in *Albert Heijn* to the situation in *Commission v. Germany*, a national regulation regarding permissible additives for beers would have to be flexible and receptive to both new uses of additives and to changing consumer habits. Such flexibility would consider national eating habits without crystallizing them. While this line of reasoning may be valid, it was not proposed by the Court and the apparent inconsistency in the Court's analysis remains.

Despite the inconsistency in the Court's analysis in *Commission v. Germany*, the Court's conclusion was ultimately correct. By striking down West Germany's overly broad restrictions on foreign beers and expanding the principle of proportionality, the Court affirmed the basic principle of the free movement of goods. The Court ruled that, even if the European Community has not established common rules for Member States on a particular subject, the States cannot enact legislation which obstructs free movement. In short, whether or not harmonization exists, free movement of goods under Article 30 must be secure.⁷⁹ Defendants of obstacles to free movement must meet a heavy burden of proof. Only narrow exceptions, rather than Germany's sweeping purity laws, will be allowed under Article 36.

IV. REACTION TO *COMMISSION V. GERMANY*

While the Court of Justice continues to affirm the free movement of goods principle, practical considerations hinder the effective advancement of the principle. The European Community has set 1992 as its target date for securing a barrier-free integral market.⁸⁰ Yet, only four years away from the target date, the Community continues to be a "maze of protectionism". One member of the Commission has said that Europe is "experiencing an innovation phase—not unfortunately in free trade,

⁷⁸ *Officier van Justitie v. Albert Heijn B.V.* 1984 E. Comm. Ct. J. Rep. 3263.

⁷⁹ On the efforts of the Community to harmonize rules of the Member States, see C. TWITCHETT, *HARMONISATION IN THE EEC* (1980); Dashwood, *Hastening Slowly: The Community's Path Toward Harmonisation* in *POLICYMAKING IN THE EUROPEAN COMMUNITIES* (H. Wallace, W. Wallace & C. Webb, eds. 1977) 273; Vogelhaar, *The Approximation of the Laws of the Member States Under the Treaty of Rome* 12 *COMMON MKT. L. REV.* 211 (1975).

⁸⁰ Dietrich, *Germans Can No Longer Exclude Foreign Beers*, Reuters, March 12, 1987 (NEXIS, Omni file).

but in obstacles and restrictions."⁸¹ Germany's beer purity laws exemptify this unwanted innovation. The Court's struggle to balance free movement with the undeniable cultural differences between Member States illustrates the inherent contradiction of a common market.

Reaction to *Commission v. Germany* also reflects the cultural divisions endemic to the common market. German brewers have stated that the purity standards would remain in force for them, and that the *Reinheitsgebot* would be used as a quality trademark.⁸² German brewers also expect consumers to remain faithful to the domestic brews which they have always consumed, even if imported beers are less expensive.⁸³ Furthermore, two of Germany's biggest supermarkets, Coop and Tengelmann, plan to boycott imported brews which do not conform to the purity laws.⁸⁴

Brewers in other Member States are betting that German consumers are ready for a change. Imports comprised only 3.3% of the total German beer market in 1980.⁸⁵ Nevertheless, French and Dutch brewers have said that they will launch massive advertising campaigns in Germany.⁸⁶

The structure of Germany's beer industry may also make it susceptible to competition.⁸⁷ Although it is the second largest beer-producing country in the world, Germany is an exception to the rule that a handful of firms produces the majority of the world's beer. Indeed, almost half of the world's 3,000 breweries are located in Germany.⁸⁸ Many German breweries have markets concentrated in specific localities.⁸⁹ The small beer producers of Germany may find it difficult to compete with the huge foreign beer producers.

The German government has not yet taken official action regarding

⁸¹ Ball, *The Common Market's Failure*, FORTUNE, Nov. 14, 1983, at 188 at 190 (quoting Karl-Heinz Narjes of the Commission).

⁸² *Beer Ruling*, *supra* note 14.

⁸³ Jautz, *Consumer Groups Welcome Beer Ruling, Brewers Disappointed*, Associated Press, March 12, 1987 (NEXIS, AP file).

⁸⁴ *Beer Ruling*, *supra* note 14. If these two supermarkets or other private groups boycott beer from other Member States, they may be found to violate Article 36 of the EEC Treaty. The European Community law is unclear as to whether Articles 30 to 34 of the EEC Treaty, along with the exceptions in Article 36, apply to private (as opposed to State) restrictions on trade. See, Themaat and Gormley, *Prohibiting Restriction of Free Trade Within the Community: Articles 30-36 of the EEC Treaty*, 3 NW. J. INT'L LAW AND BUS. 577, 608 (1981).

⁸⁵ J. CAVANAGH & F. CLAIRMONTE, *ALCOHOLIC BEVERAGES DIMENSIONS OF CORPORATE POWER* 23 (1985).

⁸⁶ Dietrich, *supra* note 81.

⁸⁷ J. CAVANAGH & F. CLAIRMONTE, *supra* note 86, at 67.

⁸⁸ *Id.* at 64.

⁸⁹ Jautz, *supra* note 84.

the purity laws. However, the German Ministry has stated that foreign beers will be tested for impermissible ingredients. Ingredients in foreign beers will also have to be listed clearly on every bottle, can, and barrel.⁹⁰ The Christian Democratic Party has said, "This decision is an example of the European Commission's growing negligence in honoring the cultural differences of its Member States."⁹¹

The unenthusiastic acceptance in Germany of the decision in *Commission v. Germany* may be indicative of the country's growing dissatisfaction with the European Community. German farmers have demonstrated heavily against Community agricultural policies, and Germany was the only Member State which failed to help promote Community togetherness for the Olympic Games. Furthermore, the Ministry has expressed a need for firm evidence that membership in the Community is more favorable than rapprochement with East Germany.⁹²

Germany also is currently a top world exporter and Western Europe's dominant economy.⁹³ While Germany enjoys prosperity, the European Community suffers from sluggish growth—less than 2% in 1988.⁹⁴ Leaders of the European Community and economic experts have stated that better cooperation among the Member States is crucial for domestic growth. Germany, France and Britain have been urged to increase government spending in hopes that further stimulation of their economies will spur the Community's abysmal growth. However, Germany has refused to cooperate because it fears higher inflation, and France and Great Britain will not follow without Germany's leadership.⁹⁵

Some economists believe that the lack of cooperation will necessitate a realignment of the European Monetary System, which Germany opposes. French and Italian currencies would be devalued against the German currency. Such a realignment would reduce trade deficits for France and Italy, but damage Germany's prosperity.⁹⁶

As Germany becomes a formidable exporter relative to the United States and Japan, the free movement of goods between the Member States seems less important to Germany. While Germany flourishes, less prosperous Member States insist on cooperation in the name of the Euro-

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Berlin, not Brussels, Exerts the Strongest Fascination*, Financial Times, April 3, 1987, § 1, at 26, col. 1.

⁹³ *Greenhouse, Better Cooperation Urged in Europe*, N.Y. Times, Feb. 23, 1988, at 24, col. 1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

pean Community. Unless Member States cooperate as members of a common market, efforts to advance free movement by the Court of Justice and other Community institutions may prove to be ineffective.

VI. CONCLUSION

The Court of Justice has commented on attempts to harmonize the national laws of Member States:

The fundamental principle of a united market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there should first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher.⁹⁷

Yet, without harmonization, the Court struggles to fit the national laws of the autonomous, and thus necessarily self-interested, Member States into a philosophically unified body of Community law.

On many levels, *Commission v. Germany* exemplifies the struggle of the ideal of the common market. According to the Court, Germany's purity laws were an effort to promote a national product at the expense of the Community's overriding principle of free movement of goods. Thus, the Court correctly struck down the beer purity laws. Yet, in advancing the free movement of goods principle and expanding the principle of proportionality, the Court was forced to acknowledge that a unique characteristic of an autonomous Member State, national eating habits, could properly stand in the way of free trade.

Enactment of legislation such as the purity laws and refusal by the German government to work with other Member States in economic policy-making stand in the way of the common market ideal. The threat in Germany of boycotts of foreign beers demonstrates that the citizens of a Member State also may hinder the realization of the common market ideal.

If neither the government nor the citizens of Member States are willing to open their borders, sacrificing some national identity for the greater cause of the Community, then decisions like *Commission v. Germany* will make little progress. The Court believes that harmonization of national laws would reduce the principle of free movement of goods to a mere cipher. It seems, however, that the opposite is true. Without some approximation of national laws by the European Community, the indi-

⁹⁷ *Commission v. Italy*, 1981 E. Comm. Ct. J. Rep. 3019.

Commission v. Germany
9:444(1988)

vidual interests of each Member State may continue to reduce the common market ideal to a mere cipher.

Mimi Y. Lee

