OUTLINE

FREE MOVEMENT OF GOODS UNDER THE TREATY OF ROME: UNFETTERED OR FICTION?

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INTRODUCTION

Free movement of goods as part of the Common Market

I. 1. Common Market constituted by 4 basic freedoms :

i) Free movement of goods;

ii) Free movement of persons;

iii) Free movement of services;

iv) Free movement of capital .

2. Free movement of goods supplemented by :

- Common Agricultural policy

Free movement of services supplemented by :

- Common transport policy.

II. Common Market "protected" against third countries by

- Common commercial policy (part of which is the Common Customs Tariff).

PART ONE

I. The different obstacles to the free circulation of goods

1. The EEC Treaty prohibits the following types of obstacles :

   i) Prohibition of customs duties and taxes of equivalent effect (Art. 9);

   ii) Prohibition of discriminating internal taxation (Art. 95);

   iii) Prohibition of quantitative restictions and measures having an equivalent effect (Articles 30 and 34 in combination with Article 36);

   iv) Discriminatory rules and practices of state monopolies (Art. 37)

   In addition, the EEC establishes a special regime for State aids (Articles 92 and 93)
   (See for details Annex I)

2. The prohibitions apply also to agricultural products (Article 38 (2))

3. The prohibitions apply to products originating in Member States and products coming from third countries which are in free circulation in the Member States (Article 9 (2)).

4. The prohibitions have direct effect , i.e. they can be invoked by private bodies (individuals and corporations).
By virtue of the principle of supremacy of Community Law, they have to be enforced against national laws of any kind. (statutes and even constitutions).

5. The prohibitions are adressed to Member States. However, they also have to be respected by the Community, unless Community law expressly allows for a derogation.

II. The prohibition of quantitative restrictions and measures of equivalent effect

1. In spite of its residual character, this is the most important of the prohibitions of obstacles to the free movement of goods.

Prohibitions with lex specialis character

- Customs duties and taxes having an equivalent effect (Article 9);

- Discriminatory internal taxation (Article 95);

- Discriminatory practices of monopoly bodies (Article 37);

- certain State aids (Articles 92 and 93)

2. Notion of quantitative restriction of imports and exports

Imports or exports are limited to a certain quantity (which can be zero)

Example : Quotas for EC Steel exports to US

Only justification : Article 36.

3. Notion of measure of equivalent effect to quantitative restriction of EXPORTS

"Measures which have as specific object or effect the restriction of export patterns 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 national 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."

Groenveld Case 15/79/[1979] p. 3409, 3415

4. Notion of measure of equivalent effect to quantitative restriction of IMPORTS

"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".

Dassonville, Case 8/74 [1974] ECR 837, 852

5. Measures of equivalent effect applicable to imported goods only

Exemple : Requirement of an import licence

These measures are forbidden, unless they can be justified by Article 36.

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 recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

6. Measures (of equivalent effect) applicable indistinctly to domestic and imported goods

Examples : Standards for production, marketing.

These measures are not measures of equivalent effect if they are justified

" in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

Rewe, Case 120/78 [1979] ECR p. 660, 665

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by " a purpose which is in the general interest and such as to take prevalence over the requirements of the free movement of goods".

Gilli, Case 788/79 [1980] ECR 2071, 2078

In addition, these measures can be justified by Article 36.

PART TWO

Comparison of jurisprudence of the US Supreme Court and the EC Court of Justice with respect to the Interstate Commerce Clause and the prohibition of measures of an effect equivalent to quantitative restrictions.

For the description of the jurisprudence of the US Supreme Court, we will refer to Blasi, Constitutional Limitations on the Power of States to Regulate the Movements of Goods in Interstate Commerce, in Sandalow - Stein, Courts and Free Markets, Perspectives from the United States and Europe, 1982, p. 174.

We will also use Blasi's categories of US cases for the comparison.

A. State laws restricting the exploitation for out-of-State markets of economic resources located within the State.

I. Situation in the U.S.

Blasi, op. cit. p. 192:

" When goods, or resources are in scarce supply, States sometimes seek to retain them for the benefit of local residents and enterprises. The Supreme Court has invalidated all State laws which embody such favouritism, with the historical exception of a few recently over-ruled cases involving special resources which States where considered to hold "in trust" for the benefit of their citizens. Measures designed to conserve resources or prevent the production of unwanted goods are invariably upheld when the impact of the law does not fall disproportionaly on#out-of State economic interests."

II. Situation in EEC

1. No appropriate case law for the retaining of resources.

2. For the prevention of the production of unwanted goods, see Case nr. 1 in B (Groenveld).

B. State laws regulating the methods by which goods produced within the State are prepared for and marketed in interstate commerce

I. Situation in the USA

Blasi, Op. Cit, p. 197

"As a general matter, the Court has looked favourably upon laws designed to ensure the quality of products in order to protect the regulation of the State's producers, has adopted a mixed and uncertain course regarding laws that regulate business transactions in order to protect producers from being deceived or exploited by interstate dealers, and has invariably struck down laws that seek to generate employment opportunities for residents, by requiring that certain operations, in the process of production and distribution be done within the confines of the State."

II. Situation in the EEC

1. Gronveld v. Produktschappen voor Vee en Vlees,

Case 15/79 [1979] ECR 3413 , 3415 concerning a Dutch regulation which prohibits any manufacturer of sausages from having in stock or processing horsemeat :

"

the regulation in question was adopted for the purpose of protecting Netherlands exports of meat products both to Member States and to non-member countries which constitute important export markets and where there are objections to the consumption of horsemeat or indeed where the importation of products containing horsemeat is prohibited. As it is practically impossible to determine the presence of horsemeat in meat products the sole means of ensuring that such products do not contain horsemeat is to prohibit manufacturers of meat products from having in stock, preparing or processing horsemeat.

Art. 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 national 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. "

2. Procureur de la République v. Bouhelier, Case 53/76 [1977] ECR 203 to 206 concerning a French regulation requiring exporters of watches and watch movements to obtain a license.

12 The second part of the question asks whether a quality inspection instituted by a Member State and carrying with it a prohibition on the export of products which do not satisfy the quality standards provided for by the national rules may be regarded as a quantitative restriction on exports or a measure having equivalent effect.

13. However desirable may be the introduction of a policy on quality by a Member State, such policy can only be developed within the Community by means which are in accordance with the fundamental principles of the Treaty.

14. Rules such as those at issue in this instance cannot be regarded as compatible with the aforementioned principles.

15. The fact that the obligatory quality standards only apply to products intended for export and are not imposed on products marketed within the Member State leads to arbitrary discrimination between the two types of products which constitutes an obstacle to intra-Community trade, governed by Article 34 of the Treaty;

16. Thus, apart from the exceptions for which provision is made by Community law, the Treaty precludes the application to intra-Community trade of a national provision which requires export licences or any other similar procedure in respect of exports alone, such as the issue of standards certificates, the requirement of which constitutes a measure having effect equivalent to quantitative restrictions in so far as such certificates are capable of constituting a direct or indirect, actual or potential obstacle to intra-Community trade.

17. Such measures are prohibited, regardless of the purpose for which they have been introduced.

3. Commission v. France, Case 173/83 not yet reported :

A French regulation setting a system of collection and destruction of used oils which excludes the export of such oils even for delivery to those authorised to collect, destroy or recycle the same in other Member State, is incompatible with the prohibition of measures having an effect equivalent to quantitative restrictions of exports.

c. State laws formally excluding out-of-state sellers from local market

1. Situation in the USA

Blasi, op. cit., p. 207 - 208

a) "When a State formally disadvantages out-of-state producers in the competition for local markets by varying the terms of regulations according to whether the enterprise affected is located within or out of the State, State laws ..... have been considered virtually unconstitutionnal per se ".

b) "The only exception to this otherwise absolute principle concerns laws that grant subsidies rather than impose restrictions; these laws, the Court has said, are not to be viewed as placing burdens on commerce and hence are not subject to the normal restrictions that derive from the negative implications of the Commerce Clause."

2. Situation in the EEC

a) With respect to a), the situation is the same.
No case is available for comparison.

b) With respect to b), see the special regime (Article 92 and 93 of the EEC Treaty) for State aids.

D. State laws regulating the prices at which goods may be sold

I. Situation in the US

" In effect, if not explicitly in theory, States now appear to have virtually unlimited authority so far as the Commerce Clause is concerned to set minimum, maximum, or fixed prices at which goods may be bought and sold within the boundaries of the regulating State. This authority extends both to imported goods, for which retail and wholesale prices may be regulated and to exported goods, for which the prices paid to producers and distributors may be regulated".

Blasi, Constitutional Limitation of the Power of States to Regulate the Movements of Goods in Interstate Commerce, in Sandelow-Stein, Court and Free Market, 1982, Vol I, p. 175 to 188.

Blasi refers specifically to Milk Control Board v. Eisenberg
Parker v. Brown and
Cities Services Co v. Peerless Co.

II. Situation in EEC

1. Openbaar Ministerie van Nederland v. Van Tiggele, Case 82/77(1978) 37, 39-40,

Concerning a Dutch system of minimum retail prices which varies according to each category of products.

/ Whilst national price-control rules applicable without distinction to domestic products and imported products cannot in general produce such an effect they may do so in certain specific cases.

Thus imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.

These are the considerations in the light of which the question submitted must be settled since the present case concerns a product for which there is no common organization of the market.

First a national provision which prohibits without distinction the retail sale of domestic products and imported products at prices below the purchase price paid by the retailer cannot produce effects detrimental to the marketing of imported products alone and consequently cannot constitute a measure having an effect equivalent to a quantitative restriction on imports.

Furthermore the fixing of the minimum profit margin at a specific amount, and not as a percentage of the cost price, applicable without distinction to domestic products and imported products is likewise incapable of producing an adverse effect on imported products which may be cheaper, as in the present case where the amount of the profit margin constitutes a relatively insignificant part of the final retail price.

On the other hand this is not so in the case of a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price.

This is the conclusion which must be drawn even though the competent authority is empowered to grant exemptions from the fixed minimum price and though this power is freely applied to imported products, since the requirement that importers and traders must comply with the administrative formalities inherent in such a system may in itself constitute a measure having an effect equivalent to a quantitative restriction.

The temporary nature of the application of the fixed minimum prices is not a factor capable of justifying such a measure since it is incompatible on other grounds with Article 30 of the Treaty. /

2. Tasca, Case 65/75 (1976) ECR 304, 308,

Concerning an Italian system of maximum prices for sugar:

13. 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 products. A maximum price, in any event in so far as it applies to imported products, constitutes therefore a measure having an effect equivalent to a quantitative restriction, especially when it is fixed at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss.

E. State laws regulating hte method by which goods produced out-of-State are marketed within the State

I. Situation in the USA

Blasi, op. cit. at 197, : " In the absence of supervising federal legislation, the Court has given the States great leeway to regulate the marketing of imported goods when the laws are designed to protect consumers against deception or sellers against undesirable practices". In support of this position, Blasi refers to :

i) Plumley v. Massachussets [155 U.S. 461 [1894]]
which upheld a Massachussets State law permitting oleomargarine to be sold only if it was free from coloration or ingredients that causes it to look like butter.

ii) Pacific States Box and Basket Co v. White [296 U.S. 176 [1935]]
which upheld an Oregon law which perceived a particular type of container, by no means standard in the trade, to be used for the sale of berries.

However, Blasi mentions also :

iii) Hunt v. Washington Apple Advertising Commission [432 U.S. 333 [1977]]
which held unconstitutional a North Carolina law prohibiting apples shipped in closed containers from displaying any grade other than the applicable US grade or standard.

II. Situation in the EEC

1. Rewe v. Bundesmonopolverwaltung für Brandwein, Case 120/78 [1979] concerning the prohibition to import a French liqueur Cassis de Dijon as its alcool content was inferior to the minimum imposed by German legislation :

8. In the absence of common rules relating to the production and marketing of alcohol — a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C-309, p. 2) not yet having received the Council's approval — it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

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 recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

With respect to the argument that the German legislation protects public health :

11. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

With respect to the argument that the German measure protects the consumer :

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

14. However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

2. Similar decision :

a) Gilli & Andres, Case 788/79(1980) ECR 2071

concerning the Italian prohibition to make vinegars other than those made of wine.

b) Fietje Case 27/80 (1980) ECR 3839 , 3855

concerning the Dutch requirement of a certain labelling for alcoolic beverages :

" The extension by a Member State of a provision which prohibits the sale of certain alcoholic beverages under a description other than those prescribed by national law for beverages imported from other Member States, thereby making it necessary to alter the label under which the imported beverage is lawfully marketed in the exporting Member State is to be considered as a measure .... prohibited by Article 30 of the treaty, in so far as the details given on the original label supply the consumer with information on the nature of the product in question which is equivalent to that in the description prescribed by law"

c) Keldermann, Case 130/80 [1981] ECR 527,

concerning a Dutch prohibition to market rolls ("brioches") as their minimum content of wheat was below the minimum imposed by Dutch legislation.

3. Rau v. Desmedt, Case 261/81 [1982] 3961, 3972 - 3973,

concerning a Belgian regulation prohibition the retail of margarine where each block or its internal packaging is not cube shaped:

"Although the requirement that a particular form of packaging must also be used for imported products is not an absolute barrier to the importation into the Member State concerned of products originating in other Member States,

nevertheless it is of such a nature as to render the marketing of those products more difficult or more expensive either by barring them from certain channels of distribution or owing to the additional costs brought about by the necessity to package the products in question in special packs which comply with the requirements in force on the market of their destination.

It cannot be reasonably denied that in principle legislation designed to prevent butter and margarine from being confused in the mind of the consumer is justified. However, the application by one Member State to margarine lawfully manufactured and marketed in another Member State of legislation which prescribes for that product a specific kind of packaging such as the cubic form to the exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less."

4. Most important case, actually "sub-judice" :

Commission v. Germany concerning German restrictions on imports of beer not produced according to the German "purity principle".

5. Commission v. France, Case 152/88 [1980] ECR 2311 , 2314-2316 ,

Concerning French restrictions on advertising for certain alcoholic beverages :

11. Although such a restriction does not directly affect imports it is however capable of restricting their volume owing to the fact that it affects the marketing prospects for the imported products.

13. French natural sweet wines enjoy unrestricted advertising whilst imported natural sweet wines and liqueur wines are subjected to a system of restricted advertising. Similarly, whilst distilled spirits typical of national produce, such as rums and spirits obtained from the distillation of wines, ciders or fruits, enjoy completely unrestricted advertising, it is prohibited in regard to similar products which are mainly imported products, notably grain spirits such as whisky and geneva.

14. nevertheless the fact remains that the classifications which determine the application of those provisions put products imported from other Member States at a disadvantage compared to national products and consequently constitute a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the Treaty.

18. The fact cannot be disputed that several alcoholic beverages on which there are no advertising restrictions under the French legislation, have, from the point of view of public health, the same harmful effects in the event of excessive consumption as similar imported products which, as such, are subjected to prohibitions or restrictions on advertising. Even though it is true that grounds relating to the protection of public health are not wanting in the disputed legislation, none the less its effect is to transfer the effort to restrict excessive alcohol consumption above all to imported products. It is therefore apparent that although the disputed legislation is in principle justified by concern relating to the protection of public health, none the less it constitutes arbitrary discrimination in trade between Member States to the extent to which it authorizes advertising in respect of certain national products whilst advertising in respect of products having comparable characteristics but originating in other Member States is restricted or entirely prohibited. Legislation restricting advertising in respect of alcoholic drinks complies with the requirements of Article 36 only if it applies in identical manner to all the drinks concerned whatever their origin.

F. State laws prohibiting or regulating the importation of products thought to be unhealthy, dangerous or otherwise undesirable

I. Situation in the USA

Blasi, op. cit, p. 211

" In general, the Constitution has been interpreted to grant the States wide power to inspect, regulate and even prohibit imported products in order to promote values of health, safety, or ecological balance. In virtually all the cases in which State laws have been invalidated, the law in question had the discriminatory effect of excluding out-of-state, but not local, producers from the local market. It remains an open question whether the Court would strike down a genuine health, safety or environmental law that significantly burdened commerce in a more discriminatory way".

II. Situation in the EEC

1. Frans Nederlandse Maatschappij voor Biologische Produkten, Case 272/80 [1981] ECR 3288 , 3290 - 3291,

concerning the Dutch legislation relating to the approval of plant protection products

12. It should be noted that, at the time of the alleged offences, there were no common or harmonized rules relating to the production or marketing of plant protection products. In the absence of harmonization, it was therefore for the Member States to decide what degree of protection of the health and life of humans they intended to assure and in particular how strict the checks to be carried out were to be (judgment of the Court of 20 May 1976 in Case 104/75 *De Peijper* [1976] ECR 613 at p. 635), having regard however to the fact that their freedom of action is itself restricted by the Treaty.

13. In that respect, it is not disputed that the national rules in question are intended to protect public health and that they therefore come within the exception provided for by Article 36. The measures of control applied by the Netherlands authorities, in particular as regards the approval of the product, may not therefore be challenged in principle. However, that leaves open the question whether the detailed procedures governing approvals, as indicated by the national court, may possibly constitute a disguised restriction, within the meaning of the last sentence of Article 36, on trade between Member States, in view, on the one hand, of the dangerous nature of the product and, on the other hand, of the fact that it has been the subject of a procedure for approval in the Member State where it has been lawfully marketed.

14. Whilst a Member State is free to require a product of the type in question, which has already received approval in another Member State, to undergo a fresh procedure of examination and approval, the authorities of the Member States are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade. It follows that they are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal.

15. For the same reasons, a Member State operating an approvals procedure must ensure that no unnecessary control expenses are incurred if the practical effects of the control carried out in the Member State of origin satisfy the requirements of the protection of public health in the importing Member State. On the other hand, the mere fact that those expenses weigh more heavily on a trader marketing small quantities of an approved product than on his competitor who markets much greater quantities, does not justify the conclusion that such expenses constitute arbitrary discrimination or a disguised restriction within the meaning of Article 36.

2. Commission v. United Kingdom, Case 124/81 (1983) 231 to 237-239

Concerning the UK regulations which require UHT milk imported into the UK to be packed on premises within the UK :

21. // the need to subject that product to a second heat treatment causes delays in the marketing cycle, involves the importer in considerable expense and, moreover, is likely to lower the organoleptic qualities of the milk. In fact, the requirement of re-treatment and repacking constitutes, owing to its economic effects, the equivalent of a total prohibition on imports,

28. ... the United Kingdom, in its concern to protect the health of humans, could ensure safeguards equivalent to those which it has prescribed for its domestic production of UHT milk, without having recourse to the measures adopted, which amount to a total prohibition on imports.

29. To that end, the United Kingdom would be entitled to lay down the objective conditions which it considers ought to be observed as regards the quality of the milk before treatment and as regards the methods of treating and packing UHT milk of whatever origin offered for sale on its territory. The United Kingdom could also stipulate that imported UHT milk must satisfy the requirements thus laid down, whilst however taking care not to go beyond that which is strictly necessary for the protection of the health of the consumer. It would be able to ensure that such requirements are satisfied by requesting importers to produce certificates issued for the purpose by the competent authorities of the exporting Member States.

30. As the French Government correctly stated in its intervention in support of the Commission's application, the Court has consistently held (cf. judgment of 20. 5. 1976 in Case 104/75 *De Peijper* [1976] ECR 613 and 8. 11. 1979 in Case 251/78 *Denkavit* [1979] ECR 3369) that, where cooperation between the authorities of the Member States makes it possible to facilitate and simplify frontier checks, the authorities responsible for health inspections must ascertain whether the substantiating documents issued within the framework of that cooperation raise a presumption that the imported goods comply with the requirements of domestic health legislation thus enabling the checks carried out upon importation to be simplified. The Court considers that in the case of UHT milk the conditions are satisfied for there to be a presumption of accuracy in favour of the statements contained in such documents.

31. That necessary cooperation does not, however, preclude the United Kingdom authorities from carrying out controls by means of samples to ensure observance of the standards which it has laid down, or from preventing the entry of consignments found not to conform with those standards. //

3. Commission v. France

not yet decided,

Concerning the French prohibition to market substitutes for skimmed milk.

The French government defends its prohibition with arguments similar to Justice Holmes' opinion in Hebe v. Stuart [248 US.297 [1919]] upholding a law prohibiting the sale of condensed skimmed milk. Justice Holmer accepted as a sufficient justification for the prohibition the interest of the State in ensuring that the admittedly wholesome product contain a certain minimum of nutritive elements and in preventing consumers from thoughtlessly using the clearly labelled product as a substitute for more nutritious whole milk.

According to Blasi, op. cit., p. 217, it is questionable whether States could be granted such a power to disrupt the nation wide system of food marketing were the issue to be presented directly to the modern Court.

4. No case available to be compared with Palladio v. Diamond 321 F Supp. 630 S.D. N.Y.) aff'd 440 F 2d 1319 (2d Cir. 1971) in which a federal Court of Appeal upheld a law from New York which prohibited the sales of shoes made from alligator and crocodile skin.

National measures would probably be considered to be justified by Article 36.

G. Central power consent to State-imposed burdens on Commerce

Sandalow-Stein, Courts and Free markets, 1982, Vol I, A 3, 30-32:

B. CENTRAL POWER 'CONSENT' TO STATE-IMPOSED BURDENS ON COMMERCE

A question has arisen in both systems whether the central authorities may authorize the states to take action burdening interstate commerce. On first sight, the two systems appear to differ in their answers to that question. The Supreme Court's sweeping decision in the 1946 *Prudential* case sustains Congress's power to authorize the states to enact legislation that, absent Congressional authorization, would be invalid under the Commerce Clause.[52] Congress, the Court reasoned, has plenary power over interstate commerce; it may burden or prohibit such commerce as well as promote it. Its choice among policies is unfettered, subject only to the restrictions placed upon its authority by other constitutional provisions.

The Court's decision in *Prudential* is especially striking because the state statute at issue imposed a tax that in terms discriminated against out-of-state insurance firms. Critics of the decision acknowledge that Congress should be able to authorize some state legislation that would otherwise be invalid under the Commerce Clause, but they maintain that Congress should not be permitted to consent to discriminatory legislation. The Commerce Clause, they argue, should not be read as merely a 'neutral' grant of power, but as containing certain minimal substantive principles of free trade, including at least a principle prohibiting consent to protective measures that are in terms discriminatory. Whatever the underlying merits of the dispute, there is not the slightest indication that the Court is considering a modification of the position it adopted in *Prudential*.

In the Community, on the other hand, the Court of Justice in principle would strike down a Council law purporting to introduce, or authorize the states to introduce, a trade barrier prohibited by the Treaty. As an exception, the Court did uphold such a measure where the alternative would have been a more serious trade disruption (the imposition of 'the monetary compensatory amounts' on agricultural trade) or where it was dictated by the general interest of the Community (a state charge for veterinary inspection of imports if the inspection is undertaken pursuant to a Community directive or an international agreement).[53] In any case, it is clear that the Court will scrutinize any such measure quite rigorously for its purpose.

It has been suggested that one reason for the difference between the two systems is the fact that whereas the Commerce Clause extends a general grant of power to Congress to *regulate* commerce, the Treaty *prohibits* Member States from interfering with commerce. In other words, the fact that the Treaty prohibits tariffs and quotas does not lead to a concomitant competence in the hands of the Community institutions. The Council and the Community institutions generally cannot go back on the customs union and cannot reintroduce tariffs and quotas in intra-Community trade. The United States Constitution, it is pointed out in this context, expressly permits Congress to consent to state-imposed tariff barriers,[54] whereas the Treaty envisages no similar competence in the Council after the lapse of the 'transitional period'.

Perhaps a more compelling explanation for the difference may be found in the different levels of integration of the two systems as manifested in their respective institutional frameworks. Unlike the Congress, the Council currently acts more as a diplomatic conference, in which states pursue discrete national interests, than as a common institution which decides in the common interest, if necessary by majority vote. Since negotiations continue until unanimity emerges, the decision often reflects the lowest common denominator of national positions at the lowest level of integration policy. The bargaining process is fraught with a distinct risk that states may accept a Treaty violation by one of their own as a quid pro quo or in the expectation that their own similar infringement may also receive the blessing of the Council. Such compromises would lead to a gradual disintegration of the Common Market. It is therefore essential for the Court to check any serious deviation from a rigorous and uniform application of the free trade rules throughout the Community. In the United States, the risk of disintegration of the national market, at this stage of the federation at any rate, is minimal. Since, moreover, the Congress may act by simple majority, the tendency towards the lowest common denominator may be less compelling, even though alliances between regional and special interests on a quid-pro-quo basis are quite common.

Although the Court of Justice has, for these reasons, refused to go as far as the Supreme Court in permitting central authorities to consent to state legislation prohibited by the constitutive document, careful scrutiny reveals that the Council is not deprived of all flexibility in responding to the pressure of local problems. Pursuant to a variety of 'safeguard' provisions, the Council or the Commission may authorize deviations and exceptions from the common rules, including reimposition of trade barriers on a selective, non-uniform basis. Although the broadest of such authorizations (Article 226) expired at the end of the transitional period, Articles 115, 103, and 108 have been used to authorize restrictive measures, often benefiting a single Member State.

PART THREE

THE PROHIBITION OF TAXES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES

I. The basic notion

"Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilateraly on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the wide sense, constitutes a charge having equivalent effect..., even if it is not perceived in the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.

Commission v. Italy Case 24/68 [1969] ECR 193 to 200

II. Only possible justification which is, however, interpreted restrictively by the Court of Justice :

// Although it is not impossible that in certain circumstances a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of Articles 9, 12, 13 and 16 of the Treaty. //

Commission v. Italy, Case 72/68 [1969] ECR 195, 203

" In the benefit of a service which the importer obtains is the permissionto market the product, the service is not an advantage to the imported product... The maintenance of better statistics on the flow of import-export trade may be in the interest of imports and exports, but the Court does not permit any national levy for that purpose since the statistical information is beneficial to the economy as a whole"

The Court of Justice asserts that a charge for services rendered is permitted only if the charge in question is the consideration for a benefit provided in fact for the exporter representing an amount proportionate to the said benefit".

Schermers
~~Schwars~~, The Role of the European Court of Justice in the Free Movement of Goods, in Sandalow - Stein, Courts and Free Markets, 1982. Vol I., p. 222 to 226.

III. Delimitation with respect to internal taxation

"The essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is that the first is imposed exclusively on the imported product while the second is on both imported and domestic products. A charge affecting both imported and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them".

Steinicke, Case 78/76 (1977) ECR p. 595, 613.

The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.

Commission v. France, Case 90/73 [1981] ECR 283, 302

IV. A famous case

In 1960, Belgium established a public fund in order to grant additional social security benefits to workers employed in the diamond transformation industry. The fund was financed by contributions from the importers of raw diamonds who had to pay 1/3 % of the value of imported diamonds.

Belgium does not produce raw diamonds. The Court considered the contributions to be prohibited taxes of effect equivalent to import duties.
(it should be noted that the contribution did not form part of a general tax system).
Social fond Diamantarbeiders, Cases 2 and 3/69 (1969) ECR 211.

PART FOUR

THE PROHIBITION OF DISCRIMINATING INTERNAL TAXATION

I. General

" The Court has repeatedly stressed that Article 95 (1) raises to the level of a legal rule the principle of non-discrimination in taxation of intra-Community trade. Article 95 (1) can then be considered as a specific illustration of the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the treaty, tailored to the field of indirect taxes on goods. Goods of other Member states should not be treated differently from similar domestic products by imposition of internal indirect taxes as this could distort normal trading conditions between Member states".

Wägenbauer, Elimination of Discriminatory State Taxation in Intra-Community trade in : Sandalow- Stein, Court and Free Markets, 1982, Vol II, 480 to 492

II. Does the prohibition of discriminatory internal taxation also apply to exports?

"The aim of the Treaty in this field is to guarantee generally the neutrality of the system of internal taxation with regard to intracommunity trade whenever an economic transaction going beyond the frontier of a Member State at the same time constitutes the chargeable event giving rise to a fiscal charge within the context of such a system". Member states cannot be free to apply in a discriminatory way a system of internal taxation to

products intended for exports to other Member states".

Staten Kontrol, Case 142/77 [1978] ECR 1543, Ground 23,25.

III. What are similar products?

"A comparison must be made between the taxation imposed on products which, at the same stage of production, or marketing, have similar characteristics and meet the same needs from the point of view of consumers. In this respect, the classification of the domestic product and the imported product under the same heading in the Common Customs Tariff ~~and~~ constitutes an important factor in this assessment."

Rewe Zentrale, Case 95/75 (1976) ECR 181 to 184.

IV. May a Member State establish different tax rates for similar products?

"At the present stage of its development and in the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from granting tax advantages in the form of an exemption from or reduction of duties, to certain types of spirits or to certain classes of producers. Indeed tax advantages of this kind may serve legitimate economic or social purposes, such as the use of raw materials by the distributing industry, the continued production of particular spirits of high quality, ot the continuity of certain classes of undertakings such as agricultural distilleries. However, according to the requirements of Article 95, such preferential systems can't be extended without discrimination to spirits coming from other Member States".

Hansen & Balle, Case 148/77 (1978) 1801, 1809.

V. When is a tax of such a nature as to afford indirect protection to other products?

1. Where an imported product is in competition with a domestic product " by reason of one or more economic users to which it may be put", but the condition of similarity is not fulfilled;

2. Where there is no such direct competition but the imported product bears a charge "in such a way as to protect certain (domestic) activities distinct from those used in the manufacture of the imposed product".

Finck - Frucht, Case 27/67 (1968) ECR 223, 233.

VI. Is it prohibited to tax imported products which do not compete with domestic products ?

Article 95 is intended to remove certain restrictions on the free movement of goods. But to conclude that it prohibits the imposition of any internal taxation on imported goods which do not compete with domestic products would be to give it a scope exceeding its purpose.

VII. Famous cases in which the Court found discriminatory taxation

1. Commission v.France, Case 168/78 [1980] ECR 347

   Commission v. Italy, Case 169/75 [1980] ECR 385

   Both France and Italy drew a distinction, for excise duty purposes, between spirits made from wine, on the one hand, and spirits made from cereals, on the other hand. Most of the products in the former category are produced domestically, most other spirits are imported. The former category was based on a lower rate than the latter.

2. Commission v. Denmark, Case 171/78 [1980] ECR 447

   Denmark made a similar distinction between akvavit and all other spirits.

   Some 95 % of akvavit consumed in Denmark is of domestic production, whereas 70 % of other spirits are imported.

   Akvavit enjoyed a lower excise rate than other spirits.

3. Commission v. UK Case 170/78 [1980]

   ECR 417 and (1983) ECR 2253

   The UK taxes wine approximately 5 times more heavily than an equivalent volume of beer.

A famous case in which the Court found no discriminatroy taxation

Vinal & Orbat, Case 46/80 [1981] ECR 77 concerning the different taxation of alcool made from agricultural products and synthetic alcool made from oil.

1. PROHIBITION OF CUSTOMS DUTIES AND CHARGES OF EQUIVALENT EFFECT

Article 9

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. PROHIBITION OF DISCRIMINATING INTERNAL TAXATION

Article 95

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

3. PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING AN EQUIVALENT EFFECT

Article 30

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 34

1. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.

Derogation in favour of certain quantitative restrictions and measures having an equivalent effect :

Article 36

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 and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

3. PROHIBITION OF DISCRIMINATORY RULES AND PRACTICES OF STATE MONOPOLIES

Article 37

1. Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

5. SPECIAL REGIME FOR STATE AIDS

Article 92

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, the aids granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries;

(d) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Article 93

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.