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Member State Exemptions from Article 100A Harmonizing Measures: A Possible European Court Approach

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INTRODUCTION

The Single European Act (SEA) identifies the free movement of goods as a fundamental feature of the internal market it seeks to establish by the end of 1992.[1] The SEA provides for the enforcement of the free movement of goods by adding article 100A to the Treaty of Rome (EEC Treaty).[2] Prior to the SEA, the European Economic Community (EEC or Community) had employed article 100 of the EEC Treaty to harmonize member state laws, thereby protecting member states from trade impediments that arise from differing national regulations.[3] Article 100 empowers the Council of the European Communities (Council) to issue directives by unanimous vote.[4] Unlike article 100, article 100A allows the Council, acting by a qualified majority,[5] to pass various types of measures, including regulations, with the objective of harmonizing the laws of the member states to promote free trade within the Community.[6] Article 100A, therefore, allows for quicker passage of Council measures designed to aid the

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[1] Single European Act, Feb. 17, 1986, art. 13, 29 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA]. Article 13 of the SEA incorporates article 8A into the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. Article 8A defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this treaty." SEA, *supra*, at art. 13.

[2] *See* SEA, *supra* note 1, at art. 18. Article 18 supplements the EEC Treaty by adding article 100A.

[3] EEC Treaty, *supra* note 1, at art. 100.

[4] Article 100 of the EEC Treaty provides, in part: "The Council shall, acting unanimously . . ., issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." EEC Treaty, *supra* note 1, at art. 100.

[5] EEC Treaty, *supra* note 1, at art. 148. A qualified majority consists of at least fifty-four votes cast in favor of an act by at least eight member states. The vote of each member state is given a certain weight in accordance with article 148 of the EEC Treaty. The eight state requirement is dropped when the Council acts on a proposal from the Commission of the European Communities, the body charged with the application of the EEC Treaty.

[6] Article 100A provides for the adoption of measures designed to aid in "the establishment and functioning of the internal market." SEA, *supra* note 1, at art. 18.

development of the internal market than does article 100, and gives the Council a greater choice of measures with which to achieve its goals.

Paragraph 4 of article 100A, however, mitigates the Council's increased power to enact measures promoting internal market development because it allows member states to seek an exemption from Council harmonization measures on the basis of several different escape provisions.[7] The Court of Justice of the European Communities (European Court) has not yet interpreted Article 100A, and the question remains as to what effect paragraph 4 will have on the ability of the Council to guide the member states to the completion of the internal market.

Part I of this Note outlines the requirements of EEC Treaty provisions relating to quantititative restrictions on goods and discusses how a member state may receive exemptions from these treaty provisions. Part I also describes the use of article 100 harmonizing measures for eliminating technical barriers to trade. Part II then examines the European Court's treatment of several attempts by member states to obtain such exemptions. Part III examines how the European Court might apply paragraph 4 of article 100A in light of the precedent developed under articles 30 through 34. This Note concludes that the European Court will not easily grant member states exemptions from article 100A harmonizing measures.

I. THE EEC'S GOAL OF ELIMINATING TECHNICAL BARRIERS TO TRADE

Technical barriers to trade are those impediments to the free movement of goods that arise from different national laws concerning such matters as diverse as health and safety measures and environmental protection.[8] Articles 30 through 34 of the EEC Treaty require member states to avoid creating technical barriers to Community trade.[9] Article 30, in particular, prohibits all quantitative restrictions on imports and other technical bar-

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[7] Paragraph 4 of article 100A allows escape from harmonizing measures on the grounds of "major needs referred to in Article 36, or relating to protection of the environment or the working environment . . . ." SEA, *supra* note 1, at art. 18.

[8] Lonbay, *The Single European Act*, 11 B.C. INT'L & COMP. L. REV. 31, 39 (1988).

[9] EEC Treaty, *supra* note 1, at arts. 30–34.

riers to trade.[10] Article 36 of the EEC Treaty, however, permits exemptions from articles 30 through 34 for trade restrictions that are considered necessary for the protection of certain societal interests.[11] Nevertheless, these exemptions are not permitted if they are sought simply to gain an advantage over another member state or are arbitrary in their effect.

Under article 100 of the EEC Treaty, the Council may harmonize the disparate laws of the member states by issuing directives. Member states must then bring their laws into accordance with the directives' general provisions so that their laws are made roughly uniform.[12] Once the Council has issued a directive, a member state may no longer use article 36 to justify a trade restriction in a harmonized area.[13]

In cases where the Council has not acted to harmonize laws pertaining to the free movement of goods, the European Court has allowed, under a "rule of reason," certain restrictions on trade not justifiable under article 36.[14] This rule, elaborated in the European Court's landmark *Cassis de Dijon* decision,[15] permits member state regulations necessary to promote certain general interests where the Community has not acted to harmonize state laws, and where the regulations fulfill "mandatory requirements" in the promotion of such interests.[16]

Article 100A appears to address some of the problems faced by the Community in ensuring the completion of the internal market.[17] Articles 30 through 34 have not yet resulted in the elimination of all technical trade barriers.[18] In addition, harmo-

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[10] *Id.* at art. 30. Quantitative restrictions include laws of individual member states pertaining to trade that are capable of restricting free trade in the Community. Procureur du Roi v. Dassonville, 1974 E. Comm. Ct. J. Rep. 837, 852, 14 Comm. Mkt. L.R. 436, 453–54 (1974).

[11] EEC Treaty, *supra* note 1, at art. 36. Article 36 allows exemptions from the provisions of articles 30 to 34 on the following grounds: "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 archeological value; or the protection of industrial and commercial property."

[12] EEC Treaty, *supra* note 1, at art. 100. For the pertinent text of article 100, see *supra* note 4.

[13] Lonbay, *supra* note 8, at 39–40.

[14] Forwood & Clough, *The Single European Act and Free Movement*, 11 EUR. L. REV. 383, 386 (1986).

[15] Rewe-Zentral, A.G. v. Bundesmonopolverwaltung für Branntwein, 1979 E. Comm. Ct. J. Rep. 649, 26 Comm. Mkt. L.R. 494 (1979).

[16] *Id.* at 662.

[17] *See* Forwood & Clough, *supra* note 14, at 396.

[18] Lonbay, *supra* note 8, at 40.

nization under article 100 has proceeded slowly.[19] The design of article 100A allows for easier passage of harmonizing measures because the new article requires a qualified majority instead of unanimity. Also, the Council now has the option of using regulations as well as directives to achieve the goal of establishing the internal market. More lenient voting provisions and a wider choice of legal measures to achieve its goals give the Council greater power to harmonize member state laws.[20]

While article 100A addresses the problem of the slow development of the internal market, paragraph 4 of article 100A is troublesome because it allows member states to seek exemptions from the requirements imposed by article 100A harmonizing measures. Whether paragraph 4 will make it easy for individual states to escape the requirements of harmonizing measures remains to be seen. Examination, however, of the European Court's interpretation of articles 30 through 34, certain article 100 harmonizing measures, and attempts by member states to obtain exemptions from their obligations under such provisions, provides some clues as to how the European Court will interpret paragraph 4 of article 100A.

II. THE EUROPEAN COURT'S CONCERN FOR THE FREE MOVEMENT OF GOODS

The European Court has applied strict standards to the interpretation of Community measures designed to insure the free movement of goods, and in the application of provisions allowing member states to escape from those measures.[21] Four cases illustrate how the European Court balances the Community's interest in the free movement of goods against a member state's justification for failing to ensure free movement.[22] These cases concern the following subjects: the level of justification a member state

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[19] *Id.* at 45.

[20] *See* SEA, *supra* note 1, at art. 18.

[21] *See* Commission v. Kingdom of Denmark, 1988 E. Comm. Ct. J. Rep. 4607, 4632, 54 Comm. Mkt. L.R. 619, 632 (1989); Commission v. Federal Republic of Germany, 1987 E. Comm. Ct. J. Rep. 1227, 1276, 51 Comm. Mkt. L.R. 780, 811 (1988); Ministère Public v. Müller, 1986 E. Comm. Ct. J. Rep. 1511, 1529, 49 Comm. Mkt. L.R. 469, 484 (1987); Commission v. French Republic, 1983 E. Comm. Ct. J. Rep. 1013, 1049–50, 39 Comm. Mkt. L.R. 160, 200 (1984).

[22] *See* Kingdom of Denmark, *supra* note 21, at 632; Federal Republic of Germany, *supra* note 21, at 1276; Ministère Public v. Müller, *supra* note 21, at 1529; French Republic, *supra* note 21, at 1049–50.

must provide for an impediment to trade;[23] the examination of a member state's attempt to impose restrictive national standards, which favor industry in that state;[24] the interpretation of a Community regulation that mentions Community trade;[25] and the balancing of different Community goals.[26]

The European Court's concern for the free movement of goods is demonstrated by the level of justification required to sustain a member state's impediment to free movement.[27] In the case of *Ministère Public v. Müller*,[28] France and the manager of an importing company disagreed on the discretion member states have in prohibiting the use of food additives permitted under a Community directive. The European Court, responding to a request from a French court, answered questions regarding the interpretation of both the directive and articles 30 through 36 of the EEC Treaty. France maintained that the directive does not force member states to accept every additive approved by the directive for use in its territory. According to the French, therefore, a prohibition of some of the approved additives is permissible to protect consumer health if warranted by the eating habits of citizens of a particular country. The manager argued that if the additive is approved by the directive, member states are not allowed to prohibit its use.[29]

The European Court held that the directive did not attempt to harmonize Community law with respect to the degree of protection member states can give their citizens from potentially harmful food additives.[30] Consequently, member states are left with discretion as to how much protection against food additives they will give their citizens. As the European Court noted, the directive indicates that only additives that fulfill a need, especially a technological or economic need, should be allowed in food. The European Court recognized, however, that in order to meet their obligations under article 30, member states must allow the im-

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[23] Ministère Public v. Müller, *supra* note 21, at 1529.

[24] Federal Republic of Germany, *supra* note 21, at 1270–71, 1276.

[25] French Republic, *supra* note 21, at 1041.

[26] Kingdom of Denmark, *supra* note 21, at 632.

[27] *See* Federal Republic of Germany, *supra* note 21, at 1275–76; Commission v. Hellenic Republic, 1987 E. Comm. Ct. J. Rep. 1193, 1224–25, 51 Comm. Mkt. L.R. 813, 830–31 (1988); Ministère Public v. Müller, *supra* note 21, at 1529.

[28] Ministère Public v. Müller, *supra* note 21, at 1511.

[29] *Id.* at 1522, 1525, 1527.

[30] *See id.* at 1527–28.

portation of food with an additive listed in the directive unless a compelling reason for the prohibition of the additive is shown under article 36. Before legally prohibiting the additive, national authorities must show that the eating habits of citizens and international scientific research demonstrate that use of the additive poses a health threat in that member state. If the additive meets a real need in the manufacturing process and poses no genuine health threat, its use must be permitted.[31]

Several recent cases concerning beer manufacturing laws have amplified the European Court's reasoning regarding technical barriers to trade arising from differing food ingredient laws among member states.[32] In *Commission v. Federal Republic of Germany*,[33] the European Court held that the Federal Republic of Germany (West Germany) had not fulfilled its article 30 obligations in light of its beer manufacturing rules. The Commission of the European Communities (Commission) objected to West Germany's prohibition on the importation of beers brewed in other member states because they did not comply with West Germany's beer purity laws. The Commission did not believe that the rules prohibiting the designation "Bier" for products not strictly complying with the West German provisions were necessary to protect the West German public. According to the Commission, such protection could be achieved through less restrictive means.[34]

The West German Government claimed that its beer brewing rules were necessary to protect public health. It asserted that the rules were not intended to be protectionist and that German consumers expected products called "Bier" to be made only with the raw materials designated by West German law. Other countries, West Germany maintained, were free to market products with the designation "Bier" in West German territory if the West German brewing rules were satisfied. According to the West German Government, these rules could easily be satisfied outside of West Germany.

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[31] *Id.* at 1528–29.

[32] *See* Federal Republic of Germany, *supra* note 21, at 1276; Hellenic Republic, *supra* note 27, at 1224–25 (rules on beer additives create barrier to the marketing of imported beers which is not justifiable under article 36). The *Hellenic Republic* case is similar in reasoning to the *Federal Republic of Germany* case. Consequently, this Note only discusses *Federal Republic of Germany*.

[33] Federal Republic of Germany, *supra* note 21, at 1227.

[34] *Id.* at 1266, 1269, 1276.

The European Court noted that where the Council has not enacted common rules concerning the marketing of products, member states may create their own laws, and the Community must accept impediments to the free movement of goods caused by disparities in these laws if the laws are necessary according to the "rule of reason."[35] In this case, however, the European Court held that the the West German brewing laws did not satisfy the "rule of reason."[36] According to the European Court, the tastes of consumers, which vary from state to state, will evolve over time, aided by the establishment of the internal market. The European Court determined, however, that the West German brewing rules impede internal market development by working to solidify existing consumer habits rather than simply protecting consumers from misleading practices. The European Court also observed that the designation "Bier" is used in a generic manner in the Community's Common Customs Tariff and that the West German legislature uses the term to refer to beverages not complying with national brewing rules. In sum, the European Court held that West Germany could protect consumers without a complete prohibition on importation. For example, the member state could offer its consumers adequate protection by requiring the use of labels listing the raw materials used in the brewing process.[37]

The European Court also examined the West German Government's justification for banning importation on the grounds of protecting public health under article 36. The court stated that West Germany must limit its prohibition on importation to what is essential to safeguard public health.[38] The European Court noted that some beer additives prohibited under West German law were actually permitted for the production of other beverages in West Germany. Stricter rules for beer are not justified, according to the European Court, simply because beer is consumed in large quantities and the ingestion of additives may carry some risks. In addition, the European Court dismissed West Germany's assertion that no additives would be technologically necessary if brewers were to obey the West German brewing laws. The European Court believed that such a view of technological necessity,

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[35] *Id.* at 1270; *see also supra* notes 14–16 and accompanying text.
[36] *See id.* at 1272.
[37] *Id.* at 1270–71.
[38] *Id.* at 1274.

which favors a member state's own production methods, constitutes a disguised restriction on trade in violation of the last sentence of article 36.

Similarly, the European Court will protect the free movement of goods where a member state uses a Community law to exclude unfairly foreign member state products from its market.[39] For example, in *Commission v. French Republic*,[40] the Court held that France did not fulfill its duties under article 30 of the EEC Treaty when it wrongfully detained shipments of Italian wine at its border. French authorities detained these imports on the grounds that the documents accompanying the wine were irregular and thus in violation of a Community regulation. The irregularities varied in severity and included the failure to complete the forms in typescript and block capitals, the omission of the country of origin, and the illegibility of some of the documents.[41]

The European Court examined the language of the regulation concerning the documentation that should accompany wine products and held that only substantial irregularities rendering a document useless for its intended purpose could justify impediments to importation.[42] According to the European Court, a document that omits an important piece of information, such as alcohol content, or that is illegible, is considered useless and may be rejected. If the document, however, is not completed in typescript, its refusal is unjustified. In addition, the European Court held that France had an obligation to see that the procedures necessary to correct such irregularities caused no needless delay in the transport of wine. The European Court, therefore, demonstrated that it will focus on the precise purpose of regulations in determining how to apply them, giving special protection to the free movement of goods in the Community.[43]

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[39] *See* French Republic, *supra* note 21, at 1049–50.

[40] *Id.* at 1013.

[41] *Id.* at 1040–42, 1050.

[42] *Id.* at 1041. The European Court noted that the second recital to the preamble of the regulation states that the requirement for an accompanying document "may not impede trade in or the marketing of products in this sector . . . ." Regulation 1153/75, Commission Regulation of 30 April 1975 Prescribing the Form of the Accompanying Documents for Wine Products and Specifying the Obligations of Wine Producers and Traders Other than Retailers, 18 O.J. EUR. COMM. (No. L 113) 1 (1975).

[43] *Id.* at 1041–42, 1045. *See also* Commission v. United Kingdom, 1988 E. Comm. Ct. J. Rep. 3921, 3935, 53 Comm. Mkt. L.R. 437, 443 (1988) (purpose of directive pertaining to lighting and light-signaling devices on motor vehicles is to reduce or eliminate impediments to trade resulting from different technical requirements in member states).

The European Court has recently indicated how it will balance certain Community policy goals against the free movement of goods.[44] In *Commission v. Kingdom of Denmark*,[45] the European Court balanced Community environmental policy, as reflected in the SEA, with the policy of promoting the free movement of goods. In that case, the European Court examined a change in a Danish law outlining standards for beverage containers designed to promote container reutilization in the interest of environmental protection. The modification allowed the sale of beverages in nonapproved containers if the quantity sold did not exceed 3000 hectoliters a year per producer or if the product was being sold in order to test the Danish market. The Commission believed that the goal of promoting reutilization of containers, and the two limitations on the use of nonapproved bottles, were unjustified and that, consequently, Denmark had failed to fulfill its article 30 obligations.[46]

The European Court determined that the protection of the environment is an important policy goal of the Community, as reflected in the SEA and a previous European Court decision, and concluded that environmental protection measures are capable of falling within the "rule of reason" exception to article 30.[47] The European Court also concluded, however, that the restrictions created by the Danish law placed an unfair burden upon non-Danish manufacturers since they were forced to bear higher costs than beverage producers within Denmark.[48] Although the European Court found Denmark's measures especially effective, it believed that an adequate, if somewhat lesser degree of environmental protection could be achieved without creating impediments to the free movement of goods. According to the European Court, the balancing of interests under the Danish law had favored concern for the environment to the detriment of the Community interest in free movement. The European Court determined that the Danish law should have provided greater protection for the free movement of goods. As in *Ministère Public v. Müller*,[49] *Federal Republic of Germany*,[50] and

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[44] *See* Kingdom of Denmark, *supra* note 21, at 632.

[45] *Id.* at 619.

[46] *Id.* at 629–32.

[47] *Id.* at 630–31; *see also supra* notes 14–16 and accompanying text.

[48] *See* Kingdom of Denmark, *supra* note 21, at 631.

[49] *See supra* notes 28–31 and accompanying text.

[50] *See supra* notes 33–38 and accompanying text.

French Republic,[51] the European Court saw the free movement of goods as an overriding Community priority.

III. THE EUROPEAN COURT'S INTERPRETATION OF PARAGRAPH 4 OF ARTICLE 100A

The cases examined above demonstrate that the European Court considers free movement of goods to be a crucial element in the establishment of the internal market and will not easily grant member states exemptions from harmonizing measures passed under article 100A. The cases concerning food demonstrate that a member state must show substantial need in order to justify imposing a barrier to trade under article 36. In *Ministère Public v. Müller*,[52] the European Court held that a country that seeks to justify a trade restriction on the grounds of protecting public health must show that substantial scientific research and the eating habits of its citizens warrant prohibition of a particular food additive in that country.[53] These are substantial hurdles for a member state to overcome.

The European Court also demonstrated, in the *Federal Republic of Germany* case,[54] that it would continue to apply strict standards to member state legislation that constitutes a trade barrier.[55] There, the European Court carefully examined a member state's justification for using an article 36 escape provision. The court conducted this close examination to determine whether a piece of legislation was actually a restriction on trade in disguise. Similar scrutiny will likely be applied to member states' use of the paragraph 4 escape provisions.

In addition, the European Court in *Federal Republic of Germany* referred to the role of the internal market in the evolution of consumer tastes in different member states.[56] The European Court refused to permit national legislation that had the effect of solidifying consumer habits in order to give national industries a competitive advantage. It seems logical that the same philosophy would underlie future judicial interpretation of paragraph 4, particularly in light of the goal stated in paragraph 1 of article

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[51] *See supra* notes 39–43 and accompanying text.

[52] Ministère Public v. Müller, *supra* note 21, at 1511.

[53] *Id.* at 1529.

[54] Federal Republic of Germany, *supra* note 21, at 1227.

[55] *See supra* notes 33–38 and accompanying text.

[56] Federal Republic of Germany, *supra* note 21, at 1270–71.

100A—namely, "the establishment and functioning of the internal market."[57]

The *French Republic* case[58] indicates that the European Court will carefully examine the wording of a regulation or directive and require a substantial failure to comply with that measure to justify an impediment to trade.[59] A member state should not use regulations and directives to justify trade restrictions which favor an industry in that member state over the same industry elsewhere in the Community. The free movement of goods is accorded a high degree of protection. It follows that the European Court will narrowly scrutinize a member state's request for an exemption from an article 100A harmonization measure designed to promote the free movement of goods in the Community.

The *Kingdom of Denmark* case[60] demonstrates that when scrutinizing environmental protection measures, the European Court will not view protection of the environment as a more important goal than the free movement of goods.[61] This tendency is particularly noteworthy because the protection of the environment is one of the exemptions permitted in paragraph 4 of article 100A. The European Court would not likely allow the offending measure to stand if too great a burden is placed on another member state. Also, given the emphasis it places on protecting the free movement of goods, the European Court will probably impose high standards on states seeking exemptions from harmonizing measures under the working environment exception. In light of *Ministère Public v. Müller*, *Federal Republic of Germany*, *French Republic*, and *Kingdom of Denmark*, the European Court will provide the internal market with a strong degree of protection when member states seek exemptions under paragraph 4 of article 100A.

CONCLUSION

Paragraph 4 of article 100A should not undermine the effect of harmonizing measures passed under paragraph 1 of that article. In *Ministère Public v. Müller* and *Federal Republic of Germany*,

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[57] SEA, *supra* note 1, at art. 18.

[58] French Republic, *supra* note 21, at 1013.

[59] *See id.* at 1041.

[60] Kingdom of Denmark, *supra* note 21, at 619.

[61] *See supra* notes 45–52 and accompanying text.

the European Court held that member states must meet high standards to justify their use of the article 36 escape provision. In *Federal Republic of Germany*, the European Court also indicated the importance of the internal market in the evolution of consumer tastes in different member states and stated that it could not allow interference with that evolutionary process. The *French Republic* case indicates that the European Court will focus on the purpose of regulations and directives and not allow impediments to trade without substantial justification. Finally, the European Court, in *Kingdom of Denmark*, demonstrated that it will not treat the protection of the environment as a more important Community goal than the free movement of goods. The interests protected in these cases indicate that the European Court is likely to provide a similar strong defense against trade barriers in its interpretation of paragraph 4 of article 100A.

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