

**REGULATORY REFORM IN THE EUROPEAN
UNION: A VIEW FROM THE EUROPEAN
COURT OF JUSTICE.**

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Abstract

The case-law of the European Court of Justice reviewing public intervention on the market is characterized by the application of a different standard to State and Community measures. The broad reading given to free movement and competition provisions must be interpreted as intended to wide Community control over national regulation on the common market and not to wide the Court's control over the degree of regulation of the market. The recent case-law reveals that the Court wants to restrain its role in the definition of acceptable public intervention on the market even if that means less control over State regulation.

Introduction:

It is certain that economic policy in the European Union must be conducted in accordance with the principle of an open market economy and free competition¹. Nevertheless it is also true that the EU's economic policy should also be conducted with the aims of creating and ensuring an internal market, the strengthening of economic and social cohesion, the promotion of research and technological development, the strengthening of the competitiveness of Community industry and consumer protection². Moreover, the Union must also pursue policies in the social sphere, environment protection and culture, among others³.

While under a pure principle of market economy and free competition, the market is the best possible allocator of resources and therefore public intervention should be limited to the measures necessary to guarantee the existence of competition, some of the objectives and policies mentioned above require intervention by public authorities to alter the results of market allocation.

In the European Union, that public intervention may lay on the EU Institutions or on Member States. In the former case, the conflict is limited to determine which of the substantive concerns -free competition and the other policy concern- must prevail. Both policy concerns are constitutionally recognised in the EC Treaty. In other words, the conflict is a debate about liberalism or interventionism at Community level.

In the latter case, the conflict is much more complex: in addition to the substantial debate on liberalism-interventionism (regulation-deregulation), the solution is influenced by the centralization/decentralization debate or, in other words, the division of powers between the Union and the Member States. When a Member State intervenes in the market, there are two additional concerns. First, it might be acting in favour of national interests, and secondly, its action may not be coordinated with other actions from the Union or other Member States. An additional control is therefore established to supervise not only the legitimacy of the substance of the intervention but also the rationality of the level at which the public intervention occurs.

¹ See article 3 A, paragraphs 1 and 2 of the EC Treaty. See also Article 3 (g) of the EC Treaty stating that the activities of the Community shall include "a system ensuring that competition in the internal market is not distorted".

² See Article 3, paragraphs (a) and (c), (j), (m), (l), and (s) respectively.

³ See Article 3, paragraphs (i), (k) and (p), respectively.

The present paper intends to analyze how these conflicts are dealt with and influenced by the case-law of the European Court of Justice. We will focus on the case-law of the Court regarding free movement of goods and the application of competition rules to public regulations (mainly the combined use of Articles 3 (g), 5 (2) and 85-86 of the EC Treaty

Part I - Free Movement of Goods: Limiting Regulation in the Common Market?

The expansion of Article 30 and the limits to State regulation of the market

Until the recent *Keck*⁴ decision the Court's approach to Article 30 was characterized by a progressive extension of its range of action pursuant to the well known *Dassonville*⁵ decision. Here, the Court held that :

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions⁶.

In spite of the broad character of such a *ratio decidendi*, specially after the abandonment of the 'trading rules' expression, subsequent decisions kept a close link with a discrimination test. It is with *Cassis de Dijon*⁷ that *Dassonville* regains breath and Article 30 initiates its progressive extension to catch any State measure capable of interfering with the market, in respect of the trade on goods. In *Cassis de Dijon* the Court stated that any good lawfully produced and marketed in one of the Member States is free to circulate throughout the common market, provided no mandatory requirement or any of the interests protected by Article 36 is unproportionally affected⁸. *Cassis de Dijon* dealt with a probably protectionist and *de facto* discriminatory national regulation but the impulse given to the broad *Dassonville* statement and the introduction of what came to be known as the principle of mutual-recognition among national legislation was taken up and developed in following decisions. Such development can be seen in *Oosthoek's*⁹, *Beer Purity Law Cases*¹⁰, *Danish Bottles*¹¹, the first of the *Sunday Trading Cases*¹² and *GB-INNO*¹³. In

⁴Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097.

⁵Case 8/74, *Dassonville*, [1974] ECR 837.

⁶Para. 5.

⁷Case 120/78, *Rewe*, [1979] ECR 649.

⁸Paras. 8 and 14.

⁹Case 268/81, *Oosthoek's*, [1982] ECR 4575.

¹⁰Case 176/84, *Commission v. Greece*, [1987] ECR 1213; Case 178/84, *Commission v. Germany*, [1987] ECR 1262.

¹¹Case 302/86, *Commission v. Denmark*, [1988] ECR 4607.

Cinéthèque the Court expressly declared that Article 30 also covered non-protectionist national measures ¹⁴.

The outcome of such developments in the Court's case-law was that almost any national regulatory measure was susceptible of review under Article 30. The proportionality test of *Cassis de Dijon* meant that a balance had to be made between their costs and benefits. This gave the Court a leading role in defining the adequate regulatory level of the common market and transformed Article 30 into a potential economic due process clause.

The regulatory policy of Article 30.

The use of Article 30 as an economic due process clause is associated with the judicial review of non-protectionist national measures, whose intention is not to regulate the flow of goods. These are cases in which the restriction on imports is a consequence of the more general restriction imposed by national rules on trade and access to the market. What is normally at stake in these cases is the general restriction imposed on access to the market and competition therein. This is confirmed by the circumstance that many of these national measures and regulations are attacked by home nationals, not foreign nationals or importers. Under the balance test developed by the Court following *Dassonville* and *Cassis de Dijon*, there have been many such measures brought under review. To give some more relevant examples: advertising and sales methods; national legislation safeguarding characteristics of traditional goods or imposing requirements on goods for consumer and health protection; national health system rules on the subvention of medical products; imposition of minimum prices; national recycling systems; prohibition of Sunday trading or of employing workers on Sundays; public law monopolies on equipment approval or ports work organization. As will be seen, the Keck decision has restricted the type of national measures that from now may be

¹²Case 145/88, *Torfaen Borough Council*, [1989] ECR 3851.

¹³Case C-362/88, *GB-INNO*, [1990] ECR 667.

¹⁴(...) it must be observed that such a system, if it applies without distinction to both video-cassettes manufactured in the national territory and to imported video-cassettes, does not have the purpose of regulating trade patterns; its effect is not to favour national production as against production of other Member States, but to encourage cinematographic production as such.

Nevertheless, the application of such system may create barriers to intra-Community trade because of the disparities between the systems operated in different Member States and between the conditions for release of cinematographic works in the cinemas of those States. In those circumstances a prohibition of exploitation laid down by such a system is not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law'. Joined Cases 60 and 61/84, *Cinéthèque*, [1985] ECR 2605, paras. 21-22.

reviewed under Article 30. Nevertheless, all those rules concerning product requirements, will still have to be assessed under the proportionality test of *Cassis de Dijon* even if non-protectionist.

In comparing the costs and benefits of national regulatory policies the Court does more than securing free trade among Member States. It determines the acceptable degree of public regulation, balancing public intervention with free market values. There are a bulk of cases where the Court has effectively defined the parameters of public regulation. In a series of cases the Court has re-defined national regulatory policies on the characteristics and designations of goods. Many national regulations prevented in absolute terms or under certain designations the marketing of goods not complying with traditional national requirements, in order to protect consumers and health. These different national regulations created obstacles to trade that the Court generally considered excessive in view of their aim and available alternative policy. This alternative policy is a consumer information policy. Already in *Cassis de Dijon* the Court stated that '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'¹⁵. Such a labeling policy by opposition to a marketing ban was since then push forward in many other areas such as: use of 'liqueur'¹⁶ or 'vinegar' designation¹⁷; requirement of a specific amount of dry matter in loaf¹⁸; packages forms requirements for margarine¹⁹; wine bottles shape²⁰; beer purity laws²¹; pasta requirements²² etc. According to the Court, labeling legislation do not restricts the importation of goods while generally safeguarding consumer protection and fair trading in providing the consumer with the information necessary to make her/his choice in full knowledge of the facts²³. Such an approach entails a regulatory conception in which consumers are not protected through mandatory requirements but through information as the Court

¹⁵Para. 13.

¹⁶Case 27/80, *Fietje*, [1980] ECR 3839.

¹⁷Case 193/80, *Commission v. Italy (Vinegar)*, [1981] ECR 3019.

¹⁸Case 53/80, *Kaasfabriek Eyssen*, [1981] ECR 409.

¹⁹Case 261/81, *Walter Rau*, [1982] ECR 3961

²⁰Case 176/84, *Commission v. Germany (Petillant de Raisin)*, [1986] ECR 3879.

²¹See note 6.

²²Case 407/85, *3 Gloken and another v. USL Centro-Sud and another (Pasta case)*, [1988] ECR 4233.

²³*Vinegar*, cit. nt. 17, para. 27.

clearly set out in GB-INNO²⁴.

Following the development of the balance test in this area, the Court extended its reach of action to cover national marketing rules; that is, rules regulating the conditions under which goods are sold. Such is the case of rules on prices, advertising, sales methods and hours etc.. These rules affect the commercial and economic freedom of traders while not being directed to imports. In *Oosthoek's*, the Court argued that 'to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme he considers particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction'²⁵. This line of approach was then pursued in reviewing national legislation where the real issue was the limits to the market freedom of economic agents. As a consequence, national legislation limiting certain sales methods or comparative advertising²⁶, imposing minimum prices²⁷ or establishing a monopoly in the approval of technical equipment or load and unload of goods in ports²⁸ has been stroke down by the Court. This might reinforce the conviction that Article 30 had in effect been transformed into an economic due process clause through which the Court of Justice will review the reasonableness of public intervention in the market. In *Buet*, the Court, with reference to the legislation under review, stated that 'it is common ground that the French legislature adopted the prohibition of canvassing in question out of concern to protect consumers against the risk of ill-considered purchases'. However, that is not sufficient and 'such rules must be proportionate to the goals pursued, and if a Member State has at its disposal less restrictive means of obtaining the same goals, it is under an obligation to make use of them'²⁹.

When the Court, introduced mutual-recognition in *Cassis de Dijon* it enhanced free choice for companies and consumers. Companies and other economic agents should be free to locate in the economic environment that best suits them and should then be free to send there products to any point of the common market in order to profit from economies of scale and to provide lower prices for consumers. These ones, should also profit from more market choices by the diversity of national products competing in the common market. At the same time, there freedom of choice should

²⁴Cit. nt. 14, paras. 13-17.

²⁵Case 286/81, *Oosthoek's*, [1982] ECR 4575, para. 15. Restated, for instance, in GB-INNO, para. 7 and Case C-369/88, *Delattre*, [1991] ECR I-1487, para. 50.

²⁶See GB-INNO and Case C-126/91, *Yves Rocher*, [1993] ECR ...

²⁷Case 229/83, *Leclerc v. Au Blé*, [1985] ECR 1.

²⁸Case , GB-INNO ('Telephone equipment'), [1991] ECR I-59...

²⁹Case 382/87, *Buet and another*, [1989] ECR 1235.

be substantively protected through the provision of adequate information.

Mutual-recognition also generates a process of competition among rules. Since products, will be recognized in accordance with the rules of their State of origin, consumers choice of what product to buy and producers choice of where to establish will generate a competitive process among the different national regulatory frameworks to which products and companies are submitted in different Member States. This process is said to have been initiated by the Court with the establishment of the principle of mutual-recognition and followed up by the Commission and Council with the White Paper on the internal market³⁰ and the new approach to harmonization³¹. For some, such process generates deregulation and brings the risk of a 'race to the bottom'. To the extent that competition among rules trusts to the market the choice on the "best" regulation it limits the power of public intervention in the market.

However, the fact that a balance test entails a judgment on the reasonableness of national regulatory measures, does not in the Community context means that such assessment is controlled by a rationale of constitutional limits to public intervention in the market. The economic due process elements in the case-law of the Court cannot be seen exclusively from the point of view of the regulation/deregulation debate, they must be analyzed taking into account the centralization/decentralization debate. We cannot deduce from the case-law of the Court that it has a certain free market conception of the economic constitution of the European Union to be protected as a constitutional right that the Court finds itself legitimate to impose on public authorities. The market conception advanced in the case-law of the Court in free movement of goods is neither a neo-liberal one, neither is it presented as an individual constitutional free market right to be protected by the Court against public intervention³². Instead, the limits are against State intervention and such case-law is more understandable as the product of a 'legislateur de substitution'³³, that does not intend to impose a constitutional conception of the market and economic organization, but to transfer economic

³⁰'Completing the Internal Market', White Paper from the Commission to the European Council, 14 June 1985, COM(85) 310 final..

³¹Council Resolution of 7 May 1985, O.J., No C 136/1.

³²In the sense that free movement goods is a fundamental right protecting commercial freedom and access to the market, see: Vilaça, Cruz (President of the Court of First Instance) and Piçarra, Nuno, 'Are There Material Limits to the Revision of the Treaties on the European Union?', forthcoming in *Vortragsreihe des Zentrum für Europäisches Wirtschaftsrecht des Universität Bonn*. See also, for a ordo-liberal conception of the European Economic Constitution, Streit, Manfred E. and Mussler, Werner, "The Economic Constitution of the EC -- From "Rome" to "Maastricht", forthcoming in *European Law Journal*, vol. 1, No. 1, 1995, also published in *Constitutional Political Economy*, Vol. 5 No. 3.

³³The expression is borrowed from Bettati, Mario, 'Le "Law-Making Power" de la Cour', *Pouvoirs*, 1985, p. 57 ff.

decisions from State level to Community level.

Article 30: a process of europeanization

The first element contradicting an economic due-process reading of the case-law on Article 30 is that even after *Cassis de Dijon* many decisions of the Court present a discrimination test as the *ratio decidendi* to be followed in reviewing national measures restricting free trade³⁴. When the balance test is taken up by the Court, it is used with extreme care. In cases not concerning mandatory product requirements the general outcome is for the national legislation to be upheld³⁵. In some of these cases, although the Court displays a tendency to consider the measure justified in light of its public interest aims, this is combined with some discretion being left for national Courts³⁶. What has equally happen in cases on product requirements³⁷. This demonstrates the uneasiness of the Court in assessing the property of national regulatory policies. To leave the role of balancing the public interest with market values for national courts is a way to get rid of some "hot potatoes" generated by the broad reading of Article 30. The *Sunday Trading cases* demonstrated the risks with this approach: national judges either refused to take up that role or they reached to different outcomes depending on their different market conceptions. As will be seen this has contributed to recent changes in the Court's approach.

In the cases where the Court has used the balance test to strike down national regulations, it is common for the Court to identify protectionist risks in the national legislation³⁸. Even in the most controverse cases, in which the balance test has led to striking down national non-discriminatory rules applicable to market circumstances,

³⁴See, for instance: Case 155/80, *Oebel*, [1981] ECR 1993; Case 75/81, *Blesgen*, [1982] ECR 1211; Case 72/82, *Commission v. Italy (Tobacco monopoly)*, [1983] ECR 1955; Case 298/87, *Smanor*, [1988] ECR 4489; Case C-23/89, *Quietlynn*, [1990] ECR 4695.

³⁵See: Oosthoek's, cit nt. 10; Case 238/82, *Duphar*, [1984] ECR 523; Case 302/86 (Danish Bottles case - in part stroke down); *Buet*, cit nt. 30; Case C-23/89, *Quietlynn*, [1990] ECR 3061; *Delattre*, cit nt. 26; *Joined Cases C-1/90 and C-176/90, Aragonesa*, [1991] ECR . And the *Sunday Trading cases*: Case C-145/88, *Torfaen Borough Council*, [1989] 3851, Case C-169/91, *Stoke on Trent* [1992] ECR ..., Case C-312/89, *Conforama and others*, [1991] I-0997, Case C-332/89, *Marchandise*, [1991] ECR I-1027.

³⁶See: *Duphar*, para. 23, *Torfaen Borough Council* (first of the *Sunday Trading cases*), para. 16, *Delattre*, para. 59.

³⁷See, *Joined Cases 80 and 159/85, Edah*, [1986] ECR 3359.

³⁸See: Case 45/87, *Commission v. Ireland (Public Works)*, [1988] ECR 4929, paras. 23 and 26; *Edah*, cit nt. 38, para. 13; *Smanor*, cit. nt. 34, para. 13; *Danish Bottles*, cit. nt. 35, paras. 16, 17 and 21.

the Court stresses some risk that the costs will burden mainly foreign interests³⁹. This and the fact that in the majority of these cases there is a combined application of competition rules with risks of delegation to private authorities of public powers⁴⁰ may explain why the Court went so far therein.

This mixture between anti-protectionism and economic due process in the case-law of the Court is best understood in light of what has been said regarding the real driving force behind its jurisprudence: harmonization and market integration. The lack of harmonization among national rules places on economic agents a burden and an extra-cost in having to comply with more than one set of rules, what impedes the achievement of some of the essential aims of an integrated market such as economies of scale and lower costs.⁴¹ Apart from all cases in which a discrimination or protectionist test is assumed by the Court and in which consequently the burden on imports is a granted consequence, also in almost all cases in which a balance test takes place such burden arising from non-harmonized national rules is presented by the Court as the real risk⁴². This is clearly what is behind the case-law on product-requirements and the alternative labeling policy. Since the Community market is dominated by non-harmonized national rules, the protection of consumers cannot be made dependent on the recognition of such rules. Otherwise, the integrity of the common market and with it freedom of choice and economies of scale will be impaired.

The Court is not simply concerned with the absence of harmonization and the obstacles that poses to the integration of the market. It is also concerned with leaving regulation on products from all over the common market to a national State. It is in here that we can find some parallelism with conceptions of the law arguing for constitutional limits on the power of public authorities to intervene in the market. Not on the setting of such limits and the legitimacy of Courts to do so, but on the conception of public law underpinning such theories. For the Court, national regulations are biased by the national market in which they were developed. And it has to be recognized has true that consumer and production habits, legislative tradition and the monopoly of information by national interest groups make of national political processes suspected institutions to enact regulations equally

³⁹See: *Leclerc v. Au Blé Vert*, cit. nt. 28, para. 30; Case 179/90 [1991] ECR I-5889, *Merci Convenzionale*, para. 19 ff, *GB-INNO* (Telephone equipment), cit nt. 29, para.34.

⁴⁰See below, part II.

⁴¹As the Court made clear in *Cinétheque*, it is not the burden that the regulation poses on economic agents that is at stake, it is the burden coming from the existence of more than one regulation. In fact, the Court stated: 'the application of such system may create barriers to intra-Community trade because of the disparities between the systems operated in different Member States and between these conditions for release of cinematographic works in the cinemas of those States', cit. nt. 15.

⁴²As stated in *Yves Rocher*, quote para 10.

affecting interests of nationals of other Member States. Instead, in the view of the Court the establishment of a common market means that the requirements imposed on goods and their marketing should take into attention the tradition and interests of all Member States. This is made particularly clear in the well known 'German Beer Purity Law' decision. The Court stated:

'Firstly, consumers' conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of a common market is, it should be added, one of the factors that may play a major contributory role in that development. (...) As the Court has already held in another context (judgment of 27 February 1980 in Case 170/78 Commission v United Kingdom [1980] ECR 417), the legislation of a Member State must not "crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them

Secondly, in the other Member States of the Community the designations corresponding to the German designation "Bier" are generic designations for a fermented beverage manufactured from malted barley, whether malted barley on its own or with the addition of rice or maizes. The same approach is taken in Community law (...)

The German designation "Bier" and its equivalents in the languages of the other Member States of the Community may therefore not be restricted to beers manufactured in accordance with the rules in force in the Federal Republic of Germany⁴³.

What the Court does in Article 30 is not to impose a certain constitutional conception of public intervention in the market but to supplement the lack of Community harmonization or push forward for such legislation. This is furthermore confirmed by the circumstance that the regulatory balance set by the Court normally corresponds to the view of the Commission and the legislation in the majority of Member States. It is recurrent to see in Court decisions as the main supporting arguments the Commission position and a statement on the legislation existent in the majority of Member States. That is the case, for instance, in two of the most discussed Court decisions: GB-INNO (I) and Ives Rocher⁴⁴. These two decisions, seen as deregulatory, are, in the Community context, not so, since, according to the Court, their outcomes lead to a status quo corresponding to the legislation of almost all Member States. Moreover, Court decisions also follow closely, when that is

⁴³Paras. 31-34.

⁴⁴See para. 12 and para. 18. For examples, upholding legislation common to all Member States, see, for instance: Cinéthèque, cit. nt. 15, para. 20 and Delattre, cit. nt. 26, para. 54.

possible, analogical arguments draw from non-directly applicable Community legislation⁴⁵. The conclusion to take is that what is taken place at the Court is a kind of Community legislative process, with the Court trying to harmonize national rules in accordance with an "ideally drafted" representation of all States interests.

This is furthermore confirmed by the fact that Article 30 only applies to imported products not to national products. Although the Court has been asked several times to extend the protection granted by Article 30 to home nationals and products it constantly refused to do so⁴⁶. This means that, according to the Court, Article 30 does not regulate access to the market but protects imports from other Member States.

The reasoning followed helps explaining the deference of the Court with regard to Community legislation. If the Court agreed with a notion of the European economic constitution as protecting the market from public intervention, that notion will be as valid towards State legislation as towards Community legislation. Instead we find no such approach with regard to Community legislation. Community legislation under review is normally upheld. The Court conceives with great latitude the general interests pursued by the Community that can justify restrictions to the exercise of an economic activity⁴⁷. Though free movement rules, as primary law, are applicable to Community secondary legislation⁴⁸, the standard of review of Community legislation under these rules and non-discrimination appears much less stricter and respectful towards the Community legislator discretion than the standard of review used with regard to national legislation⁴⁹. Moreover, the Court appears to accept Community legislation authorizing Member States to impose more stringent requirements restricting trade even if these ones may be applied to

⁴⁵See: Case 94/82, *Kikvoorsch Groothandel*, [1983] ECR 947, para. 11; *Commission v. Ireland (Public Works)*, cit. nt. 39, para. 22; and Case 247/87, *Commission v. Germany*, [1989] ECR 947, para. 14.

⁴⁶In *Joined Cases 314 to 316/81 and 83/82, Waterkein*, [1982] ECR 4337, it expressly stated that 'contrary to the contention advanced by the accused, the judgment of 10 July 1980 only affects the treatment of products imported from other Member States', para. 11.

⁴⁷See: Case 234/85, *Keller*, [1986] ECR 2897, para. 8 and Case C-370/80, *Marshall*, [1990] ECR I-4071, paras. 27-28. *Hellinike* quote

⁴⁸See, *Joined Cases 80 and 81/77, Commissionnaires Reunis*, [1978] ECR 927 and Case 15/83, *Denkavit*, [1984] ECR 2171.

⁴⁹See: Case C-11/92, *Gallaher*, [1993] ECR complete, para. 18 and *Joined Cases C-251/90 and C-252/90, Gordon Wood*, [1992] ECR complete, para. 19. A striking example of the same legislation being struck down as national legislation and upheld as Community legislation comes from the comparison of Case C-369/89, *Piageme*, [1991] I-2971 with Case C-51/93, *Meyhui*, [1994] ECR I-3879 (*Keck* will not justify a different outcome since the case deals with product-requirements). Another example, less clear cut since pre-emption is involved in the answer of the Court, is Case 150/88, *Parfumerie Fabrik*, [1989] ECR 3891 compared with Case C-39/90, *Denkavit (Compound feedingstuffs)*, [1991] ECR I-3069.

imports⁵⁰. If this level of protection is established by Community legislation the Court defers to it.

The europeanization process taking place in Article 30 case-law is not restricted to a function of the Court as "legislateur de substitution". The case-law of the Court also pushes for legislation at the Community level. Issues and policies raised in cases brought to Court under Article 30 have follow ups in the Community legislative process. Thus, the case-law in labeling, advertising and consumer information adopted by the Court may have contributed to the numerous Community legislative initiatives on advertising and labeling. There are striking coincidences in which Community legislation appears to come as reaction to relevant Court decisions though we have no secure confirmation to that. Two relevant examples are: the legislative initiative concerning comparative advertising and the GB-INNO case⁵¹ and the legislation on the definition, description and presentation of spirit drinks⁵² and the case-law of the ECJ in this area⁵³.

The recent developments in the case-law of the Court step back with regard to any potential use of Article 30 as an economic due process clause. That is the conclusion to be taken out of *Keck*. In *Keck* the Court restricts *Cassis de Dijon* to measures relating to product-requirements and reinterprets *Dassonville* but only with reference to measures regulating market circumstances. In the later case it is no longer sufficient for national measures to restrict trade to come under review. They must now discriminate 'in law or in fact' against imported products⁵⁴. The wide interpretation made of Article 30 had lead to a progressive flood of cases to the Court and a difficulty in finding the rule which lay behind the use of Article 30⁵⁵. *Keck* can be seen as an attempt to answer those problems and to secure more certainty and reduce the overload of cases in the Court. Moreover, the Court clearly states in the

⁵⁰See, Buet, cit. nt. 30, para. 16.

⁵¹The Yves Rocher decision may have also played a role in this legislative process.

⁵²Council Regulation (EEC) No. 1576/89 of 29 May 1989, OJ L160, p. 1.

⁵³Case 13/78, Eggers Sohn, [1978] 1935; *Cassis de Dijon*, cit nt. 10; Fietje, cit. nt. 17; Case 75/81, Thomas Blesgen, [1982] 1211; Case 59/82, Vermouth, [1983] ECR 1217; Case 176/84, Petillant de Raisin, [1986] ECR 3879; Beer Purity cases, cit. nt. 11, etc.

⁵⁴See paras. 15-16.

⁵⁵The doctrine also called for clarification of the Court's stance with regard to Article 30. See: Marengo, 'Pour une interpretation traditionnelle de la notion de mesure de effet equivalent a une restriction quantitative', (1986) C.D.E. n° 3-4, p. 291.; White, 'In Search of the Limits to Article 30 of the EEC Treaty', (1989) C.M.L.Rev. 26: 235-280; Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?', (1991) C.M.L.Rev. 28: 115-136; Steiner, 'Drawing the Line: Uses and Abuses of Article 30', (1992) C.M.L.Rev. 29: 749-774. See also the Opinion of Advocate-General Van Gerven in the first of the *Sunday Trading Cases* (see above note 12).

decision its intention to limit the use of Article 30 as an instrument to challenge rules affecting commercial freedom⁵⁶. It is not certain that Keck will be sufficient to achieve that goals but it is indicative of the Court's approach with regard to Article 30. It is not a rule intended to limit the power to intervene in the market but a rule to integrate and harmonize the market. When the Court has defined regulatory policies it has done so to supplement the absence of Community harmonization and avoid for persons and companies to be submitted to more than one regulation with the limits that poses in achieving the aims of an integrated market. Moreover, that intervention is dominated not by a particular conception of the Community economic constitution but by a construction of Community legislation on the basis of the Commission position and Member States legislative traditions. At the same time the broad use of Article 30 gave rise to real harmonization through the Community Political Process. This may help us in understanding the apparent contradictory developments in the case-law of the Court regarding freedom to provide services and free movement of persons when compared with a general move to self-restrain. In those areas the Court as moved from a non-discrimination test to a balance test⁵⁷⁵⁸. The explanation is that once integration has been achieved in free movement of goods it is time for the Court to redirect its resources to other areas of the common market. Once again, the relation between the regulation v. deregulation debate and the centralization v. decentralization or competencies debate is fundamental in fully understanding what is taking place in the case-law of the Court. Not a process of deregulation but a process of europeanization.

⁵⁶Para. 14.

⁵⁷Case C-76/90, Säger, [1991] ECR I-4221 and Schindler cit reference.

⁵⁸See, Johnson, Esther and O'Keefe, David, 'From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994', CMLRev. 31:1313-1346, 1994.

Part II - EC Competition Law: Limiting Regulation in the Common Market?

A general overview of the EC Competition Law Chapter: what measures to control public intervention in the market.

Rules on competition are contained in articles 85 to 94 of the EC Treaty. A first reading of the Chapter reveals two explicit tools to control public intervention: the control of State aids⁵⁹ and rules about undertakings to which Member States grant special or exclusive rights or undertakings entrusted with the operation of general economic interest or having the character of a revenue-producing monopoly⁶⁰.

These two classical tools to intervene in the market are subject to control by the Union Institutions, and there is no doubt that this control has diminished the Member States' capacity to intervene in the market through these two means⁶¹.

Nevertheless, Member States have other means to regulate the market (not falling under the State aid provisions or Article 90). The EC Competition

⁵⁹ See articles 92-94.

⁶⁰ See article 90.

⁶¹ In brief, the role of the Court of Justice, in relation to State Aids and Article 90, is characterised by two objectives: first, to widen the possibilities of control by EU Institutions of State intervention, and second, to make this control more effective.

In relation to State aids, the Court has designed a very wide concept of State aid and has given direct effect to the prohibition of granting a State aid before notifying it to the Commission and before the Commission has given a final decision about it.

In relation to Article 90, the Court has enlarged the possibilities of control through:

- the wide interpretation of the clause "affect trade between Member States", resulting in most exclusive rights, falling under EC competition rules.

- the imposition of strict conditions before accepting the legality of the States' granting of exclusive rights.

- the statement that a non-justified exclusive right deprives Article 86 of its useful effect, and therefore it is illegal (joint application of art. 90.1 and 86);

- the extension of the Commission's capacity to control States' regulatory powers, through a large interpretation of article 90.3. The Commission, under the control of the ECJ, has been given the power to determine the degree of regulation in the market.

Law Chapter does not explicitly foresee any other control of State intervention in the market. The ECJ has, nonetheless, identified an obligation on Member States not to eliminate the effectiveness of Articles 85 and 86 of the EC Treaty. Accordingly, the Court has constructed an additional control to State intervention in the market. This part will focus mainly on determining the use of this latter instrument of control.

The combined use of articles 3 (g), 5 (2) and 85 or 86 of the EC Treaty.

Articles 85 and 86 of the EC Treaty are, in themselves, only concerned with the conduct of undertakings and not with measures adopted by Member States by law or regulation. This is why the ECJ has consistently held that these two articles cannot directly be applied to Member States' measures⁶².

Nevertheless, since the judgement in the case INNO/ATAB in 1977⁶³, the ECJ has also consistently held that Member States cannot adopt measures that will remove the effectiveness ("effet utile") of articles 85 and 86⁶⁴. In an already classical statement, the ECJ says:

Article 85 and 86 of the Treaty, "in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable

⁶² See judgement of 8 June 1971, case 78/70, *Deutsche Grammophon*, ECR 487. For a recent confirmation of this statement see the judgement of 9 June 1994, case C-153/93, *Delta Schiffahrts-Und Speditionsgesellschaft*, ECR I-2157, at 14.

⁶³ Judgement of 16 November 1977, case 13/77, *INNO/ATAB*, ECR 2115.

⁶⁴ In the case *INNO/ATAB*, the Court set up the principle, but it did not apply it as the measure was also incompatible with articles 30-34. The same line of reasoning can also be found in other cases during the period 1977-84. See cases: 82/77, *Van Tiggele*, judgement of 24 April 1978, ECR 25; 5/79, *Buys*, judgement of 18 October 1979, ECR 3203; 181/82, *Roussel*, judgement of 29 November 1983, ECR 3849; 238/82, *Duphar*, judgement of 7 February 1984, ECR 523.

In a second phase, the Court did not only assert the principle but also applied it and asserted that there had been a violation of the obligation arisen from articles 3,5 and 85-86. See for instance, judgement of 30 April 1986, *Asjes (Nouvelles Frontières)*, joined cases 209 to 213/84, ECR 1425; judgement of 11 April 1989, *Ahmed Saced*, case 66/86, ECR 803; Judgement of 1 October 1987, *Vlaamse Reisbureaus*, case 311/85, ECR 3801.

In several occasions, the Court has refined the principle (see for instance, judgement of 10 January 1985, case 229/83, *Leclerc-livres*, ECR 1 and judgement of 29 January 1985, case 231/83, *Leclerc-carburants*, ECR 305) or discussed whether the principle should be reinterpreted and extended (see particularly, order of the Court of 9 December 1992, in case C-2/91, *Meng*, ECR [1993] I-5759). Nevertheless, the principle remains the same. For an analysis of the current content, see below.

to undertakings"⁶⁵.

Therefore, Member States have the obligation not to eliminate the effectiveness of Articles 85 and 86. The extent to which this obligation limits Member States' ability to intervene in the market adopting measures with anti-competitive effect, depends on how the ECJ interprets the expression "effect utile".

A wide interpretation of the "effet utile" of Articles 85 and 86, meaning any measure producing anticompetitive effects similar to the effects prohibited by the Articles above, will imply a very powerful tool on the hands of the ECJ. Almost every economic regulation of a Member State will be subject to the ECJ's control. Hence, it will be for the Court to balance between the loss of competition and the benefits regarding the other policy concerns.

A narrow interpretation, on the other hand, meaning that only economic regulation having a "close link" with practices and agreements forbidden by Articles 85 and 86, will limit ECJ's control to a much more achievable task: a prohibition for Member States to give private operators means to circumvent the prohibitions of Articles 85 and 86.

In the following points it will be discussed whether the ECJ's is currently⁶⁶ using a wide or a narrow interpretation.

The narrow interpretation. Preventing State regulation disguising private conduct contrary to articles 85 and 86.

Since the judgement on the case Van Eycke the ECJ has consistently held that the effectiveness of article 85 will be violated in two main hypothesis:

First, "if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects"⁶⁷.

There is no doubt about the illegality of a State regulation imposing an

⁶⁵ See the judgement in case 267/86 Van Eycke [1988] ECR 4679, paragraph 16 and the case Delta, cited above, paragraph 14.

⁶⁶ For a historical point of view, see above footnote 64.

⁶⁷ See Van Eycke, at paragraph 16; Delta, paragraph, 14; Reiff, paragraph 14.

obligation on undertakings to act against EC Competition rules⁶⁸. Less precise is the concept of "favouring or encouraging" anticompetitive behaviour. Although a State recommendation of anticompetitive behaviour is clearly illegal, other more obscure cases might appear.

In relation to the reinforcement effect, the ECJ has considered illegal some Member economic regulations extending the effects, to all the operators in a certain activity, of previous agreements between some of these operators. For instance the Court has declared illegal the homologation of fares previously agreed by some of the operators⁶⁹ or an economic regulation reproducing a previous agreement prohibiting to travel agents to waive a part or the total of their fees⁷⁰ or a national regulation establishing as rules for any operator in a certain sector, the agreement reached within an interprofessional organism⁷¹.

Second, "if a Member State were to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere"⁷².

The principle reveals two connected ideas:

First, it is important for the Court to find out not only what are the effects of the measure but also who is taking the measure; it is, therefore, relevant to determine if, in substance, the measure has private or public nature.

This only has sense if, in the Court's opinion, EC Treaty rules for private and State measures restricting competition are different and these differences should be maintained⁷³. This opinion must be based on the idea that

⁶⁸ A different problem is whether or not those undertakings can be actually bound by such a regulation. In our opinion, as the State regulation will be contrary to Community Law, the undertakings are not bound. More doubtful is whether their anticompetitive practices deserve a fine. At this point, a case by case study must be done.

⁶⁹ Judgement of 30 April 1986, Asjes ("Nouvelles Frontières"), joined cases 209 to 213/84, ECR 1425, at point 77. See also Judgement of 11 April 1989, case 66/86, Ahmed Saeed, ECR 803.

⁷⁰ Judgement of 1 October 1987, case 311/85, Vlaamse Reisbureaus, ECR 3801. It is important to stress that, although it is clear that the agreement had existed, it is not so clear that it was still into force when the State regulation was adopted.

⁷¹ Judgment of 3 December 1987, case 136/86, BNIC/Aubert, ECR 4789.

⁷² See judgement of 21 September 1968, case 267/86, Van Eycke, ECR 4769, at paragraph 16; case Delta, cited above at paragraph, 14; judgement of 17 November 1993, case C-185-91, Reiff, at paragraph 14.

⁷³ See in favour of different rules Marengo, G.: " Competition between National Economies and

competition in the market should only be restricted and the outcome or market forces alter, when the achievement of an aim of general interest requires such a restriction, and only to the extent that the measure is necessary to achieve the aim. Public measures -taken by the State acting as an authority⁷⁴- are presumed to defend the general interest, while private measures are deemed to pursue private goals that might differ from the general interest. Accordingly, private measures deserve a stricter control than public measures.

A private measure having anticompetitive effect will be forbidden unless authorized by public authorities⁷⁵. A State measure having the same anticompetitive effect will be valid unless it is proved that it is not pursuing the Community general interest, whether because it is just pursuing a national or a private interest⁷⁶.

Second, the State measure will be deemed to pursue a private interest when the State has shifted to private actors the responsibility for the adoption of the measure and no longer has control on the final decision. Mere consultations to private actors or even their involvement in the legislation procedure is not sufficient indication, for the Court, that the State has delegated its responsibility. That delegation will only occur if the adoption procedure lacks the guarantees ensuring that the public interests are evaluated and that the responsibility of the final decision lays on the public authorities.

It is important to stress that the Court of Justice seems more willing to accept guarantees in recent cases than it was in previous years.

In the case *Reiff*⁷⁷, a committee was set up with the aim of fixing the prices for road long distance transport of goods. This committee was formed by members of the transport associations appointed by the Federal Minister of

Competition between Businesses", *Fordham International Law Journal*, Vol. 10, 1987 at pp. 420-443. Cfr. Pescatore, "Public and private aspects in recent Competition cases before the Court of Justice", *idem* at pp. 373-419; and "European Community Competition Law- A Rejoinder by Judge Pescatore", *idem* at pp. 444-445. See also Waelbroeck, M. : "Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE", in *Du droit international au droit de l' intégration*", *Liber Amicorum Pescatore*, Nomos Verlagsgesellschaft, Baden Baden 1987.

⁷⁴ When the State is acting as an undertaking, it is subject, in principle, to the same competition rules as private undertakings. Nonetheless, see article 90.

⁷⁵ This is the case of restrictive agreements exempted by the Commission (whether by a block exemption regulation or an individual exemption).

⁷⁶ A delegation to private actors of the public authorities's responsibility is incompatible with the Treaty. Whether or not the regulation is protectionist will be examined at the light of the Treaty provisions on free movement, State aids and Article 90.

⁷⁷ Cited above.

Transport upon a proposal by transport undertakings and associations. Once the committee had decided the prices, they were made legally binding by means of State regulation. The ECJ decided that there was no delegation to private operators because the Minister could have rejected the approval of the proposed prices and have fixed them by himself⁷⁸. This possibility of rejection was, hence, considered sufficient guarantee that the State had not delegated its power to private operators.

Nevertheless, some years before the Reiff judgement, in the cases BNIC/Clair and BNIC/Aubert⁷⁹, in an almost identical situation⁸⁰, with the same guarantee, the ECJ decided that the practice was illegal⁸¹.

Accordingly, it might be interpreted that the Court is prepared to give more room for Member States' intervention in the market.

In sum, the ECJ is still ready to prevent State regulation disguising conduct contrary to Articles 85 or 86. Nevertheless, it seems that it will only restrict State intervention in very clear cases: where the regulation tries to impose to the undertakings a conduct contrary to EC competition rules or gives a recommendation in that sense, or when the State delegates completely in private operators the task of regulating without maintaining the possibility of rejecting the private operators' decision and imposing its own decision.

The wide interpretation: Supervising the reasonableness of all State intervention in the market?

By an order of 9 December 1992, the Court of Justice reopened the proceedings of the case Meng and ask to the parties, to the member States and to the Commission six questions⁸². The questions reveal that the Court wanted to know the opinion of the Member States and the Commission about a possible extension of the ECJ's control of State anticompetitive measures.

The Commission answered that the Treaty does not foresee the control of

⁷⁸ See paragraph 22 of the judgement.

⁷⁹ Judgement of 30 January 1985, case 123/83, BNIC/Clair, ECR 391, and judgement of 3 December 1987, case 136/86, BNIC/Aubert, ECR 4789.

⁸⁰ The only factual difference with the Reiff case was that in the latter the law established that the members of the committee should carry out their duties on an honorary basis and were not bound by instructions from the undertakings or associations that proposed them.

⁸¹ In BNIC/Clair, the ECJ decided that there was an agreement contrary to Article 85 and condemn the undertaking, while in BNIC/Aubert it said that the State regulation was illegal.

⁸² See the Hearing report of case C-2/91, ECR [1993] I-5752.

all State measures having equivalent effects on competition to an agreement or a concerted practice. In its opinion, such an extension would be excessive and would go against the subsidiarity principle. The majority of Member States, although with different degrees, shared the Commission's conclusion. Advocate Generals Tesouro⁸³ and Darmon⁸⁴ were also against the extension.

Finally, the ECJ decided that it was more appropriate not to extend its control of anticompetitive State measures, and has reproduced in the judgements its classical statements. Without renouncing to control some of the anticompetitive State measures, it has limited that control to measures having a link with a private behaviour contrary to Articles 85 and 86, as explained above.

In sum, regardless of the reasons behind the judgement⁸⁵, the ECJ did not consider appropriate to extend its control and to subject almost every Member States' intervention in the market to its revision. An important part of the State intervention in the market escapes ECJ's control under the competition rules. Hence, each Member State will be free to decide the degree of intervention -as far as its intervention does not violate other EC rules-. Different levels of intervention and therefore of distortions of competition may exist and competition among rules will play an important role.

Final remarks:

The analysis of the EC Competition Law Chapter and its application by the Court of Justice reveals:

A) In relation to the combined use of Articles 3 (g), 5 (2) and 85-86:

1- As currently interpreted by the ECJ, it is an instrument of preventing public authorities to delegate to private actors their responsibility to regulate the market. It seems to be a way of compelling the public authorities to maintain the control of the regulation and, therefore, to ensure that the regulation will be adopted in the general interest and not only in the interest of private actors.

⁸³ See his Opinion in cases C- 2/91, Meng and C- 245/91, Ohra. ECR [1993] I-5773.

⁸⁴ See his opinion in case C-185/91, Reiff, ECR [1993] I-5823.

⁸⁵ A wide interpretation would have meant, among other consequences, an overload of cases to be decided by the Court, a reduction in legal certainty of States' economic legislation, and would have given the Court a political task: to decide between liberalism and interventionism. For a more detailed explanation of the consequences, see the Hearing Report and the opinion of the Advocate Generals cited above. See also López Escudero, Manuel: "Las reglamentaciones nacionales anticompetitivas (Comentario a las sentencias del TJCE de 17 de Noviembre de 1993, asuntos Meng, Ohra y Reiff)", Revista de Instituciones Europeas, Vol. 21, 1994, n_ 3, pp. 917-942. There is a striking parallelism with the Court's approach to Article 30 in Keck. See Reich, Norbert: "The November Revolution of the European Court of Justice: Keck, Meng and Audi Revisited", CMLRev. Vol. 31, 1994, pp. 459-492.

It is not used as instrument to control public intervention in the market, or to decide what degree of regulation a market must have or even to decide at what level that regulation must occur.

2- It is usually applied in relation to Member States' measures. Nevertheless, I think the same obligation regards as well the European Union Institutions.

Theoretically, the combination of Articles 3 (g), 5 (2) and 85-86 can also be used in relation to these Institutions: the Court has consistently held that Community Institutions also have the obligation of loyalty contained in article 5.

From a practical point of view, a Commission's measure disguising private conduct contrary to Articles 85-86 would be very unlikely and, in any case, unacceptable.

Hence, a unique standard must be applied both for the Union and Member States' measures.

B) In relation to the EC Competition Law Chapter in general:

1- Limits to certain types of States' intervention.

Member States are no longer free to adopt all kind of measures having an anticompetitive effect. The EC Treaty does not forbid them to intervene in the market but impose certain limits and conditions to that intervention. Within these borders they still have the decision about whether or not to intervene, and in the former case how to intervene.

This is the case of State aids (Articles 92-94) and regulations granting special or exclusive rights to certain undertakings or regulating the activities of undertakings entrusted with the operation of general economic interest or having the character of a revenue-producing monopoly (Article 90).

The reasons for limiting States' intervention is twofold: On one hand, market integration and elimination of protectionism. On the other, fixing minimum conditions to distort competition. It is important to stress that only minimum conditions are established; but public authorities maintain a great 'marge of discretion about whether or not intervening and with what intensity to intervene.

It appears that States' and Community's measures are not equally treated, and subject to the same kind of tests and control. This might be because Community measures are presumed to pursue market integration, while States' measures are suspicious of being protectionist. As the "minimum conditions test" is, as a general rule, easily satisfied, the most thoroughful analysis takes place at the light of the protectionism concern.

2- No control under the EC competition rules of certain States' interventions with anticompetitive effects.

States's economic regulation having anticompetitive effect and not falling under one of the three categories mentioned above (State aids, article 90 and regulations that disguise private conduct contrary to Articles 85 and 86) will not be subject to control at the light of the competition objective. Therefore, the Court of Justice will carry out the control of these measures mainly through the provisions on free movement.

Part III: CONCLUSIONS.

The recent case-law indicates that the Court wants to restrain its role in the definition of acceptable public intervention in the market even if that means less control over State regulation. Keck and Meng are exemplary in that regard.

The Court has always been more concerned with State intervention than with public intervention in the market. This is confirmed by a double-standard regarding review of State and Community measures under the European Union Economic Constitution⁸⁶.

The reasons for limiting States' intervention is twofold: On one hand, market integration and elimination of protectionism. On the other, fixing minimum conditions to distort competition. It is important to stress that only minimum conditions are established; but public authorities maintain a great marge of discretion about whether or not intervening and with what intensity to intervene.

As Community intervention in the market is not suspicious of being protectionist, and the "minimum conditions test" is easily satisfied, it will be hard to find a Community measure succesfully challenged before the Court for a violation of the free movement or free competition principles.

The broad reading given to free movement and competition provisions has brought many national provisions under review. Nevertheless, this must be interpreted as intended to wide Community control over national regulation in the Common Market, and not as to wide the Court's control over the degree of regulation in the market. We have been attending a process of europeanization of regulation in the Common Market, that may have to be reassessed in light of the subsidiarity principle and the most novel decisions of the Court.

⁸⁶ It is not clear that this double standard exists -and in any case, it should not exist- in relation to States' and Community' measures delegating to private actors the responsibility of regulating the market. For this type of measures the concern has nothing to do with the regulation-deregulation debate or the decision about at what level -Community or State level- the decision should be taken. The ECJ should only ensure that a public authority -whether it is the Community or a State- is responsible of the intervention, and should condemn both Community and States' measures delegating that responsibility to private actors.