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Protective Regulation and Protectionism in the European Community: the Creation of a Common Market for Food and Beverages

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ABSTRACT

This paper describes the efforts of the European Community to create a single European market for food and beverages as well as agricultural animals and plants between the early 1960s and the present.

The first section places these efforts in a broader context. Divergent national health and safety standards have become an increasingly important source and focus of trade conflict throughout the industrialized world. The challenges faced by the EC are similar to those faced by any federal or quasi-system, including the United States, namely, the reconciliation of the interests of political sub-units in protecting the health and safety of their citizens with the goal of removing national regulations that function as non-tariff trade barriers.

By the early 1960s, tariffs on most goods with the EC had been eliminated. Accordingly the Community began to turn its attention to the removal of non-tariff barriers. In the case of foodstuffs, the Commission initially attempted to harmonize divergent member state safety and compositional standards. This effort to create "Euro-food," was, for the most part, unsuccessful: national culinary traditions proved too diverse to be harmonized.

In 1979, the European Court offered a solution to this impasse. Cassis de Dijon established the principle of mutual recognition. This meant that any product that could be lawfully sold in one member nation could be sold throughout the EC, unless the importing state was able to demonstrate that its national restrictions were necessary to protect the health of its citizens.

Cassis allowed the European Commission to distinguish between non-essential and essential food safety and compositional regulations. The former could be left in the hands of member states, subject only to food labeling requirements; only the latter needed be harmonized. In its 1985 White Paper on the Creation of the Single European Market, the Commission outlined a new strategy for removing intra-Community trade barriers. This new approach formed an important basis for the Single European Act, which was approved as an amendment to the Treaty of Rome the following year.

Since 1985, the Council has approved a significant number of framework directives. Its efforts, along with a number of European Court decisions that have struck down a number of long-standing national trade barriers, have allowed the EC to make substantial progress in creating a single European market for food and beverages.

Nonetheless, significant areas of conflict remain. The divergence of national inspection systems, as well as significant differences in the views of both producers and consumer groups in various member states regarding a number of highly visible food safety issues, reveal the persistence of important tensions between

consumer protection and free trade within the EC.

I. Introduction

This paper examines the politics surrounding the relationship between protective regulation and trade. It specifically focuses on the Community's efforts to create a single European market in food, beverages and other related products.

The policy areas of international trade, and national health safety and environmental regulation, have recently become more interdependent. A growing number of international trade disputes now focus on the impact of different national - and in the case of the EC - regional, regulatory standards on trade in both manufactured goods and agricultural products. Similarly, many national regulatory policies, including those of the member nations of the European Community, have been modified as a result of international pressures, negotiations and agreements. The politics of protective regulation, like so many other policy areas that have historically been almost exclusively domestic in focus, have thus acquired an important international dimension.

The expansion of international trade has meant that national differences in regulatory standards are increasingly likely to affect citizens in a number of different countries. As the international trade has grown in recent decades, both citizen groups and regulatory officials have become much more aware of the potential or actual health hazards of imported products. The growth of political influence of consumer and environmental organizations in a number of industrialized countries represents a new and important source of political pressure to restrict both imports and exports. In addition, many producers and government

officials who represent their interests, have sought to capitalize on the public's heightened concern with health, safety and environmental issues, in order to increase public support for protectionist policies. In some cases, producers, consumer and environment groups have formed political alliances, both within countries and across national boundaries, to maintain or promote trade restrictions.

The increase in protective regulation at the national level does not by itself threaten the principles of a liberal world economic order; after all the last three decades have witnessed both a significant increase in national health, safety, and environmental regulation and a major expansion of international trade. Whether or not protective regulations are protectionist depends in part on whether they are imposed unilaterally or multilaterally. It is the former that have become an important source of international trade friction. By contrast, the adoption of common or similar regulatory standards by different countries represents a way for government officials to both satisfy the interests of their constituents for stronger or stricter regulation and reduce the use of regulation as a non-tariff trade barrier.

We are thus experiencing two contradictory trends. On one hand, domestic pressures from consumer and environmental organizations - at times encouraged by producers - are prompting a number of industrial nations to adopt increasingly strict and comprehensive regulatory standards - many of which either explicitly or implicitly restrict international trade. On the

other hand, in order to both reduce the use of regulation as a trade barrier and also preserve or enhance the goals of protective regulation, there has been a substantial increase in international efforts to harmonize health, safety and environmental regulations. The EC's trade disputes with the United States fall into the former category; the Community's own efforts to create a single European market fall into the latter.

The growth of protective regulation clearly poses an important challenge to the relationships among national and international political institutions. National governments have the right - if not the responsibility - to determine for themselves the level of consumer protection and environmental quality they wish to accord their citizens. Because the citizens of different industrial nations have different values and priorities, national standards are apt to differ widely. But this in turn increases the potential role of protective regulations as a source of trade friction. How can the international community respect the right of citizens to national regulatory self-determination, while at the same time minimize the use of protective regulation as a non-tariff barrier?

This is an issue with which the European Community has been wrestling since its formation; it is also an issue that affects any federal or quasi-federal structure. The United States federal government also faces the challenge of balancing the rights of the citizens of each of its fifty states to enact regulations that protect their environment and health with the need to preserve interstate commerce. The American experience suggests that an

integrated market is not incompatible with a wide diversity of state and local regulatory standards - some of which obviously will be stricter than others. This is also true at the international level; an integrated world economy does not require identical national regulatory policies.

But it is also the case that widely divergent national and local standards, if not restrained by some extra-local or extra-national authority, can seriously undermine both interstate and international commerce. In this sense, the challenges faced by the European Community are analogous to those faced by both the American Federal Government and the GATT. All three institutions are committed to minimizing trade restrictions within the political units under their jurisdiction. However, all in turn are confronted with pressures from political subunits to preserve or enact health, safety and environmental regulations that may differ from those of other subunits and thus inhibit trade.

II. The Legal Framework of EC Regulation

A central purpose of the establishment of the European Community in 1957 was to permit the free movement of goods among its member states. From the outset, the EC understood that the achievement of this goal would require major changes in a wide variety of national policies. Article 3 of the Treaty of Rome specifies two requirements for the creation of a common market: "the elimination, as between member states, of customs duties, and

all of quantitative restrictions on the import and export of goods, and of all other methods having equivalent effect," and "the approximation of the laws of the member states to the extent required for the proper functioning of the common market."[1]

Each of these requirements are amplified in other provisions of the Rome Treaty. Article 30 states that, "Quantitative restrictions on imports and all other measures having equivalent effect shall. . . be prohibited between Member States,"[2] while Article 100 empowers the Council of the European Community to, "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."[3] These two articles pursue different objectives, but are essentially complementary: the purpose of the former is to remove quantitative national restrictions on trade while the latter's goal is to "enable obstacles of whatever kind arising from disparities between (nations) to be reduced."[4]

However, the Rome treaty also includes a provision that explicitly limits the purview of Article 30. Article 36 permits

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[1] Diana Welch, "From 'Euro Beer' to 'Newcastle Brown," A Review of European Community Action to Dismantle Divergent "Food" Laws," Journal of Common Market Studies, Vol. XXII, No. 1 September, 1983, p. 48

[2] Quoted in T.R. Stocker, "Food Law and 1992," unpublished paper prepared for Worldwide Information Conference on Food Law: Current Changes and their Implications." 1990, p. 2

[3] Welch, ibid

[4] Welch, op. cit., p. 48

member states to restrict or even ban imports, exports or goods in transit if such restrictions are necessary for reasons of "public morality, public policy or public security (or for) "the protection of health and life of humans, animals or plants...."[5] (This provision is similar to Article XX of the General Agreement on Tariffs and Trade, which states that, "... nothing in this agreement shall be construed to prevent the adoption or enforcement ... of measures ... necessary to protect human, animal or plant life, or health."[6]) Article 36 also contains a qualifying clause: the restrictions imposed by a member state cannot "constitute a means of arbitrary discrimination or a disguised restriction on trade between member states."[7] They must also meet the test of "proportionality:" a member state seeking to justify a regulation under Article 36 must demonstrate that the means it has chosen are proportional to the objective it is pursuing and it interferes with free trade as little as possible.

As a response to increased public demands for additional health, safety and environmental regulation in western Europe during the 1970s, the EC has subsequently modified its interpretation of Article 100. Instead of restricting Community directives to rules and regulations that were necessary to promote

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[5] Stocker p. 2

[6] Quoted in Antoine St-Pierre, "Business and the Environment" The International Dimension," Global Business Issues, Vol. 2 No. 3 p. 3

[7] Welch, op. cit., p. 48

intra-community trade, the Community has issued an increasing number of directives whose primary purpose has been to improve the health, safety and welfare of its citizens. "The basis of the Commission thinking has been changing from that of improving free trade to improving the quality of life by protection of the consumer and public health."[8] Accordingly, "measures which do not affect trade but which are intended for health and safety reasons directly affect the common market within a broad interpretation of Article 100."[9] This change in emphasis was made official by the Single European Act, which came into effect on July 1, 1987. This amendment to the Treaty of Rome explicitly acknowledged the Community's commitment to improve the quality of the physical environment and to enhance consumer protection - as well as pursue the EC's original purpose of promoting economic integration.

The Community has thus moved from "negative" harmonization, whose purpose is to remove national obstacles to the operation of a common market to "positive" harmonization," whose objective is, "to attune the legal systems of the Member States to the common policies developed by the EC"[10] In a sense, the EC has come to employ Article 100 in much the same manner that the United States has interpreted the interstate commerce clause of the Constitution. Originally intended to provide Congress with the authority to prevent the states from restricting commerce among themselves - as

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[8] Quoted in Welch, op cit p. 49

[9] Ibid.

[10] Quoted in Welch, op. cit., p. 50

they had done under the Articles of Confederation - Article I, Section 8, has subsequently been used to justify a wide variety of "positive" regulatory controls imposed on the states by the federal government, ranging from non-discrimination to air and water quality standards.

A somewhat analogous process has taken place at the international level. The GATT Standards Code constitutes an agreement on "Technical Barriers to Trade." Its purpose is essentially a negative one: it is "to assure that products introduced into international trade could not be discriminated against or treated unfairly because of arbitrary standards-related activities on the parts of governments."[11] Disputes that cannot be satisfactorily resolved bilaterally are referred to a Committee on Technical Barriers to Trade, which has the power to make judgments and impose penalties.

Yet there have also been a number of international agreements affecting international commerce whose purpose has been to promote consumer protection and environmental quality. In 1962, the Food and Agriculture Committee and the World Health Organization of the United Nations jointly established a food standards program that is administered by the Codex Alimentarius Commission. It objective is to develop common food safety standards that will both facilitate international trade and protect consumers. Moreover, during the last two decades, two important international treaties have been

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[11] Eddie Kimbrell, "International Standards and Non-Tariff Trade Barriers," Food Technology, July 1985, p. 70

enacted that have sought to improve or protect the quality of the global environment by restricting trade in various environmental "bads," namely various endangered species and chemicals that threaten the ozone layer. These can be seen as examples of "positive" harmonization at the global level.

III. Early Harmonization

A useful way to begin to explore the complex dynamics of the relationship between protective regulation and intra-community trade is to examine the way the Community has addressed the issue of food safety. "The food sector has always been the trailblazer of policy making in creating the internal market."[12] The EC's very first directive, issued in 1962, specified the colorings permitted in foodstuffs. Subsequently, the key decision of the European Court which interpreted the scope of Article 36, namely Cassis de Dijon (1979), struck down a national regulation that defined the alcoholic content of liquor. Through 1988, more than half of all cases brought before the European Court alleging violations of Article 30 had to do with national food regulations. Of the 300 regulations listed in Lord Cockfield's 1985 White Paper as requiring action by the European Council in order to complete the creation of an internal market by 1992, nearly one-third involved the elimination of restrictions on trade in food, beverages,

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[12] Paul Gray, "Food Law and the Internal Market," Food Policy, April 1990, p. 111

animals and plants; indeed the notable inability of the EC to make substantial progress in creating a single market for foodstuffs during the 1970s played an important role in persuading the EC of the need to develop a new approach. Finally, the foodstuffs sector is an extremely important one. It is the biggest contributor to jobs and value-added of all EC industries, accounting for slightly more than 4% of the EC's GNP.[13]

By the middle of the 1960s, tariffs among the member states of the Community had been virtually eliminated. Accordingly, in May 1969, the EC Council of Ministers began to turn its attention to the removal of non-tariff or "technical" barriers to trade, and developed a general program to accomplish this objective. The EC's strategy for achieving this objective was to rely primarily upon its powers under Article 100 to harmonize national regulations. As a Community document put it: "a national legal act in principle calls for a Community legal act."[14] The Council established a detailed schedule for the adoption of forty-two directives designed to ensure free trade in foodstuffs. Each of these directives was intended to be "total," i.e., they were meant to supercede all relevant national regulations.

In 1973, the Community, faced with a lack of progress in meeting the deadlines it had established four years earlier, and confronted with three additional member states, adopted a revised

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[13]Paolo Cecchini et al. The European Challenge, 1992 Aldershot, England: Wildwood House, 1988, p.57,58

[14] Quoted in Gray, op. cit., p. 112

harmonization program. The EC now decided to emphasize the use of "optional" directives, which require the free movement of all products that conform to EC standards, but allow distinctive national standards for products sold in the country where they are produced.

The Commission's efforts to harmonize food regulations meet with some success. For example, the EC's first directive reduced the number of food colors permitted in the (then six) member states by 60%. "It was widely regarded as a triumph not only for diplomacy but also for consumer protection."[15] However subsequent progress was extremely slow. Between 1962 and 1979, the Commission only managed to adopt directives for coloring matters (1962) preservatives (1964), antioxidants (1970), emulsifiers, stabilizers, thickeners and gelling agents (1974), saccharin (1978), dietary foodstuffs (1977), fruit juices (1975), cocoa and chocolate products (1973), preserved milk (1976) and jams and jellies (1979). Not only was it able to harmonize national regulations in only a small proportion of the areas specified in both its 1969 and 1973 plans, but even these plans did not include all relevant European food law regulations.

The Commission found it somewhat easier to secure agreement on "horizontal" directives, which regulated the use of a particular additive or preservative in all foods, than "vertical" ones, which specified the composition of an individual food product. Indeed it was not until 1973 that the Commission was able to adopt its first

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[15] Gray, op cit p. 111

vertical directive - for cocoa and chocolate. It took fourteen years of negotiations before another vertical directive which specified the composition of fruit jams, jellies, marmalades and chestnut puree directive, was adopted.

Moreover, a number of food directives were far from "total;" in order to facilitate agreement, the Council was frequently forced to compromise by leaving various standards up to the discretion of national authorities. For example, the EC's directive on food additives established positive lists for various kinds of additives. Member states were only permitted to authorize the use of additives included on these lists.[16] However, a nation was still permitted to prohibit or restrict the use of any approved additives in any specific food item, subject to the sole provision that it could not completely ban an additive on the Community's positive list. Thus France, for example, decided to permit the use of the food coloring amaranth only in a single product -- caviar. Likewise, the EC's cocoa and chocolate directive excluded from its scope a number of substances commonly used in these products.

An important reason why it proved difficult to harmonize food standards was that national customs, traditions and regulations were widely divergent - the product, in many cases, of centuries of distinctive patterns of food production and consumption. For example, in the case of bread, some nations permitted the long-lasting "Anglo-Saxon" loaf designed for use in the English sandwich

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[16] Ludwig Kramer, "EEC Action in Regard to Consumer Safety, Particularly in the Food Sector," Journal of Consumer Policy, December 1984, p. 475.

while others assumed that this commodity was purchased on a daily basis. Developing a standard that could be applied to both proved to be extremely difficult. As one observer put it, the concept of "Eurobread" was like, "trying to cross a baguette with a loaf of pumpernickel."[17] Similarly, Reinheitsgebot, the German beer law, restricted the ingredients that were permitted in this product; its standards embodied the "state of the art" for beer production in 1516 and had been modified only slightly since. Other nations brewed beer very differently; most included various additives that were prohibited by German law. Not surprisingly, it proved impossible for German and British brewers to agree on the appropriate composition of "Eurobeer." The same was true of jam: the Dutch preferred smooth jam, the French, chunky jam and the British liked marmalade.

The European Commission's effort to standardize such products as bread, beer and biscuits throughout Europe soon became an object of derision. The EC was accused of trying to force everyone to eat "Euro-Bland" food, made by "Euro-recipes." "Harmonizing all existing law was leading to a conflict between culinary cultures and traditions with an attempt to unify products which had culinary diversity into unique product descriptions."[18] In addition, the rigidity of those compositional standards on which the Commission

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[17] Shawn Tully, "Europe Gets Ready for 1992," Fortune, February 1, 1988. p. 83.

[18] Paul Gray, "Food law and the internal market," Food Policy April 1990, p. 112

was able to agree threatened to undermine technical progress in what was a highly dynamic and innovative industry. One industry observer wrote in 1979 that, "the result of EEC food law harmonization programme seems merely to burden us with regulations of unnecessary complexity, without benefiting consumers or manufacturers or helping trade."[19] The publication Eurofood added:

> At its worst harmonization can damage companies, forcing them to give up long standing and harmless production systems and ingredients. At best harmonization . . . can be restrictive to new developments in the food industry. [20]

The attempt to formulate horizontal directives also ran up against an obstacle: the wide divergence of national food safety standards. For example, in the case of food additives, some nations employed a positive list, i.e. only additives that were specifically approved were permitted, while others employed a negative list, i.e. any additive could be used unless its use was specifically prohibited.[21] There was also a lack of scientific consensus about what additives were and were not safe - differences compounded by the divergence of national eating habits and recipes. For example, while British poultry producers traditionally used arsenic in chicken-feed, French law prohibited the sale of eggs from arsenic-fed chickens, even though eggs produced in Britain contained no arsenic residues. Likewise, the British permitted the use of thousands of food additives, while French food law was more

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[19] Quoted in Welch, p. 55

[20] Ibid.

[21] John Abraham and Erik Millstone, "Food Additive Controls; Some International Comparisons,"Food Policy, February, p. 43 - 57.

restrictive.[22]

To help address these issues, a Standing Committee on Foodstuffs was established by the Council in 1969.[23] It was composed of representatives from each member state and intended to serve as an advisory body to the European Commission. In 1974 a Scientific Committee for Food was formally established as an advisory body to the Commission and two years later a Consultative Committee for Food was organized. The former consisted of fifteen scientific and technical experts, chosen from member state nationals, but not as representatives of their respective countries. However, given the unusual sensitivity of the foodstuffs sector to public concerns about safety, these bodies had only a modest impact; no nation was prepared to defer to their expertise.

Moreover, the Community's requirement that all directives receive the unanimous agreement of the Council of Ministers proved extremely cumbersome - particularly after the number of EC member states was increased from six to nine. Nations which were committed to preserving the status quo of their own domestic regulations for foodstuffs, but which had not succeeded in persuading the Commission's staff frequently attempted to renegotiate the details of various directives when they came before

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[22] John McCarthy, "Protectionism and Product Harmonization in the EEC" Economic and Social Review, April, 1979 p. 191

[23] R. Haigh, "Harmonization of Legislation on Foodstuffs' Food Additives and Contaminants in the European Economic Community," Journal of Food Technology Volume 13, (1978), p. 255 - 264

the Council. The latter came to function less as a vehicle for advancing Community interests than as a forum for diplomatic bargaining in which each state pursued its own interests. Consequently, "many proposals for a directive from the Commission were blocked at the Council and many were even sent back to the commission for renegotiation and reworking."[24] Between 1969 and 1970, a total of twelve draft directives regarding products ranging from mayonnaise to butter, beer, ice-cream and margarine, were withdraw by the Commission;

While the Community was making relatively little progress in harmonizing existing national regulations for food safety, processing and composition, the number of national regulations governing foodstuffs was increasing. Some were inspired by producers seeking to insulate themselves from competition from foodstuffs and agricultural products produced in other member states. "Particularly prevalent were national specifications on the safety of products, some of which were so restrictive that only nationally produced goods could meet them without modification."[25] For example, the French banned drinks with sugar substitutes in order to protect their domestic sugar-beet industry, thus preventing the emergence of a European diet soft-drink industry.[26] Others were a response to the public's demands for heightened

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[24] J. H Byrne, "Food Law Harmonization in the European Economic Community," Food Technology, July, 1985, p. 78

[25]Stephen George, Politics and Policy in the European Community. Oxford: Oxford University Press, 19991, p. 159

[26] Tully, op cit, p. 83

consumer and environmental protection - a development that was also occurring in the United States at about the same time. As one observer noted, "...there has been a great increase in consumer awareness of possible dangers in products...; there has also been increased concern for the environment. Thus nations have been led to protect their citizens and country from unsafe products or manufacturing processes."[27]

The result was that the Community's tariff-free internal market was becoming increasingly fragmented by a proliferation of non-tariff barriers. In short, during the 1970s, the effort to create common market in food and beverages had not only lost much of its earlier momentum, but on a number of dimensions it appeared to have reversed course.

In 1980, the Commission conceded that the goals established in its 1969 General Programme of eliminating technical barriers to trade had been unrealistic. It noted that, "in the foodstuffs sector progress has been less spectacular (than in industrial products) largely because of the structure of the food industry."[28] The Commission's food directives still covered only a relatively small portion of the food and food substances consumed within the Community. The result was that "new products had to be adapted to pass a complex maze of different safety and technical standards for

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[27] John McCarthy, Protectionism and Product Harmonization in the EEC," Economic and Social Review, April 1979 p. 188-9

[28] Quoted in Alan Swinbank, "EEC Food Law and Trade in Food Products," Journal of Agricultural Economics, September, 1982 p. 345

each European country."[29] This outcome, of course, was precisely the opposite of that intended by the Community's proponents: the European food market had become even more fragmented, the profit margins of European food processors had decreased and consumers were confronted with higher costs.[30] In sum, the Community was faced with a serious problem: notwithstanding all of the Commission's efforts, "foodstuffs constitute(d) the area most hampered by non-tariff barriers to trade."[31]

IV. Mutual Recognition

An important step in breaking this logjam was provided by the European Court in its decision in Cassis de Dijon, handed down in 1979. Cassis de Dijon is a low alcohol (15 to 20%) liqueur manufactured in France. A German firm wanted to import this liqueur into Germany, but was refused a license to do so on the grounds that German law requires that any product sold as a liqueur have a minimum alcohol content of 32% The German government justified its restriction on the grounds of both public health and consumer protection. It argued that the importation of Cassis de

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[29] Mitzi Elkes, "Europe 1992: Its Impact on Nontarif Barriers and Trade Relations with the United States," Food, Drug and Cosmetic Law Journal, September, 1989, p.471

[30] Mitzi Elkes, "Europe 1992: Its Impact on Nontariff Trade Barriers and Trade Relations with the United States," Food, Drug Cosmetic Law Journal, September, 1989, p. 571

[31] G. Chambers Food Hygiene Policy and 1992 Scientific and Technological Options Assessment, European Parliament, May 17, 1990 p. 36

Dijon was harmful to public health because alcoholic drinks with low alcoholic content induced more tolerance for alcohol than did beverages with higher alcoholic content. The European Court was unpersuaded: it held that the German regulation had no legitimate public health justification and that therefore Community trade principles took precedence over German law.

This decision made explicit the concept of "mutual recognition:" nations were free to maintain and enforce their own regulations for products produced within their jurisdiction, but they could not legally prevent their citizens from consuming products that met the legal standards of another member state of the community. This concept was not new. It was both implicit in Article 30 and underlay a Community directive on food labeling that was also put into effect in 1979. In addition, Article 57 of the 1957 Treaty of Rome had explicitly used the term in connection with education and professional qualifications as a means of promoting the free movement of persons with the EC. Nonetheless, the court's decision in Cassis de Dijon, by explicitly defining the scope of Article 30 and limiting the purview of Article 36, made legal history.

The Court acknowledged that "obstacles to movement within the Community resulting from disparities between national laws . . . must be accepted insofar as ...[they are] necessary in order to satisfy mandatory requirements relating in particular to...the protection of public health... and the defense of the consumer."[32]

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[32] Quoted in Welch, op. cit., p. 60

The question before the Court was whether the German regulation was in fact necessary to satisfy one of these "mandatory requirements?" In other words, did the restriction it imposed on imports qualify as one of the exceptions to free trade permitted under Article 36? The Court concluded that the German 32% alcoholic content requirement served no legitimate public or national interest. Not only was this beverage being lawfully produced in France, but, equally importantly, the German regulation "was not considered by the court as a necessary means to protect the consumer."[33] Accordingly, since it had the "equivalent effect" of a "quantitative restriction on imports," it constituted a violation of Article 30.[34]

It is important to note that the Court struck down the German regulation even though it applied equally to imported and domestically produced goods. The Court concluded that the standard of "equivalent effect," applies to "any national measure capable of hindering, directly or indirectly, actually or potentially, intra-community trade."[35] In other words, the test of "equivalent effect," is not whether a measure discriminates against imports, but whether it restricts them."[36] This represented an important change in EC law, since five years earlier, the Commission had stated that non-discriminatory measures were <u>not</u> to be considered

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[33] Quoted in Welch, op. cit., p. 65

[34] Welch, op cit, p. 61

[35] Quoted in Welch, op cit p. 60

[36] Quoted in Welch, op. cit., p. 62

violations of Article 30.

The court did recognize that in the absence of "common rules" i.e. harmonization, each member state had the right "to regulate all matters relating to ... production and marketing ... in their own territory."[37] Thus Germany was free to require that liquor produced in Germany have a minimum alcohol content of 32%. But what it could not do was impose that requirement on products lawfully produced in another member nation. In other words, Cassis did not require that any nation change its domestic laws; it only restricted their scope. As the Commission noted in its interpretation of the Cassis decision:

> ....any ... product must be admitted if it has been lawfully produced elsewhere in the Community and conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is lawfully marketed in the territory of the latter.[38]

The principle of mutual recognition articulated in Cassis exposed a wide variety of national regulatory standards to judicial scrutiny. Following Cassis, "a member state using [a health and safety defense] must present an argument that will bear harsh scrutiny by the Court if it expects to maintain the regulatory measure."[39] The following year the court ruled that an Italian regulation prohibiting the sale of all products labeled "vinegar"

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[37] Quoted in "Environmental Protection and the Free Movement of Goods: the Danish Bottles Case," Journal of Environmental Law, Vol. 2, No. 1 (1990), p. 93.

[38] Quoted in Alan Swinbank, "EEC Food Law and Trade in Food Products," Journal of Agricultural Economics September, 1982, p. 344-5

[39] Welch, op. cit., p. 65

other than wine vinegar violated Article 30. It held that the purpose of Italy's regulation was to favor a national product, namely wine vinegar, and that by not allowing vinegars made from apple cider or malt to be sold in Italy under the same product designation, products produced in other member states were placed at a disadvantage.

In Fietje (1980) the court overruled a Dutch law on the labeling of alcoholic drinks that prohibited the sale of various beverages unless they were labeled in accordance with Dutch government requirements. The court concluded that this statute was not justified on consumer protection grounds since its objective could be equally well meet by adequate product labeling. That same year in Kelderman, the court struck down a Dutch statute that specified the dry matter content required in bread. The Netherlands had imposed a ban on imports of French "brioches" on the grounds that they did not conform to its Broodbesluit or "Bread Order;" the Court reasoned that consumers could easily be informed by other means, "such as requiring labelling showing, for example, the weight and specific composition of an imported product."[40]

The following year in Rau v De Smedt, the court decided that a Belgian rule that required margarine to be sold in cubic form in order to avoid confusion with butter violated the Treaty of Rome. It noted that although a packaging requirement was not an absolute barrier, it did make imports more expensive and difficult. Again

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[40] Quoted in T. Venables, "The Impact on Consumer Protection On International Trade," Presented at an OECD Symposium on Consumer Policy and International Trade, Paris, November, 1984, p. 15

the court concluded that consumers could equally well be protected by a labeling requirement, which would not interfere with free trade.

V. The Impact of Cassis

The doctrine of mutual recognition had a major impact on the EC's effort to harmonize national regulatory standards. Cassis made harmonization both easier and more essential. It made it easier because the Community could now dispense with the need to reconcile an almost infinite number of different national standards and regulations: their maintenance no longer represented a barrier to intra-community trade since they no longer applied to products produced in other EC member states. It was in large measure the deregulatory implications of Cassis that laid the groundwork for the amendments to the Treaty of Rome contained in the Single European Act of 1987.

On the other hand, it now became even more urgent for the EC to establish and enforce uniform health and safety requirements, lest all EC consumers find themselves exposed to products produced according to the standards of the least stringent national authority. As one observer warned, "if (Cassis) applied . . . without any restrictions, we should be steering straight towards . . . a common market where there would not be any legal standards

and where . . . the bad products would drive out the good ones."[41] Not surprisingly, BEUC, a European consumer lobby, expressed concern that the Commission would use Cassis as a way of solving its inability to harmonize health and safety standards, which would in turn lead to a lowering of food safety and quality standards.[42]

In principle, this downward spiral could have been avoided by permitting nations to invoke the "escape clause" of Article 36. After all, Cassis only restricted the use of this article; it did not prohibit it. And in fact, following Cassis, the court did uphold a number of national consumer protection laws that restricted trade. For example, in Eyssen (1980), the court upheld a Dutch ban on the use of nisin in processed cheese on the grounds that since clear health risks had not yet been established for the maximum permissible daily intake of this preservative, the Dutch were entitled to restrict its use. Two years later, in Sandoz, the court relied on similar reasoning to uphold a Dutch prohibition on the addition of vitamins to foodstuffs. It wrote:

> in view of the uncertainties inherent in scientific assessment, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified on principles within the meaning of article 36 of the Treaty on grounds of the protection of human health.[43]

In any case, reliance on mutual recognition subject to

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[41] Quoted in Welch, op cit, p. 65

[42] Welch, op cit, p. 64

[43] Quoted in Venable, op cit, p. 18-19

judicial review was not a viable solution for several reasons. Politically, the Commission considered it important to re-assure consumers that progress toward the creation of a single European market would not result in any relaxation of consumer protection standards for Community residents; it wanted the creation of a common market to be associated with a strengthening, not a diminution of European health and safety standards. From an economic point of view, allowing divergent national health and safety regulations - even if justified - would undermine many of the efficiency gains that the Commission hoped to achieve from the creation of a single European market. Moreover, it was administratively cumbersome, since the European Court might be required to review the literally tens of thousands of national rules and regulations regarding food composition.

A Commission official noted in 1981, "we cannot agree with those who have concluded from this new case law that the new principles set out by the court bring practically all harmonization activity within the scope of Article 30." He stated that it is the Commission's view that, "there remains a need for harmonization programmes but that harmonization will now apply over a narrower but better defined field."[44] In short, harmonization would begin where liberalization left off.[45]

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[44] Quoted in ibid.

[45] Alan Dashwood, "Hastening Slowly: The Community's Path Towards Harmonization," in Policy-Making in the European Community edited by Helen Wallace, William Wallace and Carole Webb, New York: John Wiley & Sons, 1983, p. 182

Initially, the Commission continued the program of harmonization that it had begun in 1969 and revised in 1973, though it now proposed fewer vertical and more horizonal directives. But progress remained slow. By the mid 1980s, directives had been adopted for only 14 of the 50 sectors falling within the general category of food legislation; six more were pending. In 1985, the Commission calculated that it had succeeded in implementing only two fifths of its 1969-73 program.[46] Even this statistic exaggerated the Commission's progress in creating a common market for foodstuffs, since a number of new products and processes had emerged since 1973 and were thus not on the Commission's initial list. Nor was food atypical: through 1985, the Council was approving measures of harmonization at the rate of only ten per year.[47]

Nonetheless, some progress had been made. At a conference held in 1984, a manager from a major European food producer stated that "during the last decade, EEC food law harmonization has made substantial progress toward the creation of an integrated common market."[48] The vice-president of European affairs for Coca Cola concurred with this assessment as did the European food law coordinator for CPC Europe. But other industry participants noted

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[46] "Completion of the Internal Market: Community Legislation on Foodstuffs," Commission of the European Communities, November, 1985

[47]John Pinder, European Community: The Building of a Union Oxford; Oxford University Press, 1991, p.71

[48]J. H. Byrne, "Food Law Harmonization In the European Economic Community," Food Technology, July, 1985, p. 79

that substantial trade barriers remained. Patrick Jordan of the Food Drink and Tobacco Federation of Ireland stated that, "we would be less than honest if we did not acknowledge areas of food laws where so-called hygiene or sanitary requirements exist primarily to act as a barrier to imports." He specifically cited French and Germany regulations that prevented the entry of cuts of meat weighing less than 3 kgs. Another observer noted that mayonnaise in the UK only had to contain 25% vegetable oil, while in other EC countries, the standard was between 75 and 80%, thus making it impossible to market the same product throughout the Community. Diane Welch concluded that, "as far as alcoholic beverages are concerned, the EEC internal market does not exist," adding that "citing further technical obstacles to trade poses no problem."[49]

VI. The White Paper

In 1985, frustrated by the slow rate at which non-tariff trade barriers were being removed in a variety of sectors - of which food was one - the Commission decided that a new approach was called for. In 1985, Lord Cockfield, the EC's Commissioner for Trade and Industry, produced a White Paper on Completing the Internal Market.[50] This document listed 300 separate measures, subsequently reduced to 279, that were required to eliminate non-tariff barriers

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[49] Diane Welch "Alcoholic Beverage Legislation," Food Policy February, 1985, p. 41, 42

[50] Completing the Internal Market Luxembourg: Commission of the European Communities, June 1985

to trade in goods, services, people and capital. Seventy-one of these measures, included in the category, "removal of physical barriers," encompassed veterinary and phytosanitary controls. Another thirty-three referred to the harmonization of food laws; these were classified under the category, the "removal of technical barriers for the free movement of goods." The report also included a timetable by which the Community was to legislate on each measure; all were to be completed by the end of 1992.

A more detailed document, "Completion of the Internal Market: Community Legislation on Foodstuffs," was released in the form of a "communication from the Commission to the Council and to the European Parliament" in 1985. Its main thrust was to distinguish between those areas of regulation that required Community legislation and those that could be left to the member states. This distinction was to be based on the "principle of proportionality: legal measures must no go further than is necessary to achieve the desired objective." [51] The principles developed by the European Court in Cassis and the cases that followed it had freed the EC from the need to harmonize all national laws, regardless of their importance. Now the Commission could concentrate on those legal measures that were "essential" or "genuinely necessary" to protect the health and life of humans within the context of the free movement of goods within the EC. As a senior EC official subsequently put it, "it is not a case of applying the minimum rule but of applying the necessary rules, and

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[51] Ibid, p. 5

applying them more strictly than in the past."[52]

In practice this meant that the Commission would officially abandon its clearly fruitless effort to specify the composition of foodstuffs; there would be no more vertical directives, no more attempts to create "Euro-bread or "Euro-beer". Following Cassis, all compositional standards would be addressed by mutual recognition. Thus future Community legislation in the area of foodstuffs would be confined to those rules and regulations that were necessary to protect public health, provide consumers with adequate information, ensure fair trading and provide for necessary public controls.[53] Based on these criteria, the White Paper specified six areas that required Community legislation: food additives, materials and articles in contact with foodstuffs, foodstuffs for particular nutrition uses, labeling, some manufacturing processes and official inspection.

The Commission specifically indicated that its approval would be required for all additives used in food sold within the EC. It also planned to require the mandatory inspection of all foods entering a member state - regardless of whether or not the food was intended for consumption in that state. In addition, the Commission emphasized the need for the EC to develop labeling requirements that would protect both consumers and producers against misleading or deceptive labels - an issue that had assumed particular importance since Cassis. The Commission stated:

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[52] Gray, op cit, p. 8

[53] Completion of the Internal Market, 1985, p. 6

> The rejection of recipe law implies a well-developed and clear system of labeling, presentation and advertising that should take the form of a binding legal act so that producers may be protected against unfair competition and consumers against misleading practice. [54]

Equally importantly, the Commission outlined a new approach that it hoped would expedite the approval of directives in these "essential" areas. In reviewing its lack of progress on harmonizing food legislation, the Commission had observed that while "member states are able to agree on the general principles of food law... insurmountable differences of opinion ...exist on points of detail, preventing any decisions from being taken."[55] For example, during the previous ten years the Community had been unable to secure agreement from the Council of Ministers to approve a single new food additive. Even when there was agreement, the Community's procedures proved extremely cumbersome. Thus the EC's food coloring directive had to be amended six times between 1962 and 1978, while the Community's preservative directive was amended 14 times between 1964 and 1979. Each change required the development of detailed proposals by the Commission followed by the unanimous approval of the Council of Ministers. The Commission concluded:

> The problems outlined above are extremely serious as they demonstrate that the Community is frequently unable to equip itself with uniform legislation, nor to manage its existing legislation properly. The directives tend to freeze a scientific or technical situation existing at a

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[54] Ibid, p. 9

[55] Ibid, p. 15

given time without allowing for future adaptions. [56]

Accordingly, the Commission proposed a new division of labor between it and the Council. The latter would establish the basic rules for food law, while the former would implement them in specific cases. For example, in the case of food additives, the Council would establish the general principles governing the approval of food additives while the Commission would draw up the list of approved food additives as well as specify the conditions for their use. A roughly similar procedure would govern the making and implementation of EC policy in each of the other "essential" areas of food regulation.

In short, instead of issuing detailed regulations that in the past had become the subject of interminable negotiations by national officials, the Council would promulgate directives that established a "framework" or "general reference to standards."[57] (A precedent for this approach had been established by the Low Voltage Directive of 1973, which had defined the general objective of safety, and then left it up to the European Committee for Standardization to draw up detailed specifications.) The specific task of implementing these "framework" Directives would then be left to the Commission, working in cooperation with national regulatory officials and private standard setting bodies. This procedural change not only promised to expedite the making of EC regulatory policies, but it also brought the Community's regulatory

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[56] Completion, p. 16

[57] Pinder, p. 72

structure more closely in line with those of its member states, each of whose legislatures delegated substantial authority to administrators.

The Council accepted most of the procedural changes outlined in the White Paper. However, because of the lack of scientific consensus about the appropriate procedures for assessing the technical need for food additives as well as the wide range of national approaches for approving food additives, the Council was unwilling to delegate this critical area of food regulation to the Commission. In addition, the Council required the Commission to consult with the Scientific Committee on Food, which operated on the basis of unanimity, before making any decisions that affected the public's health; previously, the SCF's role had been only advisory.

One important purpose of this consultation requirement was to help implement a critical provision of the Single European Act, adopted the following year, namely that the Commission, in developing proposals in the area of consumer and environmental protection, should "take as a base a high level of protection."[58] The mandatory system of consultation was intended to assure consumers that, "stringent scientific criteria [sic] were being applied by an independent body to ensure safety," and that harmonization would therefore <u>not</u> lead to a reduction in food quality.[59] This requirement further brought EC regulatory policy-

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[58] Chambers, op cit, p. 39

[59] Gray, op cit, p. 13

making in line with those of its member states, most of whose regulatory authorities relied on the advice of similar independent or quasi-governmental committees. The Commission subsequently developed a set of cooperative arrangements with several national scientific institutes in order to exchange relevant scientific information and avoid duplication among national regulatory authorities.

The Single European Act further simplified the Community's regulatory decision-making processes by abandoning the unanimity rule for legislation whose purpose was to remove obstacles to intra-EC trade. Now, only a "qualified majority," defined as fifty-four of seventy-six votes from at least eight member states, was required to approve Council directives taken under Article 100A. Equally importantly, by defining the Community's legal objective as the creation of "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured," the Single European Act created a "Blueprint for 1992," the symbolic date for the creation of a single European market.[60] To reenforce the significance of this deadline, the SEA included a provision giving the Commission the option of declaring that all national laws, regulations and administrative practices that had not been harmonized by the end of 1992 "must be recognized as

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[60] Quoted in Mitzi Elkes, "Europe 1992; Its Impact on nontariff Barriers and Trade Relations with the United States,"Food, Drug and Cosmetic Law Journal, September, 1989, p. 568

consumers that would result from the creation of a genuine common market in food and beverages included, less expensive pasta products in Italy and France, a wider range of imported beers in Germany, lighter beers in Italy and Spain and the availability of diet soft drinks in France and Spain.[64]

VII. Progress toward Harmonization

The result of the Community's new approach to the removal of non-tariff barriers was to increase significantly the number of directives approved by the Council. Between 1985 and 1989, more than forty-five directives were approved in the area of foodstuffs and by June 1990, the Council had adopted Directives covering seventeen of the twenty-six non-tariff barriers in the area of foodstuffs identified by the White Paper. In the related area of veterinary and phytosanitary controls, by June 1991 the Council had completed action on fifty-three of the eighty-two obstacles to the completion of the internal market identified in the White Paper. This rate of progress was slower than that specified by the timetable outlined in the White Paper, in part due to a serious shortage of Commission staff, but it was substantially faster than the rate at which food law had been harmonized during the first half of the 1980s.

One of the most important framework directives approved by the Council regulated the use of food additives within the EC.

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[64]Cecchini, op cit, p. 61

equivalent."[61]

To create additional political momentum for the creation of a single market, in 1988 the Commission released a report describing the economic benefits that would flow from the removal of all trade barriers.[62] The Cecchini Report, named after the EC Commission under whose auspices it was prepared, cited the foodstuffs sector as one of the industries that was most likely to benefit substantially from the removal of trade barriers.[63] The report estimated that the removal of national trade barriers would reduce the industry's costs by approximately 2 - 3 % or 500-1000 million Ecu. (As of January, 1992, one Ecu was worth $1.25). It specifically identified 218 non-tariff barriers that were interfering with the creation of a single European market in food and beverages. Most took one of four forms: specific import restrictions, packaging/labeling laws, specific ingredient restrictions and content/denomination regulations. The most significant trade barriers cited in the Cecchini Report were national regulations that restricted the vegetable fat content of ice cream and chocolate, and a variety of national beef and pasta purity laws; two of these barriers - restrictions on vegetable fat in chocolate and ice-cream - alone accounted for 40% of current non-tariff barriers. The Report predicted that the benefits to

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[61] Quoted in Kalypso Nicolaidis, "Mutual Recognition: The New Frontier of Multilateralism?" Promethee, June, 1989, p. 29

[62]Paolo Cecchini, The European Challenge, 1992, Aldershot: Wildwood House, 1988

[63]ibid, pp. 57 - 61

(89/107). This directive called upon the Commission to propose a "comprehensive directive" that would specify a list of approved additives as well as the conditions for their use. It also established general labelling requirements. Approved additives will be granted an "E" label. Once the Commission had completed this list, only additives included on it were to be permitted in the EC. Firms seeking approval of additional additives could then either apply to a member state or directly to the Commission. Through 1989, the Commission had issued E-numbers for approximately half of the 400 - 500 additives other than flavorings used in food produced and sold in the EC.

In 1990, the Commission announced that it planned to propose four additional additive Directives covering sweeteners, preservatives, antioxidants, all other categories except colors, and colors. As of August 1991, only the Colors Directive has been approved by the Council, though substantial progress has been on each of the others. Final agreement on the later continues to be frustrated by national differences regarding appropriate safety standards. For example, in February 1989, the Council rejected a proposal from the Commission that three emulsifiers commonly used by the baking and confectionery industries be permitted for use throughout the Community. Although they were given a clean bill of health by the EC's Scientific Committee for Food, Italy, Greece and Germany persuaded a majority of their colleagues that the use of karaya gum, polysorbates and soybean oil should remain subject to

national authorization.[65] In 1991, the British objected to a proposed EC Directive on food coloring on the grounds that maximum coloring levels had been set at too high a level for a number of foodstuffs.[66] And, as of August, 1991, German opposition has held up Council approval of a proposed Directive of Sweeteners: the Germans want them kept out of beer.

On the other hand, the Council has succeeded in enacting framework Directives regulating the use and labeling of extraction solvents, flavoring agents - including the use of the term "natural" - materials and articles in contact with foodstuffs, quick-frozen foodstuffs, dietetic foods, and organic or health foods.[67] In 1990, the Council approved a directive designed to guarantee the safety of plastics used in the preparation and packaging of food products. Regarded as an "important step to a single market in food," it is based on the "positive list" principle: after January 1, 1993, no food may be sold in the EC which has come into contact with plastic which has not been approved by the Scientific Commission on Food.[68] While a more comprehensive labeling directive is still being negotiated, the Commission has issued guidelines governing the use of trade

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[65]"Food Additives Stuck in European Ministers Throats," Financial Times, February 2, 1989

[66]"UK Challenges EC Standards," Chemistry and Industry May 20, 1991

[67] Gray op cit, p. 114

[68]Tom Dickson, "EC Approves Food Wrap Rules," Financial Times Feb. 27, 1990, p. 3

descriptions: an importer can either keep the name under which the product is lawfully marketed in the member states or manufacture, or adopt the trade description under which similar products are marketed in the importing member state, or both.[69] This policy is designed to prevent member states from using compositional standards to restrict imports.

In order to prevent nations from enacting new barriers to trade, in 1989 the EC issued a directive requiring member states to submit drafts of new technical regulations to the Commission, thus bringing the food sector in line with industry, whose introduction of new rules and technical standards had been subject to a similar restriction since 1983. The Commission was given the authority to require member states to refrain from enacting national legislation while Community measures were being prepared or pending an assessment of their compatibility with Community law. Though 1991, the Commission received 100 such requests, about one-third of which related to "recipe law." In most of these cases, the Commission has encouraged national governments to either use voluntary standards or to insert a "Cassis de Dijon' clause in national law, thus unequivocally preserving the Common Market."[70]

The EC has also made progress in harmonizing standards relating to food production and processing. The Council has

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[69]"Communication on the free movement of foodstuffs within the Community," Official Journal of the European Communities 89/C 271/03

[70]P. S. Gray, "EEC Food Law and International Trade," unpublished paper, Brussels, June 1991, p. 3

approved a directive establishing maximum levels for pesticide residues in cereals, fruit and vegetables; "No bushel of grain or peck of apples can therefore be kept out of another EC state if has less pesticide residue than the EC maximum."[71] The EC has also approved directives designed to promote intra-trade in meat, eggs and milk; since 1989, heat-treated milk must satisfy various conditions before it can be sold in another EC state while beginning in January 1992, the production of EC-traded eggs must conform to Community wide standards. The EC has also issued a directive which lists permitted antibiotic additives for cattle feed and the Council of Ministers has voted to ban the use of all growth-promoting hormones, (previously the latter had been permitted in Britain, Ireland and Denmark), thus provoking a major trade dispute with the United States.

On balance, substantial progress has been made. At a conference on "Food Law and 1992," convened in late 1989, the Director for EEC and International Policy of the Food and Drink Federation, while noting that the "concept of the Internal Market [was] a gradually evolving phenomenon," concluded that "the main message" [of the EC report on the free movement of foodstuffs released in October, 1989] is that the Internal Market is already open for business." He added: "Do not wait for 1992."[72] That same

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[71]Nicholas Colchester and David Buchan, Europe Relaunched London: Economist Books Ltd, 1990, p. 240

[72] T. R. Stocker, Food Law and 1992," A paper presented at a Worldwide Information Conference on Food Law: Current Changes and Their Implications" p. 1, 5.

year in 1989, The Times, after taking note of Directives in progress, concluded that, "the internal market for foodstuffs, excluding labeling, is . . . all but complete."[73] In the fall of 1991, according to a representative of the Confederation of the Food and Drink Industries of the EEC, "while a few important issues remained to be resolved prior to 1992, virtually all economically significant obstacles to free trade in foodstuffs within the EC have either been removed or were in the process of being removed."[74]

The substantial progress the Council and the Commission has made in harmonizing national food regulations owes much to the momentum created by the White Paper. By establishing December 31, 1992 as a "target date" for the completion of the single market, the White Paper has put substantial pressure on European industry to reach agreement. Indeed, a kind of informal rivalry has emerged among different sectors, with each seeking to make more progress than other sectors in removing obstacles to intra-European trade. In the case of the food processing sector, its noticeable lack of success in reducing trade barriers through the mid 1980s had become a source of embarrassment. This placed additional pressure on it to redouble its efforts following the issuance of the White Paper, lest it be left behind. The Single European Act also has played a critical role, not only by introducing a system of weighted voting

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[73]Richard Owen and Michael Dynes, The Times Guide to 1992 London: Times Books, 1989

[74]Interview with S. Van Caenagem, Brussels, October 23, 1991

for legislation aimed at completing the internal market, but by giving the Commission the option of declaring that all national regulations not harmonized by the end of 1992 will be considered equivalent. The uncertainty created by this later provision has placed substantial pressure on the Council to harmonize as many regulations as possible by this deadline, since after that date nations may find themselves forced to accept the importation of goods produced according to the rules and regulations of any one of their trading partners. The development of Community-wide standards for food safety, and their acceptance in most cases by national governments, has also been promoted by the decision of the Commission not to establish a European Food Safety agency. Instead the Commission has established a cooperative arrangement between the Scientific Commission for Food and national regulatory authorities. The assessments of food safety on which the SCF bases its judgments are based on the scientific work carried out by the latter.

> It was thought preferable to opt for cooperation in the food sector since legislative powers were already to a large extent vested in the Ec Commission or the EC Council. The constituent national assessment bodies could nevertheless mobilize a scientific potential in respect of food similar in size to that of the USA FDA. Other work for the system could include joint work on the intake of food additives or the coordination of microbiological surveys.[75]

This not only has freed the SCF from the need to develop and secure funding for its own professional staff, but has provided the SCF's

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[75]P. S. Gray, "EEC Food Law," Address to the Annual Conference of Lawyers, Edinburgh, June, 1991 p. 8

judgments with additional legitimacy, since they are based on research carried out by the same bodies that historically regulated food safety in Western Europe. Since 1990, most applications for the approval of new additives, packaging etc, come directly to Brussels, which in turn farms them out to the appropriate national regulatory officials or on forms a cross-national committee of experts.

VII. The European Court

The European Court has also continued to play a critical role in reducing reduce trade barriers in foods and beverages by clarifying the doctrine of mutual recognition. In both Motte (1985) and Muller (1986) the court reviewed the validity of national regulations that prohibited the sale of imported products on the grounds that they contained an additive whose use was authorized in the country of the manufacturer, but was either not approved or directly prohibited in the state to which they were being exported. The court ruled that the latter nation must allow the foodstuff to be sold, provided the additive does not present a risk to public health according to international scientific research and meets a genuine need. In addition, Muller required member states to formulate procedures to permit importers to request authorization for the use of specific additives not permitted in the nation in which they were seeking to sell their product.

The most controversial and important case on national regulation of foodstuffs decided during the second half of the 1980s concerned the Reinheitsgebot, a German statute that prohibited the sale of any product labeled "bier" in the Federal Republic made with any ingredient other than malted barley, hops, yeast and water. The oldest hygienic law in the world, the Reinheitsgebot, had been originally enacted by the Bavarian Parliament in 1516; it was re-issued in slightly modified form by the Federal Republic of Germany in 1952. Regardless of its original purposes, it now served to protect an extremely important German industry - in 1986 German per capita beer consumption was 148 liters (38.3 gallons), the highest in the world - from international competition: less than one percent of the beer consumed in Germany was imported, even though a number of other member states were large beer producers.

In 1981, a French brewer complained to the European Commission that Germany was unfairly blocking the export of his product because it contained various additives whose use was permitted in France, but which violated Germany's beer purity law. The Commission agreed and the following year it declared that the German regulation violated Article 30. The German reaction was furious: there were large public protests; former Bavarian Minister-President Franz Josef Strauss equated the Commission's "unacceptable attack on one of the world's oldest food legislation," with, "a menace leading to the second loss of

paradise."[76] The president of the German Brewers Association presented a petition signed by 2.55 million citizens in favor of maintaining the purity decree. The Commission was unmoved and, after Germany ignored a two-month deadline to comply, filed suit with the European Court.

In its decision, issued on March 12, 1987, the Court acknowledged that since the Council had not yet completed its task of harmonizing EC additive regulations, member states maintained total responsibility for determining which additives they wished to permit: they could chose to ban an additive entirely or limit its use for specific products. However, if their restrictions limited the import of a product containing an additive approved for use in another member state, they had to meet two tests: they had to prove that the additive was dangerous and that the legislative response to the danger was not disproportional.

The court concluded that the Reinheitsgebot fell short on both counts. German authorities had failed to present persuasive scientific evidence that the additives contained in imported beer were harmful. (All other EC countries other than Greece permit brewers to use as many as twenty additives). Indeed some of the same additives authorized for beer in other member states were permitted in other Germany beverages - including German beer produced for export. The German rule also failed the

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[76] Quoted in John Weinkopf, "Pure Beer Law and Free Movement of Beer in the Common Market after Commission v. Germany: A casenote on the Reinheitsgebot Decision for the Beer Lover," Prepared for European Community Law Seminar, Boalt Hall, 1989, p.33

proportionality test, since German law provided no mechanism by which importers could petition to allow specific additives to be permitted in beer sold in Germany. The court observed that, "while it is legitimate to seek to enable consumers who attribute specific qualities to beer manufactured from particular raw materials to make their choice in light of that consideration," this objective did not require restricting the designation "beer" to products made in a specific way; it could be achieved equally well by mandatory labeling requirements.[77]

While German consumer groups applauded the court's decision, Germany beer producers were much less enthusiastic. In order to restrict the market share of imports, the German Brewer's Association decided to adopt the quality trademark "Pure Beer." It launched a vigorous add campaign to promote the Reinheitsgebot and discourage the consumption of "alien chemical beers." Two major Germany supermarkets announced they would not sell imported beer. The German Government cannot legally restrict the use of the "pure beer" label to beer that conforms to the Reinheitsgebot; that would be considered a form of "negative labeling," which had been banned by the European Court in the Italian vinegar case. On the other hand, German brewers are permitted to label their beer as "made in conformity with the Reinheitsgebot," which in fact they have done.

The actual extent of German compliance with both the letter and spirit of the Court's ruling represents a critical test of the

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[77] "Communication on the free movement of foodstuffs within the Community,"Official Journal of the European Communities, October 24, 1989, C. 271 4

Community's ability to dismantle trade barriers. Cassis may have made legal history, but Reinheitsgebot dramatically illuminates the tension between national customs and traditions and the creation of a single European market. "How quickly and responsively Germany implements the ruling and how actively private entities resist the judgement through campaigns and boycotts reveal the real commitments on the part of member states to make sacrifices for achieving the 1992 goal."[78] On the other hand, the very fact that the EC Commission had to bring the case in the first place reveals an important shortcoming of the Community's reliance on judicial procedures:

> Companies trying to sell food in West Germany observe rather sourly that the federal government has almost never won any of the cases that have been brought against it for the misuse of Article 30, but that the time the cases come to court provides an effective protective umbrella for small Germany farmers and small food processors just the same.[79]

Reinheitsgebot also illustrates the close relationship between harmonization and mutual recognition. Had the EC continued its original effort to define the composition of "Euro-beer" under the terms of Article 100, there would still not be a single European market in beer. Clearly the interpretation of Article 30 by the European Court has played an indispensable role in removing non-tariff barriers to intra-Community trade in food and beverages. In fact, the principle of mutual recognition remains important even in

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[78] Weinkopf, op cit, p. 97

[79] "Strategies of Food Processing Companies: Innovation and the Single Market," European Trends No. 4 1989, p. 51

those areas that the EC has determined are "essential" to harmonization. Food additives are a case in point. Currently, between 400 and 500 additives other than flavorings are being used in food produced and sold within the EC. Yet as of January, 1989, the Commission had managed to issue regulations or "E-numbers" for only half of them. This means that the rest remain under the control of national authorities - subject only to the constraints imposed by the European court on non-tariff barriers.

But the Court tends to rely on the views of the Scientific Committee on Foodstuffs in deciding whether or not a national restriction on the use of an additive is justified. Thus this Committee is in effect making an authoritative judgement as to what additives are and are not safe, even in the absence of EC legislation. This has provided the Council with another important incentive to reach a consensus, since if it does not do so, EC policy will be made by default by the Scientific Committee, acting through the Court. Accordingly, while the EC has decided not to create an independent regulatory agency with the authority to make authoritative judgments on food safety, thanks to the European Court, the Scientific Committee has become the functional equivalent of such a body. As a consultant to the Commission recently put it, "The deference shown by the Court to the Scientific Committee makes my job of drafting EC legislation a lot easier. If the Council cannot agree to grant EC approval to an additive deemed by the Committee to be safe, each country will wind

up having to accept it anyway."[80]

Since Reinheitsgebot the European Court has struck down a number of other long-standing national foodstuffs regulations. In 1988, the Court threw out a longstanding Italian ban on pasta that was not made from a certain hard wheat grown mainly in southern Italy, thus permitting German pasta made with soft wheat to enter Italy.[81] That same year the Court ruled that France could not restrict imports of Italian salami. In 1989, the Court decided that Germany could not protect the integrity of its wursts by banning the sale of foreign sausages made from products other than meat such as milk, eggs or soybeans; instead it could only require that the ingredients of all wurst sold in Germany be clearly labeled.[82] The Court also ruled that France could not forbid the sale of non-dairy coffee imitation cream for desserts.[83]

IX. The Politics of Hygiene and Inspection

In spite of the progress that has been made in creating a single European market for foodstuffs, tensions between national

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[80]Interview with P.S. Gray, Adviser, Ec Commission, Brussels, October, 1991

[81] Philip Revzin, "Italians Must Change Their Business Style in Integrated Europe," Wall Street Journal, November 21, 1988, p. 1

[82] "Court of Justice Bans Some National Food Laws," Europe, #285, p. 42

[83] "Community-Food," Reuter Library Service, February 23, 1989.

regulations and the creation of a single European market persist. Indeed in recent years, a new focus of contention has emerged - one significant enough to be described by the head of the Commission's Foodstuffs Division as a "fourth level of protectionism."[84] It is rooted in the divergence of national control and inspection standards. For even if national standards are harmonized - and other non-tariff barriers rendered moot by the principle of mutual recognition - both national and local governments will still vary in both their ability and willingness to enforce safety standards for foods and beverages. If inspection is not uniform throughout the Community, consumers are likely to be increasingly exposed to hazards from food produced in nations with less effective public controls.

Indeed, it is precisely the success of the EC in creating a single European market that has brought this issue to the fore: a growing proportion of the products consumed by Europeans are produced outside their own country, thus making the health of all consumers increasingly dependent on the competence of the inspectors of other nations. (This applies equally well to food imported by a member state from a non-EC member and then distributed within the Community.) At the same time, the steady growth in the consumption of processed food, combined with new technologies of food production, have increased the vulnerability of all European consumers to food borne diseases.

According to a recent study, each year 16.5 million people, or

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[84] Gray, op cit p. 118

roughly 5 per cent of the Community's population, become ill as a result of food poisoning.[85] In 1989, large-scale outbreaks of foodborn disease occurred in the United Kingdom, France and the Netherlands. European consumers have recently been exposed to botulism in nut-flavored yoghurt, the contamination of wine by methanol, Salmonella in chickens, eggs and powdered milk, lead-contaminated milk powder, harmful bacteria in soft cheeses from France and the United Kingdom, benzene in bottled water, the illegal use of growth hormones in beef cattle, and high-levels of radiation in a variety of foods as a result of the nuclear accident at Chernobyl. In 1990, they became highly alarmed by the outbreak of B.S.E or "mad-cow" disease in Britain.

Consequently, food hygiene and food inspection have emerged as important and highly contentious issues in Europe. Public concerns about the adequacy of national control and inspection system not only pose an important challenge to intra-Community trade; in many cases they represent an important economic threat to both European farmers and food processors. Not only does the lack of common principles of food controls undermine public trust in the quality of imports, but importing countries are frequently required to duplicate the inspections carried out in the country of production, thus creating an additional obstacle to the creation of a single European market.

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[85] J.A. Papadakis, "The Control of Foodstuffs in the Context of the Completion of the E.C. Internal Market," Scientific and Technological Options Assessment, European Parliament, Strausbourg, May 17, 1990, forward.

In November 1989 the EC's Farm Commissioner stated that he was "very much aware of the growing consumer interest in the safety of the food" and promised to propose health rules on eggs, and to establish a system to insure a common approach controlling dangerous micro-organisms in food. He also urged community-wide rules on fish and dairy products and suggested that regulations that applied to trade in red meat products and poultry should be extended to domestic markets.[86] The second symposium on foodstuffs control in the EC, held in Rome the following month, attracted more than 650 participants - a clear indication of "the increased interest in control as the programme of food law and Article 30 case law have increased the free circulation of foodstuffs in the Community."[87]

For more than a decade, the Commission has operated a rapid alert system for dangerous foodstuffs. Upon becoming aware of a problem, they notify appropriate national authorities and coordinate appropriate national or Community wide restrictions, in effect establishing a system of mutual recognition in reverse. This system has worked reasonably well on a number of occasions. For example, following Chernobyl, "the rapid alert system was used on an almost continuous basis to relay the state or contamination of foods in .. and outside.. the EC... to control authorities."[88] The

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[86] "EC Plans Battle Against Food Poisoning," Reuter Library Report, November 28, 1989.

[87] "The Second symposium on foodstuffs control," unpublished paper, p. 1

[88] Gray, op. cit., p. 119

Commission also worked closely with the FDA in the United States to develop a coordinated response to the health issues raised by Chilean grapes that were contaminated with cyanide. In the case of two wine contamination scandals, the Commission was able to coordinate the efforts of national governments to track down the wine and prevent its sale.

Yet this system has a number of shortcomings. Most obviously, its purpose is to respond to food safety problems after they have occurred rather to prevent such problems from arising in the first place. Even more importantly, the Commission's effectiveness is limited by the fact that the legal responsibility for inspecting foods, both at the point of production and sale, remains the sole responsibility of national authorities; the Commission has no police powers. Nations vary widely in both their scale and method of reporting outbreaks of illness. In some nations, reporting threats to public health from food contamination is centralized while in others it is the responsibility of more than one agency. National reporting patterns are also affected by cultural factors: all Community residents are not equally likely to resort to a doctor in cases of gastro-intestinal illness of short durations, thus preventing a coordinated EC response to various unsafe foods.

Historically, the European Commission paid relatively little attention to questions of food hygiene, instead focusing its efforts on food composition and labeling. In 1987, the Commission polled officials of member states about the adequacy of their systems for food inspection. Not surprisingly, all member states

reported that their inspection systems were good. However this "rosy picture contrasts rather sharply with the picture that a number of Members of the European Parliament recognize for their own countries." In fact, "the organization of inspection services, the training of inspectors and the fundamental inspection philosophy differ enormously." As a result, "in many cases what looks splendid on paper turns out to have little basis in reality."[89]

The EC's 1989 directive on the official control of foodstuffs while emphasizing the need for "harmonization and approximation of different national food control systems," allowed member states to continue to maintain their own inspections systems. Moreover, the food inspection Directive made no attempt to harmonize either the frequency of inspections or the fines to be imposed when a violation is found. At a result, national practices and policies continue to diverge widely; some nations have perfunctory inspection systems, while others have quite comprehensive ones. Their administration also varies significantly. For example, in Britain, food inspection is the responsibility of local authorities and individual inspectors enjoy substantial autonomy. By contrast, Germany has a system of centrally employed inspectors who follow a strict inspection program. The inspection systems of these two nations have no more in common than they had prior to the creation of the EC.

The Commission has encouraged representatives of national food

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[89] G. Chambers, "Food Hygiene Policy and 1992," p. 30

inspection systems to meet together on a regular basis. But these meetings have accomplished relatively little - in part because of language barriers. "A number of representatives of national inspection services at the Second Symposium on the Control of Foodstuffs held in Rome in December, 1989 were dismayed at what they described as the total lack of progress" during the previous decade.[90] The Commission has appropriated 80,000 ECUs (approximately $110,000) for a five-year program to enable 200 food law enforcement officers to visit their opposite numbers in other EC countries. While initial results have been encouraging, but its long-term impact remains unclear.[91]

A Directive establishing common standards for food inspection officially goes into effect in June, 1992, but for it to accomplish its objective of creating a single market in foodstuffs, nations must have, "a high degree of trust in each other's controls," which they do not now have.[92] Significantly, the EC has yet to reach agreement on a food hygiene directive; their failure to do so represents one of the more important remaining obstacles to the EC's 1992 program.

The creation of a common market in animals and plants has meet with similar difficulties. Many nations are wary of allowing animals to freely enter their country, because of the diseases that

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[90] Ibid

[91] Paul Allen, "Food Law and EEC Deregulation Policy," British Food Journal, Jan/Feb, 1989 Vol, 91 No. 1, p. 11

[92] Colchester and Buchan, p. 240

they may carry. The importance of this lack of trust in each nation's system of animal inspections, and its potential as a obstacle to the creation of a single European market in animals as well as processed beef, was revealed in the winter of 1989 - 1990, when widespread outbreaks of "mad-cow" disease occurred among cattle in Great Britain. Within months, more than 9,500 British cows were "spongy-brained, mad and dead."[93] Britain's Ministry of Agriculture stated that the disease posed no danger to humans, although they did ban the feeding of diseased cows to other animals in order to prevent the spread of the disease among their livestock. British consumers were unpersuaded. Coming shortly after widely publicized outbreaks of Salmonella, listeria and botulism, the government's assurances - especially coming from a Ministry widely regarded as "the farmer's mouthpiece,"[94] - had little impact: sales of domestic beef in the United Kingdom fell between 20 and 30 per cent.[95]

The outbreak of mad-cow disease in Britain created tensions between Britain and some of its trading partners in the EC. In January, 1990, Germany officially banned British beef; subsequently, a number of other countries, including France and Italy, prohibited imports of this product from Britain as well.

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[93] "Mad, Bad and Dangerous to Eat," Economist, February 3, 1990, p. 89

[94] Ibid

[95] Nigel Dudley, Robert Melcher and Tony Paterson, "Shoppers Snub the Experts in Mad Cow Crisis," The European June 8 - 10, 1990, p. 1. See also Marianne McGowan, "In Britain, Concern Grows About Cattle Disease," New York Times, June 21,1990, B7

Although a veterinary community of the European Commission ruled that the risk of this disease being transmitted to humans was "remote", the panel did not declare the infected beef to be completely safe. Nevertheless, the EC Commissioner responsible for the operation of the Common Agricultural Policy formally criticized the ban.[96]

The French initially refused to rescind their ban until a team of French veterinary experts had the opportunity to meet with their British counterparts. The French Minister of Agriculture stated that "We have taken these severe measures against the UK so that French people can eat meat in safety."[97] The British were furious. The Times labeled France's rejection of the EC's request that it lift its ban as "an act of naked protectionism", adding that the "French Agricultural Minister ... has sided with his farming lobby [which] fear[s] competition from cheap British imports." The editorial concluded: "protecting home markets under the guise of protecting public health defies the spirit as well as the letter of Community law."[98]

The British threatened to retaliate. Indeed, both France and Britain have a long history of using health and safety concerns to protect domestic agricultural producers from their competitors across the Channel. This particular fracas threatened to provoke a

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[96] "Protecting Beef-Eaters," The Times, June 1, 1990, p. 13

[97] Michael Hornsby and Susan MacDonald, "France Defies EC on Beef Ban,"The Times, June 1, 1990, p. 1

[98] "Protecting," op cit

trade war similar to the one that had been narrowly avoided a year earlier when the British had threatened to ban sales of French soft cheeses and the grounds that they contained bacteria that caused the disease listeria. The French in turn had threatened a retaliatory ban on British eggs on the grounds that they contained Salmonella. "The press in both countries indulged in campaigns that owed more to petty patriotism than common sense."[99] Now the British once again threatened to ban sales of French soft cheeses. The dispute was eventually settled by the Agricultural Council in June, 1990. After the British agreed to major new controls to prevent the export of affected meat, France, West Germany and Italy agreed to lift their ban on imports of British beef. The controversy has however left a residue of mutual suspicion and distrust, as well as considerable economic losses on the part of British producers.

In order to prevent this and similar incidents from reoccurring, the Commission has advanced a number of proposals to eradicate or control animal diseases such as swine fever, foot and mouth disease, brucellosis and tuberculosis. It also announced plans to issue directives regulating trade in and the transportation of pedigree cattle, pigs and sheep as well as their embryos and semen. Agreement on the lifting of border controls on the transit of live animals - especially livestock - proved difficult, largely because Britain and Ireland were worried about the importation of rabies from the continent. (So great is the

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[99] Dudley, op cit

British fear of rabies that they are installing special barriers in the Chunnel in order to prevent wild animals from France from crossing the channel without being inspected.) However in June 1990, the Council voted to remove border controls on the transit of live animals between Member States by the end of 1992. (A parallel agreement for animal products had been approved the previous year.) However health checks will continue on animals at the points of departure and arrival. In March, 1991, the European Parliament approved a number of proposals designed to expedite the free movement of plants within the Community, although agreement has not yet been reached on a pesticides Directive that would establish a European-wide system for pesticide registration. A number of other proposals in the area of plant and animal health have yet to be adopted.

X. The EC and Consumer Protection

The mad-cow trade dispute raised a more profound issue: to what extent does the creation and smooth functioning of a Single European market threaten to interfere with the ability of Member States to establish and maintain their own consumer protection standards? In principle, this problem has been resolved: the health and safety of European consumers will be assured by the promulgation of EC Directives which will take as their standard the maintenance of a "high level of protection."[100] "Non-essential"

[100] Chamber op cit, p. 39

regulations will remain under the control of national authorities, who however are not allowed to apply them to goods produced elsewhere in the EC, unless they can justify their restrictions on consumer protection grounds.

The combination of harmonization and mutual recognition have been relatively effective in reducing trade barriers. But it remains unclear how well they have addressed the issue of consumer protection. The approach of the EC has been to treat the issue of consumer health and safety primarily as a technical or scientific matter. Thus both the Commission and the Court rely heavily on the advice of the Scientific Committee for Food - the former to determine appropriate standards for harmonization and the latter to assess the claims of Member States to restrict trade under the provisions of Article 36. In most cases, there is a clear scientific consensus, particularly when a nation has imposed restrictions that clearly are designed to protect producers rather than consumers: it would be hard to make a scientific argument that the Court's decisions in Cassis or Reinheitsgebot have undermined the health of the German people. But in the case of many other regulatory issues and policies, the issue of consumer safety is less straightforward: reasonable people can and do disagree about the degree and scope of regulation that is needed to assure an adequate margin of safety. Not surprisingly, the food safety issues with which the EC has recently been wrestling, such as the spraying of particular pesticides on crops, the use of antibiotics in animal feed, the use of growth-promoting hormones in

cattle feed, the inclusion of both natural and synthetic additives in processed food, and food irradiation, have also been the focus of considerable controversy in the United States.

The difference, however, is that in the United States, the resolution of these issues does not, for the most part, raise any jurisdiction questions. In most cases, the federal role is pre-eminent and in those areas where it is not, state regulation is not viewed as a threat to interstate commerce or federal authority. Precisely because Americans can take the existence of a single internal market for granted, they are less threatened by state regulation. As a result, in America these regulatory issues are primarily about consumer protection, not protectionism: for the most part, they pit consumers against producers, not those consumers or producers of one political jurisdiction against those of another.

In Europe, the situation is very different: the debate over consumer protection frequently raises issues of protectionism as well. The legitimacy of the EC's authority as a source of health and safety regulation is still problematic, while national governments have a long tradition of regulation in the area of food safety. The Commission's technocratic approach to the regulation of food safety may make sense from the perspective of creating a single European market, but it is less persuasive when measured against the standards of consumer protection. The latter has less to do with scientific decision-making than with social values - values on which the governments elected by the citizens of

democratic societies can and do disagree.

The aftermath of the nuclear accident at Chernobyl provides a clear illustration of the Community's continuing difficulties in agreeing on common health and safety standards, particularly when important economic interests are at stake. France, Italy, Spain, and Germany unilaterally banned imports of fresh fruits and vegetables from Eastern Europe, while Britain and Spain, which were less affected by the fallout from the Soviet Union did not.[101] More importantly, the EC's foreign ministers were initially unable to agree on common radioactivity levels for food produced within the EC. Germany insisted on maintaining very strict standards. However, Italy, fearful of losing its market for early-season produce, insisted on more flexible ones, claiming that the standards proposed by the EC discriminated against Italian farmers. On the other hand, Italy, which had previously been embarrassed by the methyl alcohol poisoning of some of its red wines, demanded health certificates for all imported produce. This in turn threatened the export of French fruits and vegetables.

The result was a serious disruption of the free movement of agricultural products within the EC, as each nation established its own standard. In frustration, Carlo Ripa di Meana, the Italian Commissioner responsible for a "Citizens' Europe," declared that the EC "does not exist as a political and scientific entity capable of reacting speedily to the problems created by the nuclear

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[101]E.J. Dionne Jr. "Europeans Squabbling Over Food: Is Their Produce Free of Radiation? New York Times May 10, 1986, p. 5

emergency."[102] It took several weeks of negotiations before the EC was finally able to agree on temporary safety levels for both imported and domestic food.[103]

However, efforts to establish permanent maximum radiation levels for food have proven far more difficult. In May, 1987, the Commission proposed stricter radiation limits for food and drinking water than those recommended by its own scientists on the grounds that it was important to leave a safety margin in the event of another nuclear accident. The Commission also expressed concern that EC food exports could be badly affected if the Community's standards were below those of its major trading partners. This initiative was strongly opposed by those nations committed to nuclear power, namely France, Britain and Belgium, but was in turn supported by countries with strong anti-nuclear movements, most notably Germany and Denmark.[104] Stanley Clinton-Davis, the EC Environment Commission who proposed the new safety standards, described the EC's failure to reach a decision as, "totally unacceptable and disastrous for the Community."[105]

As a compromise, a qualified majority of member states agreed to continue the standards imposed after the accident at Chernobyl

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[102]"EEC Confirms Ban On Food Imports From East Europe," Financial Times, May 13, 1986, p. 3

[103]Paul Cheeseright, "EEC To Set N-Safety Level in Food,"Financial Times, May 5, 1986, p. 3

[104]Quentin Peel, "Commission Calls for Stricter Limits on Radiation In Food," Financial Times, May 21, 1987, p. 2

[105]Quentin Peel, "EC in Deadlock Over Food Radiation Limits," Financial Times, October 21, 1987, p. 4

for an additional two years; Germany, Luxembourg and Denmark supported tougher standards, but were outvoted.[106] In a special meeting held in November 1987, the EC's foreign ministers were unable to agree on permanent standards. The Community remained deadlocked between France, Britain, Spain and Greece, which favor a relaxation of the EC's post-Chernobyl standards, and Germany, the Netherlands and Denmark, which favor stricter ones. As Clinton observed, "There are still massive differences between member states."[107]

No surprisingly, one of the EC's most conspicuous failures has been its inability to develop common standards for food irradiation. Six EC member nations permit irradiation for the treatment of certain foods while two - Great Britain and Germany - ban it. The others neither formally permit or ban it. While irradiation has been endorsed by both the World Health Organization and the EC's own scientific advisors, an internal EC report notes that the idea is "one which public opinion doesn't appreciate."[108] Faced with strong opposition from Germany and Luxembourg, the EC was recently forced to abandon its effort to legalize the sale of irradiated herbs, spices and teas in the EC, though it has resisted the demands of the Green Party members of the European Parliament

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[106]William Dawkins, "EC Ministers Agree on Radiation Safety Levels for Food," Financial Times, December 15, 1987, p. 2

[107] "EC Fails in New Bid To Agree Radiation Limits for Food," Reuters Library Service, November 8, 1987

[108]"Irradiated Food Row Splits European Community," Reuter Library Report, December 13, 1990

for an immediate ban on the irradiation of foodstuffs in the Community.[109]

Moreover, both consumer groups and national regulatory authorities have expressed considerable reservation about the EC's approach to the making of regulatory policy. The Commission has been criticized for relying too closely on a small group of experts and not permitting other interest groups to participate in its deliberations. In addition, Member States have expressed reluctance about giving "too much power to the Commission on possibly very sensitive national issues relating to public health and safety."[110] In a statement on food policy in the EC issued in 1987, Consumers in the European Community Group, an umbrella organization of 27 British consumer groups, argued that the "EEC has no overall consistent food policy. . . . the Commission is mainly interested in removing barriers to trade . . . consumer protection is of only secondary importance."[111]

Their lengthy statement identified scores of areas in which they thought EC standards did not adequately protect consumers and in which Community rules were inferior to British ones. A subsequent document expressed particular concern about the EC's unwillingness to allow nations to maintain any compositional

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[109]"Irradiated Food Row Splits European Community, "Reuter Library Report, December 13, 1990. "EC Commission Rejects Call for Ban on Food Irradiation, Reuters Library Service, March 10, 1987

[110] Chamber op cit, p. 41

[111] A Hot Potato? A Pamphlet produced by Consumers in the European Community Group, May 1987, p, 9

standards, since they believe that in some cases, these standards provide consumers with important information.[112] It contended that "we must weigh up the desire to have free movement of goods against the wish to prevent food from being uniform throughout the Community, and losing high quality foods through competition from lower-quality ones."[113] CECG specifically cited the case of mayonnaise, where national standards for oil content vary between 35 and 80%. They argued that if each of these products are allowed to be sold as "mayonnaise" throughout the EC, as the Commission has proposed, many consumers are likely to wind up purchasing products that differ substantially from the ones they purchased when mayonnaise was subject to national composition standards.

The European Consumer Law Group also has expressed concern about the EC's commitment to consumer protection. They have criticized the Commission for interpreting the principle of mutual recognition too narrowly, contending that "quality standards, regulations about labelling and consumer information, and prescriptions about denominations" should not be considered unlawful per se but should be balanced against reasonable consumer interests.[114] They have also suggested that harmonization should be minimal rather than total. Accordingly, EC rules should establish a floor, not a ceiling, thus allowing member states to

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[112] Food Labelling and Standards: A New Beginning, CECG 87/17

[113] Ibid, p. 6

[114] "European Consumer Law Group: Consumer Protection in the EEC After Ratification of the Single Act," Journal of Consumer Policy, September, 1987, p. 322

enact stricter health or safety regulations - even if they interfere with economic integration. Another critic of EC consumer regulation has attacked the Commission for not attempting to apply the principle of mutual recognition in reverse.[115] Ludwig Kramer has suggested that a product determined to be unsafe by a member state therefore should be prohibited from being sold throughout the EC. Indeed, he notes that while the EC has established procedures for approving the use of a new substances or products, it has not developed either criteria or procedures for banning throughout the Community a product or substance that subsequent evidence has shown to be unsafe.

The emergence of more militant consumer groups, such as Parents for Safe Food, founded by British entertainer, Pamela Stevenson, threatens to make the creation and enforcement of European food safety standards even more complex. Like a number of American environmental groups, PSF favors a sharp reduction in the use of pesticides and chemical preservatives in order to protect the health of consumers.[116] Again, the contrast with the situation in the United States is instructive. In the United States, this organization, if it was not able to influence federal regulatory policy to its satisfaction, could seek to affect policy at the state level. State food safety regulations do not pose any

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[115]Ludwig Kramer, "EEC Action In Regard to Consumer Safety, Particularly in the Food Sector," Journal of Consumer Policy, December, 1984, pp. 473 - 485

[116] See, for example, Erik Millstone, "Food Additives: A Technology Out of Control?" New Scientist, October 18, 1984, pp. 20-24.

constitutional issues, provided they subject products produced in the state to the same standards as "imported" ones. For example, if Proposition 128, which would have imposed severe restrictions on the use of pesticides on food sold and grown in California been approved by California voters in the fall of 1990, it would not have violated the interstate commerce clause. (However, it might well have violated the GATT.)

But it is highly unlikely that the European Community would permit a Member State to enact an equivalent proposition. Not would the EC's Directive on pesticide residues preempt similar regulations by a Member State, but even if the EC had not yet succeeded in harmonizing regulatory policy in this area, the doctrine of mutual recognition would have required all Member States to permit the import of products made with pesticides and preservatives that were legal in other European states -- unless the SCF had judged them to be harmful. Brussels has sought to preempt national regulations to a greater extent than Washington has preempted state regulatory actions. Similarly, the European Court has been far more willing to strike down national regulations on the grounds that the violate Article 30 of the Treaty of Rome than the American Supreme Court has been to overturn state regulations on the grounds that they violate the commerce clause of the American Constitution.[117]

Thus in the event that a member nation were persuaded of the

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[117] See Lawrence Tribe, American Constitutional Law, Mineola, New York: The Foundation Press, 1988, Second Edition,p. 408 - 427

desirability of enacting "Prop 128," the stage would be set for a major confrontation between free trade at the Community level and consumer protection at the national one. This particular occurrence is highly unlikely, but it does illustrate the extent to which the emergence of a more activist consumer movement in Europe threatens to expand the range of potential conflicts between the EC and national governments in the foodstuffs sector. The Community has made substantial progress in reducing non-tariff barriers created by producers; it now faces the challenge of also effectively addressing the threats to the creation of a single European market posed by consumers.

It is true that the EC will find it easier to formulate rules for new products or processes than to harmonize national regulations governing existing ones. However as new issues of food safety emerge - and this seems to be occurring at an accelerated pace due both to continual innovations in food production and processing technology and increased public concern about food safety and hygiene - they will become new potential sources of trade barriers within the EC. Some national regulatory authorities, and some national consumer groups, will invariably feel that their legitimate concerns about the public's health and safety have been given short-shrift in Brussels. And they in turn will find allies among producers, who stand to benefit from more restrictive national or EC regulations.

XI. Harmonization and National Culture

Finally, national assessments of food safety and compositional standards also remain strongly influenced by different national customs and traditions. Notwithstanding the EC's decision to abandon its effort to impose "Euro-recipes," both producers and consumers throughout the Community fear that the creation of a single European market in foodstuffs threatens their culinary traditions. This concern was echoed in an article published in the French publication, Le Point in February, 1989. Entitled, "Our Good Food In Danger," it described in graphic detail the ways in which French food quality was being threatened by the EC:

> What could happen on our plates within four years?....All that is needed is look at the astonishing menus our neighbors are preparing for us: Spanish foie gras, made with pork fat; mock snails (from West Germany,) ice cream made with vegetable fat (from Holland), chocolate made with animal fats (from Britain), minced meat mixed with soya (from Belgium), sausages made with flour (from Britain), (a nation with) no culinary traditions and chocolate made with cocoa butter (from Britain.) [118]

Doubtless many Germans, who have recently had the European Court strike down regulations for two of their most cherished national products, namely bier and wurst, would offer a similar appraisal of recent developments in European food law. For the former product, the Germans are now required to allow the import of beer from Belgian, which contain, among other ingredients, "strawberries, apples, wheat, anything that's not tied down."[119]

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[118] "Our Good Food In Danger," Le Point February 13 - 19, 1989, in passim

[119]David Brooks, "Jam Sessions," New Republic November 4, 1991, p. 15

In November of 1991, the French had another reason to be upset. The EC proposed regulations restricting the amount of bacteria allowed in cheese, justifying its proposal on the grounds of consumer safety. However about one-tenth of the cheese produced in France is made with unpasteurized or raw milk, including Camembert, Brie, Pont l'Eveque and "other names close to the French epicurean heart."[120] These cheeses are allowed to ripen with their naturally produced bacteria, some of which the Commission has determined to be harmful. The French Ministry of Agriculture accused the Commission of being "obsessed with hygiene" and promised that everything would be done to "protect our cheeses." Claire Marcellin of the Normandy Milk Union, contended that the EC restriction would, "mean the loss of a whole wealth of very French flavors"[121] while the residents of Camembert (population 185), noting that "no one has ever fallen ill from eating raw-milk camembert," accused Brussels of trying, "to ruin the product which has made them famous."[122] In response, Brussels promised to set specific standards for raw milk cheese, but farmers feel that these standards will require them to purchase expensive new equipment.

The British, for their part also have found grounds on which to protest food standards emanating from Brussels. German-influenced sausage standards proposed by the EC would prohibit the

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[120]Marlise Simons, "The Message from Camembert to Europe: Don't Mess With Cheese," New York Times, November 29, 1991, p. B1

[121]ibid

[122]"Cheesed Off," Economist December 7, 1991, p. 78

use of gristle, cheekmeat and sinew, each of which is currently used to make sausages in Britain, commonly referred to as bangers. The British press promised "blood, sweat, and tears in defense of their peculiar breakfast delicacy." After EC officials pointed out that the EC standards would make British sausages healthier and better, the Daily Telegraph responded with the headline: "Hands Off Our Bangers, We Like Them Lousy."[123]

Those who live on the continent are equally alarmed about the prospect of EC food being sold in their countries. Commission officials are fond of repeating the story of an English sausage manufacturer who lay dying. "He gathered his family around him and said, 'my children, I must pass on to you a secret that has been in our family for many years. You can make sausages using meat.'"[124]

XII. Conclusion

The creation of a common market for food, beverages and animals within Europe must be understood not so much as a goal as an ongoing process. The Community has made substantial progress in establishing a legal, political and scientific framework for enabling its member states to identify and address the regulatory issues that must be resolved before a common market can actually come into existence. And it has actually managed to resolve an

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[123]Brooks, op cit

[124]"People's Europe: A Consumer Viewpoint," EIU European Trends no. 2, 1990, p. 78

impressive number of these issues. But the number of such issues is not, as the White Paper implies, finite. "Nineteen ninety-two" makes sense less as a goal than as a vision. As such the question is not when or even if it will ever be realized, but the extent to which there is continual movement toward it. Seen in these terms, the progress made since the White Paper is impressive. Important obstacles remain for the creation of a single market in foods, beverages, plants and animals. Some of these may never be overcome, while new ones will undoubtedly emerge. But the momentum is now clearly in favor of integration.

However while the removal or reduction of non-tariff barriers is a necessary condition for the creation of an internal market, it is not a sufficient one. An integrated market also requires changes in consumer and producer behavior. For example, one important obstacle to increased intra-Community trade in processed foods is the European distribution system. There is little point in allowing consumers to purchase food produced in other EC states unless an efficient transportation system is available to move it across national boundaries and wholesalers are both interested in and capable of distributing it to retail outlets. Accordingly, the creation of a common market in transportation services, along with a reduction of the delays caused by border inspections, are likely to contribute significantly to the creation of a common market in foodstuffs. Likewise, increased purchases of food from from supermarkets will also promote economic integration.

The creation of a common market in foodstuffs also requires

changes in consumer attitudes and behavior. Unless consumers are actually willing to purchase goods or commodities from other EC countries, many of the efficiency gains associated with the creation of single European market may prove elusive. The evidence is so far mixed. On one hand, as a growing number of Europeans travel to, or in some cases work or study in, other nations in the Community, both their taste for and confidence in the quality of "foreign" foods is likely to increase. Just as many Italian dishes that were once strictly local or regional have become accepted as national dishes in the hundred years since unification, so is the political and economic integration of Europe likely to contribute to the development of a "European" cuisine.

Likewise, the growth of consumption of convenience, packaged and frozen foods is also likely to promote intra-Community trade, since their production benefits from scale economies and processed food is less likely to have a distinctive regional or national identity. As of 1989, between ten and fifteen percent of all food sold in Europe was "processed" - a figure that has been rising steadily for a generation.[125] However, this is an average figure that conceals substantial national variations: it is highest in Britain and lowest in Greece and Portugal. Similarly, the consumption of frozen foods varies significantly within the EC as does the proportion of households with microwave ovens.

On the other hand, national tastes and culinary traditions

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[125]Christopher Farrands, "Strategies of Food Processing Companies: Innovation and the Single Market," EUI European Trends, No. 4 1989, p. 44

remain strong in a number of European countries. For example, notwithstanding the decision of the European Court, "imported" beer still accounts for less than 1% of Germany consumption. One suspects that regardless of whatever edicts emanate from Brussels, the Dutch are unlikely to ever purchase much chocolate or cheese from other Member States. Nor are the French likely to consume more than negligible quantities of "foreign" cheese, bread or wine. And the Belgians are unlikely to relinquish their predilection for their own country's chocolate, or the Italians for their domestically produced pasta. For these and countless other number of similar products, intra-Community trade is likely to remain modest.

In addition, European markets remain substantially different in a number of important respects. For example, in recent years both the Dutch and the Germans have become more health conscious - a change in attitude that is less apparent in Britain and virtually non-existent in Ireland. In France, there has been a significant reaction against many fatty foods, but virtually no change in public attitudes towards salt, sugar or additives. The maintenance of substantial differences in national, or in some cases, regional tastes, is likely to complicate the efforts of food processors to engage in European-wide production and marketing. Nonetheless, niche markets, such as in diet soft-drinks, organic foods or inexpensive candy bars or snacks are beginning to develop across national boundaries.

As a single European market in food actually develops, it is

likely to result in the restructuring and consolidation of the European food and beverage industry. "The breaking down of trade barriers in likely to favor the larger company, able to make cross border investment of some kind, whether merger acquisition, joint venture or simply expansion.... smaller companies which fail to secure their markets [are likely to fold."[126] With two notable exceptions, namely Unilever and Nestle, most European food companies remain nationally focused: as of 1988, only one out of ten European firms had a presence in the five largest EC Member States.[127] Ironically, the major beneficiaries of the creation of a common market in food and beverages may well be American-based multinationals. Eight out of ten of the world's largest food producers are American, and each has long had a strategy of producing and marketing throughout Western Europe. Unless European firms rapidly adjust their structure and marketing, many of economies of scale that are available to be captured by the creation of a common market in food and beverages are likely to be captured by non-European firms.

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[126]Vivienne Kendall, "Food Industry - Keeping the European Customer Satisfied," Eui European Trends, Np. 2, 1989, p. 65-6

[127]Cecchini, op cit, p. 61

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