FOOD LABELLING REQUIREMENTS IN EUROPEAN UNION LAW

C.M.O. MacMaoláin

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of PhD is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

Signed: Caoimhín MacMaoláin **ID No.:** 97970832

Date: 18th April 2000

ACKNOWLEDGEMENTS

There are many people without whose support and assistance the completion of this study would have been made far more difficult and far less enjoyable I will begin by expressing my sincerest gratitude to my mother and father who have continually encouraged me, both financially and otherwise, throughout my third-level education Fr Kevin McMullan, Fr Brendan McMullan, Gaye and Noel Johnston and various other relatives have also aided me in this regard over the past number of years

I must also express my appreciation to my colleagues in Dublin City University, Mr Adam McAuley and Dr Ubaldus deVries, who have acted as constant mentors and advisors over the past years They never miss an opportunity to offer their assistance on all matters I also thank the library staff of Dublin City University, University College Dublin and The Institute for Advanced Legal Studies in London for their services On the academic front I will conclude by thanking my supervisor Dr David Tomkin His exceptional dedication, generosity and good humour have constantly extended far beyond the duty of an academic supervisor

Finally, I would like to thank Siofra Her level of support and encouragement have never waned to even the slightest degree from being complete She is a wonderful friend and partner

ABSTRACT

This study, the first of its kind, essays a detailed survey of the Irish law on food labelling and its related literature The preponderance of Irish law on food labelling may be ascribed to Ireland's membership of the European Union The thesis commences by describing, analysing and evaluating the legislative methods employed by the European Union The thesis finds that the European Union proceeds in diverse ways to achieve what is assumed to be a single end instead of adopting any one method whereby each Member State simultaneously changes its own law to achieve harmony The thesis shows, by taking specific examples such as honey, chocolate and genetically modified foodstuffs, that throughout the European Union, identical food products are marketed in different ways and with different labelling requirements, and the same product, such as yoghurt, may require to be differently labelled, depending on the national law applicable The thesis then compares and contrasts the evolution and implementation of food labelling laws in Australia and New Zealand on the one hand, and in the United States of America on the other The comparison between the legislative methods in these different federations and jurisdictions highlights the shortcomings inherent in the legislative machinery contemplated by the Treaty of Rome The thesis concludes by offering several specific recommendations In particular it demonstrates how, by altering the legislative medium from directives to regulations, many of the difficulties in European Union regulation of food labelling could be avoided The thesis concludes by raising two wider or more general questions concerning how and to what extent diverse economic, and above all cultural interests are necessarily well served by the implementation of clear, simple and simultaneously effective laws, and how in general harmonisation of food labelling law should be best achieved

TABLE OF CONTENTS

PART B

Chapter Six

Food Names

Chapter Seven

Ingredients

Chapter Eight

Net Quantity

PART C

Chapter Nine

Genetically Modified Foods

LIST OF ABBREVIATIONS

AJ Comp L	American Journal of Comparative Law
ANZFA	Australia New Zealand Food Authority
BSE	Bovine Spongiform Encephalopathy
CAP	Common Agricultural Policy
CECLD	Current European Community Legal Developments Series
CJD	Creutzfeldt Jacobs Disease
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
COM	Commission Communication
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
ELRev	European Law Review
EMU	Economic and Monetary Union
EPA	Environmental Protection Agency

EU	European Union
FSAI	Food Safety Authority of Ireland
FVO	Food and Veterinary Office
GM	Genetically Modified
GMM	Genetically Modified Micro-organism
GMO	Genetically Modified Organism
HACCP	Hazard Analysis Critical Control Point
ICLQ	International and Comparative Law Quarterly
ICG	Inter-Governmental Conference
IFA	Irish Farmers Association
IHF	Irish Heart Foundation
ILRM	Irish Law Reports Monthly
IR	Irish Reports
JCMS	Juris-Classeur Periodique (La Semaine Juridique)
KCAL	Kilocalories
KG	Kilograms
KJ	Kilojoules
LMBG	Lebensmittel-und Bedarfsgegenstaendegesetz
LMKV	Lebensmittelkennzeichnungsverobnung
LQR	Law Quarterly Review
MEP	Member of the European Parliament
MG	Milligrams
MLR	Modern Law Review

MP	Member of Parliament
OJ	Official Journal of the European Communities
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
QUID	Quantitative Ingredient Declaration
RDA	Recommended Daily Allowance
SEA	Single European Act
SI	Statutory Instrument
TEU	Treaty on European Union
UEFA	Union des Associations Europeennes de Football
VAT	Value Added Tax
YBEL	Yearbook of European Law

LIST OF CASES

(European Court of Justice)

Commission v Italy [1961] ECR 317

Van Gend en Loos v Nederlandse Belastingensadministratie [1963] ECR 1

Variola v Amministrazione delle Finanze [1973] ECR 981

Procureur du Roi v B & G Dassonville [1974] ECR 837

Van Duyn v Home Secretary [1974] ECR 1337

Rewe-Zentralfinanz v Landwirtschaftskammer [1975] ECR 843

Commission v Nederlandse [1978] ECR 863

Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein [1979] ECR 649

Pubblico Ministero v Ratti [1979] ECR 1629

Commission v Germany [1979] ECR 2555

Union Laitiere Normande v French Dairy Farmers Limited [1979] ECR 2663

R v Henn & Darby [1979] ECR 3795

Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v Commission [1980] ECR 1949

Criminal Proceedings against Adriaan Fietje [1980] ECR 3839

Officier van Justitie v Koninklijke Kaasfabriek Eyssen BV [1981] ECR 409

Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV [1981] ECR 527

Commission v Ireland [1981] ECR 1625

Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV [1981] ECR 3277

Commission v Italy [1982] ECR 2187

Commission v Belgium [1983] ECR 531

SA Delhaize Frères "Le Lion" & others v Belgium [1983] ECR 2973

Duphar BV & others v Netherlands [1984] ECR 523

Campus Oil v Minister for Industry and Energy [1984] ECR 2727

Criminal proceedings against Albert Heijn [1984] ECR 3263

Th Kohl KG v Ringelhan & Rennett SA & Ringelhan Einrichtungs GmbH [1984] ECR 3651

Association des centres distributeurs Edouard Leclerc & others v SARL "Au ble vert" & others [1985] ECR 1

Vereniging Slachtpluimvee-Export e V v Rewe-Zentral-Aktiengesellschaft [1985] ECR 1157

Cinetheque v FNCF [1985] ECR 2605

Criminal Proceedings against Miro BV [1985] ECR 3731

Criminal proceedings against Leon Motte [1985] ECR 3887

Ministere Public v Xavier Mirepoix [1986] ECR 1067

Criminal proceedings against Claude Muller & others [1986] ECR 1511

Driancourt v Cognet [1986] ECR 3231

Criminal proceedings against Arthur Mathot [1987] ECR 809

Commission v France [1988] ECR 793

Proceedings for compulsory reconstruction against Smanor SA [1988] ECR 4489

Ministere Public v Deserbais [1988] ECR 4907

Torfaen Borough Council v B & Q plc [1989] ECR 3851

Grimaldi v Fonds des Maladies Professionelles [1989] ECR 4407

State (Italy) v Nespoli & Crippa, Re Low-Fat Cheese Commission v Italy [1990] ECR I 3647

Criminal Proceedings against Jean-Claude Bellon [1990] ECR I 4863

Cargill v Commission [1991] ECR 2987

European Parliament v Council of the European Communities [1991] ECR 4529

Francovich & Bonifaci v Italy [1991] ECR I 5357

Commission of the European Communities v Italian Republic [1992] ECR I 4545

Commission v Hellenic Republic [1992] ECR I 4577

Commission v French Republic [1992] ECR I 4719

Exportur SA v LOR SA and Confiserie du tech SA [1992] ECR I 5529

Stoke-on-Trent CC v B & Q plc [1992] ECR I 6457

Criminal proceedings against Giorgio Domingo Banchero [1993] ECR I 1085

Criminal proceedings against Cooperatieve Zuivelindustrie "Twee Provincien" WA [1993] ECR I 6045

Criminal proceedings against Keck & Mithouard [1993] ECR I 6097

Hunermund v Landesaqpothekerkammer [1993] ECR I 6787

Tankstation't Heustke vof & JBE Boermans [1994] ECR I 2199

SpA v Sindaco del Commune di Capena [1994] ECR I 2355

Criminal proceedings against J J J Van der Veldt [1994] ECR I 3537

Pfanni Werke Otto Eckart KG v Landeshauptstadt Munchen [1994] ECR I 4605

Lucien-Ortscheit v Eurim-Pharm Arzneimittel GmbH [1994] ECR I 5243

Societe d'importation Edouard Leclerc-Siplec v TF1 Publicite SA & M6 Publicite SA [1995] ECR I 179

European Parliament v Commission of the European Communities [1995] ECR I 2019

Piageme and Others v BVBA Peeters [1995] ECR I 2955

Commission v Germany [1995] ECR I 3599

Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman [1995] ECR I 4921

Commission v Germany [1996] ECR I 2423

Criminal proceedings against Jacqueline Brandsma [1996] ECR I 3159

Commission v Luxembourg [1996] ECR I 5143

Tommaso Morellato v Unita samitara locale (USL) n 11 di Pordenone [1997] ECR I 1431

Canadane Cheese Trading and Other v Hellenic Republic [1997] ECR I 4681

Criminal proceedings against Hermann Josef Goerres [1998] ECR I 4431

Denmark, Germany and France v Commission, Unreported, European Court of Justice, 16 March 1999, Joined cases 289/96, 293/96 and 299/96

Verbraucherschutzverein eV v Sektkellerei G C Kessler GmbH and co , Unreported, European Court of Justice, 28 January 1999, Case 303/97

(Irish)

Browne v An Bord Pleanala [1989] ILRM 865

LIST OF EUROPEAN UNION TREATIES, DIRECTIVES, REGULATIONS AND DECISIONS, CONSTITUTIONS, STATUTES AND STATUTORY INSTRUMENTS AND CONVENTIONS

EU Treaties

European Coal and Steel Community Treaty, Paris, 1951

European Economic Community Treaty, Rome, 1957

Merger Treaty, 1965

Single European Act, 1986

Treaty on European Union, Maastricht, 1992

EU Directives

64/54/EEC on the approximation of the laws of the Member States concerning the preservatives authorised for use in foodstuffs intended for human consumption

70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty

71/316/EEC on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control

71/347/EEC on the approximation of the laws of the Member States relating to the measuring of the standard mass per storage volume of grain

71/354/EEC on the approximation of the laws of the Member States relating to units of measurement

73/173/EEC on the approximation of the Member States' laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (solvents)

73/241/EEC on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption

74/409/EEC on the harmonisation of the laws of the Member States relating to honey

75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids

76/211/EEC on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain prepackaged products

76/770/EEC amending Directive 71/354 on the approximation of the laws of the Member States relating to units of measurement

76/895/EEC relating to the fixing of maximum levels for pesticide residues in and on fruit and vegetables

77/94/EEC on the approximation of the laws of the Member States relating to foodstuffs for particular nutritional uses

77/728/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of paints, varnishes, printing inks, adhesives and other similar products

78/891/EEC adapting to technical progress the Annexes to Council Directives 75/106 and 76/211 on pre-packaging

79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

80/232/EEC on the approximation of the laws of the Member States relating to the ranges of nominal quantities and nominal capacities permitted for certain prepackaged products

80/428/EEC amending Annex II to Council Directive 76/895 relating to the fixing of maximum levels for pesticide residues in and on fruit and vegetables

85/7/EEC amending a first series of directives on the approximation of the laws of the Member States in the foodstuffs sector, as regards the involvement of the Standing Committee for Foodstuffs

85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

86/197/EEC amending Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

86/362/EEC on the fixing of maximum levels for pesticide residues in and on cereals

86/363/EEC on the fixing of the maximum levels for pesticide residues in and on foodstuffs of animal origin

88/344/EEC on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients

88/388/EEC on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production

89/107/EEC on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption

89/108/EEC on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption

89/395/EEC amending Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

89/396/EEC on indications or marks identifying the lot to which a foodstuff belongs

89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses

89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products

90/219/EEC on the contained use of genetically modified micro-organisms

90/220/EEC on the deliberate release into the environment of genetically modified organisms

90/496/EEC on nutrition labelling for foodstuffs

91/72/EEC amending Council Directive 79/112 in respect of the designation of flavourings in the list of ingredients on the labels of foodstuffs

91/680/EEC supplementing the common system of value added tax with a view to the abolition of fiscal frontiers

92/2/EEC laying down the sampling procedure and the Community method of analysis for the official control of the temperatures of quick-frozen foods intended for human consumption

92/41/EEC amending Directive 89/622 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products

93/43/EEC on the hygiene of foodstuffs

93/102/EC amending Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

94/15/EC adapting to technical progress for the first time Directive 90/220 on the deliberate release into the environment of genetically modified organisms

94/34/EC amending Directive 89/107 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption

94/36/EC on colours for use in foodstuffs

95/2/EC on food additives other than colours and sweeteners

95/35/EC amending Directive 91/414 concerning the placing of plant protection products on the market

97/4/EC amending Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs

97/35/EC adapting to technical progress for the second time Directive 90/220 on the deliberate release into the environment of genetically modified organisms

EU Regulations

3954/87 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency

944/89 laying down maximum permitted levels of radioactive contamination in minor foodstuffs following a nuclear accident or any other case of radiological emergency

2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs

2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs

207/93 defining the content of Annex VI to Regulation 2081/92 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs

315/93 laying down community procedures for contaminants in food

2037/93 laying down detailed rules of application of Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs

1935/95 amending Regulation 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs

258/97 concerning novel foods and novel food ingredients

1139/98 concerning the compulsory indication on the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112

EU Decisions

96/281 concerning the placing on the market of genetically modified soya beans with increased tolerance to the herbicide glyphosate, pursuant to Directive 90/220

97/98 concerning the placing on the market of genetically modified maize with the combined modification for insecticidal properties conferred by the Bt-endotoxin gene and increased tolerance to the herbicide glufosinate

98/613 concerning a draft Decree of the Republic of Austria on the identification of genetically modified additives and flavourings used as food ingredients

Constitutions

(Ireland)

Bunreacht na hÉireann, 1937

(Australia)

Commonwealth of Australia Constitution Act, 1900

Statutes

(Ireland)

European Communities Act, 1972

Packaged Goods (Quantity Control) Act, 1980

Environmental Protection Agency Act, 1992

Food Safety Authority of Ireland Act, 1998

(United Kingdom and Ireland)

Adulteration of Tea and Coffee Act, 1724

Adulteration of Tea Act, 1730

Adulteration of Food and Drink Act, 1860

Sale of Food and Drugs Act, 1875

(United Kingdom)

Weights and Measures Act, 1963

(Australia)

Australia New Zealand Food Authority Act, 1991

National Food Authority Amendment Act, 1995

Statutory Instruments

(Ireland)

Food Standards (Cocoa and Chocolate Products) (European Communities) Regulations, 1975, SI No 180/1975

EC (Food Standards) (Honey) Regulations, 1976, SI No 155/1976

Packaged Goods (Quantity Control) Regulations, 1981, SI No 39/1981

EC (Quick-Frozen Foodstuffs) Regulations, 1992, SI No 290/1992

Genetically Modified Organisms Regulations, 1995, SI No 345/1994

Genetically Modified Organisms (Amendment) Regulations, 1996, SI No 348/1996

Genetically Modified Organisms (Amendment) Regulations, 1997, SI No 332/1997

(United Kingdom)

Honey Regulations, 1976, SI No 1832/1976

Cocoa and Chocolate Products Regulations, 1976, SI No 541/1976

(Italy)

Law No 283/62 30/04/62

Law No 580/67 GURI No 189 of 29/07/67

(Germany)

LMBG, paragraph 17

LMKV, paragraph 5(2)(2)

(Netherlands)

Likeurbesluit, Article 1

Conventions

Stresa Convention on the Use and Designations of Origin for Cheeses, 1951

Expert Consultation on Biotechnology and Food Safety, Rome, October 1996

BIBLIOGRAPHY AND OTHER WORKS CONSULTED

Bibliography

Ahlstrom, D & O'Sullivan, K "Scientist Who Exposed Possible Dangers of GM Foods Gets Support" The Irish Times, 13 February 1999

Anon "Poll on Modified Food" The Financial Times, 10 January 1997

Anon "France Bans Modified Maize" The Financial Times, 13 February 1997

Anon "Scientists Back Moratorium" The Irish Times, 16 February 1999

Austin, J (1832) The Province of Jurisprudence Determined, Hart, HLA ed (1954), London Weidenfeld & Nicolson Ltd

Baas, A (1996) "The Netherlands in Face of its Community Obligations 1984-1995" Common Market Law Review, Volume 33, p 1197

Bareham, J (1995) Consumer Behaviour in the Food Industry, Oxford Butterworth-Hememann Ltd

Beach, JE (1998) "No 'Killer Tomatoes' Easing Federal Regulation of Genetically Engineered Plants" Food and Drug Law Journal, Volume 53, p 181-191

Beck, U (1992) "From Industrial Society to Risk Society" Theory, Culture and Society, Volume 9, p 97-123

Bentham, J (1782) Of Laws in General, Hart, HLA ed (1970), London The Athlone Press, University of London

Bentham, J (1789) An Introduction to the Principles of Morals and Legislation, Hart, HLA & Burns, JH ed (1970), London The Athlone Press, University of London

Bernard, N (1995) "The Direct Effect of Directives Retreating from Marshall (No 1)?" Industrial Law Journal, Volume 24, p 97-102

Bieber, R & Amarelle, C (1998) "Simplification of European Law" Colombia Journal of European Law, Volume 5, p 15-37

Bohrer, RA (1994) "Food Products Affected by Biotechnology" University of Pittsburgh Law Review, Volume 55, p 653-679

Bourdieu, P (1986) Distinction A Social Critique of the Judgement of Taste, London Routledge and Kegan Paul

Breier, S (1996) "Negotiations on and Transposition of EC Legal Instruments in the Federal Republic of Germany Using the Example of the Directive on Integrated Pollution Prevention and Control" European Environmental Law Review, May 1996, p 152-156

Brouwer, O (1988) "Free Movement of Foodstuffs and Quality Requirements Has the Commission Got it Wrong" Common Market Law Review, Volume 25, p 237-262

Brouwer, O (1991) "Community Protection of Geographical Indications and Specific Character as a Means of Enhancing Foodstuff Quality" Common Market Law Review, Volume 28, p 615-646

Cahill, D (1999) Francovich, Paper, read at the Annual Conference of the Irish Association of Law Teachers, Kilkenny, 9 April 1999

Campbell-Potter (1993) "Implications of the Single European Act on European Community Law-Making A Modest Step Forward" Vanderbilt Journal of Transnational Law, Volume 26, p 249-269

Carney, T (1999) Cassis de Dijon, Paper, read at the Annual Conference of the Irish Association of Law Teachers, Kilkenny, 9 April 1999

Carolan, M "Escape of Genetically Modified Organisms 'Would be Disastrous'" The Irish Times, 2 July 1998

Chalmers, D (1993) "Free Movement of Goods within the European Community An Unhealthy Addiction to Scotch Whisky?" International Comparative Law Quarterly, Volume 42, p 269-294

Chalmers, D (1994) "Repackaging the Internal Market - The Ramifications of the *Keck* Judgement" European Law Review, p 385-403

Chicoine, D (1993) "Genetically Modified Organisms A New Proposal Regarding Deliberate Release" Boston College International & Comparative Law Review, Volume 16, p 137-147

Craig, P (1997) "Directives Direct Effect, Indirect Effect and the Construction of National Legislation" European Law Review, Volume 22, p 519-538

Craig, P & de Burca, G (1995) EC Law, Oxford Oxford University Press

Daltrop, A (1986) Politics and the European Community, 2nd Ed, London Longman

Davison, C (1989) "Eggs and the sceptical eater" New Scientist, 11 March, p 45-49

Degnan, FH (1997) "The Food Label and the Right-to-Know" Food and Drug Law Journal, Volume 52, p 49-60

Degnan, FH (1998) "Emerging Technologies and Their Implications Where Policy, Science and Law Intersect" Food and Drug Law Journal, Volume 53, p 593-596

Dias, RWM (1985) Jurisprudence, 5th Ed , London Butterworths

Donnelly, R "Blair Defends Genetically Modified Food" The Irish Times, 16 February 1999

Eleftheriadis, P (1996) "The Direct Effect of Community Law Conceptual Issues" YBEL, volume 16, p 205

Elias, N (1978) The Civilising Process vol 1 The History of Manners, Oxford Blackwell

Fennelly, N Van Gend en Loos Paper, read at the Annual Conference of the Irish Association of Law Teachers, Kilkenny, 9 April 1999

Frank, RL (1979) "Food Labelling- The Case for National Uniformity" Food Drug Cosmetic Law Journal, October 1979, p 512-524

Freudenburg, WR (1993) "Risk and Recreancy Weber, the Division of Labor and the Rationality of Risk Perception" Social Forces, Volume 71, p 909-932

Gerard, A (1981) "EEC Directives on the Approximation of Member States' Legislation Relating to Foodstuffs" Food Drug Cosmetic Law Journal, October 1981, p 543-549

Giddens, A (1991) Modernity and Self Identity, Cambridge Polity

Gormley, L (1986) "The Application of Community Law in the United Kingdom, 1976-1985" Common Market Law Review, Volume 23, p 287-323

Goyens, M (1992) "Consumer Protection in a Single European Market What Challenge for the EC Agenda?" Common Market Law Review, Volume 29, p 71-92

Groves, PJ (1995) European Community Law, London Cavendish Publishing Limited

Hansen, JD, Heinrich, H & Nielsen, JU (1992) An Economic Analysis of the EC, Maidenhead McGraw-Hill International

Hartley, TC (1981) The Foundations of European Community Law, Oxford Clarendon Press

Judge, T "Organic Farm Proves Big Success" The Irish Times, 5 February 1999

Keane, A (1997) "Too Hard to Swallow? The palatability of healthy eating advice" Food, Health and Identity, Caplan ed London Routledge

Kelly, F (1988) A Guide to Early Irish Law, Early Irish Law Series Volume III, Dublin Dublin Institute for Advanced Studies

Khan, P (1980) "Food Labelling More or Better?" Food Drug Cosmetic Law Journal, Volume 35, p 160-169

Kolia, M (1992) "Monopolising Names EEC Proposals on the Protection of Trade Descriptions of Foodstuffs" European Intellectual Property Review, Volume 7, p 233-238

Lefevere, J (1996) "State Liability for Breaches of Community Law" European Environmental Law Review, August/September 1996, p 237-242

Lenaerts (1990) "Constitutionalism and Federalism" AJ Comp L, volume 38, p 205, 213 *et seq*

Lister, C (1992) "Protectionism and Integration Designations of Origin for Foodstuffs in the European Community" Food and Drug Law Journal, Volume 47, p 639-656

Lister, C (1992) Regulation of Food Products by the European Community, London Butterworths

Lister, C (1993) "The Naming of Foods The European Community's Rules for Non-brand Food Product Names" European Law Review, Volume 18, p 179-201

Lister, C (1996) "A Sad Story Told Sadly The Prospects for US-EU Food Trade Wars" Food and Drug Law Journal, Volume 51, p 303-311

Maine, HS (1861) Ancient Law, Pollock, F ed (1930) Oxford Oxford University Press

Marshall, DW (1995) Food and Nutrition, London Blackie Academic & Professional

Marvasti, F (1991) "The Single European Act A Profitable Perspective not only for the European Community" Southwestern University Law Review, Volume 20, p 175-194

McIntosh, WA (1996) Sociologies of Food and Nutrition, London Plenum Press

McLoughlin, T Regulation of Genetically Modified Organisms (GMOs) in Ireland by the EPA Paper, read at the Conference on the Regulation of Genetically Modified Organisms in Ireland and in other European Countries, Dublin, 23 October 1997

Montfort, J-P (1996) "The Article 30 Solution An Alternative to Market Food-Contact Materials in the European Union" Food and Drug Law Journal, Volume 51, p 161-173

Morris, PE (1989) "The Direct Effect of Directives- Some Recent Developments in the European Court" Journal of Business Law, p 233-245, 309-320

Murdoch, H (1993) A Dictionary of Irish Law, 2nd Edition, Dublin Topaz Publications

Nyberg, CD (1985) "The Need for Uniformity in Labelling" Food Drug Cosmetic Law Journal, Volume 40, p 229-237

O'Driscoll, S "Store Bans Genetic Food" The Sunday Tribune, 22 March 1998

O'Rourke, R (1998) European Food Law, Bembridge Palladian Law Publishing Ltd

O'Sullivan, K "Information Gaps Must be Filled on Genetically Altered Food, Meeting Told" The Irish Times, 14 November 1997

O'Sullivan, K "Genetic Food Impels Food Group to Act" The Irish Times, 23 January 1998

O'Sullivan, K "Fears Crop Biotechnology Could Lead to 'Superweeds'" The Irish Times, 9 February 1998

O'Sullivan, K "Group Queries Genetic Food Labelling" The Irish Times, 27 July 1998

O'Sullivan, K "Scientist in Food Safety Controversy Suspended" The Irish Times, 13 August 1998

O'Sullivan, K "Scientist Suspended over Misleading Information on Genetically Modified Food" The Irish Times, 13 August 1998

O'Sullivan, K "Genetic Engineering Report 'Ambiguous'" The Irish Times, 25 August 1998

O'Sullivan, K "Food for Thought" The Irish Times, 2 November 1998

O'Sullivan, K "Consumer Victory as EU Broadens Rules on the Labelling of GM Foods" The Irish Times, 13 November 1998

O'Sullivan, K "Monsanto Accused of Misleading Consumers" The Irish Times, 6 February 1999

O'Sullivan, K "Biotech Lobby Accused of Weakening GM Rules" The Irish Times, 11 February 1999

O'Sullivan, K "Report's Safe Passage Boosts Prospects for GM Foods" The Irish Times, 12 February 1999

O'Sullivan, K "Revolution, or Just Plain Revolting?" The Irish Times, 16 February 1999

O'Sullivan, K "Green MEP Says Greed Has Won Out Over Food Safety in GM Debate" The Irish Times, 1 March 1999

O'Sullivan, K "Monsanto Pushes Benefits of GM Foods to the Environment" The Irish Times, 1 March 1999

O'Sullivan, K "Food Safety Authority to Issue its Verdict on GM Food Risks" The Irish Times, 2 March 1999

Pescatore, P (1987) "Some Critical Remarks on the 'Single European Act'" Common Market Law Review, Volume 24, p 9-18

Potter, B (1993) "Implications of the Single European Act on European Community Law-Making A Modest Step Forward" Vanderbilt Journal of Transnational Law, Volume 26, p 249-269

Reich, N (1994) "The 'November Revolution' of the European Court of Justice Keck, Meng and Audi Revisited" Common Market Law Review, Volume 31, p 459

Reid, L & Cronin, D "State May Put Temporary Ban on GM Crops" The Sunday Tribune, 28 February 1999

Reilly, J & Miller, D (1997) "Scaremonger or scapegoat? The role of the media in the emergence of food as a social issue" Food, Health and Identity, Caplan ed London Routledge

Savigny, FK von (1840) System of Modern Roman Law, Translation by Holloway, W (1867), Westport Hyperion Press

Schermers, HG (1997) "No Direct Effect for Directives" European Public Law, Volume 3, p 527-540

Slot, PJ (1996) "Harmonisation" European Law Review, Volume 21, p 378-397

Smith, M "Brussels to Overrule Maize Bans" The Financial Times, 11 September 1997

Steiner, J (1993) "From Direct Effect to *Francovich* Shifting Means of Enforcement of Community Law" European Law Review, Volume 18, p 3-22

Timmermans, C (1997) "How Can One Improve the Quality of Community Legislation?" Common Market Law Review, Volume 34, p 1229-1257

Urry, M "Genetic Product Row Worsens" The Financial Times, 20 June 1997

Van Gerven, W (1995) "Bridging the Gap between Community and National Laws Towards a Principle of Homogeneity in the Field of Legal Remedies?" Common Market Law Review, Volume 32, p 679

Veblen, T (1953) The Theory of the Leisure Class, New York Merton

Vogelaar, TW (1975) "The Approximation of the Laws of Member States Under the Treaty of Rome" Common Market Law Review, Volume 12, p 211-230

Waldron, A (1999) "Frankenstein Farms?" Solicitors Journal, 4 June 1999, p 532

Weatherill, S (1996) "After Keck Some Thoughts on How to Clarify the Clarification" Common Market Law Review, Volume 33, p 885-906

Welch (1983) "From 'Eurobeer' to 'Newcastle Brown', A review of European Community action to dismantle divergent food laws" 22 JCMS p 47

Wheelock, V & Freckleton, A (1984) "Nutritional Labelling" Food Policy Research Briefing Paper, University of Bradford, December 1984

White, PB (1996) "The Use of Standards is the Name of the Game" Food and Drug Law Journal, Volume 51, p 337-338

Winter, JW (1972) "Applicability and Direct Effects" Common Market Law Review, Volume 9, p 425

Woolf, M "Revealed How US Bullies Nations Over Genetic Food" The Independent on Sunday, 22 November 1998

Wright, EJ (1989) "The Development of Food Standards in Australia- An Aussie Recipe for Cooperative Federalism" Food Drug Cosmetic Law Journal, Volume 44, p 251-261

Wright, EJ (1992) "The National Food Authority A New Ingredient in Australian Food Regulation", Food and Drug Law Journal, Volume 47, p 215-223

Wyatt, D & Dashwood, A (1993) European Community Law, 3rd Edition, London Sweet & Maxwell

Wytinck, P (1993) "The Application of Community Law in Belgium (1986-1992)" Common Market Law Review, Volume 30, p 981-1020

Other Works Consulted

"Commission Communication on Safeguarding Free Trade within the Community" (1978), Brussels OJ 1980, No C256/2

"Commission Communication on the Free Movement of Foodstuffs within the Community" (1989), Brussels COM 89/C/271/03

"Ireland in Europe A Shared Challenge" (1992), Dublin The Government of Ireland

"Commission Communication on Priorities for Consumer Policy" (1995), Brussels COM

"Food Additives A Booklet Prepared for the Confederation of Irish Industry" (1997), Dublin Nutriscan Ltd

"Commission Green Paper on the General Principles of Food Law in the European Union" (1997), Brussels COM (97) 176, 30/04/97

"Commission Communication on Consumer Health and Food Safety" (1997), Brussels COM (97) 183, 30/04/97

"The Food Standards Agency A Force for Change " Cm 3830 January 1998

"Eat More Fruit and Vegetables The Healthy Food Magazine" (1998), Dublin Department of Health

"Commission White Paper on Food Safety" (2000), Brussels COM (99) 719 final

CHAPTER ONE

AIMS AND STRUCTURE OF THE THESIS

1.1. Introduction

This thesis examines the way in which laws relating to food labelling are harmonised It commences by describing, analysing and evaluating the legislative methods employed by the European Union The thesis finds that instead of adopting one particular method whereby each Member State simultaneously effects a similar change in its law, the European Union proceeds in diverse ways In general, the European Union legislates in this area by issuing directives and, sometimes, regulations The regulations then become law in the relevant Member State without the Member State in question having to take any action At other times, the Member State is required to take action in order to incorporate the provisions of the directive into its domestic legislation

The thesis shows that throughout the European Union, identical foods are marketed in different ways and with different labelling requirements at any one time The thesis then moves to consider, compare and contrast the evolution and implementation of food labelling laws in Australia and New Zealand on the one hand, and in the United States of America on the other The comparison between the legislative methods in these different federations and jurisdictions highlights the shortcomings inherent in the legislative machinery contemplated by the Treaty of Rome The thesis concludes by offering several recommendations In particular it demonstrates how, by altering the legislative medium from directives

to regulations, many of the difficulties in European Union regulation of food labelling could be avoided

By way of parenthesis, this work seeks to explain why there may be reluctance at Commission and Parliament level to implement a simpler and more effective method of legislation It concludes that all economic interests are not necessarily equally well served by the implementation of clear, simple and contemporaneously effective laws

1.2. Subject of the thesis

Food is vitally important for human health, economic and political reasons The market for food in the European Union was worth £375 billion annually by 1997,[1] providing 11 per cent of its manufacturing jobs by 1992[2] It is a larger exporter of food than the United States Six of its Member States are among the top eight exporting countries of food in the world[3] Methods of regulating the industry must thus be considered carefully to ensure that this vastly significant source of income is not adversely affected in any way

Prior to the introduction of more stringent production requirements, sawdust and sand were often added to food to act as preservatives[4] Even more dangerous was the addition of adulterants such as copper, lead, mercury, and even arsenic, as colorants[5] As a direct consequence of issues such as these, the Food and Drink Act was passed in 1860 which made it an offence to produce food that

[1] O' Rourke, R European Food Law, Bembridge Palladian Law Publishing Ltd pp 5 and 6
[2] The Financial Times, 10 May 1991
[3] Daltrop, A (1986) Politics and the European Community, 2nd ed
[4] O'Rourke, R (1998) European Food Law, Bembridge Palladian Law Publishing Ltd pp 5 and 6

contained substances that could be harmful to human health. Since then, the regulation of food products in Ireland has received new impetus from its accession to the Treaties establishing the, currently named, European Union.

Food is essential to human existence. This, however, has the unfortunate consequence of placing consumers in a disadvantageous position. *Prima facie* it could be thought that the satisfaction of consumers and purchasers of food was of paramount importance to producers because it is upon these people that the industry relies for its existence. Despite this, people do require food to survive and so thus can not voice their objections to the shortcomings of the industry as a whole by boycotting their products.[6] Due to the fact that the producers' product will always be in demand these opinions can often be ignored to a large extent without detrimental consequences for the manufacturers.

Several sociologists, including Beck (1992) and Freudenburg (1993), have noted that as a society develops, so too does its citizens' concept of risk. Their concerns are increased by the fact that they mistrust the opinions of experts, who seem to be in permanent conflict with one another on food safety matters. The Treaty contains provisions designed to ensure the protection of consumer expectations. These are not, however, being met. The European Union has failed to take adequate account of the desire of consumers to be informed through the enforcement of a body of relevant food labelling legislation. This desire has been

[5] Ibid.

[6] It is not being suggested here that purchasers of food can not avoid the buying of a particular product if it is revealed that it is produced in a manner that could be detrimental to human health. What is being suggested, however, is that if the entire industry, or at least a substantial portion of it, operates in such a manner then the opportunities for consumer action are limited.

heightened by their mistrust of the food industry and those responsible for the regulation of it

The Treaty of Rome, as amended, sets out, *inter alia*, two clear provisions on the protection of consumer interests and the free movement of goods The regulation of food labelling is an area of European Union law that should, in theory, encompass both of these principles This study demonstrates the way in which the protection of consumers has been ignored to a large extent in both the legislation and the decisions of the European Court of Justice in an effort to ensure the intra-community free movement of goods at all costs

The situation that has developed as a result of the policy that has been adopted in regard to food labelling is ironic In an effort to appease consumer anxieties, the individual Member States have, on occasions, taken matters into their own hands and legislated on specific aspects themselves This domestic legislation potentially impedes the free movement of goods [7] There is thus a need for an acceptable balance to be struck between the interests of consumers, producers, the authorities of the Member States and the European Union itself

The protection of consumers to an appropriate level, and the sacrosanctity of the free movement of goods, have also been adversely affected by the manner in which the legislation used to regulate the labelling of food products has been drafted The most common medium used in this process has been directives These do not automatically alter the laws of the Member States, despite the best efforts of the European Court of Justice to afford them such a status [8] Even

[7] See, for example, *infra*, Chapter 9
[8] See, *infra*, Chapter 3

where the more effective regulations have been used, they are often poorly drafted, thus adding to the already complicated regime obtaining [9] They have not clarified the regulatory system in the manner that they have the potential to

It is also suggested in this study that the way in which food labelling laws have been drafted has left open the potential for trade conflicts with ultra-community bodies, such as the United States of America and Australia The series of intricate differences that have developed between the transposition of the laws in the individual Member States increase the difficulties for an external exporter to import into the Community as their labelling has to be altered to suit the requirements of each individual State The fact, however, that there is a series of laws in place, albeit inadequate ones, means that the Community is placed in the position where it can ensure that the Member States must allow intra-community trade to flourish without any impediment

Consumers have, in recent years, began to make their opinions on food safety clearer by their lobbying for changes in the areas of both production and labelling Price, while important, would appear to take second place in the order of consumer concerns when compared to the level of interest aroused in safety issues It has also, given recent crises, become an important issue for political debate This has all arisen despite the fact that the regulation of food production has developed dramatically in the last century and, in particular, since the inception of the European Union The political issues involved, however, are universal in nature As such any political grouping at any time may decide to adopt them, whatever their political connections may be This makes it easier for

[9] See, for example, *infra*, Chapter 10

those not in government to adopt food safety as a political issue While in opposition they will not be capable of taking any affirmative action Thus the food producers, who are so vital to the economy of a state, will not be adversely affected This then has the unfortunate consequence for consumers that while there may be plenty of lobbying, there is unlikely to be much in the way of real action on the issues that concern them

Before further regulating the labelling of food several, often conflicting, considerations have to be borne in mind by those responsible for legislating The various functions of the label is one such example of this One of the primary purposes of the label is the promotion of sales For the producer and retailer, the space on the label is a valuable source of advertisement The information that can be used for this purpose is restricted by the size of the product and so it thus must be used carefully when appropriate communication to the purchaser is desired The information that is relayed on the label can be the determining factor when it comes to commercial success

The level of regulatory intervention in the label is thus of prime concern to the producer Government requirements may absorb some of the already scarce space that is required for promotion of the product This may be of less importance to already established products which can then place consumers at a disadvantage due to the fact that new products may be impeded from obtaining a share of the market if the use of their label space as a method of advertisement is restricted This can then have the effect of reducing competition in the marketplace Labels also serve to educate consumers about the content of

products This can be of importance when the consumer desires to avoid certain ingredients for the sake of their health

This thesis thus seeks to examine how the various conflicting interests outlined above can be reconciled to create a clearer legal regime on the issues involved, one which will be of benefit to all of the relevant parties It aims to achieve this be comparing the legislative system in operation in the European Union with that obtaining elsewhere, namely the United States of America and Australia In augmentation to this, it identifies additional factors that could be contemplated by the Community when legislating on food labelling issues These considerations are necessary due to the federal nature of the European Union, which seeks to unify the labelling requirements of fifteen individual Member States

1.3. Thesis structure

This thesis is divided into three parts Part A consists of four chapters It serves as background to the rest of the study It examines the existing framework legislation in relation to food labelling and the policy underlying that legislation It surveys, in Chapter Two, the existing literature on the topics that are dealt with in this thesis It analyses the discussions made therein and compares them to those made in this study

Chapter Three analyses the regulation of food products in Ireland and the United Kingdom It examines the methods that have been used in those Member States, since their accession to the Treaty of Rome, to implement European Union

legislation into their domestic systems It ascertains what the outcome of these methods has been and the extent to which this has differed from that envisaged in the Treaty It then contrasts the procedures for standardisation and harmonisation of food labelling laws within the European Union with the way in which other federations have approached the same task The thesis considers the way in which food laws are created in Australia subsequent to their membership of the Australia New Zealand Food Authority It also considers the federal laws adopted in the United States of America and their interaction with State laws in this regard It looks at the legislative models adopted in both regimes and questions whether the European Union could imitate a similar approach to help alleviate some of the difficulties that have been encountered by the Community on food labelling matters

Chapter Four examines the free movement of goods within the European Union It notes that the requirement of protecting public health is often the motive behind the prompting of permission being granted by the institutions of the Community for derogation from the principle by the Member States It also considers the policy approach to food labelling requirements generally in the context of the free movement of goods It then considers the case law on this issue and the way in which it has evolved and considers whether this is likely to act as a catalyst in the reform of food labelling issues The thesis then proceeds to an examination of the principle of mutual recognition in an effort to ascertain whether the current difficulties that obtain could be solved, in the interim at least, by this principle

Chapter Five considers the policy that has been adopted by the European Union in relation to the labelling of food products It looks at the framework directive in this area and the way in which it has been developed It also examines the area of nutritional labelling It studies the way in which community food labelling policy has evolved and brings this section up to date with the proposals that were made in the Commission Green Paper on this matter It scrutinises these recommendations and questions whether or not they can act as an aid to the harmonisation process Particular attention is paid in this chapter to the way in which policy has been developed to ensure that consumers are afforded protection through the legislation

Part B contains three chapters The topics of these chapters were chosen for inclusion in the thesis because they look at three of the more heavily regulated areas of the framework legislation The first, Chapter Six, looks at the issues involved in the naming of food products It establishes the different types of names that are permitted under European Union law Each of these is then looked at individually The adequacy of various specific legislative measures that have been adopted since the framework legislation was drafted are also examined Proposals that have been made by the Economic and Social Committee of the European Union on the simplification of the measures are then scrutinised and it is questioned whether these recommendations can achieve the desired effect

Chapter Seven inspects the listing of ingredients on the labelling of food products It looks at both that which has, and that which has not to appear in this

listing It examines the extent to which additives are to be considered as ingredients and then, bearing this in mind, studies how the listing of ingredients may actually breach the Treaty provisions on the free movement of goods It also seeks to ascertain the extent to which consumers can be certain that the ingredients contained in the food products that they purchase have not been contaminated in any way at production level

Chapter Eight concludes Part B This chapter examines the way in which the net quantity of a food product has to appear on the labelling It looks at the legislation regarding the checking that quantities stated on labels are correct It also examines the domestic legislation to test the extent to which European provisions are transposed into domestic law It concludes with an examination of the degree to which the European legislative scheme on this matter has developed and analyses whether it has been able to keep up with technological progress in the area

Part C contains the final three chapters Chapters Nine and Ten deal with the labelling requirements for genetically modified and organic foods These two areas of food labelling were chosen for three specific reasons Firstly, they are used to examine the hypothesis that in its efforts to harmonise laws in a relatively short space of time, the European Union legislators have failed to adhere properly to the Treaty provisions regarding the free movement of goods and consumer protection These chapters do this by looking at two issues of food labelling regulation that have come to the fore only relevantly recently Secondly, the production methods examined in these chapters conflict with each other in

relation to the needs and wants of consumers The final reason for using these two areas of food labelling regulation to test the hypothesis, is that both areas arouse a certain amount of controversy in the political arena

The chapters on organic and genetically modified foods are used to encapsulate all of the arguments that have been put forward in the previous nine chapters They look at the way in which directives have been both overused and misused, to regulate what are essentially two very important matters They also examine how efforts to promote the free movement of goods have actually been detrimental to that endorsement due to the ever-increasing anxieties of consumers about the use of technology in food production

The thesis concludes with a summary of the study in Chapter Eleven This chapter summarises all of the theories and recommendations that have been put forward in the thesis It is followed by a series of appendices that are used to demonstrate the evidence behind some of the ideas that have been suggested

1.4. Individual chapter conclusions

Chapters Two to Ten each contain within them an individual set of conclusions about the particular content of the chapter These conclusions, appearing at the end of each chapter, aim to provide the reader with a summary of it as well as a series of comments and observations on the specific topic The conclusions drawn from these chapters are then unified at the end of the thesis in Chapter Eleven, which also makes certain proposals about the type of approach

that should, and that which still could, be adopted by the European Union when regulating the area of food labelling

1.5. Hypothesis

This thesis sets out to question whether in an effort to ensure the harmonisation of laws in a short space of time, the European Union has failed to ensure the Treaty guarantees of promoting the free movement of goods within a common market and the protection of consumer interests

Due to the hastiness that has been involved in the legislative process the laws regulating the labelling of food products have become overburdened with derogations, a piecemeal system has been created and Member States have become unable or unwilling to transpose the relevant provisions into their domestic systems

Part of the problem that has been attached to this impatience is that the wrong regulatory tools have often been used for legislating on the matter Possible solutions to the difficulties that have been brought into existence are offered in the final chapter of this study

This thesis also suggests that there may be an external policy at work in the method and form that have been adopted in the drafting of European Union food labelling legislation The European Union in its efforts to harmonise national laws has created a situation whereby Member States are free, and sometimes obliged by their citizens, to derogate from the approximated rules These minor differences, while ignored to an extent due to their use as legal

backup for the enforcement of the free movement of goods within the common market, act simultaneously as a barrier to trade for external producers wishing to market their goods in the Community

PART A

CHAPTER TWO

REVIEW OF THE LITERATURE

2.1. Introduction

This chapter examines the literature that has previously been written on the subjects discussed in this thesis It considers whether or not the evidence of the literature is consistent with the findings of this study It also seeks to examine whether the scholarly literature remains valid, given recent developments in the area of food labelling The structure of this chapter follows that of the table of contents of the thesis from chapters three to ten

2.2. The effect of directives in the individual Member States

2.2.1. Implementation by Member States

This thesis criticises the method of implementation of European Union food labelling directives into the domestic legal systems of the Member States Member States have consistently failed to implement directives in time and in full This study suggests that compliance in the food labelling law area is best ensured by the use of regulations This would ensure that the law is standardised in the various national legal systems This section of the literature review examines the extent to which directives are effective and the degree to which they are implemented by the Member States in this regard

Baas (1996) found that by far the largest problem that the Netherlands' authorities encountered between 1984 and 1995, where community obligations were concerned, was their incapacity to implement directives prior to the expiry of the implementation periods Several reasons were offered for these failures The transposition of directives into national law did not receive adequate attention The officials responsible gave priority to legislation of domestic origin There was a lack of communication and conflicts of interest between government departments [1] While the Dutch were found to be better than average where implementation dates were concerned, Baas pointed out that the figures were still disappointing, when set against their level of political commitment to European law

This thesis demonstrates that Member States would appear, to a large extent, to ignore the set implementation dates for food labelling related directives It has been said of the Dutch in this regard that "the implementation of directives does not form a structural part of [their] legislative process" and that "the fact that a directive is a binding instruction which has to be implemented in time seems not to be accepted by all the responsible levels of the Dutch administration "[2]

Baas claimed that despite the awareness of the extent of the problem throughout the 1980s, the Dutch Government had still done little to improve the situation This thesis argues that similar claims could be made about the situation

[1] These reasons were originally offered by Mr P Dankert, then Secretary of State for European Affairs Staatscourant No 235, 03/12/92, p 2
[2] Mr T Van Rijn, European Commission Official Parliamentary Papers Lower House 1989-1990, 21 109 No 22, appendix 9

in Ireland [3] It argues that the most reasonable way of dealing with this issue is to alter the legislative medium from directives to regulations where appropriate

Baas also demonstrated how the transposition of regulations into the domestic laws of the Netherlands was not without its difficulties either However, Baas suggests that these difficulties have been caused by an attempt to introduce laws which not only fulfil minimum European Union requirements, but also effect more detailed or precise regulations required by the national legislature This thesis suggests that such difficulties are less serious than those created by the misuse of the directive as the vehicle for harmonisation of food labelling legislation in the European Union

There is also academic literature about the way Belgium has complied with directive implementation Wytinck (1993) looked at the extent to which there was vertical direct effect in existence for directives in that Member State He found that Belgian judges tended to disregard national provisions that were contrary to that form of European legislation He also noted, however, that horizontal direct effect was absent where directives were concerned

Despite not entering into as much detail as Baas, Wytinck did indicate that directives, while not possessing the direct applicability of regulations, do enjoy a large degree of vertical direct effect when coming under examination by the national courts This thesis argues that the uncertainty surrounding this situation is just one of a number of reasons why the European Union has to move away

[3] See Appendix One

from the use of directives and on to regulations where important food labelling issues are concerned [4]

Breier (1996) found that in view of the drawn-out legislative procedure in operation, it was not surprising to find that Germany often fails to meet the transposition deadlines provided for in directives Breier found that one of the reasons for this, was that some of the terms used in directives can be interpreted differently by the bodies involved in transposition This, coupled with other related factors, prolongs the length of time that it may take for this transposition As this thesis demonstrates, Ireland often fails to meet the transposition deadlines set by the directives relating to food labelling matters This other body of literature has shown that this is clearly a Europe-wide problem The effects that this problem can, and often does create are also outlined in this thesis [5]

Gormley (1986) undertook an extensive study of the United Kingdom's dedication on this matter Although his investigation was undertaken prior to the full introduction of the Single European Act, it remains useful, due to the fact that much food labelling legislation predates this Act Gormley found that "as a matter of general policy, the United Kingdom sets out to implement obligations arising from community directives as soon as possible "[6] This point would certainly be debatable where food labelling directives are concerned, as much in the United Kingdom as in Ireland and throughout the European Union

2.2.2. Direct effect of directives

[4] See, *infra*, Chapter 3
[5] See, for example, *infra*, Chapter 9

Craig and de Burca (1995) pointed out that by the wording of Article 189[7], regulations are clearly directly effective, and are thus capable of being relied upon by individuals in the national courts of the individual Member States They also illustrated, however, that there is confusion where directives are concerned They noted that while the Court has recognised the direct effectiveness of directives, we are still left with questions about how their position on this issue can be reconciled with the criteria set down in the *Van Gend en Loos* case [8]

Van Gerven (1995) saw that the Court had played a major role in bringing directives within the scope of the doctrine of direct effect He said that -

> [ ] the most revolutionary part of the doctrine of direct effect is the acceptance by the Court that even provisions of directives may have direct effect against the authorities of a Member State that has not implemented the directive in time [9]

He found that the motivation behind the adoption of this approach was an eagerness on the behalf of the Court to extend the judicial protection of individuals as far as was possible by giving some direct effect to a legal instrument which, unlike a regulation, is only supposed to be binding "as to the result to be achieved "[10] This, he said, was designed to ensure that Member States could not avoid the obligations of a directive against individuals by their own failure to implement it properly

---

[6] P 321
[7] Now Article 249
[8] Van Gend en Loos v Netherlandse Belastingsadministratie [1963] ECR 1
[9] P 680
[10] The former Article 189 of the Treaty, now Article 249 Parts 2 and 3 [of the Treaty of Amsterdam] reconstitute the EC Treaty and the TEU They provide for, *inter alia*, the re-numbering of the articles of these treaties

Van Gerven also claimed that some Advocates General were enthusiastic about the prospect of extending the scope of the direct effect of directives to include a version of horizontal direct effect In concluding, he said that the European Union was correct to allow the principles of direct effect to be extended to directives They had been developed by the Court in an effort to "secure for the individuals effective protection for the rights which they derive from community law "[11]

This thesis argues that the Court erred in extending the direct effect principle to directives [12] The approach that has been adopted by the Court clearly goes beyond the provisions of the Treaty It did not envisage such a status for directives This was clearly recognised by the Court itself, as early in the development of its case law as the decision in *Van Gend en Loos* This thesis demonstrates that the real difficulty is not caused by the lack of direct effect that should be afforded to directives It lies instead with the inappropriate use of the directive as the legislative vehicle rather than the regulation

Baas (1996) argued that judges in the Netherlands often find solutions in cases without clearly answering the question of whether a provision of a directive has direct effect or not The fact that Baas, and others, have also clearly recognised that horizontal direct effect for directives does not exist, adds weight to the theory that directives can not adequately serve as the type of legislation to be used where food labelling is concerned As this thesis points out, they simply do not possess the clarity or force required to implement European Union

[11] P 682
[12] See, *infra*, Chapter 5

provisions properly This is particularly important when considering the protection of consumers and the free movement of goods

Schermers (1997) claimed that directives have never been accepted as generally binding laws His view was that they are directly effective against governments He found that the principle of direct effect was of great value as an aid to the implementation of community legislation This thesis argues that had the European Union's approach to legislation been better formulated initially, this could have spared it the necessity of policing national food labelling laws If horizontal regulations with vertical appendices were to be used instead, there could be minimal need for court supervision over implementation

2.2.3. Penalties for the non-transposition of directives

Schermers argued that the development permitting individuals who had suffered a loss because of the non-implementation of directives to sue the State for damages was satisfactory It is, however, not a solution Where food labelling is concerned, many unimplemented requirements will slip through any protective net Consumers may be ignorant of the actual protections that have been afforded to them [13] This could mean that only rarely would the non-implementation of a directive by a Member State ever reach the national courts This would mean that the non-transposition of directives within the prescribed period would go unpunished

[13] See, *infra*, Chapter 11

This thesis demonstrates that in Ireland, many food labelling directives have not been implemented by the required date[14], and yet no action has been taken against the State, either at European Union or at national level This has occurred despite the detrimental consequences this may have on the fair and proper functioning of the common market Schermers goes so far as to state that the "possibility of claiming damages from governments which do not comply with their obligations under a directive offers an acceptable alternative to granting direct effect to the directive "[15] This thesis disputes that the effect of the decision in *Francovich & Bonifaci v Italy*[16] is to guarantee compliance with European Union requirements

The two most influential cases in the evolution of the doctrine of direct effect by the Court are *Van Gend en Loos v Nederlandse Administratie der Belastingen*[17] and *Francovich* Hartley (1981) noted that where direct effect is concerned, the Court has not hesitated to remodel the law even when this has involved the adoption of a solution different from that envisaged in the Treaties He also noted that "there is little doubt that the authors of the Treaties did not intend directives to be directly effective "[18] This thesis concurs with these points on the direct effect of directives This is especially so when considering the position that the Court has adopted in the post *Van Gend en Loos* era of trying to afford them such a status

[14] See Appendix One
[15] P 540
[16] [1991] ECR I-5357
[17] [1963] ECR 1
[18] P 204

Cahill (1999) claimed that the *Francovich* case "has provided the citizen with an important legal tool to use against the State when seeking redress for harm caused because of the State's failure to comply with its EC obligations "[19] This thesis suggests that while the *Francovich* judgement may have prompted some Member States into paying more attention to the implementation of directives, it has offered little to the citizens of the individual States wronged by that State's lack of action where transposition is concerned [20] Cahill recognises that the judgement has increased pressure levels on Member States to ensure that they implement European Union laws on time However, the threat of financial sanctions may lend some impetus but will not rectify the problem of delayed or non-transposition entirely [21]

Cahill stated that "by 1991 the Community was engaged in a massive legislative programme of directives designed to implement the internal market programme "[22] He found that, taking this into consideration, the decision in *Francovich* was well timed This thesis disagrees In the food law area, the European Union creates so many directives that their effective implementation at national level is proving impossible Taking this into consideration, the judgement could actually be regarded as being poorly timed Many of the difficulties of transposition could be attributed to the European legislators, rather

[19] P 2
[20] See, *infra*, Chapter 3
[21] Ibid
[22] P 3

than those responsible for their implementation in the individual Member States [23]

Steiner (1993) too saw the benefits of the *Francovich* judgement She was of the opinion that community law depends for its full effect on proper implementation by the Member States She went further She stated that if these obligations were not met, then the States should be held accountable This accords with the point made previously that, given the legislative impetus put into operation by the Single European Act, it is often not the Member States alone who should be left to shoulder the blame for non-implementation The Community should also accept some of the responsibility However, this thesis also argues that where Member States wilfully neglect their duties in regard to perfectly reasonable community provisions, they should be held liable for any losses suffered by their citizens Interesting questions can then be raised where community inactivity or improper activity has actually prompted Member States into purposely ignoring or derogating from European Union legislation [24]

Lefevere (1996) claimed that after the decision in *Francovich* it was feared that the courts of the Member States would be flooded with claims for damages by individuals seeking compensation for a State's failure to implement community law He pointed out, however, that given the practicalities of the situation, this did not actually occur

2.2.4. Horizontal direct effect

[23] See, *infra*, Chapter 3
[24] See, *infra,* Chapter 9

Morris (1989) recognised that it was clear from the wording of Article 189 of the Treaty that its authors had intended to create fundamental differences between regulations and directives He even described directives as a "much weaker form of legislation "[25] This distinction, however, has been altered to a large degree by the Court's insistence that directives have to be afforded a degree of direct effect in the individual Member States Morris stated that directives should never be afforded direct applicability Morris also noted, as does this thesis, that direct effect is only possible where the three-fold test devised by the Court m *Van Gend en Loos* is satisfied In the light of Article 189 of the Treaty, directives should never be capable of satisfying these criteria [26]

Morris went on to find that the refusal by the Court to afford directives a degree of horizontal direct effect was "disappointing but unsurprising "[27] This thesis also argues that directives should not have direct effect in any circumstances, given both the conditions which the Court in *Van Gend en Loos* lay down as prerequisites, and the wording of the Treaty This does not mean, however, that this thesis advocates the loosening of the effectiveness or enforcement of European Union rules It demonstrates that where food labelling requirements are concerned, the excessive use of directives has led to the development of an inadequate, confusing and piecemeal system To rectify this situation, the more directly applicable and purposeful regulation should be used as the legislative medium in its place

[25] P 234
[26] See, *infra*, Chapter 3
[27] P 319

Morris does, however, make other comments that echo some of the findings of this study He notes that given the lack of real influence afforded to directives, the danger of their fragmentary and arbitrary application across the Community is very possible As is demonstrated by this study, this may bring about a situation where the legislation comes into direct conflict with the provisions of the Treaty This is particularly so with the Articles concerning the free movement of goods and the protection of consumers [28]

Bernard (1995) suggested that the national courts of the Member States were hostile to the concept of direct effectiveness of directives This meant that the concept had been taken as far as it would go, at least in the foreseeable future The thesis concurs There is an obvious conflict between the extension of direct effect, Article 189 of the Treaty and the criteria established in *Van Gend en Loos* It is also, however, a matter of dispute as to whether or not Bernard's perception is correct [29]

Craig (1997) suggested that it was surprising that Member States continued to oppose the horizontal direct effect of directives, given the fact that in the post-*Francovich* era the States are left open to the increased threat of monetary liability for non-implementation This thesis argues that this fact is not so surprising as Craig suggests It is unlikely that States will become overburdened with actions on this issue [30] One needs to look no further than the findings of Lefevere in this regard

[28] See, *infra*, Chapter 9
[29] See, *infra*, Chapter 3

2.3. The harmonisation of law

2.3.1. The harmonisation process

The main reason for the existence of directives and regulations is their role in the implementation and enforcement of the principles underlying the Treaty through the harmonisation of the laws of the individual Member States The previous section examined the extent to which directives have effect, and that to which they actually should have effect This section looks at the process of harmonisation within the Community, which uses directives and regulations as its medium for carrying out that task

Vogelaar (1975) found there to be "a substantial intrinsic value in harmonisation legislation"[31] He stated that such an approach to law-making would facilitate to a great extent the promotion of the common market He saw legal unification as being comparable with the unifying effect of a common language The methods by which the European Union has attempted to achieve the harmonisation of food labelling laws has actually effected various direct conflicts The Member States themselves disagree The Member States and the European Union administrative bodies disagree There are conflicts between the provisions of the laws themselves and the relevant provisions of the Treaty

Vogelaar also found that other multinational organisations look to Europe to draw inspiration from its unique legal structure This thesis argues, however, that where food labelling is concerned the European Union should look elsewhere

---

[30] See, *infra*, Chapter 3
[31] P.229

for inspiration on how to legislate One source of an alternative legal structure is that adopted by the Australia New Zealand Food Authority [32]

Slot (1996) found that the objective of harmonisation was the achievement of a common market rather than a single legal system Slot also went on to find that there were several different types of harmonising laws in operation within the European Union These methods dealt primarily with harmonisation through the use of directives This overall method is unsatisfactory as it fails to achieve the desired effect

Slot concluded by stating that the developments that have taken place in the harmonisation process show that despite the fact that it was "once looked upon by some observers as a Eurocratic idiosyncrasy" it has "gradually and quietly moved to a central place in the Community "[33]

2.3.2. Harmonisation of foodstuff laws

Commenting directly on the issue of the approximation of laws relating to foodstuffs, Gerard (1981) found that the abolition of customs duties, quantitative restrictions and measures of equivalent effect were insufficient to achieve the common market as envisaged in the Treaty of Rome He found that this approximation had to take place, due to the variety of regulations in operation in the individual Member States These regulations were seen to create a series of technical barriers to trade that were inhibiting the free movement of goods This, according to Gerard, made it clear that these obstructions would have to be

[32] See, *infra*, Chapter 3
[33] P 397

"progressively eliminated "[34] He went on to find, however, that the elimination of technical barriers to trade in foodstuffs was not the sole aim of harmonisation, claiming that there was also a concern present for the protection of consumer interests This thesis argues that despite a certain degree of pre-draft consultation with concerned parties the resulting legislation fails to guarantee the necessary protections

2.3.3. The Single European Act

The Single European Act is regarded as being of high influence in relation to the harmonisation of the laws of the Member States This section of the literature review examines that which has been written about the Act and the effect that it has had, or that which it is likely to have, on the harmonisation of food labelling laws within the European Union

Pescatore (1987) was highly critical of the Single European Act prior to its full introduction He described it as being "unfortunately negative in most respects "[35] He felt that "putting into force the Single Act would therefore mark a severe setback for the European Community "[36]

Pescatore's criticisms of the Single European Act are extreme Pescatore even went so far as to say that it was "the worst piece of drafting I have come across in my practice of European affairs, in this respect marking a sharp contrast with the original Treaty known for its sober and precise legal wording "[37]

---

[34] P 543
[35] P 9
[36] Ibid
[37] P 15

Examples such as the Single European Act only serve to add to the confusion that has been created It appears that the European Union pays a far greater deal of attention to the policy that has been developed since the drafting of the Treaty, than to the actual Treaty itself Much of this post-treaty policy is then in direct conflict with the provisions of the Treaty This emasculates the Treaty's effectiveness When food labelling laws are drafted, or cases concerning them considered, its provisions are routinely circumvented

Pescatore opines that the Act appeared to ignore all of the progress that had been made by the Community up until 1986 It implied that the process involved in achieving that advancement would have to be restarted This thesis adverts to the difficulties created by instruments such as the Single European Act It suggests that the best way forward might be an entirely new legislative approach This could be efficiently implemented as a code

Marvasti (1991) felt that the Single European Act would create a series of benefits for American, Japanese and other third country manufacturers who would be able to export into Europe with fewer restrictions and thus lower costs This is of interest in any consideration of the influence that the Act has actually had on the free movement of foodstuffs This thesis demonstrates how the legislative impetus put into operation by the Single European Act has actually, in some cases, led to the creation of additional barriers to trade, in both an intra and an ultra-community sense [38]

Marvasti suggested that the idea of a 'fortress Europe' arising out of the Single European Act was only a myth This thesis disagrees with this assertion

It is here argued that it is not necessarily the harmonisation of the laws between the Member States that has created this fortress Instead it is actually the intricate differences between those laws that have been produced by the Act, that potentially erects a series of obstacles to third countries wishing to export their food products in to the Member States of the European Union These minor differences have also made it theoretically more difficult for these other countries to alter their laws to harmonise them with those of the European Union, as Marvasti suggested they should, to avoid unfavourable consequences of the Single European Act

Potter (1993) came to a different conclusion than Pescatore about the Single European Act She found more to praise in its formulation, claiming that it "carefully calculates a balance in EC law-making between its tandem goals of efficiency and democracy in that process "[39] Pescatore disapproved of the Act because it failed to go far enough to encourage further integration Potter approves of it because, in her judgement, it went just far enough This thesis maintains, however, that it went too far The Single European Act put in place too short a timescale The piecemeal requirements did not result in the desired effects in relation to food labelling

Potter also made some declarations about the drafting of European Union laws prior to the enactment of the Single European Act She claimed that the system of law-making there had "always been one of intricacy, principally because of the inherent tension between the member States' desire to retain

[38] See, *infra*, Chapter 3
[39] P 269

national sovereignty and the necessity of relinquishing some sovereignty in order to advance the goals of the EC "[40] Potter stated that this intricacy was furthered by the changes made by the Single European Act This thesis argues that where food labelling requirements are concerned, the Single European Act has only served to add to the confusion surrounding those requirements, due to the pressured time-scale that it put in place, to ensure hasty progress towards integration and harmonisation These requirements, which were already piecemeal and discordant prior to the introduction of the Single European Act, in effect piled Pelion upon Ossa Potter realised the value of the expanded use of the qualified majority vote under the Act, a fact that is also welcomed by this thesis [41]

2.4. The free movement of goods

2.4.1. The *Cassis* case

The decision of the European Court of Justice in *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein*[42], or the *Cassis* case, helped to establish many of the political principles that had been envisaged by the Community, when drafting the Treaty, in relation to the free movement of goods Gerard (1981) described the *Cassis* case as "a watershed in the evolution of community policy in the elimination of barriers to trade "[43] He stated that it had

[40] P 256
[41] See, *infra*, Chapter 3
[42] [1979] ECR 649
[43] P 548

helped to establish the situation where products manufactured and marketed in one Member State should, in principle, be saleable throughout the Common Market Differences between national standards would not thus be able to continue unless justifiable under Article 36[44] of the Treaty

The fact that the *Cassis* case was a defining judgement is not in dispute Slot (1996) stated that it provided the impetus for the Commission to change its policy where harmonisation was concerned It helped to establish the principle of mutual recognition throughout the Community Slot claimed that as a result of the formulation of this principle, the Commission drastically altered its harmonisation program He stated that it then became accepted that most of the variations between national laws that created restrictions to trade could be settled through Article 30 procedures and the mutual recognition principle Harmonisation was seen to be necessary, only where the differences between the rules of the individual Member States could be justified under Article 36 of the Treaty, or by one of the *Cassis* 'rule of reason' exceptions

Carney (1999) saw the *Cassis* judgement as being less sound than some of the other commentators He claimed that "from the time it was first reported in 1979, uncertainty has flowed through the cracks in the reasoning of *Cassis de Dijon* "[45] He found that failure by the Court to set any sort of parameters for the operation of its 'rule of reason' had generated confusion regarding the application of Article 30 of the Treaty

[44] Now Article 30 (Post Treaty of Amsterdam)
[45] P 1

Despite his criticisms about the judgement, Carney still found it possible to credit it with some degree of influence over the promotion of the free movement of goods within the Community He concurred with the opinion that it helped to prohibit restrictions on intra-community trade as well as helping to establish the principle of mutual recognition of goods between the Member States Also, aside from his comments about the lack of clarity emanating from the judgement about the rule of reason Carney noted that this rule did help to create a series of treaty-based protections for issues such as consumer and environmental protection This thesis points out that although the Treaty affords special protection to consumers, their interests are often overlooked by both the Court and the Commission when dealing with food labelling issues They would appear to be more interested in promoting the free movement of goods at all costs

2.4.2. Economic consequences of the free movement of goods

Chalmers (1993) described the free movement of goods as "one of the bedrocks of the common market "[46] He claimed that many of the economic gains made by the Community are derived directly from the promotion of the free movement of goods He went on to state that no other principle of substantive community law has equivalent impact on the lives of all community citizens It is in the context of this very importance, that this thesis examines why some food labelling legislation actually, in effect, contravenes this principle

[46] P 269

Chalmers suggested that the free movement of goods had been affected to an extent by the desire to create a community rather than a common market The creation and maintenance of, *inter alia*, the Common Agricultural Policy (CAP), social policy, environmental policy and a research and development policy put pressure on the free movement of goods in a number of ways Articles 36 and 100A(4) of the Treaty allow restrictions on free movement to protect certain areas The Court has, it was noted, held that non-discriminatory measures taken to protect the environment, consumers and the fairness of consumer transactions are all capable of being compatible with Article 30 of the Treaty, even where they affect the free movement of goods, if the measures taken are proportionate to the aim pursued

Chalmers also noted other pressures that act upon the free movement of goods He claimed that the Member States still remained important economic actors within the envisaged common market Member States retain powers in the areas for which the Community institutions have not been made responsible [47] Whilst the Treaty does not make clear the powers that States may possess within the common market, it does envisage that they are responsible for, *inter alia*, public order, economic policy, property legislation and national security Parallel policies may be adopted at Member State level for research and development, environmental and regional policy issues

Chalmers found that these doctrinal and institutional pressures have had a major influence over the decisions of the Court in this area He claimed that even

[47] See also Lenaerts (1990) "Constitutionalism and Federalism" AJ Comp L, volume 38, p 205, 213 *et seq*

some of the more recent judgements "merely build upon past case law, inconsistencies and all "[48] This resulting confusion was seen to have led to a situation where matters were being referred to the Court that had little merit for the promotion of the common market principles This line of case law was to take on a new direction after the decision in *Criminal proceedings against Keck & Mithouard*[49]

2.4.3. The post-*Keck* era

Chalmers (1994) expressed himself to be more optimistic than he had been pre-*Keck*, about the case law of the Court on the free movement of goods He claimed that before this decision "the only certainty about Article 30 [ ] was that it was confused "[50] He described the decision itself as probably being the "most important judgement on free movement of goods since *Cassis de Dijon* "[51] Chalmers did however retain some reservations about the case law that he felt would be likely to follow stating that *Keck* was "unlikely to stem the flood of cases that, according to the Court, prompted its rethink on Article 30 "[52]

Chalmers welcomed the clarification about the position of the Court in the *Keck* decision He stated that the Court of Justice had suggested the free movement of goods was centred on three requirements First, a product should not be obliged to comply to national regulations unless some overriding public interest issue required this Second, Member States should not permit any

[48] P 294
[49] Criminal proceedings against Keck & Mithouard [1993] ECR I 6097
[50] P 385
[51] P 386

discrimination against imported goods Third, access to domestic markets should be freely available to all producers of goods manufactured within the European Union While it was noted that none of these requirements are specified in the wording of Article 30, it is accepted that they have been developed out of the series of judgements made by the Court relating to this matter Chalmers stated that it is cautiously suggested that these principles have their origins in the nature of the internal market

Chalmers found that the *Keck* judgement raised substantive questions about the structure of the internal market It defined the scope of the internal market and the market activities which fall within the regulatory competence of the Community [53] Chalmers argued that the laws of each Member State must achieve harmony with European Union legislation, only insofar as such national laws impact on other Member States' goods or services If the Member State's legislation is exclusively internal on domestic application, the requirement to harmonise does not arise

The *Keck* judgement, according to Chalmers, seemed to be a part of a process designed to redefine the internal market into a much narrower concept On this point he appears to be quite optimistic His opinion on the free movement of goods case law, despite the uncertainties that he has identified, is that the *Keck* decision demonstrated the European Union's maturity This was due to the fact that there was now a recognition that strengthening the internal

---

[52] Ibid

[53] See Opinion of Advocate General Tesauro in Case C-292/92 Hunermund v Landesapothekerkammer Baden-Wurttemberg [1993] ECR I-6787

market could also include a process of consolidation rather than an extension of the principles upon which it was founded

This thesis argues that Chalmers' view is equally applicable to the approach that should be adopted for the drafting of food labelling legislation While there are suggestions to this effect in the Commission Green Paper[54] on food production these do not go far enough to alleviate the damage that the Community has inflicted on itself in this area

Weatherill (1996) claimed, as did the Court, that the *Keck* case was designed to reduce the amount of claims related to Article 30 breaches being brought before it While it was seen to succeed in this matter, it was also noted that it helped to create a more sophisticated approach to the free movement of goods as well Weatherill also claimed that Advocate General Jacobs "endeavoured to smooth the rough edges of the *Keck* ruling"[55] in the opinion that he gave on the *Leclerc-Siplec*[56] case This viewpoint is endorsed further by this thesis [57]

Weatherill also claimed that the *Keck* case did not achieve the policy effect which was intended This decision relied heavily on what the Court considered of great significance, namely selling arrangements These were not in fact rules which producers themselves knowingly observed or understood Hence concentration was focussed on the form of measures, rather than on their economic effect on trade He found that treating rules that affect these 'selling

[54] "Commission Green Paper on the General Principles of Food Law in the European Union" (1997), Brussels COM (97) 176, 30/04/97
[55] P 889

arrangements' as a special category, places the focus, wrongly in his opinion, on the form of a measure rather than its actual effect on trade He continued his criticism of the invented category of 'selling arrangements' by describing it as being, at best, a shorthand method of expressing the idea that on occasions market interventions do not actually have the effect of hindering access to the market

Weatherill stated that "pre-*Keck*, the Court had lost sight of the link between Article 30 and internal market building by pushing it in the direction of general review of national market regulation disassociated from a need to show a hindrance to trading activities aimed at the realisation of the internal market "[58] The Sunday trading saga of decisions such as those in *Torfaen*[59] and *Stoke*[60] was recognised as being the most notorious example of this The subjection of all measures of national market regulation to community law supervision was seen to damage both the image and the legitimacy of the European Court of Justice *Keck* created the risk that the Court would ultimately go too far in the opposite direction

Reich (1994) claimed that the Court in the *Keck* decision attempted to achieve legal certainty by distinguishing between product-related regulations and what it termed 'selling arrangements' He noted that product regulations on *inter alia* presentation, composition, labelling and packaging would still have to follow the *Cassis* principle This thesis concurs [61]

---

[56] Societe d'importation Edouard Leclerc-Siplec v TF1 Publicite SA & M6 Publicite SA [1995] ECR I 179
[57] See, *infra*, Chapter 4
[58] P 904
[59] Torfaen Borough Council v B & Q plc [1989] ECR 3851
[60] Stoke-on-Trent County Council v B & Q plc [1992] ECR I 6457
[61] See, *infra*, Chapter 4

Reich found that the concept of selling arrangements was an obscure one, stating that it was novel to both community and Member State law It was noted that in this effort by the Court to achieve clarity by the adoption of a new formula, in reality its primary consequence was the creation of additional uncertainty If the Court were to include regulations on advertising and sales promotion in its concept of selling arrangements, then it would artificially separate product and marketing rules linked by secondary community law, such as Article 2 of Directive 79/112

Reich concluded by finding that the Court in the post-*Keck* era would be required to decide claims concerning a disputed meaning of the term 'selling arrangement' These possible conflicts are set out in this thesis [62] The legal certainty that was promised in the judgement has actually established a whole new set of difficulties Reich found that it might actually have been more beneficial for the Court to continue along its case-by-case approach and to continue examining the intra-community effects of laws in operation in the individual Member States It was not seen as being necessary for the Court to overturn its entire case law in an attempt to create legal certainty

2.4.4. Mutual recognition

The principle of the mutual recognition of products between Member States was examined by Montfort (1996) who suggested that the content of Article 30 of the Treaty offered access to the European Union market for external importers who were obliged to conform with community requirements on food

packaging He noted that one of the principal tools envisaged by the authors of the Treaty to eliminate restrictions to trade and thus promote the free movement of goods was the harmonisation of the laws of the Member States

Another instrument that could be used for the promotion of the free movement of goods was seen to be use of the principle of mutual recognition This system works on the basis that instead of adopting harmonised legislation the national legislation is maintained but with that the Member States are obliged to recognise the legislation of the other Member States as well Thus, a product that complies with the laws of one Member State must be permitted under the principle to circulate freely in the other Member States, even where it does not comply with the relevant laws of the importing state [63] Once the laws in a particular area are harmonised there is no need to continue use of the concept of mutual recognition Mutual recognition is therefore designed to apply only in the absence of harmonised legislation

Montfort saw that the mutual recognition principle as it effects food-contact materials involves a three stage process First, it must be questioned whether the material is covered by harmonised and/or national rules Second, if it is determined that the mutual recognition principle is applicable, it then arises whether the material is lawfully manufactured and marketed in another Member State Third, a decision must be taken as to whether the material could benefit from the mutual recognition principle

---

[62] See, *infra*, Chapter 4

[63] While Montfort is arguing here that mutual recognition could be used as a tool by importers from outside the Community to import into it, it is in fact debatable as to whether or not this is indeed the case In many ways the European Union adopts a self-protective stance where its own

A similar analysis could be applied to the principle of mutual recognition for food labelling issues, particularly where compositional requirements are concerned If the thesis's recommendations concerning food labelling were to be implemented, then the mutual recognition doctrine would assume greater importance Applicable legislation would be less concerned with futile attempts to regulate minutiae [64] If this were the case then more stringent and clearer criteria for the assessment of mutual recognition by the Court would be necessary, particularly when considering the fact that it is somewhat unclear at present [65] The main danger noted in this thesis in relation to mutual recognition is that it can lead to the acceptance of the lowest form of a product becoming legally marketable in all of the Member States [66]

Several defences are open to Member States where mutual recognition is concerned Montfort noted that Member States may deny the mutual recognition of foodstuffs containing additives, if the additive represents a danger to public health, or if the use of the additive does not fulfil a genuine need in the production of that product, particularly an economic or technological requirement It is on this point in particular that this thesis aims to demonstrate the degree of the lack of clarity that is involved in the clear interpretation of this principle Indeed, Montfort recognised that neither the Court nor the Commission has specified how these considerations are to be assessed for food-contact materials A similar assessment can be made for the inclusion of additives in the

producers are concerned and it could, quite easily, adopt measures to ensure that Montfort's suggestion does not become the case

[64] See, *infra*, Chapter 11

[65] See, *infra*, Chapter 4

preparation of food, despite the fact that Montfort believes that this is not in fact the case [67]

Montfort noted that the Court has ruled, that m their assessment of the genuine need for the use of an additive, Member States are to take into consideration the availability of raw materials This thesis suggests that in the past, when European Union policy is faced with a conflict between issues of public health on the one hand, and producer freedoms on the other, the latter will be accorded preference, absent a scandal with political implications While it could be considered that technological and economic reasons are genuine ones, a fair balance of assessment on this matter needs to be struck

2.4.5. Free movement and the naming of foodstuffs

Brouwer (1988) examined the decision taken by the Commission to cease the harmonisation of compositional requirements and outlined the conflict that this could create with the free movement of goods The disparity between national regulations on compositional requirements was seen to be capable of causing severe restrictions to intra-community trade Brouwer believed that there were shortcomings in the new approach adopted by the Commission on this matter in 1985 [68]

Brouwer found that certain disadvantages could exist when standardised composition requirements are created Consumers can become deprived of

---

[66] See, *infra*, Chapter 4
[67] See, *infra*, Chapter 7
[68] The new approach was outlined in a communication on the completion of the internal market for foodstuffs Document COM (85) 603

cheaper products of better quality Also, the 'recipe laws' were seen as being capable of seriously hampering product innovation, particularly where the use of new technologies is concerned Though the object of such legislation may well be meritorious, its poor draftsmanship and the ill-chosen legislative vehicle in which it is encapsulated vitiates its effectiveness [69] Recipe laws also tend to add to the over-regulation of foodstuff production, a problem that could possibly be alleviated to a degree by the adoption of some of the recommended methods set out in this thesis [70]

Brouwer also criticised the decision taken by the Commission to cease the creation of composition laws He argued that this abandons quality policy with regard to foodstuffs to the individual Member States themselves This effectively means that only the judiciary will seek to promote the free movement of goods This new approach was seen to be open to being jeopardised by the question of just who is responsible for establishing whether the composition of a foodstuff, despite the fact that it may have been lawfully produced and marketed in the state of export, is considered undesirable from a public health aspect in the Member State of import The Commission would seem to indicate that this is a task for the national courts and the European Court of Justice It was also noted that judges are not in a good position to make food safety or health decisions Indeed, it could be argued in the wake of the BSE controversy, that even scientists themselves fail to agree on such issues However the overburdening of the marketplace with piecemeal composition requirements is not desirable either and

[69] See, *infra*, Chapter 6
[70] See, *infra*, Chapter 11

so a third method has to be developed, such as the one suggested in Chapter Eleven of this study [71]

2.5. The sociology of food labelling

2.5.1. The concept of risk

As was remarked before, sociologists such as Beck (1992) and Freudenburg (1993) noted that societies that are at an advanced stage in their development tend to simultaneously develop an advanced concept of risk McIntosh (1996) stated that this may be attributed to the fact that technological and other advances have brought about a greater awareness of potential risks to human health This increased level of understanding about what can adversely affect human health has coincided with an increased level of preoccupation with the health effects of modern high-fat and high-sugar diets These result from excessive reliance on convenient processed foods McIntosh stated that -

> [t]he very improvements that have enhanced life chances have increased our understanding of what puts us at risk, and as our knowledge increases, so does our ability to make predictions about harmful outcomes In addition, institutions such as the economy, government, and science/technology increasingly take actions that have unintended consequences At the same time these institutions contribute to delocalization That is, actions that have effects on local areas are taken by those whose connections to those local areas have greatly lessened [72]

When considering the delocalising effects of the expansion of the European Union, this statement becomes all the more relevant Important decisions are being taken at European Union level Prior to their introduction,

[71] See, *infra*, Chapter 11

their possible effects are not afforded appropriate consideration This thus increases the possible harm that can be caused to society by such actions [73] Many of these actions have clearly had detrimental effects on the citizens of the European Union The abolition of duty free sales for travellers, discussed later, is but one example [74] Positive theorists, such as Bentham (1789) have noted, however, that the primary aim of legislators should be to improve the life of those for whom they legislate He said that -

> [i]t has been shown that the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be made to fashion his behaviour [75]

Keane (1997) pointed out that campaigns to encourage healthy eating habits have had little effect on the purchasing decisions of consumers This does not mean that the campaigns are failing to educate It is also evident that people are well aware of what constitutes healthy food The inference is that consumers know of the risks involved but are insufficiently motivated to change [76] There is indeed clear evidence that consumers do not always alter their habits or behaviour for the better, even when unambiguously informed about the health or safety risks Davison (1989) suggested that this was due to the fact that while people may know that certain types of food are bad for them, they also know that this is not necessarily always the case They may, for example, know somebody who ate fatty foods yet lived into their nineties As a result of this they see risk as

---

[72] (1996 42,43)
[73] See, *infra*, Chapter 11
[74] See, *infra*, Chapter 2 10
[75] (1789 34)

being relative and so choose to both believe and disbelieve the health food messages that they are given Due to this, they see little point in altering their diets

From the literature cited and discussed in this study, it appears that consumers implicitly desire and expect that authority will take their autonomy away They are content to allow legislators the task of prohibiting consumers from harming themselves Consumers are averse to taking and implementing decisions to improve their own behaviour in order to obviate risk They seem by and large uninterested in gastronomic self-improvement

Coupled with their increased perception of risk and interest in health and nutrition is the fact that the public can lose faith in the institutions that are designed to protect them from risk Freudenburg offers three reasons for this loss in public confidence These are feelings that -

(i) technology can be incompetent,

(ii) dishonesty is rife, and

(iii) that the system is incapable of coping with any potential problems that may arise

McIntosh suggested that loss of confidence in the food industry could coincide with an increasing distance between producer and consumer perceptions about what is important in the production of food A gap also develops between the experts and consumers which, in turn, leads to a mistrust of any opinions that experts may offer Even the perceptions about what the important issues actually are, tend to differ between these various groups The experts themselves often

[76] See Appendix Two

disagree with one another They may also alter their opinions This leads to an erosion of confidence in the worth of the opinions of experts generally This thesis suggests that European Union food labelling legislation has failed to take into account this reduction in consumer confidence It suggests that the reasons for this lie in the efforts to ensure the promotion of the free movement of goods at all cost

McIntosh also noted that perhaps because of the new concepts about risk a series of new social movements have started to appear Groups have rallied around several issues, including food safety These new movements are seen to be mostly value driven Giddens (1991) argued that the very appeal of these new social movements was their ability to connect members of an advanced society with moral and existential questions long repressed by institutions Another difference noted about these new movements was their relationship with political parties Unlike other modern movements, these attempt to maintain organisational autonomy and distance from traditional political issues McIntosh also noted how the various groups involved in these movements often temporarily join forces with other groups to pursue a particular goal, often for very different reasons As an example, McIntosh cited the diverse opposition to the opening of a hamburger franchise at the University of California The boycotts and picketing were organised by "consumer and animal rights groups who were joined by Japanese Americans, lesbians, gays and people with disabilities "[77]

McIntosh also noted that the mass media had played a major role in the construction of the various social problems involving food For some time,

journalists and editors have lost interest in the issue of hunger They have decided that the general public will not be interested in yet another African famine story As a result many such crises have gone unreported Interest in stories about eating disorders have taken their place

This thesis demonstrates how the issue of food labelling has become another source of fashionable stories for the media One such example of this is the hype that surrounds the trials and deliberate release of genetically modified foods [78] The theories on food safety issues presented by sociologists may explain how the topic became a major political debating point It is difficult to explain why the European Union failed to anticipate that failure to impose clear and honest labelling requirements for genetically modified and organic foods would lead to an explosion of consumer resistance

It is not in dispute that laws need to develop alongside those advancements taking place in society They should, however, also account for changing social attitudes, such as those explained here about advanced concepts of what constitutes risk Increasing levels of technology in all spheres of society have led to a requirement for additional regulatory measures An example of this can be seen in the alterations that have taken place to account for the increased use of computers Several areas of law have changed as a result The threat to privacy, for example, could give rise to increased levels of concern Copyright and patent law would thus require revision

[77] (1996 46)
[78] See, *infra*, Chapter 10

The level of technology involved in the production of food has also increased in recent years This fact, in addition to an increase in the level of public perception about what constitutes risk, has led to the need for additional regulation of the food industry Many of these necessary additions are in relation to food labelling requirements What must be noted, however, is that over-regulation could be perceived as having detrimental consequences as well One such disadvantage could be that many of the fundamental food labelling and safety requirements will be overlooked New requirements will require accommodation These take away valuable labelling space from the producer

Paradoxically, though as has been stated, consumers are content that legislators should take away their freedom of choice, the evidence also demonstrates that consumers mistrust authority Consumers are not always confident that legislation is solely motivated by a desire to protect consumer health and safety They fear a hidden agenda They have also been well educated, however, about healthy eating As a result of these factors they call for additional legislation to regulate food production, including the labelling of food products This, however, would appear to be primarily for the purpose of removing some of the responsibility from themselves when it comes to making purchasing decisions They want the authorities to regulate, and possibly even prohibit, the marketing of products potentially detrimental to consumer health Consumers may be said to feel that if decisions are left up to them as to whether or not they consume a product for health reasons, the decisions will be unlikely to

be rationally made Consumers want convenience foods and not the inconvenience of healthy eating habits

Reilly and Miller (1997) pointed out that the media are generally seen as being irresponsible and sensationalist when it comes to the reporting of food risks They are seen to do this in two ways The first is an uncritical admission that the food industry may on occasions damage people's health Alternatively, some reporting fosters undue alarm by publishing the views of non-expert and politically motivated pressure groups The important food labelling issues become intertwined in a web of complex laws issued to appease all of the various factions In some ways, such laws can satisfy nobody

Using the BSE saga as an example, Reilly and Miller found that such a story was likely to remain a topical one as long as scientific uncertainties remained about the cause of new CJD cases, and as long as the European Union continued to interfere with beef exports It is suggested in this thesis that the same could be said for the genetically modified food debate If the European Union were to deal adequately with the matter, the likelihood is that it would almost immediately become less of an issue for media scaremongering Procrastination has inhibited both consumer protection and the free movement of goods as enshrined in the Treaty [79]

2.5.2. Nutritional labelling and the consumer

The food industry has taken note in recent times of the importance of the issue of nutrition in food to the consumer It has thus become a valuable

marketing tool for the food industry Prior to purchasing, particularly in a large supermarket, the consumer has a wide range of choices to make Many different brands of what is essentially the same product may be on sale For this reason the content of the labelling of a food product can be the difference for the producer between commercial success and failure Notifications such as 'low fat' or 'contains real fruit' may be the determinant for the consumer in choosing one product over another, particularly in this more nutrition-conscious era Many consumers, however, are still ignorant of the real content of the food they eat

Marshall (1995) suggested that various methods were available to help consumers in the making of informed purchases of food products These included education about broad food groups that have a set of general characteristics and could thus be considered equivalent in terms of the role that they play in nutrition, for example cereals, pastas, fruits or vegetables Problems arise, however, with this approach when it is realised that combinations of food groups can introduce undesirable nutritional consequences To ensure that consumers get the right balance in this regard, the use of nutritional labelling has become important

Nutritional labelling is used by producers to identify the product as being either high in something that is desirable or low in something that is not Marshall (1995) suggested that this type of labelling is unfair to consumers One of the reasons offered for this is because it expresses the quantity of nutrient per 100g weight of the food To understand the labelling, the consumer thus has to either weigh the quantity of the product that he or she is about to consume, or

[79] See, *infra*, Chapter 9

instinctively know what 100g looks like To make informed nutritional comparisons, the consumer requires a knowledge of the calories per gram of different nutrients, and a calculator Only in this way can the consumer work out the nutritional composition of a food product from the information required by the European Union directive on nutritional labelling Average portion sizes are not seen to offer a solution either, as people tend to eat portions of different sizes

Marshall identifies another problem with nutritional labelling 'low fat' Such a description can only be justified by comparison with a similar product higher in fat A reduced fat cheese may contain less fat than the conventional product But some benchmark is needed, before it should be permissible to inform consumers that the food in question is 'low fat' Marshall suggests that the solution to this problem lies in labelling products with the amount of energy attributable to them, such as an indication of the percentage of calories in the total composition of the product

Bareham (1995) suggested that as from May 1993 the United States had introduced much stricter controls over nutritional labelling Words such as 'healthy' and 'fresh' were now to be the subject of strict definitions In effect, it was noted that consumers would be given much more complete information on the label to help them to select a more healthy diet The European consumer was seen to be unlikely to be in such a position for some time The European legislative framework allows too much power to food producers

As early as 1984, Wheelock and Freckleton suggested how the nutritional labelling of food should be regulated They recognised that consumers needed

information on nutrients to make informed choices They also saw however, that it was necessary to integrate any steps taken on the labelling of nutrients in food into a programme of nutrient education Keane (1997) noted that health and nutrient promotion had superseded general health education during the 1970s Unless Wheelock and Freckleton's suggestions were taken into consideration, it was seen that the fundamental aim of assisting the consumer would not be achieved They also found that it would be highly desirable for this labelling to take the form of grams per 100g This suggestion conflicts with that advanced by Marshall

The effect of Marshall's research is to highlight a policy dilemma On the one hand consumers should be afforded as much information as possible about the product's nutritional value On the other, a superfluity of technical detail is useless to, and will be ignored by the majority of consumers A recommended compromise is that proposed and discussed in Chapter 5 4 1

2.6. Food labelling

2.6.1. Labelling considerations

Degnan (1997) examined food labelling in the context of the right of the consumer to make an informed purchase He found that European Union Member States were prevented from creating their own labelling framework for genetically modified products He also stated that the European Union was in a

position to alter regulatory requirements to suit the needs of the time and to find a balance between the concerns of industry, government, science and the public

Accomplishing the balance mentioned was seen to be a difficult task One of the main reasons offered for this was the 'consumer right to know' perspective Such a perspective assumes that consumers have a right to know any fact that they may deem important about a food product before making a purchasing decision This thesis suggests that the failure to take this obligation into account has imperilled the validity of two of the most important treaty guarantees consumer protection and the free movement of goods

Degnan considered the technical task of implementing policy concerning the labelling of food containing genetically modified ingredients He concluded that the implementation of such policy would be facilitated by the fact that the Food, Drugs and Cosmetics Act, 1938[80] laid down guiding criteria Degnan saw that the European Union did not have such an efficient system Instead the European Union attempted to effect a compromise between the various interests in the labelling legislation it had introduced This may be too complicated an explanation It might simply be that in the United States less information is required The present European Union Commissioner, Mr David Byrne, has suggested that the American legislation is designed to afford consumers notice of risk whereas the European Union legislation aims to be educational and informative [81]

[80] Pub L No 75-717, 52 Stat (1938)
[81] Lecture Institute of European Affairs 28/01/00

Degnan noted that the main issue in the European Union is not whether to label but what information should be on the label In the absence of guiding criteria, like those created by the United States' Food, Drugs and Cosmetics Act, the form that the legislation might take becomes unpredictable He noted that because of this, guiding principles such as those found elsewhere might provide a useful reference point for the Community in this regard

2.6.2. Labelling quality

Khan (1980) questioned whether labelling regulations should require that more relevant information appear on the label, or whether the aim should be to improve the clarity of a small amount of information appearing instead He noted that efforts to appease consumer lobbies can lead to "a burden of gobbledygook" that may not achieve the desired effect [82] Labels were recognised as being for the benefit of consumers As such, controlling regulations should not force manufacturers to put on packages a scientific language that is likely to be confusing to the consumer This thesis concurs [83]

2.6.3. Uniform labelling requirements

While it is recognised that clear and appropriate labelling is required to benefit consumers, economic considerations must be borne in mind also The desired clarity can be assisted by a uniform system of requirements operating throughout the Community Nyberg (1985) recognised this point also He

[82] P 161
[83] See, *infra*, Chapter 11

claimed that regardless of differing positions on the deregulation of the food industry, there was almost a consensus that uniformity on labelling requirements was desirable

Whereas he discussed the matter with the American market in mind, many of the points made by Nyberg are relevant to the European Union He claimed that uniformity in legislation was necessary, not only to facilitate the interstate movement of food products, but also to ensure the free movement of foodstuffs in international markets generally This thesis recognises the importance of this in a European Union context It demonstrates that the current system operates in a manner that can sometimes encourage non-uniformity [84]

Frank (1979) recognised a need for legislation uniformity as well He claimed that the non-implementation of uniform requirements creates additional costs, all of which are then borne by consumers This itself would inhibit consumer protection

Lister (1996) discussed the trading conflicts between the European Union and the United States of America He pointed out that the European Union's policy about the regulation of foodstuffs was dominated by considerations other than the necessity of harmonising world laws on this topic Lister went on to find that the European Union and the United States have adopted significantly different rules regarding food labelling This thesis suggests that a flawed harmonisation programme permits each Member State to introduce its own version of the European Union law This means that as well as each Member State having its own national legislative scheme it must also enact its own version

of the European Union legislation Therefore the law in each Member State may be a unique blend of national legislation and European Union inspired law Instead of achieving harmonisation it ensures the construction of fifteen different towers of legislative Babel

2.7. Food naming

2.7.1. The 'recipe laws'

European Union law restricts the power of producers to market a good under different names in different states This policy decision has been implemented, not by one piece of legislation, but rather by a series of directives There is considerable academic commentary upon this phenomenon Compositional rules set out in a series of directives collectively make up what are known as the 'recipe laws'

Lister (1993) demonstrates that in particular instances, the rules effectively inhibit the achievement of a single community market for certain foods This point is one made more generally in this thesis [85]

Lister stated that the Community's rules for name selection involve complex and substantial policy issues, which relegate the consumer's interest in product choice and adequate labelling to a relatively low position Lister claimed that the recipe laws have been developed by attempts to protect or benefit local and national interests, rather than to create or consolidate a common European

[84] See, *infra*, Chapter 9
[85] See, *infra*, Chapter 6

single market in the goods in question Though noting Lister's apparent emphasis on the necessity of achieving a common market, the researcher recognises that there must be merit in allowing diversity of products within such a market In the interests of achieving such diversity, it is necessary to accept that regional producers of foodstuffs with a particular identity and character must be fostered This is so, even at the expense of some flexibility of nomenclature A simplification of the relevant laws would allow local products to retain their identity and quality levels Universally produced foodstuffs could still be encouraged to move freely throughout the common market

Lister also argued that too little emphasis has been placed on the facilitation of vigorous competition and the encouragement of entry of new products and producers into the common market This thesis shows that an over-emphasis on market integration has led to the development of a complex regulatory system that has created an abundance of difficulties for producers and consumers alike It concurs with Lister's point that the legislation and the decisions of the Court on the matter have made it more difficult for new producers to enter the market, particularly when they are based outside the European Union It also suggests that this may actually be a deliberate policy, designed to create a disguised form of 'closed shop' This would effectively make imports into the Community more difficult for external bodies such as the United States of America or the Australasian countries [86]

2.7.2. Food standards

In the United States and Australia, the food standards system is used to determine the name under which a foodstuff may be legally marketed White (1996) saw that these standards possessed the potential to act as a medium for global harmonisation on food naming Looking at their use in the medical industry, he saw them as representing "a significant response by the medical device sector to the trend of utilising standards for harmonisation, mutual recognition of regulations and third party certification "[87] The development and use of wide-ranging horizontal standards for global regulatory harmonisation was seen to offer benefits to manufacturers and regulatory authorities, as well as helping to provide people around the world with safe and effective products

The efficacy of the system of Australian food standards was examined by Wright (1989) He found that its success depends on the continuing commitment of the federal States that combine to make up the Commonwealth The greatest obstacle to the establishment of these standards was seen to be the infrastructure that would be required to replace the already existing administration and enforcement mechanisms in the individual States The originators of the present system of European Union laws on food labelling would have done well to consider this problem at the beginning It could be argued that there was sufficient evidence to suggest that any imposition of obligatory transnational standards would require a prior abrogation of individual national codes [88]

2.7.3. Customary and geographical names

[86] See, *infra*, Chapter 11
[87] P 388

One of the more controversial areas of the regulation of food names is that of customary and geographical names Brouwer (1988) noted that some commentators seemed to suggest that in order to avoid any problems that may arise in the absence of compositional requirements in the Member State of export, only products that are lawfully and traditionally manufactured and marketed under a given designation in the Member State of import should have a right of entry into the importing state under that same name The protection of quality requirements, or the characteristics of traditional products is viewed as one of the interests which the Court should rank, together with the protection of fair trading [89] Tradition would, in Brouwer's opinion, appear to be the key argument in deciding whether to allow or prohibit the use of a given designation when analysing the decisions of the Court on this matter

Brouwer made several interesting observations on the criteria that should be used by the Court to establish whether or not a product can be considered 'traditional' He noted that in the cases that had previously come before the Court, no reference was made to what was meant by 'traditionally manufactured and marketed' He found that such terms were too vague He pointed out that it was impossible to be certain what it was that would have to be established For example, there was nothing to suggest for how long a product would have to have been in production or on the market, before meriting the epithet 'traditional' Tradition and quality, it was noted, are not synonymous One is no guarantee of the other

[88] See, *infra*, Chapter 11

Brouwer (1991) also made a series of observations on the protection by the Community of geographical indications in an effort to enhance the quality of foodstuffs Brouwer pleads for some community system for discriminating between products which should be allowed to retain or possess some geographic reference in their name, and others, where such a reference is or would be inappropriate Brouwer also criticised some other aspects of the legislation He claimed that by introducing a distinction between geographical indications and designations of origin and affording the same level of protection to both, the rules extended the protection of the former too far He also claimed that the possible friction that may occur between trademarks and protected geographical indications needed to be addressed The legal basis for the regulation was also questioned

2.7.4. Naming monopolies

The concept of community certificates of specific character aroused Brouwer's ire He suggested that the entire scheme fostered a monopoly on a trade description which could seriously hamper competition This thesis suggests that such certificates assist consumers to identify exactly what it is that they are purchasing, a benefit omitted from Brouwer's consideration

Brouwer advocates a different scheme for identifying goods by reference to local identity He suggests the implementation of a European Union scheme which would allow each Member State, or possibly each region, to draw up its

[89] See Welch "From 'Eurobeer' to 'Newcastle Brown', A review of European Community action to dismantle divergent food laws" 22 JCMS (1983) p 47

own terms of reference This would specify when a product may be marketed by reference to its local identity He suggests that were such a scheme to be implemented, consumers would see such a label or description as an accolade of quality This thesis argues that Member States tend to be self-interested in these matters In the interest of maximisation of its own market share, Member States might apply different levels of leniency in enforcing quality standards

Kolia (1992) also discussed the issue of food name monopolies She claimed that the monopolies that are capable of creation under Community legislation in this area could fall into the hands of anyone, suitable or unsuitable as the case may be The monopoly created is on the trade of a product and not on the trader himself This was not seen to apply however, where the product concerned has to be produced in a particular geographical area In such a situation, access to production in that area may be controlled by cartels of producers or by state interests The legislation was seen to create a "mutually acceptable allocation of monopolies to each Member State in accordance with the interests which it represents"[90] thus allowing some flexibility within the free movement of goods programme

2.7.5. Naming and market integration

Lister (1992) noted that the legislative direction of the European Union has changed Initially its focus was on market integration With the partial achievement of this objective, the European Union undertook a new goal, namely the insurance of quality standards One of the ways the community sought to

achieve this was by requiring foodstuffs to carry their origin on the label Lister found that this form of regulation raised serious questions about market integration and protectionism He claimed that "the cries are for product quality, but the goals are often product protection "[91]

While Lister noted that few would object to desires for high quality foodstuffs, he also stated that the Community programme on designations of origin and protected geographical indications consisted largely of efforts to incorporate national protectionist rules into the Community framework The regulations were seen by Lister to mark "a direction as well as a program[me] "[92] This direction was seen to be towards a renewed system of protectionism Lister concluded by stating that having laboured for a decade to open up the Community to free trade, the intention now seemed to be to reverse this trend Lister rejects the Community's policy of labelling by origin, on the grounds that this militates against free trade On the other hand, considerations of quality in which origin plays a part, will ultimately become an integral feature of any efficient, harmonious market This is a point which Lister appears to discount

2.8. Labelling genetic modification

Bohrer (1994) examined the controversy surrounding the regulation of genetically modified foods He noted that as the research into these foods moved outside the laboratory and into the public domain, controversy levels increased, as did public concern Brouwer claimed that understanding this controversy

[90] P 238
[91] P 640

requires not only an appreciation of the scientific issues, but also of public risk perception This must then be allowed to influence the legal and regulatory process This thesis advances the view that public risk perception is insufficiently taken into account by those charged with the responsibility of drafting community legislation Those so empowered tend to be over-influenced by economic and technological interests This is evident in the regulation of genetically modified foods as well as in other areas of food labelling rules

Degnan (1998) claimed that food safety issues raised major questions as to how the law should be adapted in order to take cognizance of differences in scientific opinion Degnan also came to the conclusion that where novel technological methods are concerned, difficulties can arise for public health authorities This was seen to particularly be the case where the legislation upon which the authority is reliant has not kept up with the latest scientific developments This can then lead to difficulties in assessing new technologies One way around this was seen to be to interpret the legislation in light of the new developments, although the uncertainty of such a process would clearly not be welcomed by those seeking to implement a codified law system into federal Europe

There is a related systemic point about the European Union legislation on labelling Technological developments impose different and perhaps novel legal and regulatory requirements If the current legal regime is piecemeal, and insufficiently flexible, this compounds the difficulties of devising and implementing effective laws One of the measures of this will be that the laws

[92] P 655

are difficult, or even impossible, to enforce This is exacerbated by the fact that Member States and food producers are afforded input into the negotiation and development of legislation

Beach (1998) claimed that, unlike the European Union, the United States of America was in the process of changing its regulations to encourage, or at least permit, the production and sale of genetically modified foods This was attributable to the belief that these foods posed no risks to human health or the environment If the European Union were to adopt an approach similar to that taken in the United States, there would be unrest amongst consumers Consumers are of the opinion that the effects of genetically modified food production on the environment or consumer health are not yet apparent due to much conflicting scientific evidence on the matter [93]

On the issue of labelling specifically, Beach noted that the Food and Drugs Administration does not regard the method of food production as of sufficient importance to warrant compulsory mention on the label It was noted that the United States of America strongly opposes the position of the European Union on this matter It may be that Beach's argument misconceives the differences between the legal positions of the United States on the one hand and the Community on the other The laws of the Community may not be as restrictive in this area as may generally be believed

Waldron (1999) claimed that the European Union directives on the use of genetically modified organisms placed "severe restrictions" on those planting trial

[93] See, *infra*, Chapter 10

crops [94] Chicoine (1993) stated that the European Union was, in relation to genetically modified organism release, "again leading other countries in managing environmental risks"[95] This may be true by comparison with the situation obtaining in the United States However, this thesis demonstrates that European Union legislation in this area may be criticised for being too weak Both the legislative mechanism and the substantive laws are relatively non-draconian and innocuous a point admitted by the Commission of the Community itself [96]

2.9. Improving European Union legislation

2.9.1. Legislation quality control

Lister (1992) stated that "few regulatory systems are as complex as that of the European Community" Lister pointed out that the European Union is an unusual form of regulatory authority, since its rules are shaped not only by clear policy objectives but as a result of negotiated compromises between constituent Member States Lister argues "[n]o other system engages in administrative rulemaking by treaty negotiation No other includes parliamentary participation while denying genuine parliamentary control Few are so indifferent to public participation and information No other requires that most of its rules, after adoption and before effectiveness, be transposed into twelve dissimilar legal

[94] P 532
[95] P 147
[96] See, *infra*, Chapter 9

regimes No other principally entrusts the enforcement of its rules to others "[97] This thesis concurs with Lister's point It goes further It suggests that the expeditious implementation of the harmonisation programme distracts from the fact that the programme is an unsatisfactory reconciliation between different requirements of various competing provisions of the Treaty

The improvement of the quality of European legislation has been subject to examination by academics Timmermans (1997) argued that "much of the criticism [levelled at European Union legislation] related to the complexity and lack of transparency of the decision-making process and the intrusiveness of community rules, which are criticised as being inaccessible, unclear, unnecessarily oppressive and inconsistent "[98] It is amidst sentiments such as these that this thesis calls for an overhaul of European Union food labelling legislation and a radical alteration to the form that this legislation should take

Timmermans recommended that a quality control mechanism should be introduced, covering aspects of legislation such as drafting, presentation, accessibility, proportionality and efficacy He stated that the European Court of Justice's role in ensuring legislative quality is limited This thesis suggests that if the Court were to adopt a more vigorous inquisitorial jurisprudential approach, it might undertake more comprehensive assessments of relevant legislation This would effectively ensure aspects of quality control However, to fulfil this function, the Court would need to establish its own juridical principles and tenets, rather than offering a series of *ad hoc* comments on the quality of legislation, no

[97] P 655
[98] P 1229

matter how well informed these might be Another simpler way of attaining the same objective might be for the Community to pass less, and better, legislation [99]

One other solution offered by Timmermans concerned the issue of increasing accessibility and the transparency of community legislation He noted that due to the piecemeal system currently in operation, interested parties often have to go through the task of finding the relevant text by looking through a series of amending legislation To improve access to, and the transparency of such legislation, it is suggested that the codification and consolidation mechanisms now in place are exploited to the full This thesis suggests that the current laws, which are piecemeal and outdated, be repealed and replaced by single-issue, simpler forward-looking regulations [100] This method could be used to deal with labelling matters of major importance The current legislation on more minor matters could be repealed altogether and set aside for reintroduction at a later date, when the Community is better prepared

2.9.2. Simplification

Bieber and Amarelle (1998) have also called for the simplification of European laws They claimed that simplification was a complex topic, as a system may be appropriately simple for one purpose yet it may be too simple or too sophisticated for another They stated that "a lack of transparency and accessibility seems to be the price to pay for an increase in refinement and justice

[99] See, *infra*, Chapter 11
[100] See, *infra*, Chapter 11

in any legal system Hence, the distance between the experts and bewildered citizens has grown and the legitimacy of the system has suffered "[101]

This thesis argues that the very complexity of European Union food labelling legislation has compromised the attainment of its specific objectives, in particular the freedom of the market and the protection of consumers If the European Union were to reduce its level of input into the process of regulation, and concentrate instead on improving the quality of legislation, then the difficulties it currently experiences, identified in this study could be avoided

Bieber and Amarelle stated that "EC legislation has major shortcomings in quality and accessibility which have increasingly led to demands for simplification "[102] They note that there have been numerous amendments made to already existing legislation that have resulted in the creation of a complex system Simplification, it is suggested, could help to achieve transparency and coherence in this system This thesis argues that codification would appear to be the best solution in this regard where food labelling requirements are concerned, short of adopting the method put forward in this thesis itself

2.9.3. External inspiration

This thesis proposes other national and international models to which the European Union could look for inspiration on methods of regulation of food labelling In particular it looks at the outline model used in Australia for the drafting of food legislation there Wright (1992) claimed that the success of the

[101] P 16
[102] P 29

system in Australia, one of co-operative federalism, similar to that in operation in the European Union, would depend on all of the jurisdictions acting in good faith This is a factor upon which the European Union relies heavily also It is one that can only be realistically achieved if the system is kept simple, accessible and transparent which, unfortunately at the moment for food labelling requirements, is not the case

2.9.4. Financing consumer issues

Goyens (1992) argued that the Single European Act agenda left no space for issues which, from the point of view of consumer interest, are vital for the proper functioning of the common market This thesis argues that this is clearly so with regard to food labelling issues This policy has continued however in the post 1992 era as well Goyens also noted that, more fundamentally, the Community does not appear to want to devote resources to consumer policy

Wright noted that for the Australian system to succeed, its National Food Authority would have to be realistically funded A lack of funding for some central agency was seen by Goyens to be one of the reasons why European Union consumer legislation is not enforced properly A dramatic change was seen to be necessary, to ensure that the Community system not only benefits traders, but consumers as well This thesis argues that current legislation and Court decisions on food labelling issues have failed consumers To a certain degree, they have impeded the promotion of the free movement of goods

2.10. Policy neutral law

This thesis suggests that much of the European Union law on food labelling is in fact policy neutral It serves little or no function other than to regulate for the sake of regulation At the time of the inception of the Community, or by the later dates of accession by the Member States who were not among the original members, the legal systems of those states were at a highly developed stage For the Community to gain any sort of foothold into those legal systems, they thus had to legislate on matters that had not been previously dealt with by national parliaments Many of the areas of food labelling for which there is now a complex web of regulatory provisions were completely unaccounted for by the laws in any of the Member States prior to the formation of the Community While it could be noted that the main function of legislating within the European Union is to proceed with the programme of harmonisation, an entirely new set of rules is being developed for that purpose that does not merely unify the laws of the Member States by taking initiative from the national legislators of those states, but creates new areas of regulation as well

It could also be noted, however, that as society progresses, so too does the need to regulate This is a point that was noted by Maine (1861) who stated that a progressive society has to keep adapting the law to new social and economic conditions Maine noted that -

> [w]ith respect to [progressive societies] it may be laid down that social necessities and social opinion are always more or less in advance of law We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen Law is stable, the societies we

> are speaking of are progressive The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed [103]

This thesis argues, however, that the high level of regulation adopted thus far by the European Union to try and close this gap has not always been entirely effective

The fact that much of the food labelling legislation of the European Union is so policy neutral makes it more difficult when it comes to analysing ways in which it could be improved This thesis suggests, however, that one way of achieving this would be to simplify the laws in a 'repeal and replace' manner to leave only the most vital parts of the label regulated in a clear, transparent and easy to implement format By altering the laws in this way, the policy of harmonisation will be realised more effectively The form and structure, however, will also have to be altered to make this system operable Both Bentham and Austin believed that prior to reforming law, it must be ascertained what the law actually is at the time of reform [104] Dias (1985) saw that computers would be of great help in this regard He noted that their ability to gather information of great depth and range in a short space of time would be of great advantage to the law reform process Reforming European Union food labelling related laws would clearly benefit from such an advantage given that they were all drafted after 1964[105] and are thus easily attainable on a series of computer database systems [106]

---

[103] (1930 31)
[104] Dias (1985 322)
[105] Directive 64/54
[106] For example, the celex system

Sociologists, such as McIntosh, have claimed that issues such as food safety and food labelling are so general and such single-issue topics, that they can be attached at any stage to any political grouping of any background For this reason issues such as these are more likely to be attached to pressure groups and/or opposition parties who will use them in an effort to win favour with the electorate This then creates a situation whereby little is likely to be done, other than promises made, to radically alter the *status quo* for consumers The government *in situ* is placed in the uncomfortable position of having the producer lobbyists to contend with as well as they will seek no alteration to the law that would increase production costs Consumer lobbyists, however, are themselves divided between according primacy to quality on the one hand, or price on the other This then begs questions about the morality of such lobbies Improved food standards or increased levels of labelling regulations would mean additional costs for the producer, which in turn are passed on to the consumer This then has the unfortunate effect of removing more of the less wealthy sections of society from affording these products This increases world malnutrition The ethics of replacing issues such as starvation, not only on a world scale, but at local level as well, with those such as the labelling of genetically modified foods or additives must be questioned The likely outcome of the lobbying, if successful, will be to increase the associated problems These have already been exacerbated by the failure of the media to report these widespread difficulties

Class and status have long been recognised as issues that affect the purchasing of food by consumers In his book *Distinction* (1986) Bourdieu,

elaborating upon the ideas of Veblen (1953) and Elias (1978) suggested that the wealthier sections of society use food, just as they do fashion, to differentiate themselves from the less well off As a result of this the latter group alters its habits while seeking to emulate the former and, consequently, the wealthier alter theirs as well to preserve the status difference

One of the principal difficulties with the European Union's approach to legislation drafting would appear to lie in the fact that, as an organisation, it is far removed from the citizens it seeks to regulate At European level, there is a democratic deficit The people have an insignificant voice This places the Community administrators in a very advantageous position from which they can not be dislodged by lobbying The European Union, through its legislative powers and judiciary, is making large-scale changes to the way society operates in the individual Member States Those who are affected by their decisions have very little scope to object Two further such examples of this are evident in the decision of the European Court of Justice in the *Bosman*[107] case and the directive on the abolition of duty free sales for travellers within the Community [108]

As has been stated previously, it is suggested in this thesis that the European Union, in order to flex its regulatory muscles, must provide detailed laws where it would be sufficient to only ordain legislative parameters for the Member States The *Bosman* decision gives an interesting example of this theory In that decision, the Court took the most popular sport in the Community It altered the rules for professional players In doing so it failed to consider the

[107] Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman [1995] ECR I 4921

probable consequences The game has now been completely restructured Consumers have lost out, both financially and otherwise So have many players The players find it difficult to gain employment The larger football clubs are free to employ as many non-national, but community citizens Prior to the decision, only three non-nationals, including those from outside the European Union, could participate in UEFA run competitions Now any number of community nationals can play in these games, as well as three non-community citizens This thus reduces the employment prospects for national players, as the places in the squads are being taken up by those from outside the European Union Coupled with this, is the fact that admission prices have had to be raised These price increases have been extremely large These are necessary to fund the wages of the free transfer signings engaged for employment under the ruling The only people to benefit from the *Bosman* decision are the few very top players The lesser professionals suffer So too, do the millions of consumers who are forced to pay extortionate admission prices to games

Another example of the European Union attempting to gain a foothold in the organisation of society on matters that did not require such regulating was the adoption of the directive on the abolition of duty free sales As of 1 June 1999, travellers within the European Union could no longer purchase duty free luxury items, such as cigarettes or alcohol Very few people seemed to be in favour of this change, yet it was implemented nonetheless [109] This is one of the difficulties inherent in the system of drafting legislation within the Community A decision

[108] Directive 91/680

of this magnitude may be taken by only a few individuals, even if these individuals have attained the exalted rank of commissioner Recent events have shown that individual commissioners have not always been above reproach The detrimental consequences of these decisions may be felt by up to 371 9 million people who constitute eight per cent of the world's population The removal of duty free shopping resulted in the loss of jobs, an increase in the cost of travel and a reduction in amenity, all without any sufficient consultation with the electorate The sole purpose of this change was to ensure that the Community's powers could be promoted There was no mischief to be avoided, nor any wrong that required redress Historical theorists such as Von Savigny (1840) have noted that legislation reflects the spirit, feelings and needs of the people [110] It would be difficult to argue this point where the majority of the food labelling legislation of the European Union is concerned

Both sets of laws would appear to be in complete conflict with the provisions of the Treaty It could be argued that so far from infringing the provisions of the Treaty, the provision of duty free goods acted as an encouragement and incentive to travel, travel being the major component of the free movement of persons Duty free goods stimulated overall sales and encouraged trade generally It is also interesting to note that the Community has thus far failed to take action against Member States, such as the United Kingdom, who charge extortionate travel tax rates for those wishing to enter their country This really is an issue that detrimentally affects the lifestyle of community

[109] Again this demonstrates the inefficacy of consumer and political lobbying on community-wide issues

citizens Its abolition would act as an incentive to those wishing to move freely within the European Union, rather than the removal of duty free sales which acted in complete contravention of both this principle and that on the promotion of consumer interests [111]

Dias (1985) noted that it was the business of law reform to call into service all the insights of legal and sociological analysis, philosophy and morality He noted that laws, prior to reform, should be collated before assessing their adequacy Sociological research is then needed to discover how the law has been working before the form that the new laws should take is decided upon

The introduction of computers as a major source of data retention and collection eases the tasks involved in law reform considerably In addition to this, the relatively recent inception of the European Union makes the reform of its laws a comparatively straightforward task Where food labelling is concerned, the laws are all available on computer databases thus making them easy to retain and examine [112] Their unification through single, easy to implement, simplifying transparent regulations would not thus prove that difficult

[110] Savigny was Prussian Minister of Legislation
[111] See Appendix Two
[112] For example, the Celex system

CHAPTER THREE

THE REGULATION OF FOOD IN IRELAND, THE UNITED KINGDOM AND AUSTRALIA

3.1. Introduction

Food production in Ireland and the United Kingdom has been regulated since mediaeval times Laws associated with food date from even earlier than that [1] Most of the mediaeval laws were vertical in their content in that they tended to deal with specific foodstuffs and not with general principles [2]

The first act applicable in both Ireland and the United Kingdom that dealt generally with the sale of food was the Adulteration of Food and Drink Act, 1860 This piece of legislation made it an offence to knowingly sell food that was impure or adulterated in any way It was later replaced by the Sale of Food and Drugs Act, 1875 which was itself followed by a series of legislative measures dealing with matters such as the composition and labelling of margarine, butter, milk and other dairy products, the use of preservatives in food and the labelling of imported meat

Since the accession of Ireland and the United Kingdom to the Treaty of Rome in 1972 their laws have altered through a process of harmonisation, which seeks to eradicate differences between the domestic regulations of the various Member States At present practically all Irish and United Kingdom food law

[1] Base clients had to pay food-rent in fixed quantities of commodities such as butter, bread, wheat, bacon, milk and onions to their lord in Ireland according to laws dating from the seventh and eighth centuries AD For further discussion on early Irish food laws see Kelly, F (1988) A Guide to Early Irish Law, Early Irish Law Series Volume III, Dublin Dublin Institute for Advanced Studies

[2] See, for example, the Adulteration of Tea and Coffee Act, 1724 or the Adulteration of Tea Act, 1730

stems from the transposition of European Union legislation into the respective domestic systems

The Treaty Establishing the European Economic Community[3] was signed in 1957 by the six original Member States[4] Its intentions include the achievement of the economic progress of the Member States by the removal of barriers to trade, the improvement of living conditions and the eradication of restrictions to the free movement of persons

The European Union, since the adoption of the Single European Act, has aimed to create a stronger European Parliament and less powerful Council of Ministers The Commission has also been placed in a powerful position by the Act One of the major effects of the Act has been the speeding-up of the law harmonisation process This has resulted in much of the legislation being drafted poorly, the outcome of which has been a weakening of adherence to the provisions of the Treaty

The authors of the Treaty were keen to remove barriers to trade Article 2 states that the Community's task is to establish a common market and approximate the economic policies of the Member States Article 3 states that customs duties and quantitative restrictions on imports between Member States are to be eliminated, as are all other measures of equivalent effect[5] As well as this, the laws of the Member States are to be approximated to the extent required

[3] As amended by the Treaty Amending Certain Financial Provisions, the Single European Act, the Merger Treaty, the Greenland Treaty and the Acts of Accession

[4] The six original Member States were France, Germany, Italy, Luxembourg, Belgium and the Netherlands These States had originally formed the European Coal and Steel Community in 1951 It aimed to establish a common market for coal and steel, beginning with the abolition of import and export duties and trade restrictions, anti-competitive practices and State subsidies It also sought the development of common policies for the coal and steel industries

for the proper functioning of the common market to achieve the purposes set out in Article 2 [6] The Treaty also undertakes to contribute to the attainment and strengthening of a high level of health[7] and consumer protection [8] These fundamental functions of the Treaty have been manifested where food is concerned through the introduction of much harmonising legislation and many decisions of the European Court of Justice

3.2. European Union legislation

3.2.1. Article 189

Community legislation can be used to regulate the food industry m several different ways The powers afforded to the various institutions to create such legislation are laid down in Article 189 of the Treaty of Rome [9] It states that -

> [i]n order to carry out their task and in accordance with the provision of this Treaty, the European Parliament acting jointly with the council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions In most instances the Treaty leaves open the choice whether to legislate by way of regulation, directive or decision [10]

3.2.2. The legislative process

---

[5] Article 3(a)(a)
[6] Article 3(a)(c) and (h)
[7] Article 3(a)(o)
[8] Article 3(a)(s)
[9] Now Article 249
[10] In some circumstances the Treaty may specify the legislative method to be used See, for example, Article 48(3)(d) which specifies that legislation concerning workers must be carried out through the use of regulations A similar obligation for consumer protection legislation would be desirable

The legislative process is, in theory, divided into three stages initiative, consultation and decision-making In reality, however, community legislation is created in a variety of different ways, depending on the subject matter [11] Under the basic model for general legislation the Commission, the Parliament and the Council are meant to work together The Commission is to be responsible for preparatory work and the Parliament is to consult public and political opinion on the proposal Both the Council and the Parliament may themselves call upon the Commission to make proposals in the first instance The final power of decision-making still lies with the Council, although the influence of the Parliament is increasing in this role It could be argued that the Parliament's role should be increased further still since it is the only body that is directly elected

The distribution of powers between the three institutions means that, in effect, all basic legal instruments are to be adopted by the Council because its structure makes it the political link with the Member States, on whose consent the creation and development of the European Union is dependant Legislation takes the form primarily of regulations and directives

3.2.3. Regulations

Article 189 further clarifies the differences between the various methods of community legislating It specifies that "a regulation shall have general application It shall be binding in its entirety and directly applicable in all Member States "

[11] In practice the European Union legislative process is complex with different legislative procedures applicable in various contexts For further discussion on this matter see Craig &

Regulations have to be published in the Official Journal of the European Union and they come into force on the date that is specified in the regulation itself If no such date is specified then the regulation comes into operation on the twentieth day following its publication [12]

Regulations automatically become part of national law They do not require further transposition by the Member States They are directly applicable also However, the validity of a regulation has to be established before its direct applicability can be confirmed The European Court of Justice has made clear that the test of whether a regulation is valid or not is a test of substance and not of form The fact that the queried legislation is called a regulation is not in itself conclusive [13] Regulations are easily definable in most respects They are not so, however, where direct applicability is concerned [14] The absence of any *travaux preparatoires* indicating the intentions underlying the treaty-making process has added to the lack of clarity on this issue What has been clarified, however, is that Member States need not pass any measures to transpose regulations into national law The Court has actually stated that the Member States should not pass any implementing measures because the regulation becomes part of the national legal order upon publication [15]

3.2.4. Directives

---

deBurca (1995) p 120
[12] Article 191
[13] *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949
[14] Uncertainty surrounds this issue of the definition of direct effect and direct applicability The ECJ has used them interchangeably See Winter (1972) and Eleftheriadis (1996)
[15] *Variola v Amministrazione delle Finanze* [1973] ECR 981

Article 189 states that "a Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods "

Directives thus differ from regulations in two fundamental ways Firstly, they do not have to be addressed to all the Member States and, secondly, they are binding as to the results to be achieved but they still leave States with some discretion where the form and method of implementation are concerned Directives that apply to all Member States have to be published in the Official Journal [16] Those that do not apply to all the states have to be notified to those to whom they are addressed The date of entry into force of directives is the same as that for regulations, namely either the date specified in the legislation itself or, if none is specified, then twenty days after publication [17] The institutions of the Community generally have discretion as to whether they legislate through directives or regulations There are, however, some articles of the Treaty, which specify that directives have to be used [18]

The fact that the institutions of the Community can legislate through the use of either regulations or directives offers them much flexibility Regulations are the most directly applicable of all the regulatory mechanisms in the European Union due to the fact that they need no Member State intervention to become part of the various domestic legal systems They thus cannot be derogated from,

[16] This became the case after the enactment of the Treaty on European Union Prior to this there was no duty to publish directives in the Official Journal but, in practice, many were
[17] Article 191(1) and (2)
[18] See, for example, Articles 54, 56(2), 63, 100 and 113(3)

amended or watered down in any way by national legislators [19] The use of the directive, on the other hand, provides the legislators with the flexibility to make certain provisions applicable only to certain Member States The advantage of this is that it eliminates the cumbersome procedure of having to make all legislation transpositional into every legal system within the Community before it can be enacted It can be difficult to devise regulations that possess the required specificity as well as the required flexibility for integration into the various legal systems The various advantages and disadvantages are examined throughout the content of this thesis

3.2.5. Decisions

Article 189 states that "a decision shall be binding in its entirety upon those to whom it is addressed " They are to be notified to the addressee and must take effect as soon as that notification is made, which may specify a date for implementation [20] Decisions that are made under Article 189 must be published in the Official Journal There are a number of areas where the Treaty specifies that decisions are to be the method used for regulation One of the most common and important such areas is their use where a Member State has breached competition rules [21]

3.2.6. Recommendations and opinions

[19] See, for example, *Variola SpA v Amministrazione delle Finanze* [1973] ECR 981 where it was pointed out that Member States are actually prohibited from interfering with regulations in any way once they have been passed into law by the Community institutions
[20] Article 191(3)

Recommendations and opinions have no binding force [22] This does not, however, exclude such measures from the judicial process National courts can make references to the European Court of Justice concerning their interpretation and validity [23]

3.3. Direct effect and direct applicability

3.3.1. Principle of direct effect

The principle of direct effect arises when a community measure fulfils certain conditions that would allow individuals to maintain rights conferred by it in national courts Community law that is directly applicable enters into force in national legal systems without any act of reception or incorporation [24] This may be the case for community regulations but it is not so for directives, thus their possibility of being directly effective as opposed to being directly applicable must be examined

3.3.2. Conditions for direct effect

The European Court of Justice has established in a number of cases, originally in *van Gend en Loos v Nederlandse Belastingensadministratie*[25], that a provision of the Treaty of Rome is directly effective in the domestic law of Member States if it is -

---

[21] Craig & deBurca (1995) p101
[22] Article 189 of the Treaty
[23] See, for example, *Grimaldi v Fonds des Maladies Professionelles* [1989] ECR 4407

(i) clear and precise,

(ii) unconditional, and

(iii) of such a kind that it requires no further action on the part of the Community institutions or the Member States, or if the measure does actually require execution, that it leaves no discretion to the Member States in such execution

3.3.3. Direct effect of directives

The principle of direct effect was extended to directives in the case of *Van Duyn v Home Secretary*[26] in which the Court of Justice outlined a similar test to that in *van Gend en Loos* -

> [t]he provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community or of Member States

Where a State is in breach of its obligation to implement a directive the possibility of direct effect arises The decision in *Pubblico Ministero v Ratti*[27] provides us with an excellent example of the principle of direct effect in action Here two directives on solvent and varnish labelling and packaging had implementation dates in 1974 and 1979 respectively [28] Mr Ratti's firm complied with both directives but neither had actually been implemented by the Italian government and Ratti was prosecuted for failing to comply with the relevant

---

[24] Winter, JW (1972) "Applicability and Direct Effect" Common Market Law Review, Volume 9, p 425
[25] [1963] ECR 1
[26] [1974] ECR 1337
[27] [1979] ECR 1629
[28] Directives 73/173 and 77/728.

Italian law which differed from that set out in the two directives The European Court of Justice ruled that the first directive was directly effective, as its implementation date had passed, on the grounds that a State can not rely upon its own wrongdoing against an aggrieved individual The second directive was found to be incapable of having such an effect until its implementation date had passed

The direct effect of directives has been accepted by the Irish courts on a number of occasions In *Browne v An Bord Pleanala*[29] Barron J summarised the law thus -

> [w]here the directive is sufficiently clear and unconditional, [the State] is estopped from relying upon the law as it actually is, but is bound by the law as it should be

In *Marshall v Southampton and South-West Area Health Authority*[30] a dietician who had worked for the respondent was dismissed on the ground that she had passed the normal retiring age applicable to women It was referred to the European Court of Justice as to whether she could rely on the provisions of the Equal Treatment Directive[31] against the health authority

The Court stated that under Article 189[32] of the Treaty the binding nature of a directive existed only in relation to each Member State to which it was addressed and not to individuals Advocate General Slynn had stated in his opinion on the case that this 'horizontal effect' of directives could not exist as it

[29] [1989] ILRM 865
[30] [1986] ECR 723
[31] Directive 76/207
[32] Now Article 249

would eradicate the distinctions that were established in the Treaty between directives and regulations

There are, without a doubt, problems with the legal certainty of the horizontal direct effect of directives There are difficulties with vertical effect as well, and the legal basis for it, given the wording of Article 189 of the Treaty Despite the imposition of a limitation on horizontal effect the Court has still begun to develop a series of ways that it can enhance the domestic application of this type of legislation

3.3.4. Horizontal direct effect

In the *Marshall* case there was a recognition that the direct effect of directives could not be extended horizontally Despite this it was concluded that the complainant could still rely on the provisions of the directive in question when viewing the respondent health authority as an organ of the State and thus answerable to the provisions of the legislation Advocate General Slynn stated that the State must be interpreted in a broad manner to include all of the organs of the State as well Broadening the scope of what can be considered as the State has thus been developed as a mechanism for expanding the scope of vertical direct effect in a horizontal manner

3.4. Transposition of legislation into domestic law

3.4.1. Legal basis

Article 29 4 5 of Bunreacht na hÉireann, combined with the European Communities Act, 1972 gives effect, in general terms, to the Treaties of the European Union Regulations are, as previously mentioned, self-implementing into domestic law Most of the European Union regulation of labelling is, however, carried out through the use of directives These do require measures to be taken by the national authorities for their transposition into domestic legal systems [33]

Article 189 of the Treaty specifies that the form and method for the implementation of directives is a matter for the individual Member States to decide Directives regulating the food industry are mostly implemented into Irish domestic law through the use of statutory instrument regulations[34] and, occasionally, through Acts of the Oireachtas This has led to the necessity for an enormous amount of domestic legislative activity Legislation is being constantly amended and created by membership of the European Union Where food is concerned, much of the legislation deals with areas which were free from regulatory supervision prior to the enactment of directives by the European legislators and this has thus completely altered the regulation of food products in Ireland including, therefore, the regulation of food labelling

3.4.2. Failure to implement a directive

Under Article 189 of the Treaty a directive is to be "binding as to the result to be achieved, upon each Member State to which it is addressed, but shall

[33] Article 189 of the Treaty as amended
[34] Section 3 of the European Communities Act, 1972

leave to the national authorities the choice of form and methods" National implementation of directives is specifically envisaged and considered necessary by the Treaty Often directives are the product of much negotiating between the Member States in an attempt to reach a set of harmonising principles The corresponding laws in these states may have been widely diversified before the drafting of the directive, so their implementation may require a large degree of accommodation in the different jurisdictions To aid in this process, directives often contain certain discretionary options for individual States What is important is that this process still enables the central aim of the directive to transcend any derogations or discretion allowed While in principle this appears like an appropriate solution to the problems involved with harmonising the various laws, the level of leniency involved can often create problems where the principle of direct effect is concerned

If a directive leaves discretion to the individual Member States, then the fundamental aspects that make European law directly effective can not be satisfied For direct effect to exist the provisions concerned must be clear and precise, unconditional and of such a kind that they require no further action on the part of the Community institutions or by the Member States Where measures do require implementation, they must leave no discretion to the Member States in such implementation [35] This has been ruled to be the case for directives in particular [36] What gives this point further relevance to this study is that this form of legislation is that which is most commonly chosen for the regulation of food

[35] *van Gend en Loos v Netherlandse Belastingsadministratie* [1963] ECR 1
[36] *van Duyn v Home Secretary* [1974] ECR 1337

products However, directives may leave discretion to the Member States, they always require further implementation and, according to Article 189 of the Treaty[37], they may not be so sufficiently precise that they must be set out in general terms because they are to be binding, but only insofar as to the result to be achieved

Many of the fundamental principles and policies of the Community rely upon the proper implementation of directives As a consequence of this, the European Court of Justice has developed a policy whereby individuals can rely upon directives before national courts, even where they have not been fully implemented in the Member States [38]

Despite the adoption of this approach by the Court a vital question still remains How can the direct effectiveness of directives be reconciled with the conditions that the Court has established to be necessary for direct effect to exist? The whole area of the direct effectiveness of directives is ambiguous as a result of the lack of clarity and logic that has been adopted in the attempts to answer this question While it may be lacking in clarity, what we can certainly derive from the case law is that directives are considered to be directly effective and that there should be no excuse available to States who choose to ignore this

Ireland has demonstrably failed to implement directives in the area of food regulation on numerous occasions This implementation failure often has to do with timescales and the transposition of legislation later than that which has

[37] Now Article 249
[38] *Pubblico Ministero v Ratti* [1969] ECR 1629

been set out in the directive itself[39] It has also been because of excessive derogation on occasions

3.4.3. Court actions

Actions have been brought before the European Court of Justice on occasions against Member States who have failed to implement food-related directives within the prescribed period This was the case as early in the food law harmonisation programme as 1978 In *Commission v Netherlands*[40] an application was brought before the Court for a declaration that the Netherlands Government, by not adopting within the prescribed period of eighteen months the laws, regulations or administrative provisions necessary in order to comply with Directive 71/347 on the approximation of the laws of the Member States relating to the measuring of grain, had failed to fulfil its treaty obligations[41] The implementation of the Directive by the Member States was seen as being vital to ensuring the elimination of technical barriers to trade, which were the result of disparities that were in existence between the provisions on the matter that were in place at the time in those States

Under Article 7 of Directive 71/347 the Member States were to adopt the appropriate measures for compliance with the Directive, including implementation, within eighteen months The Netherlands authorities failed to comply with this provision The Commission, in applying Article 169 of the Treaty, afforded the Netherlands authorities the opportunity to submit

[39] See Appendix One
[40] [1978] ECR 863

observations on the matter The Netherlands in turn informed the Commission that they were aware that they had failed to fulfil their obligations, claiming that their failure to implement the Directive had had no adverse affect on the functioning of the common market This line of argument was not, however, accepted by the Commission who ruled that the defendant state had failed to fulfil their obligations under the Treaty

A similar issue arose in the case of *Union Laitiere Normande v French Dairy Farmers Limited*[42] This case arose in the course of an action between a group of agricultural co-operatives incorporated under French law and an English subsidiary The dispute concerned the performance of a contract to supply standardised whole milk produced in France and exported to the United Kingdom The milk in question was packaged in containers with a volume of one litre

When the subsidiary company decided to terminate the contract for the supply of the milk an action was brought by the group of co-operatives for its non-performance During those proceedings several questions were referred to the European Court of Justice concerning the free movement of goods Aspects of these questions concerned the compatibility of the British Weights and Measures Act, 1963 with the European Community directives dealing with the same issue, most importantly Directive 75/106 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged

[41] OJ, English Special Edition 1971 (III), p 852 et seq
[42] [1979] ECR 2663

liquids [43] The Court noted that the object of this directive was, according to the first recital in the preamble, to harmonise "the conditions of presentation for sale of liquids in prepackages" on the ground that these conditions were in most of the Member States "the subject of mandatory regulations which differ from one Member State to another, thereby hindering trade in such prepackages "[44]

Directive 75/106 provides that Member States have a period of eighteen months from the date of its notification in which to implement the provisions necessary to comply with it [45] It also provided however that Belgium, Ireland, the Netherlands and the United Kingdom could defer implementation of the Directive until 31 December 1979 [46] As a result of this exemption the United Kingdom Government could thus have continued to enact the provisions of its Weights and Measures Act, 1963 until that date They were thus entitled to prevent the marketing of milk on their territory unless it was packaged in volumes of one third of a pint, half a pint or multiples of half a pint under the provisions of the 1963 Act The product in question in this case was imported into the United Kingdom in one-litre packages The Court thus found that since the date for the implementation of the provisions of Directive 75/106 had been deferred for the United Kingdom, the maintenance in force of the provisions of the Weights and Measures Act, 1963 was not, at the date of the imports in question, prohibited by the rules of community law The United Kingdom could therefore, at that date,

[43] OJ L 42, 15/02/1975, p 1
[44] Paragraph 11
[45] Article 7(1)
[46] Article 7(2)

apply it to the marketing in its territory of prepackaged milk made up in containers of one litre imported from another Member State [47]

This case, while clearly enforcing the provisions of the Directive, does highlight the detrimental effects that the placing of exemptions in that form of legislation can have on the promotion of the free movement of goods Directives have the advantage over regulations in that they can offer more in the way of flexibility by the granting of such exemptions At the same time, however, these exemptions can inhibit the enforcement and promotion of the same directives in Member States that do not benefit from the concessions in question If State A has to fully implement a directive several years before State B, for whatever reason, then any exports from A to B of the product covered by the directive will not be possible if those products conform to the provisions laid down in that directive, unless A produces two different types of the product, one which satisfies the provisions of the directive and thus can be sold on their domestic market and another that conforms with the domestic provisions of B and thus can be marketed there This would seem to be totally contradictory to the aim that the directive would be seeking to address, that of the harmonisation of rules to ensure that the free movement of goods is possible between Member States Directives offering this type of flexibility highlights one of the reasons why they are not a suitable medium for important food legislation in the European Union and why the increased use of regulations is now desirable

In *Commission v Luxembourg*[48] an action was brought against the defendant State for failing to transpose Directives 90/219 and 90/220 on

[47] Paragraph 16

genetically modified organisms into its domestic law by the prescribed date Article 22 of Directive 90/219 and Article 23 of Directive 90/220 provide that the Member States were to bring into force the laws necessary to comply with those directives by 23 October 1991 In addition to this it was required that the Member States inform the Commission of the measures that they had adopted to ensure this

The Commission received no notification from Luxembourg as to the measures that they had taken to implement the two directives by 20 May 1992 and thus initiated proceedings against them The Luxembourg Government did not deny that it had failed to implement the two directives within the prescribed period but it contended nevertheless that the proceedings should be dismissed They claimed that the delay involved was due to the complexity of the subject matter They also argued that they were near transposition of the legislation, a fact that would render the proceedings devoid of purpose The Court noted that it had consistently held that a Member State could not plead circumstances existing in its legal system in order to justify a failure to comply with the obligations and time limits laid down in a directive [49] The action was thus considered by the Court to be well founded They declared that, by failing to adopt within the prescribed period the measures necessary in order to comply with the two directives, Luxembourg had failed to fulfil their obligations under those directives Ireland did not implement these two directives until 1 January 1995

[48] [1996] ECR I 5143
[49] *Commission v Germany* [1996] ECR I-2423

3.4.4. Penalties for failure to implement community legislation

While Article 189[50] of the Treaty declares that Member States must take the appropriate measures to transpose community legislation, it puts in place no enforcement mechanism to encourage this It thus fell upon the European Court of Justice to implement some form of penalty for a failure on the States part to act in the appropriate manner It was afforded the opportunity to do so in the joined cases of *Francovich v Italian State* and *Bonifaci v Belgian State*[51]

The joint cases arose as a result of the Italian Government's failure to implement Directive 80/987[52] on the protection of employees in the event of their employers becoming insolvent The Directive was to be implemented by October 23, 1983 The Italians took no steps to transpose and as a result the Court of Justice found in February 1989 that Italy had failed to fulfil its treaty obligations in the case of *Commission v Italian State*[53] By 1991 the Directive had still not been implemented The applicants were owed arrears of salary under the legislation and thus sued their company as well as the State The liability of the State was then examined before the Court of Justice

Two separate issues were raised in the case The first looked at the direct effect of the Directive The second examined the extent, if any, of a member State's liability for any damage arising from a breach of obligations imposed upon it by community law

[50] Now Article 249 (Post Amsterdam)
[51] [1991] ECR I-5357
[52] [1980] OJ L 283, p 23
[53] [1989] ECR 143

On the first question the Court found that the Directive was not directly effective If the State were held to be liable under the Directive then it would be taking on obligations that were not its own The provisions of the Directive could thus not be invoked directly against the State On the second question the Court held that -

> [w]here, as m the present case, a Member State fails to fulfil an obligation imposed upon it by Article 189(3) of the Treaty to take all the necessary steps to achieve the result required by the Directive, that provision of Community law, to be fully effective, must give rise to liability for damages provided that three conditions are fulfilled
> 1 The result required by the Directive must include the conferring of rights for the benefit of individuals,
> 2 The content of these rights must be determinable by reference to the provisions of the Directive, and
> 3 There must be a causal link between the breach of the obligation of the State and the damage suffered by the person affected [54]

Member States were thus to be held financially liable for a failure on their behalf to implement provisions of community legislation where their citizens suffered damage as a result

The Court has since further elaborated its doctrine on state liability for breaches of community law in a series of judgements It is now clear that if a domestic court of a Member State finds that state liable for breach of its treaty obligations, after the domestic court's application of the three conditions set out in the *Francovich* case, then that state must compensate those adversely affected It is for the domestic legal system of each Member State to decide on the damages, once the criteria used are not less favourable than those applying to similar claims based on domestic law and they must not be such that it would become impossible or very difficult to obtain reparation

The facts of the matter are that the Court has been incorrect to extend the doctrine of direct effect to directives It is clear from the wording of Article 189 of the Treaty that they were never designed to receive such a status Efforts by the Court to give this extra importance to this type of legislation may be a method of disguising the fact that it is not the effectiveness of the directives that is the root of the problem with their implementation but it is actually the fact that their over-use has led to the development of a situation whereby it has become almost impossible to implement and adhere to the vast quantity of piecemeal and ever-changing provisions Placing the responsibility for non-implementation entirely at the feet of the Member States would thus appear to be grossly unfair

A decision such as that in *Francovich* is unlikely to achieve the desired effect anyway due, in part at least, to the fact that the piecemeal nature of requirements means that most would remain unaware of what exactly their rights are under the various European directives *Francovich* can also be seen as being a poorly timed decision given the timetable put in place by the Single European Act for law harmonisation making it very difficult for Member States to have all of the necessary provisions in place

3.5. Single European Act

3.5.1. Alterations to the Community structure

The Lord Cockfield inspired timetable for the completion of the internal market was afforded a concrete commitment by the drafting of the Single

[54] Paragraphs 39 and 40

European Act It put in place a deadline of 1992 by which time the various barriers to trade that remained in existence would have to be removed

It is not in dispute that at the time it was signed, in 1986, the Single European Act represented the most important revision of the Treaties establishing the European Community since their original adoption It did receive criticism from some quarters however for being limited and regressive [55] Despite this it did put in place a new momentum towards integration which was later furthered by the signing of the Treaty on European Union in 1992 and the Treaty of Amsterdam in 1997

Some of the alterations to the structure of the Community that the Single European Act helped to introduce included the creation of an additional court to assist the European Court of Justice in its tasks It also brought about the introduction of a new legislative procedure, known as the 'co-operation procedure', which included an increased input for the European Parliament in the legislative process The changes that this thesis is most concerned with however are those that brought about the increased legislative tempo in an effort to promote the free movement of goods

The Treaty was amended slightly by the Act to include, *inter alia*, an altered Article 8a [56] It stated that -

> [t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article [ ] The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty

[55] See, *supra*, Chapter 2
[56] Now Article 18

3.5.2. Qualified majority voting

Another feature introduced into community law by the Single European Act was qualified majority voting This was a new voting system that was to be adopted for use in a number of areas that had previously relied upon unanimous agreement for the introduction of any new measures This also helped to put in place an increased legislative tempo as now the measures introduced to achieve the objectives of the amended Article 8a would only require acceptance by a qualified majority of States when their aim was to further establish the internal market Previously the Council had been obliged to act unanimously when issuing directives for the approximation of national measures that affected the establishment or functioning of the common market The introduction of this new voting system would have obvious advantageous consequences for reaching the necessary consensus in the legislative process

3.5.3. Vertical directive simplification

It will become apparent throughout the course of this thesis that the policy that has been adopted of overusing directives as the method of regulating the labelling of food products in the European Union is in urgent need of reconsideration Much of this over-regulation has been brought about as a direct consequence of the timetable put in place by the Single European Act This fact has also been recognised, but to a lesser extent, by the Economic and Social Committee They called for, in 1996, the simplification of directives relating to

inter alia chocolate, honey, sugars and fruit juices Two of these products are dealt with specifically in this thesis, where it will be argued that any suggestions that have been made by institutions of the European Union on this matter have failed to address the issues that have been allowed to continue without challenge for nearly thirty years [57]

3.6. National food authorities

3.6.1. Food Safety Authority of Ireland

To aid in the process of legislation implementation, and to improve the standards of the enforcement of that legislation, the Food Safety Authority of Ireland Act, 1998 was passed It is designed to establish a body that will help to ensure that consumers are afforded the utmost protection when purchasing food The Authority is to be independent in the exercising of its functions [58] Its principle function is to ensure that both food produced and that to be sold in the State meet the highest standards of food safety and hygiene [59]

In order to achieve the highest level of protection possible the Authority is to promote and encourage, at all stages of production and consumption, the establishment and maintenance of high standards of food hygiene and safety [60] To help achieve this the Authority is to carry out, or arrange to have carried out,

[57] See, *infra*, Chapter 6
[58] Section 10
[59] Section 11
[60] Section 12(1)

such food inspections as it feels are necessary to ensure compliance with the legislation [61]

The Authority is also to have an advisory role It is to advise the government on issues relating to a number of matters, including the labelling and packaging of food [62] It may also collect all food legislation and publish it in a form that it considers appropriate, collect and assess statistical data on the official control of food and also collect data relating to its production and consumption [63] Official control of food includes all the systems of inspection and control relating to the production, manufacture, storage, sale or use of food that are required by law It is obliged to constantly review and report annually on the efficacy of the food inspection services [64]

Part IV of the Act deals with the enforcement of food safety standards The Authority is afforded the power to enforce the standards that are set down in the legislation [65] To aid in this process, the Authority is to ensure that inspections, approvals, licensing arrangements and registration agreements are carried out It is also to have responsibility for the inspection, sampling and analysis of food, including food ingredients, and the inspection and analysis of food labelling to ensure compliance with the relevant food legislation [66]

Authorised officers are afforded certain powers to aid in the enforcement of compliance with the law [67] This includes the power to examine records, enter

[61] Section 12(2)
[62] Section 15
[63] Section 16
[64] Section 17
[65] Section 45
[66] Section 46
[67] See Appendix Two

premises and conduct interviews [68] Anyone failing to comply with these requirements when requested is liable to a fine or imprisonment or both Where an authorised officer is of the opinion that certain production activities pose a serious risk to public health they may, after further consultation, serve a prohibition order on the producer or trader This order may state that a particular consignment, batch or item of food be withdrawn from sale [69] For the purposes of the Act, food legislation means the acts set out in part I, the statutory instruments in part II and also any legislation that may be deemed as food legislation enacted after the establishment of the Act [70]

The food inspection services that have been afforded various powers under the regulations that are designed to implement the European Union legislation have been found to be wholly inadequate Responsibility for the enforcement of food legislation was passed from the various authorities to the Food Safety Authority of Ireland by August 1999 It was this process of transferral that exposed the serious shortcomings in the food inspection arrangements Some of the deficiencies that were revealed included -

(i) some local authorities not having a full-time veterinary inspection service to look after the implementation of regulations,

(ii) inspection of retail butchers being carried out by two separate bodies, the health boards and the local authorities, and

(iii) low levels of sampling and analysis of pesticides in foods

[68] Section 50
[69] Section 54
[70] Section 2

The Food Safety Authority of Ireland Act falls well short of setting up the independent, law construction and enforcement body that is necessary to ensure the proper implementation of European Union legislation in Ireland The enforcement mechanisms envisaged are practically identical in nature and construction to those appearing in the earliest statutory instruments associated with food labelling The legislation coming within the scope of the Act, as set out in Parts I and II, excludes many of the European directives that were not afforded an enforcement mechanism at their original drafting by either the European Economic Community or the domestic legislators [71]

The Act may possess a type of unifying role, which is to be welcomed, for some of the legislation already in place and for any new legislation that is forthcoming which is related to food, but it still lacks the originality necessary for its purpose, namely as an aid to the process of legislation implementation While it has to be recognised however that the real problem where food labelling legislation is concerned is, most definitely, at a community level, this Act could have achieved far more than it appears to have done It could have addressed properly the issue of derogation from community legislation and ensured that the domestic legislators did not deviate from the standards set down there A more effective enforcement mechanism through the increased use of penalties such as fines could also have been considered important enough to merit a larger role in the Act

At a community level much work still needs to be done to ensure that when we are met with initiatives, such as the Food Safety Authority of Ireland

[71] See Chapter 6 3 2

Act, the bodies established by such legislation are given real purpose As the thesis progresses it will become clear how the legislative system that has developed in the European Union in relation to food labelling has made itself unenforceable There are two main reasons for this Firstly, the almost total use of directives instead of regulations has led the Member States into a belief that they are free to derogate from some aspects of the legislation and, in some circumstances, to implement it late or not at all Secondly, the directives that have been drafted have led to a very piecemeal system being developed that is hard for both consumers and producers to trace All of this leads to a lack of consumer confidence, as they are unaware of the protections that producers are obliged to adhere to, to ensure that they are capable of making an informed purchase with the aid of accurate labelling Producers are faced with problems too, as they also become unaware of the law Exactly how these two situations have come about and how the problems attached to them can be rectified are dealt with throughout the course of this study

3.6.2. Proposed United Kingdom Food Standards Agency

The United Kingdom Government has proposed to develop a body specifically designed to control food safety It is intended to name this body the Food Standards Agency One of the main reasons underlying their proposal was a fear that the public had lost confidence in the standards of British food In order to re-establish this confidence, and to increase trust levels in the food industry, it

was envisaged that there would be far greater inclusion of veterinarians and medical experts in the legislative process

It was proposed to establish the new agency as a non-departmental public body with executive powers The Agency would have a large degree of consumer and public interest involvement with its operations The Agency was then to report to Parliament through the Minister for Health while other Ministers, such as the Minister for Agriculture, were also be involved The remit of the proposed Agency was to include coverage of food labelling requirements It was proposed that its role would include the development of policy, the proposal and drafting of legislation and responsibility for the education and availability of information to consumers for all areas within its authority It was also proposed that it be entrusted with various powers to aid in the carrying out of its functions, including access to information, surveillance and enforcement powers at all stages in the production process It was expected that the Agency would work closely with the local authorities to produce a coherent organisation with a national, regional and local structure

The operations of this new body would replace the existing food law system operating in Britain Under the previous system the Department of Health would take the lead on issues of food law They would then be advised by a series of expert committees Laws would then be drafted

3.6.3. Food Standards Bill

The remit and functions of the Agency were set out in the draft Food Standards Bill The main features of the Bill were -

(i) it established the Food Standards Agency, which would be a non-ministerial government department and conferred upon it the necessary functions, powers and duties to carry out its tasks,

(ii) it set out the general functions of the Agency and afforded it the right to make public any advice that it may offer to Ministers, government departments or anybody else,

(iii) it provided powers for the Agency to carry out surveillance and to propose regulations under the Food Safety Act 1990 to cover the full range of activities connected with the production and supply of food which may cause safety-related difficulties, and

(iv) it provided new powers for the Agency to set standards for, and monitor the performance of, local authority and food law enforcement

The draft Food Standards Bill gave effect to the proposals set out in the White Paper The main purpose of the Bill was to establish the Food Standards Agency, provide it with functions and powers and to transfer to it certain functions that were previously carried out by the Minister of Agriculture, Fisheries and Food

Clause 9 of the Bill deals with the development of food policy and the provision of advice It gives the Agency the function of providing advice, information and assistance to any public authority, including local authorities or government agencies The advice that it may provide could include the making

of recommendations to Ministers on the need for new legislation designed to improve food safety or standards The Agency is also afforded the position under clause 9 of representing the United Kingdom at working level in relevant European Union and other international fora

Clause 10 deals with the provision of advice to those who are not public authorities Under it the Agency would be able to, *inter alia*, run information campaigns on issues of current interest, publish scientific data, run a consumer helpline and issue food hazard warnings

Clause 15 deals with the monitoring of enforcement actions Under it the Agency is empowered to require any information that may be relevant to the assessment of an enforcement authority's performance These would usually be local or health authorities as set down in the Food Safety Act 1990 The Agency also receives the power to enter and inspect premises in the role as monitors They may take samples and examine relevant data and records

Clause 20 deals with the implementation of international agreements by the Agency It allows the Secretary of State to give the Agency directions to do anything that the United Kingdom may be obliged to do under European Union or international law The power to issue directions under this clause is also vested in the devolved authorities of Scotland and Wales where the directions relate to the implementation of European union or international obligations within their devolved competence

In January 1999 a document was produced that outlined the consultation that had taken place on the proposed United Kingdom Food Standards Agency It

was presented to the Parliament by the then Minister of Agriculture, Fisheries and Food It was designed to initiate further consultation on the Government proposals for changes in the arrangements for the handling of food safety and standards issues It also summarised any progress that had been made since the publication of the White Paper on the establishment of the Agency[72] and invited comments on the draft Food Standards Bill

3.7. Australian food regulation

By examination of the general method of legislating adopted by the Australia New Zealand Food Authority, and comparing it to that obtaining in the European Union, this thesis demonstrates how the adoption of a simple legislative method could be used to avoid many of the complications that can arise if a multi-state body attempts to legislate on too wide a variety of areas of food labelling prior to the establishment of a series of framework rules that have clearly demonstrated themselves as being operable

In order to enhance food safety standards and to increase the levels of free trade between the two states, Australia and New Zealand have formed the Australia New Zealand Food Authority This body is comparable to the European Union in several ways It contains more than one Member State, it is designed to enhance the free movement of goods and it creates legislation in order to encourage this concept of free movement

The Constitution of Australia specifies that food law may be the subject of both national and state legislation There is thus a system in place similar to that

[72] "The Food Standards Agency A Force for Change " Cm 3830 January 1998

of the European Union where the power to regulate food production is entrusted to two separate bodies, these bodies in the European Union being the Community itself and the individual Member States

During the 1980s, in order to alleviate the regulatory burden on the various parties involved in the food trade, the Australian States enacted a system for the creation and adoption of uniform food legislation This was done through the adoption of the Food Standards Code, which is now known as the Australia New Zealand Food Standards Code This code prescribes, *inter alia*, certain labelling standards for all food offered for sale in Australia and New Zealand

The Australia New Zealand Food Standards Council considers and, if appropriate, approves the food standards drafted by the Australia New Zealand Food Authority It also oversees the implementation and operation of this uniform legislation The standards are automatically adopted as being part of the food laws of each State and Territory once they are published in the Commonwealth of Australia Gazette, similar to the form that the directly applicable regulations take in the European Union Unfortunately, however, the European Union legislators persist in regulating through the use of directives, which are not afforded a status similar to that of the regulation or the Australia New Zealand Food Authority standards

The Authority sets food standards by drawing on the expertise of its staff To assist in this process it also seeks the advice and opinions of the food industry, government departments, the public, consumer associations, analytical laboratories, the National Health and Medical Research Council and other

professional bodies and professionals Alterations to the Food Standards Code may be requested by the food industry, governments departments or concerned individuals The Authority has the power to develop or review standards on its own initiative as well The Authority then consults the broad set of bodies mentioned before making a recommendation On the basis of the scientific information available and any input that has been made in the consultative process, the Authority makes recommendations to the Australia New Zealand Food Standards Council After a recommendation is made to the Council the latter may adopt it or order the amendment of it The acceptable draft is then published in the Commonwealth of Australia Gazette which also specifies the date on which the new standard is to take effect This type of consultative process is, unfortunately, absent from the legislative system in operation in the European Union Its inclusion in that system could lead to greater levels of transparency, accountability and democracy in the food labelling legislation of the European Union and thus help to avoid the types of consumer demonstrations that have developed there [73]

In addition to the procedures already mentioned, the Authority also undertakes a biennial survey to examine the level of pesticides and other contaminants entering the food chain It also co-ordinates food surveillance projects in close consultation with the State and Territory governments Many of the findings and activities of the Authority are then published

The Australia New Zealand Food Authority itself is a statutory body coming under the direct control of government ministries It was established by

[73] See, *infra*, Chapters 9 and 10

the Australia New Zealand Food Authority Act, 1991 and comprises of seven government-appointed members Their expertise is to be drawn from a wide background including industry, consumer affairs, food regulation and food science

One of the major catalysts for the foundation of the Authority was a recognition that there was a large regulatory burden on the various parties involved in the food industry To alleviate this problem a series of unifying food legislation was enacted The Australia New Zealand Food Authority Act, 1991, as amended by the National Food Authority Amendment Act, 1995, delegates to the Authority the power to develop and review existing food regulatory standards Food safety, packaging and labelling are all controlled by regulations made pursuant to the various uniform acts These regulations are constantly under review and reform by the Australia New Zealand Food Authority While there has been recognition at European Union level that a piecemeal system of legislation in relation to food labelling is undesirable, there has been little in the way of affirmative action to rectify this self-inflicted situation [74]

Despite the fact that the Food Authority and the Food Standards Council were established under commonwealth acts it remains the responsibility of the health departments in the various regions to administer and enforce the provisions of the food legislation It is up to these regions to use their own regulatory system for the enforcement of these codes A similar delegation of powers at an official level to the relevant departments in the various Member States of the European Union would be another positive step that could be taken there This

would make the legislation enacted more enforceable at domestic level as some of the feeling of remoteness from the European Union may be removed from the consumers in the Member States

The Australia New Zealand Food Authority Act is constantly under review As a result of this there is now a recognition that change is necessary to keep the legislative scheme as uncomplicated as possible It has been recommended that the various provisions should be included in a series of revised uniform food acts Most of the provisions that are considered necessary to be included in this revision are contained in the food acts currently in existence The recommendations simply unify and update them The recommendations also set out existing administration and enforcement arrangements in each jurisdiction and consider how developments in the international food regulatory environment may require alterations to the present system Keeping the legislation as simple as possible would also be desirable in the European Union as a complex and piecemeal system of legislation has unfortunately been developed there due to the manner in which the European Union has legislated thus far

3.8.United States food regulation

3.8.1. Structure and organisation of the Food and Drugs Administration

The regulation of food in the United States of America is organised through the Food and Drugs Administration Its legal authority is outlined in the

[74] See, *infra*, Chapter 5

Food, Drugs and Cosmetics Act, 1938, and related laws Its structure is not however set down in any statute

The 1938 Act, as amended, establishes the basic legal framework controlling the activities of food producers The Administration has also been delegated responsibility for administering other important regulatory laws applicable to food The main assignment of the Administration is to ensure that the products it regulates are safe and truthfully labelled

The activities of the Food and Drugs Administration have altered somewhat from concentrating on the enforcement of statutory prohibitions to choosing among a series of closely balanced alternatives designed to control ever-advancing technologies

3.8.2. United States of America food labelling requirements

The marketing of food in the United States is regulated by the 1938 Food, Drugs and Cosmetics Act Under section 403 of the Act every food label must bear, at the very minimum, the following four categories of information -

(i) the name of the food,

(ii) a statement of the ingredients contained therein,

(iii) the net quantity of the contents of the product, and

(iv) the name and address of the manufacturer or distributor

After the White House Conference on Food, Nutrition and Health in December 1969 these four standard statutory categories of mandatory information remained The Conference did however set in motion a new approach to Food

and Drug Administration food labelling requirements Convened in response to charges of widespread malnutrition and hunger in the United States, the results of the Conference were to reflect a new emphasis on the provision of adequate information to consumers rather than establishing rigid standards for product composition

The requirements for ingredient listing were extended to include as many ingredients as possible Under the Act a standardised food is not required to list mandatory ingredients, only the optional ones that are specified as being required to be labelled under the actual standard The Food and Drugs Administration urged manufacturers and distributors to include in the statement of ingredients both mandatory and optional ones It also began to amend the existing food standards to make as many mandatory ingredients optional as possible and to require the labelling of all optional ingredients

After the introduction of the Act, food names were supposed to accurately identify or describe the basic nature of the food or its characterising properties or ingredients They were to achieve the effect of distinguishing it from other, different foodstuffs

Food standards under section 401 of the Act have been designed to promote honesty and fair dealing in the interest of consumers By 1970 it was estimated that half of the American food supply was subject to a Food and Drugs Administration food standard They define and identify a food product for that very purpose

When the early food standards were established modern food technology was beginning to flourish Accordingly, the Food and Drugs Administration adopted the policy of establishing 'recipe' standards to identify products under which every permitted ingredient was specifically listed in the standard Under this system no new ingredient could be used until the standard had been amended to include it With the enactment of the Food Additives Amendment Act 1958 and the Colour Additive Amendments of 1960 the use of 'recipe' standards was no longer necessary In the 1960s any safe and suitable functional ingredient was permitted for inclusion but this did not lead to a broadening of the scope of the existing standards

As foods have become increasingly processed claims that a product is 'natural' or that it contains only 'natural ingredients' or has been grown under 'organic' conditions have become common These types of representations have led to regulatory agencies feeling compelled to establish enforcement policies in this area

The Food and Drugs Administration initially adopted the position that the only food products that could be lawfully marketed as being natural were raw agricultural commodities that were sold in their natural state without any processing By the middle of the 1970s the Administration had concluded that it would prohibit use of the term 'natural' only for products containing artificial colours, flavour or other synthetic ingredients such as chemical additives

Weight labelling has led to problems, particularly so where the moisture content of food products is concerned Food stored in a moist or dry climate may

gain or lose weight depending on the circumstances encountered Rules were thus developed to regulate the gain or loss of moisture during transportation or storage When California adopted its own rules that differed slightly from those set down by the Food and Drugs Administration the matter came before the United States Supreme Court After this, regulations were proposed that would allow variations below the declared weight to a set maximum level The maximum permitted levels are based upon two handbooks of the National Institute of Standards and Technology [75]

The Food and Drugs Administration has issued numerous regulations to explain the requirements for ingredient labelling that are set out in sections 403(i) and (k) of the Act The basic rule on this can be stated simply as all of the ingredients of a food must be listed in descending order of predominance Listing is to be by chemical name rather than class or function Spices, flavourings and uncertified colourings may be listed generically Chemical preservatives must be declared by both chemical name and by function There are some exceptions provided for the baking industry for ingredients acting as a leavening, yeast nutrients or dough conditioners These can be declared by their function instead of their specific name

3.9. Conclusions

European Union food labelling legislation is generally drafted through the use of directives and sometimes through the use of regulations Regulations

[75] The two handbooks were No 44, "Specifications, Tolerances and other Technical Requirements for Weights and Measuring Devices" and No 133, "Checking the Contents of

possess the advantage of direct applicability into the legal systems of the various Member States. Directives, on the other hand, are not directly applicable and thus have to be examined for direct effectiveness.

For legislation to be directly effective it must be clear and precise, unconditional and require no further implementation by the individual Member States. The *van Duyn* case extended the principle of direct effect to directives and this was later backed up by decisions such as that in *Ratti*.

Despite this, it is clear that individuals should not be able to rely on directives in their own states if the principles set out in *van Gend en loos* are not adhered to. Directives by their very nature are not clear and precise and will always require further implementation by the Member States. The absence of real clarity on this issue is just one of a number of reasons why the use of regulations on important matters of food labelling is preferable to the use of directives.

The form and method for the transposition of directives into the national law of the Member States is left up to those states. Where food labelling is concerned the directives involved are often altered or derogated from by the implementing domestic legislation. States often adjust the conditions of the legislation to suit their own domestic circumstances. This can lead to many problems. Most notably, the Treaty guarantees concerning the free movement of goods and consumer and health protection may be seriously affected.

If domestic laws vary between the Member States some producers are likely to be placed at a disadvantage. For example, if one Member State, State A,

---

Packaged Goods."

has fully implemented a directive while another, State B, has derogated from it, this is likely to create an unfavourable situation for producers in State A This can affect the free movement of goods for several reasons Firstly, the producer in State A may incur extra costs by adherence to the fully implemented directive This then places him in an unfavourable position when exporting to State B where the additional labelling requirements are not necessary

The whole concept behind law harmonisation was to aid in the process of free movement by making production requirements uniform in all of the Member States Harmonisation on important aspects of food labelling is generally carried out through the use of directives As has been identified, this can actually create a set of non-uniform rules due to non-implementation by some of the Member States

The full implementation of legislation in the harmonisation programme is also necessary to ensure that consumers are afforded equal levels of protection in all of the Member States There can be no doubting the fact that consumer and health protection have suffered as a direct result of the use of directives instead of regulations The directives themselves fail to adequately provide for protective measures Much of the legislation is hastily drafted and quite easily derogated from This has led to legislation having to be amended or repealed as soon as it is tested This will become apparent throughout the course of this thesis

Overall what can be concluded then is that regulations should be used more often then they are for the harmonisation of food labelling requirements,

once they are drafted in a clear and precise manner [76] The over-use of directives is not acceptable any longer as they have led to the development of a piecemeal system which has to be constantly placed under review and which has so far failed to aid in the promotion of the provisions safeguarded by the Treaty Bodies such as the Food Safety Authority of Ireland and the proposed United Kingdom Food Standards Agency, while conceptually a progressive development, appear to offer little in the way of a solution The proposal of the Food Safety Authority to develop a legislation collection in a specified format would however have the potential to aid all of the parties concerned to overcome the burdens created by the piecemeal and ever-altering nature of European Union labelling requirements

The Australia New Zealand Food Authority operates on a format somewhat similar to that in operation in the European Union An equivalent system of legislation creation and adoption to the one used by that authority might offer a practical solution to the current difficulties being encountered by the European Union

The Australia New Zealand Food Council, in which all states are equally represented, considers the legislation recommended in the Food Standards Code This legislation is then only approved after a consultation process with many interested parties, including consumer and producer groups, and after drawing on the expertise of its own staff Concerned bodies or individuals can request alterations to the approved rules at any stage thus creating a transparent and flexible system Apart from requested alterations, the legislation is constantly under review by the Authority itself Australia New Zealand Food Authority

[76] See *infra* Chapter 10 2

legislation also possesses the added advantage of immediate incorporation into the domestic law of the individual states and territories upon publication in the codes

The foundation of the association was conceived after a recognition that there was a necessity for uniform legislation as consumers and producers were both faced with a large regulatory burden similar to that with which they are currently faced in the Member States of the European Union Its model for the creation of legislation is based upon the principles of clarity, transparency and expert involvement The unification of food laws in Europe through a series of horizontal regulations with vertical appendices would be far more satisfactory than the continuation of a piecemeal system that has developed due to careless drafting that has taken place in an urge to fulfil the requirements of the Single European Act and the law harmonisation programme These regulations would also be required to repeal much of the legislation that is currently in place

The current remedy that is used by the European Union to try to improve unsound or outdated food labelling laws is to amend them These amendments often add to the disorder and regularly face amendment themselves soon after adoption Involving the Parliament to a greater extent in the legislative process could also help to alleviate this problem as legislation may be drafted on a basis that more accurately reflects public opinion [77] The ideas set out in this chapter are developed further throughout this study

[77] For an example of how the views of the Parliament are often ignored see, *infra*, Chapter 10

CHAPTER FOUR

THE FREE MOVEMENT OF GOODS

4.1. Introduction

Articles 30 to 36 of the Treaty of Rome deal with the free movement of goods in the European Union Articles 31, 32, 33 and 35 have, however, now expired Articles 30 and 34 are concerned with the basic prohibition on restrictions to the free movement of goods Article 36[1] creates derogations from this principle that allow the domestic laws of the Member States to restrict free movement in some circumstances, albeit limited ones These provisions that deal with the free movement of goods were described by Mancini AG as "the most important of the pillars upon which the Community edifice rests" [2]

> Article 36 states that -
>
> [q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States

Article 34 similarly prohibits quantitative restrictions on exports and all measures having equivalent effect

Quantitative restrictions are measures designed to prohibit or limit imports or exports of particular classes of goods by reference to their number, weight, value or other quantitative criteria [3] Measures having equivalent effect have proved more difficult to define The Court has elaborated the definition in a way that it is now far advanced from being a simple numerical restriction on the

[1] Now Article 30 (Post Amsterdam)
[2] *Duphar v Netherlands* [1984] ECR 523

volume of intra-community trade that is permitted by the individual Member States The scope of what can be caught in the developed definition of quantitative restrictions is quite wide, although it does tend to fluctuate from time to time In the case of *Keck and Mithouard*[4] the European Court of Justice took the opportunity to reconsider its previous case law on measures equivalent to quantitative restrictions on imports, a case law that had become prominent since that of *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein*[5], also known as the *Cassis* case

4.2. Article 36 Derogation

Article 36[6] of the Treaty creates an exception to one of the fundamental principles of it, that principle being the free movement of goods It must therefore only be used where necessary and as a result of this the list of exceptions that can be granted is exhaustive [7] As a consequence of the necessity for the adoption of such an approach the Court has found that the Article 36 derogation can not be used in circumstances related to economic policy,[8] the protection of creativity and cultural diversity[9] or the fairness of commercial transactions [10] Consumer protection is another area of public policy, a widely

[3] See, in particular, *R v Henn and Darby* [1979] ECR 3795
[4] [1993] ECR I-6097
[5] [1979] ECR 649
[6] Now Article 30
[7] *Commission v Ireland* [1981] ECR 1625 and *Commission v Italy* [1982] ECR 2187
[8] *Commission v Italy* [1961] ECR 317
[9] *Leclerc* [1985] ECR 2
[10] *Commission v Italy* [1982] ECR 2187

definable term, that is not recognised as capable of being afforded the protection of the derogation [11]

The protection of public health is an area of public policy where states may be afforded the use of the Article 36 derogation, particularly where the Community has yet to legislate on the area in question The Court has stated that -

> [i]n so far as the relevant Community rules do not cover certain pesticides, Member States may regulate the presence of residues of those pesticides in a way which may vary from one country to another according to the climatic conditions, the normal diet of the population and their state of health [12]

Article 36 sometimes therefore leaves a form of discretion with the national authorities This discretion is, however, limited by two factors Firstly, any discrimination that is created between imported and domestically produced products may not be arbitrary Secondly, national measures must not restrict trade any more than that which is necessary for the protection of the interest in question

In determining whether or not discrimination against imported goods is arbitrary their treatment is measured against that taken towards domestically produced goods [13] For derogation under Article 36 to be considered acceptable it must be necessary [14] For it to be considered necessary it must be in proportion to the aim pursued In *Commission v Belgium*[15] the Court noted that for public health measures to be justified it must be established that they are completely

[11] *Th Kohl KG v Ringelhan & Rennett SA & Ringelhan Einrichtungs GmbH* [1984] ECR 3651
[12] *Criminal Proceedings against Albert Heijn* [1984] ECR 3263
[13] See *Rewe-Zentralfinanz v Landwirtschaftskammer* [1975] ECR 843
[14] *Commission v Germany* [1979] ECR 2555

necessary to attain the objective referred to in Article 36 This protection can not be achievable by any other means that would place less of a restriction on the free movement of goods within the Community Thus, for example, if food is inspected by the competent authorities for contamination in the Member State from which it is being exported then it would be seen to be contrary to the free movement of goods if it faced a similar examination when reaching the importing Member State Even where the Community has yet to legislate on a particular area of the food industry this would still remain the case While it would be for the national authorities to decide on any course of action that they take it may not be unduly excessive in its restrictive effects on free movement

Recourse to Article 36 is not justifiable if community legislation provides the necessary measures designed to ensure the protection of the areas of interest set out in that article [16] This may be the case where directives have been implemented which provide for certain harmonising measures to be adopted and standards set and maintained by the Member States in the production of their food If a directive places the obligation to label food products on the exporting Member State then the importing State would be acting in contravention of that directive if it placed additional requirements on the product when it entered its territory [17]

4.3. Directive 70/50[18]

[15] [1983] ECR 531
[16] See, for example *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727
[17] See, for example *Le Lion* [1983] ECR 2973
[18] OJ 1969 L 13/29

Commission Directive 70/50 set out to abolish measures which have an effect equivalent to quantitative restrictions on imports It covers measures, other than those that are equally applicable to both domestically produced and imported products, which hinder the importation of products from other Member States, including those measures which make importation more difficult than domestic production [19] In particular, it covers measures which make imports subject to a condition which is required of imported products only or which differs from that required for domestic products [20]

The measures that the directive refers to include *inter alia* those which deal with prices, values, market access, payment conditions, publicity and the use of national facilities [21] The directive also covers measures governing the marketing of products which deal with shape, size, weight, composition, presentation or identification and which are equally applicable to domestically produced products and imported goods where the restrictive effect of such measures on the free movement of goods exceeds the effects essential for trade rules [22] This is the case, in particular, where the restrictive effects on the free movement of goods are out of proportion to their purpose or where the same objective could be achieved by some other means which would pose less of a hindrance to intra-community trade The provisions of the directive are echoed to a large extent by the court in its various judgements on the matter

[19] Article 2(1)
[20] Article 2(2)
[21] Article 2(3)
[22] Article 3

4.4. Mutual recognition principle

The origin of mutual recognition lies in the concept of the free movement of goods It has been designed to act as an aid to the elimination of obstacles to free trade between the Member States Despite the introduction of harmonising legislation the Court has still been required to act in a complementary manner to this by ensuring that Member States allow goods legally marketed in one state to be freely available for sale in the fourteen others One of the ways that this can be achieved is by adherence to the principle of mutual recognition throughout the Community

One of the main tools envisaged for use by the authors of the Treaty of Rome to eliminate restrictions to trade and thus promote the free movement of goods within the common market was the harmonisation, or approximation, of the laws of the Member States Through this a set of rules is created that are applicable in all states that should thus eliminate any technical obstacles which may exist

Mutual recognition is another tool available to help achieve the free movement of goods Prior to the introduction of new harmonising legislation this principle is used to maintain the national legislation already in place yet still have the importing Member State accept the legislation of the exporting one as being equivalent in effect to their own Thus a product that complies with the laws of one Member State must be permitted to circulate freely in the other Member States, even where it does not comply with the domestic laws of those states Once a particular area is harmonised then there is no further need for use of the

principle of mutual recognition It only applies in the absence of harmonised legislation for a particular aspect of regulation

Mutual recognition is not restricted to products produced within the European Union Third countries' products, such as those originating in the United States or Australia, may also receive some benefit from the principle Under the Treaty of Rome the provisions on the free movement of goods are also found to apply to products coming from other countries which are freely marketed in a Member State of the Community [23] The issue of mutual recognition needs to be made much clearer, however, to ensure that product quality is not judged by the lowest standard allowed in any one of the fifteen Member States

4.5. Labelling as an obstacle to the free movement of foodstuffs

In October 1989 the Commission issued a communication on the free movement of foodstuffs within the Community [24] It did so due to a recognition that the foodstuff sector was one of the few in the European Union that had a direct bearing on every individual in it Due to increasing levels of intra-community trade at the time, and the fact that consumers were being constantly confronted with an ever greater diversity of foodstuffs on the market, it was felt necessary to indicate how and to what extent the provisions of the Treaty aimed at eliminating obstacles to trade between Member States had to be applied to the movement of foodstuffs Its content reiterated the stance that had been, and that

[23] Article 9 2
[24] COM 89/C/271/03

which would be, adopted by the Community in relation to the free movement of food

The Communication claimed that the Commission was proposing, in the foodstuff sector, to adopt a series of harmonised rules only for matters relating to public health, the protection of consumers, the fairness of commercial transactions and environmental protection These were to adopt the form of horizontal measures

Part II of the Communication deals with barriers in existence to the free movement of food other than those intended to protect public health It states that the marketing of a foodstuff imported from another Member State, where it is lawfully produced and marketed, can not be prohibited for reasons associated with the protection of consumers or the fairness of commercial transactions if the foodstuff is adequately labelled in terms of its nature and characteristics and if it complies with the relevant community provisions It was then stated that -

> [a]s the Court has pointed out in many individual cases, an obligation to affix an adequate label concerning the nature and characteristics of a product put on the market is always a measure that hinders trade less than a marketing ban and nearly always suffices to ensure consumer protection and fair trading As the Court has explicitly stated, this principle is not defeated by the fact that many foodstuffs are consumed on licensed premises and in restaurants and the like, since the consumer can be informed of the nature and characteristics of the products even in such cases (for example, by means of information displayed on the casks or taps, in the case of beers served on draught)

This thus means, according to the Communication, that the only circumstances where the marketing of an imported foodstuff can be restricted by national measures seeking to avoid confusion in the minds of consumers between two different products is when the labelling, the packaging or the presentation of

the product is itself liable to create confusion as to the nature, characteristics or origin of the product and where this confusion can not be prevented by other measures that hinder the free movement of goods to a lesser extent

Other obstacles related to the labelling of foodstuffs that could create difficulties with regard to the free movement of goods were also addressed The name that a product has to be called on the label was seen to pose a problem Under Directive 79/112[25] the name under which a foodstuff is sold is to be the name that is laid down by whatever laws, regulations or administrative provisions that apply to the foodstuff in question In the absence of any such name the one that is customarily used in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused is to be used

National regulations relating to the names under which foodstuffs are sold were seen to pose two types of obstacles to the free movement of goods The first of these was that the imported product could be disqualified from bearing the name under which it is marketed in the Member State of manufacture if that same name was reserved in the importing Member State for products displaying certain characteristics The second possible problem could arise where the imported product has to be sold under a generic name that is mandatory for such products in the importing Member State

[25] OJ L 33 08/02/1979, p 1

To help alleviate these problems the Court has decided that a Member State may not reserve a generic name for products manufactured on its territory,[26] products that are manufactured out of specific raw materials, products containing a given concentration of one of their characteristic ingredients[27] or products which are fresh to the exclusion of products that have undergone a specific treatment but their characteristics do not differ substantially from those of the untreated variety [28] A Member State can not reserve a generic name for any of these types of products when they are imported from another Member State where they are lawfully marketed under the disputed name or description An imported foodstuff should therefore only be deprived of the name that it is marketed under in the exporting Member State, where it differs in either its composition or method of manufacture to such an extent, that it could not be regarded as being similar to products generally known by that name or description in the Community

The Commission stated in the Communication that there is no reason, provided that it does not result in any confusion to the purchaser, why imported products from other Member States should not be able to bear two trade descriptions These would be the one under which it is known and lawfully manufactured in the Member State of origin and the one under which similar products are known and marketed in the importing Member State They also stated that this matter should not be confused with the question of the language

[26] *Verbraucherschutzverein eV v Sektkellerei G C Kessler GmbH and Co* , Unreported, European Court of Justice, 28 January 1999, Case 303/97
[27] *Criminal proceedings against Miro BV* [1985] ECR 3731 and *Ministere Public v Deserbais* [1988] ECR 4907

that is to be used on foodstuff labelling This, it claimed, was dealt with satisfactorily by Article 14 of Directive 79/112, which provides that the mandatory labelling particulars set down by that directive are to appear in a language that is easily understood by purchasers, unless other measures have been taken to a satisfactory degree to ensure that the purchaser is fully informed about the contents of the product

One other important issue addressed in the Communication was the protection of public health as a barrier to the free movement of foodstuffs Only the protection of public health was seen to justify a complete ban on importing and marketing foodstuffs imported from another Member State where they are lawfully manufactured and marketed In the opinion of the Commission a legitimate health policy objective was only recognised where it was designed to -

(i) prohibit, restrict or limit the use of food additives,

(ii) ensure that materials and articles coming into contact with foodstuffs are inert with regard to the latter,

(iii) prohibit or limit the presence on or in foodstuffs of residues of pesticides or other contaminants,

(iv) regulate the use of certain food protection or treatment processes, or

(v) require that the labelling include information to ensure the protection of public health

The application of any of these factors to a ban on imports from other Member States would be liable to detrimentally affect the free movement of goods It is thus up to the Commission to ensure that laws in these areas are

[28] *Proceedings for compulsory reconstruction against Smanor SA* [1988] ECR 4489

harmonised to ensure that Member States do not feel that it is necessary to adopt their own measures as this could seriously affect free movement Pending the adoption of harmonised provisions in these areas, Articles 30 and 36 of the Treaty are designed to limit any prohibitive measures that Member States may choose to embrace There must be a genuine risk to public health for any such measures to be justified This is to be assessed on the basis of scientific evidence or the eating habits of the importing Member State

4.6. Influence of the European Court of Justice

4.6.1. *Cassis* Case

In *Procureur du Roi v B & G Dassonville*[29] a prohibition on the importation of scotch whisky that was not accompanied by a certificate of origin from one Member State into another came under scrutiny The Court defined measures equivalent to quantitative restrictions on imports, as prohibited by Article 30,[30] as being "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade "[31] National rules that did not discriminate against imported products but which inhibited community trade nonetheless were thus seen by the Court to be in contravention of Article 30 of the Treaty

[29] [1974] ECR 837
[30] Now Article 28 (Post Amsterdam)
[31] Paragraph 5

The facts of the *Cassis*[32] case were as follows German legislation laid down that certain fruit liqueurs could only be marketed if they contained a minimum alcohol content of 25 per cent German products met this requirement but it made it impossible for Rewe to lawfully import and sell the French liqueur Cassis de Dijon which had an alcohol content of between 15 and 20 per cent Rewe brought an action against this requirement and the national court in turn referred the matter of its consistency with Article 30[33] of the Treaty to the European Court of Justice

The German Government argued that the measure was designed for the protection of public health and for the protection of the consumer against unfair consumer practices, their reasoning being that lower alcohol level products were inclined to more easily induce a tolerance towards alcohol and were less expensive than their higher alcohol volume counterparts The Court found that the requirements relating to the minimum alcohol content of beverages did not serve a purpose that was in the general interest, nor was it such to take precedence over the requirements of the free movement of goods, which was recognised by the Court as being one of the fundamental rules of the Community The requirement was thus seen as being incompatible with Article 30 The sale of Cassis de Dijon and its equivalents could thus not to be subjected to a legal requirement on the marketing of beverages merely because its alcohol content was lower than the limits set by those national rules

[32] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649
[33] Now Article 28

The significance of this decision was far-reaching Not only did it support the decision in the *Dassonville* case but it also recognised that in the absence of community harmonisation on a particular area reasonable measures could be taken by a State to prevent unfair trading practices The Court was met with a plea from the German Government that their domestic rules were necessary for the protection of human health and commercial fairness Although these arguments were not successful in this particular case the Court did recognise that they could be used as a defence mechanism for domestic laws Paragraph eight of the judgement begins with an assertion of Member States' rights and the principle of mutual recognition but then forces these states on the defensive by requiring them to justify the indistinctly applicable rules under one of the areas of the 'rule of reason', such as public health Health and consumer protection were made difficult to use as a defence mechanism by this decision but they were made possible

Following this judgement, a communication was sent from the Commission concerning its consequences [34] The Commission noted that in a previous communication dating from 6 November 1978 entitled "Safeguarding free trade within the Community" it had been emphasised that the free movement of goods was being affected by a growing number of restrictive measures They stated that as a result of the *Cassis* judgement they could now avail of some interpretative guidance which would enable them to monitor more strictly the application of the Treaty rules on the free movement of goods and, in particular, Articles 30 and 36 As a result of the judgement they also noted that they would

have to tackle a whole body of commercial rules which laid down that products manufactured and marketed in one Member State had to fulfil technical or qualitative conditions in order to be admitted to the market of another Member State They were referring, in particular, to the rules covering the composition, designation, presentation and packaging of products as well as rules requiring compliance with certain technical standards

On the issue of the harmonisation of laws, the Communication noted that the work of the Commission in that area would have to be directed at national laws which had an impact on the functioning of the common market They also found that the proper functioning of the Community demanded that each Member State should give due consideration to the legitimate requirements of the other Member States

Prior to the decision in *Cassis* it had been generally assumed, and the case law of the Court had been consistent with this assumption, that Article 30 had no application to a national measure unless it could be proved that the measure in question was discriminatory in some way between imported and domestic products [35] The decision in Cassis had altered this assumption and the case law on the issue was to take a new direction

4.6.2. Pre-*Keck* Judgements

[34] OJ 1980, No C256/2
[35] Wyatt & Dashwood (1993)

In *Cinetheque v FNCF*[36] the trend that had been initiated in *Cassis* was continued, but altered somewhat The facts of the case were as follows French law banned the sale or hire of videos of films during the first year in which the film was released This was designed to encourage people to go to the cinema, and promote the cinema industry The rule applied equally to domestic and imported videos The law was challenged as being in breach of Article 30 The Court recognised that the law was not designed to favour national production over that of other Member States but was actually intended to encourage cinema production Despite this recognition the rule was seen to be capable of creating barriers to intra-community trade because of the differences between the systems of video rental operated in the various Member States

The prohibition was not seen as being compatible with community rules unless any obstacles to the free movement of goods thereby created did not exceed that necessary to ensure the attainment of the objective and unless that objective in turn was seen as being justified by community law It was noted that the promotion of the cinema industry was so justified

The Court went on to find that Article 30 did not apply to the national legislation in this case because it applied equally to domestic and imported goods and was justifiable The French law was thus seen as being *prima facie* within the scope of Article 30 but was also seen as being lawful under that same provision Advocate General Slynn actually felt that it was not within the scope of Article 30 at all He felt that importers of videos were no worse off than their French counterparts and consequently, despite the fact that the domestic provision

[36] [1985] ECR 2605

lead to an overall reduction in community imports, it was outside the scope of Article 30

The question of whether or not Article 30 should be interpreted in such a way so as to catch equal burden rules was examined again in *Torfaen Borough Council v B&Q plc*[37] B&Q were prosecuted for violation of the Sunday trading laws that were operational in England at the time These laws prohibited retail shops from selling on Sundays, subject to exceptions for certain types of products B&Q claimed that this was a measure equivalent to a quantitative restriction on imports as prohibited by Article 30 because the law had the effect of reducing total turnover by 10 per cent with a corresponding reduction in imports from other Member States Imported goods were placed in no worse a position than those that were domestically produced, as the reduction in total turnover would affect all goods equally This was recognised by the Court who then referred to the judgement in *Cinetheque*, stating that a prohibition was not compatible with the free movement of goods unless obstacles to community trade that were created did not exceed that which was necessary to justify the objective in question and its attainment

It was noted that Sunday trading laws were not designed to govern the patterns of trade between Member States It was thus found that the prohibition put in place by Article 30 did not apply to national rules prohibiting retailers from opening their premises on a Sunday where the restrictive effects on community trade which may result do not exceed the effects of the rule The approach here was thus similar to that taken in *Cinetheque*, namely that the rule itself was

caught within the scope of Article 30 but it could escape prohibition provided that the objective behind the rule was justified under community law and was proportionate by not being excessive to the objective sought

The Court has since had doubts as to whether this *Cinetheque* and *Torfaen* strategy for dealing with equal burden rules is the correct one to have adopted The case of *Criminal proceedings against Keck and Mithouard*[38] was to signal a change of attitude towards such rules and signalled the adoption of a position more like the one taken by Advocate General Slynn in *Cinetheque*

4.6.3. Post-*Keck* Analysis

The *Keck* case involved criminal proceedings against two Frenchmen, Keck and Mithouard, for selling goods at a price that was lower that their actual purchase price, a business practice known as "resale at a loss" This practice was contrary to a French law dating from 1963 that had been amended in 1986 The two defendants claimed that the domestic provision was contrary to community laws concerning the free movement of goods, persons, services, and capital and to the principles of free competition within the Community The case was thus referred to the European Court of Justice, which dismissed the claims about persons, services and capital but focussed instead on the argument concerning the free movement of goods

The Court noted that it was not the purpose of national legislation imposing a general prohibition on resale at a loss to regulate trade in goods

[37] [1989] ECR 3851
[38] [1993] ECR I-6097

between the Member States They saw that such legislation may, however, restrict the volume of sales and hence the volume of imports from other Member States insofar as it deprived sellers of a method of sales promotion In view of the increasing tendency of traders to invoke Article 30 as a means of challenging any rules whose effect was to limit their commercial freedom, even when such rules were not aimed at products from other Member States, the Court considered it necessary to re-examine and clarify its case law on the matter

Regarding the *Cassis* case, and the case law that it had helped to establish, the Court held that contrary to it, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements was not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgement This was stated subject to the requirement that those provisions applied to all affected traders operating within the State and provided that they affected in the same manner the marketing of domestic products and those from other Member States Where these conditions were fulfilled, it was found that the application of such rules to the sale of products from other Member States was not by nature such as to prevent their access to the market any more than it impeded the access of domestic products Such rules were thus seen to fall outside the scope of Article 30 of the Treaty altogether, just as Advocate General Slynn had suggested in *Cinetheque* Article 30 was thus found not to apply to the legislation of a Member State that prohibited resale at a loss

The decision in *Keck* gives a clear indication of a new strategy adopted by the Court about the outer limits of Article 30 In not only re-examining its previous case law, but in departing from it as well, the Court has altered its approach as to what constitutes measures equivalent to quantitative restrictions on imports The Court set a distinction between rules that relate to the goods themselves in terms of composition, packaging and presentation, amongst others, that fall within the scope of Article 30 as compared to rules that relate to what are now termed as 'selling arrangements' that may affect the total amount of goods sold but at the same time do not distinguish between domestic and imported products and thus are seen to be outside the scope of that provision of the Treaty In the latter category it was seen that both their purpose is not to regulate trade as such and that their affect and nature are not such as to prevent access to the market, or at least not to impede access to the market for importers any more than they do for domestic producers If this were not the case then such arrangements would come under the observation of Article 30

The new strategy adopted by the Court would encompass decisions such as *Torfaen* and *Cinetheque*, which both concerned selling arrangements that affected importers no more than they affected domestic producers but in both cases the Court had held that the national laws prohibiting the selling arrangements were nonetheless caught by Article 30, subject to the possibility that they could be legitimated by one of the rules of reason Advocate General Slynn in *Cinetheque* preferred to regard such arrangements as being totally outside the scope of Article 30 and the Court in *Keck* was to adopt a similar

approach It would no longer be necessary to examine whether the objective pursued by rules of this nature were legitimate from a community perspective, nor would it be necessary to determine whether the efforts made to obtain this objective were proportionate or not National provisions relating to selling arrangements are thus outside the limits of Article 30 provided they are applicable to all traders operating within the national territory and affect in the same manner the marketing of domestic goods and imports as a result of the decision in *Keck* This approach has also been adopted in subsequent cases

Cases concerning quantitative restrictions on imports in the post-*Keck* era have tended to follow the same lines as those laid down in that decision However, some instances can not be caught within the scope of that judgement One example of this would be where the domestic provisions in question were not equally applicable to domestic goods and those imported from other Member States An example of this was seen in *Lucien-Ortscheit v Eurim-Pharm*[39] This case concerned proceedings between two companies importing medical products Lucien-Ortscheit sought an order that Eurim-Pharm cease all their advertising of foreign medicinal products that were not authorised by the German authorities Under German law medicinal products could not be marketed in Germany unless they were authorised by the German authorities This prohibition applied to both domestic and imported products The authorities considered Eurim-Pharm's advertisements to be of the type prohibited under German law after the complaint by Lucien-Ortscheit It was then questioned as to whether this domestic law was compatible with community law The products in question were already lawfully

in circulation in the host state However, under paragraph 8(2) of the law on advertising in the health sector in Germany, advertisements containing an offer to obtain specified medicinal products by individual importation which had not been authorised in Germany was prohibited, even if the same product was authorised for sale in its country of origin

The Court observed that this prohibition applied solely to foreign products, and as it thus did not have the same effect on the marketing of medicinal products from other Member States as on those produced domestically it had to come within the scope of Article 30 [40] Examination of the principle as developed in *Keck* was thus not necessary here because the law was not equally applicable to domestic and imported goods alike

Two cases where the facts were seen to fit the *Keck* criteria were *Hunermund v Landesaqpothekerkammer*[41] and *SpA v Sindaco del Commune di Capena*[42], also known as the *Punto Casa* case In *Hunermund* the court found that a rule which prohibited pharmacists from advertising para-pharmaceutical products that they were allowed to sell was not seen to be caught within the scope of Article 30 at all Using language similar to that used in *Keck* the Court observed that the rule in question was not directed towards intra-community trade, that it did not preclude traders other than pharmacists from advertising the goods, that the rule applied equally to all traders and that although the rule might have some impact on the overall volume of sales that this was not enough to

[39] [1994] ECR I-5243
[40] Now Article 28
[41] [1993] ECR I-6787
[42] [1994] ECR I-2355

render it a measure equivalent to a quantitative restriction on imports under Article 30 of the Treaty

In *Punto Casa* the Court was also to follow the decision it had made in *Keck* This case was similar to that of *Torfaen* in that it also concerned a prohibition on Sunday trading However, the conclusions drawn were to be much different The Court was to find that the domestic rules on such selling arrangements applied equally to domestic and imported products in the sense of affecting them in the same manner in law and in fact They were thus seen to be outside the scope of Article 30 altogether

Provisions similar to those in *Punto Casa* were again examined in the case of *Tankstation't Heustke vof and JBE Boermans*[43] This case arose from criminal proceedings against Tankstation over compliance with provisions relating to the closing of shops Contrary to domestic law, the defendants had had two shops in petrol stations open to the public without the prescribed legal notice indicating opening hours having been affixed to every entrance to those shops The defendants complained that the legislation concerning the closure of shops was contrary to community law The Court was again to follow the decision in *Keck* and stated that -

> [t]he application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgement [ ] provided that those provisions apply to all relevant traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States

[43] [1994] ECR I-2199

Where the situation was as stated above, then the object of the requirements was not seen to be to prevent access to the domestic market nor to impede access any more than that for domestic products Such rules were thus seen to fall outside the scope of Article 30, as in *Keck* Here the rules related to the times and places that the goods in question could be sold to the consumers They were seen to apply to all relevant traders without distinguishing between the origin of the products in question and thus did not affect the marketing of products from other Member States in a manner different from that in which they affected domestic products

Advocate General Van Gerven found that Article 30 and the decision in *Keck* gave rise to four principles concerning infringement of that treaty provision These were that -

(i) mandatory requirements must exist,

(ii) there is no *Keck* impact if there is no effect on community trade,

(iii) there is no *Keck* impact concerning selling arrangements as they do not have the same impact on intra-community trade, and

(iv) there is a clear distinction between product rules and selling arrangements

Advocate General Jacobs was to give a detailed account of the reasons behind the *Keck* decision in his opinion on the case of *Leclerc-Siplec v TF1*[44] He felt that the reasons behind the *Keck* judgement were to "remove some of the confusion created by the contradictions in the previous case law" and to "discourage excessive resort to Article 30 " He later expressed dissatisfaction with the findings of the Court in *Keck* He was dissatisfied with the reasomng of

the Court, although not the result He felt that measures affecting selling arrangements could create extremely serious obstacles to imports For an example he gave the scenario of a rule permitting certain products to be sold only in a handful of small shops in a Member State being almost as restrictive as an outright ban on importation and marketing Secondly, he found that exclusion from Article 30 of measures that affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States to be an inappropriate test He felt that the central concern of the Treaty provisions on the free movement of goods was to prevent unjustified obstacles to trade between Member States He said that if an obstacle to inter-state trade existed then it did not cease to exist simply because an identical obstacle affects domestic trade

He went on to suggest that in order to determine whether a measure falls within the scope of Article 30 a *de minimis* test should be established to limit its scope, one of the aims of *Keck* This, he suggested, should be a test based on the extent to which a measure hinders trade between Member States by restricting market access, except for measures that openly discriminate against goods from other Member States as these would automatically come within the scope of Article 30 even if their effect on inter-state trade was slight He did, however, agree with the results in *Keck* and *Hunermund* stating that a law that prohibits all retailers of all goods from reselling goods at a loss was unlikely to have a significant effect on the marketing of imported goods and does not prevent a trader from another Member State enjoying full access to the market He felt the same way about legislation restricting the opening hours of shops if it is neither

[44] [1995] ECR I-179

arbitrary nor discriminatory He concluded by stating that Article 30 should thus apply to non-discriminatory measures that were liable to substantially restrict access to the market

The facts of *Leclerc-Siplec v TF1* were that French law imposed a prohibition on television advertising on the distribution sector to protect the regional press by forcing the sector in question to advertise through that medium This law was not seen by the Court to be designed to regulate trade between Member States, nor did it prevent distributors from using other forms of advertising They did admit, however, that the volume of sales, and hence the volume of sales of products from other Member States, may be restricted It was questioned as to whether this was sufficient to characterise the prohibition in question as a measure equivalent to a quantitative restriction on imports within the meaning of Article 30, which was found not to apply here as the prohibition affected the marketing of products from other Member States and those from the host state in the same manner The Court again found that the provision concerned selling arrangements as it prohibited a form of promotion and a method of marketing and was thus outside the scope of Article 30 of the Treaty

In the case of *Criminal proceedings against Giorgio Domingo Banchero*[45], which concerned the unlawful possession of manufactured tobacco products of foreign origin, the Court considered that the Italian legislation in question related solely to the arrangements for the retail sale of such products by prohibiting their sale otherwise than through authorised outlets The fact that the law related to a specific product was not seen to alter this Furthermore, the

obligation on all traders to have their products distributed by authorised retailers was applied without distinction as to the origin of the products and thus did not affect the marketing of goods from other Member States differently than it affected those from the host state The Italian tobacco law was thus not seen to come within the scope of Article 30 thus continuing along the same lines of the approach adopted by the Court since its decision in *Keck*

4.7. Consequences for food regulation

The regulation of food is very strongly influenced by the principle of the free movement of goods in a common market Many of the directives and regulations that deal with food strongly account for this concept in their drafting, as does much of the case law of the European Court of Justice This will become apparent as the thesis develops Many different aspects of food regulation can create the possibility of inhibiting in some way the free movement of goods

In *Tommaso Morellato v Unita sanitara locale (USL) n 11 di Pordenone*[46] a reference was made to the Court on the issue of the composition of bread within the context of the free movement of goods Mr Morellato, representing a company called Soveda, challenged three orders issued by the defendants which required Soveda to pay certain sums by way of fines for infringements by them of Italian domestic laws laying down rules for the processing and marketing of cereals, flour, bread and pasta[47] Soveda was the exclusive distributor in Italy of deep-frozen bread that was lawfully manufactured

[45] [1993] ECR I-1085
[46] [1997] ECR I-1431

and marketed in France by a company called BCS The bread was covered by a certificate issued by the Marseilles Inter-regional Laboratory to the effect that it was a "good-quahty, healthy product, fit for human consumption "

Soveda supplied several consignments of deep-frozen bread manufactured by BCS to a supermarket in Porcia, Italy The defendants found that by doing so Soveda had infringed the relevant Italian law in three ways Firstly, the moisture content of the bread was too high Secondly, the ash content of the bread was too low Finally, the bread contained bran, which was not permitted under the domestic provisions The fines imposed for these infringements were then challenged by Mr Morellato, at which stage several questions were referred to the Court

The Court was asked whether the Italian legislation was contrary to Article 30 of the Treaty of Rome insofar as it prohibited the sale of deep-frozen bread of the type in question here If the answer to this was affirmative then the question was whether the Italian authorities could rely on Article 36 of the Treaty to justify the legislation on the grounds of the protection of public health

Community law at the time of this case did not cover the manufacturing and marketing of bread by a system of harmonised rules As a result of this it was seen to be up to the individual Member States to ensure that any legislation that they enacted in that area kept within the limits imposed by Article 30 The Court then referred to the case of *Criminal Proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV*[48] In that judgement the Court

[47] Law No 580/67 GURI No 189 of 29 July 1967
[48] [1981] ECR 527

had stated that the extension to imported products of the requirement that they contain a specific amount of dry matter could have the effect of preventing bread from other Member States from being marketed in the State concerned [49] This extension was seen to possess the possibility of making it necessary for producers to vary their methods of manufacture according to the place where the bread was to be sold This had the effect of impeding the movement of bread lawfully produced in the Member State of origin if identical manufacturing standards were not prescribed in the importing state The Court thus held m that case that the rules laid down by a Member State imposing conditions concerning composition were liable to hinder community trade and thus fell within the prohibition set out by Article 30 of the Treaty

The Court noted that a similar issue had arisen m the case of *Criminal proceedings against JJJ van der Veldt*[50] There the Court stated that the extension of additional compositional requirements to imported bread and other bakery products, originating in Member States other than the importing state, could have the effect of preventing these products from being marketed in the importing state [51] Such measure were thus seen to constitute a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty

The Court noted that their settled case law provided that the Article 36 exception could only be justified if the national authorities demonstrated that it was necessary in order to attain one or more of the objectives specified in that

[49] Paragraph 7
[50] [1994] ECR I-3537

Article, in this case the protection of public health, and that it was in conformity with the principle of proportionality [52] In this case it was seen that no such demonstration had been made to the Court that this applied here The answer to the questions posed was thus that the application to products lawfully manufactured and marketed in other Member States of national legislation prohibiting the marketing of bread with too high a moisture content or too low an ash content or containing bran constituted a measure having an equivalent effect to a quantitative restriction on imports, contrary to Article 30 of the Treaty This contravention was not found to be justifiable under the terms of Article 36 either as it was not seen as being necessary for the protection of human health

The Court in *Keck* set out a distinction that it saw existed between rules that relate to the goods themselves in terms of composition, packaging and presentation, amongst others and what it termed as 'selling arrangements' The former were seen to fall within the scope of Article 30 Rules that relate to selling arrangements that may affect the total amount of goods sold, but at the same time do not distinguish between domestic and imported products, were seen to be outside the scope of that provision of the Treaty In the latter category, it was seen that both their purpose was not to regulate trade as such and that their affect and nature were not such as to prevent access to the market, or at least not to impede access to the market for importers any more than they did for domestic producers If this were not the case then such arrangements would come under the scrutiny of Article 30

---

[51] Paragraph 11
[52] Paragraph 14

The decision in *Keck* thus has minimal effects on food labelling and composition laws that may be adopted by the Member States The only way that this decision has had any effect on the food industry in Europe is where trading rules are concerned, such as those that prohibit shops from carrying out their business on a Sunday Cases such as that of *Tommaso Morellato v Unita sanitara locale (USL) n 11 di Pordenone* and *Van der Veldt* dealing with bread composition are unaffected by the decision in *Keck* as rules dealing with composition are still seen to be fully within the scope of Article 30 of the Treaty

4.8. Conclusion

Due to the fact that composition requirements are still accepted as coming under the supervision of Article 30 the drafting of labelling legislation will remain relatively unaffected The majority of this legislation deals with issues such as composition requirements and not with trading rules and for this reason will remain fully answerable to the concept of protecting and encouraging the free movement of goods throughout the Community when faced with examination by the Court If, however, a *de minimis* test, similar to that suggested by Advocate General Jacobs, was to be introduced then the whole area of the free movement of goods would have to be re-examined What would become the important factor then would not be whether we were dealing with compositional requirements or selling arrangements *per se* but we would be more concerned with the level that a particular measure affects intra-community trade This, however, will still be more likely to alter the position of selling arrangements than compositional requirements

CHAPTER FIVE

EUROPEAN UNION FOOD LABELLING POLICY

5.1. Introduction

Foodstuffs intended for sale to consumers or for supply to restaurants, hospitals or caterers must be correctly labelled under the relevant European Union provisions Directive 79/112[1] and its subsequent amendments are the framework legislation in this area They lay down general rules and obligations for how food products should be labelled Other directives and regulations have been drafted to supplement them Article 1(2) of Directive 79/112 defines labelling as being -

> [ ] any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff

Labelling within the meaning of Directive 79/112 must, under the definition set out therein, therefore be construed as being words, particulars and other information relating to a foodstuff that is specifically intended to inform the consumer as to the characteristics of the foodstuff in question [2]

5.2. Labelling

5.2.1. Labelling defined

[1] OJ L 33, 08/02/1979, p 1
[2] Article 1(3)(a)

Despite the rather wide definition of labelling set out in the framework directive, certain markings on foodstuffs may still be recognised as being outside the scope of that definition An example of this was seen in *Criminal proceedings against Cooperatieve Zuivelindustrie "Twee Provincien" WA*[3] In this case proceedings were brought against the defendants because of a failure on their behalf to affix to their cheese products a national cheese mark which was compulsory for the type in question under Netherlands law dealing with the quality of agricultural products

It was argued before the national courts that the obligation to include a national cheese mark on such products was incompatible with European Union legislation It was thus referred to the European Court of Justice as to whether a national measure requiring cheese products to affix a mark indicating the country of production and the type of cheese, as well as letters indicating the region of production, despite there being no appreciable differences in quality between the regions, was consistent with the provisions of Directive 79/112 [4]

In order to answer the question posed to it the Court had first to establish whether the national cheese mark in question constituted labelling within the meaning of Directive 79/112 The Court found that labelling within the meaning of the Directive was to be construed as words, particulars and other information relating to a foodstuff which was specifically intended to inform the consumer as to the characteristics of the product in question [5] A national cheese mark of the

[3] [1993] ECR I-6045
[4] In particular, Article 15 thereof
[5] Paragraph 16

kind at issue here was not seen to pursue such an aim [6] It consisted of a serial number and a combination of letters, which varied according to the region of production Such a mark was not seen to have the intention of informing the consumer about the characteristics of the product in question but was actually seen to constitute a mark which made it possible to verify that the cheese was produced in accordance with the relevant rules The answer to the question posed by the national court was therefore that Directive 79/112 was to be interpreted as meaning that a national cheese mark such as the one in question here does not constitute labelling within the meaning of Article 1(3)(a) of that directive

The judgement in this case would appear to be defective for several reasons The Court stated that the national cheese mark was a sign imposed on producers which made it possible to verify that cheese was produced in accordance with the relevant rules and also that it specified particulars regarding the place of production and the batch or consignment to which a particular cheese belongs [7] This would appear to offer the consumer much 'other relevant information' relating to the foodstuff, a factor that was seen to bring information on a label within the definition of labelling as laid down in Directive 79/112 [8] This could then arouse questions about the clarity of this particular mark, another factor that is necessary for adequate food labelling Clarity in relation to food labelling legislation, however, is an issue that has constantly been overlooked by legislators in the European Union despite proclamations made by the European Union itself about the necessity of it For example, if legislators were interested

[6] Paragraph 17
[7] Ibid

in labelling clarity then why do they allow different forms of what is essentially sugar to be labelled as sugar, dextrose, glucose, maltose, invert sugar or fructose in some circumstances? Similarly why allow the possibility of salt appearing on labelling as salt, sodium citrate, monosodium, sodium chloride, MSG NaCl?[9] Clarity is clearly not an issue which food legislators in the Community are too concerned with This will become evident throughout the course of this thesis

The information that the national cheese mark obliges producers to put on their labelling clearly offers the consumer much relevant information The actual worded definition of labelling in the Directive refers to any "particulars [ ] placed on any packaging" A mark that requires a product to identify itself with the relevant production rules, the place of production, the producer, the date of production and the batch or consignment to which it belongs certainly comes within the scope of the definitions of labelling in both the Directive itself and that given to it by the Court in this case If the Court had found, as it should have, that the national mark was within the scope of Directive 79/112 then some interesting questions could have been raised about the compatibility of the obligations imposed by the Netherlands authorities with the concept of the free movement of goods As this mark required producers to identify not only the country but also the region of origin on the product this could then have been interpreted as a measure equivalent to a quantitative restriction on imports as prohibited by Article 30 of the Treaty

[8] Paragraph 16

5.2.2. General labelling requirements

Under the framework legislation certain general criteria are laid down for the labelling of foodstuffs All labelling must -

(i) be easy to understand,

(ii) be clearly marked in such a way that it is visible, legible and indelible,

(iii) be designed to protect public health,

(iv) help prevent fraudulent trading and imitation,

(v) help protect industrial and commercial property rights, and

(vi) appear in a language that can be easily understood by the consumer [10]

For prepackaged foodstuffs, the compulsory labelling particulars should appear on the packaging itself or on a label attached to it Where the prepackaged food is sold in bulk to caterers the compulsory labelling particulars should appear on the commercial documents accompanying the transaction The name under which the particular food is sold, the best before date and the name of the manufacturer should all appear on the external packaging Member States may adopt rules for the labelling of products which are offered for sale without packaging or which are packaged at the time of sale They may also adopt specific labelling rules for foodstuffs that are sold in fancy or elaborate packaging

5.2.3. Labelling language

[9] "Eat More Fruit and Vegetables The Healthy Food Magazine" (1998), Dublin Department of Health
[10] Article 2

Directive 79/112 also deals with the language that is to be used on labelling [11] Labelling is to be drafted in the official language(s) of the country in which it is sold Foreign terms and expressions may be used but only where this does not impair the consumer's understanding of the labelling

In *Piageme and others v BVBA Peeters*[12] the language in which labelling on mineral water had to appear was examined It was contended that the Belgian law that was intended to transpose Directive 79/112 into the domestic legislation provided that the particulars required on labels were to appear in the language or languages of the region where the foodstuffs were offered for sale Peeters pleaded that this was actually incompatible with Article 30 of the Treaty and Article 14 of Directive 79/112 Article 14 provides that the relevant particulars are to appear in a language that can be easily understood by purchasers unless other measures have been taken to ensure that the purchaser is well informed about the contents of the product

The Court stated that what Article 14 of the Directive allowed Member States to do was to prohibit the sale of products whose labelling was not easily understood by the purchaser rather than to actually require the use of a particular language While acknowledging that the language of the region would be that most likely to be understood there the Court felt that such an interpretation of Article 14 would fail to take account of the aims of the Directive, namely to eliminate the differences that exist between the various national provisions and thus hinder the free movement of goods They noted that it was this very aim that

[11] Ibid
[12] [1995] ECR I-2955

Article 14 of the Directive was dealing with It sought to put in place a requirement that the labelling appear in a language that could be easily understood by the purchaser It also provided that the entry of foodstuffs into the territory of a Member State could be authorised where the relevant particulars did not appear in such a language if other measures to inform the consumer about the contents of the product had been taken The obligation to use the language of the region was thus seen to be a measure equivalent to a quantitative restriction on imports as prohibited by Article 30 of the Treaty Consequently it was found by the Court that Article 30 of the Treaty and Article 14 of Directive 79/112 precluded a national law from requiring the exclusive use of a specific language for the labelling of foodstuffs without allowing for the possibility of the use of another language that could be easily understood by the purchaser or of the fact that they could have been informed by another appropriate measure

A similar problem came before the court again in *Re Goerres*[13] Here the defendant operated a food shop in Germany He was prosecuted and fined under the domestic German legislation implementing Directive 79/112 because some of the goods for sale in his shop were labelled only in French, Italian or English The implementing legislation provided that the food products had to be labelled clearly in German or some other "easily intelligible language"

The defendant claimed that the Directive actually prevented a Member State from insisting that a foodstuff be labelled in a specific language He also contended that even if he were incorrect on this matter, that sufficient steps had

[13] [1998] ECR I-4431

been taken by him to prevent consumer confusion, in that he had erected a sign in his shop setting out the necessary information in German

The Court rejected both of the arguments put forward by the defendant It held that the Directive did not prevent domestic legislation from insisting that food labelling be in a language that could be easily understood by consumers The erection of the sign by the shop owner was seen to be insufficient to achieve the purposes of the Directive, namely to protect not only the purchasers of the food products but also their ultimate consumers

The decisions of the Court in *Piageme* and *Re Goerres* would appear to be in conflict In *Piageme* the court found that insistence by the national authorities that the language of the region of the sale of a product be used for food labelling was too restrictive They came to the conclusion that another language could possibly, in some circumstances, be understood by consumers or that other methods could be used to provide any necessary relevant information In *Re Goerres* the fact that the relevant information was provided by notices was not seen to be sufficient to achieve the purposes of the provisions of Directive 79/112 on providing consumers with information

Other methods of information provision were used by the Court to find national laws on labelling language to be in conflict with Article 30 of the Treaty in *Piageme* When a similar point was argued in *Re Goerres* it was not seen to be a valid one This again highlights the lack of consistency and clarity often involved in the interpretation of food labelling directives such as the one at issue here

5.2.4. Compulsory labelling requirements

Directive 79/112 lays down certain compulsory requirements for the labelling of foodstuffs [14] These include -

(i) the name under which the product is sold,

(ii) the list of all of the ingredients used in preparation of the food in descending order of the weight of the ingredient that was used for such preparation, preceded by a suitable heading which includes the word "ingredients",

(iii) any special storage conditions or conditions for use,

(iv) the net quantity of prepackaged food in metric units,

(v) the 'best before' date consisting of the day, month, and year in that particular order and preceded by the words 'best before' or 'best before end' or the use by date for highly perishable goods,

(vi) the name or business name and address of the manufacturer, packer or European Union seller,

(vii) the place of origin where failure to name this place might mislead the consumer as to the true origin of the foodstuff,

(viii) instructions for use where the absence of such instructions would make it impossible to properly use the foodstuff,

(ix) for beverages containing more than 1 2 per cent of alcohol by volume the actual alcoholic strength by volume, and

[14] As amended by Directive 89/396 OJ L 186, 30/06/1989, p 21

(x) lot marking preceded by the letter 'L' except where such marking is clearly distinguishable form other indications on the label [15]

5.2.5. Date of durability

The minimum date for which a foodstuff is durable must be indicated on the labelling and should be preceded by the term 'best before' The date indicated should consist of the day, the month and the year in this particular order This requirement may vary, depending on the length of time for which the product in question is durable For foodstuffs that will not keep for longer than three months the day and month must both be indicated Where the product will retain its durability for between three and eighteen months the month and the year must be indicated on the labelling Finally, where a product will keep for in excess of eighteen months, the end of the year in which the food product will perish must be indicated A description of the storage conditions should follow the date of minimum durability if such conditions would affect the durability of the product The 'best before' date should appear in the same area as the generic name and the net quantity

There are certain foodstuffs specified in Council Directive 79/112 and its subsequent amendments that do not have to display a best before date These include the following -

(i) fresh fruit and vegetables,

(ii) vinegar,

(iii) chewing gum,

---

[15] Article 3(1)

(iv) solid sugar,

(v) cooking salt,

(vi) individual portions of ice-cream,

(vii) wines and liqueur wines,

(viii) beverages containing 10 per cent or more by volume of alcohol,

(ix) alcoholic beverages which contain under 10 per cent alcohol by volume sold in individual containers of more than five litres,

(x) soft drinks or fruit juices, and

(xi) bakers' pastries where they are normally consumed within 24 hours of their manufacture

For highly perishable foodstuffs the 'best before' date is replaced with the 'use by' date The term 'use by' along with the date consisting of the day, the month and sometimes the year, takes the place of the 'best before' date where such foodstuffs are concerned Again, the use by date should be followed by a description of the ideal storage conditions if such conditions would have an effect on the durability of the foodstuff Storage conditions themselves may be indicated anywhere on the label It is only where they have an effect on the durability of the product that they must appear immediately after the 'best before' or 'use by' date

5.2.6. Various other labelling requirements

The name, or business name and address, of the manufacturer or packer or the seller within the European Union must be indicated on the labelling The

place of origin of the particular foodstuff must also be stated where a failure to state this could mislead consumers as to the area of manufacture Instructions for use of the product are to be present on the labelling in such a way that they will enable the consumer to use it in the appropriate manner Alcoholic strength is to be highlighted by a statement to no more than one decimal place followed by the '% vol ' symbol and preceded by the term 'alcohol' or 'alc'

In the case of *Criminal Proceedings against Arthur Mathot*[16] an action was brought against the defendant for the marketing in Belgium of butter that was prepared by him and which was contained in a package that did not bear the name and address of the processor contrary to Belgian domestic law [17]

It was questioned whether a requirement imposed on Belgian processors, and not on their competitors from other Member States, to indicate their name and address on the packaging of butter, was compatible with Article 30 of the Treaty The Court noted that, with regard to Article 30, the purpose of that provision was to eliminate obstacles to the importation of goods and it was not to ensure that goods of national origin always enjoy the same treatment as imported goods A difference in treatment between goods that was not capable of restricting imports was not seen by the Court on previous occasions to fall within the prohibition contained in that provision of the Treaty [18]

The Court further noted that in this case the national laws on the labelling of butter had been harmonised by Directive 79/112, which included the compulsory inclusion of the name or business name and address of the

[16] [1987] ECR 809
[17] Royal Decree, 1963

manufacturer or packager, or of a seller established within the Community on the labelling [19] However, the Directive also provides that -

> [ ] Member States may retain national provisions which require indication of the factory or packaging centre, in respect of home production

The Court pointed out that Directive 79/112 created obligations concerning the labelling and presentation of foodstuffs marketed in the Community without permitting any distinction according to the origin of those foodstuffs [20] National rules imposing the obligations contained m the Directive on domestically produced products only discriminate against certain traders where the requirements of the Directive are not applied to imported products as well However, this was not seen by the Court to give those traders the right to exemption from the obligations laid down in the legislation It was seen to be for the Commission to ensure that the national authorities end discrimination by extending the scope of the national rules to all the products that were supposed to be covered by the Directive The Court thus ruled that Article 30 of the Treaty did not make it unlawful for certain provisions of national legislation, themselves in conformity with the Community legislation, to apply only to domestically produced products to the exclusion of those from other Member States

The decision in this case illustrates another of the problems that have become an integral part of the harmonisation programme Despite the fact that domestic producers were put at a disadvantage when compared with those of imported products, the Court only made a ruling on the fact that this was not a

---

[18] See, for example, *Driancourt v Cognet* [1986] ECR 3231
[19] Article 3(1)

discriminatory measure To ensure the free movement of goods surely all producers, domestic and otherwise, should be faced with the same regulatory requirements While recognising that this problem could be solved in this instance by extending the provisions of the Directive to imports as well, the real issue has not been addressed At what was a highly important stage of the law harmonisation programme, given the likely effects that the Single European Act would have on that programme, a recognition that the use of directives on important issues such as this was not going to work could have been made We are dealing with the framework directive here and if this piece of legislation could not be implemented properly, before the creation of a piecemeal system really set in, then what hope would there be for the regulatory legislation to follow?

If harmonisation is to be used properly to promote the free movement of goods then surely it should not include allowing a situation to develop where domestic producers are placed at a disadvantage The issue of food labelling requires a high degree of regulation to make it work properly Composition requirements have to be set to ensure that products can not be passed off as being that which they are not The issues of consumer health and choice also have to be accounted for To make this high degree of regulation work, a simple, transparent and easily enforceable system is required This has evidently not been the type used by the European Union thus far

5.2.7. Lot marking

[20] Paragraph 11

Council Directive 89/396 specifies that foodstuffs must be accompanied by an indication of the lot to which the foodstuff belongs This is to be preceded by the letter "L", except in cases where it is clearly distinguishable from the other indications on the label For prepackaged foodstuffs, the lot marking is to appear on the packaging or on a label attached to it For non prepackaged foodstuffs the lot marking shall appear on the packaging or on the container or relevant commercial documents that accompanies the product in question

Directive 89/396 also specifies that lot marking is not necessary in certain circumstances These include -

(i) foodstuffs which are sold in bulk to the consumer,

(ii) agricultural products which are sold or delivered to temporary storage for immediate integration into a preparation or processing system,

(iii) packages or containers where the largest side has an area of less than 100 square centimetres, and

(iv) foodstuffs whose lot number is determined by the best before or use by date, provided that this date consists of a specified day and month

5.3. Amendments to the framework directive

There have been several amendments to Council Directive 79/112 The first of these was Directive 85/7 [21] Directive 85/7 amended a number of other directives as well where their association with the Standing Committee for Foodstuffs was concerned The other directives amended include Directive 73/241 on the approximation of the laws of the Member States relating to cocoa

and chocolate products intended for human consumption and Directive 77/94 on the approximation of the laws of the Member States relating to foodstuffs for particular nutritional uses [22] Directive 85/7 amends Article 18 of Directive 79/112 by extending the period from the date on which matters are referred to the Standing Committee for Foodstuffs from 18 months to two years

The second amendment came with the drafting of Directive 86/197[23] and it had more of an effect on the provisions of Directive 79/112 than did its predecessor Article 3(1) of Directive 79/112 was altered by the addition to its content of certain alcoholic beverages Beverages containing more than 1 2 per cent by volume of alcohol were now to compulsorily indicate the actual alcoholic strength on the label Trade in beverages which did not comply with this directive was permitted until the stocks became exhausted [24]

Directive 89/395[25] was to bring about more wholesale amendments to the content of Directive 79/112 The format of the date of minimum durability that has to appear on food labelling was changed In the interests of the better protection of public health a stricter system of dating was introduced for foodstuffs that are highly perishable [26] What was previously to be labelled in the case of these foodstuffs as the date of minimum durability was now to be known and to appear as the 'use by' date [27] The scope of Directive 79/112 was extended to cover the supply of all foodstuffs to restaurants, hospitals, canteens and other

---

[21] OJ L 2, 03/01/1985, p 22
[22] OJ L 26, 1974, p 55
[23] OJ L 144, 29/05/1986, p 38
[24] Article 2
[25] OJ L 186, 30/06/1989, p 17
[26] See *infra* Chapter 5 2 2
[27] Article 1(5) This thus amended Article 3(1)(4) of Directive 79/112

mass caterers [28] Any foodstuffs that had been treated with ionising radiation now had to indicate this by stating on the labelling that the product was "irradiated" or "treated with ionising radiation" [29]

Amending Directive 91/72[30] created a new annex to Directive 79/112 This new annex was to deal with the labelling of flavourings Flavourings were now to be designated either by the word 'flavouring(s)' or by a more specific name or description of the flavouring [31] The word 'natural', as a result of this directive, can only now be used to describe a flavouring where its components exclusively contain the flavouring substances that are set out in Directive 88/388 [32]

Two more recent amending directives are Commission Directive 93/102[33] and European Parliament and Council Directive 97/4 [34] Directive 93/102 replaces Annex I and II with new annexes that alter the categories of ingredients which may be designated by the name of the category rather than their specific name [35] It also alters the categories of ingredients that must be designated by the name of their category followed by their specific name or number Directive 97/4 deals with customary and misleading names that appear on foodstuff labelling as well as implementing some of the decisions of the European Court of Justice on food products

[28] Article 1(2)
[29] Article 1(8)
[30] OJ L 42, 15/02/1991, p 27
[31] Article 1(2)
[32] See Article 1(2)(a) and (b) of Directive 88/388
[33] OJ L 291, 25/11/1993, p 14
[34] OJ L 43, 14/02/1997, p 21

5.4. Nutritional labelling

5.4.1. Foodstuffs intended for particular nutritional uses

Council Directive 89/398[36] deals with the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses The preamble to this directive recognised that foodstuffs intended for particular nutritional uses are the subject of specific provisions in general rules on foodstuffs and could be monitored by these provisions The preamble also recognised that not all nutritional foodstuffs were regulated in this way and thus legislation such as this directive was required to include foodstuffs not accounted for elsewhere

The Directive defines foodstuffs intended for particular nutritional uses as being those which, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs intended for normal consumption They are suitable for their claimed nutritional purposes and are marketed in such a way as to indicate this suitability to the consumer [37] The Directive also deals with the labelling of these foodstuffs It puts in place a prohibition on the use of the word 'dietetic' or 'dietary' in the labelling of foodstuffs intended for normal consumption or any other markings or presentation that could give the impression that a foodstuff is intended for particular nutritional uses [38]

---

[35] Articles 1 and 2
[36] OJ L 186, 30/06/1989, p 27
[37] Article 1(1)
[38] Article 2(2)(a) and (b)

There are other provisions in the Directive dealing specifically with the labelling issues as well The labelling or presentation of the products defined in the Directive must not attribute to those products properties for the prevention, treatment or cure of human disease, nor should such properties even be implied [39] This provision may be derogated from in some exceptional and clearly defined cases in accordance with the Directive [40] It is stated in the legislation that such derogations may only be allowed where the Standing Committee for Foodstuffs, acting in conjunction with the Commission, permits [41]

The Directive also calls for the adoption of more specific directives to deal with the groups of foods appearing in Annex I to this directive [42] These specific directives are to be used to deal with matters such as the use of raw materials in these nutritional foodstuffs, hygiene requirements and also provisions regarding the labelling, presentation and advertising of these products [43]

In Chapter Two, it was noted that a policy dilemma appeared in respect to the labelling of products by nutritional content We noted that the literature showed that consumers were equally disadvantaged by too much detailed information as by too little A recommended compromise would be that legislation should require producers advancing a nutritional claim for their product to indicate on the label the main constituents of the product which justifies this claim The percentage of each main constituent of the whole should also be indicated On the one hand it is unlikely that all consumers will check

[39] Article 6(1)
[40] Ibid
[41] Article 13
[42] Article 4(1)

these claims On the other if the information is there, and if it can be established that the information is incorrect, consumers, or more properly consumer groups, may have a cause of action

5.4.2. Directive 90/496[44]

Nutritional labelling is governed by Council Directive 90/496 It deals with the labelling on foodstuffs that specifies the nutritional aspects of the product such as protein, carbohydrate and fat content Under the Directive, nutritional labelling is not compulsory unless a nutritional claim is made on the product or m the advertising or the promotion of it

Nutritional labelling must consist of a numerical declaration of nutrients expressed per 100 grammes (g) or 100 millilitres (ml), as the case may be, or per serving/portion The serving, where applicable, is also to be quantified on the labelling The information is to be presented in tabular form If space on the label does not permit tabular form then linear may be used The quantities of nutrition specified should be those of the foodstuff as it is sold This information may relate to the foodstuff after preparation, provided that sufficiently detailed preparation instructions are given and the information relates to the foodstuff as prepared for consumption

Apart from the declarations that have to be made where fats, proteins and carbohydrates are concerned, details concerning various other nutrient quantities

---

[43] Ibid
[44] OJ L 276, 06/10/1990, p 40

must also be specified Directive 90/496 states that details concerning quantities of the following must also be included on the labelling -

(i) starch,

(ii) polyols,

(iii) monounsaturates,

(iv) polyunsaturates,

(v) cholesterol, and

(vi) minerals and vitamins

Where polyols, sugar and starch are concerned, their declaration is to immediately follow the declaration of the carbohydrate content Where fatty acids and cholesterol are concerned, their declaration is to immediately follow the declaration of the total fats Where the amounts of polyunsaturates, monounsaturates or cholesterol are stated, the amount of saturates is also to be declared

Information on vitamins and minerals must be expressed as a percentage of the recommended daily allowance (rda) The particular vitamin or mineral type has to be stated and followed by the unit of measurement, generally milligrams (mg), and the percentage of the recommended daily allowance of the vitamin or mineral that this amount of it is equal to

Energy values are also to be declared on the labelling of food products under Council Directive 90/496 This value is to be calculated using set conversion factors stating both the kilojoules (kJ) and kilocalories (kcal)

The declared values for nutrients are to be calculated as average values based on -

(i) the manufacturer's analysis of the food,

(ii) the known or actual average values of the ingredients used in the production of the foodstuff, and

(iii) the generally established and accepted data

5.5. Food labelling policy

5.5.1. Commission food labelling policy

The development of a European Union consumer protection policy formally began in 1975 with the adoption of the First Council Resolution which recognised that, in order to develop the Community, the needs of consumers required special consideration However, it was not until 1987 that a specific legal basis for consumer policy appeared with the adoption of the Single European Act When this act was signed in 1986 it represented an important revision of the Treaty of Rome [45] It was to act as a major catalyst in the further integration of the Community by creating a commitment to the removal of internal barriers to free movement by 1992 This Act also required that the Commission have regard to the creation of a high level of protection in the areas of health, safety, the environment and consumer issues Regard for these areas was to be the basis for the creation of a single market This situation received further impetus from Title XI of the 1992 Treaty on European Union, which is

devoted to consumer protection Member States can establish higher national levels of consumer protection than those set by the European Union, providing that these measures do not inhibit in any way the free movement of goods [46]

Developments since 1987 have indicated that it is an increasingly recognised fact that consumers have a decisive role to play in the completion of the internal market and that it will not operate properly without their active and willing participation [47] It is the choices that consumers make at market level that could ultimately decide whether the economic benefits of an integrated market are realised Whether their concerns are fully accounted for, however, is put into question throughout this study

5.5.2. Tobacco labelling

Tobacco is to be labelled under European Union legislation in a manner that will help ensure that a high level of health protection is attained It is this principle that is, according to the Commission, to be used as the basis for harmonising the provisions of the Member States concerning the labelling of such products

To aid in this process two main pieces of legislation have been drafted These are Council Directive 89/622 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products and its amending legislation, Council Directive 92/41

---

[45] See also, *infra*, Chapter 3
[46] For an example of a situation where Member State action was seen to have the potential to affect the free movement of goods see *infra* Chapter 9
[47] See, *infra*, Chapter 10

Directive 89/622, as amended, defines tobacco products as products designed for the purpose of smoking or chewing inasmuch as they are, at least partially, made of tobacco in either powder or particulate form or a combination of the two Tar and nicotine yields must be indicated on cigarette packets These particulars must be -

(i) printed on the side of the packets,

(ii) be labelled in the official language(s) of the country of final marketing,

(iii) be in legible print on a contrasting background, and

(iv) cover at least four per cent of the packet surface for countries with one official language, six per cent where the country has two official languages and eight per cent where the country has three official languages

All unit packets of cigarettes must also carry, on the most visible surface, the following general warning in the official language or languages of the country of final marketing "Tobacco seriously damages health" This warning must -

(i) cover at least four per cent of each large surface of the packet,

(ii) be clear and legible,

(iii) be printed in bold letters on a contrasting background,

(iv) be printed in a place where it cannot be damaged when the packet is opened, and

(v) be located on the packet itself and not on a transparent wrapper or any other form of external wrapping

The labelling of tobacco products is similar in many ways to that set down for food products Despite the many similarities, the Member States would appear to take the tobacco labelling requirements more seriously All of the cigarette and cigar packages examined during the course of this study adhered to the health notice requirements set out in Directive 92/41 The same could not, however, be said for food products

While it could be noted that tobacco offers a clearer risk to consumer health, a comparison could be drawn with the labelling requirements for genetically modified foods, the risks to health of which are not yet known [48] Suspicions as to why this difference in response to European Union directives may exist could possibly be found in the fact that exchequer returns for tobacco products make up a far higher proportion of the price paid by consumers for those goods and thus stringent regulation would be more desirable for the respective governments concerned

Moves are underway within the Community to harmonise the *ad valorem* taxes on tobacco If a similar move were to be made regarding food products we may see the labelling requirements for them being taken more seriously as well It is also interesting to note that the regulation of tobacco labelling has been carried out effectively without the need to create a piecemeal system of legislation which just serves to add to the general lack of clarity that is usually involved with food labelling

5.5.3. Directorate-General XXIV

As a reflection of the increasing political importance afforded to consumer policy in the European Union, the Commission created an autonomous consumer policy service in 1989 This then became a fully-fledged Directorate-General in 1995 It was devised to help achieve the following aims -

(i) to ensure that the interests of consumers are taken into consideration in the development of European Union policies,

(ii) to reinforce market transparency,

(iii) to improve the safety of consumer products,

(iv) to improve consumer confidence, particularly by the making of information freely available, and

(v) to develop dialogue between the Commission and groups representing consumers [49]

To facilitate this interaction between the Commission and groups representing consumers, a consumer committee has been established to advise the Commission on consumer protection measures It also represents consumers during the formulation of other European Union policies

5.5.4. Development of consumer protection

In the first decade following the adoption of the First Consumer Programme in 1975 several directives were adopted on a variety of topics, including some on the labelling of foodstuffs Between 1988 and 1993 the legislative tempo quickened in respect of consumer protection, as a result of the

---

[48] See, *infra*, Chapter 9
[49] http //europa eu int

timetable set down in the Single European Act New health controls and labelling requirements were applied to food and agricultural products

In October 1995, the Commission issued a communication stating its future policies for consumer protection [50] It set out three priorities, which were -

(i) to undertake action in areas of immediate concern to consumers, including foodstuffs,

(ii) to develop long term action in the area of consumer education, and

(iii) to provide technical support and other forms of assistance to countries in Eastern Europe and developing countries to help them to develop consumer protection policies

To help implement these priorities the Commission intended to reinforce its relations with consumer organisations at European, national and regional levels In order to satisfy the objectives of the Communication and to enhance consumer health protection the Directorate-General for consumer policy has been restructured It is now responsible for managing all the competent scientific committees

5.5.5. Accounting for technological developments

With public concerns about what we eat reaching new heights the Commission has developed a new approach to consumer health and food safety to aid in the alleviation of these fears A communication entitled "Consumer Health and Food Safety"[51] and a green paper entitled "The General Principles of Food

[50] The Communication was entitled "Priorities for consumer policy 1996-98 "
[51] COM (97) 183, 30/04/97

Law in the European Union"[52] have laid the foundations for this revised food policy

A series of general principles have been set out, upon which the new approach to food safety is to be based These principles include responsibility for legislation being treated separately from that for scientific consultation and inspection and the adoption of a greater level of transparency and increased access to information throughout the decision-making process

The Communication states that when new food legislation is being drafted a high regard has to be taken for the procedures of scientific advice and risk analysis Scientific advice is to become a vital factor in the process of drafting new legislation and in the implementation and enforcement of existing food legislation Most of this advice is to be sought from the scientific committees The creation of a scientific steering committee to co-ordinate the work of the other committees is designed to ensure a more effective advisory role in this area The advice is always to be based on the principles of excellence, independence and transparency

Risk analysis comprises of a three staged process The first stage is a scientific evaluation of the risks The second is concerned with risk management This is an assessment of the measures required to reduce the risks to an acceptable level Finally, there is to be a communication of the risks to the parties concerned These parties include the decision-makers, inspectors, consumers and producers Risk analysis, as thus defined, comes within the remit of the Commission The Commission has a supervisory role to play where risk

[52] COM (97) 176, 30/04/97

analysis is concerned in that it may anticipate the emergence of new hazards It is also to include an assessment of the impact that the different policy alternatives will have on the levels of protection afforded

Ultimate responsibility for the implementation of community food labelling laws in the current form rests on the shoulders of the Member States The Commission is to monitor the efficacy of its control measures through the use of Directorate-General XXIV This is conducted by the Food and Veterinary Office (FVO) and a food control section transferred from Directorate-General III (Industry) These bodies are to look at the effectiveness of the official food control systems as operated by the relevant national authorities The overall aim is to establish and maintain a harmonised approach to control and inspection

The Commission Green Paper on the General Principles of Food Law within the European Union aims to examine the extent to which the legislation currently in place meets the needs and expectations of all the interested parties These parties include consumers, producers and retailers It also seeks to evaluate the present control and inspection systems, while also looking at how community food law could be developed in the future to address any shortcomings identified The Green Paper seeks to arouse public debate on the relevant issues in order to provide guidance to the Commission on possible methods of improving the protection of consumer health in an internal market system

One of the more important aspects of the Green Paper is that it reiterates the Treaty guarantees associated with food labelling and merges them with some

new proposals It then proceeds to explain how these principles are to be used to shape future legislation-making policy These principles are based upon a need -

(i) to ensure a high level of protection of public health and safety and of consumer protection,

(ii) to ensure the free movement of goods within the single market,

(iii) to ensure that legislation is based primarily on scientific evidence and risk assessment,

(iv) to ensure the competitiveness of European industry and to enhance its export prospects,

(v) to place the primary responsibility for food safety with the food industry, producers and suppliers through self-checking procedures backed up by official controls and sufficient and appropriate enforcement mechanisms, and

(vi) to ensure that foodstuffs legislation is coherent, rational and intelligible

The Green Paper recognises that foodstuff legislation is in need of simplification and rationalisation This is due to the complex and fragmented state of community food laws The Green Paper recognises that the legislation must be updated in a manner that will account for technical and scientific progress The Green Paper also reviews the form of the existing legislation, including the use of the regulation as an alternative to the directive By doing so it aims to identify how to establish a coherent and consistent body of community labelling rules to ensure that consumers receive all the useful information they desire whilst avoiding any unnecessarily detailed provisions

There is also a recognition in the Green Paper that the timely and correct implementation of community legislation is essential for the effective operation of the internal market The role of the Community here is not seen to be to replace the Member States, but actually to verify that the necessary controls are being enforced in an effective and equivalent manner throughout the internal market The legislation is to provide the appropriate enforcement mechanisms and control measures Sanctions that may be imposed for legislation breach should be effective, proportionate and dissuasive Lastly, there is a recognition that as both an importer and as an exporter of food products that the Community should ensure that both the goods coming into and going out of it maintain the same high standards as those laid down for foodstuffs that circulate exclusively within the boundaries of the internal market

5.5.6. The Consumer Committee

The Consumer Committee is a consultative committee of the Commission It is entrusted to represent the interests of consumers to the Commission and also to give opinions on any problems that it may identify relating to the implementation of policy that may affect consumers adversely It may act either on its own initiative or at the request of the Commission

The Consumer Committee has drafted a series of comments on the Commission Green Paper on the General Principles of Food Law in the European Union In their commentary the Green Paper is welcomed, as is the so-called

'stable to table' approach that it proposes to adopt in future action on food safety matters

On more specific matters the comments deal with issues such as the simplification and rationalisation of community food law It is their opinion that caution should be taken before launching into a simplification and rationalisation process and long-term effects should be analysed To maximise food safety they believe that the entire food chain must be covered by a legislative and regulatory framework adopting the stable to table principle General prescriptive rules will remain inevitable and this issue should be addressed by adding annexes with prescriptive rules to general legislation The Consumer Committee also believes that neither horizontal nor vertical legislation should take preference in this process as both types of measures have a role to play in any future developments They also are of the opinion that neither regulations nor directives should take priority in the drafting of new legislation and that the real issue is one of clarity rather than form This study suggests that the two are of equal importance [53]

The Consumer Committee also has several points to make on the topic of labelling specifically They consider that there is a need to review current labelling provisions, starting with an assessment of whether consumers can, or whether they actually do, use each piece of information that appears on the label They also believe that all labelling requirements should derive from Directive 79/112 They also call in their comments for a more consumer-friendly and compulsory nutrition label The labelling of genetically modified foods and

[53] See, *infra*, Chapter 11

ingredients is seen to be necessary for consumers to be able to utilise their right to accept or reject particular products

5.5.7. Other comments

After its publication of the Green Paper on the General Principles of Food Law in the European Union, the Commission invited a wide variety of bodies to comment on its content These bodies included the Member States and various European and International organisations The Commission received over one hundred and forty comments on the issues raised

Labelling provisions were considered to be incomplete and the necessity to take legislative measures in several areas was noted Areas that are singled out to be in need of immediate attention included those related to claims made by particular foodstuffs and nutritional labelling In view of the increasing importance of labelling it was seen to be necessary to carry out detailed investigations into labelling effectiveness which could lead to an improvement in the level of information received by consumers from the label

A list was also drawn up of issues that concerned parties felt it was necessary for the Commission to consider yet which were not adequately addressed in the Green Paper This list included an improvement in the functioning of the Standing Committee on Foodstuffs and closer co-operation between it and the scientific committees established in the individual Member States, earlier analysis of proposed new legislation and its probable effectiveness and further transparency in the legislative process

Member States were found in their comments to have a preference for the horizontal approach to food legislation Non-governmental organisations were of the same opinion on this issue However, only a few Member States made a comment on the form that future legislative texts should adopt Regulations were seen to possess the inconvenience that consensus may not have been reached on the matter addressed in the legislation Non-governmental organisations were found to favour the use of regulations as opposed to directives in the future drafting of legislation Some bodies were still found to favour the use of directives as the usual form of legislation

5.6. Conclusions

The European Union has, since the adoption of the Single European Act, embarked upon a wide-scale harmonisation programme in an effort to break down the barriers to free movement within the Community The policy behind the legislation was meant to involve a consideration for the protection of consumers as well as the promotion of the free movement of goods This thesis argues that the protection of consumers, which is afforded Treaty status, has been ignored to a large extent in the formulation and implementation of community policy in relation to the labelling of food products Consumer issues would appear to play a very small role in the relevant legislation However, the free movement of goods is often also inhibited, yet generally unintentionally, by poorly drafted directives and regulations

The fact that the system has failed thus far has even been recognised by the administration of the European Union itself Commission documents have been published to address this fact These documents and the comments made on them by the various interested parties would appear to have overlooked the problems that have developed since the inception of the early 'recipe laws' and which have continued to exist ever since

Some of the bodies that have been involved in a possible alteration of the approach that may be taken in future legislation drafting are of the opinion that directives are still the preferred medium for this task This thesis argues that only horizontal regulations with a series of vertical annexes that are kept clear and transparent in their content and which contain a strong enforcement mechanism will help to rectify the situation that has been created by the impatient approach that has been adopted in an effort to meet the deadlines set by the Single European Act

The outlook would appear to be bleak when even the framework directive has become outdated and ineffective Despite this, some parties feel that the increased use of this particular piece of legislation would aid progress in this area The next three chapters of this thesis look at three of the individual areas that are dealt with in that directive and demonstrate just how the system currently in place has become inoperable

PART B

CHAPTER SIX

FOOD NAMES

6.1. Introduction

Food names are a vital, in many ways the most vital, part of the label They inform the purchaser immediately about what it is that they are purchasing They are also usually the first, and often the only, part of the label to be read This importance is generally reflected in the European Union rules on food labelling where extensive composition requirements, with which a product must comply to be called a particular name, are set down The importance of controlling the name by which foodstuffs are labelled has become increasingly important because of new regulations on the geographical origin of food products [1]

Article 3(1) of Directive 79/112 states that the name under which a foodstuff is sold must appear on the labelling of that product Article 5(1) deals with this in further detail It states that -

> [t]he name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions that apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused

[1] Regulation 2081/92

On further examination of this provision it becomes clear that a foodstuff may be named in any one of three ways, subject to certain conditions Firstly, it may be labelled under the name laid down by the applicable laws This includes the various vertical European Union directives that deal with specific foodstuffs Secondly, in the absence of such a directive, the customary name used in the Member State where the product is sold may be used If neither of these two options is available then the producer may simply use a description of the foodstuff or of its use, once this is sufficient to inform the consumer about the specific characteristics of the product This thus leaves us with three categories of non-brand names that may be used legal, customary and descriptive Another category that has recently been recognised to exist is geographical This category, however, is not entirely autonomous as it contains mainly legal, also known as community, and customary names

6.2. Legal names

6.2.1. The 'recipe laws'

The European Union has adopted an extensive series of vertical directives dealing with the issue of non-brand names for food products These rules define standards and impose limits for various foodstuffs They deal primarily with compositional requirements Under what have become known as the 'recipe laws', authorisation to use certain product names has been made a reward for compositional correctness These rules have assumed special importance within

the European Union due to the frantic efforts that have been made to establish a set of standard harmonised rules throughout the common market This harmonisation programme is designed to enable goods sold in one Member State to easily fulfil the compositional requirements that may be required in another thus enabling their availability in marketplaces throughout the Community This acts as an aid in the promotion of the free movement of goods

The recipe laws of the early 1970s were designed to supplement the rules laid down in Directive 79/112 This was intended to give extra importance to the earlier vertical legislation Many of these directives date from the initial days of attempts to harmonise food laws within the Community

6.2.2. Directive 74/409[2]

An example of one of the recipe laws is Directive 74/409 on the harmonisation of the laws of the Member States relating to honey It states that -

> [f]or the purposes of [the] Directive [honey] shall mean the foodstuff which is produced by the honey-bee from the nectar of blossoms or secretions of or on living parts of plants, and which the bees collect, transform and combine with specific substances of their own and store and leave to mature in honey combs [3]

Despite the specificity of this particular foodstuff definition, the Directive further instructs as to what the various types of honey within its scope are to be named as

[2] OJ L 221, 12/08/1974, p 10
[3] Article 1(1)

Honey is sub-divided into two categories by the Directive Honey can be named either according to its origin or according to its mode of presentation [4] If named by origin, it can then be further sub-divided into blossom honey and honeydew honey Blossom honey is defined as being that "obtained predominantly from the nectar of blossoms " Honeydew honey is defined as that "obtained predominantly from secretions of or on living parts of plants" and it is also stated that "its colour varies from light or greenish brown to almost black "

The types of honey that appear in the category dealing with presentation mode include comb honey, which is defined as "honey stored by bees in the cells of freshly built broodless combs and sold in sealed combs or sections of such combs " Other varieties of honey in this category are chunk honey, drained honey, extracted honey and pressed honey, each of which is also given certain specific compositional requirements before it may be sold under the relevant name Comb honey and chunk honey must, in particular, be described as such The others may simply be named as honey or they may be labelled under one of the more specific titles if the producer so chooses [5]

Member States, under the Directive, are obliged to take the necessary measures to ensure that honey may only be offered for sale as that product if it conforms with the requirements laid down [6] In addition to this, no other product may be added to honey when it is labelled as being purely such [7]

[4] Article 1(2)
[5] Article 7(1)(a)
[6] Articles 2 and 3
[7] Article 5

Directive 74/409 gives a clear example of the way in which the recipe laws operate They lay down specific definitions for foodstuffs and these products can only be named under the various definitions if the relevant compositional requirements are fulfilled However, these rules do have their shortcomings It must be questioned whether a directive such as this one creates for itself an adequate enforcement mechanism or leaves itself open to being derogated from by producers in the various Member States

The Directive states that the methods of sampling and analysis necessary for checking the composition of honey are to be determined in accordance with the procedure laid down [8] This procedure, however, refers only to decisions that are to be taken by the Standing Committee for Foodstuffs [9] The procedure is stated as follows -

> [w]here the procedure laid down [here] is to be followed, the matter shall be referred to the Standing Committee on Foodstuffs [ ] by its Chairman, either on his own initiative or at the request of a representative of a Member State The representative of the Commission shall submit to the Committee a draft of the measures to be taken The Committee shall give its opinion on that draft Opinions shall be delivered by a majority of 41 votes [ ] of the Member States Where the measures envisaged are in accordance with the opinion of the Committee, the Commission shall adopt them

This is the only procedure that is relevant to the examination of the composition of honey that is laid down in the Directive It has nothing to do with the actual examination of the contents of food being marketed as honey in the individual Member States This type of approach to ensuring that compositional requirements are adhered to is too far removed from the operation of the food

[8] Article 9
[9] Article 10

industry in those states It offers little in the way of protection against the avoidance of the required compositional requirements by producers To examine if this is the case in reality, the transposition of the Directive into domestic law must be examined to ascertain whether or not a procedure that does deal with this issue is laid down there

6.2.3. EC (Food Standards) (Honey) Regulations, 1976

Directive 74/409 was transposed into Irish law by the EC (Food Standards) (Honey) Regulations of 1976 [10] These regulations refer to the fact that food may not be offered for sale as honey unless it is that as described in the Directive [11] It then proceeds to specify the different varieties of honey as they may be marketed under the European legislation The aspects of the Directive dealing with the labelling of honey in the prescribed manner and the composition of honey itself are both replicated in the statutory instrument [12] However, at no stage are any specifications laid down providing for a system to analyse the contents of honey to ensure that what appears on the labelling and what is named as honey is indeed that product The compositional requirements laid down in the Annex to the Directive state that the moisture content of honey is, in general, not to be more than 21 per cent At no stage of either the European legislation or the domestic regulations is there any enforcement mechanism set out to examine whether or not producers adhere to such a requirement

[10] Statutory Instrument No 155 of 1976
[11] Article 3(2)
[12] Articles 4(1)(a) and 6 respectively

A system must be developed to ensure that producers do not name a product, in this case honey, as such when it may not be pure but may actually contain one or more other components that bring about its impurity Legislation establishing national bodies, similar to that establishing the national environmental protection bodies, could be drafted to alleviate this problem by removing the enforcement mechanism from the Standing Committee for Foodstuffs and placing it with a standard authority in each of the individual Member States The Food Safety Authority has been established in Ireland to fulfil this role The Authority's effectiveness is limited, however, because it does not possess the statutory power to administer the full implementation of much of the harmonising European legislation, including Directive 74/409 [13]

6.2.4. United Kingdom Honey Regulations 1976[14]

Directive 74/409 was transposed into United Kingdom domestic law by the Honey Regulations 1976 Section 7(1) states that -

> [ ] no person shall sell or consign or deliver pursuant to a sale any honey in a container unless there appears on a label marked on, or securely attached to, the container a true statement in compliance with this regulation

This honey label has always to include the description 'honey' immediately preceded by the word 'comb' or 'chunk' as the case may be [15] It may also, when the Regulations so specify, have to be preceded by the word 'baker's' or

[13] See, *supra*, Chapter 3
[14] Statutory Instrument No 1832/1976
[15] Section 7(2)(a)

'industrial' in some circumstances [16] The statement is also to include the name or trade name and the address or registered office of the producer or packer of the honey or of the seller established within the Community [17]

The Regulations also specify the format in which the prescribed labelling must appear The format must be clear, legible and indelible [18] It must also be placed in a conspicuous position on the label marked on, or securely attached to, the container in a manner that it will be readily discernible and easily read by the intending purchaser or consumer under normal conditions of purchase or use [19] It is also prohibited to obscure the specified labelling requirements in any way or to interrupt in a manner that may mislead the purchaser or consumer as to the nature of the honey [20]

There are a series of enforcement mechanisms and sanctions for those in contravention of the Regulations laid down therein also If any person is in contravention of any of the provisions then they are deemed to be guilty of an offence punishable by imprisonment or a fine or both [21] Each relevant authority is to enforce and execute the provisions of the Regulations in their area [22] The transposition of the Directive into United Kingdom law would appear to be more forceful It must be remembered however that it is still at community level that the legislation fails to achieve the desired effect by not putting in place any

[16] Section 7(2)(b)
[17] Section 7(4)
[18] Section 9(1)(a)
[19] Section 9(1)(b)
[20] Section 9(1)(c) and (d)
[21] Section 10(1)
[22] Section 10(2)

provision for an adequate enforcement mechanism to ensure complete compliance with it

6.2.5. Directive 73/241[23]

Another example of a vertical directive, as envisaged by the provisions of Directive 79/112, is Directive 73/241 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption Chocolate is defined in annex I as being -

> [t]he product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose with or without added cocoa butter, having [ ] a minimum total dry cocoa solids content of 35 %- at least 14% of dry non-fat cocoa solids and 18% of cocoa butter

This definition of chocolate in the Directive distinguishes it from plain chocolate, milk chocolate and milk chocolate with a high milk content Plain chocolate differs in that it must include a minimum dry cocoa solids content of 30 per cent and contain at least 12 per cent of dry non-fat cocoa solids Milk chocolate differs further in that it is seen to be -

> [t]he product [that is] obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose, from milk or milk solids obtained by evaporation, with or without added cocoa butter, and, containing [ ] a minimum total dry cocoa solids content of 25% including at least 2 5% of dry non-fat cocoa solids, at least 14% of milk solids obtained by evaporation, including at least 3 5% of butter fat, not more that 55% of sucrose, at least 25% of fat

Milk chocolate with a high milk content must contain at least 20 per cent of milk solids obtained by evaporation, including at least five per cent of butter fat

[23] OJ L 228, 16/08/1973, p 23

Under Directive 73/241 only products composed of the specified minimum contents are allowed to call themselves by the names set down in the legislation The Directive actually states that -

> Member States shall take all measures necessary to ensure that the products referred to in Article 1 may be offered for sale only if they conform to the definitions and rules laid down in [the] Directive and in Annex I thereto [24]

While again informing Member States that they are to take all the measures necessary to ensure that the Directive is implemented this is in practice asking them to do little more than to transpose it into domestic law and, once again, an adequate enforcement mechanism is absent The Directive then creates unnecessary confusion by going back on the definitions as they appear in the Annex It states that the name 'chocolate' may be used in Ireland and the United Kingdom to describe chocolate, plain chocolate, milk chocolate and milk chocolate with a high milk content This then has the effect of rendering the various definitions set out for these different types of chocolate product obsolete once the product in question conforms in composition with any one of the four varieties' standards What this provision is therefore saying is that once any variety of chocolate comes within the compositional thresholds of any of the other varieties then it is free to be named simply as 'chocolate' [25]

The only information specified in the Directive that has to appear on the labelling of chocolate, which has to appear in a conspicuous, clearly legible and indelible manner, are the name of the product, an indication of the total dry cocoa content, the net weight and the name and address of the manufacturer or packer or

[24] Article 2

the European Union seller Thus we can derive from the Directive, taken in its entirety, that the label must include, for the various types of food known as chocolate -

(i) the name of the product,

(ii) that this name may simply be chocolate for any one of the four specified varieties,

(iii) that an indication of the total dry cocoa content must appear This may vary from a minimum of 20 per cent upwards to 35 per cent ,

(iv) the net weight, and

(v) the name and the address of the manufacturer of packer or the European Union seller

For a chocolate product to be named chocolate in Ireland and the United Kingdom it may have the composition of either chocolate, plain chocolate, milk chocolate or milk chocolate with a high milk content, as laid down in the Directive These four varieties specify a minimum total dry cocoa content of 35 per cent , 30 per cent , 25 per cent and 20 per cent respectively If the Directive, as it does, allows any one of these four varieties to be named simply as chocolate then it renders the various definitions set out in the Annex somewhat meaningless as each specifies different minimum total dry cocoa contents For example, if chocolate has to have a minimum total dry cocoa content of 35 per cent and milk chocolate has to have a minimum of at least 25 per cent , then this would indicate that milk chocolate may be named chocolate when it may contain as much as 10

[25] See Appendix Two

per cent less total dry cocoa content than chocolate has to contain to meet the specified compositional requirements

6.2.6. Food Standards (Cocoa and Chocolate Products) (European Communities) Regulations, 1975

The Food Standards (Cocoa and Chocolate Products) (European Communities) Regulations, 1975[26] transpose Directive 73/241 into Irish law These regulations state that -

> [s]ubject to the condition specified in Article 3(1) of the Council Directive, the name 'milk chocolate' shall be used to describe a product [as] defined [ ] in paragraph 1 of Annex I to that Directive [27]

The condition specified in Article 3(1) is that the name milk chocolate may be used in Ireland to describe both milk chocolate and milk chocolate with high milk content, as defined earlier, on condition that the term is accompanied by an indication of the amount of milk solids obtained by evaporation in the form "milk solids- % minimum " At no stage does the Statutory Instrument deal with the other issue raised in Article 3(1), that dealing with cocoa solids

Directive 73/241 and the 1975 domestic regulations have thus left the legislation dealing with the labelling of chocolate in a somewhat confused position The term chocolate can be used to describe milk chocolate with high milk content, however, chocolate as defined in Annex I to the directive must contain a minimum dry cocoa solids content of 35 per cent, whereas the minimum total allowed for milk chocolate with high milk content is actually only

[26] Statutory Instrument No 180 of 1975
[27] Article 5

20 per cent This thus means that chocolate can be used to describe a product that can have as much as 15 per cent less dry cocoa solids than that which is actually permitted by the definition of that product in the Annex to the Directive

6.2.7. United Kingdom Cocoa and Chocolate Products Regulations 1976[28]

Directive 73/241 was transposed into United Kingdom domestic law by the Cocoa and Chocolate Products Regulations 1976 Under the Regulations no person is permitted to sell or deliver for sale any cocoa or chocolate product unless there is attached to it a true statement in compliance with the legislation [29] A product that declares itself as being 'milk chocolate' must also state on the labelling that it contains a minimum of 14 per cent milk solids or 20 per cent as the case may be [30] This variation depends on whether the chocolate in question falls into one of two categories These categories are set out in Schedule I to the Regulations

Schedule I sets out a series of chocolate products and their reserved definitions It defines chocolate as being -

> [a]ny product obtained from cocoa nib, cocoa mass, cocoa, fat-reduced cocoa or any combination of two or more thereof and sucrose, with or without the extraction of cocoa butter and containing not less than 35 per centum total dry solids, including not less than 14 per centum dry non-fat cocoa solids and not less than 18 per centum permitted cocoa butter

It also defines plain chocolate as being -

> [a]ny complying with the definition specified [herein] in relation to the reserved description 'chocolate' except that it contains not less than 30 per

[28] Statutory Instrument No 541/1976
[29] Section 5(1)
[30] Section 5(3)(b)(i) and (ii)

centum total dry cocoa solids, including not less than 12 per centum dry non-fat cocoa solids

Milk chocolate is defined as being -

> [a]ny product obtained from cocoa nib, cocoa mass, cocoa, fat-reduced cocoa or any combination thereof and sucrose, and from milk or milk solids, with or without the addition of extracted cocoa butter and containing -
> (a) not less than 25 per centum total dry cocoa solids including not less then 2 5 per centum dry non-fat cocoa solids, not less than 14 per centum milk solids including not less than 3 5 per centum milk fat, not more than 55 per centum sucrose and not less than 25 per centum total fat, or
> (b) not less than 20 per centum total dry cocoa solids including not less than 2 5 per centum dry non-fat cocoa solids, not less than 20 per centum milk solids, not less than 5 per centum milk fat, not more than 55 per centum sucrose and not less than 25 per centum total fat

6.2.8. Recommendations of the Economic and Social Committee

The Council, under Articles 43 and 198 of the Treaty, consulted the Economic and Social Committee in 1996 on the simplification of some of the vertical directives on food The directives that these proposals ultimately addressed included those on chocolate and honey At the Edinburgh Summit in 1992 it had been decided that a number of product directives that were no longer in line with food legislation policy should be either simplified or abolished It was suggested subsequent to the findings expressed at this summit that the Commission and the Council would avoid making further vertical product provisions because they were difficult to agree upon given the diversity of eating habits in the European Union Instead it was agreed that the focus should be concentrated on horizontal measures designed to protect consumers and the environment

It was proposed that these horizontal measures would be taken in areas such as additive use, health rules and labelling [31] The proposals of the Economic and Social Committee make interesting reading, more for the issues that are not addressed, in some cases being deliberately avoided, than those which are actually dealt with

There can be no doubt that the system that has been adopted by the European Union legislators to regulate the labelling of food products has not worked The overuse of directives instead of regulations has led to the creation of legislation that is not adequately enforced by the individual Member States In many cases it has also been drafted with a distinct lack of clarity or cohesion which has added to the problem This has also resulted in the system becoming piecemeal in nature, as amendments are constantly required to deal with the inadequacies of the original legislation

The recommendations put forward by the Economic and Social Committee in 1996 presented yet another opportunity to address this matter adequately and finally Instead of taking a few steps back and repealing the defective legislation efforts were made to sort out that which was beyond repair The fact that these recommendations, and the approach to legislation drafting that they tried to pioneer, have failed to alter the situation as radically as was required has been evident through the way in which genetically modified and organic foods have been regulated since their inception [32]

[31] OJ C 231, 09/08/1996, p 1
[32] See *infra* Chapters 9 and 10

After the recommendations were made by the Economic and Social Committee through a consultative process, in accordance with the Treaty, it was felt that the abolition of any of the vertical directives dealt with was not possible It was felt, however, that certain proposals could be made to simplify the legislation This was described as "a first step in the right direction" [33] Given the record identified in this study it is more likely that it was to be the last step as well where its content was concerned and certainly not an entirely correct one The only thing that these recommendations did do was to recognise that a problem in need of attention existed In no substantial way were any of the real problems addressed

The issue of additives was really not dealt with at all It was felt, however, that for better transparency individual references to additives should be omitted from legislation Instead, for directives for foods where additives were permitted there should be a separate article within the legislation dealing with a cross-reference to the directives that deal exclusively with the individual additives [34]

On the format and drafting of legislation several points were made Emphasis was put on the need to consult and listen to the various advisory bodies on which the appropriate socio-economic interests are represented If a legislation drafting system such as that used by the Australia New Zealand Food Authority model was used from the outset then many of the problems encountered later on by the harmonising directives could easily have been

[33] OJ C 231, 09/08/1996, p 1

avoided What made this process more difficult was the fact that the Community failed to allow itself adequate time to complete the process of law harmonisation and as a result of this many of the vertical directives were drafted hastily and poorly, lacking real clarity and transparency

It was also stated that the proposed implementation dates in many of the vertical directives were unrealistic in that they did not allow Member States enough time to prepare for transposition This was another feature of the unwillingness of the Community to take its time over the harmonisation process While allowing Member States more time to draft implementing legislation may have helped matters in theory, in reality these states largely ignored the dates that were set anyway, and often were not reprimanded for this deficiency As is pointed out in this thesis the situation in the post-*Francovich* era is unlikely to alter radically

The recommendations did deal specifically with the vertical directive on chocolate Controversy on this issue in the recommendations centred round the addition of vegetable fats other than cocoa butter to these products As this thesis has pointed out, the chocolate directive lays down specific compositional standards for the various types of chocolate Eight Member States were opposed to the addition of vegetable fats to chocolate [35] These states feared that the addition of this substance would reduce the quality of the product What should be noted at this stage is that community research shows that consumers in the

[34] These specific additive directives are 95/2 on additives, 95/35 on sweeteners and 94/36 on colours

[35] These Member States who were opposed were Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands and Spain

European Union have come to prefer milk chocolate, which contains much less cocoa than dark chocolate [36] As this thesis has demonstrated, Directive 73/241 actually allows products to be labelled as chocolate, in some circumstances, where the cocoa content could be as much as 15 per cent below that allowed by the definition of that product as set out in the legislation

It was suggested in the recommendations of the Economic and Social Committee that to safeguard the health of the consumer, the Commission should create a system of labelling that would specify the origin of the vegetable fats that are used in chocolate It was also found that the Directive should emphasise that other foods, including vegetable fats, can only be used in the production of chocolate in addition to the legally prescribed ingredients of chocolate and they may not be used as substitutes for those ingredients It was also suggested that where actual dry matter levels of liquid vary, the quantitative ingredient declaration system should be used when such products are being sold to the ultimate consumer [37]

The recommendations made by the Economic and Social Committee on possible changes that could be made to simplify and update Directive 73/241 run into four pages In total twenty-four proposals are made Most would not have had to be made had the original drafters had more patience and taken a longer time to deliberate over its content Despite this recognition of the need for change and simplification, the obvious solution to the problems created by the

[36] The research, dating from 1992, showed that milk chocolate sales account for as much as 85 to 90 per cent of all chocolate sales in the community
[37] See, *infra*, Chapter 7

rashness adopted in the harmonisation process, that of repeal and redraft[38], was deliberately overlooked

Recommendations were also made that were designed to simplify the vertical directive on honey, Directive 74/409 This thesis has demonstrated how this legislation laid down a number of compositional requirements for products to adhere to before being permitted to be called honey and then failed to put in place any enforcement mechanism that would ensure that these prerequisites were actually realised in the products concerned The recommendations that were made by the Economic and Social Committee failed to address this matter at all and instead only looked at a few minor issues relating to the wording of the Directive

While the Directive on honey would not appear to be in as urgent a need for repeal and redraft it does need to be amended Amendment, however, would only add to the complicated web of labelling legislation that has been created by the harmonisation process This directive is part of the process that was started before the foundations necessary for it to function properly were in place themselves Indeed, this basis has never been appropriately created As a result of this, even this directive that is only in need of minor alteration, albeit on a very major issue, would be required to be included in the repeal and replace procedure

6.3. The European Court of Justice and non-legal food names

6.3.1. Framework directive requirements

[38] See, *infra*, Chapter 11

Directive 79/112 requires that every packaged food product bear a name That name should be one defined by community or national law Chocolate and honey are both names defined by community law They may be supplemented by trade or brand names but these names may not be used instead of the legal name [39] The Directive also specifies that in the absence of a legal name the one that is customary in the Member State where the product is sold to the ultimate consumer may be used instead In some circumstances a descriptive name may be used if no legal or customary name exists The Directive defines descriptive names as -

> [ ] a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused

These may be used in the absence of a legal or customary name

The Directive provides that a customary name must be so in the Member State where the product is sold to consumers It does not require that a name that is used be customary throughout a state or even in a particular language Customary names may be different in the same language between Member States, or even between different regions of the same state By merely specifying that the product name must be customary in the Member State where it is sold, the Directive thus again creates clear potential for confusion As a result of this we have to turn to the decisions of the European Court of Justice to examine what interpretation has been given to the legislation on this matter

[39] Article 5(2)

As a consequence of the confusion that surrounds the European Union legislation on non-brand food names many of the rules on this issue now derive directly from judgements of the European Court of Justice instead

6.3.2. Customary names

The issue of food composition requirements affecting the use of customary names was tested in *Ministere Public v Deserbais*[40] The case arose due to the fact that French law prohibited the sale of Edam cheese unless it conformed with domestic laws on minimum dry matter levels and fat content The rules in question originated from the 1951 Stresa Convention on the Use and Designations of Origin and Names for Cheeses This agreement had been entered into by France, Denmark, Italy and the Netherlands, amongst others, but not by Germany Edam cheese that was manufactured in Germany failed to meet the French requirements and the French authorities sought to prevent it from being marketed in its territory by the name 'Edam' The Court held that in the absence of harmonised rules Member States were free to establish compositional requirements for cheese Despite this proclamation the Court went on to find that this could not hinder the free movement of goods that were being lawfully traded in other Member States once consumers were informed on the labelling about any differences that existed in the composition The French authorities were thus found to be unable to prohibit the sale of German Edam on their territory in this instance

[40] [1988] ECR 4907

One important observation made by the Court in its judgement was a recognition that if a product differed so much from foods generally known by a particular name then it could not be placed in that particular product category An obligation placed on producers to use different product names in those circumstances was seen to be permissible The only forms of difference to which the Court referred were product composition and methods of production

Greek rules concerning the name that may be given to certain cheese varieties have constantly been under the scrutiny of the Court[41] One of the more influential cases in this area was *Canadane Cheese Trading and Other v Hellenic Republic*[42] The case arose from proceedings in which the Danish undertaking, Canadane Cheese Trading, and the Greek undertaking, Adelfi G Kouri, sought the annulment of a number of administrative decisions that had been adopted by various Greek authorities These decisions had prevented the two plaintiffs from marketing in Greece a consignment of cheese imported from Denmark that they wished to be named 'Feta'

To help determine the dispute the Greek Council of State decided that a preliminary ruling should be sought from the European Court of Justice on whether or not Articles 30 and 36 of the Treaty permitted a Member State to refuse to allow the use of a certain commercial name for products produced by and exported from another Member State for circulation within the importing state where those products are so different from the aspect of their composition and method of production from products which are generally known by that name

[41] *Commission v Italy* [1990] ECR I-3647
[42] [1997 ECR I-4681

that they could not be regarded as similar products falling within the same category It was also asked whether general familiarity with a product that is called a certain name should be assessed and judged in relation to consumers within the Member States of the European Union if it is their protection that is sought by a particular domestic regulation In relation to this it was asked whether products generally known under a certain name by consumers within the Community meant similar products, the general and essential characteristics of which as regards composition and manufacturing methods are familiar to consumers

Advocate General Ruiz-Jarabo Colomer delivered a detailed opinion on the facts of this case He noted that when, in 1988, Greece began to adopt measures regulating the production and marketing of Feta that the Commission had examined their compatibility with community law Through Communication No 3935 of 6 March 1989, the Directorate-General of Agriculture had informed the Greek authorities that, after a careful examination of the methods of production and marketing of Feta, it was considered that the Greek legislation was compatible with community law The Commission, it was noted, had maintained that view in response to complaints by the national federations of producers of milk products in various Member States According to the Commission, the *Cassis* case was not applicable owing to the fundamental differences between the Feta that was made in Greece and that which was being produced m other Member States The fundamental difference between Greek feta and that produced elsewhere was the milk used in its production The Greeks

tended to use sheeps' and/or goats' milk which was processed through a natural straining method, while that produced elsewhere tended to use cows' milk that was processed by ultra-filtration

The Commission then discovered, and notified Greece, that a fairly substantial quantity of Feta was being produced in that country by the addition of cows' milk, which could thus affect the validity of the Greek legislation The Greek authorities consequently heightened their enforcement of the compositional requirements for Feta cheese The Commission then pointed out that by restricting their allowance of the use of the generic name Feta to cheese produced in certain areas of Greece they were in contravention of Article 30[43] of the Treaty [44]

The Advocate General went on to set out the types of names of food products that could be used within the European Union He claimed that there were two types of food name These were community names and generic names Community names were defined as -

> [ ] names which are regulated by Community secondary law and define the characteristics and method of production of the product for the whole of the Community These 'eurofoods' [for example, honey and chocolate] can be marketed without restriction in all Member States and do not give rise to problems in relation to intra-Community trade [45]

The Advocate General defined generic names also These were said to be -

> [ ] common names used to designate agricultural or food products They form part of the general cultural and gastronomic stock and may, in principle, be used by any producer

[43] Now Article 28 (Post Amsterdam)
[44] Paragraph 25
[45] Paragraph 27

The case-law of the Court does not define what is meant by a generic name, but the following have, *inter alia*, been held to be generic names vinegar, geneva, beer, pasta, yoghurt, Edam cheese, Fleischwaren and bread

Advocate General Ruiz-Jarabo Colomer then went on to clarify the issue of what he termed 'geographical' names This is not an uncontroversial area Many food names derive from the location in which they are traditionally produced If the earlier decisions of the Court dealing with Feta cheese were to be followed in this case then geographical and generic names could not overlap one another An example of where such a situation had been seen previously was the case of *Deserbais* where the name Edam cheese was found to be capable of being used for cheeses other than those produced in the locality of Edam Surely then Feta could be used to describe cheese that was not necessarily Greek in origin He said that geographical names were those "used to designate food products which allude to their origin from a particular geographical area "[46] He found that geographical names had the following characteristics -

(i) they guarantee the geographical origin of the product and indicate that the product possesses certain characteristics arising from that geographical origin,

(ii) they are proof of the quality of the product,

(iii) they impart a good reputation to products amongst consumers, and

[46] Paragraph 35.

(iv) the legal protection of geographical names safeguards producers' interests against unfair competition and protects consumers against information that may mislead them

The Advocate General then went on to make an important observation about these names He pointed out that sales descriptions that contain place-names can not always be considered as being geographical in nature He claimed that a name embodying a place-name may be generic or it may have become so over the course of time and thus can no longer be considered as being geographical and therefore may not enjoy the legal protection afforded to such names Examples of names falling into this category were given, such as Parmesan cheese, Edam cheese and Emmenthal cheese

It was then noted that, according to the case-law of the Court, restrictions on the movement of goods within the Community deriving from national rules protecting geographical names could be justified where they were intended to safeguard the specific subject-matter of such names Such rights were found to be of an industrial and commercial property nature, the protection of which is allowable under Article 36[47] of the Treaty but which may give rise to an infringement of Article 30 [48]

This matter faced further examination from the Court in the joined cases of *Denmark, Germany and France v Commission*[49] Here it was recognised that geographical indications and designations of origin of agricultural products and

[47] Now Article 30
[48] Now Article 28
[49] Unreported, European Court of Justice, 16 March 1999 Joined cases 289/96, 293/96 and 299/96

foodstuffs are protected by community law It was also noted, however, that that same law provides that once a name becomes generic it can not be registered under the relevant legislation and enjoy the preferential status afforded to names that have not become universal in nature

It had been requested by the Greek authorities that the name Feta be registered as a protected designation of origin under Regulation 2081/92 Other Member States argued that it should actually be recognised as a generic name and thus be prohibited from receiving the protection afforded to non-standardised names In order to ascertain what approach should be adopted on this matter the Commission arranged for a survey to be carried out that would question nearly thirteen thousand citizens of the various Member States [50] The Commission, as a result of this survey, concluded that the name Feta had not become generic and, consequently, that it continued to indicate a product of Greek origin Feta was thus registered as a protected designation of origin at community level in 1996 to include only Feta cheese that was produced in Greece The applicants in this case all contested this registration

The Court found that the Commission had minimised the importance that should be attached to the situation that existed in the Member States other than the state of origin and had considered the national legislation of those states to be irrelevant It was also found by the Court that the Commission did not, contrary to community requirements, take account of all the factors when making its decision about protected designation of origin status They said that when deciding whether or not a name has become generic the situation in the Member

State from which the foodstuff originates and that in areas of consumption, along with the relevant national or community legislation in operation at the time, all have to be considered In particular, it was noted that the Commission should have taken account of products that were being lawfully marketed in the Member States at the time As a result of the failure by the Commission to take account of all the relevant factors, and due to the fact that in the intervening period the name Feta had become generic, the Court annulled the registration of the name as a protected designation of origin [51]

6.3.3. Composition requirements and pre-harmonisation food names

The issue of cheese naming was to arise again in *State (Italy) v Nespoli & Crippa, Re Low-Fat Cheese Commission v Italy*[52] This case concerned the sale of French cheese in a Milan supermarket The cheese in question failed to satisfy Italian rules regarding minimum fat content The product had been labelled to indicate that it contained reduced fat Despite this indication the Italian authorities initiated proceedings for violations of the national compositional rules

The domestic court referred the issues of European law to the European Court of Justice where it was claimed by the Commission that the Italian rules were contrary to Article 30 of the Treaty due to the fact that they hindered the sale of products which were being lawfully traded in other Member States The Commission also argued that Italy could not claim that the reason for its having such rules in place was the protection of human health because both Italy and the

[50] Surveys such as this are known as a "Eurobarometer"
[51] See also, *infra*, Chapter 6

Community had been publicly urging reduced consumption of fat in peoples' diets

The Italians claimed that they were not against the sale of low-fat products themselves but that they were against the marketing of such products as cheese when they did not fulfil the compositional requirements of that product They pointed out that in addition to this the enforcement of compositional requirements for the use of a particular foodstuff name was necessary for the prevention of consumer deception and unfair trading conditions They also felt that the harmonisation of rules on food product names could lead to standardisation at a low level of quality if compositional requirements were disregarded and thus certain products could call themselves that which they were not

The Italian association of dairy producers argued that the free circulation of imported products combined with the continued enforcement on Italian cheese producers of the domestic compositional requirements would be unfair This would be due to the fact that only Italian producers would be subject to the rules on composition and thus they would be placed at a competitive disadvantage as against producers from the other Member States operating in the Italian market Italian producers would be prohibited from naming their products as cheese whereas their competitors from the other Member States would be free to call their products by that name

There are two ways that this issue could be approached Firstly, if the Italian rules were done away with then all the traders would be free to call their

[52] [1990] ECR I-3647

products cheese Secondly, if the domestic rules were seen to be acceptable by the Court then all traders would also be free to call the low-fat variety of their products by that name

The Court held that in the absence of community rules, Italy could establish whatever compositional standards it felt were appropriate for cheese What it was not permitted to do, however, was to hinder the sale of products lawfully traded in other Member States

The Court did not deal with the claims made by the dairy association, as they had not been presented to the domestic court They concluded that the Italian authorities could prevent local producers from using the name cheese but could not prohibit its use by producers of low-fat products from other Member States This decision is somewhat similar to that in the *Mathot* case Again, the fact that adequate legislation was not in place was seen by the Court to permit placing domestic producers at a disadvantage when compared to those from other Member States [53]

6.3.4. Alcohol content requirements

Several important cases on the issue of composition requirements deal with the marketing of alcohol One of the first such cases was *Criminal Proceedings against Adriaan Fietje*[54] Here a preliminary ruling was sought under Article 177 of the Treaty of Rome on the compatibility with Article 30[55] of the Treaty with Article 1 of the Netherlands *Likeurbesluit* insofar as that article

[53] See, *supra*, Chapter 5
[54] [1980] ECR 3839

made the use of the name 'Likeur' mandatory for the types of beverage defined in those domestic provisions Mr Fietje was charged with having supplied a beverage, imported from Germany, that did not bear the description Likeur even though it fell within the scope of the definition laid down by the Dutch law The domestic law of the Netherlands provided, *inter alia*, that in order to protect public health and fair trade general administrative regulations could specify the descriptions to be used for goods where they were of a kind or composition provided for in the legislation

Mr Fietje submitted that the Dutch laws were incompatible with Article 30 of the Treaty The Court found it necessary to consider whether the national rules were capable of impeding the free movement of goods between Member States and, if so, to what extent such an obstacle could be justified on the ground of public interest It was being asked essentially whether or not a Member State was entitled to enforce on producers from other Member States an obligation to label the specified types of product in a manner that was customary in the host state, in other words to give them the customary name of that state

The Court recognised that the extension to imported products of an obligation to use a certain name on the label does not wholly preclude the importation into the Member State concerned of products originating in other Member States but that it may make their marketing more difficult [56] The rules were thus seen as being capable of impeding trade between Member States They then thus turned their attention to the question about whether or not this was a

[55] Now Article 28
[56] Paragraph 10

justifiable impediment on the grounds of public interest and consumer protection

The Court went on to state that -

> [i]f national rules relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and to enable it to be distinguished from products with which it might be confused, it may well be necessary, in order to give consumers effective protection, to extend this obligation to imported products also, even in such a way as to make necessary the alteration of the original labels of some of these products [57]

It was thus recognised that Member States may prescribe, in some circumstances, that products imported from other Member States have the product name on their labelling altered in order to clarify with consumers what exactly it is that they are purchasing Despite this apparent adoption of a consumer friendly approach to labelling they were to backtrack on this stance by finding that the taking of such an approach was unnecessary It was noted that -

> [h]owever, there is no longer any need for such protection if the details given on the original label of the imported product have as their content information on the nature of the product and that content includes at least the same information, and is just as capable of being understood by consumers in the importing state, as the description prescribed by the rules of that state [58]

It was found that the determination of this issue was a matter for the national courts of the individual Member States

Taking into consideration the opinion that it was no longer necessary to protect consumers if the labelling on the imported products was seen to adequately inform the purchaser, the Court came to the conclusion that the extension by a Member State of a provision that prohibits the sale of certain goods under a description other than that prescribed by national law to goods of

[57] Paragraph 11

that type imported from other Member States, thereby making it necessary to alter the label under which the product is lawfully marketed in the exporting state, was seen to be a measure having an effect equivalent to a quantitative restriction on imports as prohibited by Article 30 of the Treaty [59]

There are two issues under examination in this case, the free movement of goods and consumer protection The Court would appear to have examined the facts with a view to promoting its policies concerning the free movement of goods and has taken little regard for the other issue in the case Although recognising the need to use a product name that is sufficiently precise to inform the purchaser about the true nature of the product and to prevent confusion with other similar products, the Court has failed, through its findings here to promote this recognition

Another case where the alcoholic content of a beverage was considered to be the determining factor in the name that a product could adopt was *Criminal Proceedings against Miro BV*[60] Miro ran on off-licence in the Netherlands They sold a product there known as 'jenever' that was imported from Belgium The product in question had been lawfully produced and marketed in the exporting state for a long time There had been no domestic rules there concerning minimum alcohol content for most of this time but then some were introduced which set it at 30 per cent The minimum alcohol content allowed for jenever in the Netherlands was 35 per cent Miro argued that their labelling indicated the alcohol content clearly and submitted that consumers were thus

[58] Paragraph 12
[59] Paragraph 15

sufficiently protected The Netherlands Government felt that the labelling itself was insufficient and that their domestic legislation on the product was justified by the necessity of protecting consumers They also pointed out that statements on the labelling of the bottle failed to inform consumers that traditional jenever there contained a minimum alcohol content of 35 per cent

The Court was to find that the labelling on the product was actually sufficient to avoid confusion amongst consumers They pointed out that a 30 per cent alcohol content was the tradition in Belgium and that one Member State could not create a monopoly for itself over a generic name The concept of competition in a common market was seen by the Court to promote consumer choice based on quality and price The Dutch laws were thus seen to be contrary to Article 30 of the Treaty as the product was lawfully manufactured and marketed in another Member State

6.3.5. Descriptive names

The issue of descriptive names arose in *Proceedings for compulsory reconstruction against Smanor SA*[61] Here the Court was to reach a more satisfactory conclusion Smanor was a French company that specialised in the production and wholesale of deep-frozen products, in particular yoghurt, which it deep-froze by the use of an invention for which it held the patent Smanor had been the subject of several attempts by the French authorities to ban them on the basis of the relevant French provisions from marketing such products under the

[60] [1985] ECR 3731
[61] [1988] ECR 4489

name 'yoghurt' and to require them instead to market them as 'deep-frozen fermented milk' It was thus questioned whether a Member State could apply to deep-frozen yoghurts national legislation banning such products from being marketed under the name deep-frozen yoghurt

The French government argued that European law was not applicable in this case as it concerned French law governing a French company marketing a product in France and was thus a wholly internal situation This argument was rejected, however, as the product in question was lawfully manufactured and marketed under the name deep-frozen yoghurt in other Member States and thus it could not be ruled out that such products may be imported into France at a later date This would then make the French legislation applicable to them

The Court noted that the French rules did not absolutely preclude the importation of the product in question but that they did make their marketing more difficult and thus impeded trade between Member States [62] It stated that the name proposed by the French government, deep-frozen fermented milk, was less familiar to consumers than deep-frozen yoghurt They thus found that the French compositional requirements were contrary to Article 30 of the Treaty In the absence of any harmonised rules on deep-frozen yoghurt it thus had to be tested whether a Member State could justify such a prohibition on the grounds of public interest

The justification pleaded by the French government, that of the protection of human health, was not found to be an acceptable one in this instance as the rules did not prohibit the actual marketing of the yoghurt, they merely prohibited

the use of the name yoghurt As regards consumer protection, the Court acknowledged that Member States could take measures to ensure that consumers are properly informed about the products that are offered to them, thus giving them the possibility of making their choice on the basis of that information [63] It was found, however, that such information could be given effectively without prohibiting the use of the name yoghurt, by requiring that adequate labelling with a compulsory inclusion of the description 'deep-frozen' appeared on the product, to clearly identify the processes that it had undergone [64] It was thus found that the prohibition placed by the national rules on the use of the name yoghurt for the sale of deep-frozen products was disproportionate in relation to the objective of consumer protection [65] Article 30 of the Treaty was thus seen to forbid such prohibitive national rules

The approach adopted by the Court in this case would appear to be a victory for common sense However, it does not go far enough in its findings When a Member State argues that it puts in place certain trading rules to protect consumers it should have to demonstrate why this is necessary in order to ensure that the interests of the promotion of the free movement of goods are maintained A prohibition on the use of the name yoghurt as in this case actually achieves the opposite to the desired effect The prohibited name is one with which consumers would be very familiar The term deep-frozen fermented milk, while describing the composition of the product and the manufacturing processes that it has

[62] Paragraph 12
[63] See also Case 216/84 *Commission v France* [1988] ECR 793
[64] Paragraph 19
[65] Paragraph 23

undergone, is not one with which many consumers would be familiar and could in itself be misleading The term yoghurt accurately describes yoghurt If Member States wish to rely on the provisions of Directive 79/112 that deal with food names they must do so in an appropriate manner They can not legislate for instances where a legal or customary name exists and they then force producers to use a descriptive name

Descriptive names can only be used in circumstances where no legal or customary name is in existence The Court in *Smanor* should have pointed out this fact and demonstrated how far a breach of the Directive these French domestic rules actually were If the French legislators had succeeded in their argument, which was dismissed immediately, a situation could have been brought about where all food products that have undergone any kind of manufacturing process would have to use descriptive names rather than legal ones If such an approach were adopted then products such as chocolate, for which the vertical legislation has already created confusion, could for example be forced to be named as 'emulsified milk, sugar, cocoa mass, cocoa butter and vegetable fat' by domestic legislators Similarly, ice-cream would have to be called 'deep-frozen skimmed milk, cream, sugar and vegetable fat '

The Court did, however, highlight an apparent contradiction in the French rules and gave a clear interpretation of the provisions of Directive 79/112 during the course of its findings It was noted that Article 5(3) of the Directive provides that the name under which a foodstuff is sold is to be accompanied by particulars as to its physical condition or the specific treatment that it has undergone It

expressly mentioned in this context the process of deep-freezing From this it could be inferred that yoghurt would thus only have to be called something else if it no longer possessed the characteristics which consumers would expect from that product It would have to simply be called 'deep-frozen yoghurt' The Court thus found that the prohibition put in place by national rules on the use of the name yoghurt for the sale of such deep-frozen products was disproportionate to the aim of consumer protection, when its characteristics are not substantially different from the fresh variety of the product and when appropriate labelling would suffice to give consumers the adequate and proper information [66]

The prohibition put in place by the French domestic regulations was clearly disproportionate to the objective of consumer protection This was not only due to the fact that the characteristics of yoghurt are practically identical to those in its deep-frozen form, but also because use of the name yoghurt on the labelling more precisely and clearly indicates what the product actually is The outcome of this case was to point us in a clearer policy direction than the *Fietje* case, which only seemed to concern itself with the promotion of the free movement of goods Ironically this case, while not being exclusively driven by the promotion of free movement, enhanced that policy by an increased level of clarity It showed that the Court, when interpreting the compatibility of domestic food naming laws with European Union policy, would not permit national legislators to use the justification of consumer protection to inhibit the free movement of goods Directive 79/112 and this decision indicate that consumer protection does not mean exclusive protection and that it will always be

[66] Paragraph 23

interpreted against the background of the promotion of free movement It also demonstrates that even where consumer protection is offered as a defence mechanism it must be tested to ensure its proportionality to the aims pursued

6.4. Quick-frozen foods

6.4.1. Regulating legislation

Council Directive 89/108[67] creates a set of rules to govern the composition, preparation, storage, labelling and packaging of quick-frozen foods Under Directive 89/108 raw materials used in the manufacture of quick-frozen foodstuffs must be of sound, genuine and merchantable quality and be fresh to a certain standard The preparation and quick-freezing of products must be carried out promptly and by using the appropriate technical equipment to limit chemical, biochemical and microbiological changes to a minimum The cryogenic (refrigeration) media authorised for use in direct contact with quick-frozen foodstuffs must be composed of air, nitrogen and carbon dioxide

Commission Directive 92/2[68] governs temperature controls in the means of transport, warehousing and storage of quick-frozen foodstuffs It also lays down rules that must be implemented regarding official checks designed to ensure that these temperature controls are met Temperatures must be stable and maintained at all postproduction points, with possible minor brief fluctuations upwards allowed during transport

[67] OJ L 40, 11/2/1989, p 34
[68] OJ L 34, 11/02/1992, p 30 Annex I and II

The means of transport, warehousing and storage must be fitted with suitable recording instruments to monitor at frequent and regular intervals the air temperatures to which quick-frozen foodstuffs intended for human consumption are subjected The competent authorities of the country in which the means of transport is registered must approve the measuring instruments Temperature recordings obtained in this manner must be dated and stored by the operator for at least one-year, or longer, depending on the nature of the food in question

6.4.2. Labelling requirements

Apart from the requirements set out in Directive 79/112 there are extra ones required for quick-frozen foodstuffs The following additional information must appear on quick-frozen foodstuffs intended for supply to the ultimate consumer -

(i) the term 'quick-frozen',

(ii) the period during which the quick-frozen products may be stored by the purchaser and the storage temperature and/or the type of storage equipment required,

(iii) lot marking, and

(iv) a clear message that highlights that the food is not to be refrozen after defrosting

Quick-frozen products that are not intended for sale to the ultimate consumer, or to mass caterers, have only to contain the following mandatory

information on the packaging, container or wrapper or on a label attached thereto -

(i) the sales name accompanied by the words 'quick-frozen',

(ii) the net quantity expressed in units of mass,

(iii) lot marking, and

(iv) the name or business name and address of the manufacturer or packager or the European Union seller

6.4.3. Directive 89/108

As previously mentioned, Directive 89/108 deals with the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption The Directive defines quick-frozen foodstuffs as being those which -

> [ ] have undergone a suitable freezing process known as 'quick-freezing' whereby the zone of maximum crystallization is crossed as rapidly as possible, depending on the type of the product, and the resulting temperature of the product (after thermal stabilization) is continuously maintained at a level of –18C or lower at all points, and which are marketed in such a way as to indicate that they possess this characteristic [69]

For the purposes of the Directive, ice-cream and other edible ices are not regarded as coming into the category of quick-frozen foodstuffs [70] Only the products coming within the definition above may bear the names[71] specified in the provisions of the legislation [72]

---

[69] Article 1(2)
[70] Ibid
[71] Article 2
[72] Articles 8 and 9

Directive 89/108 also provides that Directive 79/112 is to apply to products covered by it and intended for supply without further processing to the ultimate consumer and to restaurants, hospitals, canteens and other similar mass caterers [73] The label of these products is also to include a clear message that they are not to be refrozen after defrosting [74]

Raw materials used in the manufacture of quick-frozen foodstuffs must be of sound, genuine and merchantable quality and they must also be of the required degree of freshness to be acceptable [75] The preparation and quick-freezing of these products has to be carried out promptly and by using the appropriate technical equipment This is to help limit the chemical, biochemical and microbiological changes to a minimum [76]

Member States may not, for reasons relating to their own manufacturing specifications, presentation or labelling, prohibit or restrict in any way the marketing of any of the products that are in compliance with the provisions of Directive 89/108 [77]

6.4.4. EC (Quick-Frozen Foodstuffs) Regulations, 1992.

Council Directive 89/108 is transposed into Irish domestic law by the European Communities (Quick-Frozen Foodstuffs) Regulations, 1992 [78] Under the Regulations authorised officers are afforded a wide-range of inspection

[73] Article 8
[74] Article 8(1)(d)
[75] Article 3(1)
[76] Article 3(2)
[77] Article 10
[78] Statutory Instrument No 290 of 1992

powers [79] They may enter, at all reasonable times, any premises in which they have reasonable grounds for believing that any foodstuff to which these regulations apply are being kept, sold or manufactured [80] They may also enter any train, vehicle, ship, vessel or aircraft in which they believe that foodstuffs to which these regulations apply are being transported or kept for sale [81] When entering any of these premises they may inspect and take copies of, or extracts from, any books, documents or other records They may also make such examinations, tests and inspections and take such samples as they consider appropriate for the purposes of these regulations or Directive 89/108

The labelling of quick-frozen food products is one of the more satisfactorily regulated areas of the food labelling requirements of the European Union Only one major regulatory tool is used (Directive 89/108) with one other (Directive 92/2) being adopted to govern an ancillary matter In Ireland the domestic regulations appear to implement the Community legislation to an acceptable level but the form of a regulation would still be more desirable, especially when considering the length of time that it took to draft domestic legislation on such an important issue [82] Despite this, the European regulation of the matter possesses both clarity and simplicity and has not yet been caught up in a web of piecemeal legislation

[79] Sections 11 and 12
[80] Section 12(2)
[81] Section 12(2)
[82] Article 13(1) of the Directive required Member States to prohibit no later than twenty-four months after notification of the Directive trade in products that did not comply with its terms While this directive was transposed later than the date specified it was still done so relatively early

6.5. Designations of origin and indications of provenance

6.5.1. Designations and indications defined

In *Exportur SA v LOR SA and Confiserie du tech SA*[83] the Court distinguished between designations of origin and indications of provenance They found that designations of origin guarantee "not only the geographical provenance of the product, but also that the goods have been manufactured according to quality requirements or manufacturing standards prescribed by an act of public authority" As a result of this it was found that such products possessed "certain specific characteristics" It was also noted that the rules attached to the products prevented "such designations from becoming merely generic so long as that regime remains in force "

Indications of provenance, on the other hand, were seen "to inform the consumer that the product bearing that indication comes from a particular place, region or country" and that a "considerable reputation may attach to that geographical provenance " The judgement went on to find that indications of provenance are not only the names of products, the flavour, qualities and characteristics of which are due to the geographical location of the place of production, but are also names which, without fulfilling that requirement, may enjoy a high reputation amongst consumers and constitute for producers established in the places to which such names refer an essential means of attracting business Indications of provenance were found to be the type of

---

when compared to other food labelling legislation This was perhaps due to the simplicity of the way in which the matter was dealt with at European Union level See also Appendix One

geographical names most closely linked to generic names because it was not essential for the origin of the product to confer on it special characteristics and because the quality requirements attached to them were less strict given that a supervisory body was not involved

Measures have recently been adopted for the protection of geographical names Rules have been adopted specifically dealing with wines and alcoholic beverages, and general rules have been adopted on the use of names for agricultural products and foodstuffs, in Regulation 2081/92 Further requirements in relation to this are set out in Regulation 2037/93 Regulation 2081/92 establishes a community system of names that permits their protection in all of the Member States Its main objective is to reduce the problems that adversely affect the free movement of goods that arise from the coexistence of different national systems of name protection

6.5.2. Regulation 2081/92[84]

Regulation 2081/92 establishes a community system of protection for certain agricultural foodstuffs and products for which a link between their characteristics and their geographical origins exist To achieve this, the Regulation sets down two different types of reference that are to be used in relation to the foodstuffs concerned These are protected geographical indications (PGIs) and protected designations of origin (PDOs) The regulation sets out the following definitions -

[83] [1992] ECR I-5529
[84] OJ L 208, 24/07/1992, p 1

(i) designation of origin the name of a region, a specific place, or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff which originates in that region, place or country and the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area, and

(ii) geographical indication means the name of a region, a specific place, or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff that originates in that region, place or country and which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area [85]

The Regulation also regards as designations of origin "certain traditional geographical or non-geographical names designating an agricultural product or a foodstuff originating in a region or a specific place, which fulfil the conditions referred to"

It can be seen from the wording in the Regulation that the definition of a designation of origin is very similar to that specified in the case law of the Court [86] However, Regulation 2081/92 also identifies a new type of name, the 'geographical indication' It defines geographical indications in a similar way to designations of origin but the requirements are not as strict The conditions

[85] Article 2(2)
[86] *Exportur SA v LOR SA and Confiserie du tech SA* [1992] ECR I 5529

relating to quality, type and reputation do not all have to be met for geographical indications whereas they all must be where designations are concerned Scottish beef is an example of that which has been deemed to be a geographical indication

The issue of geographical names that have become generic is also addressed in the Regulation [87] This type of product name may not be registered under the legislation and thus can not receive the protection that is afforded therein A name that has become generic is specified as being that which, although relating to the place or the region where the product or foodstuff was originally produced or marketed, has become the common name used for that particular agricultural product or foodstuff [88] To establish whether or not a name has become generic account has to be taken of all the relevant factors, in particular -

(i) the existing situation in the Member State in which the name originates and in the areas of consumption,

(ii) the existing situation in other Member States, and

(iii) the relevant national or community laws

Where an application for entry onto the register is rejected because a name has become generic, the Commission has to publish that decision in the Official Journal of the European Communities

The Regulation also sets out a list of specifications with which agricultural products or foodstuffs must comply to be eligible to use a protected

[87] Article 3
[88] Article 3(1)

designation of origin or a protected geographical indication These specifications include -

(i) the name of the agricultural product or foodstuff, including the designation of origin or the geographical indication,

(ii) a description of the agricultural product or foodstuff including the raw materials, if appropriate, and principal physical, chemical, microbiological and/or organoleptic characteristics,

(iii) the definition of the geographical area which is applicable,

(iv) evidence that the agricultural product or foodstuff originates in the geographical area,

(v) a description of the method of obtaining the agricultural product or foodstuff and, if appropriate, the authentic and unvarying local methods,

(vi) details of the inspection structures,

(vii) the specific labelling details or the traditional national indications, and

(viii) any requirements laid down by community and/or national provisions that relate to the product

The indications PDO, PGI or the equivalent traditional national indications may only appear on agricultural products and foodstuffs that comply with the provisions of the Regulation [89]

The Regulation then proceeds to set down an inspection structure, an aspect of food regulation that is so often addressed in an inadequate manner elsewhere [90] The reason that this is dealt with adequately here may have

[89] Article 8
[90] See, *infra*, Chapter 6

something to do with the economic value that is attached to products that do come within the scope of the legislation Member States are to ensure within six months of the entry into force of the regulation that inspection structures are in place [91] The function of these structures is to ensure that agricultural products and foodstuffs bearing a protected name meet the requirements laid down in the legislation An inspection structure may comprise of one or more designated inspection authorities and/or private bodies approved for that purpose by the Member State [92] The designated inspection authorities and private bodies are to act at all times with objectivity and impartiality with regard to all producers and processors subject to their control They must also have permanently at their disposal the qualified staff and resources necessary to carry out inspections on agricultural products and foodstuffs that bear a protected name to ensure their compliance with the regulation If after an inspection has been carried out on a product or foodstuff the authority discovers that it does not meet the specifications they are to take the necessary steps to ensure that the Regulation is complied with [93]

Registered names receive much in the way of protection under regulation 2081/92 They are specifically protected against -

(i) any direct or indirect commercial use of a name registered in respect of products not covered by the registration insofar as those products are comparable to the products registered or insofar as using the name exploits the reputation of the protected name,

[91] Article 10(1)
[92] Article 10(2)

(n) any misuse, imitation or evocation, even if the true origin of the product is indicated,

(iii) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin, and

(iv) any other practice liable to mislead the consumer as to the true origin of the product [94]

Protected names may not become generic In this way they are distinguished from generic names [95]

6.6. Conclusions

Food names, as recognised by the European Union, can be categorised as either legal, customary or descriptive More recently we have also seen an extension of customary names to include the sub-category of geographical names Various problems with the regulation of each of these types of names exist

Where legal names are concerned, there are several problems with their regulation These problems arise through the vertical legislation that defines them This legislation is designed to reward producers by allowing them to use a particular name in return for adherence with the compositional requirements set down in the legislation These difficulties arise with the non-existence of an

[93] Article 10(3)
[94] Article 13(1)

enforcement mechanism to ensure that producers are carrying out the requirements that they say that they are or they can be to do with a lack of clarity in the provisions themselves. As with other areas of food labelling regulation the over-use of directives as opposed to regulations is one of the main reasons for the existence of this inadequate situation.

In the *Smanor* case the European Court of Justice did not go far enough when the French authorities insisted upon deep frozen yoghurt being called deep-frozen fermented milk. By failing to do so the possibility of authorities in the individual Member States reading the word 'descriptive' too literally where such names are concerned has been left open and an opportunity to ensure labelling clarity on this matter was, unfortunately, missed.

The area of customary names is changing rapidly. Efforts to promote the free movement of goods have again led to confusion here. An example of this was seen in the *Deserbais* case where imported Edam cheese was compositionally different from that which consumers in the host state were used to but the Court still found, in an effort to promote the free movement of goods, that its importation without restriction had to be allowed. This could lead to a situation where consumers end up purchasing a product that is different in composition from the one that they were led into believing was that which they were actually purchasing.

The naming of cheese has been a constant problem due to the fact that many are named after the areas from which they originate and are then produced in a different region using different ingredients or an alternative method of

[95] Article 13(3).

production The drafting of legislation in this area is urgently required because a failure to do so leaves the Member States with too wide a discretion on how they will regulate the sale of these products An example of the problems that arise when this does not happen is evident, in particular, in the case of Greek Feta cheese

Cases on the labelling of various cheese varieties as Feta has led to the introduction of a new type of food name, the geographical name The Advocate General in the *Canadane* case felt that names such as Edam and Feta had become generic over the course of time and as such should no longer be afforded the level of protection that may be given to geographical names that have not become so Names that have not become generic are now afforded a high level of protection under Regulation 2081/92 Unfortunately, the European Court of Justice has now weakened the status afforded to protected designations of origin by its 1999 decision in *Denmark, Germany and France v Commission*

Overall, what can be said about the regulation of food names is that this area is poorly legislated upon The European Court of Justice has not helped matters either by a series of judgements that have left open the possibility of consumer confusion A series of well-drafted horizontal regulations with vertical annexes that repeal the piecemeal and vague series of directives would appear to be the most appropriate solution to this problem

CHAPTER SEVEN

INGREDIENTS

7.1. Introduction

All ingredients involved in the preparation of foodstuffs must be listed on the labelling of such products They are to appear in descending order of their weight used in the preparation process and must be preceded by the word 'ingredients' If an ingredient appears in the name under which the foodstuff is sold then the quantity of that ingredient used must be expressed as a percentage of the total ingredients This is also a requirement where the ingredient concerned is emphasised on the labelling in words or pictures or where it is essential to characterise a particular foodstuff or to distinguish it from products with which it might be confused due to its name or appearance One of the more controversial aspects of ingredients listing is the question of whether or not additives are to be considered as ingredients

The listing of ingredients in descending order of their weight used in the preparation process is not ideal The reason that the current situation should be that which it is, is that consumers are more likely to read those ingredients that appear first in the list These would, *prima facie*, be those with which consumers would be most concerned as they make up the majority of the content of the product However, it is often those ingredients that are present in small quantities, and thus appear towards the end of the ingredients listing, that

consumers should be concerned with as these are often some form of additive or they could even have been genetically modified during the production process [1]

Additives were first introduced into the process of making food to help preserve, add flavour to and blend and thicken it The variety and purpose of additives has increased greatly in recent years The benefits of this expansion have added considerably to the variety, quality and value of foodstuffs that consumers receive While the food production industry has increased its use of additives to improve their products so too have the volume of control measures increased in an effort to ensure that consumers are protected from harmful substances

Increasing consumer awareness has led to the issue of additives in food becoming a topic for debate in recent years As with other areas of food production there is much inaccurate information in circulation about their uses and effects Common misconceptions about additives are exemplified most clearly by those about E number additives Far from being an indication that their presence in food is harmful, they are actually proof that the additive in question has undergone stringent food safety tests approved by the European Union

There is also a misconception that many additives are developed from artificially created chemicals Most are actually taken directly from nature For example, lecithin (E322), which is used to prevent food from separating, is obtained directly from egg yolk, while pectin (E440), which is used as a setting agent, derives naturally from plants This does not mean, however, that the

[1] See, *infra*, Chapter 9

legislation in force meets the needs of consumers, who still wish to be made aware of what it is that they are eating

The fact remains that if consumers desire information it should, in reasonable circumstances, be disclosed to them Even if it could be argued that most additives are safe this fact remains Similar claims have been made about genetically modified foods yet the need for openness and information remains in that sector It is the same for any substance that may be used in the food production process

7.2. Exemptions from the listing of ingredients

7.2.1. Substances not regarded as ingredients

Under Directive 79/112 there are several substances specified which are not to be regarded as ingredients [2] These include -

(i) the constituents of an ingredient which have been temporarily separated during the manufacturing process and later reintroduced, but not in excess of their original proportions,

(ii) additives which are used as processing aids,

(iii) additives whose presence in a given foodstuff is solely due to the fact that they were contained in one or more ingredients of that foodstuff, provided that they serve no technological function in the finished product, and

(iv) substances used in the quantities strictly necessary as solvents or media for additives or flavouring

7.2.2. Foodstuffs for which the list of ingredients is not mandatory

Council Directive 79/112 also specifies certain foodstuffs for which a list of ingredients does not have to be given on their labelling These include -

(i) fresh fruit and vegetables,

(ii) carbonated water,

(iii) fermentation vinegars derived from a single basic product, provided that no other ingredient has been added,

(iv) cheese, butter, fermented milk and cream once no other ingredient has been added, and

(v) products consisting of a single ingredient where the trade name is identical or enables the nature of the ingredient to be easily identified [3]

7.3. Additives as ingredients

7.3.1. Additives defined

The European Union framework directive on additives is Council Directive 89/107 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption It defines additives as being -

> [ ] any substance not normally consumed as a food in itself and not normally used as a characteristic ingredient of food whether or not it has nutritive value, the intentional addition of which to food for a technological purpose in the manufacture, processing, preparation,

[2] Article 6
[3] Article 6(2)

treatment, packaging, transport or storage of such food results, or may be reasonably expected to result, in it or its by-products becoming directly or indirectly a component of such foods [4]

7.3.2. Categories of food additives

Specific categories of food additives are laid down in Directive 89/107 [5] These categories include colours, preservatives, anti-oxidants, emulsifiers, emulsifying salts, thickeners, gelling agents, stabilisers, flavours, enhancers, acids, acidity regulators, anti-caking agents, modified starches, sweeteners, raising agents, anti-foaming agents, glazing agents, flour treatment agents, firming agents, humectants, sequestrants, enzymes, bulking agents, propellant gases and packaging gases

7.3.3. Additive regulation

In late 1988 the European Union adopted a framework directive which set out the criteria by which additives are to be assessed and their use regulated It also provided for the adoption of more specific directives to establish a list of additives that are permissible to be used m food production, the foods in which they may be used and also any maximum levels to which they may be used Additives are now only allowed to be used in foodstuff production within the Community if they pass the tests that have been laid down by the Scientific Committee for Food [6]

[4] Art 1 2
[5] Annex I

7.3.4. Council Directive 89/107[7]

Council Directive 89/107 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption was adopted by the European Union on 21 December 1988 It set out the criteria by which the safety of additives are to be assessed It also provides for the adoption of more specific technical directives to establish a list of approved additives, the foods in which they can be used and the maximum levels to which they can be used

To achieve this end the Directive requires that all food additives be tested by the European Scientific Committee for Food to assess their safety against the criteria laid down in the Annex These criteria are those to be used by the Member States in consultation with the Commission when deciding whether a particular additive should be approved for use in food They are to take account of consumer health in this testing process while also recognising the need to afford producers a certain level of protection to ensure the economic development of the Community Consumer health is to be protected by the laying down of stringent testing and monitoring standards while producer protection is to be aided by allowing the use of additives in some circumstances, even where there is a more favourable substitute available, if such a use would make more economic sense

7.3.5. Criteria for the use of food additives

---

[6] See Chapter 3 7
[7] OJ L 40, 11/02/1989, p 27

The criteria for the use of food additives are set out in the Annex to the Directive They establish a general set of rules for such use These rules cover all aspects of additive use including necessity, safety, testing, observation and levels of the use

Food additives can only be approved if they can demonstrate a reasonable technological need, and this need can not be achieved by other means which are economically and technologically practicable, and they present no danger to the health of the consumer at their proposed level of use [8]

7.3.6. Necessity of additives

Additives can not be used by producers in all circumstances where their use is purely for reasons of convenience There must be evidence that the proposed use of the additive would have demonstrable advantages that will benefit the consumer It is thus necessary for food producers to establish a case for the necessity of the additive To demonstrate this need the additive must serve at least one of the following four purposes -

(i) to preserve the nutritional quality of the food,

(ii) to provide the necessary ingredients for foods which are specially manufactured for groups of consumers with specific dietary needs,

(iii) to enhance the quality of the food, but not to such an extent that it changes it in a way that deceives consumers, or

[8] Annex II

(iv) to aid in the manufacture, processing, preparation, treatment, packing, transport or storage of food once not used to cover up the use of faulty raw materials or undesirable practices used in any of these activities

7.3.7. Testing and evaluation

Additives are to be tested for any harmful effects that they may possess by being subjected to an appropriate testing and evaluation process Such an evaluation is to take into account the possible effects that substances foreign to the human body may have on its health All food additives must also be kept under continuous observation and be re-evaluated whenever necessary in the light of changing conditions of use or any new scientific information that may be established

Approval by the European Scientific Committee for Food must also specify the foodstuffs to which the additives may be added and the conditions under which they may be added The maximum levels at which the additives may be used has to be limited to the lowest level of use necessary to achieve the desired effect Any approvals must also take into account the acceptable daily intake by consumers of the additive in question

7.3.8. Directive amendment

The framework directive was amended in 1994 by European Parliament and Council Directive 94/34 The amendment provides that Member States can nominate certain traditional foods that have not been permitted by the state in

question to contain certain additives These nominated foods can continue to be restricted in their use in the territory of that Member State This amendment, while somewhat contrary to the principles of law harmonisation and the free movement of goods, does follow the jurisprudence that has been established by the European Union insofar as it allows individual Member States some flexibility where tradition and culture are concerned and thus in the light of that can not be seen to be contrary to those principles [9]

7.4. Ingredients and the free movement of goods

7.4.1. Article 30 and ingredients

In the case of *Commission v Germany*[10] the association between Article 30 of the Treaty and Directive 79/112 in relation to ingredient listing was examined The Commission brought an action for a declaration that, by requiring as a condition of entry into the German market, foodstuffs containing an ingredient that was not in conformity with the traditional recipe had to carry a trade description with an additional statement indicating that the substance in question had been used, even if that substance was already included in the list of ingredients, the Germans had failed to fulfil their obligations under Article 30 of the Treaty and Directive 79/112 Paragraph 17 of the LMBG (the German law on foodstuffs and products for human consumption) placed a prohibition on the sale of foodstuffs whose composition and appearance could deceive consumers

[9] See, *infra*, Chapter 4
[10] [1995] ECR I-3599

without the use of sufficiently precise labelling If products did not comply with the law then that fact was to be mentioned on the label in an appropriate manner to the extent required for the protection of consumers

The foodstuffs at issue in this case were two sauces and certain biscuits and pastry products containing an additive called E 160 F The German authorities prohibited the marketing of the sauces when they were prepared using vegetable fats on the ground that consumers were led to believe that those products had actually been made using butter and eggs in accordance with the recipe traditionally used in Germany The marketing of these products was possible, however, when an additional statement appeared on the label indicating that they had actually been prepared using vegetable fats In the case of the pastry products and biscuits containing E 160 F, a colouring, the German authorities required that an additional statement appear on the label to the effect that the consumer was not left with the impression that the products contained eggs The requirements applied to both domestic products and those imported from other Member States

The Court examined the various arguments and came to the conclusion that by requiring that the sauces that were made with vegetable fats and the biscuits and pastry products containing E 160 F should, in order to be marketed in Germany, carry a trade description with an additional statement indicating that the substances in question had been used, even if those substances were already listed in the ingredients listings referred to in Article 6 of Directive 79/112, Germany had failed to fulfil its obligations under Article 30 of the Treaty

7.4.2. Additives and the free movement of goods

The obligation on producers to include additives in the list of ingredients has been examined by the European Court of Justice on occasions Producer obligations where the addition of the additive is to one of the ingredients as opposed to the finished product itself was examined in the case of *Pfanni Werke Otto Eckart v Landeshauptstadt Munchen*[11] Article 3 of Directive 79/112 provides that the labelling of a foodstuff is to include a list of ingredients There are various exceptions to this rule Article 6(4)(c)(ii) provides that the following are not to be regarded as ingredients -

> [a]dditives whose presence in a given foodstuff is solely due to the fact that they were contained in one or more ingredients of that foodstuff, provided that they serve no technological function in the finished product

That provision was transposed into German law[12] The domestic provisions stated that the following were not to be regarded as ingredients -

> [t]he substances in Annex II and aromas which were contained in one or more of the ingredients of the foodstuff, provided that they serve no technological function in the finished product

Diphosphate E 450a was included in Annex II to the domestic law

Pfanni Werke, a manufacturer of dehydrated potato products, added diphosphate E 450a when manufacturing the product, potato puree flakes, to help counteract grey discoloration that was caused by enzymes present in the product Landeshauptstadt Munchen objected to the fact that Pfanni Werke did not include that additive in the list of ingredients on the ground that it affected the colour of

[11] [1994] ECR I-4605
[12] Paragraph 5(2)(2) of the Lebensmittelkennzeichnungsverordnung (LMKV)

the finished product and should therefore be regarded as an ingredient within the meaning of the directive Pfanni Werke brought an action claiming that the additive in question did not play any role in the finished product and thus did not have to be included in the list of ingredients The additive was added to the potato pulp and they argued that the pulp was only one stage in the manufacturing process of the ingredient potato puree flakes They also stated that after the subsequent dehydration of that pulp the colour of the potato flakes in the finished product could no longer be affected because the enzymes in the potatoes had been neutralised through heating

During appeal proceedings in the German courts the following question was referred to the European Court of Justice -

> [d]oes an additive still serve a technological function in the finished product where it prevents discoloration of an ingredient during its manufacture and that state continues to exist in the finished product without the additive still needing to be present in that product?

The Court interpreted this as asking whether Article 6(4)(c)(ii) of Directive 79/112 could be interpreted as meaning that an additive that prevents the discoloration of an ingredient during its manufacture no longer serves a technological function in the finished product where its presence in the finished product is no longer necessary to prevent the discoloration of that product

The Court noted that the Directive was based on the need to inform and protect consumers It also noted that in order to give effect to that aim it required producers to give a list of ingredients on the labelling of their products, but that this was itself subject to various derogations, including that in Article 6(4)(c)(ii) It followed from this that the Directive required consumers to be provided with

effective information that they could understand This was not seen to include an exhaustive list of ingredients used in the manufacturing process of the products concerned It was accepted that the risk of the potato pulp discolouring no longer existed after the heating process and thus the presence of diphosphate E 450a was no longer necessary in the final product Accordingly, the additive at issue was no longer seen to serve a technological function in the finished product so that, if consumers were no longer to be misled, it was not seen as being necessary to include it in the list of ingredients The Court therefore found that the provision of Directive 79/112 in question was to be interpreted as meaning that an additive preventing discoloration of an ingredient during its manufacture no longer served a technological function in the finished product where its presence was no longer necessary to carry out that function

7.4.3. Member States' prohibitions on the use of additives

In *Commission of the European Communities v Italian Republic*[13] the compatibility of a prohibition on the addition of certain substances to food with the Treaty provisions on the free movement of goods within the Community was examined The Commission brought this action to get a declaration that by banning the importation of cheese to which nitrate had been added within the limits widely accepted in international scientific circles (50 mg per kg), and which was lawfully manufactured and marketed in other Member States, Italy had failed to fulfil its obligations under Article 30 of the Treaty Nitrate is added

[13] [1992] ECR I-4545

to various types of cheese in the course of their manufacture to help eliminate certain bacteria that make these products swell abnormally

Italian Law No 283 of 30 April 1962 governing certain health aspects of the production and sale of food and drink provided that no chemical additives of any kind whatsoever could be used in the manufacture of foodstuffs and that no foodstuffs containing such additives could be made available for consumption without prior ministerial authorisation No order pursuant to that law had authorised the use of nitrate in the production of cheese Nitrate was actually one of the substances listed in the Annex to Council Directive 64/54 as amended The inclusion of nitrate in this list indicated that it was one of the additives whose use in foodstuffs could be authorised by the Member States It was thus recognised by the Court to be up to the discretion of those states to determine the conditions governing their use

According to the Commission, the importation of foodstuffs manufactured in another Member State containing an additive included in the community list had to be authorised provided it posed no danger to public health and met a particular need The Court noted that according to its own case law[14] rules making the use of an additive subject to an authorisation were in compliance with community law if two conditions were satisfied Firstly, the rules had to make provision for a procedure that enabled traders to have the additive included on the national list of authorised additives This procedure had to be one that was readily accessible, that could be completed within a reasonable period and if it

[14] See *Motte* [1985] ECR 3887 at paragraph 25, *Muller* [1986] ECR 1511 at paragraph 26, and *Bellon* [1990] ECR I 4863 at paragraphs 16 and 17

lead to a rejection that that rejection had to be open to challenge before the courts Secondly, an application to have an additive included on the list in question could be rejected by the competent authorities only if the additive did not meet any genuine need, in particular a technological need Even if it did meet such a need it could not present any danger to public health

The Court noted that it was not sufficient for the purpose of showing that an additive did not meet a genuine need to show that a product could have been manufactured using a different substance Such an interpretation of the concept of need was seen to have the ability to result in favouring national production methods This was identified as possessing the possibility of constituting a disguised method of restricting trade between Member States [15] It was noted, however, that the Italian legislation on additives introduced a system comprising of a ban, subject to the possibility of authorisation, that applied equally to additives in foodstuffs from Member States where they were lawfully manufactured and marketed and those of domestic origin The Commission did not claim that the procedure set up by the Italian legislation was contrary to community law and, as a result, the Commission's action was dismissed

A similar case was brought against France in *Commission v French Republic*[16] The French had also banned the importation of cheeses lawfully manufactured and marketed in other Member States to which nitrate had been added within the limits accepted in international scientific circles The

[15] Paragraph 12
[16] [1992] ECR I-4719

Commission claimed that such a prohibition was contrary to the Treaty provisions on the free movement of goods

Again, the Court had found that it was not sufficient, for the purpose of showing that an additive did not meet a genuine need, to rely on the fact that the product could be produced using a different substance, and that such an interpretation of the concept of technological need could result in favouring national production methods which could then constitute a disguised method of restricting trade between Member States [17] Despite this, they were to find that the national rules, designed for the protection of public health, were not in contravention of Article 30 provided that two conditions were satisfied These were that the domestic provisions provided for an appeals procedure and that such an appeal could only be rejected if the additive failed to meet a genuine need or presented a danger to public health [18]

Some earlier cases also looked at the issue of prohibitions on additive use and their conformity with community law In *Officier van Justitie v Koninklijke Kaasfabriek Eyssen BV*[19] the issue of a prohibition on the addition of nisin to cheese was examined A Netherlands manufacturer produced processed cheese for sale on the domestic market and for export to other Member States He was charged with having held in stock for the purpose of sale in the Alkmaar district quantities of processed cheese containing the additive nisin

Nisin presence was not allowed under Netherlands law Nisin occurs naturally in varying quantities in most varieties of cheese It acts as a

[17] Paragraph 12
[18] See also *Commission v Hellenic Republic* [1992] ECR I 4577

preservative The key factor in this case was that the prohibition applied only to products for the domestic market and not those intended for export to other Member States At the time of this case nisin addition was permitted in some Member States, but not in all In view of this disparity between rules it was found not to be disputable that the prohibition by some Member States on the marketing within their territory of processed cheese containing additional nisin was of such a nature as to affect imports of that product from other Member States where, conversely, the addition of nisin was wholly or partially permitted and for that reason it constituted a measure having an effect equivalent to a quantitative restriction on imports

However, whilst a hindrance to community trade was recognised, the prohibition was seen to be justified under Article 36 of the Treaty on the ground of the protection of human health The Netherlands legislation was not seen to constitute a means of arbitrary discrimination nor was it seen to be a disguised restriction on trade between Member States

In *Criminal proceedings against Jean-Claude Bellon*[20] the addition of sorbic acid to pastry imported from Italy, where its use was permitted, and offered for sale in France, where it was not, was examined Sorbic acid use was also permitted in community law under Directive 64/54 and its various amendments In France it could only be used in a limited number of stipulated foodstuffs

[19] [1981] ECR 409
[20] [1990] ECR I-4863

Since the products concerned were imported from another Member State where they were lawfully produced and marketed, the application of the French rules was clearly to be regarded as a measure hindering intra-community trade and thereby constituting, in principle, a measure having an effect equivalent to a quantitative restriction on imports It therefore had to be ascertained whether or not this measure could be justified under Article 36 of the Treaty

The Court noted that any prohibitions on the marketing of products containing additives authorised in the Member State of production, but prohibited in the Member State of importation, had to be restricted to what was actually necessary to secure the protection of public health They went on to find that the prohibition was justified on the grounds of public health but that, again, a system of approval for products such as those prohibited here must be implemented by Member States carrying out such a prohibition

7.5. Quantitative ingredient declarations

It has been proposed that the European Union adopt legislation on quantitative ingredient declarations (QUID) The idea behind this is to make it compulsory for producers to express on the label the percentage of the ingredient in question that is present in the product

Where foods lose moisture during heating, or some other form of treatment, the quantitative ingredient declarations must be based on the weight that is actually present in the final product Concentrated foods or dehydrated

foods intended to be reconstituted by the consumer may express these declarations on the basis of the reconstituted product

It has been recognised by the Economic and Social Committee that since the drafting of much of the European Union food labelling legislation the concept of quantitative ingredient declarations has been developed This must now be accounted for in the drafting of legislation that is used to amend the existing legislation [21]

7.6. Ingredient purity

7.6.1. The purity of ingredients

Foodstuff ingredients containing contaminants in a quantity that is unacceptable from a public health perspective are not allowed to be placed on the market Contaminant levels are, in general, to be kept as low as can reasonably be achieved during all the stages of production Maximum tolerance levels for certain contaminants, such as radioactive contamination, extraction solvents and pesticide residues, have also now been established [22] The directives covering these varieties of contaminants set limits for the same contaminant in different foods, set analytical detection limits and also refer to the sampling and analysis

[21] See, for example, the opinion of the Economic and Social Committee on the amendment of Council Directive 89/398 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses OJ C 108, 16/04/94, p 17 Here it was recognised that since Directive 89/398 was adopted the notion of quantitative ingredient declarations had been developed and that this development would thus have to be accounted for in any amending legislation

[22] See, for example, Directives 76/895 and 88/344

methods to be used The principal legislation governing contaminants in foodstuffs is Regulation 315/93

European Union rules govern the maximum permitted levels of radioactive contamination of foodstuffs that are placed on the market following a nuclear accident or any other radiological emergency as well The maximum permitted levels for baby foods, dairy produce, liquid foodstuffs and other foodstuffs except minor foodstuffs (foodstuffs considered to be of minor dietary importance and which account for only a small proportion of the average food intake) are listed in the Annex to Regulation 3954/87 The maximum levels for minor foodstuffs are listed in the annex to Regulation 944/89

In the case of *European Parliament v Council of the European Communities*[23] the legality of Regulation 3954/87 came into question The Parliament claimed that the Regulation should have been based on Article 100a of the Treaty, which it was not Their reasoning for this was that not only did the regulation concern the protection of the public against ionising radiation but it also concerned the establishment and functioning of the internal market within Article 8a of the Treaty The Court rejected this argument, stating that the Regulation had only the incidental effect of harmonising the conditions for the free movement of goods within the Community inasmuch as it avoided the need for trade in foodstuffs which had undergone radioactive contamination to be made the subject of unilateral measures The contested regulation was seen to thus have been validly adopted

7.6.2. Extraction solvents

European Union rules govern the use of extraction solvents in the manufacture of foodstuffs or their ingredients However, they do not govern the use of extraction solvents in the production of food additives, vitamins and other nutritional additives unless such are listed in the Annex to Directive 88/344 Substances and materials listed in this annex may be authorised for inclusion in the manufacture of foodstuffs once they adhere to certain conditions of use, purity criteria and maximum residue limits Substances listed in the Annex and intended for use as extraction solvents may not be marketed unless their packaging, containers or labels carry certain specified information in an easily visible, clearly legible and indelible manner This information includes -

(i) their name as specified in the Annex to Directive 88/344,

(ii) a clear indication that the material is of a quality suitable for use for the extraction of food and food ingredients,

(iii) the lot marking,

(iv) the name or business name and address of the manufacturer, packer or European Union seller,

(v) the net quantity given as units of volume, and, when necessary,

(vi) any special storage conditions or conditions of use

The particulars listed from (iii) to (vi) may appear merely on the trade documents relating to the batch or lot, which are to be supplied with or prior to the delivery of the foodstuffs The other requirements must appear on the label of the foodstuff itself While measures such as this have been taken to lessen the

[23] [1991] ECR 4529

potential for detrimental effects to human health from substances such as these, the fact that they are legislated for through the use of a directive as opposed to a properly drafted regulation is unsatisfactory This is particularly the case for substances that possess the potential to cause such danger to human health

7.6.3. Pesticide residues

There are many directives dealing with the use of pesticides in the production of food [24] Maximum levels for certain pesticide residues in and on certain foodstuffs, such as cereals, fruits, vegetables and certain products of animal origin have been fixed Procedures for reducing specified levels and methods of sampling and analysis for monitoring levels are outlined in various directives also [25] Again, the fact that directives are the legislative medium used for such an important matter where human health is concerned is unacceptable

Cereals listed in Annex I of Directive 86/362 may not contain, from the time that they are put into circulation, levels of residues of pesticide greater than those specified in Annex II Authorisation for the presence of pesticide residues listed in Part B of Annex II to Directive 86/363 in or on cereals may extend the specified limits if these products are not intended for immediate consumption and an appropriate control system ensures that they do not come into contact with the end user Foodstuffs of animal origin listed in Annex I to Directive 86/363 may not contain, from the time that they are put into circulation, levels of pesticide greater than those specified in Annex II to the Directive Fruits and vegetables

[24] See, for example, Directives 76/895, 80/428, 95/156 and 96/738
[25] See, in particular, Directives 76/895, 86/362 and 86/363

listed in Annex I to Directive 76/895 may not contain, from the time that they are put into circulation, levels of pesticide greater than those specified in Annex II to Directive 76/895 unless Member States consider that it is justified for those particular foodstuffs

It has to be questioned as to what effects Article 30 may have on Member States implementing their own controls over the use of pesticides to protect the health of their citizens This very question, although not directly linked to foodstuff contamination, was dealt with in *Criminal proceedings against Jacqueline Brandsma*[26] Ms Brandsma was prosecuted for selling a product that was used to prevent algae from growing on walls which contravened Belgian law on pesticide use The product in question was being lawfully sold in the Netherlands The Court noted that a legal provision of a Member State, such as this Belgian one, that prohibited the use of pesticides for which community-wide legislation existed constituted a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty It was argued, however, that the product in question was actually biocidal, for which there was no harmonising directive at the time It was noted that since biocidal products were used to combat organisms harmful to human or animal health that they inevitably contained dangerous substances themselves In the absence of any harmonising rules it was seen to be for the Member States themselves to decide what course of action they will take regarding dangerous substances

[26] [1996] ECR I-3159

The fact that the European Union allows the Member States to regulate where no harmonising laws exist does not create the most detrimental hindrance to the protection of the Treaty guarantees on the free movement of goods and consumer protection The real difficulties exist where the European Union has actually legislated but has done so in an inadequate way Member States may then feel obliged to introduce their own measures to rectify this inadequacy This can then place producers in the Member States where the harmonised laws have been adopted at a disadvantage [27]

In reaching its decision the case of *Frans-Nederlandse Maatschappij voor Biologische Producten*[28] was noted by the Court It was stated in that case that whilst a Member State was free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, the authorities of the Member States are still required to assist in bringing about a relaxation of the controls existing in intra-community trade and to take account of technical or chemical analyses or laboratory tests that have already been carried out in another Member State

The court in *Brandsma* thus came to the conclusion that national legislation prohibiting the marketing of a biocidal product containing dangerous substances without prior authorisation from the competent authorities was justified under Article 36 of the Treaty, even where the product in question has been authorised for sale in another Member State These authorities were not

[27] See, *infra*, Chapter 9
[28] [1981] ECR 3277

however entitled to unnecessarily require analyses where it has been carried out elsewhere in the community

A similar issue, although this time directly relating to pesticide use in food production, was raised in the case of *Ministere Public v Xavier Mirepoix*[29] Criminal proceedings were instituted against Mr Mirepoix for importing for sale on the French market, from the Netherlands, onions that had been treated with a substance called maleic hydrazide, the use of which was not authorised in France The substance in question was a pesticide designed to regulate growth, the residue of which does not disappear entirely during the marketing period Mr Mirepoix challenged the compatibility of the French law with Articles 30 and 36 of the Treaty

The Court noted that use of the pesticide was not regulated by any harmonising directive The imposition by a Member State of a total prohibition on the use of the pesticide in question and the resulting ban on the importation of crops treated with it was seen to be capable of affecting trade between Member States However, it was also noted that as a result of the decision in the case of *Criminal proceedings against Albert Heijn*[30], where pesticides were recognised as posing a major risk to human and animal health as well as that of the environment, and, in the absence of harmonising laws on this particular substance, it was for the Member States themselves to decide what course of action to take It was noted that the national authorities must also, by means of a procedure that is easily accessible to traders, make it possible for exceptions to be

[29] [1986] ECR 1067
[30] [1984] ECR 3263

made where it appeared that the use of the pesticide for a given purpose was not dangerous to public health Member States were thus found to be freely available, in the absence of any harmonising legislation, to preclude the marketing of products on their territory that had been treated with maleic hydrazide

The facts of the *Heijn* case were as follows Proceedings were initiated against the defendant for having in stock, for sale or supply, a quantity of apples intended for human consumption which constituted a danger to health by the presence in them of a quantity of the pesticide vinchlozoline Netherlands law provided that foodstuffs or beverages containing pesticides in quantities that exceeded the levels allowed were not to be regarded as being of marketable quality The levels allowed for vinchlozoline presence under the domestic provisions for apples was zero

Heijn complained that their apples had been imported from Italy where they were perfectly marketable in their condition It was thus felt that a prohibition on their sale in the Netherlands was contrary to the Treaty provisions on the free movement of goods As in the previous case, the substance in question was not dealt with by any harmonising rules on pesticides and thus that it was recognised that it was thus up to the individual Member States to decide on what course of action to take in the circumstances Articles 30 and 36 of the Treaty were found not to prevent a Member State from prohibiting the importation of apples from another Member State by virtue of the presence in or on those apples of a quantity of the pesticide vinchlozolme, even where the

maximum level of that substance that was permitted in the importing state differed from that permitted for other types of food and drink

7.6.4. Hygienic production methods

Council Directive 93/43 establishes general rules for food hygiene levels in the European Union and the procedures for verification of compliance with these rules The preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and the offering for sale or supply of foodstuffs is to be carried out in a hygienic way

Under the hygiene directive food business operators are obliged to identify any step in their activities which is critical to ensuring food safety is achieved Adequate safety procedures are to be identified, implemented, maintained and reviewed on the basis of the HACCP (hazard analysis and critical control points) method This method includes -

(i) analysing the potential food hazards in a food business operation,

(ii) identifying the points in those operations where food hazards may occur,

(iii) deciding which of the points identified are critical to food safety,

(iv) identifying and implementing effective control and monitoring procedures at those critical points, and

(v) reviewing the analysis of food hazards, the critical control points and the control and monitoring procedures periodically and whenever the food business operations change

Food business operators are also to comply with the rules of hygiene as listed in the Annex to the Directive, with the following outlined in detail -

(i) general requirements for food premises,

(ii) specific requirements in rooms where foodstuffs are prepared, treated or processed,

(iii) requirements for movable and/or temporary premises, premises used primarily as a dwelling house, premises used occasionally for catering and vending machines,

(iv) equipment requirements,

(v) transport requirements,

(vi) food waste requirements,

(vii) water supply requirements,

(viii) personal hygiene requirements,

(ix) production requirements, and

(x) training requirements

Under the Directive Member States may adopt guides to good hygiene practice which may be used voluntarily by food businesses as a guide to compliance with the hygiene rules If there is recognised to be a need to produce such guides at community level then the Commission will do so after consultation with the Member States These guides will then be published in the Official Journal

Competent authorities in the Member States are obliged to carry out controls to ensure that foodstuffs, including those imported into the European

Union, are in compliance with the relevant hygiene requirements Inspections must include a general assessment of the potential food safety hazards associated with the business Competent authorities must pay particular attention to critical control points identified by food businesses to assess whether the necessary monitoring and verification controls are being operated

If, while carrying out the controls the competent authorities ascertain that failure to comply with the hygiene requirements might result in risks to the safety or wholesomeness of foodstuffs they are to take appropriate measures These measures may extend to the withdrawal and/or destruction of the foodstuff or to the closure of all or part of the undertaking for an appropriate period of time Those affected by this have the right to appeal against the measures taken by the competent authority

If a hygiene problem that is likely to pose a serious risk to human health arises or spreads in the territory of a third country, the commission, either on its own initiative or at the request of a Member State, is to take the following measures without delay -

(i) suspend imports from all or part of the third country concerned and, where necessary, from the transit third country, and

(ii) lay down special conditions for foodstuffs from all or part of the third country concerned

Normally these measures would be taken after consultation with the Member States However, in the case of an emergency the commission may take interim protective measures regarding the foodstuff concerned

7.7. Conclusions

This chapter has looked at the listing of ingredients on the labelling of food products in a wide context It has examined that which has, and that which has not, to appear as ingredients on the labelling of these products The latter will raise serious questions about the labelling of genetically modified foods at a later stage in this thesis [31] The use of additives has also been looked at in this chapter because they offer us an earlier example than genetically modified foods do of a constituent of food products that have aroused both anxiety and controversy amongst consumers Finally, the chapter looked at how the ingredients of food products may be listed but also examines whether we can be sure that these ingredients have not been contaminated or the finished products produced in any unhygienic manner

The listing of ingredients can really only encroach upon the Treaty provisions on the free movement of goods where the domestic composition requirements of the individual Member States are concerned In *Commission v Germany* it was found that where a Member State requires that a statement appear on a food product to indicate that it contains a particular ingredient, but this ingredient has already been listed in the prescribed manner, the Member State in question will be in breach of Article 30[32] of the Treaty The findings of the Court in this judgement indicate that they are very willing to afford the promotion of the

[31] See *infra* Chapter 9
[32] Now Article 28 (Post Amsterdam)

free movement of goods added protection where the listing of ingredients under Directive 79/112 is concerned

The question of whether or not additives are to be included as ingredients for the purposes of Directive 79/112 has been posed to the Court on occasions In the case of *Pfanni Werke* it was found that additives that do not serve any technological function in a finished food product are not to be considered as ingredients of that product This decision was based upon provisions of Directive 79/112 However, while that directive states that such additives are not to be considered as ingredients for the purposes of the legislation, the finding of the Court that an additive that completely alters the colour of a food product, which would appear to play quite a major technological function in that product, was to be considered in the category of non-ingredient appears to take the interpretation of the Directive a stage too far

The issue of additives as ingredients has also been examined in the context of the free movement of goods The Court stated in *Commission v Italy* that once an additive meets a specific need, in a finished food product the importation of that product must be allowed into the host state, even where that state does not permit the use of that particular additive within its territory The Court did indicate that it was willing to support the use of additives by exporters in circumstances such as these by ensuring that states could not validly use the argument that producers in the exporting state modify their production methods and use an alternative additive, the use of which would be permitted in the importing state, that carries out the same function as the one that may not be used

The additive in question was still seen by the Court to meet a genuine need, even if the alternative, more acceptable, additive could have been used instead

This decision was echoed by that in *Commission v France* In this case, however, the Court stated that where such rules were designed for the protection of public health they could be allowed to stand if the domestic provisions provided for an appeals procedure and that such an appeal could only be rejected if the additive did not possess a genuine need in the manufacture of the finished product or if it posed some danger to human health

The problems that are created by legislating through the use of directives instead of regulations can be seen again in the area of the compulsory listing of ingredients on the labelling of food products Additives have been recognised as one of the items that have to appear in this list, both by the legislation and by the European Court of Justice The fact that the European Union chose to legislate on their use before consensus was reached on the matter has led to problems with the compatibility of measures adopted by the individual Member States with the Treaty provisions on the free movement of goods Where agreement can not be attained directives are used to legislate These do not possess the same legal force as regulations and, as such, will not be adhered to by the Member States to the same degree as regulations A more suitable approach to adopt would be to wait until consensus can be reached and then legislate through the use of regulations, from which there can be no derogation The problems of compatibility with the Treaty could then be avoided if this more forceful legislation was drafted properly and with a greater degree of patience

CHAPTER EIGHT

NET QUANTITY

8.1. Introduction

Council Directive 71/316 of 26 July 1971 deals with the approximation of the laws of the Member States relating to common provisions for both measuring instruments and metrological control The net quantity of a prepackaged foodstuff must be expressed in metric units for both liquids and non-liquids under this legislation Such labelling is not compulsory, however, for foodstuffs which -

(i) are subject to considerable losses in their volume or mass,

(ii) are sold by number quantity,

(iii) are weighed in the presence of the purchaser, or

(iv) have a net quantity less than 5grams or 5millilitres

If a prepackaged item consists of two or more individual packages which are available as separate units containing the same quantity of the same product then the net quantity of each package plus the number of individual packages must be indicated, unless this is clearly visible from outside the exterior package If, however, a prepackaged item consists of two or more individual packages which are not regarded as separate units containing the same quantity of the same product then the net quantity has to be stated by indicating the total net quantity and the total number of individual packages Member States may exempt certain specific foodstuffs from having to mention the total number of individual units

8.2. Quantity labelling requirements

8.2.1. Net quantity symbol

The indication of the quantity (the nominal weight or volume) must be marked in figures of specific sizes, depending on the quantity of the contents It must also be followed by the symbol for the particular unit of measurement, for example kilograms or millilitres, or by the actual name of the unit A small 'e' symbol, at least three millimetres high, must accompany the nominal weight or volume [1]

In *Vereniging Slachtpluimvee-Export e V v Rewe-Zentral-Aktiengesellschaft*[2] the conditions for affixing the e sign alongside the nominal weight or volume on the labelling were examined Questions concerning these conditions arose during an action relating to a failure by Vereniging Slachtpluimvee to deliver to Rewe-Zentral two hundred boxes of whole chickens bearing the sign It was questioned whether a packer of prepackaged products had to obtain prior authorisation from the national weights and measures authorities concerned in order to be able, under Directive 76/211, to affix the small e sign to those products It was stated by the Court that the Directive did not specify what checking procedures were to be recognised, or the manner in which such procedures were to be recognised, where the weight of the products was concerned However, it was noted that according to the wording of the fifth paragraph of section 4 of Annex I to the Directive that in order to be able to use

[1] The e symbol should have the same form as that indicated in section 3 of Annex II to Directive 71/316

the e sign a packer who checks that the actual contents correspond to those stated had to carry out checking procedures that had previously been recognised by the national weights and measures authorities either by means of general provisions or by previous individual decisions [3] The reply to the question was thus that under Directive 76/211 a packer that measures the quantity in each prepackage was entitled to affix the e sign without prior authorisation from the national authorities but that this packer must, in order to be able to use the sign, operate checking procedures that have been recognised by the national authorities

8.2.2. Directive 75/106

Directive 75/106 is concerned with the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids [4] It deals specifically with prepackages containing the liquid products listed in Annex III measured by volume for the purpose of sale in individual quantities of between fifty millilitres and five litres, inclusive [5] A prepackage is defined in the directive as being the combination of a product and the individual package in which it is prepacked [6] A product is considered to be prepackaged when it is placed in a package of whatever nature without the purchaser being present and the quantity of the product contained in the package has a predetermined value and can not be altered without modifying the package itself [7]

---

[2] [1985] ECR 1157
[3] Paragraph 15
[4] OJ L 42, 15/2/1975, p 1
[5] Article 1
[6] Article 2(1)
[7] Article 2(2)

Under the Directive all prepackages must bear an indication of the volume of liquid, called the nominal value of the contents, which they are required to contain [8] Member States are not to refuse, prohibit or restrict the placing on the market of prepackages which satisfy the requirements laid down in the directive for any reason connected with the volume of the contents, the determination of such volume or the methods by which they have been checked [9]

Prepackages covered by Directive 75/106 are to be composed in such a way that the completed prepackages satisfy the following requirements -

(i) the actual volume of the contents shall not be less, on average, than the nominal volume of the contents,

(ii) the proportion of prepackages having a negative error greater than that tolerable are deemed sufficiently small to satisfy the requirements of the tests specified in Annex II These tests are carried out by sampling and are in two parts These two parts are the checking of the actual volume of the contents of each prepackage and another check that covers the average of the actual volumes of the contents of the prepackages in the sample A batch of prepackages is considered acceptable if the results of both these checks are satisfactory, and

(iii) no prepackage having a negative error greater than twice that tolerable may be marked with the European Union mark [10]

The Directive defines the nominal volume of the contents of a prepackage as being the volume indicated on the prepackage, that is, the volume of liquid

[8] Article 4(1)
[9] Article 5

which the prepackage is deemed to contain The actual volume of the contents of a prepackage is the volume of liquid that it actually contains In all inspection operations the actual volume of the contents is to be examined at a temperature of 20 Celsius The negative error is defined as the quantity by which the actual volume of the contents is less than the nominal volume of the contents of the prepackage [11]

All prepackages made up in accordance with the directive are to bear certain specified markings on the packaging These markings are to be affixed in such a manner as to be indelible, easily legible and visible on the prepackage in normal conditions of presentation [12] The nominal volume of the contents must appear on the labelling expressed in litres, centilitres or millilitres and marked in figures at least six millimetres high if the nominal volume of the contents is greater than 100 centilitres, four millimetres high if it is between 20 and 100 centilitres, three millimetres high if it is 20 centilitres down to but not including five centilitres and two millimetres high if it is not more than five centilitres,[13] followed by the symbol for the unit of measurement or, where appropriate, by the name of the unit, in accordance with Directive 71/354

A mark or inscription enabling the authority concerned to identify the packer or the person responsible for the packing or the European Union importer is also to appear on the labelling In addition to these requirements, the small e symbol, at least three millimetres high, is to appear in the same field of vision as

[10] Annex I
[11] Annex I (2)
[12] Annex I (3)
[13] As amended by Directive 76/770 OJ L 311, 04/11/1978, p 21

the indication of the nominal volume of the contents to certify that the prepackage meets the requirements of the Directive

The quantity of liquid contained in a prepackage, also known as the actual volume of the contents, has to be measured or checked It is the responsibility of the packer to ensure that this is done [14] This check, which has to take place using a measuring instrument suitable for effecting the operation, may be carried out by sampling Checks to ensure that the prepackages comply with the provisions of the directive, are to be carried out by the relevant authorities in the Member States This is to be done by sampling on the packer's premises If this is not practicable, then the sampling is to take place on the premises of the importer established in the Community [15]

8.2.3. Directive 76/211

Council Directive 76/211 again deals with the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain prepackaged products [16] This directive, however, relates to prepackages containing products with the exception of those dealt with in Directive 75/106 [17] It deals specifically with those prepacked products that are intended for sale in constant unit nominal quantities which are -

(i) equal to values predetermined by the packer,

(ii) expressed in units of weight or volume, and

---

[14] Annex I (4)
[15] Annex I (5)
[16] OJ L 46, 21/2/1976, p 1
[17] Article 1

(iii) not less than five grams or five millilitres and not more than 10 kilograms or 10 litres in quantity

The tolerable negative errors in the contents of a prepackage are fixed by the directive in a more clear and definable manner than in Directive 75/106 They are set out in tabular form in Annex I to the Directive Products are divided into two classes, "A" and "B", according to their physical characteristics and/or the packaging processes which they undergo

The following products are considered as belonging to class A -

(i) products which are solid or difficult to pour at the selling stage but which can be made sufficiently fluid in the course of packaging and which do not contain any apparent solid or gaseous elements and which can be packaged in a single operation,

(ii) products in powder form,

(iii) products composed of pieces, fragments or grams, the unit weight of which does not exceed one third of the tolerable negative error corresponding to the nominal weight of the contents of the prepackage, or

(iv) paste products which are easily spread [18]

All products which are not accounted for in class A belong to class B The following are also considered to belong to class B -

(i) liquid products,

(ii) prepackaged products of a nominal weight or volume less than twenty five grams or twenty five millilitres, or

[18] Annex I (2)(5)

(in) products with rheological properties (fluidity or viscosity) or density when flowing which cannot be kept sufficiently constant by appropriate technical means [19]

8.2.4. Directive 78/891

A need to review Directives 75/106 and 76/211 was recognised by the Standing Committee for Foodstuffs This recognition resulted in the adoption of Directive 78/891 [20] It had been realised that the implementation of the provisions of Directive 76/211 showed a necessity for revision of the tolerable negative error limits specified in that directive [21] The Committee also wanted to introduce a simpler classification system for prepackaged products to facilitate their preparation for sale by producers and to offer the consumer a wider choice of available prepackaged products [22]

Two other important factors were recognised as being in need of review These were that the markings on small prepackages could, in some cases, be less than the height that was specified in the two earlier directives, yet they could still maintain sufficient visibility and legibility, and also that modern statistical control methods had made it possible to reduce the extent of the sampling plans set out in the two directives [23]

---

[19] Annex I (2)(6)
[20] OJ L 311, 04/11/1978, p 21
[21] Preamble
[22] Ibid
[23] Ibid

To counteract the findings of the Committee the annexes to Directives 75/106 and 76/221 were replaced [24] Where goods are imported from non-European Union countries the importer, instead of measuring and checking himself, must now provide evidence that he is in possession of all the necessary guarantees enabling him to assume responsibility for the goods This thus eases the burden on European Union sellers of non-community food products by removing the need to ensure that the quantities contained in the prepackaged products are duplicated accurately on the labelling Many of the other changes imposed by Directive 78/891 were along similar lines to this in that they extended the provisions of Directives 75/107 and 76/221 to non-European Union imports and altered the responsibilities placed on the importers of those products

One of the most important factors running through all the directives dealing with the labelling of the net quantity of foodstuffs is that of the sampling and analysis procedures Directive 78/891 reiterates the responsibilities placed on the competent national authorities in the individual Member States in this regard They do this, however, in a somewhat ambiguous way Because the actual sampling aspect is such an important part of the enforcement mechanism in these directives, its full and effective implementation into domestic legislation is vital to the adequate operation of the intentions of the directives Directive 78/891 is implemented into Irish domestic law by the Packaged Goods (Quantity Control) Regulations, 1981 [25]

[24] Articles 1,2 and 3 of Directive 78/891
[25] Statutory Instrument Number 39 of 1981

The 1981 regulations continue the precedent set by other implementing legislation in this area by continuing the watering down of the European Union directives Directive 76/770 specifies that products up to five centilitres in volume must display figures of a minimum height of two millimetres The domestic regulations state that the Minister may exempt packages with a nominal quantity of 50 millilitres (five centilitres) from the requirements regarding the minimum height of figures [26]

On the issue of sampling and inspection procedures the domestic regulations again fail to implement a satisfactory program for dealing with the issue This problem, however, may be also partially attributable to the European Union directives as these also deal with this issue unsatisfactorily

8.2.5. Packaged Goods (Quantity Control) Act, 1980

Directives 75/106 and 76/211 are implemented into Irish domestic law by the Packaged Goods (Quantity Control) Act, 1980 [27] The Act reduces the level of control over weight and volume regulation that the directives attempted to create In particular, Section 6 of the act provides for a series of exemptions from the provisions of the two directives and their various amendments The directives themselves tried to implement a system whereby national authorities would be obliged to ensure that producers were not misleading consumers by placing in prepackaged products a weight or volume of the product that was less than that which appeared on the labelling The appearance on the labelling of the quantity

[26] Regulation 8(3)
[27] Number 11 of 1980

of the product is an area in which consumers may be easily mislead by producers It would be difficult for them to determine at the time of purchase exactly what the actual weight or volume of the product is It is for this reason that strict regulation in this area is so vital Member States should not then reduce the level of protection afforded to consumers by the European legislation by creating a series of exemptions to it

Section 6 of the act sets out when an exemption may be granted to compliance with all or any of the requirements of the act It states that -

> [w]here, on an application being made to him in that behalf, the Minister is satisfied that because of -
> a difficulty in obtaining or providing any appliance, equipment, machine or machinery,
> an inability to or a difficulty in recruiting or training staff,
> the holding of stocks of containers or of labels or of other documents,
> any other consideration which in the particular circumstances of the case is relevant, or
> it would be unreasonable to require the applicant to comply with all or any of the requirements of [the] Act without being given a period within to prepare for such compliance, then subject to subsection (2) of this section he may grant to the applicant an exemption under this section

These exemptions were capable of being granted by the Minister up until 31 December 1985 [28] There were some slight controls placed on the exemptions These included the fact that certain conditions could be attached to an exemption and if this condition was not complied with then the exemption would cease to have effect [29]

The Directive does not expressly permit the derogations that appear in the domestic legislation It is for reasons such as this that the use of regulations in place of directives would be preferable for areas where it is vital for consumers to

[28] Section 6(3)

be afforded maximum protection If the domestic provisions allow for implementation of European legislation several years after the rest of the community then problems can arise These problems include the fact that it becomes harder to enforce legislation in the future if it is introduced with a measure of leniency, it also creates disadvantages for producers and importers from other Member States where the legislation has had to be complied with immediately and, it leads to a reduction in the level of protection afforded to consumers in that Member State where the legislation is implemented over the course of time with a staggered approach The fact that regulations automatically become a part of the domestic legislation would help lead to the elimination of such problems

The Act also sets out the powers afforded to inspectors to ensure that the legislation itself is complied with The powers set out are detailed and comprehensive This makes the provisions that deal with exemptions all the more disappointing as the good work done by this section on inspection was temporarily undone by that which created the exemptions

An inspector may carry out any of the following in the course of their inspections under the Act -[30]

(i) enter any premises at all reasonable times, other than dwelling premises, in which he reasonably believes that there are packages to which the act applies,

(ii) inspect those premises and examine any relevant packages found there,

---

[29] Section 6(4)
[30] Section 14(1)

(iii) open the packages and examine or measure any goods contained in them,

(iv) take away the relevant packages from the premises for examination, testing or measuring,

(v) test any equipment that he reasonably believes is used to make up or check the packages,

(vi) require any person on the premises to produce books for inspection or any records or documents which relate to the packages or the goods contained therein and to give him such information that he may require in relation to any entries included in those books, records or documents,

(vii) inspect and copy or take extracts from any of the books, records or documents, or

(viii) require the name of the person who made up the package if it is known by any person on the premises

If an inspector has reasonable grounds for suspecting that a person has failed to perform the duties imposed on him by the act as regards any package found on the premises being inspected or if any such package is considered to be inadequate then he may seize and retain the package and anything else that is so found and which appears to the inspector might be something that could be required as evidence in proceedings for an offence under the Act

8.2.6. Directive 80/232

Council Directive 80/232 legislates for the approximation of the laws of the Member States relating to the ranges of nominal quantities and nominal

capacities permitted for certain prepackaged products [31] It is concerned with the same types of prepackaged products as those that Directive 76/211 deals with It does not apply to prepackages intended solely for professional use [32] These products are then divided into three groups for the purposes of the Directive [33] These groups are -

(i) products sold by weight or by volume save those products referred to in (b) and (c) Annex I lays down for each of these products the range of nominal quantities of the contents of the prepackages,

(ii) products sold by weight or by volume and put up in the rigid containers listed in Annex II, except for those products listed in Annex I Annex II lays down for these products the range of capacities for such containers, and

(iii) products put up in aerosol form Annex III to the directive lays down the volumes of the liquid phase for such products and, in the case of metal containers, the capacity of the container

Prepackages covered by this directive have always to indicate the nominal weight or volume of their contents in accordance with the requirements of Directive 76/211 For those referred to in (b) and (c) above the containers must also indicate, in such a way as it does not lead to any confusion with other indications also prescribed, their nominal capacity [34]

[31] OJ L 51, 25/02/1980, p 1
[32] Article 1
[33] Article 2
[34] Article 3

8.3. Conclusions

There have been no new directives or any other forms of European legislation drafted in this area since Directive 80/232 in 1980 Due to changes in the technology available to producers to ensure that their stated weight or volume corresponds to that actually contained within the prepackaged product new legislation would appear to be a necessary step to be taken on the matter This would preferably take place through the medium of a regulation that would encompass the various aspects that the different directives have legislated for It would also replace the previous legislation to take on some of the more directly applicable features of a regulation

The three principal directives in this area cover much of the same ground and could quite easily be united through the use of one regulation The use of a regulation itself, while preferable, would not however be completely necessary This is due to the fact that any derogation from the legislation that a Member State may choose to make would be less easy to justify Justifications for derogations by the Member States before now have been allowed in order to deal with the fact that often the required technology may not have been readily available to producers or importers A similar argument would be harder to make twenty years after the adoption of the original legislation

PART C

CHAPTER NINE

GENETICALLY MODIFIED FOODS

9.1. Introduction

Genetically modified organisms are produced from plants and animals in which the genetic material has been altered in a way that does not occur by natural reproduction [1] This process has in recent years brought many benefits to agriculture and food processing It has also benefited other industries such as pharmaceuticals These advantages should have established a scenario whereby legislators would provide for easy access to the market for such products Instead a situation has developed whereby public anxieties have prevented this from occurring [2]

The general public appears unenthusiastic [3] France banned the cultivation of genetically modified maize despite the fact that it has to be labelled as such Consumer groups have campaigned against the product since the European Union approved it in December 1996 [4]

Recently in Austria 1 3 million voters, over 20 per cent of the electorate, signed a petition to put extra pressure on the government to stiffen its opposition to European Union guidelines on genetically modified food products According to another recent poll taken by Greenpeace most Europeans, including one in two

[1] Directives 90/219 and 90/220
[2] See Appendix Two
[3] See, *infra*, Chapter 10
[4] Anon "France Bans Modified Maize" The Financial Times, 13 February 1997

Britons, are opposed to the development of these foods [5] Protests by environmental groups are frequent outside the headquarters of the European Union in Brussels as consumer fears and anxieties grow These fears are generally aroused by a lack of available information about these products rather than specific knowledge about any potential dangers that may exist They have also led to some Irish supermarket chains banning the use of genetically modified ingredients in their products [6]

The controversy does not stop with consumers A European Union proposal to label genetically modified agricultural products was seen to be unacceptable as being a restriction to trade, according to the United States Secretary of Agriculture, Mr Dan Glickman [7] This state of affairs has led to much conflict between consumers and Member States, producers and Member States, the European Union and Member States and the European Union and other trading organisations [8] Declarations by a scientist carrying out research that genetically modified foods actually harmed the immune systems and stunted the

[5] Anon "Poll on Modified Food" The Financial Times, 10 January 1997 The actual figures quoted to be against gene modification in foods were, on average, fifty-nine per cent while only twenty-two per cent were in favour of such products

[6] O'Driscoll, S "Store Bans Genetic Food" The Sunday Tribune, 22 March 1998 The supermarket chain in question is the Iceland chain Their stance may, however, be difficult to enforce as many food producers obtain their ingredients from a variety of sources and thus genetically modified ingredients can become mixed in with non-genetically modified ones

[7] Urry, M "Genetic Product Row Worsens" The Financial Times, 20 June 1997

[8] Smith, M "Brussels to Overrule Maize Bans" The Financial Times, 11 September 1997 The European Union came into conflict with Austria and Luxembourg over the placing of import bans on genetically modified maize The Commission ordered the bans to be lifted after three scientific committees reaffirmed that the maize endangered neither human health nor the environment Austria then threatened use of the European Court of Justice

growth of rats on which they were being tested led to his suspension from the research project in question [9]

Despite the fears and protests several hundred new genetically modified foods are entering the market around the turn of the millennium A conference in Dublin in October 1997 on the regulation of genetically modified organisms in Ireland and in other European countries noted that gaps in scientific knowledge about the potential effects of genetic foods have to be filled before any public concerns can be abated [10] This would appear to be the most important aspect of the debate that currently rages between consumers, producers and legislators

9.2. Role of the European Union

To aid in the alleviation of consumer fears, the European Union began by passing legislation covering the contained use of genetically modified micro-organisms[11] and the deliberate release of genetically modified organisms[12] as well as a council regulation concerning novel foods and novel food ingredients[13] New legislation on the matter is constantly being drafted and introduced These pieces of legislation restrict genetically modified products' access to the market by providing for certain compulsory standards to be met on labelling, production and registration at both national and community levels The conflict between the

[9] O'Sullivan, K "Scientist Suspended over Misleading Information on Genetically Modified Food" The Irish Times, 13 August 1998
[10] O'Sullivan, K "Information Gaps Must be Filled on Genetically Altered Food, Meeting Told" The Irish Times, 14 November 1997
[11] Council Directive 90/219
[12] Council Directive 90/220
[13] Commission Regulation 258/97

various sets of anxieties had to be addressed by the first pieces of community-wide legislation on the issue

The Council, the Commission and the Court have all now aided in the attempts to reduce consumer and producer reservations The original European directives were transposed into Irish domestic law by the Genetically Modified Organisms Regulations, 1994[14], just as they have been in the other Member States Despite this, debate still continues as to whether the European Union has gone far enough to allay consumer concerns Producers, on the other hand, continuously seek the adoption of more lenient measures in relation to market access The consumer argument has now been backed up by claims that as little as 10 per cent of foods produced in some way by genetic engineering have to be labelled to that effect under present European Union labelling requirements [15]

The United Nations has joined the debate also with its publication of recommendations derived from an Expert consultation on Biotechnology and Food Safety, which was held in Rome in October 1996

9.3. Early domestic regulation

The techniques involved in gene cloning were originally developed in the early 1970s As a direct response to this, the Medical Research Council was requested by the Department of Health to report on any further DNA research done in Ireland to ensure regulation at national level under the direct guidance of

[14] Statutory Instrument No 345 of 1994
[15] O'Sullivan, K "Group Queries Genetic Food Labelling" The Irish Times, 27 July 1998 The group in question is Genetic Concern

a government department This regulation was necessary for both safety and ethical reasons concerning interference with natural processes

An expert group was set up by the Medical Research Council to study any research developments made outside the country The Royal Irish Academy also set up a more broadly based committee to provide advice and recommendations on any legal, scientific, political or other problems that may arise A European Economic Community council recommendation in 1980 specified that each Member State should establish a national authority responsible for the overseeing, notification and registration of any experiments done in this area

In 1981 the Medical Research Council and Royal Irish Academy committees were disbanded and a new national DNA committee was formed to control research and development in the area This new committee consisted of a chairman and fourteen other members The members of the committee were drawn from the Government Departments of Agriculture, Health and Labour and also from the National Drugs Advisory Board, the Agriculture Institute, and experts from the trade unions, the higher education sector and the Confederation of Irish Industry The new committee was to control research and development by -

(i) the establishment of national guidelines for work in DNA research and the harmonisation of such guidelines with those of international organisations,

(ii) the provision to the appropriate bodies, either at such bodies' request or on the initiative of the committee of relevant information, and

(iii) the establishment and maintenance of liaisons with the appropriate bodies in Ireland and abroad

By 1990 the two primary European Union directives had been adopted into Irish law and it is this that now constitutes the principle legislation on genetically modified organisms in Ireland The two directives in question are 90/219 on the contained use of genetically modified micro-organisms and 90/220 on the deliberate release into the environment of genetically modified organisms

Section 111 of the Environmental Protection Agency Act, 1992, provides that the Minister for the Environment is to give full effect to the two directives by statutory regulation and this was done by the Genetically Modified Organisms Regulations, 1994 and two amendments to it in 1996 and 1997 respectively [16]

9.4. European Union regulation

9.4.1. Council Directive 90/219

Council Directive 90/219 of 23 April 1990 deals with the contained use of genetically modified micro-organisms [17] Containment limits the contact of the genetically altered substance with humans and the environment [18] The Directive was drawn up with a number of considerations borne in mind It attempts to address the issues that may give rise to public anxiety about these products [19] It goes about doing this by creating a series of compulsory safe procedures to be

[16] McLoughlin, T Regulation of Genetically Modified Organisms (GMOs) in Ireland by the EPA Paper, read at the Conference on the Regulation of Genetically Modified Organisms in Ireland and in other European Countries, Dublin, 23 October 1997
[17] OJ L 117, 08/05/1990, p 1

adhered to by producers and enforcing the compulsory registration of research developments The main principles that were considered in the drafting of the directive were -

(i) the taking of preventive action in relation to the environment with the objective of preserving, protecting and improving the environment and the protection of human health,

(ii) the having regard to the Fourth Environmental Action Programme which declared that measures concerning the evaluation and best use of biotechnology with regard to the environment were a priority area on which Community action should concentrate,

(iii) that the development of biotechnology contributes to the economic expansion of the Member States,

(iv) that the contained use of genetically modified micro-organisms should be carried out in such a way as to limit any possible negative consequences for human health and the environment with the giving of due attention to the prevention of accidents and the control of waste, and

(v) that for the bringing about of the safe development of biotechnology throughout the community it was necessary to establish common measures for the evaluation and reduction of the potential risks arising in the course of all operations involving the contained use of genetically modified micro-organisms and to set the appropriate conditions for their use

---

[18] Article 2(c)
[19] Article 1

While some restrictions were placed on the production of genetically modified products, the development of biotechnology was recognised as being vital to the economic expansion of the Member States and the Community itself The question that then has to be asked is whether or not the restrictions imposed go far enough to increase consumer confidence or do they merely create a smokescreen designed to enable further research and development into the genetic alteration of food products?

The Directive lays down common measures for the contained use of genetically modified micro-organisms with a view to protecting human health and the environment [20] It states that Member States shall take all the necessary measures to avoid adverse effects on human and environmental health that might arise from the contained use of genetically modified micro-organisms [21] To this end, the user is obliged to carry out a prior assessment of the contained uses as regards the risks to human health and the environment that they may incur [22] A record of this assessment has to be kept by the user[23] and made available in summary form to the competent authority [24] This assessment offers a clear analysis of any possible risks and then places this in the hands of the relevant national authority thus offering an open system of accountability In turn this system of accountability should lead to an increase in public confidence but so far it has failed to do so

[20] Article 1
[21] Article 6(1)
[22] Article 6(2)
[23] Article 6(4)
[24] The competent authority in Ireland is the Environmental Protection Agency

Certain principles of good microbiological practice and of good occupational safety and hygiene are also laid down in the Directive [25] While calling for certain standards and procedures to be adhered to these principles still allow room to manoeuvre where production is concerned These safety features include -

(i) the keeping of workplace and environmental exposure to any physical, chemical or biological agent to the lowest practicable level,

(ii) the exercising of engineering control measures at source and to supplement these with appropriate personal protective clothing and equipment when necessary,

(iii) the testing and maintenance of control measures and equipment,

(iv) the provision of training for personnel,

(v) the establishment of biological safety committees or subcommittees as required, and

(vi) the formulation and implementation of local codes of practice for the safety of personnel [26]

Additional safety practices have to be adopted in some circumstances For example, when a particular installation is to be used for the first time for operations involving the contained use of genetically modified micro-organisms, the user shall be required to submit to the competent authority, before commencing such use, a notification of the use [27] Users of certain classified genetically modified micro-organisms are required under the directive to keep

[25] Article 7
[26] Article 7(1)

records of the work carried out This information is to be made available to the competent authority upon its request [28]

The Environmental Protection Agency is obliged to examine the conformity of any notifications made to them under the Directive and to ensure that the information submitted to them is accurate and complete and that any safety measures being taken are adequate [29] In addition to this, they may make certain other requests, including -

(i) asking the user to provide further information or to modify the conditions of the proposed contained use In this case the proposed contained use cannot proceed until the competent authority has given its approval on the basis of the further information obtained or of the modified conditions of the contained use, and

(ii) limiting the time for which the contained use should be permitted or subject it to certain specific conditions

If the user becomes aware of any relevant new information or modifies the contained use in a way which could have significant consequences for the risks posed by the contained use, then the competent authority must be informed as soon as possible[30] If any information becomes available subsequently to the competent authority which could have significant consequences for the risks posed then the competent authority may require the user to modify the conditions of, suspend or even to terminate the contained use Where a Member State

[27] Articles 8 and 11(4)
[28] Article 9
[29] Article 10
[30] Article 12

considers it appropriate, it may provide that groups or the public at large are to be consulted on any aspect of the proposed contained use [31]

Member States are to ensure that the competent authority organises inspections and other control measures to ensure user compliance with the directive [32] Co-operation between the Member States is also called for The Commission, in consultation with the Member States, is required to establish a procedure for the exchange of information between itself and the Member States and the states between themselves Member States are also to send to the Commission, at the end of each year, a summary report on the contained uses, proposed uses and risks of genetically modified micro-organisms that they have encountered Every three years they are to send a summary report on their experiences of the operations under the directive[33] The Commission is to be assisted by a committee composed of representatives of the Member States and chaired by a representative of the Commission The Commission then adopts measures envisaged if they are in accordance with the opinion of the committee [34]

9.4.2. Council Directive 90/220

Council Directive 90/220 of 23 April 1990[35] deals with the deliberate release into the environment of genetically modified organisms Deliberate release covers any intentional release of a genetically modified organism into the

[31] Article 13
[32] Article 17
[33] Article 18
[34] Article 21
[35] OJ L 117, 08/05/1990, p 15

environment without provisions for containment [36] This can be for research and development purposes or simply to place genetically modified products on the market The objective of this directive is to approximate the laws, regulations and administrative provisions of the Member States on this matter It is also designed to protect human health and the environment when genetically modified organisms are deliberately released into the environment or when products are being placed on the market which contain or consist of genetically modified organisms [37] This directive deals with many similar issues to Directive 90/219, only here they are dealing with deliberate release of the organisms where the likelihood is that they will eventually come into contact with consumers

Member States are to enforce certain necessary provisions before a deliberate release takes place They are to ensure that persons involved in deliberate releases, for the purpose of research and development or for any purpose other than placing them on the market, submits a notification to the competent authority of the Member State within whose territory the release is to take place [38] This notification shall include a technical dossier supplying the necessary information for evaluating any foreseeable risks, whether immediate or delayed Other, more general, information has also to be supplied, such as that on personnel and training and on the genetically modified organisms themselves [39]

After receipt and acknowledgement of the notification, the competent authority must examine it for compliance with the Directive, evaluate the risks

[36] Article 2(3)
[37] Article 1
[38] Article 5(1)
[39] Article 5

posed by the release and record its conclusions in writing and, if necessary, carry out tests or inspections on the organisms [40] The competent authority then considers any comments made by other Member States They are then to respond in writing to the notifier within ninety days of receipt of the notification Here they must express either that they are satisfied that the notification is in compliance with the Directive and that the release may proceed, or that the release does not fulfil the conditions of the directive and that it is therefore rejected For the purpose of calculating the ninety-day period, any periods of time during which the competent authority is awaiting further information that it may have requested from the notifier shall not be taken into account [41] The notifier may proceed with the release only when they have received the written consent of the competent authority and have complied with any conditions required in this consent [42] If information subsequently becomes available to the competent authority, which could have significant consequences for the risks posed by the release, then the competent authority may require the notifier to modify the conditions of, suspend or terminate the deliberate release [43]

Where a Member State considers it appropriate, it may provide that particular groups or the public in general shall be consulted on any aspect of the proposed deliberate release [44] After the completion of a release, the notifier shall send to the competent authority the result of the release in respect of any risk that

[40] Article 6
[41] Article 6(3)
[42] Article 6(4)
[43] Article 6(6)
[44] Article 7

it posed either to human health or the environment [45] Before a genetically modified organism or a combination of genetically modified organisms are placed on the market the manufacturer or the importer has to submit a notification to the competent authority of the Member State where the product is to be placed on the market for the first time [46] This authority then examines the notification, paying particular attention to the environmental risk assessment and the recommended precautions relating to the safe use of the product that have been included in the notice [47]

Where a Member State has justifiable reasons to consider that a product that has been properly notified and has received written consent constitutes a risk to human health or the environment, it may provisionally restrict or prohibit the use and/or sale of the product in its territory It is to immediately inform the Commission and the other Member States of its decision and state any particular reasons for it [48] The Commission itself is to publish in the Official Journal of the European Communities a list of all the products receiving written consent under this directive For each product the genetically modified organisms contained therein and their uses have to be clearly specified[49]

Member States have to send to the Commission, at the end of each year, a brief factual report on the control of the use of all products placed on the market under this directive [50] The Commission must send to the European Parliament and the Council, every three years, a report on the control by the Member States

[45] Article 8
[46] Article 11
[47] Article 12(1)
[48] Article 16

on these products also [51] The Commission and the competent authorities are obliged not to divulge any of the confidential information submitted to them and are also to protect any intellectual property rights relating to the data received [52] As with Directive 90/219, the Commission is to be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission [53] The Commission shall adopt any measures envisaged if they are in accordance with the opinion of the committee Member States and the Commission are to meet regularly to exchange information on their experiences under this directive [54]

9.4.3. Commission Directive 97/35

Council Directive 90/220 has been amended on two separate occasions, originally by Commission Directive 94/15[55] and then later by Commission Directive 97/35 of 18 June 1997 Annex III to Directive 90/220 contains the additional information required for the notification necessary for the placing on the market of genetically modified organisms Directive 97/35 replaces the original Annex III with a new Annex III The additional information required by the new Annex includes proposed labelling requirements for foodstuffs containing the genetically altered substances Directive 90/220 states that the labelling should include, at least in summarised form, information relating to -

---

[49] Article 17
[50] Article 18(1)
[51] Article 18(2)
[52] Article 19(1)
[53] Article 21
[54] Article 22
[55] OJ L 103, 22/4/94, p 20

(i) the name of the product and any genetically modified organisms contained therein,

(ii) the name of the manufacturer or distributor and his address in the community,

(iii) any conditions of use,

(iv) any measures that should be taken if the product is misused, and

(v) the instructions or recommendations for storage or handling [56]

To account for technical advances and an ever-increasing amount of deliberate releases into the environment of genetically modified organisms amending directives have become a necessity Annex III of Directive 90/220 was thus repealed and replaced by Directive 97/35 This new annex stated that the labelling must include, in addition to that set out in Directive 90/220, an indication that the product contains or consists of genetically modified organisms Where the ingredients of a product are derived from a mixture of genetically and non-genetically modified substances it now has to be stated on the label of the foodstuff that there is a possibility that genetically modified organisms may be present in the foodstuff [57]

9.4.4. Role of the Court of Justice

The European Court of Justice has played its role in ensuring that the two original directives are adhered to by the Member States In *Commission v*

[56] Annex III (B)(5)
[57] Annex III(c)

Luxembourg[58] a case was brought against the Member State in question under Article 169 of the Treaty for a failure to fulfil its obligations where Directives 90/219 and 90/220 were concerned The case was concerned in particular with a failure by Luxembourg to implement Article 22 of Directive 90/219 and Article 23 of Directive 90/220 These provide that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with those directives by 23 October 1991 [59]

Luxembourg did not deny that it had failed to transpose the directives into national law within the prescribed period Instead they contested that the application made by the Commission should be dismissed on the ground that the delay in transposition was related to the complexity of the subject matter and the consequent difficulties that arose in its legal system [60] They also claimed that they were close to transposing the two directives

Despite the arguments put forward by Luxembourg, the court noted that it had consistently held that a Member State could not plead provisions, practices or circumstances existing in its internal legal system to justify a failure to comply with the obligations and time-limits laid down by a directive [61] Since the directives here had not been transposed within the prescribed period the action by the Commission was found by the court to be well founded It was therefore held that Luxembourg, by failing to adopt the necessary measures to comply with the two directives, had failed to fulfil its obligations that arose under them

---

[58] [19] ECR
[59] Paragraph 2
[60] Paragraph 7
[61] *Commission v Germany* [1996] ECR I-2423

9.5. Genetically Modified Organisms Regulations, 1994

The Genetically Modified Organisms Regulations, 1994[62] were adopted to transpose Directives 90/219 and 90/220 into Irish domestic law Section 111 of the Environmental Protection Agency Act, 1992 provides for the Minister for the Environment and Local Government to give full effect to these two European Union directives by means of statutory regulation, after consultation with any other Minister of the Government concerned

The Regulations were made in November 1994 and the EPA was nominated as the competent authority to administer them The commencement date for implementation was 1 January 1995 The Department of the Environment and Local Government was made responsible for national policy in the genetically modified organism area and the Department casts the Member State vote under Article 21 of Directive 90/220[63]

An Advisory Committee was set up in 1995, under Part VI of the regulations The committee consists of 12 members nominated by the Government and some non-Governmental organisations The bodies who nominate the committee members include -

(i) the Environmental Protection Agency,

(ii) the Minister for Health,

---

[62] S I No 345 of 1994

[63] Article 21 of Directive 90/220 deals with the assistance afforded to the Commission by a committee composed of representatives of the Member States and chaired by a representative of the Commission The committee is to deliver its opinion on any draft measures to be taken These opinions are to be delivered by the majority as laid down in Article 148 (2) of the Treaty The votes of the representatives of the Member States within the committee are to be weighted in the manner set out in that Article The chairperson has no vote

(iii) the Minister for Enterprise and Employment,

(iv) the Minister for the Environment,

(v) the Minister for Agriculture, Food and Forestry,

(vi) the National Authority for Occupational Safety and Health, and

(vii) the Commissioners for Public Works in Ireland

The committee members are appointed for up to a three-year term [64] A member whose term of office expires is eligible for reappointment The Environmental Protection Agency appoints a person to chair the meetings of the committee and a person to act in the absence of the person appointed [65] They have tended to meet quarterly to discuss relevant issues and to offer advice to the Environmental Protection Agency of their functions under the regulations [66]

Part VII of the regulations deal with the enforcement of the provisions set out The Agency may appoint its officers to be authorised persons for the purpose of the regulations [67] The Agency is also empowered to prosecute any offenders [68] The High Court may by order, on the application of the Agency, prohibit or restrict any process or action involving a genetically modified organism where it is satisfied that the continuance of the process would constitute a contravention of the Regulations or would pose a real and substantial danger to human health or that of the environment [69] The Environmental Protection Agency may, where it considers it necessary, serve notice on a user to take

[64] Article 57
[65] Article 58
[66] McLoughlin, T Regulation of Genetically Modified Organisms (GMOs) in Ireland by the EPA Paper, read at the Conference on the Regulation of Genetically Modified Organisms in Ireland and in other European Countries, Dublin, 23 October 1997
[67] Article 60
[68] Article 61

certain measures for the protection of human health or the environment Anyone on whom such a notice is served can, within such period as is specified in the notice, make representations in writing to the Agency concerning the terms of the notice and the Agency can then, in turn, having considered such representations, amend or revoke the notice[70]

Part VIII of the regulations deals with monitoring and reporting The Agency has to carry out, or arrange the carrying out of, monitoring and inspections, or other measures that may be considered necessary for the performance of its functions[71] They are also, if directed by the Minister[72] or any person specified by the Minister, to supply records of any monitoring carried out under these regulations[73]

There have been two amendments to the 1994 Regulations, in 1996 and 1997 respectively The Genetically Modified Organisms (Amendment) Regulations, 1996[74] deal with criteria for the classification of genetically modified micro-organisms The Regulations lay down certain criteria for classifying them into group I status The Genetically Modified Organisms (Amendment) Regulations, 1997[75] lay down additional information that is required in the case of notifications for the placing of genetically modified organisms on the market The information that has to be supplied is laid down in the seventh schedule to the 1994 regulations and includes -

---

[69] Articles 62(a) and (b)
[70] Articles 63 (1) to (4)
[71] Article 64
[72] The Minister for the Environment and Local Government
[73] Article 65
[74] S I No 348 of 1996
[75] S I No 332 of 1997

(i) general information, such as the name and address of the notifier and any experience or qualifications,

(ii) information relating to the recipient and plant reproduction,

(iii) geographical distribution of the plant,

(iv) potentially significant interactions of the plant with others,

(v) information on control and monitoring, and

(vi) any environmental impacts

In addition to this, the amendment provides that the following information has also to be submitted -

(i) the name of the product,

(ii) the name of the manufacturer or distributor,

(iii) the exact conditions of its use, and

(iv) the types of expected use

The following is also to be provided where relevant -

(i) the measures to be taken in case of any unintended release or misuse,

(ii) the specific instructions or recommendations for storage and handling,

(in) the estimated production in and/or imports to the European Union,

(iv) the proposed packaging, which must be appropriate, and

(v) the proposed labelling, which must include an indication that the product contains, or consists of genetically modified organisms

The Environmental Protection Agency has set up a register of genetically modified organism users as it is required to do so under Article 8 (1) of the regulations The register contains information such as names and addresses of

notifiers, descriptions of genetically modified organisms, purposes of the contained uses, deliberate releases and any placing on the market of products The register is available for inspection at the Agency headquarters by members of the public during office hours By the end of September 1997, 66 users were listed on the register The register is updated on a regular basis

9.6. Novel foods and novel food ingredients

Regulation (EC) No 258/97 of the European Parliament and the Council of 27 January 1997 is concerned with novel foods and novel food ingredients It addresses the issue of the placing on the market of these novel foods, of which several categories are dealt with in the Regulation The Department of Health has been nominated as the competent authority to administer this legislation in Ireland The reasons behind the drafting of the regulation included -

(i) the fact that differences between national laws relating to novel foods or food ingredients may hinder the free movement of foodstuffs or create conditions of unfair competition, thereby affecting the functioning of the internal market,

(ii) the protection of human health through a single community safety assessment of the foods before they are placed on the market, and

(iii) the protection of the environment

The Regulation applies to the placing on the market within the European Union of foods and food ingredients that have not yet been used for human consumption to a significant degree Several categories are specified -

(i) foods and food ingredients containing or consisting of genetically modified organisms within the meaning of Directive 90/220,

(ii) foods and food ingredients produced from, but not containing, genetically modified organisms,

(iii) foods and food ingredients with a new molecular structure,

(iv) foods and ingredients produced from fungi or algae, and

(v) foods and food ingredients to which has been applied a production process not generally used, where that process gives rise to significant changes in the structure or composition of the foods or ingredients which affect their nutritional value or metabolism [76]

Any substances that fall within the scope of the Regulation must not present a danger for the consumer, mislead the consumer or differ from foods or food ingredients which they are intended to replace to such an extent that their normal consumption would be nutritionally disadvantageous for the consumer [77] The person responsible for placing the product on the market, referred to in the regulation as the applicant, is to submit a request to the Member State in which the product is to be placed on the market for the first time Simultaneously, they are to submit a copy of this request to the Commission[78] An assessment is then carried out and the applicant is informed as soon as possible of any decisions made

[76] Article 1
[77] Article 3(1)
[78] Article 4(1)

Additional specific labelling requirements based on scientific evaluation are to apply to foodstuffs within the scope of this regulation to ensure that the consumer is fully informed [79] These extra items of information include -

(i) food properties, such as composition, nutritional value or intended use of the food which renders the novel food or food ingredient no longer equivalent to an existing food or food ingredient,

(ii) any presence in the novel food or ingredient that is not present in an existing foodstuff and which may have implications for the health of certain sections of the population, and

(iii) any presence in the food that may give rise to ethical concerns

The Commission is again to be assisted by a committee, the Standing Committee on Foodstuffs, which delivers opinions on any related matters

The Commission then adopts measures if they are in accordance with the opinions of the committee[80] Where Member States, as a result of new information or a reassessment of existing information, have grounds for considering that the use of a food or food ingredient may pose a threat to human health or the environment, they can suspend or temporarily restrict trade in, or use of, the substance They are to immediately inform the Commission of any such decisions and give reasons for them The Commission then examines the grounds stated[81]

9.7. Amending legislation

[79] Article 8
[80] Article 13

9.7.1. Regulation 1813/97

Regulation 1813/97 was introduced by the Commission to solve a conflict that existed between the 1990 genetically modified organisms directives and the novel foods regulation This conflict had allowed certain foodstuffs to be exempt from additional labelling requirements It claimed in the preamble that Member States were taking their own action as a result of this loophole in respect of the labelling of foods and ingredients that contained genetically modified substances This, it was seen, would be liable to impede the free movement of those foods and thereby adversely affect the proper functioning of the common market It was thus seen as necessary to ensure that the same provisions should be required for genetically modified products as were for novel foods

The Regulation applied to the labelling of foods and ingredients produced from genetically modified soya beans covered by Decision 96/218 and genetically modified maize covered by Decision 97/98 [82] It did not apply to food additives, flavourings or extraction solvents used in the production of foodstuffs Certain additional labelling requirements were set down for the foods covered by the Regulation These were that the final consumer was to be informed of any characteristic or food property, such as composition, nutritional value or effects, intended use of the food, which rendered the food no longer equivalent to an existing food or food ingredient [83]

---

[81] Article 12
[82] Article 1
[83] Article 2

A food was no longer deemed to be equivalent if it could be shown by scientific assessment that its characteristics differed from conventional foods, having regard for the accepted limits of natural variations Where this was the case then the labelling was to indicate the characteristics or properties modified as well as the method by which that characteristic or property was obtained [84] The content of this legislation was never likely to satisfy the Member States who were rebelling over the issue, the fact which brought about the Regulation in the first place

9.7.2. Regulation 1139/98

Council Regulation 1139/98 of 26 May 1998 deals with the compulsory indication on the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112 Before examining the Regulation itself it is important to look at the reasons behind its drafting

Two commission decisions led to consent being given for the placing on the market of certain genetically modified products in accordance with the provisions of Council Directive 90/220 prior to its amendment by Directive 97/35 These were Commission Decision 96/281 concerning the marketing of genetically modified soya beans and Commission Decision 97/98 dealing with the marketing of genetically modified maize The labelling rules for these two varieties and any products derived from their inclusion thus had to be specified

[84] Ibid

There was seen to be no safety grounds under the terms of Directive 90/220 upon which the mentioning on the label of either product that they were obtained by genetic modification techniques was deemed necessary The individual Member States themselves thus felt it necessary to take measures in respect of the labelling issue to allay consumer fears in those states This then was seen to have created problems due to the fact that the differences between these measures would be liable to impede the free movement of those food products as envisaged in the Treaty It was thus seen to be necessary to adopt uniform community labelling rules for the products concerned

The Regulation was to adopt the same labelling format as that set out in Article 8 of Regulation 258/97 It was also deemed necessary to ensure that the labelling requirements would to be no more burdensome that was necessary yet still remain sufficiently detailed to supply consumers with the information that they required

The foodstuffs specified in the Regulation have to possess additional labelling requirements to those usually necessary on food products [85] Information must be included specifying -

(i) where the food consists of more than one ingredient, the words 'produced from genetically modified soya' or 'produced from genetically modified maize', as appropriate, are to appear on the list of ingredients made compulsory for inclusion under the terms of Article 6 of Directive 79/112 Such a statement must appear immediately after the name of the ingredient concerned Alternatively, these words may appear in a

prominently displayed footnote to the ingredients' listing, related to by the use of an asterisk attached to the ingredient concerned The asterisk is to be directly attached to the word 'soya' or 'maize' The typeface size of the footnote is to be at least the same as that used for listing the ingredients themselves,

(ii) for products for which no list of ingredients exists, the words 'produced from genetically modified soya' or 'produced from genetically modified maize', as appropriate, are to appear clearly on the labelling of the food, and

(iii) where an ingredient of a compound ingredient is derived from the substances coming within the scope of the Regulation, then this has to be specified on the labelling of the final product [86]

This Regulation falls some way short of achieving what it set out to do The principal reason behind the Regulation was to establish a set of harmonised laws between the Member States to ensure proper adherence to the Treaty provisions on the free movement of goods The reason that this was necessary was because the previous legislation, namely Directive 90/220, had failed to implement adequate procedures to ensure that proper labelling requirements would be necessary for any newly approved genetically modified food products This had led to the creation of a series of discordant laws on the mater as Member States sought to appease consumer fears The real root of the necessity for the Regulation was thus consumer anxieties about the labelling of genetic food

[85] Article 2(1)
[86] Article 2(3)

products This legislation does little to appease or accommodate those fears by not enforcing producers to state clearly on the labelling of their products that they contain genetically modified ingredients The only products which do have to display such a statement are those which are excluded from having to place a list of ingredients on the labelling at all

Under Directive 79/112 certain food products need not list their ingredients These foodstuffs include -

(i) untreated fresh fruit and vegetables,

(ii) carbonated water,

(iii) fermentation vinegars,

(iv) cheese,

(v) butter,

(vi) fermented milk and cream, and

(vii) products consisting of a single ingredient [87]

Only these products, under Regulation 1139/98, have to state clearly on their labelling that they are "produced from genetically modified soya" or "produced from genetically modified maize" [88] These are all products which are highly unlikely to contain either of the genetically modified ingredients covered by the Regulation Therefore, the only products which have to state clearly and separately on their labelling that they contain genetically altered ingredients are all highly unlikely to come within the scope of the Regulation at all Products which do actually contain the genetically modified ingredients but which are not

[87] Article 6(2)
[88] Article 2(3)(b)

listed in Directive 79/112 as being one of those foodstuffs having to place a list of ingredients on their labelling only have to state that they contain such ingredients in the listing itself or as a footnote to it This would appear to be somewhat less than what anxious consumers actually seek to appear on foodstuff labels

The Regulation fails to fulfil its function by leaving consumers in a position little better of than that which they were in before the individual Member States took action on the matter by introducing their own measures It has been recognised that Directive 90/220 has the potential to create a situation where the Treaty provisions on the free movement of goods could be contravened However, the Council has failed, through the introduction of this Regulation, to create a situation where the Treaty provisions will be definitely adhered to by the member States Many states may still face lobbying from consumer groups hoping to increase the level of protection afforded to them than that which is offered by this particular piece of legislation

The results of the failings of Regulation 1139/98 have already become evident By October 1998 the Austrian authorities had notified the Commission that they intended to issue a decree which would require the identification of additives and flavourings produced by genetic engineering To accommodate this the Commission has undertaken to introduce the necessary community provisions [89] In the meantime they have issued Decision 98/613[90] requiring Austria to suspend the adoption of its draft decree on the matter

[89] OJ L 291, 30/10/1998
[90] Ibid

The Commission consulted the other Member States about the Austrian proposal through the Standing Committee on Foodstuffs The Member States and the Commission recognised that, as consumers were already to be informed about the presence of ingredients containing or produced from genetically modified organisms under Regulation 1139/98, then they should also be informed about the use of additives or flavourings which had been genetically modified in any way However, the taking of such action should not have been necessary, neither by the Austrian authorities nor the Standing Committee Regulation 1139/98 was designed to cover ingredients in food products containing genetically modified soya or maize The European Court of Justice in the case of *Pfanni Werke Otto Eckart v Landeshauptstadt Munchen*[91] found that additives were actually to be regarded as ingredients once they serve a technological function in the finished product [92] This is further backed up by Article 6(4)(c)(ii) of Directive 79/112, which states the same Therefore, additives and flavourings should have come within the scope of the Regulation at the outset

9.8. Conclusions

The public can no longer see genetically modified foods as futuristic Many are already on the supermarket shelves and have been for some time They are generally concealed from consumers [93] The consumer lobby now thus seeks the implementation of adequate labelling requirements [94] An opinion poll taken

[91] [1994] ECR I-4605
[92] See Chapter 7 2 1
[93] O'Sullivan, K "Food for Thought" The Irish Times, 2 November 1998
[94] See Chapter 9.1.1..

in Ireland early in 1999 showed that 88 per cent of Irish consumers wanted clear labelling for genetically modified foods [95] In response to mounting controversy over these foodstuffs, the Food Safety Authority of Ireland has asked its scientific committee to consider the safety of such products from the perspective of consumer health The outcome of its deliberations would then determine the Authority's stance on the issue [96]

The European Union has been set a clear and specific role in regard to this matter Primarily, it must safeguard the Treaty provisions on the free movement of goods[97] and consumer protection [98] This, however, has been overlooked in the drafting of legislation to date Council Directive 90/220 failed to implement procedures that would ensure the display of adequate labelling requirements on products containing genetically modified substances This was highlighted by the aftermath of Commission Decisions 96/281 and 97/98, which clearly contravened the relevant Treaty provisions [99] Attempts to rectify this resulted in Regulation 1139/98 and several difficulties with that piece of legislation have now also become evident

The European Union Industry Commissioner, Mr Martin Bangemann, has since conceded that consumers have a right "to be informed about the use of additives or flavourings genetically modified or produced by genetic

[95] O'Sullivan, K "Monsanto Accused of Misleading Consumers" The Irish Times, 6 February 1999
[96] O'Sullivan, K "Genetic Food Impels Food Group to Act" The Irish Times, 23 January 1998
[97] Article 3(a)(c)
[98] Article 3(a)(s)
[99] See Chapter 9 6

engineering "[100] Despite this apparent change in attitude within the European Union the future does not look bright for consumers Groups in Ireland have expressed concern over the Government's stance on genetically modified foods [101] This, coupled with the European Union's previous track record on drafting legislation on the matter, does not present consumers with the confidence-inspiring sentiment that any future legislation will adopt this apparently altered approach [102] Constant promises of new legislation will not necessarily neutralise anxieties

If the European legislators are to draft a new regulation to control the labelling of genetically modified foods how can it be drafted in a manner that will help prevent the previous shortcomings being repeated?

Firstly, the fact that new legislation is to probably take the form of a regulation and not a directive has to be welcomed Member States can not be left to their own devices and discretion on a matter of such sensitivity Any new legislation must have immediate direct effect throughout the Community to enable the prevention of a discordant series of laws coming into existence which would have the potential to contravene the Treaty provisions on the free movement of goods

Secondly, the new regulation should appease consumer fears and thus be consistent with what the Treaty states on that matter This can only be achieved if the legislation enforces strict labelling requirements on both producers and

[100] O'Sullivan, K "Consumer Victory as EU Broadens Rules on the Labelling of GM Foods" The Irish Times, 13 November 1998
[101] O'Sullivan, K "Genetic Engineering Report 'Ambiguous'" The Irish Times, 25 August 1998
[102] See, for example Chapter 9 6

importers These requirements must encompass the existence or possible presence to any degree of genetically modified ingredients in any product Even where genetically engineered ingredients are mixed with non-genetically engineered ones prior to their addition to the final product, be this as part of a compound ingredient or a single ingredient independently, their presence must be stated as being a definite one in the finished product The most likely obstacle to be placed in the way of consumers receiving fairness on this matter is the threat of a trade war with the United States of America on the issue given their very liberal approach to the matter

Thirdly, the 'stable to table' approach set out in the 1997 Green Paper must be adhered to in any new legislation This means that any ingredient at any stage of production that could possibly contain genetically altered substances must be clearly labelled as such

Lastly, responsibility must be placed on the individual Member States to ensure compliance with any new legislation This should take the form of strict inspection and analysis measures for foods suspected of containing genetically modified ingredients and which are not clearly labelled to that effect These enforcement procedures should be carried out through a designated state body with a department specifically appointed for these types of products

The Regulation itself should not be merely an amending piece of legislation but instead should redraft all existing legislation on the matter to prevent the piecemeal regimes that we currently experience in other aspects of food labelling law This particular area of food labelling requirements should

have the foresight to ensure amendment does not become necessary in the near future Any shortfall in the recommendations made here would be highly likely to render the new legislation meaningless soon after its introduction as these suggestions would appear to be the minimum that interested consumer groups desire

CHAPTER TEN

ORGANIC FOODS

10.1. Introduction

The European Union regulates the labelling of organic foodstuffs by Council Regulation 2092/91 This regulation defines organic foodstuffs as including -

(i) unprocessed agricultural crop products and animals and unprocessed animal products which meet the principles of production required in annexes I and III of the Regulation, and

(ii) products intended for human consumption, which are composed of one or more ingredients of plant or animal origin that also meet the appropriate production and inspection requirements [1]

The word 'organic' may only be applied to products that are produced in accordance with the provisions of the Regulation and its amendments

10.2. Regulating legislation

10.2.1. Regulation 2092/91

The framework regulation on organic foodstuffs was drafted in 1991 due an ever-increasing level of demand from consumers for such products [2] The price of such products is, in general, higher than similar products not produced in this

[1] Article 1(1)
[2] Preamble

manner It was in light of this also that the Regulation was drawn up [3] Some Member States had already begun to draft their own measures regulating the production of organic foods and this thus increased the necessity for a community-wide regulatory system to help protect and promote the Treaty provisions on the free movement of goods by harmonising the laws on the matter A framework of community rules was also seen to possess the possibility of giving the market for organic products a more distinctive profile by ensuring transparency at the various stages of production and that this in turn would improve the credibility of such products in the views of consumers [4]

The Regulation applies to agricultural products that are produced in accordance with the production rules laid down in Annex I and the inspection rules laid down in Annex III and to foodstuffs in which such products are incorporated [5] Products are seen to be bearing indications referring to organic production methods where, in the labelling, advertising material or commercial documents, such a product or its ingredients is described in a manner that would suggest to the purchaser that it has been produced in accordance with the rules of the Regulation [6]

The Regulation lays down rules for the labelling of organically-produced agricultural products and foodstuffs derived therefrom, that are marketed without further processing Such products may only refer in their labelling to such production methods where these indications clearly demonstrate that they relate

[3] Ibid
[4] Ibid
[5] Article 1
[6] Article 2

to a method of agricultural production and that all the appropriate production and inspection measures referred to in the Regulation have been complied with [7]

Products that are not entirely unprocessed but that bear indications referring to organic production methods may only be labelled as organic where -

(i) at least 95 per cent of the ingredients of agricultural origin contained in the product are derived from products obtained in accordance with the rules laid down in the Regulation,

(ii) all the other ingredients of agricultural origin have been obtained in accordance with the rules laid down in the Regulation,

(iii) the non-agricultural substances contained in the product are listed in the Regulation,[8]

(iv) the product or its ingredients have not been subjected to treatments, including those involving the use of ionising radiation, prohibited by the Regulation, and

(v) the name and/or the code number of the inspection body to which the operator is subject appears on the labelling [9]

10.2.2. Amending Regulation 1935/95

Regulation 1935/95 makes several amendments to Regulation 2092/91 One of the more important of these deals with the labelling requirements for food products that are not entirely unprocessed Products falling into this category may only bear indications referring to organic production methods where -

[7] Article 5(1)
[8] These substances are listed in Annex VI, Section A of the Regulation

(i) at least 70 per cent. of the ingredients of agricultural origin are, or are derived from, products obtained in accordance with the rules laid down in the Regulation;

(ii) all of the other ingredients of agricultural origin are included in the Regulation or have been provisionally authorised by a Member State;[10]

(iii) the indications referring to organic production methods appear in the list of ingredients in the same colour and of identical size and style of lettering as the other indications in the list of ingredients. Such indications must also appear in a separate statement in the same visual field as the sales description and must indicate the percentage of the ingredients that are of agricultural origin or which are derived therefrom and which were obtained in accordance with the rules of the Regulation. This statement may not appear in a colour, size or style of lettering which is more prominent than the sale description. The statement is to take the following form: "X% of the agricultural ingredients were produced in accordance with the rules of organic production";

(iv) the product contains only substances of non-agricultural origin that are listed in the Regulation;[11]

(v) the product or its ingredients of agricultural origin have not been treated by ionising radiation or other substances prohibited by the Regulation;[12]

---

[9] Article 5(3).
[10] These ingredients are listed in Annex VI, Section C to Regulation 2092/91.
[11] These substances appear in Annex VI, Section A to Regulation 2092/91.
[12] These substances are listed in Annex VI, Section B to Regulation 2092/91.

(vi) the labelling refers to the name and/or the code number of the inspection body to which the operator is subject

Regulation 2092/91 is a poorly drafted piece of legislation dealing with an important subject matter It lacks transparency and clarity, two elements essential for legislation of this kind Despite the use of a regulation, the problems more commonly associated with directives have not been avoided What could have been addressed in a straightforward manner has been made unnecessarily complex by the framework regulation Full and accurate implementation is made more difficult by it being overwhelmed by a series of derogations, transitional periods and a general lack of clarity The problems attached to this legislation have been highlighted since its drafting by the need to amend it on numerous occasions [13] This has led to the issue being dealt with by an ever-increasing piecemeal system As a result, it is not surprising to find that it appeared before the European Court of Justice in, what would now appear to be a highly controversial case [14]

10.3. Labelling genetically modified as organic

10.3.1. *Parliament v. Commission*

In *European Parliament v Commission of the European Communities*[15] the applicant brought an action against the Commission for the annulment of Commission Regulation 207/93, amending Regulation 2092/91 on the organic

[13] Regulation 2092/91 was amended fifteen times by the middle of 1996
[14] *European Parliament v Commission* [1995] ECR I 2019

production of agricultural products. The Parliament sought the annulment of the contested regulation due to the fact that it included genetically modified micro-organisms both in the list of ingredients of non-agricultural origin that may be present in foodstuffs that could be labelled and advertised as organic, and in the list of processing aids and products that could be used for the processing of such foodstuffs. The Parliament claimed that, in doing so, the Commission had exceeded its powers in relation to this matter.

The applicant maintained that by extending the ambit of organic foodstuffs to include products containing genetically modified micro-organisms the contested regulation undermined the objectives of Regulation 2092/91 relating to consumer expectations, the free movement of organic foodstuffs and the balance between agricultural production and protection of the environment. It was claimed that in adopting this approach the Commission had exceeded its powers under Regulation 2092/91 by amending that regulation without observing the procedure laid down in Article 43 of the Treaty of Rome. Article 43 of the Treaty provides for the adoption of legislative measures by the Council after consultation with the Parliament.

The Commission insisted that the contested legislation was designed to ensure that consumers would be protected in the future, presumably when genetically modified foods would become more commonplace. They also pointed out that Regulation 2092/91 did not prohibit the use of either genetically modified organisms or genetically modified micro-organisms in organic farming despite the fact that the Parliament had suggested that an amendment be drafted

[15] [1995] ECR I-2019.

to ensure that this would become the case The framework regulation did not prevent the addition of genetically altered foods or their ingredients to the lists of authorised ingredients or processing aids specified therein either The Commission thus insisted that due to these factors it was perfectly entitled to act in the contested manner

The Court stated that the main purpose of Regulation 2092/91 was to define a framework of community rules on the production, labelling and inspection of organic foodstuffs [16] Part of the reason behind the drafting of such legislation was seen to be the improvement of the credibility of these products in the eyes of consumers [17] It was also noted that this legislation only permits use of the word organic on labelling if all of the ingredients of agricultural origin of the product satisfy the production rules set out therein It may also be used if the product contains ingredients of non-agricultural origin where these are listed in Annex VI to it and if it has not been subjected to treatment involving the use of ionising radiation or substances not listed in Annex VI It must also have been prepared by an operator who is subject to the inspection measures set out [18] Regulation 2092/91 also states that the lists set out in Annex VI[19] are to be established according to the procedure laid down which enables the Commission to adopt measures that are in accordance with the opinion of a committee composed of representatives of the Member States [20] It was, in the opinion of the

[16] Paragraph 19
[17] Ibid
[18] Paragraph 20
[19] Pursuant to Article 5(8) of Regulation 2092/91
[20] This procedure is laid down in Article 14 of Regulation 2092/91

Court, in accordance with that procedure that the Commission had adopted the contested regulation [21]

It was found that, contrary to the contentions of the Parliament, the contested provisions did not go beyond the framework established for the implementation of the principles laid down by Regulation 2092/91 The inclusion of genetically modified micro-organisms in Annex VI was not seen to be in contravention of the provisions of that regulation [22] The Court stated that when the Council had adopted the Regulation it had not sought to prohibit the use of either genetically modified organisms or genetically modified micro-organisms in organic farming, despite the proposed amendment suggested by the Parliament It was thus also seen that these substances should not thus be rendered incapable from inclusion in Annex VI [23]

On the issue of genetically modified organisms and micro-organisms the Court stated that it was not for Regulation 2092/91 to regulate the use of such substances because Directives 90/219 and 90/220 had appropriately dealt with this matter [24] These directives were seen to provide a system of prior notification on the use of such substances to the competent authorities of the Member States by the manufacturer or importer and for authorisation by those authorities or even, in some circumstances, by the Commission [25] From this it was deduced that the effect of the reference to genetically modified micro-organisms in Annex VI was not the creation of new rules permitting the use of those substances in

[21] Paragraph 21
[22] Paragraph 24
[23] Ibid
[24] Paragraph 25

organic farming Regulation 207/93 was thus not seen to amend the legislation and thus the Commission was not believed to have been acting in excess of its powers on this matter [26]

The Parliament also claimed that the Commission had misused the powers conferred on it by Article 5(8) of Regulation 2092/91 [27] They pointed out that when concern was expressed at the inclusion of genetically modified micro-organisms in Annex VI the procedure set down in Article 5(9) of the Regulation should have been followed by the Commission [28] The Commission maintained that it was not obliged to consult with the Parliament on this issue because the regulation of genetically modified organisms and micro-organisms was governed by other provisions of community law

The case of *Cargill v Commission*[29] defined misuse of power as the adoption by a community institution of a measure with the purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing specifically with the circumstances at issue The Court felt in *Parliament v Commission* that there was nothing to suggest that the Commission had adopted the contested provisions for any purpose other than those stated in

---

[25] Ibid
[26] Paragraph 27
[27] Article 5(8) of Regulation 2092/91 deals with the addition of substances to the lists set down in Annex VI It states that where a Member State considers that a product should be added to those lists, or that amendments should be made to it, it should state its reasons for this and send them to the other Member States and the Commission for approval by the Committee referred to in Article 14 This committee is to be composed of representatives of the Member States and chaired by a representative of the Commission The Commission is to adopt the measures envisaged if they are in accordance with the opinion of the Committee
[28] Article 5(9) of Regulation 2092/91 requires the Commission to submit proposals for the revision of that regulation which, by virtue of Article 43 of the Treaty, could only take place after consultation with the Parliament
[29] [1991] ECR 2987

the preamble to Regulation 207/93 [30] Consequently the plea of misuse of powers was rejected

10.3.2. Regulation 2092/91

Regulation 2092/91 has the ability to allow genetically modified ingredients to be labelled as organic It also permits genetic modification processes to be used in the production of organic foodstuffs Genetically modified foods are not uncontroversial Allowing them to be labelled as organic is entirely in conflict with what the consumer lobby seeks and also permits the producers of the genetically altered substances another method of adequate labelling avoidance

10.4. The technology conflict

10.4.1. Genetic concern

Early concerns about genetically modified foods dealt more with research into these products than the consumption of them [31] The fear was that where gene biotechnology was applied to agriculture it could lead to the arrival of "superweeds" which would render the new technological advances pointless It was felt that these weeds would become resistant to herbicides along with the crops surrounding them Concerns were also expressed that the escape of genetically modified organisms into the environment could have disastrous

[30] Paragraph 32

consequences for it which, would in turn, have detrimental effects on the reputation of Ireland as an agricultural producer [32] It was also claimed before the High Court that the Environmental Protection Agency had failed to establish that there would be no risk of such an escape from research sites, such as one in Carlow for which it had granted consent for the growth of genetically modified beet [33] The Agency was required by the Genetically Modified Organisms Regulations, 1994 to be satisfied prior to the giving of such consent that the deliberate release of those substances would not result in adverse effects on human health or on that of the environment It was claimed by the consumer lobby that level of information submitted on this matter could not have satisfied the Agency in that regard [34]

The consumer lobby received its greatest assistance in August 1998 when a scientist carrying out research on genetically modified organisms raised serious questions about the safety of their consumption by humans The scientist involved was then suspended from his position of research for issuing "misleading information based on incomplete research" [35] He claimed that rats fed on genetically modified potatoes were made less resistant to infection This incident was to lead to further controversy when, six months later, the suspended scientist, Dr Arpad Putszai, received support from the findings of colleagues carrying out research on the same topic The investigation in question received

[31] O'Sullivan, K "Fears Crop Biotechnology Could Lead to 'Superweeds'" The Irish Times, 9 February 1998
[32] Carolan, M "Escape of Genetically Modified Organisms 'Would be Disastrous'" The Irish Times, 2 July 1998
[33] Ibid
[34] Ibid

support from a group of twenty scientists from thirteen different countries [36] Environmental and consumer groups immediately called for a moratorium on the release of these foods [37]

The scientific findings were later to be backed up by a survey of leading bioscientists It showed that only half of them would give their unqualified support for the introduction of genetically modified crops on a commercial basis [38] Many of those who supported the introduction of these crops also backed a moratorium or felt that there was still a need for additional research [39] A small number of the scientists questioned were adamant that they did not eat genetically modified foods [40]

10.4.2. Member States' reactions

The issue of consumer choice with regard to genetically modified food had come to the fore in the various Member States at different times over a period of several years [41] When it hit the headlines in this part of the Community, the governments of Britain and Ireland moved quickly to appease consumer fears, while falling well short of satisfying their demands The opposite approach was taken when consumer anxieties grew in other parts of the Community several years previous to that In those states some of the domestic governments adopted

---

[35] O'Sullivan, K "Scientist in Food Safety Controversy Suspended" The Irish Times, 13 August 1998
[36] Ahlstrom, D & O'Sullivan, K "Scientist Who Exposed Possible Dangers of GM Foods Gets Support" The Irish Times, 13 February 1999
[37] Ibid
[38] Anon "Scientists Back Moratorium" The Irish Times, 16 February 1999
[39] This survey originally appeared the Daily Telegraph, 16 February 1999
[40] Ibid
[41] See Chapter 9 1 1

their own, consumer friendly, legislation to deal with the matter This, however, can have catastrophic consequences for the promotion of the free movement of goods, and is therefore not the preferred option [42]

The Irish government did, however, make some indications that would have encouraged environmental and consumer groups early in 1999 It is likely, however, that these gestures were only made to temporarily silence these groups, who had been given a very public platform to air their views in the aftermath of the previously published scientific evidence, in the hope that the issue would fade into the background A moratorium on the planting of genetically modified crops was considered to be an option as part of a national policy in relation to these crops by the Minister for the Environment [43] A statement of this possibility was coupled, however, with a reiteration of the fact that European Union legislation at the time did not allow for the adoption of such an approach

10.4.3. The Bowe Report

On the eve of the results of the scientific evidence being published a community report came into the public arena on a similar matter, after it had safely negotiated its way through the Parliament This report prepared the way for the European Union to allow the introduction of more varieties of genetically modified crops into circulation, despite the reservations held by many of the Member States The Bowe Report detailed how Directive 90/220 should be

[42] See Chapter 9
[43] Reid, L & Cronin, D "State May Put Temporary Ban on GM Crops" The Sunday Tribune, 28 February 1999

reformed to allow this to happen [44] The report also contained recommendations for increasing the level of labelling requirements for such products Despite this it was still widely felt that, in an effort to ensure the hasty introduction of this legislation, loopholes could be created, as has happened with so much of the Community food labelling legislation [45]

10.4.4. State opinion

In response to increased concerns about the safety of genetically modified food among Irish consumers, the Food Safety Authority of Ireland announced that it would be issuing its verdict on the risks posed, if any existed, from eating these foods [46] This report was to be based on the opinions of leading Irish food scientists and geneticists [47]

In the United Kingdom the Prime Minister, Mr Tony Blair MP, intervened personally in the row over genetically modified foods He claimed that he was "very strongly of the view that [these] products [were] safe" [48] It was widely believed that this statement, and others from top government politicians at the time, was designed to avert the kind of adverse publicity that had plagued the previous government during the BSE crisis [49]

---

[44] The Bowe Report is named after its author, Mr David Bowe, a British MEP
[45] O'Sullivan, K "Report's Safe Passage Boosts Prospects for GM Foods" The Irish Times, 12 February 1999
[46] O'Sullivan, K "Food Safety Authority to Issue its Verdict on GM Food Risks" The Irish Times, 2 March 1999
[47] Ibid
[48] Donnelly, R "Blair Defends Genetically Modified Food" The Irish Times, 16 February 1999
[49] Ibid The BSE crisis developed in Britain in the mid 1990s during the reign of John Major's Conservative Party government Public anxieties were created when it was revealed that there was a probable link between the disease bovine spongiform encephalopathy in cows and creutzfeld jacob disease in humans It was widely acknowledged that humans could contract the

10.4.5. The organic option

Organically produced foods are in high demand from consumers wary of what other producers are adding to their foods before offering them for sale to the public An impressive argument for the offering of a high level of support for organic farming has been made in a report produced by an advisory body to the Western Development Commission in Ireland [50] A detailed "action plan" for organic production has been derived from this report It also concludes that organic farming is an economically viable sector with "enormous potential" It is claimed that this potential has been slow to develop because of the failure of successive governments to recognise it

Demand is growing across Europe for organic food In France organic food sales account for 39 per cent of total retail turnover [51] With the aid of state support, the value of the market in Sweden increased more than tenfold between 1992 and 1997 [52] The European market for organically produced meat and dairy products was estimated to be worth over one billion dollars in 1996 This is expected to rise to a figure over three billion dollars by 2002

Ireland has already seen rapid growth in this sector The number of organic producers has risen by more than 300 per cent since 1993 The introduction of cash incentives under the Rural Environmental Protection Scheme is believed to have been a major factor in this increase Significant increases in

---

human variant, which was generally fatal, from eating contaminated meat The European Union temporarily banned the export of British beef

[50] Judge, T "Organic Farm Proves a Big Success" The Irish Times, 5 February 1999

[51] Ibid

the market share of organic foods have also been seen in Britain Sales of these products increased at a level of between 30 and 50 per cent in 1997 [53]

10.4.6. Genetic Modification Lobbies

The producer and consumer lobbies have been at loggerheads in the aftermath of the genetically modified food controversy Both offer alternative solutions to the issue However, the producer lobby would appear to hold the upper hand when it comes to levels of influence in the legislative process The consumer lobby which, in some quarters, feels that the interests of US trade and the biotechnology industry have won out due to the failure to secure a world biosafety protocol on these products has even conceded this fact [54]

Attempts to revise European Union legislation on genetically modified foods in response to consumer concerns were seen by many in the European Parliament to be weakened by the intense lobbying of the biotechnology industry [55] It was claimed that the Parliament was bowing to the interests of industry by trying to "weaken safety standards [on genetically modified organisms] below those proposed by the European Commission and Council of Ministers" [56] While this may prove to be correct, it is debatable as to whether

---

[52] Ibid
[53] O'Sullivan, K "Revolution, or Just Plain Revolting?" The Irish Times, 16 February 1999
[54] O'Sullivan, K "Green MEP Says Greed Has Won Out Over Food Safety in GM Debate" The Irish Times, 1 March 1999
[55] O'Sullivan, K "Biotech Lobby Accused of Weakening GM Rules" The Irish Times, 11 February 1999 These opinions were made known during a debate in the Parliament on the Bowe Report on 10 February 1999
[56] Ibid

these proposed standards of the commission and council are of a particularly high standard themselves, or at least if they will prove to be in practice [57]

The major biotechnology companies involved in this issue, such as the American company Monsanto, have often been outspoken themselves on the matter Consumer groups, such as Genetic Concern, have accused them of "deliberately misleading the public in relation to [the] labelling of genetically modified food" [58] Monsanto had responded to calls for proper labelling by declaring itself to be in agreement with the concerns of consumers What they claimed to seek, however, was what they called "scientifically-based" labelling The consumer lobby felt that the labelling requirements which the biotechnology industry sought made any attempt to address the matter meaningless due to the fact that producers did not segregate conventional crops and genetically modified ones [59] A Genetic Concern spokesman called on the likes of Monsanto to openly declare what exactly they meant by scientifically-based labelling Mr Quentin Gargan said that -

> [i]f their definition is the same as current labelling regulations which exclude oils, fats, additives and anything else which industry and its independent scientists consider to be safe [then] the public are being mislead

Monsanto has made other claims about genetically modified foods in an effort to promote their benefits amongst consumers It has stated that claims that these foods are of no benefit to consumers are false [60] It also took exception to

---

[57] See Chapter 9
[58] O'Sullivan, K "Monsanto Accused of Misleading Consumers" The Irish Times, 6 February 1999
[59] Op Cit
[60] O'Sullivan, K "Monsanto Pushes Benefits of GM foods to the Environment" The Irish Times, 1 March 1999

the Food Safety Authority of Ireland's comments that the genetically modified foods available on the market at the time were of no direct benefit to consumers [61]

The United States, the world's biggest producer of genetically modified food, has even been accused of "bullying" foreign governments in an effort to protect the ambitions of Monsanto [62] Cabinet documents from New Zealand show that the US government threatened to pull out of a proposed free trade agreement with that State due to its plans for the labelling and testing of these foods [63]

10.5. Conclusions

Organic foodstuffs are regulated in the European Union by Regulation 2092/91 The fact that a regulation was used instead of the traditional directive does appeal to one of the findings of this thesis Regulations require no further implementing measures to be taken by the Member States and, as such, remove some of the transposition problems that it has been demonstrated are attached to directives on food labelling matters This is the theory anyway Unfortunately, another opportunity for European Union legislators to deal with the problems that have been created by the way in which they have tackled the harmonisation program was missed when it came to legislating for organic foods

Legislation designed to regulate organic foodstuffs was seen to be necessary due to the ever-increasing demands from consumers for these products

---

[61] Ibid
[62] Woolf, M "Revealed How US Bullies Nations Over Genetic Food" The Independent on Sunday, 22 November 1998
[63] Ibid

This area was, to a certain extent, free from regulation prior to the implementation of Regulation 2092/91 There was thus an opportunity there for the taking to introduce a simple and clear legislative regime for organic foodstuffs, one that would not become piecemeal and inoperable within a short space of time and that would deal with the treaty guarantees of consumer protection and the free movement of goods in an appropriate and acceptable manner Neither of these pledges was supported due to the inadequate way that the Regulation was drafted

The Regulation has had to be amended an extraordinary amount of times since its inception It was drafted without both clarity and transparency This has led to some extensive problems where the free movement of goods and consumer protection are concerned Where legislation has to be amended constantly the changes involved take time to become part of the legislative scheme in the individual Member States Producers and consumers alike require time to adjust to the alterations If this adjustment takes different time scales in the various states this can have detrimental effects on producers where the legislation has, or in some cases has not, been implemented as they would possibly have to alter their production methods or labelling to satisfy the demands in the states where the laws have or have not yet, as the case may be, been modified A larger volume of amendments still creates extra problems as states attempt to keep up with the required enforcement of an ever-increasing amount of piecemeal legislation

The fact that Regulation 2092/91 allows foods that have been genetically modified to be labelled as organic epitomises how the regulation of food products in the European Union has failed consumers, and thus failed to ensure the Treaty guarantees that are meant to be afforded to them It would seem that the type of consumer who desires organic foods would also be the same type that would express abhorrence for the use of genetically modified ingredients or products

This thesis has demonstrated how these genetically modified foods are both controversial, in many ways, and how they are unwanted by many consumers It begs the question then as to why the European Union fails to initiate the Treaty guarantees of affording consumers the type of protection they desire while simultaneously promoting the free movement of goods

Genetically modified and organic foods offer a more recent example of a problem that has been in existence for as long as the harmonisation programme itself The problems attached to their regulation serve as another example of the difficulties that have been encountered in the efforts made thus far to regulate food labelling requirements within the European Union It is time that these obstacles to the application of the provisions of the Treaty were recognised and then dealt with by the repeal and replace method, as outlined in this thesis [64]

Continuance and development of the legislation creation and enforcement mechanism that has been formed by the European Union must be halted now to give the system real effect and to ensure that harmonisation is achieved in a manner that enables both producers and consumers to maximise the possibilities that are available to them through membership of the European Union

CHAPTER ELEVEN

SUMMARY OF THE STUDY

11.1. Introduction

This study shows how consumers have, in recent years, begun to make their opinions on food safety clearer They now lobby for changes in the areas of both production and labelling Price, while important, would appear to take second place in the order of consumer concerns The main issue is safety Food has also, given recent crises, become an important issue for political debate This situation has arisen only relatively recently In Europe, the European Union's intervention in the food regulation area has fostered political debate

Acting as an obstruction to the furtherance of consumer rights in this area, however, is the fact that the political issues involved are often universal in nature As such they are capable of espousal by any political grouping at any time This makes it easier, for those not in government, to rally to the cause of food regulation and to lobby for change Those outside government are not required to take policy decisions Food producers, who are so vital to the economy of a state, are not adversely affected by these pressure groups, whose function is to be seen to make a case, rather than bring about change

There is much conflict about what ought to appear on the food label Food producers may oppose compulsory information on the grounds that it is likely to compromise the integrity of the design of the label Packaging, and this includes labelling, is an integral part of overall marketing strategy Food

[64] See, *infra*, Chapter 11

producers may not wish consumers to be accurately informed about the contents of the foodstuff This may be because some of the contents are, or are perceived to be, deleterious to health or the environment Likewise, food producers might wish to be less than frank about the origin of their product They may know consumer preference is for goods of some particular kind from one rather than another region or country

Food consumers, on the other hand, have a different agenda They wish to be notified about the actual content of the goods they buy However, governments may wish to manipulate the situation Consumer ignorance of the constituents of some food products may enable national governments to promote indigenous industries The manipulation may take the form of regulating food labelling, in such a way as to permit producers to conceal information, while appearing to voters to be intervening in the consumer interest

These different considerations all compete for legislative accommodation Their reconciliation is particularly difficult, given the European Union regulatory framework

11.2. Elements of the food label

From the survey carried out in this study, it has been shown that the seven basic elements that must be contained on any food label are the name of the product, its ingredients, the net quantity contained therein, details of any nutritional claims made about the product, the date of minimum durability, any processes that the product has undergone in its manufacture and the placing of the

name and address of the producer or importer on the label These requirements are currently accounted for in the framework directive, as amended, and in a series of other legislation introduced at a later stage

The evidence on consumer behaviour shows that for food labelling to be genuinely informative, the label must be kept simple Problems do exist, however, with all seven identified aspects of the label These difficulties, discussed previously, are here summarised

(1) Name Several difficulties can arise where the naming of the food is concerned As a general rule, European law requires that the lowest quality form of a product that can be marketed legally in any one Member State must be marketable in all

(2) Ingredients listing The ingredients of a product must be listed in descending order of quantity If a consumer reads the list of ingredients, and it is probable that most do not, he or she will generally read the major constituents first These are often substances such as water, flour, meat, milk or other basic single constituent foods However, the ingredients present in only very minor quantities, such as artificial colorants or preservatives, are more likely to be those that have a detrimental effect on human health In most cases, it is unlikely that the intending purchaser will ever have read so far down the listing Most consumers therefore will remain unaware of any potentially harmful ingredients contained in the product

(3) Net quantity Problems can arise with the correspondence of the quantity that is stated on the label of the product with that which is actually contained

therein There are two main reasons for this Firstly, much of the enforcement legislation in this area at European Union level has become quite outdated, and has failed to account for technological developments where measurement is concerned Secondly, products can absorb or lose moisture, or contents can settle in a manner prior to retail sale This will alter the actual quantity contained in the product from the time of measurement

(4) Nutritional labelling The main difficulty that exists with nutritional labelling is the form in which it appears on the label This fails to give consumers an easily understandable version of information It can often be misleading as a result

(5) Date of minimum durability The date of minimum durability is dealt with in the framework directive and a series of amendments to it Its main shortcoming is one attached to the overall form that the framework legislation has taken through the use of a piecemeal series of directives It would also appear that there is an inadequate enforcement mechanism to control the adherence of producers to this particular provision

(6) Manufacturing processes Many food products undergo a series of potentially harmful processes in their production The difficulties that the labelling of this fact can arouse, are evident in the way in which the labelling of genetically altered products has been dealt with at community level They are generally too politically sensitive to be afforded the appropriate regulation

(7) Name and address of the producer The principal problem that can arise with this element of the food label is that it generally offers little in the form of

recourse to the citizen of a Member State who purchases a defective food product in a different state from the one where it has been manufactured There is also the difficulty which can arise from the extension of the defective products directive[65] to primary agricultural products, as these are generally exempt from having to present a label Tracing who the manufacturer or European Union importer is may then prove difficult This extension is unlikely to offer much in the way of assistance to the purchaser or consumer of such products on the issue of labelling Whereas these requirements may be useful to the monitoring of the movement of goods, at least under the present legislative regime, they are unlikely to contribute to effective consumer protection

11.3. Format of the legislation

In more general terms, the thesis concludes that the type of legislation used for the regulation of the food labelling requirements of the European Union is unsatisfactory for several reasons All of these reasons are linked to the fact that Article 189[66] of the Treaty stipulates that directives are not directly applicable into the domestic laws of the individual Member States

Directives are generally used as these are designed to offer more in the way of flexibility for the Member States on the matter of implementation They are thus seen as being a more appropriate way of accommodating the differences obtaining in the legal systems of the individual Member States

[65] Directive 85/374
[66] Now Article 249

Before most Member States joined the European Union, their domestic food labelling laws were fairly minimal and individual differences were many As a result of this, a certain degree of flexibility has to be allowed when efforts are being made to harmonise a complex set of rules between all of those states The over use of directives has led, however, to a situation where the Member States do not take the legislation as seriously as they should This in turn leads to all sorts of difficulties, particularly where consumer protection and the free movement of goods are concerned

Because of the fact that directives are the main medium used for the regulation of food labelling, a discordant set of rules between the various Member States has been created This is generally due to the fact that some transpose adequately while others do not The detrimental effects that this can have are outlined in the thesis To summarise, if one state implements the directive and another does not, then producers in the state where implementation has not taken place are given a competitive advantage Less regulation means cheaper goods Conforming to sophisticated labelling requirements imposes its own costs In an ultra-community sense, these intricate differences act as a barrier to outside entrants, such as the producers in the United States or Australia and New Zealand

Apart from the Member States' reluctance to transpose directives properly, and the detrimental effect this has on the free movement of goods, the rights of consumers, which are also afforded treaty status, are also affected If a

directive is transposed late or improperly, then any provisions in that legislation that are designed to give consumers extra protection are not afforded to them

Another aspect of the excessive use of directives that can have detrimental consequences on the proper functioning of the common market, is the rather grey area of direct effect It could be argued that directives should never be afforded direct effect They have already been given a measure of vertical effect by the European Court of Justice, which now also seeks to extend this horizontally Directives and regulations were initially seen as appropriate in different circumstances This has since been overlooked by the Court, who now see them as virtually interchangeable legislative mechanisms

Another of the problems associated with the use of directives to regulate the labelling of food products is the fact that they are often used to legislate on highly complex and intricate matters This has led to some of the more complex issues being legislated upon, before the basic provisions have been dealt with properly The directly applicable regulation has been used on occasions to amend minor details of legislation that were dealt with originally by a directive If directives were no longer overused, and regulations more frequently employed, this would result in the better harmonisation of European Union laws

Other aspects of the legislation that could be altered include -

(1) A repeal of much of the complex web of food labelling legislation currently in force and its replacement by a series of single issue horizontal regulations with vertical appendices This would simplify the situation for the states, the producers and the purchasers

(2) An overall simplification of the issues dealt with in the legislation, leaving the matter largely self-regulating in the interim This would ensure the proper harmonisation of the laws on what may be considered to be the seven vital areas of the food label at the very least

(3) A court clarification on the issues of mutual recognition and selling arrangements These arrangements will become increasingly important when much of the present legislation is repealed This clarification must remove some of the ambiguity attached to their definitions at present This would consequently narrow their scope

(4) An increased role for the Parliament in legislation drafting This body is currently the only democratically elected forum operating in the European Union This would have the potential to make the legislation more transparent and consumer friendly The drafting of legislation by bodies other than the Parliament should continue on a qualified majority basis that aims to implement the very highest of standards

(5) An increase in the level of consultation with interested bodies, particularly consumer groups, on whose approval the entire concept of a common market is theoretically reliant

(6) An improved enforcement mechanism contained in the legislation that would give national authorities an increased scope for implementation in their own Member States and which would then afford national food safety bodies extra powers of implementation

11.4. Commission Green Paper

From this thesis, it is evident that the Commission Green Paper on the future of food regulation does not offer an adequate solution to the situation that has been created by the European Union Some aspects of the document are to be welcomed However, the reaction it has received from the Member States indicates that the regulation of food labelling is not likely to improve just yet The comments that have been received by the Commission from the Member States, and from other various interested parties, would appear to indicate that there is still an underwhelming lack of support for the types of changes needed for an adequate overhaul of the way in which food labelling legislation is created The development of an altered policy in this area looks bleak In addition to this, many of the problems that have been pointed out in this thesis have not yet been recognised, let alone dealt with, at community level

The framework legislation on food labelling itself is weak This has led to the creation of an incredibly piecemeal and complex system that makes enforcement almost impossible Examples of the situation that it has helped to create are the controversial and complex rules on the naming of food products Other examples proliferate in the legislation governing the listing of the ingredients of a food product, or the net weight that must be declared on the label

11.5. Commission White Paper

The appointment of new commissioners after the controversial collapse of the Commission of the European Union in 1999 led to a wave of optimism

amongst consumer groups They believed that the issues for which they had spent the preceding years lobbying would finally be addressed in a manner acceptable to them In January 2000 the Commission followed up on its initial Green Paper with a White Paper on Food Safety [67] Three aspects, in particular, of this document require mention These are the establishment of a European Food Authority,[68] the regulatory aspects[69] and the provisions detailing the policy to be administered in relation to the provision of consumers with the information, about the food products that they consume [70]

The European Food Authority envisaged in the White Paper would appear to offer the consumer little in the way of additional labelling protection mechanisms This independent body is to have as its primary responsibilities the areas of risk assessment and communication on food safety issues This role is similar to that of the Food Safety Authority of Ireland [71] Risk analysis is defined in the White Paper as including risk assessment, risk management and risk communication Legislation and control are identified as being the two main components of risk management, though this analysis is open to question since legislation is a form of control

In particular, this thesis notes the manner in which the European Union proposes to regulate the labelling of food products on a community-wide basis as part of its risk management strategy The White Paper states that the Commission, in its role as guardian of the Treaty, "[ ] is responsible for

[67] COM (1999) 719 final
[68] White Paper Chapter 4
[69] White Paper Chapter 5
[70] White Paper Chapter 7

ensuring that Community legislation is properly transposed into national law and properly implemented and enforced by national authorities of the Member States "[72] The White Paper does not suggest that this function be transferred to the new European Food Authority, for three reasons Firstly, it was seen that the transfer of regulatory powers to an independent authority could lead to an unwarranted dilution of democratic accountability The Commission's position in relation to such accountability must also be questioned, however, given the fact that it is not a democratically elected body in the first place Secondly, it was noted that control over food legislation must remain at the core of the Commission's risk management process, to enable it to act effectively on behalf of the consumer Thirdly, it was noted that an authority with regulatory power could not be created under the current institutional arrangements of the European Union and would require modification of the existing provisions of the Treaty

The system of regulation in operation at present must, however, be examined in the context of the legislative medium that is to be used This study has demonstrated how the continued use of directives as opposed to a series of horizontal regulations with vertical appendices will only serve to add further to the piecemeal and discordant system of legislation that is used to regulate European Union food labelling requirements at present The establishment of a central authority to oversee this legislation implementation would be likely to prove ineffective anyway if the method of legislating were not to be modified as suggested here Any such alteration would have to include two key elements that

[71] See, *infra*, Chapter 3
[72] Page 15

have been identified in this study These are simplification and direct implementation without derogation Thus, the fact that regulatory powers remain with the Commission as opposed to a central authority leaves the situation in relation to the food labelling legislative process relatively unaltered by the White Paper The Authority is accorded only an advisory role It must then be asked what the White Paper does actually change about the legislative format to be used

The White Paper states that there is a need for the labelling provisions in relation to genetically modified and novel foods to be completed and harmonised It goes no further than this While there is a recognition in the Annex that much of the legislation currently in operation requires amendment, much of this is to take place through the continued use of a series of directives Thus the piecemeal system becomes even more discordant

The White Paper states that consumers are to be provided with essential and accurate information so that they can make informed choices It declares that binding labelling rules must, therefore, ensure that the consumer has the information on the product characteristics that determine choice, composition and any storage or use specifications of a product Operators are to be free to provide more information on the label, provided this information is correct and not misleading How this producer freedom will be monitored, is not actually addressed in the White Paper

In relation to the labelling of ingredients, it is stated that the Commission intends to propose a new amendment which would remove the current possibility

of not having to indicate the components of compound ingredients where they form less than 25 per cent of the final product This is proposed to ensure optimal consumer information as to the composition of a food product for consumers who may wish to avoid certain ingredients for whatever reason It is noted in this thesis, however, that the system of ingredient labelling in operation at present is in need of reform in other ways to ensure its effectiveness Simply adding to what already may be a detailed list may make the present system even more unsatisfactory It is also proposed to bring the requirements of the legislation in relation to nutritional labelling into line with consumer needs and expectations

Overall it can be stated that the White Paper on Food Safety offers only a minimal departure from the legislative system in operation in the European Union at present Many of the recommendations made in this study are not addressed in the White Paper at all While the Annex would offer a slight indication that there may be some form of departure from the overuse of directives as the primary legislative medium, there is no indication that the use of regulations will increase significantly The difficulties that this approach can have, are outlined in detail in this thesis The basic fact remains that in an effort to ensure compliance with the Single European Act and the harmonisation timetable that it put in place the whole area of food labelling has become over regulated and thus ineffective

11.6. Developing technology

The labelling of foodstuffs that have been brought about by the increased use of technological developments clearly demonstrates many of the findings of the thesis The fact that directives were originally used to legislate on the matter, shows the lack of importance often attached to major issues such as genetic modification This legislation has since been found to be inadequate It has thus been amended on occasions by regulations These regulations have failed to meet consumer expectations This has consequently placed pressure on the individual Member States to adopt their own legislation There are thus detrimental consequences for the free movement of goods

Organic foods would appear to be at the opposite end of prioritisation for food purchasing where consumers are concerned from genetically altered products The Court has found that products that have been genetically altered can, in some instances, be labelled as organic This also highlights the extent to which consumer issues are often considered as being of minor importance or are deliberately ignored This process is particularly evident if there is any conflict with the promotion of the free movement of goods or other producer interests

11.7. Conclusion

Since its inception, the European Union has attempted to harmonise the laws of the Member States on many different matters, one of these being food labelling The main difficulty that was always going to be encountered, relates to the wide variety of conflicting cultural differences obtaining in the various Member States, and the consequent difficulty in standardisation of laws There

are also conflicting interests within each of the areas identified for standardisation At the time of the formation of the present Community, national food labelling laws were already well established within each state Complete approximation was thus never going to be an easy task

It is in this context, that the approach adopted for harmonisation by the European Union must be examined It has, despite the prevailing difficulties, attempted to approximate the laws on a series of intricate details before dealing properly with fundamental issues One explanation for this may lie in the fact that due to its entry at such a late stage in the evolution of the legal systems of individual Member States, standardisation of hitherto unregulated matters is less troublesome It is easier to adopt new rules which create additional regulatory restraints, rather than trying to alter already existing ones The result has thus been that society is now in danger of becoming over-regulated, by a series of minor intricate details Issues that actually affect the quality of lifestyle of the citizens of the European Union are overlooked or deliberately interfered with

It is not in dispute that Community legislation has brought many benefits to its citizens, particularly in relation to working conditions However, the policy underlying the vast majority of European Union action must be questioned Two of the most influential decisions taken on the lifestyles of community citizens, the decision in the *Bosman* case and the eradication of duty free sales for travellers, offer examples of this The former only offers benefits to very few and detriment to many, while the latter would appear to benefit nobody In many ways the same can be said about the vast majority of food labelling legislation

While it has to be accepted that new laws are always required to keep pace with ever-advancing levels of technology, it is not always to see who benefits from these new community provisions Their complexity and their piecemeal nature have made compliance difficult This adversely affects both the protection of consumer interests and the free movement of goods The European Union, partly as a consequence of the Single European Act, has impetuously sought to alter society by ill-considered legislative intervention It now must address a coherent programme of legislative repeal and reform This involves both the formulation of clearer and more democratic policy objectives, and devising and implementing a simpler regulatory framework, which can accommodate future necessary changes

APPENDIX I

European Union Food Labelling Directives and their Dates of Implementation

European Union directive number	Subject of the directive	Date specified in European Union directive for implementation	Date of actual implementation into Irish domestic law	Difference between the two dates
73/241	Cocoa & chocolate products	24 July 1974	1 January 1976	525 days late
74/409	Honey	22 July 1975	12 August 1976	386 days late
79/112	General labelling	18 December 1980	1 July 1982	560 days late
86/197	General labelling	1 May 1988	1 May 1989	365 days late
89/107	Additive labelling	21 June 1990	31 January 1992	589 days late
89/108	Frozen foods	21 June 1990	20 October 1992	851 days late
90/219	GMOs	23 October 1991	1 January 1995	1164 days late
90/220	GMOs	23 October 1991	1 January 1995	1164 days late
90/496	Nutrition labelling	1 April 1992	31 December 1993	640 days late
91/72	General labelling	30 June 1992	1 August 1994	761 days late

APPENDIX II

Extracts from additional related newspaper articles.

Example 1

Many bacon product labels 'in breach of regulations'

O'Sullivan, K The Irish Times, May 6 1999 (Extracts)

The consumer's entitlement to properly labelled bacon products is being flouted by many Irish supermarkets, according to the Irish Farmer's Association It has identified 10 pre-packed bacon products purchased this week with labels "in breach of regulations on basic information to consumers"

The products- vacuum-packed rashers and cuts of bacon- in many cases did not indicate country of origin but also important details to guarantee traceability, said the IFA president, Mr Tom Parlon He accused the Office of Consumer Affairs of failing to respond adequately EU law requires products to indicate country of origin "if its absence misleads to a material degree"

Example 2

Low-fat foods snubbed

Anon Evening Herald, May 31 1999 (Extracts)

Almost half the population never go for the low-fat healthy option According to a new survey, 40 pc of Irish people never request a health food alternative and most of them are aged between 20 and 29 or over 60

Happy Heart Eat Out month starts tomorrow and the month long promotion, organised by the Irish Heart Foundation (IHF), has called on restaurants, pubs and hotel (sic) to provide healthy choices for customers

Maureen Mulvihill of the IHF said "The results show that there is still much more work to be done in educating people about low fat healthy eating "

Example 3

Tighter EU food safety laws vital, Byrne says

O'Sullivan, K The Irish Times, 6 November 1999 (Extracts)

Radical reforms of European food legislation to restore consumer confidence in what they eat have been outlined by the EU Commissioner for Health and Consumer protection, Mr David Byrne

The reforms, to be contained in a white paper, will modernise EU legislation on food, improve the scientific advice system to respond rapidly and effectively to food scares and "reinforce controls from farm to table", he said at a conference on food regulation held in Dublin by the legal firm Arthur Cox

Mr Byrne warned that economic growth, employment and competitiveness in the European agri-food industry were at stake Moreover, the functioning of the single market had been called into question by successive crises, which had undermined the public's trust in "the capacity of the food industry, in the broadest sense, and in public authorities to ensure their food is safe"

He said "The Commission is very serious when it says food safety is a top priority We are not pandering to any particular lobby We are not trying to curry favour from a European public which has grown increasingly sceptical about the benefits of European integration "

Food legislation lacked overall coherence and had to updated On GM foods [Senator Feargal Quinn] said with the importance of Ireland's food industry, it could not let the EU decide on policy "for us" GM foods might prove vital to innovative food production, but equally could have unacceptable risks

Example 4

EU fails to resolve impasse over chocolate

Anon The Irish Times, 22 June 1999 (Extracts)

The European Union has failed to resolve a longstanding impasse over how to define chocolate after the European Commission objected to a hard-fought compromise that most EU states supported

It would have also allowed Irish and British manufacturers to market milk chocolate under the name "family milk chocolate"- to distinguish it from the continental version, which has lower milk content

The Commission opposed language that would have diluted its powers by requiring EU governments and the European Parliament to agree technical changes to rules governing chocolate once it was adopted, EU officials said

Most EU governments had rallied around a compromise to the 25-year-old dispute, which has inflamed passions in both big chocolate-making countries such as Belgium and cocoa-producing states

The text would have allowed chocolate products to include 5 per cent of certain non-cocoa vegetable fats, as long as they were clearly labelled and would have meant that Irish and British manufacturers could have used the family milk chocolate name

The compromise text would have allowed six specific tropical fats to be used instead of cocoa butter The EU has been attempting for years to draw up common rules on chocolate to ensure that it can be sold freely throughout the 15-member bloc

A 1973 directive bars the use of cocoa-butter substitutes, but Austria, Britain, Denmark, Finland, Ireland, Portugal and Sweden won exemptions when they joined the union

Example 5

Consumers not receiving clear and accurate information about genetically-modified foods

Raleigh, K The Irish Times, 29 April 1999 (Extracts)

Admittedly, the labelling issue [in relation to genetically modified foods] has also led to much confusion From the outset, the food industry has been consistent in its calls for labelling which will allow consumers to make an informed choice on whether to purchase GM foods

We [Irish Business Employers Confederation] are committed to labelling all food products containing soya and maize derivatives according to the EU regulations These regulations require that ingredients are labelled if they contain either protein or DNA This allows the food industry, authorities and consumers to verify whether the label is accurate By applying these rules we are providing the consumer with meaningful information- if the genetic material is not present it cannot be tested To label all ingredients, whether or not it can be proven, is of little use to the consumer and is completely impossible to regulate

To illustrate this rationale, it is worth noting that if a product is labelled as organic, up to 5 per cent of the ingredients may be derived from non-orgamc ingredients This is a sensible provision for organic farmers, allowing some flexibility This argument has been totally ignored by particular interest groups, which will allow no flexibility in the labelling of GM ingredients

Example 6

Duty-free threat to 500 jobs

(Extracts)

Gatwick, one of the country's biggest employers, is warning that more than 500 jobs could go at the airport next year when the European Union abolishes duty and tax free shopping And (sic) Newhaven ferry operators, Stena Line, say the move could even pose a threat to the future of the Newhaven-Dieppe service The EU plans to scrap duty-frees in Europe from June 30 1999

as part of the single market The move is being fought by UK airlines, ferry companies, suppliers and retailers who stand to lose about £750 million a year A report highlighting the impact [has] been published by an industry pressure group, the Duty Free Confederation They warn than holidaymakers will not only lose their favourite perk, the cost of travel will also have to rise because of the loss of duty free income Gatwick makes £36 million a year from duty-frees and 1,000 people work in duty and tax free shops at the airport Half of those jobs are at risk, and more will go at Gatwick-based airlines The airport is warning that the price of an average package holiday for a family of four could rise by £60

Example 7

First read the label, then add a pinch of salt

Irish Independent, 22 November 1999

Our new EU Commissioner David Byrne may be fighting for consumer interests and he has said already that he regards clearer and more accurate labelling as a key to building confidence in food in Europe

But the reality is that the hottest demand for labelling revision in Europe at the moment is for clearer "country of origin" markings That has been sparked by the Anglo-French beef dispute and it is to satisfy producers not consumers, that the change is being demanded

At present the country of origin is only the last country where the product was "significantly changed" The present state of labelling of food products both

here and elsewhere in Europe is Orwellian Words on labels frequently mean the exact opposite of what the reality is inside the packet, tin or jar

There is nothing to stop companies using misleading information on their labels A careful study of labels- and there are thousands to choose from- show that companies are flirting with deception

Terms such as 'natural', 'wholesome', 'nutritious' and 'fresh'- used on the labels of countless products- are virtually meaningless according to the Consumers Association of Ireland