# European chocolate makes the trade go round (in a most delightful way)

**Des Taylor**[1]

## 1. INTRODUCTION

Many important decisions handed down by the courts over the years have often been in cases where the subject matter (around which the dispute focused) was rather ordinary - even mundane. For example, ***Donoghue v Stevenson***[2] concerned a snail in a bottle of ginger beer; ***Central London Property Trust Ltd. v High Trees House Ltd.***[3] reviewed the rental arrangements of a block of London flats; ***Salomon v Salomon***[4] examined a leather and boot manufacturing business and ***Grant v Australian Knitting Mills***[5] looked at two sets of long underwear. Even at the European Union (EU) level, there are similar cases: ***Van Gend en Loos***[6] concerned a consignment of ureaformaldehyde and ***Cassis de Dijon***[7] centred on a blackcurrant liqueur. However, as with most cases, it is not the subject matter but the legal principle which the court enunciates (or confirms) that is the important aspect of the case. As has been commented in relation to ***Van Gend en Loos***:

> The ruling of the Court of Justice … constituted … a major constitutional step in the development of the European Community. Its core element is the ruling that the Treaty of Rome represents more than a mere international agreement imposing obligations, at the level of international law, as between the contracting States. It confers rights on individuals which become part of their legal heritage and which national courts are bound to protect. From this central proposition the Court then or later deduced many of the main principles of Community law.[8]

Likewise, as regards ***Cassis de Dijon***, the significance lies in the fact that there the European Court of Justice (ECJ) gave 'an expansive interpretation of Article 28 (ex Article 30) of the EC Treaty, extending its net to catch any State measure capable of interfering with the market in respect of intra-Community trade in goods'.[9] Recently, the

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[2] [1932] AC 562.

[3] [1947] KB 130.

[4] [1897] AC 22.

[5] [1936] AC 85.

[6] Case 26/62, NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

[7] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

[8] Nial Fennelly, 'The Dangerous Idea of Europe? Van Gend en Loos (1963)' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century*, Round Hall Sweet & Maxwell, Dublin, 2000 at 220-236.

[9] Tom Carney, 'What Rule of Reason? Cassis de Dijon (1979); A Flawed Locus Classicus' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century*, Round Hall Sweet & Maxwell, Dublin, 2000 at 310-326.

ECJ gave judgments in two cases (**Case C-12/00 *Commission v Spain***[10] and **Case C-14/00 *Commission v Italy***[11]) the subject matter of which was also something quite ordinary - that normal everyday delicacy, 'chocolate'. However, once again, the court's decision is important not for that fact but for what the court decided.

# 2. FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION

The basis of the European Union's Single Market is the free movement of goods, services, persons and capital within the European Union (the most important of these being the free movement of goods). Without this free movement, there could be no Single European Market. As Agnete Philipson has commented, '[t]he free movement of goods is a cornerstone of the Single Market and the European Commission is vigilant in ensuring the free movement provisions, as contained in the Treaty, are upheld, most significantly, by investigating alleged infringements of the provisions by Member States.[12]

Article 28 EC prohibits EU Member States from imposing quantitative restrictions and measures having equivalent effect on imports of goods between Member States – and, for many years, the ECJ has consistently struck down a wide range of measures as being quantitative restrictions or measures having equivalent effect.[13] As can be seen from such cases as **Case 34/79 *R v Henn and Darby***,[14] anything which restricts importation by reference to quantity (e.g. a quota system) is a quantitative restriction. The nature of 'measures having equivalent effect' can be seen from such cases as **Case 249/81 *Commission v Ireland (Re 'Buy Irish' Campaign)***.[15] In that case, the advertising campaign was held to be equivalent to a restriction although it merely encouraged consumers to purchase Irish goods rather than imported ones.

In fact, the concept of measures having equivalent effect has been widely interpreted by the ECJ. In ***Dassonville***,[16] the ECJ stated its definition of measures having equivalent effect to quantitative restrictions in the following terms:

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[10] Case C-12/00 Commission v Spain (ECJ 16 January 2003) available at: <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0012>.

[11] Case C-14/00 Commission v Italy (ECJ 16 January 2003) available at: <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0014>.

[12] Agnete Philipson, *Guide to the Concept and Practical Application of Articles 28-30 EC*, European Commission Internal Market DG, Brussels, 2001, at 7.

[13] As can be seen from such ECJ judgments as that in Case 249/81 Commission v Ireland (Re 'Buy Irish' Campaign) [1982] ECR 4005, indistinctly applicable measures can comprise such things as (a) regulatory measures designed to enforce minimum standards of size, weight, quality, price or content; (b) tests and inspections or certification requirements to ensure that goods conform to those standards; and even (c) any activity capable of influencing the behaviour of traders such as the promotion of goods by reason of their national origin.

[14] Case 34/79 R v Henn and Darby [1979] ECR 3795.

[15] Case 249/81 Commission v Ireland (Re 'Buy Irish' Campaign) [1982] ECR 4005..

[16] Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837.

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[17]

In ***Cassis de Dijon***, the ECJ said that measures having equivalent effect include not only 'distinctly applicable measures' (i.e. those which discriminate against imported goods) but also 'indistinctly applicable measures' (i.e. those which ostensibly apply to both domestic and imported goods but which in fact do impede free trade between the EU Member States). In ***Cassis de Dijon***, the ECJ applied the aforementioned *Dassonville formula* but added what is now known as the *'first Cassis principle'*, namely:

> Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[18]

What this means is that certain measures will not breach Article 28 EC if they are necessary to satisfy certain 'mandatory requirements' (such as protection of the consumer), even though such measures may come within the 'Dassonville formula' because they are *indistinctly* applicable measures.[19]

Additionally, there is a requirement for a measure to be 'proportionate', i.e. where the Member State maintains that the measure is allowable since it is a mandatory requirement, the Member State will not succeed where the measure employed to pursue the mandatory requirement is disproportionate to the objective to be achieved. In ***Cassis de Dijon***, the ECJ also laid down the *'second Cassis principle'* which is a (rebuttable) presumption that normally there is no valid reason why, provided they have been lawfully produced and marketed in one of the EU Member States, such goods should not be introduced and marketed in any other of the other EU Member States.

Thus, subject to what has been said above, in essence, if a measure is *distinctly applicable*, it will normally breach Article 28 EC, unless it can be justified under Article 30 EC (which is construed quite narrowly by the ECJ). In other words, Article 30 EC provides the main legal basis for justifying quantitative restrictions which are

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[17] Id. (paragraph 5).

[18] Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 at 662 (paragraph 8).

[19] The ECJ has made it clear that the categories of 'mandatory requirements' are not exhaustive and its subsequent judgments have added further categories to the four listed in Cassis de Dijon. For example, in Case C-145/88 Torfaen Borough Council v B&Q plc [1989] ECR 3851, the ECJ recognized a further mandatory requirement, namely that of prohibiting Sunday opening of certain retail trading premises. The ECJ held that this restriction was compatible with EU law because the measure was not designed to hinder the free movement of goods between Member States but rather it reflected certain social and political choices in a Member State to have Sunday as a day of rest. Such a measure was therefore compatible with Article 28 EC, provided the measure was not disproportionate.

discriminatory in nature. To be an allowable derogation under Article 30 EC, a measure needs to come within one of the following: public morality; public policy and public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Even then, the measure must not constitute a means of arbitrary discrimination or a disguised restriction on trade between the EU Member States.[20]

## 3. THE 'CHOCOLATE' CASES

The two 'chocolate' cases were **Case C-12/00 *Commission v Spain*** and **Case C-14/00 *Commission v Italy***.[21] Judgment in both cases was given by the ECJ on 16 January 2003. The cases are essentially similar and involve the same principles of EU law.

As mentioned above, Article 28 EC provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the EU Member States. In its actions brought against Spain and Italy pursuant to Article 226 EC, the Commission stated that chocolate containing vegetable fats other than cocoa butter up to a maximum of 5% of the total weight of the product is manufactured under the name 'chocolate' in six EU Member States (namely, Denmark, Ireland, Portugal, Sweden, Finland and the United Kingdom) and that it is accepted under that name in all the EU Member States except Spain and Italy. The Commission's view was therefore that the obligation under the Spanish and Italian legislation (requiring the marketing of cocoa and chocolate products containing vegetable fats other than cocoa butter under the name 'chocolate substitute') significantly obstructed the access of such products to the Spanish and Italian markets - and accordingly there was a breach of Article 28 EC.

The argument by the Spanish and Italian Governments was that Council Directive 73/241/EEC of July 24, 1973 on the approximation of the laws of the EU Member States relating to cocoa and chocolate products intended for human consumption[22] fully regulated the marketing of cocoa and chocolate products, thereby precluding the application of Article 28 EC in that, *first*, it set out the principle that the use of vegetable fats other than cocoa butter was prohibited in the manufacture of cocoa and chocolate products and, *second*, it established a system of free movement under the name 'chocolate' only for cocoa and chocolate products which did not contain such vegetable fats. The Spanish and Italian Governments therefore contended that Directive 73/241 enabled the EU Member States (whose national law prohibited the addition of vegetable fats other than cocoa butter to products manufactured within their territory) also to prohibit the marketing within their territory – under the name 'chocolate' – of products whose manufacture did not comply with their national legislation.

[20] An example of a ban being held to be justified under Article 30 EC on the ground of the protection of the life and health of animals can be seen in Case C-67/97 Ditlev Bluhme [1998] ECR I-8033.
[21] See Notes 10 and 11 (supra).
[22] OJ 1973 L228, p23.

The ECJ, however, in its judgment, stated that it was clear from Article 14(2)(a) of Directive 73/241 that the Directive did not seek to establish a fully harmonised system under which common rules completely replaced existing national rules in the field, since it explicitly authorised the EU Member States to lay down national rules which were different from the common rules which it provided for. In accordance with the judgment in ***Cassis de Dijon***,[23] Article 28 EC prohibits obstacles to the free movement of goods (in the absence of the harmonisation of national laws) which are the consequence of applying to goods coming from other EU Member States (where they are lawfully manufactured and marketed) rules that lay down requirements to be met by those goods (such as those relating to their name, form, size, weight, composition, presentation, labelling and packaging), even if those rules apply to national and imported products alike.[24] Accordingly, that prohibition also applies to obstacles to the marketing of products whose manufacture is not subject to comprehensive harmonisation but which are manufactured in conformity with national rules explicitly permitted by the harmonising directive. A contrary interpretation would be tantamount to authorising the EU Member States to partition their national markets in regard to products not covered by the EU's harmonisation rules, contrary to the objective of free movement pursued by the EC Treaty.

The ECJ then went on to consider whether and to what extent Article 28 EC precluded the Spanish and Italian legislation which prohibited the marketing in such EU Member States of cocoa and chocolate products containing vegetable fats other than cocoa butter under the sales name 'chocolate' (under which they were lawfully manufactured and marketed in the EU Member State of production) and which provided that those products could only be marketed under the name 'chocolate substitute'.

The ECJ stated that it had consistently held that - while a prohibition such as that under the national legislation, which entailed the obligation to use a sales name other than that used in the EU Member State of production, did not absolutely preclude the importation into the EU Member State concerned of the products in question - it was nevertheless likely to make their marketing more difficult and thus impede trade between EU Member States. Since the obligation imposed by the Spanish and Italian legislation might compel the traders concerned to adjust the presentation of their products according to the place where they were to be marketed and consequently to incur additional packaging costs, it was therefore liable to obstruct intra-Community trade. That was all the more so in view of the fact that the name 'chocolate substitute' which the traders concerned were required to use could adversely affect the consumer's perception of the products in question, in as much as it denoted *substitute* (and therefore *inferior*) products.

The ECJ reminded the parties that it is settled case-law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions are applicable to domestic and imported products alike and may be justified as being necessary in order to satisfy overriding requirements relating, inter alia,

[23] See Note 7 (supra).
[24] The ECJ, when making this point, referred inter alia to such cases as Case C-267-8/91 Keck and Mithouard [1993] ECR I-6097.

to consumer protection. However, in order to be permissible, such provisions have to be proportionate to the objective pursued and that objective has to be not capable of being achieved by measures which are less restrictive of intra-Community trade. It is legitimate for an EU Member State to ensure that consumers are properly informed about the products which are offered to them, thus giving them the possibility of making their choice on the basis of that information, and in particular EU Member States can, for the purpose of protecting consumers, require the description of a foodstuff to be altered where a product offered for sale under a particular name is so different, in terms of its composition or production, from the products generally understood as falling within that description within the Community that it could not be regarded as falling within the same category.[25] However, where the difference is of minor importance, appropriate labelling should be sufficient to provide the purchaser or consumer with the necessary information.

As pointed out by the ECJ, the characteristic element of cocoa and chocolate products (within the meaning of Directive 73/241) is the presence of a certain minimum content of cocoa and cocoa butter. The percentages set by Directive 73/241 are minimum contents which have to be complied with by all chocolate products manufactured and marketed under the name 'chocolate' in the EU, independently of whether the legislation of the EU Member State of production authorised the addition of vegetable fats other than cocoa butter. In addition, since Directive 73/241 explicitly permits EU Member States to authorise the use of vegetable fats other than cocoa butter, it cannot be claimed that the products to which those fats have been added, in compliance with the Directive, are altered to the point where they no longer fall into the same category as those which do not contain such fats. Therefore, the addition of vegetable fats other than cocoa butter to cocoa and chocolate products which satisfy the minimum contents required by Directive 73/241 cannot substantially alter the nature of those products to the point where they are transformed into different products. In the ECJ's view, it thus followed that the inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information and, in those circumstances, the obligation (imposed by the national legislation) to change the sales name of the products would not appear to be necessary to satisfy the overriding requirement of consumer protection. It therefore followed that the Spanish and Italian legislation – to the extent that the same required the name of products which were lawfully manufactured and marketed in other EU Member States under the sales name 'chocolate' to be altered for the sole reason that they contained vegetable fats other than cocoa butter was incompatible with Article 28 EC.

Accordingly, the ECJ held that, by prohibiting cocoa and chocolate products which complied with the requirements as to minimum content laid down in Directive 73/241 to which vegetable fats other than cocoa butter had been added (and which were lawfully manufactured in EU Member States which authorised the addition of such fats) from being marketed in Spain and Italy under the name used in the EU Member State of production - and by requiring that those products could only be marketed under the name

[25] The ECJ, when making this point, referred to such cases as Case C-366/98 Criminal proceedings against Geffroy [2000] ECR I-6579.

'chocolate substitute', Spain and Italy had failed to fulfil their obligations under Article 28 EC.

# 4. THE SIGNIFICANCE OF THE 'CHOCOLATE' CASES

Europe's thirty year old 'chocolate war' (which started in 1973 when the United Kingdom, Ireland and Denmark joined what is now known as the European Union) has finally been ended this year - with the defeat of so-called 'chocolate purists' Spain and Italy. As a result of the ECJ's ruling, such countries as the United Kingdom have won the right to continue to produce 'chocolate' that includes vegetable oil. In essence, the ECJ has ruled that Spain and Italy's insistence that chocolate that does not contain 100% cocoa butter be labelled 'chocolate substitute'[26] infringed the EU's principle of the free movement of goods).

Initially, even such countries as Belgium (which likewise have considered the purity of chocolate to be very important) objected to what they perceived as false chocolate coming into their markets from countries like the United Kingdom. The 'chocolate' debate raged within the EU until 2000 when the EU Member States struck a deal whereby - as long as the United Kingdom products (and similar) were labelled with their fats and milk content - they could be called 'family milk chocolate'. However, although this arrangement satisfied such EU Member States as Belgium and France, others – namely Spain and Italy - refused to accept this arrangement. They continued unilateral bans, leading to the Commission taking action against them in the ECJ which resulted in the court's ruling (against Spain and Italy) on 16 January 2003.

Prima facie, the ECJ's ruling is good news for the chocolate manufacturers in such countries as the United Kingdom, Ireland and Denmark (and also Portugal, Finland and Sweden) who will now be able to sell their Double Deckers, Picnic bars, Crunchies, Chomp bars, Curly Wurlies, Wispa bars and Flakes anywhere in the European Union (including Spain and Italy) - in competition with such local products as Ferrero Rocher. However, despite this favourable court ruling, it seems to be commonly agreed that the chocolate manufacturers in such countries as the United Kingdom cannot now automatically expect to have a sudden surge in their sales (as a result of their being able to access such European markets as those of Spain and Italy) since, in any event, UK-style chocolate just does not appeal to many European palates. Nevertheless the ECJ's ruling is far from being just a symbolic victory. The judgment in the 'chocolate' cases is an important ruling in that it has confirmed the importance of the EU's principle of the free movement of goods – and reiterated that obstacles and impediments thereto will not be tolerated by the ECJ.

# 5. CONCLUSIONS

The title (and theme) of this article is 'European chocolate makes the trade go round (in a most delightful way)'. The subject matter of the two 'chocolate' cases was chocolate emanating from the United Kingdom. The UK is a Member of the EU and hence a European country. Thus its chocolate products can properly be designated 'European

[26] As indicated earlier, this implied to consumers that it was an inferior product.

chocolate'. The next aspects of the title/theme is that such product (i.e. the UK/European chocolate) 'makes the trade go round'. The outcome of the 'chocolate' cases has been, as indicated above, to confirm the importance of the EU's principle of the free movement of goods and a reiteration by EU's highest court (the ECJ) that obstacles and impediments thereto will not be tolerated by the ECJ. Further, the ECJ's ruling in the 'chocolate' cases is not just confined to 'chocolate' and other food products such as pickles and jams – it confirms the right of free movement within the EU of many products which have 'ingredients' and 'components'. The final part of the title/theme is that the ECJ's ruling has confirmed this right of free movement of goods within the EU 'in a most delightful way'. As regards this final aspect, it is submitted that the ECJ's ruling is a 'delightful' (i.e. good) outcome because the free movement of goods (which has again, in the 'chocolate' cases, been confirmed and reinforced) is one of the cornerstones of the EU's Single Market which, we should not forget, is the world largest domestic market and something which has contributed significantly to growth, competitiveness and employment not only in Europe but also in many other countries of the world which do business with the EU.