

New Trends in EU Food Law Regarding the Free Movement of Goods*

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I. Introduction

An analysis of new trends regarding the free movement of food seems to be a delicate issue at first sight. On closer examination, however, this topic leads to the very heart of European food law, as its history starts with the principle of the free movement of goods.

One of the European Court of Justice's first cases concerning the free movement of goods dating from 1962 dealt with a duty levied by the Grand Duchy of Luxembourg on gingerbread imported from other Member States.¹ The ECJ qualified this special import duty as a charge equivalent to a customs duty which hindered the free movement of goods (see Art. 25 TEC). The *Dassonville* Judgment of 1974 constitutes a further landmark decision.² It concerned criminal proceedings against a Belgian food trader who had acquired a consignment of Scotch whisky from an intermediate trader in France without possessing a certificate of authenticity from the British Customs Authorities as demanded by Belgium. The ECJ considered this requirement a measure having an effect equivalent to a quantitative restriction (see Art. 28 TEC).

These few references may suffice to characterize the matrix of interests in which European food law used to find itself for many years. I would like to show that the balance of objectives of EU food law has changed recently and that it is advisable to go back to its basic structures.

II. Different ways of integrating food law within the EU

First, I would like to briefly outline the basic principles of European food law and describe the development it has undergone.

1. From positive to negative integration through an application of the principle of free movement of goods

From the beginning of the sixties, the EU was pursuing a "positive integration" of food law in the sense of a complete approximation of the respective national norms. This approach was abandoned in the mid-eighties. Until then, recipe standards had been set for certain categories of products (for instance for jam or chocolate products) which still exist today.³ However, only few horizontal provisions applying to all kinds of food (for instance such governing additives or labelling) were established.⁴ The failure to achieve a comprehensive harmonization of food law was also due to the fact that the legal basis in force at that time provided for a unanimous decision of the Council (see Art. 100 EEC Treaty). Such consensus did not exist in the food sector, however.

After a number of directives had been adopted in the field of food law, the eighties brought about a true change of paradigm towards an approach of negative integration. This turn was triggered by the ECJ's famous "Cassis de Dijon" Judgment of 1979.⁵ In this case, the Court had to deal with a provision of the German "Branntweinmonopolgesetz" which fixed a minimum 25 % alcohol content for fruit liqueurs. Due to this absurd norm, a French black currant liqueur with an alcohol content below 20 % could not be freely marketed in Germany. This rule was indeed "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", although it applied to domestic and imported products without distinction, which means it was not of a discriminatory nature.⁶ It was therefore identified by the ECJ as a prohibited measure having an effect equivalent to quantitative restrictions referred to in art. 28 TEC.

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¹ Joined cases 2/62 and 3/62, *Commission/Grand Duchy of Luxembourg* [1962] ECR 425.

² Case 8/74, *Dassonville* [1974] ECR 837.

³ See Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, OJ 2002, L 10/67; Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate pro-

ducts intended for human consumption, OJ 2000, L 197/19.

⁴ See Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 2000, L 109/29; Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption, OJ 1989, L 40/27.

⁵ Case 120/78, *Cassis de Dijon* [1979] ECR 649.

⁶ Case 8/74, *Dassonville* [1974] ECR 837, para. 5.

As a result of this extremely broad formula coined by the ECJ I have just mentioned, food traders frequently relied on the principle of free movement of goods in order to challenge inconvenient national economic laws, although many cases in question did not have a real link to free trade within the common market. Thus, the Court modified its case-law on the occasion of its 1993 “Keck” Judgement in connection with a French law forbidding the practice of “resale at loss”.⁷ It stated that certain national provisions were “not such as to hinder trade between Member States”, as long they were not of discriminatory nature. This included “provisions restricting or prohibiting certain selling arrangements”, hence provisions which only concerned the modalities of selling goods – in the pertinent case, reselling products in supermarkets at prices lower than their actual purchase price. The Court continued that those provisions had to be distinguished from provisions that imposed requirements that had to be met by the goods themselves “such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging” of foodstuffs. Such provisions remained prohibited, even if they applied to all products without distinction.⁸

2. Recognition of national protection clauses

However, there are certain limits to the marketability of food within the EU which arise from the TEC itself insofar as art. 30 TEC explicitly recognizes national protection provisions. The justifications enumerated there authorize the Member States, in particular cases, to take measures generally prohibited by EU law. As a matter of course, the protection of health and life of humans is of great importance in the food sector, for instance in connection with the control of foodstuffs. Although it is primarily up to the Member States to determine the scope of protection, it is the ECJ that limits the excessive use of justifications by resorting to the principle of proportionality.⁹ Hence, one must always check whether a ban on trafficking certain foodstuffs or substances cannot be replaced by an authorization procedure.

Besides the justification grounds provided for in art. 30 TEC, there exist further unwritten justifications. The ECJ held in the aforementioned *Cassis de Dijon* judgment that, in the absence of common rules relating to the production and marketing of foodstuffs, obstacles

to intra-Community trade of goods “must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements”.¹⁰ Such additional unwritten justifications are required since art. 30 TEC blinds out important values protected by EU law. Thus, the ECJ has particularly qualified the protection of consumers against fraud and misleading information, which is of paramount importance in the field of food law, as a mandatory requirement acknowledged by EU law.

The Court, however, is hostile towards a ban on the traffic of foodstuffs in the name of consumer protection which it deems disproportionate. In its opinion, appropriate product information, for instance on the product label, sufficiently meets the legitimate consumer concerns for protection against fraud. In this context, the Court draws upon the model of the knowledgeable and well-informed consumer who is capable of preserving his interests on his own.¹¹ More on that later on, though.

3. Principle of mutual recognition

The ECJ’s *Cassis de Dijon* judgment is also significant in another respect, as the Court held that in the absence of rules on the Community level relating to the production and marketing of foodstuffs there was “no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [foodstuffs] should not be introduced into any other Member State”.¹² Embracing this statement, the Commission developed the principle of mutual recognition of national food laws in 1985 which is based on the assumption that national legislations regarding the production and marketing of goods are basically equivalent to each other.¹³ For this reason, it is justified, at least *prima facie*, to say that goods which are marketable in one Member State according to its national law are considered marketable throughout the Union – even though the national rules on production and marketing might be different.

4. Return to the principle of positive integration through regulation of the food sector

The phase of mutual recognition of national food laws by the Member States has not yet come to an end. The elimination of trade barriers arising from national food laws remains a permanent task, particularly in view of the EU enlargement.

⁷ *Joined cases C-267/91 and 268/91, Keck* [1993] ECR I-6097.

⁸ See Schroeder, in: Streinz (ed.), *EUV/EGV, commentary, 2003*, Art. 28 TEC, paras. 42, 51.

⁹ Schroeder, in: Streinz (ed.), *EUV/EGV, Art. 30 EGV*, paras. 49-58.

¹⁰ *Case 120/78, Cassis de Dijon* [1979] ECR 649, para. 8.

¹¹ *Schroeder/Kraus, Europäisches und Österreichisches Lebensmittelrecht*, 2006, p. 35.

¹² *Case 120/78, Cassis de Dijon* [1979] ECR 649, n. 14.

¹³ *Completing the Internal Market: White Paper from the Commission to the European Council, COM (85), 310 final, para. 77; Commission of the European Communities, Completion of the Internal Market: Community Legislation on Foodstuffs, COM (85) 603 final, para. 1.*

At the same time however, the limits of negative integration of the food sector become visible. When the importing state cannot maintain its stricter food law provisions vis-à-vis more liberal norms of a foodstuff's country of origin, this will eventually lead to a regulatory competition among the Member States that will result in a "race to the bottom". In order to prevent such a factual approximation of food law on the lowest level, the EU has adopted efforts of harmonization to accompany the mutual recognition of national food laws. However, it used to limit its activities to essential questions of health and consumer protection, regarding for instance additives or labelling.¹⁴ An overall strategy with regard to scope and depth of harmonization did not become manifest, though.

At the end of the nineties, EU food law entered a new phase of regulation. It was chiefly the BSE crisis that convinced the EU institutions that there a new approach in EU food law had to be found. First, in its 1997 Green Paper, the Commission elaborated "General Principles of Food Law in the European Union"¹⁵ and, subsequently, – on the basis of the 2000 "White Paper on Food Safety" – developed an action plan providing for a series of legal measures to be taken.¹⁶ This included a new legal framework for food security covering the whole food supply chain as well as animal feed.

This concept was codified in Regulation (EC) No 178/2002 of the European Parliament and the Council of January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (the so-called "Basic Regulation").¹⁷ The Basic Regulation represents the general part of European food law and shall assure a high level of protection of life and health of humans as well as of consumer interests.

III. Current problems regarding the implementation of free movement of goods in EU food law

I would like now to address some problems arising from the system change in European food law.

1. Quality of EU law-making

Currently, that is, since the entry into force of the Basic Regulation, a real proliferation of legislation in the food sector and an impressive output of legal acts can

be observed. The Basic Regulation was only one of 84 individual measures set out in the "Action Plan" for the implementation of the 2000 White Paper on Food Safety. From the beginning, it was intended to complement it with accompanying special rules on EU level in order to fill the European framework. Among those, one might mention in particular:

- rules on food supplements,
- the consolidation of food additives law,
- rules on nutrition and health claims,
- rules on fortified foods,
- the consolidation of hygiene law and
- rules on control of foodstuffs.

In the wake of the BSE crisis, however, the reorientation of food law has taken place in a very rapid, if not hectic manner which was not without effect on the quality of law-making. The sheer number of recitals in recent EU food law rules – 66 (!) legislative motives in the Basic Regulation, for instance – speaks volumes about the quality of those legal acts.

In any case, due to their complex requirements (to give only a few keywords: traceability, withdrawal, documentation and information obligations, precautionary principle, etc.) the new EU food law rules have created a series of new problems for the food industry without solving the problems already existing for the free movement of foods. They do not so much consist in the need for new food legislation as in the desire for a coherent and thus calculable application of existing rules. The free movement of food stuffs could thereby indeed be realized. The fact that there are considerable shortcomings in this context becomes manifest by the still observable food scandals, for instance recently in Germany concerning tainted meat. But here, the ball is in the Member States' court, as it is above all up to the national authorities to apply EU food law.

2. Internal market policy or health policy?

Although food law is almost completely determined by EU law, the European treaties do not mention the term "food law" at all. This is rather an object of the EU-internal market policy. Since diverging national food laws can hinder trade between Member States, Art. 95 TEC allows the EU-legislator to harmonize national food law, provided that such harmonization measures genuinely have as their objective "the improvement of the conditions for the establishment

¹⁴ See Schroeder/Kraus, *Europäisches und Österreichisches Lebensmittelrecht*, pp. 32.

¹⁵ *General Principles of Food Law in the European Union – Commission Green Paper, COM (97) 176.*

¹⁶ *White Paper on Food Safety, COM (99) 719 final.*

¹⁷ *OJ 2002, L 31/1; Schroeder/Kraus, Das neue Lebensmittelrecht, EuZW 2005, p. 423.*

and functioning of the internal market”, as the ECJ stated in its 1998 Tobacco Advertising Judgment.¹⁸

It is, however, doubtful, whether recent EU food legislation is really oriented towards a promotion of the internal market and the free movement of food. I would like to illustrate this taking as an example the planned Regulation of the European Parliament and of the Council on nutrition and health claims made on foods (“Health Claims Regulation”)¹⁹. The 1997 Commission Green Paper on General Principles of Food Law mentions health claims for the first time, namely in the context of the goal to harmonize them within the EU. Not everything called “low-fat” in Austria is also considered “low-fat” in France or Italy. The harmonization of such norms thus facilitates the free movement of foodstuffs and is therefore a positive trend.

This is not the whole story, however. The Commission’s proposals on health claims in 2003 then do not only refer to the realization of the internal market, but also to regulatory measures.²⁰ It was particularly under the influence of a WHO report on overweight in Europe that nutritional profiles were introduced into the debate on health claims. As overweight is ascribed to the EU citizens’ bad diets, according to the Commission, the rules on health claims should be combined with nutritional profiles, a sort of certificate for foodstuffs indicating their fat, sugar and salt content.

It is by this token that the system change in European Food Law becomes perfectly visible: Initially, the Health Claims Regulation was conceived to complement the Labelling Directive 2000/13/EC.²¹ It therefore states that health claims must not be false or misleading. As such, this is completely reasonable. Besides being protected against misleading claims, however, the consumer shall be protected, by means of nutritional profiles and other instruments, against potential manipulation through health claims and, subsequently, against possible negative effects on his dietary habits. The Claims Regulation’s recitals speak of “good dietary habits” and “beneficial effects” of a foodstuff. According to the ECJ’s opinion, however, the knowledgeable average consumer is himself capable of making a choice on the basis of the information provided to him – as long as the provided information is correct. I have outlined the core elements of the pertinent case-law above.

Substantially speaking, it is not so much internal market policy, but health policy which is being pursued here by the EU legislator. However, the TEC does not endow the EU with powers of harmonization in the area of health policy and it can therefore not serve as

a legal basis for the adoption of food law (see art. 152 para. 4 (c) TEC).

Of course, health and consumer protection is a major objective of the EU and is therefore also taken into consideration in the context of internal market policy. According to Art. 95 para. 3 TEC, for example, the EU legislator shall even strive for a high level of health and consumer protection when pursuing the harmonization of food law in the internal market – But is this legal basis still valid when the EU legislator’s true motives aim at a new nutrition policy? I doubt that.

3. Transition from “abuse principle” to “interdiction principle”

A further element of critique: The putting into circulation of food is traditionally governed by the “abuse principle” in both national and European food law and basically does not require authorization. Only when there is suspicion that foodstuffs are not safe is it prohibited to put them into circulation.²² This system is based on a concept of law which trusts in the personal responsibility of the autonomous human being.

The “interdiction” principle, however, needs particular justification as – due to the requirement of obtaining a special authorization for bringing foodstuffs onto the market – it interferes more intensely with the basic rights of food entrepreneurs, but also with the consumer’s freedom of choice. The principle according to which the putting into circulation of food is only allowed with the approval of the authorities and is prohibited otherwise, can be justified only when there is need for preventive health protection against qualified risks, for instance with regard to additives or genetically modified organisms.

Notably enough, however, the interdiction principle increasingly spreads into EU food legislation. This is an unpleasant trend, because this principle just does not serve the realization of the free movement of food. It is not understandable at all, for instance, why the Health Claims Regulation stipulates a general ban on nutrition and health claims. The admission procedure which the Regulation provides for those health claims which are not absolutely prohibited does not really help improve the situation. Such procedure, in which the competent national authorities, the European Food Safety Authority (EFSA), the Commission and a comitology committee are involved, is not only very complicated but also time- and money-consuming. This will particularly affect small and medium-sized enterprises in the food sector.

¹⁸ Case C-376/98, *Germany/ Parliament and Council* [2000] ECR I-8419, para. 84.

¹⁹ See the *Common Position (EC) No 3/2006 of the European Parliament and of the Council on nutrition and health claims made on foods*, OJ 2006, C 80E/43.

²⁰ *Commission’s proposal on nutrition and health claims made on food*, COM (03) 424 final.

²¹ OJ 2000, L 109/29.

²² *Schroeder/Kraus, Europäisches und Österreichisches Lebensmittelrecht*, p. 21.

4. The notion of food

Another, as I believe important point: It is really amazing that the notion of “food” – the central concept of EU food law – has still not been consistently defined. This lacuna on EU level, on the one hand, and the extensive application of the notion of “medicinal products” in some Member States, on the other hand, causes problems with regard to admission procedures required for medicinal products. And this is certainly a further obstacle to the free movement of food in the EU.

At least, the Basic Regulation is trying to provide a definition. But its characterization of “food” (or “foodstuff”) as “any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans” (see art. 2 para. 1 Basic Regulation) is of limited use and still does not solve the core problem of the notion of food, that is the delimitation of food from medicinal products. The Basic Regulation merely stipulates that medicinal products are not foodstuffs (see art. 2 para. 3 (d)) Basic Regulation). It therefore does not end the dispute on the classification of food supplements such as vitamins and mineral products as foodstuffs or medicinal products. The legal status of such “dual use”-products will further have to be determined on a case-by-case basis by means of a set of indications (pharmacological effect) also in the future.²³ In practice, as a result of this ambiguous legal situation, the dual use products are occasionally submitted to the regime of medicinal products which means a significant interference with the free movement of food in the EU.

5. Consumer model

The last but perhaps most problematic trend in European food law, however, concerns the fact that the EU applies different standards to the Member States’ food legislation and to its own food law provisions. This is not only confusing, but also negatively affects the free movement of food in the EU; this became particularly manifest only recently in the context of health claims and the approach to consumer protection.

Until 2003, the Austrian Food Act contained a general ban on health claims and a mandatory authorization procedure for certain health claims. To those who are familiar with the case-law of the ECJ, it will not come as a surprise that the Austrian rules conflicted with EU law. It was already in its 1995 *Sauce Bernaise* judgment that the ECJ stated with regard

to national food law provisions that “consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients”.²⁴ Hence, labelling obligations always prevail over interdictions. The *Mars* judgment of the same year speaks of the “reasonably circumspect” consumer who is capable of processing a considerable amount of product information even though it might be very complex.²⁵ The ECJ’s 2002 *Linhart/Biffi* case then focused on Austrian food. One party to the main proceedings had placed on the market a soap with the statement “dermatologically tested” which was forbidden by the Austrian authorities.²⁶ The ECJ ruled that the Austrian ban on health claims and the authorization procedure violated the principle of free movement of goods.²⁷ Austria’s objection that the ban was justifiable for the sake of consumer and health protection was rejected by the Court, arguing that the protection of consumers from misleading claims could also be ensured by lesser means, for instance the obligation to prove the correctness of the respective health claim in case of doubt. A preventive prohibition is disproportionate, however. When balancing the risks for the consumer, on the one hand, and the requirements for the free movement of goods, on the other hand, according to the ECJ, one must apply the criterion of the presumed expectations of an average consumer who is reasonably well informed and reasonably observant.²⁸ The statement “dermatologically tested” cannot suggest to the circumspect average consumer anything other than that the product is well tolerated when applied to the skin. Furthermore, the authenticity of those results can be monitored by the national authorities.

However, there seems to be a change in perspective on EU level (even though not so much with respect to the ECJ, but with respect to the EU legislator) regarding the approach to be taken towards the consumer. The Health Claims Regulation proposal, for example, identifies a “great risk” that health claims made on foodstuffs will “confuse and mislead the consumer”. Thus, it opts for a general ban on health claims, whether or not they are capable of misleading the consumer. Remarkably enough, a regime which has already been rejected by the ECJ as being disproportionate in the above-mentioned case against Austria is thereby being revived on European level. Just to recall the judgment’s core message: The Court stated that there was no need for a general ban on

²³ *Joined Cases C-211/03, HLH Warenvertriebs GmbH, Judgment of the Court, 9 June 2005 = ZRL 2005, p. 435; Schroeder, Die rechtliche Einstufung von Nahrungsergänzungsmitteln, ZLR 2005, p. 411.*

²⁴ *Case C-51/94, Commission/Germany [1995] ECR I-3599, para. 34.*

²⁵ *Case C-470/93, Mars [1995] ECR I-1923 para. 24.*

²⁶ *Case C-99/01, Linhart and Biffi [2002] ECR I-9375.*

²⁷ *See also Case C-221/00, Commission/Austria [2003] ECR I-1007.*

²⁸ *Case C-99/01, Linhart and Biffi [2002] ECR I-9375, para. 31.*

²⁹ *General Principles of Food Law in the European Union – Commission Green Paper, COM (97) 176, Part II No 6.*

health claims in national legislations since the ex post monitoring by national health authorities would completely suffice to control possibly misleading claims. This development suggests that the EU concept of the average consumer – reasonably well informed and reasonably observant and circumspect - is an instrument that is used to dispose of national trade barriers in the food sector, but is completely abandoned by the EU when it gets ready to regulate the food sector itself. It rather bases its own legislation on the paternalistic model of the unwary and uncritical consumer (as known from former Austrian food law), that is an immature human being, largely depending on the all-embracing care of the authorities. Hence, an understanding of European food law becomes manifest which has already been insinuated by a statement in the Commission's Green Paper on Food Law: "In order to ensure a high level of protection of public health and of consumers, the foodstuffs sector is and will continue to be highly regulated".²⁹

IV. Conclusion

I am concerned in view of these trends. The free movement of food in the EU has still not been realized. The EU should also take care of that problem. Certainly, it goes without saying that, while doing that, a high level of health and consumer protection must be ensured. Maybe the EU legislator should be a little more honest about his real motives in the field of food law. This would undoubtedly enhance acceptance of the new European food law in the Member States.

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