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Trading Health for Economics: Commission of the European Communities v. Kingdom of Denmark

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Trading Health for Economics:  
*Commission of the European Communities v. Kingdom of Denmark*

I. INTRODUCTION

In 2002, the Commission of the European Communities (Commission) brought an action before the European Court of Justice (ECJ) against the Kingdom of Denmark (Denmark), claiming Denmark’s practice for determining whether vitamin enriched foodstuff could be imported violated community law.¹ Notwithstanding scientific uncertainty on over-consumption of vitamins, and Denmark’s argument that a nutritional need for the enriched foodstuff was absent in its population, the ECJ ruled that Denmark’s administrative practice violated community law.² This ruling will shape Member States’ import practices and force them to ignore their own cultural nutritional norms.

This note argues that the ECJ wrongly decided the case and the holding is not in line with case precedent. Furthermore, the ECJ blatantly ignored individual Member State’s nutritional customs and policies when deciding the case, creating a trade regime that disregards public policy supporting Member States’ freedom to decide which foodstuffs can be imported. Finally, this note recommends an alternative test for deciding whether an import restriction is harmonious with community law. Part II outlines the relevant facts of *Commission v. Denmark* that the ECJ considered when making its ruling. Part III addresses the parties’ arguments regarding the import restriction. Part IV examines the ECJ’s ruling and analysis of community law. Part V closely investigates case precedent and other grounds supporting Denmark’s argument. Part VI posits an alternative test that takes

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2. *Id.* ¶ 57.
into account a Member State’s nutritional norms and public policy. Part VII concludes that the ECJ’s emphasis on free trade in this context is unwarranted and, in light of cultural norms and case precedent, the court should have held in favor of Denmark.

II. FACTS

In 1998, when Denmark’s Food and Veterinary Office (Office) refused the marketing of Ocean Spray Cranberry Juice with added vitamin C, a complaint was made to the Commission alleging unjust obstacles to trade. In response to the complaint, the Commission sent a formal notice to the Office, which called into question the general Danish administrative practice for enriched foods imports and claimed it was a systematic trade barrier. According to the Commission, the Danish administrative practice constituted a violation of Article 28 of the Treaty Establishing the European Community (Treaty). Article 28 prohibits quantitative trade barriers. A Member State, however, can use Article 30 to avoid the effect of Article 28. Article 30 permits a trade restriction if the prohibition is found to protect human health. The Commission argued that Article 30 was inapplicable.

The Commission and the Office met shortly after the notice was sent. At the meeting it became apparent that Denmark restricted the juice import because of inadequate labeling. After this revelation, the Commission declared that the restriction did not violate community law.

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4. Id. ¶ 10.
5. Id.
6. Consolidated Version of the Treaty Establishing the European Community, Dec 24, 2002, arts. 28, 30, 2002 O.J. (C 325) 33, 47 (2002), available at http://europa.eu.int [hereinafter EC Treaty]. Article 28 states “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” Id. A quantitative restriction on trade, however, can be justified when a Member State can prove that the restriction on trade is in accordance with Article 30. Id. The language of Article 30 provides that “[t]he provisions of Article 28... shall not preclude prohibitions or restrictions on imports... justified on grounds of...the protection of health and life of humans, animals, or plants...” Id. Article 30 also dictates that “[s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” Id.
8. Id.
9. Id.
At the time, there were no other specific instances of Danish officials prohibiting foodstuff marketing allowed by another Member State. The Commission nevertheless challenged the Danish practices for evaluating the addition of nutrients to foodstuff. The Danish government refused to change its practice and the Commission filed a case with the ECJ.

The Danish Administrative Practice

Despite the Commission's stance that the Danish import practices systematically created a trade barrier, the Danish government continued to allow functional foods to be fortified with vitamins. Prior authorization, however, is required for use of food additives and conditions may be imposed by the Danish Minister for Food.

Prior authorization for added vitamins or minerals is implemented through the challenged administrative practice. Specifically, the administrative practice permits additives to foodstuff under four circumstances: (1) the additive is required to correct insufficient intake of the nutrient, (2) the additive has the purpose of restoring any loss of nutritional value during manufacturing, (3) the additive is in new foodstuff that may be used in place of and in the same way as a traditional product, or (4) the additive foodstuff constitutes a meal in itself or is intended as a special-purpose food.

III. ARGUMENTS BEFORE THE ECJ

The Commission argued to the ECJ that the Danish practice

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10. Id. ¶ 12.
11. Id.
12. Id. ¶¶ 16-17.
14. Case C-192/01, Comm’n v. Denmark, 2003 E.C.R. I-9693, ¶¶ 5-6, available at http://europa.eu.int. Article 15(1) of Law No 471 provides that “only substances authorized by the Minister for Food (Minister) may be used or sold as additives.” Id. ¶ 3. Article 15(2) of Law No. 471, the Danish Foodstuffs Law, states that the “Minister may draw up rules relating to the conditions of use of additives, inter alia the aim, the quantities and the products with which they are associated, as well as rules relating to the identity and purity of additives.” Id. ¶ 4.
15. Id. ¶ 10.
16. Id. ¶ 11.
of only importing enriched foodstuff when it met a need in the Danish population violated Article 28 and 30. The Commission maintained that for trade interference to be justified under Article 30, a Member State must illustrate that the product is an actual threat to public health. Furthermore, the Commission contended that the potential danger associated with excess vitamin consumption does not constitute sufficient proof of a public health risk. Finally, the Commission argued that a Member State could not meet the community law proportionality requirement by relying on the absence of a need for the nutrient in its population.

In response, Denmark agreed that its administrative practice was a quantitative obstacle to trade and violated Article 28. Denmark argued, however, that a Member State is not required to present actual risks associated with each individual foodstuff to fall within Article 30, because such task would be impossible under current scientific knowledge. Additionally, because the degree of harmfulness of vitamins is uncertain, Denmark maintained that a Member State could rely on Article 30 by showing that the foodstuff failed to meet a real nutritional need. Denmark contended that once a Member State proved this, the required proportionality concept would also be fulfilled.

To support its argument, Denmark stated that there was a lack of scientific knowledge on the critical limits and precise effects of vitamin consumption. Moreover, it was impossible to monitor the actual consumer intake vitamin quantities.

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17. Id. § 13.
18. Id. § 15.
19. Id. § 27.
20. Proportionality means that when a Member State prohibits certain foodstuff imports, the Member State's regulation(s) must be "confined to what is actually necessary to ensure the safeguarding of public health." Id. ¶ 45. In order to meet the requirement of proportionality, measures must be the least restrictive on intra-Community trade, while still pursuing the objective of the Member State. Id.
23. Id. ¶ 28.
24. Id. ¶ 14.
25. Id. ¶ 16.
26. Id. ¶ 29.
27. Id. ¶ 30.
IV. ECJ RULING AND ANALYSIS OF COMMUNITY LAW

The ECJ first established that the Article 28 prohibition applies to all Member States' commercial rules that potentially or actually, directly or indirectly hinder trade throughout the European Community (EC). The ECJ declared that the Danish administrative practice made the marketing of enriched foodstuff difficult, if not impossible, and thus hindered free trade between the Member States and violated Article 28.

The ECJ, however, maintained that when uncertainties exist regarding the risks associated with an additive, it is up to the Member State to decide their intended level of protection of human health and life. In doing so though, the Member State must always take into account the requirements of free trade within the EC. Thus, community law does not preclude a Member State foodstuff restriction. According to the ECJ, however, when a Member State prohibits such imports, it must comply with the principle of proportionality.

Moreover, the ECJ stated that Article 30 requires that Member States prove that in light of nutritional habits and international scientific research their regulations are necessary to protect their asserted interest. To fulfill this requirement, a Member State must make a detailed showing that the product poses an actual risk to public health. When there is not enough scientific information to perform such an analysis, the ECJ ruled that a Member State may use precautionary principles without having to wait for such data to be uncovered. A risk assessment on health effects, however, cannot be based on purely hypothetical considerations.

The ECJ further reasoned that the nutritional need of a population can play a role in a Member State's assessment but the

29. Id. ¶ 41.
30. Id. ¶ 42.
31. Id.
32. Id. ¶ 44.
33. Id. ¶ 45.
34. Id. ¶ 46.
35. Id.
36. Id. ¶ 49.
37. Id.
absence of such a need cannot be the sole justification for a total foodstuff prohibition.\textsuperscript{38} The ECJ ultimately concluded that the Danish practice was disproportionate because it systematically forbade all enriched foodstuff imports without distinguishing the various vitamins being added or according their public health risks; thus, it was not consistent with proportionality.\textsuperscript{39} Absent a detailed risk assessment of each vitamin being added, the Danish government violated Article 28.\textsuperscript{40}

\textbf{V. THE ECJ'S MISSED ANALYSIS}

The ECJ's ruling fell outside of well-established case precedent. It is likely that the Danish Government would have prevailed had the ECJ taken precedent seriously. Before examining the case precedent and other support for Denmark's position, it is vital to examine the background principles of free trade in the EC. These principles shed light on why the ECJ overturns national laws that "impede free trade."

\textit{A. Background and Free Trade Ideology in the EC}

The free movement of goods between Member States is at the heart of the EC Treaty.\textsuperscript{41} Thus, community law is primarily drafted to create free trade rights among members.\textsuperscript{42} Mutual recognition is at the core of the EC free trade regime and occurs when an importing Member State allows another Member State's product free access to its market, provided that the exporting Member State provides an equivalent level of protection of various legitimate interests.\textsuperscript{43} Legitimate interests include, but are not limited to, protection of health and life of humans, as well as protection of consumers.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} \S 54.
\item \textsuperscript{39} \textit{Id.} \S 56.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{42} Commission Interruptive Communication on Facilitating the Access of Products to the Markets of Other Member States: The Practical Application of Mutual Recognition 2003 O.J. (C 265) 2, 4.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 12 n.8.
\end{itemize}
To further mutual recognition and other free trade principles, Article 28 bars quantitative import prohibitions between Member States. Article 30 creates an escape clause by allowing an import restriction to protect human health, provided that the Member State complies with the principle of proportionality when implementing the prohibition. The goals of the Treaty, the concept of mutual recognition, and the EC free trade regime, illustrate the EC's paramount emphasis on free trade. At the same time, the EC has constrained Member States' legitimate concerns that can trump the free movement of goods. Furthermore, when a Member State has a legitimate concern, it may not go too far in restricting imports. Instead, a Member State may only implement the least restrictive measures on free trade.

Cumulatively, these concepts create an inference that the EC values free trade over a Member State's concerns. Even in the rare cases when Member States' concerns are accepted, they must be minimized to be the least harmful on trade. Keeping these concepts in mind, it is easy to see why the ECJ distorted case precedent the way it did. Instead of keeping with logical progression of case precedent, the ECJ promoted free trade over the health concerns of Denmark.

B. Case Precedent: Twisted to Promote Free Trade

In Commission v. Denmark, the ECJ completely disregarded an essential part of case precedent when it held that a Member State may not rely on, in light of scientific uncertainty, the absence of a need for added vitamins in their population to satisfy Article 30. A closer examination of precedent illustrates that when an additive does not meet a real need and a lack of information about the additive's health effects exist, a Member State should be able to restrict the importation of the product.

48. Id.
1. Misinterpretation of Sandoz BV

The Danish government's arguments were largely based on a 1983 case, Sandoz BV. Specifically, Denmark relied on Sandoz when they contended that a Member State could satisfy the Article 30 exception, if in light of uncertainty in the scientific community regarding the additive, it could show that enriched foodstuff does not meet a real nutritional need. A close reading of Sandoz demonstrates that the case supports Denmark's argument.

In Sandoz, Uden Sandoz (Sandoz) imported food and beverages with added vitamins to the Netherlands without prior approval. Sandoz applied with the Netherlands officials to market his products. His application, however, was rejected because the vitamins in the products presented a danger to public health.

To decide whether these facts justified the Netherlands' restriction, the ECJ examined the text of the articles presently numbered Article 28 and 30. The ECJ stated that the Netherlands' administrative practice for enriched foodstuff impeded trade and was the equivalent to quantitative restrictions. Thus, the ECJ looked to Article 36 (currently Article 30).

Similar to Denmark's argument, the Netherlands defended its restriction on the fact that there was a lack of scientific research on the vitamin's health effects. The ECJ clearly ruled that "in view of uncertainties inherent in the scientific assessment, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified on principles within the meaning of Article 36."

Furthermore, the ECJ stated that restrictions must adhere to the principle of proportionality. In light of proportionality, the ECJ held that when it comes to vitamins, a Member State must
allow marketing of enriched foodstuff when the products meet a real need, especially a nutritional or technical one.\footnote{Id. at 2463-2464.}

If scientific knowledge is lacking regarding the vitamin’s health affect, the \textit{Sandoz} case permits a Member State to restrict importing of enriched foodstuff based on the fact that there is no nutritional need. Consistent with this, Denmark stated that scientific information, although it had made progress regarding risks of vitamin over-consumption, was still uncertain about the safe levels of vitamin intake.\footnote{Case C-192/01, Comm’n v. Denmark, (Opinion of Advocate Gen.) ¶ 16 (2003), http://europa.eu.int. The Expert Group on Vitamins and Minerals has stated that high consumption of Vitamin C, the vitamin added to Ocean Spray Juice, can have gastrointestinal effects, metabolic acidosis, change in prothrombin activity, conditioned need scurvy, and effects on the urinary route. Expert Group on Vitamins and Minerals, Safe Upper Levels for Vitamins and Minerals, 101-102 (2003), http://www.food.gov.uk/multimedia/pdfs/vitamns2003.pdf. See also All Refer.com Health, Vitamin C, http://health.allrefer.com/health/vitamin-c-side-effects.html.} If the ECJ had given more credence to \textit{Sandoz}, it would have seen that Denmark’s restrictions were in accord with Article 30 and proportionality.

\textit{C. Further Clear Support for Import Restrictions in the Absence of a Real Nutritional Need}

Consistent with the \textit{Sandoz} case, the ECJ has time and time again quoted the principle that a Member State may not restrict enriched foodstuff when there is a finding of a real need, especially a technical or nutritional one.\footnote{See Case C-178/84, Comm’n v. Germany, 1987 E.C.R. I-1227, ¶ 4, \textit{available at} http://europa.eu.int; Case 304/84, Muller, 1986 E.C.R. 1511, 1529; Joined Cases C-13/19 and C-113/91, Debus, 1992 E.C.R. 3617, 3631.} It is logical that absent such a need, coupled with scientific uncertainty, a Member State could prohibit the importing of enriched foodstuff.

Consistent with this notion, and through examining additional case precedent, Advocate General Mischo drafted a legal test to determine whether a Member State was within the Article 30 exception.\footnote{Case C-95/01, Ministère Public v. Greenham, (Opinion of Advocate Gen.) ¶¶ 63-73 (2002), http://europa.eu.int.} The test proposes, in the presence of scientific uncertainty regarding a nutrient’s risks, that a Member State must allow importation of a foodstuff when it meets a genuine nutritional need.\footnote{Id. ¶ 73.} Alternatively, a Member State may prohibit
foodstuff importation when there is no nutritional need. The Mischo test falls squarely within the Sandoz logic and ruling.

1. Mischo's Logic: Prohibiting Imports

Advocate General Mischo, in his opinion for the criminal proceedings against John Greenham and Léonard Abel, recognized that community law allows for prohibitions on enriched foodstuff imports, when the product does not meet a real need for the population of the importing Member State. In making this observation Mischo examined three cases: Commission v. France (case 216/84), Debus (case C-13/91 and C-113/91), and Commission v. France (case 344/90).

In Commission v. France (case 216/84), France claimed that import restrictions were justified because the foodstuff's nutritional value was lower than existing products available in the market. The ECJ held that public health grounds could not be claimed in this case because lower nutritional value does not constitute a real threat to human health. Mischo reasoned that because the product's nutritional value was lower than other products in the market, it was inconceivable that France's argument constituted grounds for prohibiting imports.

Looking at Debus, Mischo noted the ECJ's holding that a Member State can enact legislation requiring prior authorization through a “general application for specific additives, in respect of all products, for certain products only or for certain uses” and that such legislation meets a legitimate need of health policy. Based on this holding, Mischo concluded that Member States may restrict additives by a system where “everything which is not authorized is prohibited.”

Mischo further examined Commission v. France (case C-344/90), and noted the ECJ's ruling that an additive may be rejected “only if the additive does not meet any genuine need, in

65. Id.
66. Id.
67. Id. ¶¶ 57-64.
69. France, 1988 E.C.R. at 794; see also C-95/01, Greenham, (Opinion) ¶ 58 (2002).
70. Case C-95/01, Greenham, (Opinion) ¶ 59 (2002).
71. Id. at ¶ 61 (citing Debus, 1992 E.C.R. at 3640-3641).
72. Id. at ¶ 62.
particular a technological need, or presents a danger to public health." It was Mischo's view that these three cases supported his conclusion "that even if a substance does not present a risk to public health, the marketing of the foodstuff in which it is incorporated can nevertheless be prohibited if that substance does not meet a genuine need.

Furthermore, Mischo stated that artificial substances incorporated into foodstuff must be risk-free and serve a useful purpose, which he thought was a basis to overturn an argument that the absence of a nutritional need can never justify a restriction on an import. Thus, Mischo reasoned that a Member State may prohibit both dangerous substances and those that do not satisfy a genuine nutritional need. In conclusion, Mischo proposed that an import be allowed when the enriched foodstuff meets a genuine nutritional need, even if scientific uncertainty exists regarding the health effects of a nutrient. A Member State, however, could prohibit the foodstuff when a nutritional need was lacking.

2. Applying Mischo's Test

Applying the test to the facts of Commission v. Denmark, Denmark's prohibition would pass muster under the Article 30 exception. According to Mischo's test, Denmark may impose restrictions on the enriched foodstuffs because they do not meet a nutritional need for its population. This is in line with Mischo's reasoning that a Member State may prohibit imports of foodstuffs that are dangerous, or do not satisfy a real nutritional need.

VI. AN ALTERNATIVE CULTURAL AND NUTRITIONAL NORMS TEST

Two important factors that the ECJ did not give any credence to were Denmark's cultural norms and health policies regarding additives. These factors should take a larger role in the ECJ's decision of whether Article 30 has been correctly relied upon. In fact, the language of Article 30 supports the examination of such factors. Article 30 allows restrictions on imports based on "public morality [and/or] public policy," in addition to those based on the

73. *Id.* at ¶ 64 (citing Case C-344/90, Comm'n v. France, 1992 E.C.R. 4719).
75. *Id.* ¶ 69-70.
76. *Id.* ¶ 72.
77. *Id.* ¶ 73.
78. *Id.*
protection of human health.\textsuperscript{79}

To the ECJ's credit, it has not completely ignored a Member State's consumer eating habits. The ECJ recognized that the use of specific additives which are allowed in another Member State must be authorized if "in view, on the one hand, of findings of international scientific research [. . .] and on the other hand, of eating habits prevailing in the importing Member State, the additive in question does not present a risk to public health and meets a real need."\textsuperscript{80} Thus, a Member State may examine eating habits of its population, in light of scientific knowledge regarding an additive's affects, to determine if a real danger is present and/or it meets a real nutritional need. Despite recognizing this principle, the ECJ did not apply it to the facts of \textit{Commission v. Denmark}, other than concluding that a detailed assessment was required for each additive.\textsuperscript{81}

Cultural norms and public health policy regarding additives should also be emphasized in a Member State's determination of whether an additive supports a real need in their population. Taking these principles into account, a revised test should be structured to allow a Member State to restrict imports of fortified foodstuffs if: (1) they do not meet a legitimate nutritional need or if they pose health risks, in light of scientific knowledge; or (2) they do not correspond to a Member State's cultural norms, its population's food preferences, and its public health policy regarding added nutrients. Using this test, a Member State may apply restrictions, provided they satisfy the concept of proportionality.

\textit{Applying the Proposed Alternative Test}

If such a test had been applied in \textit{Commission v. Denmark}, the ban on fortified food imports would have been justified. Investigating Danish food habits and norms supports this conclusion. When looking at a population's food preference, there are four fundamental principles that are examined including taste, convenience, naturalness, and wholesomeness.\textsuperscript{82} Customs

\textsuperscript{79} EC Treaty, art 30.
\textsuperscript{80} Case C-42/90, Criminal Proceedings Against Bellon, 1990 E.C.R. 4863, 4883 (emphasis added).
\textsuperscript{81} Denmark, 2003 ¶¶ 46-58.
\textsuperscript{82} Tino Bech-Larson et al., The Acceptance of Functional Foods in Denmark, Finland, and the United States: A Study of Consumers' Conjoint Evaluation of the
regarding what constitutes wholesomeness differ from country-to-country with some weighing traditional production methods and additive-free food production as extremely important.83

According to a comparative study on eating habits, the Danish population perceives enriched foods as being less wholesome and natural.84 Moreover, the Danish population and government embrace a strong organic food philosophy, and believe that organic foods are superior over vitamin enriched or pesticide grown foods.85 This outlook is so entwined in Danish public culture that in the 1990's, the Danish government considered permitting only organic farming, but ultimately declined to do so when it was realized that food production would be cut in half.86

These norms are also apparent in Danish domestic law regarding foodstuff. The prevailing Danish custom for many years has been to restrict fortified foods.87 Imports restrictions have traditionally been based on the rationale that the Danish population has no nutritional deficiencies.88

Thus, under the alternative cultural and nutritional norms test, the Danish government may rely on these nutritional norms and restrict vitamin fortified foods. To rule otherwise would unjustly disband Denmark's established nutritional consensus and way of life.

83. *Id.* at 1.
84. *Id.* at 9.
86. Avery, *supra* note 85.
VII. CONCLUSION

The EC has put too much emphasis on free trade and too little on health concerns of individual Member States. This has created an environment where a Member State must import products that do not meet a genuine nutritional need for their population.

The ECJ has misapplied case precedent to conclude that even in the face of scientific uncertainty, a Member State may not restrict enriched foodstuff unless it presents a close examination of the health effects additive. The ECJ ruled this way, despite the fact that due to scientific knowledge such an assessment may not be possible. With this illogic, the ECJ has completely obstructed a Member State from implementing restrictions against vitamin enriched foodstuff.

Adopting Mischo's proposed test or a new test that gives more weight to a Member State's cultural norms, and eating habits would be both fair and just. This would allow Member States, such as Denmark, that value organic and natural foods, a say in protecting their population's life style. Additionally, it would respect individual Member State's autonomy, while still considering the notion of free trade.

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90. Id. at ¶ 28 (discussing Denmark's argument that it could not show an actual risk because such task was impossible under current scientific knowledge).
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