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THE ROLE OF THE COURT OF JUSTICE IN THE IMPLEMENTATION OF THE SINGLE EUROPEAN ACT

Michel Waelbroeck*

Few events in the history of the European Economic Community have stimulated as much interest as the Single European Act\(^1\) which came into effect on July 1, 1987. Scarcely a day goes by without the press, radio, or television mentioning 1992 as a sort of "miracle year" during which all existing trade barriers will disappear, giving way to the "big market." In all the countries of the European Economic Community, studies are being undertaken, conferences organized, and experts consulted, to identify the changes in enterprises, workers, and the general public which will result from this event. One Member State that I will not quote went so far as to designate a Secretary of State to deal with the problems resulting from 1992.

Leaving the domain of official announcements and news items in the mass media to focus on legal texts, it is surprising to note the limited number of innovations introduced by the Single European Act:

- the moderate increase in the advisory powers of the European Parliament through the establishment of the cooperation procedure;
- the possible approximation of laws and regulations ("harmonization") by a qualified majority of the Council;
- the formal recognition of the "monetary power" of the Community;
- solidification of the ties between the Community and the European Political Cooperation;
- a new accent on the development of social policy and "new policies" concerning research, technological development, and the environment;
- the planned creation of a Court of First Instance to recognize certain categories of claims by private individuals and legal persons.

This contrast between the ambitions which were officially an-

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* Professor at the Free University of Brussels. This article is a translation by the M.J.I.L. of the original text of the inaugural lecture for the Franqui chair at the University of Liege, 1988. It first appeared in French in 1-2 CAHIERS DE DROIT EUROPÉEN 41 (1989).

nounced and the modesty of the changes actually carried out has aroused suspicions, or even frank hostility, on the part of certain experts. Thus, Mr. Pierre Pescatore, former judge of the Court of Justice of the European Communities, believes that the Single European Act will lead to the questioning of judicial achievements dealing with the realization of the Common Market and the opening of a path to a resurgence of national protectionism. This opinion is not shared by all. Professor J. Mertens de Wilmars, former President of the Court of Justice, Professor P. Verloren van Temaat, former Advocate General of the Court of Justice, M.G. Bosco, former judge of the Court of Justice, Dr. C.D. Ehlermann, former Director-General of the judicial department of the Council, and Mr. Jean DeRuyt, a member of the Belgian delegation who participated in the Single European Act's elaboration, all stress the numerous positive aspects of the Single European Act, notwithstanding its limited nature. Where does the truth lie? In my opinion, the answer depends to a large extent on the Court of Justice and the interpretation it gives to the provisions of the Single European Act in the future.

This is what I will attempt to show in this paper. For this purpose, it will be necessary for me to begin by evoking the judicial achievements obtained on the eve of the enactment of the Single European Act. Next, I will explain the innovations introduced by the Single European Act, and emphasize the divergent interpretations that they are likely to receive. Then, modestly, as an external observer, I will strive to express several personal suggestions for a solution.

I. Judicial Achievements on the Eve of the Enactment of the Single European Act

Article 2 of the EEC Treaty provides for "the establishment of a Common Market" as one of the principal instruments to be used to carry out the goals of the treaty. According to the doctrine, this means the creation of an economic space where the movement of


goods, persons, services, and capital must be carried out freely, sheltered from all hindrances, including restrictive or discriminatory measures, whether state or private in origin. Such an economic environment would permit those belonging to the different Member States to have economic relations analogous to those existing in an internal market ("binnenmarktähnliche Verhältnisse").

It is important to emphasize that this notion does not imply the complete disappearance of borders. It only means that the crossing of borders must be carried out freely, without taxes, burdens, or other obligations of a protectionist or discriminatory nature. In order for the other obstacles to disappear, especially those resulting from the Member States' regulations which seek to protect security, health, morality, environment, and consumers, it is necessary to "harmonize" the national legislatures so that they will not present differences which are too significant. Failing to do this, it would necessarily be expected that the Member States which impose the highest standard would oppose the importation of products conforming to less rigid regulations, as allowed by the treaty.

The same holds true where persons are concerned. Here, as well, the Member States maintain the right to require the possession of titles, diplomas, or other professional qualifications in order to practice certain activities, since such diplomas, etc., can vary from one country to another. This can raise obstacles to the right of establishment or provision of services by those belonging to other Member States. In this domain, as in the trade of goods, an effective free movement implies a harmonization of the laws and regulations related to the conditions of admission and the practice of professional activities.\(^5\)

In brief, the notion of "Common Market," as understood by the EEC treaty, implies the elimination of all hindrances to the movement of merchandise, persons, services, and capital of a protectionist or discriminatory nature, but is not necessarily opposed to the existence of regulations applied equally to nationals and to citizens of other Member States. It is through the approximation of these laws and regulations, as opposed to their suppression, that the disappearance of the obstacles to which they give rise must be carried out.

The difficulty which the drafters had not foreseen was that, except in certain domains, the approximation of legislation cannot be adopted against the will of a Member State. Article 100 of the treaty, which is the key clause on this score, provides that the directives for approximation of legislation must be unanimously adopted by the Council.

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5. Id. arts. 57, 66.
The result is that the harmonization process is very slow. Moreover, the development of movements to protect consumers, workers, and the environment, as well as the confrontation of risks created by a more complicated and encroaching industrialization, induces the national administrations to adopt a growing number of regulations concerning the fabrication, composition, presentation, packaging, transportation, and sale of products, the protection of workers and consumers, and the access to economic activities. Conscious of this problem, on March 28, 1983, the Council adopted a directive which provides for a consultative procedure in the area of rules and technical regulations, with the objective of anticipating the advent of new hindrances to trade resulting from the national proposals of rules and technical regulations. Nevertheless, this directive could not prevent a rise in the number of new regulations. Thus, in 1987, this number surpassed that of 1986 by 34.2 percent.

Most importantly, these regulations are not always without ulterior motives. Often, under the guise of protecting health or public security, for example, the rules that are adopted are "tailor-made" for the situation and needs of national producers, and in fact, discriminate against producers of the other Member States.

The same can be said concerning persons. There is currently talk of introducing a "distribution attestation" in Belgium. It concerns a measure which would require people involved in distribution to establish that they know how to manage a business. The establishment of the "distribution attestation" is designed to protect small businessmen who launch themselves in business without knowing anything about it, and to avoid the problems of suppliers who find themselves confronted by the bankruptcy of irresponsible neophyte tradespeople. Its protectionist nature is nonetheless expressly recognized by the organizations who defend the middle class: "In anticipation of the opening of the European borders in 1992 everyone protects his internal market, somehow or other, thinking that the least protected countries will be the first devoured."

The Court of Justice rapidly perceived the risk to the development of the Common Market which this proliferation of regulations brings about, as well as the inadequacy of the only designated remedy: the unanimous harmonization procedure as stated in article 100. The

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Court resorted to four techniques to remedy this, all of which involved a broad interpretation of the provisions of the treaty which forbid the States’ restrictive measures, and a restrictive interpretation of the scope of the approximation measures that needed to be adopted.

A. Material discrimination

The first of these techniques consisted of recognizing the notion of material discrimination. As early as 1963, in the Italian Refrigerators Case, the Court affirmed that discrimination can consist not only of treating comparable situations in a different way (what the Court calls “formal discrimination”) but also of treating non-comparable situations in the same manner (material discrimination). Thus, in a reasoning which somewhat evokes Mallarmé, the Court declared that “the appearance of formal discrimination can in fact correspond to an absence of material discrimination.”

Applying this idea, the Court ruled that a British legal provision forbidding the retail sale of certain products without indicating the country where they were made, was not, as the U.K. government had argued, applicable in an equal manner to national and to imported products. In reality, the Court held that the British decision concealed material discrimination because its purpose was to permit the consumer to decide between these two categories of products, a decision which could incite him to favor the national products.

B. Indirect discrimination

The second method to which the Court had recourse in order to enlarge the scope of application of the prohibitions which the treaty imposes on Member States is the use of the notion of “indirect discrimination.” The Court used this idea especially in the domain of internal taxation which is the object of article 95.

Article 95 forbids the Member States from imposing on imported products any internal taxation, of any nature, that is higher than the taxation imposed on similar national products. This provision certainly does not require the Member States to impose a single rate of taxation on all products: the Court has recognized that it is legitimate, for social, political, or economic reasons, to apply differentiated rates of taxation on different categories of products, even if these products are used to satisfy the same needs. The question remains what hap-

pens if the category taxed at a lesser rate contains products which are mostly national products, whereas the majority of imported products belong to the higher taxed category?

The Court was confronted with this problem in 1980 when the Commission brought an action questioning the taxation rates on alcoholic beverages in Denmark, France, and Italy. These three countries applied taxation systems providing a lower tax for alcoholic beverages traditionally produced in their countries (aquavit in Denmark, fruit and wine-based alcoholic beverages in Italy and France). They denied the discriminatory nature of the tax, emphasizing the fact that the preferential taxes benefited not only the national products, but imported products of the same category. (Thus, the French cognac imported into Italy enjoyed the favorable tax rate applicable to grappa, just as the German aquavit imported into Denmark enjoyed the favorable tax rate applicable to the Danish aquavit.) They drew attention to the production in their own countries of non-negligible quantities of certain beverages that were taxed at the highest rates (thus, a significant production of Schnapps exists in Denmark, gin in France and Italy, etc).

The Court was not convinced by these arguments. In three decisions given on February 27, 1980, it declared that although the treaty does not forbid Member States from granting certain fiscal advantages to certain kinds of alcoholic beverages, this right cannot be used to establish indirect discrimination favoring national products by deciding categories of taxation in such a way that the lower rates of taxation are reserved for national products and the highest are imposed on products that the State only produces in limited quantities.12

C. The Cassis de Dijon decision: the principle of equivalence

In its famous Cassis de Dijon decision of February 20, 1979, the Court accomplished the third and extremely important step in the expansion of article 30 of the treaty, which prohibits measures of equivalent effects as quantitative restrictions on importation. This decision was to give a new impetus to the realization of the free movement of goods.13

The case concerned a German regulation which imposed a minimum level of 25 percent for all spirituous beverages sold in Germany. An importer of "Crème de Cassis," a well-known French liqueur with

an alcohol level of less than 20 percent, was prosecuted for non-compliance with the German regulation. In accordance with article 177 of the treaty, the case was referred to the Court of Justice so that the notion of "measure of equivalent effect as a quantitative restriction" could be interpreted.

It is important to draw attention to the fact that the purpose of the measure in question was not to protect German products, but to guarantee proper consumer information. However, by hindering access to the German marketplace for spirituous liquor which was legally made and sold in other Member States, the measure protected, albeit in an unintentional manner, the German producers of similar beverages.

The Court believed that the peremptory assessment of a minimum alcohol level was not necessary for the protection of public health, and that it did not constitute an essential guarantee of good faith in commercial transactions. It was, in fact, easy to ensure suitable information for consumers by requiring the labeling of the alcohol level and country of origin on each product's packaging. The Court concluded from this that the prescriptions did not pursue an objective of the general interest which could prevail over the principle of free movement of goods, — one of the Community's fundamental rules.14

On this occasion, the Court announced its fundamental principle, according to which:

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted insofar as these provisions may be recognized 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 defense of the consumer.

In other words, every product, legally produced and traded in a country of the Community, must be allowed to move freely in all the other countries unless opposed by mandatory requirements. This is what is called the "principle of equivalence of regulations."

Even if this jurisprudence does not totally eliminate restrictions on intra-Community trade, it nevertheless permits the free movement of a large number of products whose conditions of trade and production have not been harmonized in the Community. Thus, the following restrictive regulations were condemned by the Court in the name of the free movement of goods:

— the Italian legislation prohibiting the sale of vinegar not made by the acetic fermentation of wine, reserving the label "vine-

14. Id. at 664.
"gar" for products made from wine;\textsuperscript{15}

- the requirement imposed by the Netherlands to use the word "likeur" on the label of all products containing ethyl alcohol, sugar, aromatic substances, or fruit juices;\textsuperscript{16}

- the Dutch regulation which required compliance with specific limits of dry ingredients in bread;\textsuperscript{17}

- the Belgian requirement requiring margarine to be sold in cubic packaging;\textsuperscript{18}

- the prohibition in Germany of the sale of wine in round-shaped bottles, other than wine from Bade and Wurtemberg;\textsuperscript{19}

- the prohibition in Germany of the sale of beer made from basic ingredients other than barley malt, hops, and water; and\textsuperscript{20}

- the prohibition of the fabrication and sale in Italy of pasta noodles not exclusively made of durum wheat;\textsuperscript{21}

Several writers have wondered whether the Cassis de Dijon jurisprudence means that all State measures restricting importation must be prohibited, even when no formal or material discrimination is involved.\textsuperscript{22} In my opinion, the answer is negative. All cases in which the justification was applied involve measures requiring imported goods to correspond to identical conditions to those applied to national goods, which resulted in higher production and sales costs for imported goods, or even in their total elimination from the marketplace. From this point of view, one may consider that these measures, although applicable to national and imported products alike, imposed a material discrimination on imported products.\textsuperscript{23}

It would be erroneous to think that the "principle of equivalence" announced by the Cassis de Dijon decision is limited to the free move-


\textsuperscript{16} Fietje Case, 1980 E.C.R. 3839.

\textsuperscript{17} Kelderman Case, 1981 E.C.R. 527.


\textsuperscript{19} Prantl Case, 1984 E.C.R. 1227.


\textsuperscript{21} Drei Glocken GmbH v. USL Centro-Sud & Provincia Autonoma di Bolzano, case 407/85 (July 14, 1988) (not yet published); Zoni Case, case 90/86 (not yet published).

\textsuperscript{22} P. Oliver, Free Movement of Goods in the EEC 69-74 (1982); L. Gormley, Prohibiting Restrictions on Trade within the EEC 13, 252 (1983); Wyatt, Article 30 EEC and Non-Discriminatory Trade Restrictions, 6 EUR. L. REV. 185 (1981); Marenco, Pour une Interpretation Traditionelle de la Notion de Mesure D'Effet Equivalent à une Restriction Quantitative, 1984 CAHIERS DE DROIT EUROPÉEN 291; Waelbroeck, Mesures d'effet Equivalent, Discrimination Formelle et Matérielle dans la Jurisprudence de la Cour de Justice, 2 LIBER AMICORUM 1329 (F. Dumon ed. 1983).

\textsuperscript{23} Marenco, supra note 22; Waelbroeck, supra note 22.
ment of goods. The Court recognized that its application also extends to the free provision of services. We saw that the treaty permits the Member States to require the possession of a diploma or professional title for the practice of certain economic activities on the condition that this be done without discrimination between nationals and citizens of other Community countries. Nevertheless, the Court refused to hold that a State was entitled to oppose the practice of a regulated activity by a citizen of another Member State where that citizen possesses a permit delivered in that Member State under similar conditions as those required in the host State, where he was subject to effective supervision in the state in which he was established, and where such supervision extended to the activities he carried out in other Member States.\textsuperscript{24}

This judicial acceptance of the "principle of equivalence" has reduced the scope of the required approximation of legislation. In fact, from the moment that a State cannot keep out persons or goods of another Member State which do not fit every condition required by its regulations, it is no longer necessary to approximate regulations. Basing its rulings on this jurisprudence, the Commission announced, in the "White Paper" presented to the Council in June, 1985 concerning the completion of the internal market, that it would limit itself in its harmonization directives concerning technical standards, to the establishment of fundamental principles by virtue of which a product would be allowed to move freely in the entire Community. The Council further pledged that it would delegate the task of defining detailed technical specifications to trade organizations.\textsuperscript{25}

Likewise, in 1985, in the area of the free movement of persons and services, the Commission presented the Council with a directive establishing a general system of recognition of university diplomas. This proposal is also based on the principle of equivalence.\textsuperscript{26}

D. Beyond discrimination

We have seen that the \textit{Cassis de Dijon} jurisprudence can be explained by the notion of material discrimination to the extent that the State regulations involved in these cases, although applied to national and imported products alike, restricted importation because they had been conceived by considering the national industry's situation and


\textsuperscript{25} See Waelbroeck, \textit{L'harmonisation des règles et normes dans la CEE}, 24 \textsc{Cahiers de Droit Européen} 243, 253 (1988).

\textsuperscript{26} 28 O.J. EUR. COMM. (No. C 217) 3 (1985).
needs exclusively. To this extent, this jurisprudence can be explained by a broad interpretation of the concept of material discrimination.

Certain recent decisions show that the Court no longer subscribes to the notion of discrimination, even in its broadest interpretation. In fact, the Court recently forbade all restrictions of intra-Community trade (except for mandatory requirements) even if such a restriction produces identical effects on internal trade.

The first decision revealing this new tendency was rendered on July 11, 1985 in the *Cinéthèque* case. The case concerned the question of whether a French regulation prohibiting the sale of videotapes less than twelve months after the movie's release in movie theatres constituted a restriction on imports and thus did not comply with the treaty. The Court concluded that the French regulation in issue applied both to French-made videotapes and to imported ones; it did not favor national production in relation to that of other Member States, but stimulated cinematographic production as such. The Court added that this does not prevent the fact that the application of such a rule can provoke intra-Community trade restrictions of videotapes due to the disparities in the rules applied in the different Member States. It concluded that under these conditions, the prohibition could only be deemed to be compatible with the principle of free movement of goods if the possible resulting restrictions did not exceed that which was necessary to reach its objective, and if this objective was justified under Community law. On this last point, the Court decided that the French case must be considered justified.

Although the compatibility of the French regulation with the treaty was established, this decision clearly indicates that the Court is ready to condemn a national regulation that creates a possible restriction in intra-Community trade, even if such a measure does not favor national production.

Whatever conclusion can be drawn from this case, it resulted in a second decision given on February 23, 1988 in the case of milk substitute products. The Commission brought an action against the French Republic alleging that, by prohibiting the importation and sale of milk substitute products of any kind, the French Republic had failed to fulfill its obligations regarding the free movement of goods. The Court examined whether the prohibition could be justified by mandatory requirements concerning the protection of consumers, health, or the goals of the common agricultural policy. The Court

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reached a negative conclusion, declaring the French legislation contrary to the treaty.

It should be noted that the French measure had neither the objective nor the effect of protecting a particular national industry: it protected milk in and of itself as a food product made throughout the Community, and not something "typically French." As far as milk substitutes are concerned (the sale of which are forbidden in France), the French industry is just as capable of making them as the industries of other Member States.

The *Warner Brothers* decision of May 17, 1988,29 confirms that the approach adopted by the Court in the case of the French videotapes did not constitute a fortuitous event. It applied the "mandatory requirements" test by verifying a Danish regulation having nothing to do with importation, but concerning only the rights of a copyright owner to authorize the rental of videotapes, whatever their origin.30

II. THE INNOVATIONS INTRODUCED BY THE SINGLE EUROPEAN ACT

In the area which interests us here, the Single European Act produced three important innovations:

— the affirmation of the Member States' will to establish an internal market before December 31, 1992;

— the establishment of a procedure of harmonization of laws by a qualified majority; and

— the ability given to the Council to decide by a qualified majority that the provisions in force in a Member State must be considered as equivalent to those applied by another Member State.

All of these innovations contain one reservation: a declaration attached by the Member States to the Single European Act foreseeing that the date of December 31, 1992 will not automatically produce legal effects.

Let us examine, in succession, these three innovations to see whether they are capable of justifying the achievements of the Com-

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munity or, on the contrary, if we can expect that they will facilitate progress in the creation of the Community.

A. The internal market

At first sight, it could seem surprising that, in 1986, the Member States decided to insert article 8A in the treaty. Article 8A provides for the progressive establishment of an internal market, during a transitional period which will expire on December 31, 1992, whereas article 8 of the original treaty had already provided that the Common Market would be progressively established during a transitional period which expired on December 31, 1969.

However witty it may be, I do not believe this comparison to be correct. As I indicated, the Common Market, foreseen by the drafters of the treaty as coming about in 1970, did not imply that national borders would disappear. It only provided that the crossing of these borders should not give rise to restrictions of a protective or discriminatory nature. The drafters of the treaty had expressly anticipated maintaining border control over persons and goods, wherever this was justified, by considerations related to statistics, revenue, security, public health, etc.

During a conference on the Swiss position on the Single European Act in Neuchâtel from October 13-15, 1988, Mr. Pierre Pescatore humorously compared the drafters of the Single European Act to the Seventh Day Adventists, an American religious sect whose members believe that the Messiah must return to Earth a second time to eliminate all sin. On the other hand, the internal market provided for by the new article 8A is defined as "a space without internal borders." As Dr. Ivo Schwartz writes, "what is in issue is the establishment of a true "Binnenmarkt" (internal market) and not just "binnenmarktähnliche Verhältnisse" (relations analogous to those of an internal market)."\(^{31}\) It is, therefore, erroneous to claim, as is sometimes done, that the only goal of the Single European Act is to carry out the original goals set out by the drafters of the Treaty of Rome, twenty-three years later than originally scheduled.

As indicated by the "White Paper" of the Commission in 1985, its realization is an ambitious objective implying the adoption of 310 harmonization directives. It is evident that, had the adoption procedure for those directives not been facilitated, the goal would be far from being achieved by the end of 1992.

B. The new procedure of harmonization

The Single European Act provided for the insertion of article 100A in the treaty, which permitted the Council — acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament, and after consultation of the Economic and Social Committee — to draw up measures concerning the approximation of the legislative, regulatory, and administrative provisions of the Member States with a view to the establishing and functioning of the internal market.

Compared to article 100 of the original treaty, article 100A brings about the following changes:

— It suppresses the rule of unanimity which permitted a single Member State to block the process of harmonization;

— It no longer limits the choice of the Council to directives, but permits it to adopt any necessary measures, whether in the form of a regulation, a directive, a decision, or any other kind of act;\(^32\)

— It provides for the cooperation of the Parliament and the consultation of the Social and Economic Committee, concerning all measures of harmonization, and not only those measures whose execution would involve the modification of legislative provisions.

This undoubtedly shows progress. However, it was not accomplished without some concession in favor of Member States which feared being marginalized by the process of harmonization. These states see a lower standard imposed on themselves than they would like to maintain, especially in the areas of health, security, environmental, and consumer protection.

Article 100 takes account of this preoccupation in three ways:

— It requires the Commission to take as a basis for comparison a level of high protection;\(^33\)

— It provides that the harmonization measures can include, in appropriate cases, a safeguard clause, authorizing the Member States, for one or several non-economic reasons, to adopt provisional measures subject to a Community control procedure;\(^34\)

\(^32\) Let us point out, nevertheless, with respect to the terms of Declaration Number 4 annexed to the Single European Act, that it is made clear that the "Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States." Single European Act, supra note 1, at 24.

\(^33\) Id. art. 100A (3).

\(^34\) Id. art. 100A (5).
— Upon the adoption of a harmonization measure by qualified majority, it permits a Member State, where deemed necessary "to apply national provisions justified by important requirements of article 36 or relating to the protection of the workplace or the environment."\(^3\)

While the first two precautions hardly raise any controversy, this cannot be said for the third. The possibility for a Member State to decline to follow a decision validly adopted by the Council constitutes a new and potentially dangerous precedent. It is therefore fitting to examine the conditions carefully.

These conditions are written in terms which provoke a great number of questions. Let us examine them to see how the Court could respond when it is eventually faced with them.

i) Article 100A(4) provides that the right of derogation can be exercised "after the adoption of a harmonization measure by the Council acting by a qualified majority."

The question could be asked whether this constitutes a simple reference to article 100A(1). If so, the right of derogation would be possible in all those cases where a harmonization measure was adopted based on this disposition, even if under the circumstances, the Council was unanimous, or if, on the contrary, it is limited to cases where the harmonization measure was enacted by a qualified majority.

In my opinion, the second solution must be adopted. It conforms, in fact, not only to the text (which speaks of the adoption of a harmonization measure by the Council, enacted by a qualified majority), but also to its purpose, which is to protect a Member State placed in the minority by a vote within the Council.\(^3\)

ii) Is the right of derogation limited to the measures adopted by a qualified majority under article 100A or 100B,\(^3\) or can it be exercised in all the cases where the treaty provides that the Council may adopt harmonization measures by a qualified majority (notably in the areas of common agricultural policy,\(^3\) freedom of establishment,\(^3\) free supply of services,\(^3\) transportation policy,\(^3\) elimination of competitive

\(^{35}\) Id. art. 100A (4).
\(^{36}\) Ehlermann, supra note 3, at 391.
\(^{37}\) Single European Act, supra note 1, art. 100B (2).
\(^{38}\) Id. art. 43.
\(^{39}\) Id. art. 57.
\(^{40}\) Id. art. 66.
\(^{41}\) EEC Treaty, supra note 4, arts. 75, 84 (2), as modified by the Single European Act, supra note 1, art. 16.
distortions, and social policy, among others)?

In my opinion, the result of article 100A, considered in its entirety, is that the derogation provided for by paragraph 4 is limited to the measures of harmonization provided for in paragraph 1. Such an interpretation conforms, as well, to the original purpose of the text: to counterbalance the introduction of qualified majority voting for the matters discussed in the first paragraph. There is no reason to apply it in areas where the Council has always had the power to adopt decisions by a qualified majority.

iii) Article 100A(4) states that a Member State can apply its national provisions when the Council has adopted a measure of harmonization by a qualified majority. The text does not specify if this Member State must belong to the minority. At first, it would be possible to think that the text authorizes a Member State which voted in favor of the measure to apply national provisions which provide for stricter regulations.

Moreover, if it is accurate, as I have suggested, that the right of derogation can only be exercised when the measure, in actual fact, was adopted by a qualified majority, it is logical to believe that this right can only be invoked by a State which voted against the adoption of this measure.

The opposite result would be contrary to the reason for which the provision was adopted, which, as already stated, was to counterbalance the introduction of the qualified majority. It would be paradoxical to allow a State which voted with the majority to exercise such a right.

iv) Article 100A(4) allows a Member State to apply national provisions which it considers to be justified. Should these provisions already exist at the moment when the harmonization measure is adopted? Or, can a Member State invoke article 100A(4) to introduce new measures?

The use of the phrase “to apply” seems to favor the last interpretation. However, such an interpretation would lead to unacceptable results. Under the pretext that a Member State was placed in the

42. Single European Act, supra note 1, arts. 101, 102.
43. EEC Treaty, supra note 4, art. 118A, introduced by the Single European Act, supra note 1, art. 21.
45. See De Wilmars, supra note 3, at 615.
46. De Ruyt, supra note 3; but see Forwood & Clough, The Single European Act and Free Movement: Legal Implications of the Provisions for the Completion of the Free Market, 11 EUR. L. REV. 383, 400 (1986); Ehlermann, supra note 3, at 394.
Council's minority, it could introduce entirely new provisions several years later. The adoption of these provisions could not have been foreseen at the moment of the Council's debates, and consequently, they were not considered by the Council when it voted.

It seems preferable to consider that if a State wishes to enact national provisions which are incompatible with a harmonization measure, it must, after the adoption of such a measure, at least inform the other Member States and the Commission during the Council discussions. Any other course of action would be incompatible with the obligation of "loyalty to the Community" provided for in article 5 of the treaty. This is the only condition under which a State placed in the minority by the adoption of a harmonization measure can introduce new provisions which are incompatible with that measure.

v) The provisions which a minority Member State is allowed to introduce as set forth in article 100A(4) must be "justified by the important requirements stated in article 36 or must relate to the protection of the workplace or the environment."

These notions require some explanation. Let us first examine the "important requirements stated in article 36. It seems that the use of word "important," instead of "mandatory," which the Cassis de Dijon jurisprudence mentions, was due to a typing error in a Commission document, unnoticed by everyone at the European Council at Luxembourg. When the Commission asked to have the error corrected, some opposed it, arguing the sacred nature of the texts adopted by the European Council.47 Whatever the case may be, the result is rather upsetting: it seems to imply that the importance of the requirements sought by article 36 would vary, and that some of them would not suffice to justify the adoption of derogation measures under article 100A(4). This result was undoubtedly not foreseen by the governments opposed to the correction of the typing error.

The notion of "protection of the workplace" is new to Community law. It will fall to the Court to specify the outer limits of this concept. In this respect, Mr. Pierre Pescatore draws attention to the risk that this notion will be evoked to justify measures designed to protect national industries having employment problems.48 The Court will no doubt avoid that risk, since such a result would be diametrically opposed to its existing jurisprudence, which has always rejected attempts to give a broad interpretation to the provisions of the treaty allowing for exceptions to its basic principles.

47. De Ruyt, supra note 3, at 171 n.36.
48. Pescatore, supra note 2, at 44; see also Forwood & Clough, supra note 46, at 400.
Concerning the notion of environmental protection, the legitimacy of which is recognized as conforming to the *Cassis de Dijon* jurisprudence,\(^49\) the Commission has acknowledged it since 1981.\(^50\) Its sanction by article 100A(4) is not at all extraordinary.

On the other hand, what is more surprising is the absence of any mention of the other mandatory requirements derived from the *Cassis de Dijon* jurisprudence, such as the need to guarantee the effectiveness of fiscal controls, the assurance of good faith in commercial transactions, and consumer protection. Should the conclusion be drawn that the Commission can refuse to confirm a national provision purporting to protect an objective which is not named in article 100A(4)? Here, as well, the Court has the duty of deciding this question. Good reasons seem to exist in favor of a restrictive interpretation.\(^51\)

vi) The second line of article 100A(4) states that “the Commission confirms the provisions after having verified that they do not constitute arbitrary discrimination or a hidden restriction in trade among Member States.” One preliminary conclusion clearly follows: to the extent that article 100A(4) allows the introduction of new measures, a Member State cannot act unilaterally. The Commission has a power of preliminary control. This response is in no way affected by the unilateral declaration introduced by the Danish government in the Final Act, and which certain states have interpreted as expressing an intention to act unilaterally in this area.\(^52\)

What is more doubtful, on the other hand, is the extent of the control that the Commission can exercise on the national provisions in question. The text provides that the Commission must verify that these provisions are not “a means of arbitrary discrimination or a hidden restriction in trade among Member States.” This phrase appears to be restrictive. Nevertheless, the recent case law of the Court shows us that it considers all measures exceeding what is strictly necessary to protect the objectives that the Member States can legitimately pursue as constituting arbitrary discrimination or a hidden restriction on


\(^{50}\) See Response to the Written Question No. 749/81 of M. Bonde, 24 O. J. EUR. COMM. (No. C 309) 7 (1981).

\(^{51}\) See Ehlermann, *supra* note 3, at 393.

\(^{52}\) Text of the Danish government’s declaration:
The Danish Government notes that in cases where a Member State is of the opinion that measures adopted under Article 100a do not safeguard higher requirements concerning the working environment, the protection of the environment or the needs referred to in Article 36, the provisions of Article 100a (4) guarantee that the Member State in question can apply national provisions. Such national provisions are to be taken to fulfil the abovementioned aim and may not entail hidden protectionism.

Single European Act, *supra* note 1, at 27.
C. The recognition of the equivalence of national provisions

As we have seen, the Single European Act does not limit itself to inserting article 100A in the EEC treaty, it also adds article 100B. This article provides that during the course of 1992, the Commission, together with the Member States, must draw up an inventory of the legislative, regulatory, and administrative provisions which fall under article 100A and were not harmonized pursuant to the latter article. The Council, acting in accordance with the procedure of article 100A, can then decide whether the provisions in force in one Member State should be recognized as equivalent to those applied by another Member State. Article 100A(4) is applicable by analogy. The Commission must proceed with the inventory and present the appropriate propositions sufficiently in advance to allow the Council to act before the end of 1992.

This provision is of great importance, even though it is hardly discussed in the commentaries on the Single European Act. The question is to know how it can be reconciled with the Cassis de Dijon and Van Wesemael cases, which accepted, well before the enactment of the Single European Act, the idea of an equivalence of national control measures in the area of free movement of goods and services. Should this fecund idea be considered as monopolized henceforth by the Council, and postponed until 1992, as feared by Pierre Pescatore?  

It will of course be the duty of the Court to respond. Nevertheless, it would greatly astonish me if the Court would interpret article 100B as denying national courts the power to decide for themselves on the equivalence of national regulations and to draw the appropriate conclusion concerning free movement. As a result, I think article 100B, despite what its terms seem to imply, does not refer to provisions which are already equivalent. Rather, its objective is to permit the Council to provide conditions under which this equivalence should be considered as already existing. It will be up to the Court to make the distinction between the Cassis de Dijon and Van Wesemael case law on

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53. This results primarily from the reasoning of the decision in Commission v. Federal Republic of Germany, 1987 E.C.R 1262, discussing the "law of purity of beer."


55. Pescatore, supra note 2, at 45.

56. Contra Forwood and Clough, supra note 46, at 402, where they argue that the establishment of equivalency is simply the judicial declaration of an existing state and does not change anything. A decision in pursuance of article 100B only facilitates the task of the national courts
the one hand, and the Council’s powers under article 100B on the other. This will be a difficult task.

D. Consequences of the December 31, 1992 expiration date

The first draft of the text on the internal market submitted by the Commission to the intergovernmental conference provided that, at the end of 1992, in the absence of harmonization provisions in a given sector, each Member State should acknowledge as equivalent the regulations in force in the other Member States concerning persons, goods, services, and capital. Thus, on this date, all provisions that had not yet been harmonized would be deemed automatically to be equivalent.\(^57\) This draft was explicitly rejected by the intergovernmental conference which decided, in a declaration quoted earlier, that the date of December 31, 1992 “will not create any automatic legal effects.”

It would be erroneous to conclude that this date will not produce any legal effects. First, its expiration could permit the establishment of an appeal against inaction under the conditions provided by article 175 of the treaty.\(^58\) Moreover, and undoubtedly more important in practice, the refusal to recognize an “automatic” effect does not mean that the expiration of the 1992 deadline will not cause the Court’s jurisprudence on the “principle of equivalence” to make further headway, notably by considering national provisions on security, health, the environment, and so on, as being “equivalent,” even though the means they employ to achieve their objectives are not totally identical.

I conclude that, although it is correct that the December 31, 1992 deadline will not produce any automatic legal effects, it would be false to believe that it will not produce any effects at all.

III. CONCLUSION

It can be seen that the Single European Act poses numerous challenges for the Court. I am persuaded that the Court will be able to meet them, as it has done in the past, by interpreting the Single Act in a way that allows it to produce useful results (“effet utile”) while avoiding any questioning of past achievements.

Thus, as I have shown, the Court had recognized, even before the enactment of the Single European Act, that the treaty prohibitions are

by rendering superfluous a detailed examination of the often complex problems concerning equivalence.

57. J. DE RUYT, supra note 3, at 158.
58. Id. at 159.
not limited to national provisions which are openly protectionist. The Court laid the foundation for a very wide opening of markets by developing the notions of "material" and "indirect" discrimination as well as the "principle of equivalence," and by rejecting any requirement that a measure should be discriminatory in order to be prohibited. The only restrictions which can continue to oppose free movement are those justified by mandatory requirements of the Member States.

No reason exists to believe that the Single European Act will prompt the Court to take a step backwards. Quite to the contrary, I think that the 1992 deadline and the great positive response which it has received in public opinion will encourage the Court to prove even more audacious and imaginative than in the past, in order to allow the realization of the vast "economic space without borders" provided for in the Single European Act.