Would chocolate by any other name taste as sweet?

A brief history of the naming of generic foodstuffs in the EC with regard to the recent Chocolate Cases (Case C-12/00, Commission v. Spain and Case C-14/00, Commission v. Italy)

By Donald Slater[1]

A. Introduction

Food law in the European Community is a touchy subject. One of the big ongoing debates in this area centres on the question of what names we call our foodstuffs by. In an internal market where local supermarket shelves are stocked with products coming from all around the EC and beyond, how can we be sure that the contents of the packets conform to our connotations of the name on the label? For example, if it says "chocolate" on the label, how can we be sure that it really is "chocolate" within our understanding of the word? The question of what names can or should go on labels is, sadly, very complicated. This article therefore intends to look at only one aspect of this problem: when a Member State is allowed to insist that the name of an imported "generic" [2] product be changed. We will begin by briefly looking at the case law and one of the major pieces of legislation in this area – the Labelling Directive – before going on to discuss application of the law to the recent Chocolate Cases, handed down by the European Court of Justice (hereafter the "Court") at the beginning of this year[3]. This discussion will give some (hopefully) interesting insights into the way in which primary law, as interpreted by the

1 My thanks go to Dr. Dominik Hanf for his helpful comments on an earlier draft of this article. All mistakes and omissions are my own.

2 There is not enough space her to go into the exact (and different) meanings of this word as used by the Court. However, the essential difference to retain here is that generic products are those products not protected by intellectual rights relating to their geographic origin (see, for example, Case C-289/96, Denmark v. Commission, ECR [1999] I-1541 ("Feta") at point 36) . For more on the meaning of 'generic' see C. MacMaoláin, "Free movement of foodstuffs, quality requirements and consumer protection: have the Court and Commission both got it wrong?" ELRev [2001] pp 417-422.

3 Case C-12/00, Commission v. and Case C-14/00, Commission v. Italy of 16th January 2003 (not yet reported).

Court, and secondary legislation interact and into the balancing of consumer protection and free trade performed by the Court.

B. Free trade and Foodstuffs in the EC

The free movement of goods between Member States of the Community, including foodstuffs, is ensured principally by the general prohibition on quantitative restrictions and measures having equivalent effect to quantitative restrictions (articles 28-30 of the EC Treaty (hereafter "TEC") and by the Community's power to harmonise national laws under articles 94 and 95 TEC.

One of the great barriers to the free movement of food is the fact that national preconceptions of the qualities inherent in foodstuffs generally known under certain names differ from Member state to Member state.

A typical example of this is beer. Belgian bière, German bier and British beer carry similar names, understandable to most, but all three countries have very different brewing traditions both as regards ingredients and production methods. Free movement of beer seems nice in theory but there may seem to be something wrong with selling a British pint to a Belgian under the name bière and expecting him not to frown when he tries it. British beer may be no worse or better than his traditional concept of bière, but it is quite possible very different.

For many years – and to some extent today – national legislators helped consumers out by laying down 'recipes' in national law dictating the ingredients and/or production processes to be used in the manufacture of certain products[4].

Producers had to stick to these recipes or sell their products under a different name (or indeed not at all). The same was true of importers whose products did not conform to the recipe-laws of the state of importation. The difficulty is obviously in deciding when such laws really aim at protecting the consumer (and the related question of whether the consumer really needs that level of protection) and when they are simply disguised trade protectionism.

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[4] A lot of these laws are far more than recipes but constitute complex market regulation mechanisms (concerning, for example, the regulation of pasta in Italy see the conclusions of Advocate General Mancini in Case 407/85, Drei Glocken, ECR [1988] 4233 at point 4). Restrictions of space mean that the expression "recipe-laws" will be used here to refer in general to the various normative instruments used to regulate the composition and manufacturing methods of foodstuffs.

C. A brief history of the free movement of generic foodstuffs in the EC

Before discussing the Chocolate Cases themselves, it seems important to outline some of the most pertinent major developments in EC law on the free movement of foodstuffs that have occurred over the last decades.

Until the late seventies, the central theme of the Community's response to the hindrances to free trade caused by disparate national recipe laws was harmonisation. Thus, during this period, the Commission pushed for the adoption of 'vertical' directives that harmonised these national recipe laws for various different foodstuffs – honey, fruit juice etc[5].

One of the first partial successes in this area was the Chocolate Directive[6]. The latter laid down certain minimum specifications for the composition of chocolate, in particular minimum percentage content of cocoa and cocoa butter. However, the adoption of the Chocolate Directive coincided with the accession of the first new Member States – Britain, Denmark and Ireland – that had chocolate traditions different to those of the founding Member States. Unlike the latter, the newcomers often added vegetable fats other than cocoa butter (hereafter "VFOCB") to their chocolate. Thus, the Member States were unable to come to consensus[7] on the question of whether VFOCB could be added to chocolate.

The compromise was translated by a set of rather obscure provision in the Chocolate Directive, which seemed to allow Member States to continue to allow or prohibit the production *on their own territory* of chocolate using VFOCB but without making it clear whether all Member States were in general obliged to allow the import of chocolate containing VFOCB[8]. The true meaning of the Chocolate Directive on this point would not become clear until thirty years later in the Chocolate

5 Directive 75/726 Fruit juices OJ L 311/40 (1.12.75) now replaced by Directive 93/77 OJ L 244 (30 September 1993); Directive 74/409 Honey OJ L 221/10 (12.8.74) now replaced by Directive 2001/110 OJ L 10/47 (12 January 2002).

6 Directive 73/241 Cocoa and chocolate OJ L 228/23 (16 August 1973) replaced by Directive 2000/36 OJ L 197/19 (3 August 2000);

7 Harmonisation directives were at that time adopted under ex-article 100 TEC (now article 94 TEC) and required unanimity in the Council

8 On the different theories of interpretation of the Chocolate Directive see E. G. Fournier and K. Richard, "Le chocolat, aliment des dieux, divise l'Europe: uniformité ou acceptation des diversités?" RDUE 3/1997 p.119 at pp131-141.

Cases, the outcome of which was entirely determined by legal developments that would occur during the intervening period[9].

The Commission's vertical directive approach did not work well, especially due to the difficulty of finding consensus among the Member States, and was heavily criticised, in particular for its centralising and innovation-stifling nature[10].

Right at the end of the 1970s/beginning of the 1980s, two major developments occurred in the Commission's approach and in the case law of the European Court of Justice (hereafter the "Court") that are highly important for our story.

Firstly, the Council adopted a 'horizontal' directive – the "Labelling Directive" – applying to foodstuffs in general, that laid down important rules on the name that foodstuffs had to be labelled with[11]. In particular it stipulated that:

- products had to be labelled with the name of the product[12]
- the name was to be that provided for in *"whatever laws, regulations or administrative provisions apply[ing] to the foodstuff in question"* and
- in the absence of such measures the name would be (i) the name used customarily in the state of marketing or (ii) a description of the foodstuff and if necessary of its use *"that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused"*[13]
- EC or, in its absence, national law could require that the name under which the product is sold must be accompanied by the mention of a particular ingredient(s)[14]

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9 The Commission admitted as late as 1996 that it is "unclear whether the products made in those 7 countries [UK, IRL, DK, P, F, S, A] using other vegetable fats could lawfully be marketed as chocolate in the other 8 Member States" Commission press release IP/96/317 of 18th April 1996.

10 For a general background of these developments see D. Welch, "From Euro Beer to Newcastle Brown, A review of European Community action to dismantle divergent food laws", JCMS [1983] pp. 47-70.

11 Directive 79/112 OJ L 33/1 of 8th February 1979 (the "Labelling Directive"), now repealed and replaced by Directive 2000/13 OJ L 109/29 of 6th May 2000 (the "New Labelling Directive").

12 Article 3(1)1

13 Article 5(1)

14 Article 6(6).

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- moreover, these provisions should be read in light of the general requirement that labelling must not *"be such as could lead the purchaser to a material degree [...] as to the characteristics of the foodstuff"*

Article 5 of the Labelling Directive seemed to indicate (as was confirmed by later case law) that the name under which foodstuffs were sold would be the law of the Member State where the foodstuff was sold[15] subject to any pertinent EC legislation[16]. Therefore, the laws of the Member State where the product was produced did not seem of relevance[17].

Just twelve days after the Labelling Directive was published, the Court handed down its famous judgment in the Cassis de Dijon case[18]. It will be recalled that in case, the German government had tried to block the import of French Cassis de Dijon because it did not contain the minimum alcohol content stipulated in the relevant German recipe law. In its judgment the Court laid down the principle of mutual recognition i.e. that a national measure hindering the import of products lawfully produced and marketed in another Member State would constitute a measure having equivalent effect to a quantitative restriction – a barrier to trade prohibited under article 28 TEC – unless justified by 'mandatory requirements' such as consumer protection or the fairness of commercial transactions. In other words (in a rather simplified way) the Germans could not stop Cassis coming into their territory under the name Cassis if it had been lawfully produced under that name in France.

The Cassis judgment had a far more liberalising effect on trade as regards the use of certain names than the Labelling Directive. The effect of Cassis was essentially to superimpose on the Directive, whose centre of gravity was clearly consumer protection, a free-trade-centred general principle, placing the burden of proof on Member States when the latter created conditions on the use of names that differed from those in other Member States.

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15 Law of Member State of sale applies (text of Article 5(1) itself)

16 Case C-136/96, Scotch Whisky, ECR [1998] p I-4571 at points 44-45

17 Case 298/87, Smanor, ECR [1988] p4489 at point 29

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

It should be noted that, ultimately, in 1997, after seven previous amendments, including one to article 5(1) itself, the principle of mutual recognition was explicitly incorporated into that article of the Labelling Directive[19].

With the Cassis judgment, the free movement of foodstuffs within the Community entered a whole new ballgame. Previously, national laws restricting the use of certain names – through the use of recipe-laws – had generally been accepted and chipped away at by the Commission's painfully slow harmonisation attempts[20].

After Cassis the Commission began challenging national laws limiting the use of names to foodstuffs produced according to certain recipes. Some of these challenges were negotiated though to settlement[21] but others made it to the Court where the Member States invariably lost[22]. There were also a number of preliminary references made to the Court during this period on the same issue[23]. Through these cases the Court laid down a number of principles governing the use of names on foodstuffs. The most important of these, which come up in the Chocolate Cases, will be laid out below.

Firstly, any national law *completely prohibiting* the import of a foodstuff lawfully produced and marketed in another Member State, because it does not conform exactly with the national recipe law – i.e. because it is seen as an 'imitation' product – violates article 28 TEC and can only be justified by human health concerns under article 30 TEC[24]. Mandatory requirements such as the protection of consumers can

19 Directive 97/4, L 43/21 of 14th February 1997. Although the principle of mutual recognition was, in any event, explicitly read into the old version of article 5(1) of the Labelling Directive by the Court (see Case C-448/98, Guimont, ECR [2000] p663 at point 29).

20 Directive 70/50 did seek to prevent national laws from reserving to national products names "which are not indicative of origin or source" (JO L 13/29 (19 janvier 1970) at article 2(3)(s)). However, this did not cover national recipe laws that were formally non-discriminatory.

21 As regards chocolate, the Commission threatened actions against both Germany and Portugal who subsequently changed their national laws to allow for the marketing in their respective territories of VFC (see E. G. Fournier supra at note 8 at page 151).

22 See for example Case 193/80, Commission v. Italy, ECR [1981] 3019 ("Wine Vinegar II" case); Case 178/84, Commission v. Germany, ECR [1987] 1227 ("German Beer" case). More recent cases have targeted laws on Béarnaise sauce (Case C-51/95, Commission v. Germany, ECR [1995] I-3599); Foie gras (Case C-184/96, Commission v. France, ECR [1998] I-6197) and Chocolate (see supra note 3).

23 See for example Case 182/84, Miro, ECR [1985] 3731; Case 286/86, Deserbais, ECR [1988] 4907; First Italian Pasta Case (supra note 4).

24 For a case where the requirements of public health were accepted as justifying a restrictive measure see Case 174/82, Sandoz, ECR [1983] 2445.

be satisfied by less restrictive means such as labelling. This can be seen, for example, in the First Italian Pasta case[25] in which the Court found that an Italian prohibition on the sale of pasta made with common wheat flour violated article 28.

Secondly, even where national law does not completely prohibit the importation of such products, lesser restrictions conditioning the use of particular names on foodstuffs may also fall foul of article 28. A number of variations on this theme have been considered by the case law the most pertinent of which are as follows.

Rules reserving the use of a generic name to products conforming to national recipe laws

Any such rule violates article 28 TEC by hindering the import of foreign products using the generic name. Products not conforming to the national recipe law must be able to use the generic name where those products have been lawfully produced and marketed in another Member State under that name. This general principle, which stems directly from the Cassis de Dijon judgment, is, however, subject to an exception. Foreign variations of the generic product that use the generic name can be blocked where those variations are so completely different that consumer protection or fair-trading requires a change of name.

However, such situations are exceptional. Thus, a name change can only be required *"where a product presented under a particular name is so different, as regards its composition or production, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category"*[26] This excludes differences of *"minor importance"*[27]. Two points should be noted about this test.

Firstly, the reference point for measuring the difference between products is that of consumers in the Community not consumers of the Member State of importation. This choice of reference point is explained by the desire not to see consumer habits crystallised, which would inhibit the development of the internal market[28]. However, such a free trade based approach, when applied to all products falling within the wide "generics" category, fails to acknowledge adequately that both the content and the strength of food traditions varies hugely from Member State to Member State and from one "generic" product to another. Ultimately, the flexibility of the notion of general consumer perceptions in the Community places undue strain on

25 First Italian Pasta (supra note 4)

26 Deserbais, supra note 23 at point 13.

27 Case C-366/98, Geffroy, ECR [2000] I-6579 at point 23.

28 German Beer, supra note 22 at point 32.

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the second branch of the test – the substantial difference of the product under examination.

Moreover, where the composition and manufacturing processes are regulated in the state of production, it is hard to imagine that the product will not correspond to consumer expectations at least there. The addition of the word "generally" to the above test would seem to indicate that perhaps the consumers of more than one Member State should be considered and compared with other Member States. Sadly, however, little guidance is given on this point in the case law[29]. Moreover, what is the threshold? Two, three, four Member States and/or a certain percentage of Community consumers?

Where the composition and manufacturing processes are not regulated in the state of production the case is even harder to judge[30]. This will especially be the case where production is regulated hardly anywhere (as was the case for example in the 'Foie Gras' case[31]).

Secondly, the notion of products that are "so different" is highly flexible and ultimately contains an irreductible element of subjectivity. In this regard, the Court has lacked consistency in the factors taken into account to judge whether a product is indeed "so different". It has looked at a variety of sources on which to base such decision, for example, the Codex Alimentarius of the FAO and the WHO[32], the classifications given in the Common Customs Tariff[33], the regulations of Member States[34] and data gathered from surveys on consumer perceptions[35]. However, it has never developed a systematic approach and has often chosen to disregard or even not mention certain sources with little reasons given for doing so[36].

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29 Although, for example, in the Smanor case (supra note 17) the Court does allude to the regulations of "several" Member States.

30 The Cassis formula "legally produced and marketed" would also appear such cases (see Case 184/96, Commission v. France, ECR [1998] I-6197.

31 See for a criticism of this point Denys Simon, "La guerre du foie gras aura-t-elle lieu?", Europe, December 1998 page 13.

32 Smanor, supra note 17 at point 22.

33 German Beer, supra note 22 at point 33.

34 Smanor, supra note 17 at point 22; First Italian Pasta case, supra note 4 at point 20

35 Feta, supra note 2 at point 36.

36 See for example Deserbais, supra note 23 at point 15 *et seq.*

We will see all these issues relating to products that are "so different" arise again in the Chocolate Cases.

A last point should be made about national rules reserving the use of a particular name to products conforming to national recipe laws. On the text of the original version of the Labelling Directive, such restrictions would not seem to be problematic (Article 5(1) requires the use of a name laid down in national or EC law, see above point 14). However, few of Court's cases give any importance to or indeed even mention Article 5(1). Those cases were solved, rather, by direct reliance on article 28 TEC and the principle of mutual recognition. Even after the principle of mutual recognition was incorporated into article 5(1) of the Labelling Directive, the Court continued to rely directly on article 28 TEC in most cases[37]. Although the same result would have been achieved in all these cases, the Court's frequent failure to refer to such a major piece of legislation is at least surprising. This is even more so when we consider that once national rules have been harmonised under article 94 or 95 TEC, these harmonising directives are usually considered to act as effectively blocking the application of article 28 TEC[38]. This unclear relationship between the Labelling Directive and article 28 TEC will come up again later on.

Rules imposing the use of a particular name on products not conforming to national recipe laws

This kind of rule goes one step further than rules reserving the use of a designation to products conforming to national recipe laws. In the latter case producers are prevented from using one name among many, in the former they can only use one name. It is therefore not surprising that such rules violate article 28. To the extent that they prohibit the use of the generic name, the same rules will apply as seen above at points 22 to 29. To the extent that they impose a particular name they can only be justified to the extent that *"details given on the original label supply the con-*

37 However, this is not always the case. So, for example, in Guimont, the Court explicitly refers to the old article 5(1) and interprets it in the light of the principle of mutual recognition.

38 It is not totally correct to talk of a blocking effect. In the presence of a harmonising directive, article 28 continues to be hierarchically superior and can technically apply (see Case 247/84, Motte, ECR [1985] p3887 at point 16). However, the existence of a directive, which lays down the Community legislator's solution to a particular hindrance to trade (e.g. by stipulating the level of consumer protection required) should mean that recourse to article 28 becomes unnecessary. Indeed, direct recourse to article 28 and general principles of free movement could in theory lead to a solution being proposed by the Court that does not accord with the proposed by the Community legislator. Thus, the Court's approach should be to look first to the directive and only then to use article 28 as an interpretative tool to clarify how the directive should apply (see Case C-448/98, Guimont, ECR [2000] I-10663 at point 30). See also on this point Fournier, supra note 8 at pp 143-145.

sumer with information on the nature of the product in question which is equivalent to that in the description prescribed by law"[39]. A further example of this will be seen below in the Chocolate Cases.

Before going on to look in detail at the Chocolate Cases, a few general observations should be made.

Firstly, the relationship between article 28 and the Labelling Directive is unclear. Sometimes the latter is ignored, sometimes it is applied cumulatively with article 28[40], sometimes it is openly acknowledged that the Labelling Directive adds nothing to the Court's analysis under article 28[41] and in yet other cases, the Labelling Directive is applied 'in the light of' the Court's case law on article 28 and the principle of mutual recognition[42].

Secondly, the Court seems to take a very black and white approach to questions of sales names. Thus, the answer is nearly always name change or no name change and it rarely considers the possibility of intermediate solutions[43]. This stands in contrast to the New Labelling Directive which takes a more 'graded' approach by foreseeing the possibility of adding further descriptions to the name of a product (i.e. where consumer protection requires more than just a mention in the list of ingredients but less than a full name change)[44].

Thirdly, in the eyes of the Court (whose case law on mutual recognition is now taken up in the New Labelling Directive, article 5(1)), compulsory name changes will only be accepted in the most extreme of circumstances. Moreover in making this assessment, the Court does not have a very systematic approach, employing very different criteria in an already highly subjective assessment.

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39 Case 27/80, Fietje, ECR [1980] p3839 at point 15. In fact this case concerned the mandatory use of a name when the product was in conformity with the national recipe law but the same reasoning applies by analogy.

40 Smanor, supra note 17 at points 24 and 33.

41 Béarnaise, supra note 22.

42 Guimont, supra note 27.

43 Although see the Italian Wine Vinegar II, supra note 22, where the Court considered the modifying of the generic name through addition of "made with wine" made with apples" etc.

44 Article 5(1) of the New Labelling Directive (supra note 11).

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D. The Chocolate Cases

Two of the most recent cases dealing with the conditions placed by Member States on the use of certain names on foodstuffs are the Chocolate Cases.

1. Facts and new legislative context

The facts and outcome of the Chocolate Cases can be described fairly simply. As noted above, in some countries of the EU chocolate is traditionally made with vegetable fat other than cocoa butter (hereafter "vegetable fat chocolate" or "VFC"). In others, including Spain and Italy, the only vegetable fat used in chocolate is cocoa butter (hereafter "non-VFC"). Spain and Italy had national laws providing that VFC could not be sold under the name chocolate[45]. To be allowed to be sold at all, it had to be renamed "chocolate substitute".[46]

Before going on to discuss in detail the arguments of the parties and the judgment, it should be recalled that the Chocolate Directive has actually already been amended (although the Member States time limit for transposing the Chocolate Directive II does not expire until August 2003). The most important amendment to the latter is that all Member States must now recognise that chocolate containing up to 5% VFOCB is to carry the name 'chocolate'. Reaching agreement on this point took the Community legislature well over 20 years. However, as we will see, the Court considers in the Chocolate Cases that, even before the laborious passing of the Chocolate Directive II, the Member States were already under an obligation to accept the free movement of VFC under the name 'chocolate'.

2. The arguments of the parties and the judgement of the Court

In the Chocolate Cases the Commission brought Spain and Italy before the Court for violation of article 28 of the Treaty. Relying on the principle of mutual recognition and the case law as described above under points 22 *et seq.* and 30 *et seq.* and also on article 5(1) of the New Labelling Directive, the Commission argued that once VFC had been lawfully produced and marketed under the name "chocolate" in one Member State of the Community, no other Member State could prevent its being imported and sold on their territory unless the Member State of import can point to a mandatory requirement that would justify a forced name change[47]. Since

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45 See above point 22

46 See above point 30

47 It should also be noted that, in the oral hearing in Case C-12/00 at point 76, the Commission points to the less radical solution in article 5(1)(b) of the Labelling Directive, which provides

VFC is not "so different" from chocolate not containing vegetable fats, no such mandatory requirement justified the Spanish or Italian measures.

For their part, the two defendants denied any violation of article 28. They considered that article 28 was not even applicable. The question raised – i.e. whether or not VFC can be sold under the name "chocolate" – was fully answered by the Chocolate Directive. According to the Spanish and Italian governments, that Directive gave Member States the right to choose whether or not to accept that VFC sold on their territory could carry the name "chocolate". In any event, even if the Chocolate Directive were not to apply, they would not be in violation of article 28 since VFC was so different from chocolate not containing vegetable fats, their law forcing the renaming of VFC was justified by the mandatory requirement of consumer protection.

The Court followed the Commission's line of argument. It's reasoning can be summarised as follows. Firstly, the problem in hand falls outside the scope of the Directive. The latter harmonised many aspects of the Member States' laws on composition but not the issue of the inclusion of vegetable fats. Article 28 thus applies directly to the problem. Secondly, since the forced name change of the offending VFC created extra packaging costs for importers and depreciated the value of the product in the eyes of the consumer (who wants to buy "substitute chocolate"?) the Court considered that there was a hindrance to trade and a violation of article 28. Thirdly, the difference between VFC and non-VFC is not substantial and so consumers could be protected by less restrictive means, such as labelling alerting the consumer to the presence of vegetable fats in the product. Thus no mandatory requirement justified the measure. The Spanish and Italian laws were therefore judged to be in violation of article 28 of the Treaty. These three points will now be looked at more closely.

Concerning the scope of the Directive, as already pointed out earlier, the specific provisions on vegetable fats are not so clear. However, the Court's reasoning is quite convincing. The Directive clearly states that it does not seek to lay down a final position on the question of the use of vegetable fats in chocolate. This is confirmed by the explicit possibility offered to the Member States to prohibit or allow for the use of vegetable fats in the production of chocolate. This cannot be seen as a derogation to a general principle of prohibition as there would otherwise have been no need explicitly to offer the Member States the possibility of prohibiting the use of vegetable fats. Moreover, to accept the complete harmonisation theory advanced

for a further description to be placed in proximity to the name should this be justified for consumer protection. This possibility is not discussed by the Court.

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by Spain and Italy would be tantamount to an explicit authorisation to partition the common market as regards the movements of VFC.

Although the exact scope of the Chocolate Directive has been a matter for debate, the Court has probably chosen the most convincing interpretation of the measure. For the purposes of our discussion, the most interesting aspects of the case come, however, in the following part of the Court's reasoning.

In that regard, the first point to note is that in assessing the impact on trade of the disputed national measures and possible justifications thereof, the Court does not once refer to article 5 of the New Labelling Directive. Everything is done by direct application of article 28, just as it has been in so many previous cases.

The solution reached would no doubt have been the same even if the Court had applied article 5 of the Directive, so why is this important? First and foremost because the New Labelling Directive is, after all, a major piece of legislation, which at least arguably should have been applied here[48]. Moreover, if the Court had considered that it did not apply, then it should have explained why, given that the Directive was discussed by all parties at least in the oral hearings and given that several provisions of the Directive appeared in the "legal framework" section of the judgment. Secondly, because, as noted above, the relationship between article 28 and the Labelling Directive is far from clear and so deserves being clarified.

As the Commission pointed out in its observations at the oral hearing, article 5 of the Labelling Directive was amended to take into account the Court's case law. While this exercise is perhaps useful for people referring solely to the text of the Directive, one can't help getting the feeling that the legislator is chasing after the Court, who is always one step ahead, applying its own case law and hardly ever article 5 of the legislative text.

The Court's application of the test to determine whether VFC is "so different" from non-VFC that consumer protection requires a change in name also merits some discussion. After having excluded application of the Chocolate Directive to the issue in hand the Court then goes on to assess the importance of the differences between VFC and non-VFC solely with reference to that same Chocolate Directive!

Thus, the Court begins by noting that under the Directive, the characteristic element of chocolate is the presence of minimum cocoa and cocoa butter content. These minima must be respected by all chocolate products, irrespective of the ques-

48 Supra at point 29.

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tion of whether they contain vegetable fats. Since the Directive authorises Member States to permit the addition of vegetable fats to chocolate, chocolate which respects the minima in the Directive cannot be substantially changed by that addition.[49]

This reasoning seems self-contradictory. If the original Chocolate Directive explicitly does not regulate the use of vegetable fats in chocolate because Member States could not agree on its use, how can it ever be used as a valid point of reference for deciding on whether vegetable fats change the character of the product?

As noted above, the Court has, in previous case law, pointed out other sources for determining the essential characteristics of a product for example the Codex Alimentarius or the Common Customs Tariff when the Court tries to discern whether two products are substantially different. The Directive is the only instrument relied on. This is all the more surprising, as at least some of these instruments actually tend to support the Court's reasoning[50].

In this regard, it is also interesting to note that in its reasoning the Court strenuously avoids mentioning the amended Chocolate Directive II, which stipulates that products can be sold under the name 'chocolate' when they contain less than 5% VFOCB. This amendment to the Chocolate Directive, which took over twenty years to negotiate, seems to be totally irrelevant.

Moreover, the Court's reasoning tends to suggest that as long as the minima laid down in the Directive are satisfied, any amount of vegetable fats can be added

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49 The Advocate General has a very disturbing way of reasoning this point. He states: "Das wird man jedoch kaum annehmen können, da die für wesentlich erachteten Mindestbestandteile alle in diesem Produkt enthalten sind. Durch das Hinzufügen anderer pflanzlicher Fette zu den Mindestbestandteilen kann im Verhältnis zum ursprünglichen Produkt daher keine wesentliche Änderung eingetreten sein, weil es ein Mehr und kein Weniger zu diesem Ausgangsprodukt ist!"At point 56 of the Opinion (English text not yet available, exclamation point added).

50 Although the process is not yet complete, the Codex Alimentarius is currently being revised to provide for the possibility of adding to chocolate up to 5% vegetable fats other than cocoa butter. This process will probably be completed this month. See ftp://ftp.fao.org/codex/alinorm03/al03_14e.pdf. The classification of goods under the common customs tariff is not conclusive: (the overall heading 1806 00 00 00 is entitled "chocolate and other food preparations containing cocoa"). This heading covers both products containing and not containing vegetable fats (compare headings 1806 32 90 91and 1806 32 90 99). As regards the legislation of Member States, the Commission pointed out that seven of the fifteen Member States allow the addition of VFOCB to chocolate. This is of course a slightly loaded figure in the sense that two of the states (Portugal and Germany) only allowed the addition of VFOCB after pressure had been put on them by the Commission.

without changing the essential character of the product[51]. This point is in practice of little relevance to chocolate, since the Chocolate Directive II lays down a maximum limit for vegetable fats other than cocoa butter ("VFOTCB"). However, it will be interesting to see how the Court's above reasoning will be applied in other cases. In this regard, if we generalise the Court's reasoning, it seems to say that as long as certain essential characteristics of a particular product are present, anything else goes[52]. Such an approach seriously reduces the informative value of the name appearing on foodstuffs and thus affords a particularly low level of protection to the consumer.

E. Conclusions

Pulling together the different elements of this brief outline of the law governing names on foodstuffs, we see a number of interesting points.

Firstly, the discussion above exemplifies some aspects of the dynamic played out between court and legislator. In this regard, we see an example of the incorporation of case law into Community legislation in particular with the example of the insertion of the principle of mutual recognition into the Labelling Directive[53]

Secondly, we can see a number of interesting points regarding the Courts approach to the application of Community legislation and the relationship between article 28 TEC and secondary legislation. In the Chocolate Cases the Court is faced with a problem of the name under which products are sold. Yet, despite listing the relevant provisions of the New Labelling Directive and the arguments of the parties relating to those provisions, the Court does not refer once to that basic legislation in

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51 There will of course technical limits and possibly limits due to the aforementioned minima. However, regarding the latter, the percentages of cocoa and cocoa butter are calculated net of the weight of other extra ingredients (Article 1.16, Annex I, of the Chocolate Directive). Since the Directive implies that these other ingredients include VFOTCB, the addition of more VFOTCB will not affect the percentages of cocoa and cocoa butter in the product calculated for the purposes of the Directive but will reduce their presence as a percentage of the gross weight of the product (see for a more detailed explanation of this Fournier supra note 7 at page 171-172).

52 Such an approach was already implied in the Court's Smanor judgment (supra note 17) but not as clearly as it is in the Chocolate Cases.

53 Although not discussed above, it is also arguable that the eventual adoption by the Council of the new Chocolate Directive II can possibly be read as an example of litigation before the Court as a catalyst for legislative change. The proposals of the Commission had failed in the 1980s and were blocked by the Parliament in the 1990s. Adoption of the new directive only happened after the Chocolate Cases had been brought before the Court.

its own appreciation of the case, preferring, rather, to rely purely on a direct application of article 28 its own case law. As can be seen from the above discussion, this tendency of the Court not to refer to the Labelling Directive can also be seen in previous cases.

In a way, this approach can be seen to reflect the history of the Directive which, since its coming into being, has been overshadowed by the Court's case law on mutual recognition. It also tends to bring into question the oft-stated principle that the passing of harmonising Directives effectively blocks the application of article 28 to cases covered by such Directives. Although this principle is not always adhered to the complete absence of its mention in the Court's appreciation is striking.

As regards the conditions under which a mandatory name change is acceptable in Community law, the Court not only ignores the Labelling Directive but also indulges in circular and even contradictory reasoning as regards the Chocolate Directive. Having begun by excluding the application of the Chocolate Directive, the Court applies the general test of "substantial differences" using that very same Directive as a guide.

This approach seems dubious in principle and the outcome is not entirely convincing either[54]. Moreover, unlike in many previous cases there is no mention of other instruments such as the Codex Alimentarius or the Common Customs Tariff when the Court tries to discern the "essential characteristics" of 'chocolate'. The Directive is the only instrument relied on.

It is fully accepted that identifying the "essential characteristics" of a foodstuff is prone to unpredictable outcomes and probably has an irreductible subjective element. However, this is all the more reason to be rigorous and consistent in the way the question is approached.

Thirdly, in absolute terms the outcome reached by the Court seems to offer a particularly low level of consumer protection. The Court appears to accept that, as long as the minimum requirements of cocoa and cocoa butter content are met, the addition of any amount of vegetable fats is permissible. In the Chocolate Cases themselves, the impact of this is not so important as the Chocolate Directive II has already been adopted, setting the maximum level of vegetable fats at 5%. However, we will have to wait and see if and how this approach is applied in the future.

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54 Surely the fact that the question of adding vegetable fats to chocolate was so contentious, and was excluded from the harmonising scope of the Directive, would tend to indicate that its presence or absence was essential to the nature of the foodstuff?

Finally, as an extension of the last point, when it comes to the play off between consumer protection and free trade in food, the latter is clearly the strong man, not only in the Chocolate Cases but also in previous case law. In the absence of exceptional circumstances (and it is unclear when these could arise) the lowest level of protection will be chosen i.e. the list of ingredients is enough. Despite the fact that a vast number of people simply do not carefully read the list of ingredients on all the products they buy, in the eyes of the Court, the "reasonable man", who bases his choices on the composition of the product does.

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