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Free Movement of Market Freedoms

From The Board

Two article contributions in this issue (Kaldellis and Landsmeer) and our case note by Vedder, all concern a trend, as yet without a clear title, but which may be called either 'assimilation' or 'convergence' of the EC market freedoms. It is sure to be one of the most promising directions for Community substantive legal doctrine in the decade.

The doctrine's thrust is directed toward breaking down, or at least reducing, the refined structure of partitions existing between the different regimes for goods, persons, services and capital. Equally fascinating is the complementary idea of taking down the screen *within* each regime, as between its compartment concerning discriminating measures and that concerning indistinctly applicable measures.

Our authors Kaldellis and Landsmeer each tackle a part of the existing partitions between the several freedoms. The work is only beginning. This is not the Berlin Wall. It is an illusion to think that a few bold strokes shall bring us into the free world of a grand unified regime.

Let me try and begin to do some preparatory 'pulling' at the separating screens inside each of the four regimes, for which the goods regime may stand as a model.

Leaving aside for now the Keck subregime, the main screen erected between Article 30 exceptions (ex Article 36: public security, health, policy etc.) and the Cassis lineage justifications is itself a norm, one working in two directions. Its two sides can be expressed as:

a) measures which discriminate as to the origin of goods may not be redeemed by grounds of the Cassis category;
b) measures seeking justification on other grounds than those in Article 30 may not discriminate as to origin.

This screen is under increasing pressure and there is overflow since the Walloon waste judgement. This judgement allowed the use of Cassis-lineage exceptions in order to keep foreign waste out of Belgium and thus redeemed a differentiation of waste according to territorial origin. Is this reasonable? Of course. Is the correct fix to upgrade the environment to the rank of 30 EC exceptions? That is the question.

It stands to reason that the screen will be increasingly tested, from both sides, putting into question both the norm's original motive and its additional reason of being, supplemented over time.

Originally its idea, or motive, was to limit the scope of Cassis-like exceptions to the less obnoxious non-discriminating variety of trade obstacles. Over time the other side of the screen gained in strength, to prevent the classical group of exceptions from infecting the Cassis-group with its ineradicable and principled nature.

The problem with the screen is first, that it is really to some extent arbitrary. There is no fundamental difference between the two sets of exceptions and their motives: each of them is about respecting public interest motives while restricting their effects domestically, and about transferring their protection to the Community level in as far as possible. Why differentiate? Even worse, why use discrimination as a criterion?

The formal flaw is in that criterion. A screen that is ultimately based on 'yes or no' discrimination cannot perform the diplomacy as between market and non-market considerations. This is because it is blind to the non-market side of the matter. This explains why the Court of Justice, when given the choice, and even sometimes when not, will pierce the screen and let reason flow into areas to do the job formally given to equality/non-discrimination.

This natural growth of the rule of reason (note the double use of the word 'rule' and consequently of 'reason') and the concomitant weight-loss of other controlling criteria will not land us in a unified empire of freedom and reason. It will, however, require the particularities of the different 'non-reason' regimes, and of the different redeeming exceptions, to acquire new precision, based on a rethinking of their respective relevances. Exciting times are ahead.

W.T.E.

Editor's Correction

Our case note by Natalie McNelis, *Both Sides Consider Section 301 Panel Report a Victory*, Volume 27, No. 2, at p. 185, provided an incorrect WTO Panel. The proper case title is, *WTO, United States – Sections 301–310 of the Trade Act of 1974, Report of the Panel, WT/DS152/R, 22 December 1999*. Our apologies to the author for this error.

J.M.