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State Promotion for Regional Products

A Legal Analysis

by

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A. Introduction

Ecological crises, like the flood-of-the-century and bio-scandals, put the environment and consumer protection regularly in the focus of the public's interest. To prevent such crises, attempts are made gradually to change consumer behavior, with more emphasis laid on quality, origin, and service. The primary attention rests in the support of bio- and ecological products, while support for "national" seals of quality has been lately reduced for example the CMA stamp of quality "Markenqualität aus deutschen Landen" (Quality from German Regions). Lately the marketing strategy for regional products has come to the foreground. For a while now we have been seeing slogans like "Aus der Region, für die Region" (From the region, for the region) or signets like "Sächsische Öko-Prüfsiegel" (Saxon Eco-label).

Such regional marketing strategies are in a certain contradiction with the European Community (EC) and public commercial law obligations[1]. Just as the EC, the WTO is also concerned with protectionist measures, and the WTO is focused on tearing down protectionist measures and building free trade for goods and services. So it comes as no surprise that the EC organs started working from the start on the issue of whether the state advertising of certain regional products constitutes an illegal obstruction of trade. The federal regions and, especially, the smaller localities in Germany constantly feel themselves confronted with the critique that certain advertising measures and information about quality only formally put consumer, environmental or health protection in the foreground; however, when closely scrutinized, they constitute a discriminating advantage for domestic producers. Only recently has the need risen for the Commission to proceed against a call for the purchase of regional products by the Presidents of the German Environmental Agency.[2] The Commission threatened further proceedings in the case that the regional marketing did not come to an end[3]. The Commission has in the mean time gone after no less than 61 situations of generous protection of designations of origin. It called upon its own Community Guidelines, which it had published for the delineation of the allowed and disallowed advertising measures for agricultural and food products.[4]

State advertising for regional products leads not only to conflicts with Community law, but also within the framework of the WTO is conflict to be expected[5]. In the latest decisions, on EC hormone prohibition[6] and US shrimp prohibition, it is outlined just

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[1] For a comprehensive analysis see recently *Marauhn* (Hrsg.), Staatliche Förderung für regionale Produkte: Protektionismus oder Umwelt- und Verbraucherschutz ?, 2004 (not yet published); see also „Tagungsbericht über den ersten Jean-Monnet-Workshop der Academia Juris Internationalis Franz von Liszt am 13. Juni 2003 in Gießen", DVBl. 2003, 1309.

[2] See *Nischwitz/Brockmann*, Fördernde und hemmende Faktoren für regionale Produktion und Vermarktung, Untersuchung ausgewählter Rahmenbedingungen. Gemeinschaftsstudie von NABU und DVL, 2003, p. 32.

[3] See „Qualität aus deutschen Landen stößt EU-Kommissar Fischler sauer auf", Frankfurter Rundschau of 22 August 2001; „Staatliche Förderung zum Kauf regional Produkte von EU untersagt", Press release by MEP M. Ferber of 8 June 2001.

[4] Community Guidelines for State Aid Advertising for in Annex I of EC-Treaty named Products and certain not in Annex I named Product s, OJ 2001 C 252/3, Point 5 (a).

[5] See recently *Dörr*, Förderung regionaler Produkte im Lichte des WTO-Rechts, in: Marauhn (fn. 1).

[6] Panel-Report *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, GATT accepted, WT/DS26/R/USA (Appeal of USA) and WT/DS48/R/CAN (Appeal of Canada) and Appelate-Body-Report *European Communities - Measures Concerning Meat and Meat products (Hormones)*, GATT accepted, WT/DS26/AB/R/USA and WT/DS48/AB/R/CAN (URL: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm).

how difficult it will be to implement trade restricting measures based upon health or environment.

Uncontested is that state advertising for regional products is neither generally allowed nor strictly forbidden. If the German Government would happen to begin an intricate advertising campaign for “Bayerischen Motorenwerke” (BMW), hardly an ounce of further proof would be needed that the Germans had exceeded the bounds of EC law. On the other hand, it is also obvious that the internal market would not prevent a local community from emphasizing certain regionally specific production and marketing methods in an advertising action, so long as these methods contain provable environment or health protection. To cope with such contradictory interests, every single case is dependent upon an analysis of the EC legal obligations and requirements, and the maneuvering space left over for the national authorities. It is important to find a just balance between the regional aid measures and the free movement of goods. In between stands the tricky relationship between environmental protection and Art. 28 ECT. For this purpose, at first the different aid measures for regional products and the assessments by the Commission are described (part B). Parts C and D analyze then the compatibility of the various advertising campaigns with Art. 28 and the WTO respectively.

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B. An inventory

I. Forms of advertising of regional products

For the aid of regional products, the national authorities have many economic instruments to choose from. Normally these are not used individually; rather, they form part of a ‘policy-mix’. Usually the measures or policy-mixes are contained within the relevant sector policy, for example environment, energy or social policy. Accordingly the Commission therefore has announced in their Guidelines that the Member States (MSs) “advertising using the media is frequently combined with other activities which do not use the media, for example at the point of sale, but which is intended to reinforce the message conveyed via the media.”[7] In such a way, a mass-advertising type campaign at the point of sale could have an effect similar to that of an advertising campaign implemented by way of the use of the media.[8]

The area of state aid measures in support of regional products is characterized by a wide range of reinforcement possibilities. For conciseness’ sake, what follows will illustrate those state instruments alone which are carried out and in market economic style and with reference to consumer ship, and which might influence consumer behavior regarding the purchase of regional products. Therewith are ruled out not only such subsidies that identify a region-wide reference. Also measures of compelling

[7] Community Guidelines for State Aid for Advertising for in Annex I of EC-Treatys named Products and certain not in Annex I named Products, OJ 2001 C 252/3., Point 5 (a).
[8] Ibid. (fn. 7).

character remain unaffected, as well as measures without effect on potential purchasers, for example:

- all prohibitions and obligatory type laws;
- mandatory labelling[9] such as food labelling, standardization labels (DIN, ISO) or marks-seals of approval (TÜV, CE-Seal); [10]
- compulsory duties, fees, taxes;
- creation of special legal framework requirements, e.g. minimum purchase-price;
- scientific or technical research works, gathering of statistics, dissemination of information to producers as well as consultation;
- availability of financial tools, for example subsidies for regional marketing projects or start-up aid for production or producer mergers;
- public procurement function.

The Commission positively formulates the concept of advertising as follows:

> "All actions are considered advertising that are in the position to stimulate the market operators and/or consumers to purchase certain products. It covers also all material that is intentionally distributed directly to the consumers, including advertising measures that are focused on the consumer at the point-of-sale."

Decisive here is the intent or purpose to influence the behavior of the market participants through certain statements or evidence; the form of influence is not of importance here.

Considered as advertising mediums, along side the products themselves (their labels), are also the following: newspapers, magazines, advertising columns, radio, TV and internet, mail inserts, advert sheets, movie theaters and outdoor advertising. [11]

State advertising for regional products takes place in various forms. According to the practical meaning, they are classified as follows:

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[9] For the purpose of this legal opinion the term "the label" serves as a general term for seal of quality, administrative seal and indication in the sense of the MarkenG. Seals of quality are such, which can be used on a product; the terminology is identical with the designation stamp of quality, seal, signet, label, logo. Administrative seals are such, which are required by the state for the bringing into circulation of a product. Indications are trademarks, geographical indications of origin and commercial designations.

[10] To the question whether seals of quality alongside the CE-Zeichen are permissible: *Lenz/Scherer*, Ist die Anbringung von Qualitätszeichen nationaler Prüforganisationen neben CE-Kennzeichnungen zulässig?, in: EWS 2001, p. 1 ff.

[11] See *Brockhaus*, Die Enzyklopädie in 30 Bänden, 20. Ed. 1996 – 1999, vol. 24, „Werbung".

1. Geographical Indications of Origin

Practically very meaningful are the so-called geographical indications of origin (GI). GIs identify the logistical origin of a good. In the EC MSs such GIs can either be protected

- by way of national law or trademark law, or
- by way of the so-called EC Origin Regulation.

GIs generally, in and of themselves, have a sales promoting effect because they distinguish themselves from unmarked products in a particular way. They are certainly unlike trademarks (TMs) or brand names[12] not tied to any particular brand or company. Their use is available for all goods that come from the labeled locality or area.[13]

GIs show not only the name of the locality that serves for the certification of the origin of goods in economic circulation [e.g., "Badischer Wein" (Wine from Baden) or "Schwarzwaldforelle" (Black Forest Trout)].[14] In addition, so-called indirect circuitous GIs are also involved. Such indirect indications point only circuitously to the certain logistical origin. It allows, however, without further need, for an association with the particular origin.[15] Important examples are the Bavarian white-and-blue flag pattern or the "Berliner Bär" (Berlin Bear).[16]

Regional products can be supported through a variety of different indications of origin:

- through 'simple' regional indications of origin whereby the legal protection does not establish a certain quality,
- through 'qualified' regional indications of origin whereby the legal TM protection establishes the special regional quality,
- through simple "generic names", which in principle enjoy no TM protection,
- through "designations of origin" (DOs) which according to the EC Origin Regulation enjoy Community-wide protection,
- through "GIs" which, according to the EC Origin Regulation, enjoy Community-wide protection as well.

In detail:

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[12] See p 13.

[13] See *Marx*, Deutsches and europäisches Markenrecht, 1996, para. 149.

[14] See *Fezer*, Markenrecht, 3rd. ed. 2001, § 126 MarkenG, para. 6.

[15] See the formulation „sonstige Angaben oder Zeichen mit gleicher Funktion" in § 126 para. 1 Alt. 2 MarkenG; *Fezer* (fn. 12), § 126 MarkenG, para. 7.

[16] See for further examples *Baumbach/Hefermehl*, Wettbewerbsrecht, 22. Ed. 2001, § 3 UWG, para. 197.

a) Simple and Qualified Geographical Indications of Origin

A statement or indication of a geographical origin does not necessarily refer to the particular quality of the product. Rather it is to be differentiated in this respect between simple and qualified indications.

Simple GIs are such that, after their introduction to the relevant market, the goods of this origin show no special regional or local particularities, traceable features or quality characteristics[17] [e.g., "Rügenwalder Teewurst" (spread-sausage)].[18] For simple GIs there exists, particularly[19] according to § 127 (1) of the MarkenG (German Trademark Act), an intellectual property (IP) protection right against their use on goods of another origin.

On the other hand, the qualified GIs show, after their introduction into the relevant market, a direct connection between the quality or feature of the products and the relevant region or locality. Typical examples are natural mineral waters, e.g., "Gerolsteiner Mineralwasser".[20] Qualitative product features can arise from a local or regional tradition in the production requirements or consumer habits and thereby on the basis of objective factors, as distinct from market opinion and, thereby, on the basis of subjective factors.[21] Namely, according to § 127 (2) MarkenG, there exists an IP protection against the use of qualified GI for goods of different-lower-quality.[22]

b) Generic Names

Generic names as well contain a reference to the regional origin of products. However, unlike with indications of origin, these indications are not understood by the relevant market[23] as references to the geographical origin of these products, and actually show no real connection between the products' quality or features and their point of origin. Rather they identify merely the belonging of the goods to a certain product description, in that they serve as indications of their type, composition, sort or other features (e.g. "Edamer Käse").[24] It is not out of the question that such marked products must correspond to[25] certain production methods. GIs can become generic names and vice versa.[26] A prominent example of this is the "Dresdner Stollen."[27] Generic names remain excluded from the IP protection according to § 126 (2) MarkenG.

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[17] See BGHZ 44, 16, 20; *EuGH Rs.* C-3/91 – Exportur - ECR 1992, I-5529, para. 11.

[18] BGH, GRUR 1956, pp. 270, 272.

[19] Protection is provided by regulations passed on the basis of § 131 MarkenG and by certain food product laws, namely the Weingesetz (Wine Act) and the Lebensmittel- und Bedarfsgegenständegesetz (Food Products and Basic Necessities Act). See *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para 186.

[20] See *Fezer* (fn. 12), § 127 MarkenG, para 9.

[21] *Fezer*, ibid, para 10.

[22] See *Fezer*, ibid, para 9. See also fn. 19, above.

[23] The decisive question is whether only an insignificant part of the relevant market still considers this indication to be an indication of origin, see § 3 UWG *BGH*, GRUR 1981, pp. 71, 72 – „Lübecker Marzipan".

[24] See § 126 (2) 2 MarkenG and Art. 3 (2) Origin Regulation and *Fezer* (fn. 12), § 126 MarkenG, para. 12 f.; *Marx* (fn. 13), para 155.

[25] *Fezer* (fn. 12), § 126 MarkenG, para 12.

[26] *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para 219 ff.

[27] See BGH, judgement of the 31 October 2002 – I ZR 207/00; earlier BGH, GRUR 1989, pp. 440; BGH, GRUR 1990, pp. 461; BGHZ 106, pp. 101, 104. *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 219.

c) Legally (EC) Protected Designations of Origin and Geographical Indications

According to EC law, geographical indications can, generally, be protected as PDOs or as PGIs.[28] The protection is carried out upon petition through the entry into the Commission controlled European list in accordance with Art. 5 (1) or Art. 17 of the Regulation 2081/92/EEC of the Council of 14 July 1992 for the protection of geographical indications and designations of origin for agricultural products and foodstuffs (so-called Origin Regulation).[29] The ensuing protection is in this respect exclusive; as for the registered or at least notified indications, an additional national entry no longer comes into consideration.[30] From the scope of protection are excluded, according to Art. 1 (1) of the Origin Regulation, wine, vineyard products and alcoholic drinks.[31]

For the entry of a designation of origin, the legal definition of Art. 2 (2) requires that the marked products owe their quality or features predominantly or exclusively to the given geographical origin including the natural and human influences, and that are there cultivated, prepared and produced at the origin.[32] So is the case by natural mineral waters that regularly owe their chemical and taste features to the source from which they come.[33]

In comparison, for the GIs it is enough, according to the legal definition in Art. 2 (2) of the Regulation, when a certain quality feature, its appearance, or another feature of the product, is rooted in its geographical origin and the product is actually cultivated, processed or produced there.

This covers for example the indications “Kölsch” (Kolsch, or of Cologne) and “Spreewälder Gurken” (Spree forest pickled cucumbers).[34]

From this definition one can see that simple indications are excluded[35] from the scope of protection of the Origin Regulation just like the generic names.[36] Indirect GIs only

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[28] The products are labelled g.U. and g.g.A.

[29] OJ L-208, 1992 p. 1, recently changed through Commission Regulation (EC) 2796/2000 (OJ 2000 L 324, p. 26). See the implementing rules in §§ 130 – 136 MarkenG.

[30] *ECJ* C-129/97 and C-130/97 - Chiciak - ECR 1998, I-3315, para. 28; see the official justification for the MarkenGesetz, BT-Drs. 12/6581 of 14 January 1994, p. 119; *Hohmann/Leible*, Probleme der Verwendung geographischer und betrieblicher Herkunftsangaben bei Lebensmitteln, in: ZLR 1995, pp. 265, 270. It is controversial whether that is the case for the non-registered geographical indications of origin, see below p. 30 f.

[31] The legal protection of geographical indications of origin for vineyard products and Spirits is focused on Art. 47 et al. of Council Regulation (EC) 1493/1999 of 17 May 1999 on the common market organization for wine (OJ 1999 L 179, p. 1) and Council Regulation (EEC) 1576/89 of 29 May 1989 for the establishment of the general rules for the term rules, designations and presentation of spirits (OJ 1989 L 160, p. 1), recently changed through joining-act of 1994 (OJ 1994 L 1, p. 1, 78).

[32] See *ECJ* C-3/91 – Exportur - ECR 1992, I-5529, para. 11.

[33] „Bad Hersfelder Naturquell“ and „Überkinger Mineralquellen“ are examples for registered and protected origin designations according to the procedure of Art. 17 Origin Regulation (g.U.) in the sense of Annex I of the Origin Regulation.

[34] See *ECJ* C-269/99 - Carl Kühne KG - ECR 2001, I-9517.

[35] See *Fezer* (fn. 12), § 130 MarkenG, para. 11. *Beier*, fn. to *ECJ* C-3/91 – Exportur - ECR 1992, p. I-5529 ff., in: GRUR Int. 1993, pp. 79, 81 argues that the Regulation is contrary to Community law.

[36] See Art. 3 para 1 the Origin Rregulation.

come into the scope provided that they fulfill the requirements of a DO, Art. 2 (3) of the Regulation.[37]

2. Seals of Quality

Advertising represents an important aiding instrument by way of support of a regional seal of quality. This support can consist of a certification from private[38] environmental and/or quality management systems, a certification from private organizations that award regional seals of quality, or from the creation of state[39] stamps of quality. The legal weight of environmentally relevant labels is restricted in practice to three different areas:

a) Eco-Labels

In the first place, the so-called eco-labels belong to the environmentally relevant seals. Under this heading come also regional products equipped with an "environmental logo", which inform the consumers in a certain way of their diminished environmental polluting, which means that they contribute to the protection of the classic environmental sectors by means of a certain production and marketing procedure. In their details, the informational content of such eco-labels can vary strongly:

Thus some eco-labels are based on broad life cycle analyses, the so-called "eco-balances".[40] The life cycle embraces the procurement of the raw materials, the production process, the distribution, the use as well as the waste disposal of the relevant products. The criteria for the individual life phases cover, for example, the consumption of natural resources, the energy consumption, the ground, water, and air pollution, noise pollution, the creation of waste as well as the effect on the eco-system on the whole.[41]

However, unlike the extensive life-cycle analysis, eco-labels also may merely point to their individual characteristics. Thereby the product is specially characterized as less environmentally damaging than other products in one of the specific areas of the life cycle.

b) Bio-label

Bio-labels belong, albeit more distantly, to the environmentally relevant quality seals. With such bio-labels, products are distinguished from the sphere of biological

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[37] For critical analysis see *Beier/Knaak*, Der Schutz geographischer Herkunftsangaben in der Europäischen Gemeinschaft, in: GRUR Int 1992, p. 41; *Beier/Knaak,* Der Schutz der geographischen Herkunftsangaben in der Europäischen Gemeinschaft – Die neueste Entwicklung, in: GRUR Int 1993, pp. 602, 608.

[38] Responsible for the awarding and control of labels are independent certification offices as experts.

[39] Responsible for the awarding and control of seals of quality is the State.

[40] See *Rehbinder a.o.*, Ökobilanzen als Instrumente of the Umweltrechts, 2000; *M. Schmidt*, Ökobilanzen, 2001.

[41] „EU-Umweltaudit" and „Blauer Engel" are examples for non-regional labels, that normally concern such a life-cycle analysis.

agriculture.[42] They serve the health interests of the consumer; by showing that either the product or its production has special quality.

The signets „geprüfte Qualität-Bayern“ (tested quality from Bavaria) for example[43] puts in the context of meat products special requirements for the product features. It identifies a particular friendly ph-value, further are forbidden the (still) authorized antibiotic performance enhancers in animal feed, as well as sludge, bio- and food-waste; the transportation time for the animals may not surpass 4 hours. The whole product line is self-controlled, as well as independent test facilities and even a government “control of the controls.“[44]

c) Energy Labels

Furthermore the so called energy labels can be qualified as environmentally relevant signets. These energy labels have in common that they point out that the distinguished product is marked by a sustainable use of energy sources. Some of these labels refer exclusively to the method of energy generation, particularly in the form of water power and solar- and wind-energy. Others concentrate on energy use during the production phase with electrical machinery.[45] These energy seals display a strong commercial component, because they point out to the consumer the cost-saving potential of their use.

3. Advertising More Narrowly Defined

Many authorities and regional bodies undertake also a more narrowly defined form of advertising for locally produced products, that means they extol the respective products with the aid of the standard forms of media like, *inter alia,* leaflets and inserts. In pursuance thereof, the authorities and bodies have at their disposal many different advertising statements.

They can in this way praise regional products via concrete regionally-oriented advantages, such as the short distance of animal transportation. It is also possible to promote regionally produced or grown products via a general-estimated quality criterion and not on certain precise type slogans like "Regional is first choice". The regions or communities can still promote products that are marked with indications of origin. Such is the case when the 16 German Regions (*Bundesländer*) present each year during "Green Week" in Berlin their specialties, for example "Allgäuer Cheese," " Frankfurt Sausages".

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[42] The minimum requirements of Council Regulation (EWG) 2092/91 of 24 June 1991 on the ecological agriculture and the corresponding marking of the agricultural products and food products (OJ 1991 L 198, p. 1) must be met.

[43] See the saxon seal „sächsisches Öko-Prüfsiegel“ and the labels „Aus Baden-Württemberg“, „Gutes aus Hessen“; „Hessen und trinken“ and for esparagus from Hessen „Ein königlicher Genuss“.

[44] See *Bayerisches Staatsministerium for Ernährung, Landwirtschaft and Forsten* (ed.), Öko-Qualität garantiert aus Bayern, p. 1 ff.

[45] See for example the non-regional „ENERGY“-label, for instruments that switch to standby mode when they are not in use. See also Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances; and the German implementation by the Energieverbrauchskennzeichnungsgesetz (Consumption of Energy Indication Act).

Finally, the regions can advertise for brands of local enterprises. They regularly show, in their brands, an additional hint which stresses the reference to a region. Under this concept the brand name is to be understood as a product label for a certain enterprise, that stands for the enterprises image on whole,[46] for example the "BMW" symbol of the Bavarian Motorworks Inc. In Munich or the emblem "Warsteiner" for the brewery located in Warstein.[47] This type of advertising requires a further commentary:

Sovereign bodies can advertise for a brand that is protected on a European level as an EC Trademark. Such protection can be gained through registration according to Art. 6 of the Regulation (EC) 40/94 of the Council, 20 December 1993, concerning Community Trademarks (Community Trademarks).[48] With its community trademark the Community Trademarks Regulation provides an independent commercial right of protection, the validity of which is enforced community wide uniformly and independently from the national regulations,[49] without detriment to the national trademark protection.[50]

Sovereign Bodies may equally advertise for brands that are not at all protected, or simply protected on the national level, by trademark laws that were partly harmonized through the first directive of the Council 89/104/EEC, 21 December 1988, for the harmonization of the Member States' (MSs) trademark laws (Trademark Directive).[51]

4. Consumer Advice, Expositions etc.

The other instruments by which the state can advertise for regional products range from mere information or explanation to the consumer about ecological, social and economically conscious consumer behavior, through the purchase of regional goods through their advice regarding the effect of the consumption of regional products, all the way to recommendations and appeals for the purchase of regional products. The same measures can also be taken with regard to gastronomy and trade.

In order to emphasize the wide collection of regional products, for example, the state can arrange and promote, in registers or databanks, the respective palette of regional products, expositions and trade fares concerning the regional assortment of goods as well as organizing farmer-markets and certifying them by way of a seal of approval. Bavaria has developed for example such an exposition-concept "regional projects portrayed via regional expositions", whereby the projects are allowed to present themselves in the region.

II. The View of the EC Commission

It is first and foremost incumbent upon the Commission, as protector of Community Law (Art 211 ECT), to make sure that advertising campaigns for regional products are compatible with the principles of free movements of goods and state aid law. Against

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[46] See *Fezer* (fn. 12), § 126 MarkenG, para. 4.
[47] *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 189b.
[48] OJ 1993 L 11, p. 1 ff., changed through the Council Regulation (EG) 3288/94 of 22. December 1994 (OJ 1994 L 349, p. 83 f.).
[49] See the principle of uniformity in Art. 1 para. 2 GMV.
[50] *Marx* (fn. 13), para 407.
[51] OJ 1988 L 40, p. 1 ff.

the background of overproduction within the common agricultural policy, the Commission pronounced itself very early in favor of the limited authorization of certain state advertising measures. Under certain circumstances, so is it stated in the new community guidelines,

> "the Commission takes a favorable view of such measures, since they facilitate the development of economic activities in the agricultural sector and the achievement of the objectives of the common agricultural policy."[52]

On the other hand the Commission harbors the suspicion that a large part of the executed aid measures in favor of regional products represent a protectionist intervention in the market place. The preferential treatment for certain enterprises or products corrupt the competition and disturb the trade between member states. Hence, the Commission developed criteria in the guidelines for state aid for the advertising of listed products (in Annex I ECT) and certain unlisted products[53] and in the Community framework for state aid in the agricultural sector[54]. With these the Commission attempts to assess the permissibility of state aid. These same criteria, because of their reference to the free movement of goods, can also be applied productively within the framework of Art. 28 ECT.

Both the Community guidelines and the community framework constitute an assessment principle, on which the Commission is legally bound, as long as it notifies no modification and so long as higher-order EC law does not stand in the way. With such partly legally binding [based on Art. 88 (1) ECT][55] and partly non-binding rules the Commission also informs other sectors concerning its future application of Art. 87 (3) ECT concerning certain types of aid.[56]

At the same time the Commission binds itself in its discretionary authority through the publication of these rules.[57] Thereby the Commission normally only approves various types of aid when they fulfill the requirements of the relevant general rules. The ECJ has accepted this practice, provided that the guidelines and the Community framework as secondary law remain in harmony with superior normative law.[58] The guidelines and Community framework, as general rules, cannot be changed, so that even the ECJ can scrutinize the interpretation of the aid framework in individual cases.[59]

In order to judge the legitimacy of the aid measures the Commission distinguishes between "advertising measures" and so-called "acts of public relations". The question, whether a certain means of aid is or is not beneficial for the internal market, serves as uniform assessment tool. The following determine whether a state or state induced

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[52] Section 1.1. of the Community Guidelines (2001).

[53] OJ 2001 C-252, p. 3.

[54] OJ 2000 C-28, p. 2. In the case of fishery products section 2.1.4 of the Guidelines for the assessment of MS Aid in Fishery- and Aqua Sectors (OJ 2001 C-19, p. 7) has to be observed.

[55] See *EuGH* C-288/96 – Germany v Commission – Slg. 2000, I-8237, para. 64.

[56] *Cremer*, in: *Calliess/Ruffert* (eds.), Kommentar zu EU- und EG-Vertrag, 2. Ed. 2002, Art. 87 EG-Vertrag, para. 1 b.

[57] See *Jestaedt/Häsemeyer*, Die Bindungswirkung von Gemeinschaftsrahmen und Leitlinien im EG-Beihilfenrecht, in: EuZW 1995, p. 787 ff.; *Hakenberg/Erlbacher*, Die Rechtsprechung des EuGH und des EuGel auf dem Gebiet der staatlichen Beihilfen in den Jahren 1999 and 2000, in: EWS 2001, p. 208, 213 f.

[58] *EuGH* Rs. C-288/96 – Germany v Commission – Slg. 2000, I-8237, para. 62. For the supremace of primary Community law see *Ruffert*, in*: Calliess/Ruffert* (fn. 56), Art. 249 EC-Treaty, para. 9.

[59] *EuGH* Rs. C-135/93 – Spain v Commission, Slg. 1995, I-1651.

measure is compatible with the principles of free movements of goods and/ or with the principles of state aid law.

The guidelines provide in detail for the following:

1. Advertising Measures and the Free Movement of Goods

Unlike in its "communication concerning the state aid of the sale of agricultural and fishery products"[60] published in 1986, and the "framework regulation for individual member state aid in the area of advertising for agricultural products (excluding fishery products) and certain not in annex I listed products"[61] released one year later, the Commission lays down the bases of the concept of "advertising". According to section 2 (7) of the community guidelines, "advertising" is defined as any measure or action,

> "which is designed to induce economic operators or consumers to buy the relevant product. It includes all material which is distributed directly to consumers for the same purpose, including advertising activities aimed at consumers at the point of sale."

Standing behind this broad criterion there is, on the one hand, the experience that state advertising often does not make use of the standard media forms; rather, as mentioned above, it can take place in the from of a "policy-Mix" directly at the point of sale. On the other hand, the new definition deals not only with encompassing of the point of sale type measures, but also,

> "to take account of advertising which is addressed to economic operators, for example foodstuffs processors, wholesale or retail distributors, restaurants, hotels and other catering establishments."[62]

The Commission separates the aid strategies within the category of "advertising measures" into three different areas: 1.) those compatible with Art. 28 ECT without problem, 2.) those, which, without any doubt, are not in accordance with said Article and 3.) a group that must be tested on an individual-case basis. However, as far as the Commission is concerned, it is already determined:

> "Article 28 of the Treaty states that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. Advertising of home-grown products by a Member State which is aimed at domestic consumption is considered as such an equivalent measure as the measure may lead or is intended to lead, to favor the consumption of home-grown products over the consumption of imported products."[63]

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[60] OJ 1986 C-272, p. 3.
[61] OJ 1987 C-302, p. 6.
[62] See section 1 para. 5 (b) the Community Guidelines.
[63] Para. 35 the Community Guidelines.

a) Art 28 ECT and Compatible Advertising

According to the view of the Commission, "the following are forms of advertising which are clearly not open to objection under Article 28 of the Treaty:

- advertising campaigns organized directly or indirectly by one Member State on the market of another Member State;

- advertising campaigns organized on the home market of a Member State which advertise the product in a purely generic manner making no references whatsoever to its national origin;

- campaigns on the home market promoting specific qualities or varieties of products even though they are typical of national production; these are campaigns which make no specific references to the national origin of the products other than those which may be evident from the references made to the qualities or varieties concerned or to the normal designation of the product."[64]

b) Art. 28 ECT and Incompatible Advertising

Advertising measures, clearly in violation of Art. 28 ECT and which accordingly can not be approved under any state-aid legal point of view, are according to Section 3. (1)(1) the following:

> "a) Advertising which advices consumers to buy national products solely because of their national origin,
>
> b) campaigns intended to discourage the purchase of products of other Member States or which disparage those products in the eyes of consumers (negative advertising); positive characterization of a Member State's home product should not be phrased in such a way as to imply that other Member State's products are necessarily inferior."

Although the first part of section b) is somewhat vague and could give raise to interpretation problems - which advertising campaigns do not prevent indirectly the purchase of products from other MSs? -, those interpretation criterias are reasonable. According to Art. 30 (2) ECT (former Art. 36) unjustified discrimination takes place, and disguised restriction on trade, whenever a consumer is induced to purchase national products merely by reason of their domestic origin ("buy German!"); just as it would offend the ECT if products from other MSs generally or specifically would be disparaged. Admittedly, the presently discussed problems with advertising for *regional products* have little to do with all of this.

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[64] See section 3.1.1 para. 19 of the Community Guidelines.

c) Borderline Situations

According to the view of the Commission many advertising campaigns for agricultural and food products can only be compatible with Art. 28 ECT under certain limited requirements.

Generally found here are, first of all, types of state advertising that contain references to national origin, as well as measures that spotlight the certain national peculiarities of products:

> "21. Some advertising on a Member State's home market may, because of references made to the national origin of products, and unless certain restraints are observed, be open to objection under Article 28 of the Treaty."
>
> "22. Advertising drawing attention to the varieties or qualities of products produced within a Member State frequently draws attention to the national origin of the products, even though those products and their qualities are similar to those of products produced elsewhere. If undue emphasis is placed on the national origin of the product in such advertising there is a danger of breach of Article 28 of the Treaty."

According to para. 23 of the community guidelines, both types of advertising campaigns would not constitute an offence against Art. 28 ECT if a reasonable balance were preserved between the - literal or symbolic - reference to the characteristics and types of an individual product on the one hand, and to its national origin on the other hand. Decisive is that the national origin reference of the conveyed main sales message be subsidiary and not the actual reason for stimulating the consumer's purchase of the product:[65]

> "23. Identification of the producing country by word or by symbol may be made providing that a reasonable balance is struck between references to, on the one hand, qualities and varieties of the product and, on the other hand, its national origin. The references to national origin should be subsidiary to the main message brought over to consumers by the campaign and should not constitute the principle reason why consumers are being advised to buy the product."

In order to judge whether the origin actually depicts a subsidiary advertising sales message, the Commission takes into consideration, in accordance with para. 41 of section 4.1 of the guidelines, the overall meaning of the text and/or symbols which refer to the origin or to the unique advertising claim.

However, according to the Commission, there are two exceptions to be made from these principles: on one hand, advertising measures offend against Art. 28 ECT, even though keeping to the above mentioned requirements, in the event that a MSs would earnestly intent to replace imported products from other Member States with their own products.[66] On the other hand, according to the Commission, advertising that emphasizes the origin of the goods as its primary sales message can be regarded as

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[65] See section 4.1 para. 40 the Community Guidelines.

[66] Section 4.1 para. 35 and section 3.1.1 para. 24 the Community Guidelines with reference to EuGH Rs. 249/81 – Buy Irish -, ECR 1982, 4005 ff.

compatible with Art. 28 ECT. As shown by para. 42- 43 of the guidelines, the above is to be the case with any general advertising campaign which explains that the retraceability of the origin for beef and beef products in EC law has become obligatory,[67] and/or that explain how such a system functions. Such an action actually puts no emphasis on any certain origin. So a violation of Art. 28 ECT is, according to Section 4.1 (44) of the Guidelines, merely to be seen when the consumer can be misled through such an advertising statement. If it would be claimed that a product of a certain origin is special because of its retraceability, while it in reality is only complying with the relevant legal rules for the marketing of similar products, then a case of misleading is suggestible.

According to section 4.1 (36) of the Guidelines, the above (secondly) is the case within the context of advertising campaigns that are carried out so as to introduce to consumers the agricultural and other products of a particular MS or region whose said products are grown or produced in agreement with various methods and traditions. The Commission sees such campaigns as an advantage for the internal market as they lead to the development of the agricultural sector. The campaigns could be focused on a single category like wine, cheese or beer, or could be intended to inform over a broad palette of agricultural and other products that come from the relevant MS or region, for example via promotional events like "Food-products Week."[68] In this setting the consumers as well as experts, active in the gastronomy or hotel industry, may sample free of charge.[69]

The Commission of course only sees such actions as compatible with the requirements of Art. 28 ECT when they aim at introducing to the consumer such products which are not yet perceived as familiar. Accordingly, they should be implemented in line with section 4.1 (38) of the Guidelines, outside of the MS or region in which the agricultural and other products are produced. Provided that this is not the case, then it is assumed that such campaigns further strengthen the existing tendency of the respective consumer circle to purchase local products. The MSs have the burden to prove otherwise. If they cannot, then there is, in principle, a violation of Art. 28 ECT. An exception is allowed then only when the advertising campaign is aimed at visitors to the MS or region and which encourages them to try local products. The pre-requisites here are that such actions inform about objective characteristics of the products like the active ingredients, the taste, the consistence and the production method (animal protection norms, eco-production etc.).[70]

A special practical meaning is given to advertising for products that, according to the national authorities, fulfill certain quality requirements. Quite often in such cases it is a situation of advertising measures via special labelling.[71] The Commission considers advertising for the special quality of agricultural products and other food products fundamentally as desirable because a higher level of quality can be thereby achieved, and such actions are suitable to raise the trust of consumers in Community agricultural production, as well as to better agricultural incomes and promote the sector in

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[67] Regulation (EC) 1760/2000 of 17 July 2000 for the introduction of a system for marking cows and on the labelling of beef and beef products and for the abolition of the Regulation (EC) 820/1997 (OJ 2000 L 204, p. 1).

[68] See para. 36 of section 4.1 the Community Guidelines.

[69] Ibid.

[70] Para. 38 of section 4.1 the Community Guidelines.

[71] See section 4.2 the Community Guidelines. This point refers to simply the permissibility of aid; however, the same question arises for the compatibility with Art. 28 EC.

general.[72] So it can be seen that such an action or advertising campaign must observe the following three conditions:

First, the campaign may not emphasize the national, regional or local origin.[73] So, a one-sided emphasis of regional or local origin is not allowed to promote the agricultural sector on the whole.

Secondly, the access to quality-control programs must be available to all products produced in the Community regardless of their MS origin; All MSs must recognize the results of similar controls conducted in any other MS.[74] So as to inform the consumer comprehensively, the Commission is willing to accept labels and logos that contain details about the name and place of the quality-control facility, that is responsible for the certification and/or monitoring within the framework of the program.[75] Additionally, types of aid will be approved for voluntary quality programs that fix or set up an obligatory indication of the respective origin of the product(s), provided that the program is available to all interested parties and the reference of the main sales-message is secondary as stipulated in section 3.1.1 of the Guidelines.[76]

The third requirement for the permissibility of advertising strategies for agricultural and other higher quality products flows from section 4.2.1 (49) of the Guidelines and requires that the special quality must derive from objective characteristics of the product itself or from its production process, and not from its origin or production location. According to section 4.2.1 (47) of the Guidelines the product must comply with the requirements and rules obviously layed out in more specific and detailed a fashion than those of the relevant rules and regulations of the Community or MSs. Otherwise, the consumer could be deceived in an illegitimate way (against EC principles) concerning in fact a non-existing special quality of a product. Such misleading of the consumer would not come into consideration for products that clearly are distinguishable from other products of the same category, whether it be for example through the applied raw materials, production method used or even the type of assembly of the product.[77]

Only under certain conditions can advertising for products holding an EC-level registered protected designation of origin or protected indication be considered compatible with EC law[78]. When a MS advertises in favor of all protected designations of origin or geographical indications of a regionally typical product, then the permissibility is focused on the strict requirements of section 4.1 and 4.2 of the Guidelines. Therefore, it is especially not allowed to emphasize excessively the regionally protected designations of origin or geographical indications of products, or to disparage the products of another MS, or to claim within the framework of such

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[72] Section 4.2.1 para. 46 the Community Guidelines.

[73] Ibid.

[74] Section 4.2.1 para. 49 f. of the Community Guidelines.

[75] Section 4.2.1 para. 50 of the Community Guidelines.

[76] See section 4.2.1 para. 51 of the Community Guidelines. This rule shall be without prejudice to other rules of Community law. But from the interpretation of section 3.1.1 para. 18 (see above) can be deduced e contrario that this cannot refer to the permissibility according to Art. 28 EC.

[77] Section 4.2.1 para. 48 of the Community Guidelines.

[78] See section 4.2.2 of the Community Guidelines.

designations or indications that products of any one particular MS are superior by nature.[79]

Advertising for agricultural products and certain other products,[80] that contain general reference to the importance of a varied and balanced nutrition diet may also be, according to the view of the Commission, fundamentally compatible with Art. 28 ECT. This flows from of para. 14 of the Guidelines, whereby the Commission, with a view to the community health- and consumer policies, recommends that the "advertising for particular agricultural and other products may, where appropriate, contain a reference of a general nature to the importance of a varied and balanced diet."[81]

2. Advertising Measures and the Prohibition of Aid

Even when they are compatible with Art. 28 ECT, advertising measures must remain in accordance with the subsidy policy of the Commission, which has developed, in the aforementioned Guidelines, a very detailed and differentiated position for the Annex I (ECT) listed products, and certain products not listed in Annex I. The Commission assumes that all state aid which is set forth for the advertising of agricultural and other products is fundamentally capable of disrupting the competition in the common market by favoring certain producers' products for which the relevant advertising measure is implemented.

Accordingly, the Commission holds that aids can be permitted via Art. 87 (3)(c) ECT, so long as they do not alter the trade conditions in a way that runs counter to the common community interests; whereas the aims of the Common Agricultural Policy (CAP) spelled out in Art. 33 ECT are to be taken into account, and are as follows:

> to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labor;
>
> thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
>
> to stabilize markets;
>
> to assure the availability of supplies;
>
> to ensure that supplies reach consumers at reasonable prices.

The Commission maintains thereby expressly that it is of no importance whether the threat of competition disruption arises from advertising for *national* products or for *regional* ones:

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[79] Section 4.2.2 para. 54 of the Community Guidelines.

[80] Section 2 para. 9 of the Community Guidelines states the products concerned.

[81] See section 3 para.14 of the Community Guidelines, which refer to Art. 152 ECT on the health of the population and Art. 153 ECT on consumer protection. Additionally, further advertising measures are allowed according to section 4.2.3 para. 57 and para. 55 of the Community Guidelines in connection with section 13.4 para. 3 of Community framework, which are however of no importance for the special situation of the advertising of regional products.

> "Where such publicly funded advertising activities refer to the national or regional origin of the products concerned, the advertising clearly favors certain products and therefore Article 87(1) may apply."[82]

All of these aids must be approved by the Commission in accordance with Art. 88 ECT in conjunction with Art. 87(3) ECT. The Commission prefers to refer to Art. 87 ECT as the legal basis - and at the same time as their requirements - of their certification policy. Accordingly, the following could be regarded as compatible with the common market:

> "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

In the view of the Commission, the experiences of the last decades have shown that the application of Art 28 and 87 ECT causes extreme difficulties in two spheres: advertising for regional origin and advertising for certain quality products. The Commission has for that reason given rise, in their Guidelines, to a detailed explanation of the certification policy in these two spheres.

a) Advertising of Origin

In the Guidelines the Commission gives a detailed comment on state advertising measures for products coming from regional cultivation, which have their origin as part of their sales message (section 4.1 Guidelines). The Commission distinguishes here between three different types of messages or statements: Advertising where origin is the primary message, advertising where origin is the secondary message, and advertising concerning traceability systems.

Advertising where origin is the primary message is regarded by the Commission as absolutely susceptible of being approved:

> "Advertising campaigns which encourage consumers to try these different products benefit the internal market and contribute to the development of the agricultural sector. Therefore, despite the fact that the primary focus of such campaigns is inevitably on the national or regional origin of the products concerned, the Commission takes a favorable view of them, provided certain conditions are met."[83]

Actually it would normally be the task of the Community Guidelines to systematize these conditions and/or requirements. Certainly by its use of mere vague statements the Commission is not clear as to whether all this is meant to be complied with alternatively or cumulatively:

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[82] Para.10 of the Community Guidelines for State Aid in advertising for the in Annex I of EC-Treaty named Products and certain not in Annex I named Products.

[83] Para. 37 of the Community Guidelines.

> "The objective of such campaigns should be to introduce consumers to products with which they are not familiar. Therefore, as a general rule, the campaign should be undertaken outside the Member State or region in which the agricultural and other products are produced. Unless appropriate explanations can be provided to suggest the contrary, publicly subsidized campaigns focused on the origin of the products and aimed at consumers residing in the Member State or region of production, who may be presumed to be familiar with the products concerned, would appear to be intended to reinforce possible existing preferences to buy local products, and would therefore be contrary to the common interest. This would not, however, be the case for advertising campaigns which are aimed at visitors to the Member State or region, and which encourage them to try local products, and possibly encourage them to visit local production facilities."[84]

All of this means that:

> "It is acceptable for such campaigns to include information about the objective characteristics of the products concerned, such as the ingredients used, the taste and texture of the product, or the method of production, e.g. animal welfare standards or biological production. However, they should not, subject to the guidance given in point 4.2, include subjective claims about the quality of the products. In essence, the focus of such a campaign should be limited to encouraging consumers or the trade to try the product, and leaving it to them to form a judgment as to its quality"[85].

The Commission has made it explicitly clear here that an all-inclusive advertising for regional products on its own merits (for its own sake) will be opposed. This restrictive starting point is grounded in the experience that the advantages of the internal market, namely to facilitate and to offer the consumer a wide variety of products, would be endangered if, because of state advertising, the consumers preferred domestic products without particular consideration to their quality(s), thereby putting products from other MSs at a disadvantage and/or potentially causing said products to be more expensive.

From the above mentioned advertising measures (origin as primary sales message), the Commission distinguishes state advertising in which origin is the secondary or subsidiary sales message. If the regional origin of the product is in content and form merely a subsidiary message, then there lies no violation of Art. 28 ECT (see above) within. To assess whether the origin is indeed a subsidiary message, the Commission will take into account the overall importance of the text or symbol referring to the unique selling point of the advertisement[86].

As third category where the origin is a part of the sales message, the Commission declares their policy for aid relevant to advertising in favor of traceability systems of origin of a product. General advertising campaigns, which remark on the fact that the retraceability has become obligatory regarding certain meat products on the basis of secondary EC law, are as such for the Commission capable of approval because they

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[84] Para. 38 of the Community Guidelines.
[85] Para. 39 of the Community Guidelines.
[86] Para. 40 and 41 of the Community Guidelines.

place no emphasis on the particular origin. However, the Commission views contrarily state advertising claiming that products of a certain origin, by reason of their traceability system, are something special:

> "claims that products of a certain origin are special because of the existence of a traceability system, when in fact they simply meet the relevant legislative requirements applicable to the marketing of all similar products concerned, may mislead the consumer, because they suggest that the product possesses special characteristics when in fact all similar products possess the same characteristics... In this case, the payment of aid for such campaigns cannot be considered to be in the common interest. However, information stemming from a traceability system may be integrated into a campaign in line with the principles on advertising where origin is the secondary message referred to in point 23."[87]

b) Advertising for Quality Products

Different from the above mentioned state funded advertising measures are those that serve to bring attention to agricultural products of a higher quality. According to the view of the Commission, state funded advertising for quality-control programs is effective in the attainment of a steady high quality level, in raising consumer confidence in community agricultural production, in bettering agricultural incomes, and in fostering the development for the agricultural sector as a whole. That means to do justice to Art. 33 ECT:

> "provided that the genuine purpose of such a strategy is to achieve a high standard of quality, and not to stress the national, regional or local origin of the products, the Commission takes a favorable view of such aid."[88]

The skepticism towards state advertising measures in favor of regional products is expressed once again clearly here:

> "National quality control schemes should be dependent solely on the existence of intrinsic objective characteristics which give the products the quality required or which concern the production process required, and not dependent on the origin of the products or the place of production. Irrespective of whether the quality control schemes are compulsory or voluntary, access to such schemes must therefore be granted to all products produced in the Community, irrespective of their origin, provided that they meet the conditions laid down ... Where the scheme is restricted to products of a particular origin ... the scheme itself is contrary to the Treaty, and it is self-evident that the Commission cannot consider aid for the advertising of such a scheme to be compatible with the common market."[89]

For the advertising in favor of regional products, that is to be assessed here, the certification policy of the Commission is especially important with regard to advertising aid in favor of products that are supplied with or holding a Community level registered

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[87] Para. 44 of the Community Guidelines.
[88] Para. 46 of the Community Guidelines.
[89] Para. 49 and 50 of the Community Guidelines.

protected designation of origin or geographical indication (section 4.2 of the Guidelines). As mentioned, it is possible for producers of agricultural or food products to apply for a protected designation of origin or geographical indication with the appropriate authority, provided that the respective product has special characteristics on the basis of its geographical origin. Regulation 2081/92/EEC of 14 July 1992 is competent for the geographical indications and designations of origin for agricultural and food products[90]. The appropriate designations and indications are then registered at the community level. Along with this registration, the Community recognizes that between the specific characteristics of the relevant products and their geographical origin there exists a close connection. In their Guidelines, the Commission comments on this as follows:

> "In such cases, therefore, the common interest does not oppose the granting of advertising aid and advertising which includes a reference to the origin of the product concerned, provided that the references to origin correspond exactly to those references which have been registered by the Community. Similar considerations apply to other designations of origin which are protected under Community legislation such as wines produced in specified regions..."

In order to ensure that aids are not being given to individual producers, the Commission will verify that all producers of the product covered by the PDO, PGI or, for products outside of the scope of Regulation (EEC) No 2081/92, the other protected designation of origin, are able to benefit from the aid in the same manner. This means that the advertising measures should relate to the PDO or PGI itself and not to any label or logo unless all producers of the PDO or PGI are entitled to use the label or logo in question. Similarly, where for practical reasons, aid is paid to a consortium of producers, the Commission will seek assurances that the aid will in fact benefit all producers, whether or not they are members of the consortium or not.[91]

The requirements are supplemented with non-discrimination for financing measures with which the national authorities intend to support, in favor of all community-wide protected designations of origin or geographical indications for a certain product type or for a typical regional product advertising measure. For this, the Commission wrote in the Guidelines as follows:

> "As an alternative to the advertising of individual PDOs or PGIs, a Member State may wish to finance a campaign for all PDOs or PGIs covering a particular type of product, or produced in a particular region. In such cases, the Commission will apply the guidance given in points 4.1 and 4.2 by analogy. In particular, the Commission will verify that excessive emphasis is not being placed on the national or regional origin of the PDOs or PGIs, that there is no express or implied claim that the PDOs or PGIs covered by the campaign are inherently superior to PDOs or PGIs from other Member States and that there is no disparagement of products from other Member States."[92]

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[90] OJ 1992 L 208/1, recently changed through Commission Regulation (EC) 2796/200 (OJ 2000 L 324/26).

[91] Para. 52 to 53 of the Community Guidelines.

[92] Para. 54 of the Community Guidelines.

3. Public Relation Campaigns

Not covered within the concept of "advertising" are - similar to the present regulation outline -certain other PR campaigns or promotional operations. The Commission understands under this idea of PR campaigns (generally and product specifically) measures with the intent of sales (turnover) promotion, such as the "dissemination to the general public of scientific knowledge" or the promotion of trade fairs and exhibitions as well as the participation therein.[93] Simply, paragraphs 13 and 14 of the Community Framework for State Aid in the Agricultural Sector [in accordance with section 2 (8) of the Guidelines] are in force for such measures for sales promotion.

Concerning the requirements for the permissibility of PR campaigns in accordance with Art. 28 ECT, it is stated in section 14.2 of the Guidelines that the campaigns are capable of benefiting all entitled natural and legal persons in the relevant area on the basis of objective and defined criteria.[94]

4. Summary

This overview already points out that the Commission, despite all the differentiations and distinctions, is primarily concerned with the functioning of the internal market and the requirements of the CAP. The marked restrictive base or starting point of the Commission is less apparent in their Aid Policy [Art. 87(3)(c) ECT]; rather, is prevalent above all else in their interpretation of Art. 28 ECT: Legal consumer protection interests are expressed only too insufficiently in the criterion; product- and product-focused environmental protection are completely omitted. This is baffling, in as much as precisely both of these points of view have moved toward the center of community interests in the course of the economic community development into a union[95] - and not least through the auspices of the Commission.[96]

Leaning single-mindedly toward the aims of free movement of goods, the Commission essentially hinges the permissibility of a measure on the following criteria:

- the action must be beneficial for the internal market,
- has to include all of the affected market operators,
- may not primarily refer to the origin of the product, and
- may not mislead the consumer.

It is quite obvious that, under these requirements, hardly any one advertising measure would be seen as in compliance with EC law within the aforementioned context.

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[93] See section 2 para 8 of the Community Guidelines and section 14.1 point 4 of the Community framework.

[94] Further requirements named there are only playing a role for the legality of aid, not in the framework of Art. 28 ECT.

[95] See below p. 47 ff. and 51 ff.

[96] For the development of the European Consumer-Protection Policy, see *Berg*, Gesundheitsschutz als Aufgabe der EU, 1997; for the European Ecological Policy see *Schmitz*, Die Europäische Union als Umweltunion, Entwicklung, Stand und Grenzen der Umweltschutzkompetenzen der EU, 1996.

Furthermore, whether the inclusion of environmental- and consumer protection, as well as the consideration of certain facts (e.g. whether the measures emphasize the regional and not national origin), would not lead to a different conclusion, will have to be examined.

The Commission is somewhat more generous in their aid policy. Based upon Art. 87 (3)(c) ECT, the Commission has developed a differential certification scheme, according to which state advertising is to be assessed upon, whenever it can be demonstrated that the goals of the CAP and of consumer protection can be served through its use.

Because, obviously, although an approval of state aid in favor of advertising measures for regional products does not come into consideration if this would offend against Art. 28 ECT, many advertising measures will fail not on Art. 87 but on Art. 28 ECT. For that reason, the state advertising of regional products and its compatibility with the principles of free movement of goods sits in the fore of the present examination.

C. Compatibility with Art. 28 ECT

Art. 28 is one of the most fundamental regulation tools for the common market. It states:

> „Quantitative restriction on imports and all measures having equivalent effect shall be prohibited between Member States."

The legality of state product advertising is to be measured directly with Art. 28 ECT, because the ban there, according to the steady case law of the ECJ, has direct and unrestricted effect in and on the MSs.[97]

I. Exclusion from Art. 28 ECT Via Special Community Laws

State advertising for regional products falls in the scope of Art. 28 ECT only provided that there have not yet been implemented in this area harmonizing measures.[98] Especially in the case of geographical indications of origin the question arises whether the advertising measures have been apprehended via all-including (total) EC secondary legislation. As total harmonizing measures the following come into consideration:

- the already mentioned EC Origin Regulation, in as far as it concerns the aid of regional products with protected designations of origin or geographical indications;

- the EC Trademark Regulation and the EC Trademark Directive, as far as the geographical indications of origin are protected in line with trademark law.

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[97] Since *ECJ* Case 26/62 – van Gend & Loos - ECR 1963, 1, 24; especially for the free movement of goods: *ECJ* Case 74/76 – Ianelli v Meroni - ECR 1977, 557, para. 13.

[98] See *Becker*, in: Schwarze (ed.), EU-Commentary, 1st Ed. 2000, Art. 28 ECT, para. 95 ff.

1. Geographical Indications of Origin

The use of geographical indications of origin is regulated in the EC primarily via the above mentioned "Council Regulation 2081/92/EEC of 14 July 1992 on the protection of geographical indications of origin and designations of origin for agricultural products and foodstuffs". It serves as the introduction of community rules on such indications and designations for agricultural and food products by which there exists a connection between the characteristics of the products and their geographical origin. According to the following rules, the Regulation plans for a system of registration of geographical indications and designations of origin on a community level, that offers protection in every MS:

Article 2(2) of the regulation contains the following general definitions of the terms indication and designation within the sense of the regulation:

- “a) ‘designation of origin’: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country, and

- the quality or characteristic of which is essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area;

- b) ‘geographical indication’: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or foodstuff:

- originating in that region, specific place or country, and

- which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.”

Article 2(4) states:

> “By way of derogation from Article 2 (a), certain geographical designations shall be treated as designations of origin where the raw materials of the products concerned come from a geographical area larger than or different from the processing area, provided that:

- the production area of the raw materials is limited,

- special conditions for the production of the raw materials exist, and

- there are inspection arrangements to ensure that those conditions are adhered to."

The first three subsections of Article 3(1) provide for the following:

> „Names that have become generic may not be registered.
>
> For the purposes of this Regulation, a 'name that has become generic' means the name of an agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff.
>
> To establish whether or not a name has become generic, account shall be taken of all factors, in particular:
>
> - The existing situation in the Member State in which the name originates and in areas of consumption,
> - the existing situation in other Member States,
> - the relevant national or Community laws."

Article 3(3) states:

> „Before the entry into force of this Regulation, the Council, acting by a qualified majority on a proposal from the Commission, shall draw up and publish, in the Official Journal of the European Communities, a non-exhaustive, indicative list of the names of agricultural products or foodstuffs which fall within the scope of this Regulation and are regarded under the terms of paragraph 1 as being generic and thus not able to be registered under this Regulation."

a) Legally (EC) Protected Designations of Origin and Geographical Indications

Provided that regional products are registered in the Official Journal of the European Communities (OJ) in accordance with the above Regulation - e.g. "Nürnburger Gingerbread" or "Spreewälder Pickled Cucumbers"[99] - such products may be protected via national rules (in Germany: § 130-136 Trademark Act).[100] Competitors whose products are not protected via the Regulation cannot refer to Art. 28 as a legal basis. The ECJ comments verbatim as follows:

> "In the present state of Community law, the principle of the free movement of goods does not preclude Member States from taking the measures necessary for the protection of names registered in accordance with

[99] „Nürnberger Lebkuchen" is one in line with the procedure according to Art. 17 Origin Regulation entered and protected geographical indication in the sense of Annex I of the Origin Regulation.

[100] *ECJ* C-87/97 – Gorgonzola v. Cambozola - ECR 1999, I-1301, para. 43.

> Regulation No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs."[101]

Obviously, this does not mean that state bodies may advertise for this community-wide protected regional product in the general media (e.g. with the slogan: 'Lübeck - the home of Lübecker Marzipan').[102] Such types of advertising in principle do not fall into the protective scope of the Regulation. As stated in Article 2(1) of the Origin Regulation, its purpose is primarily to introduce a registration rule on a community level so as to protect designations of origin and geographical indications of agricultural and food products. Accordingly, an advertising campaign for protected designations of origin and geographical indications may not mislead the consumer.[103] The reference to the origin of the product must match exactly the one which was registered at the community level. Because of this limited protection aim, the EC Regulation does not support any far-reaching advertising campaigns for regional products. In this respect, it all remains by the full application of Art. 28 ECT.

b) Unprotected (EC) Geographical Indications of Origin

For the use of geographical indications of origin that are not legally protected in an EC sense, § 127 of the German Trademark Act (MarkenG) is particularly valid.[104] § 127 (1) protects simple indications of origin, and § 127 (2) protects qualified indications of origin against their use for goods of a different origin.[105]

Word for word § 127 (1) MarkenG states:

> „Geographical indications of origin in commercial circulation may not be used for goods or services which do not come from the local, area or zone or from the land that via the indication is described, when by the use of such a name, indication or mark for goods or services of another origin there exists a danger of misleading concerning the geographical origin."

§ 127 (2) MarkenG reads as follows:

> "If labelled goods or services, through a geographical indication of origin, have special characteristics or quality, then the geographical indication of origin may only be used in commerce for the corresponding goods and services of this origin, when the goods and services show this characteristic or quality."

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[101] See *ECJ* C-87/97 – Gorgonzola v. Cambozola - ECR 1999, I-1301.

[102] „Lübecker Marzipan" is one of the in line with the process according to Art. 17 Origin Regulation entered and protected geographical indication in the sense of Annex I of the Origin Regulation.

[103] See Art. 13 para. 1 (c) Origin Regulation and *ECJ* C-362/88 – GB-INNO-BM - ECR 1990, I-667, para. 16.

[104] Protection can arise from regulations on the basis of § 131 MarkenG and from foodstuff type laws, in particular from the Weingesetz and the Lebensmittel- and Bedarfsgegenständegesetz. See fn. 17 above and Baumbach/Hefermehl (fn. 14), § 3 UWG, para.186.

[105] See above p. 9.

With the help of this protection for example, the designation "Solinger Stahlwaren" for cutting instruments from Solingen[106] or „Gerolsteiner“ for Mineral water from Gerolstein are preserved.

This poses the question whether the scope of the Origin Regulation also stretches to cover such indications of origin that come from the product sectors of agricultural or food products (in the sense of the Regulation). In this assessment there are three different case formats to be deciphered:

- First, the reach-scope of the Regulation becomes questionable, when a fundamentally registrable - meaning 'qualified' - indication of origin is not at all conveyed to the Commission for registration in the register-index.

- Secondly, the area of application (scope) of the Regulation is doubtful, when the indication of origin actually is applied for the entrance in the EC's legal register, but refused by the Commission.

- As third scenario, when an indication of origin comes into consideration that is per se not registrable, i.e. 'simple'.[107]

The Commission and some national governments have repeatedly expressed that the protection mechanism of the Origin Regulation is all-inclusive (total). This has as a consequence that indications that are not protected on a community level also may not receive protection on a national level.[108] So is it argued:

> "authorizing the maintenance, alongside Regulation No 2081/92, of national rules on the protection of geographical indications which do not coincide with the conditions for protection laid down by the Regulation would run counter to the very purpose of that regulation, which, according to its seventh recital, is to set up a Community system for the protection of geographical indications and designations of origin by replacing diverse national practices in that area with a framework of Community rules and a more uniform approach."[109]

According to Article 17 (3) of the Origin Regulation, a MS could grant a single-individual state protection for the Commission-communicated designations merely transitionally. From this it would be deduced not only that the geographic indication with a turned down registration attempt would not be nationally protected but, furthermore, that the non-communicated indications would become unprotected on a national level. National rules, which regulate the permissibility requirements for the

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[106] See *Beier/Knaak*, (fn. 37), p. 411. This indication of origin is special in that it is specified and protected from a transformation into a generic name by the „Verordnung zum Schutz des Namens Solingen” (Regulation for the Protection of the name Solingen) based on § 137 MarkenG, of 16 December 1994 (BGBl 1994 I, p. 3833). See *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 221; *Marx* (fn. 13), para. 163.

[107] See *Obergfell,* „Qualitätsneutrale“ geografische Herkunftsangaben als Schutzdomäne des nationalen Rechts – Zur Entscheidung des EuGH vom 7.11.2000 – Case C-312/98 (Warsteiner), in: GRUR 2001, p. 313, 314.

[108] See the Commission Communication of 9 October 1993 (OJ 1993 Nr. C 273, p. 4).

[109] That was the argument of the Greek Government in *ECJ* C-312/98 – Warsteiner - ECR 2000, I-9187, para. 48.

protection of such non-legally recognized (on EC level) marks or indications, would violate therefore the Origin Regulation.[110]

The ECJ is opposed to this view. The set objective of the Origin Regulation would be to guarantee a uniform protection of the geographical designations that are caught within it.[111] For that reason, the Regulation is not questioned because alongside the EC legal protection system there are national protection rules applied. The ECJ can be quoted as follows:

> "In that regard it must be observed, first, that the purpose of Regulation No 2081/92 cannot be undermined by the application, alongside that regulation, of national rules for the protection of geographical indications of source that do not fall within its scope.
>
> Second, Regulation No 2081/92 is intended to ensure uniform protection of the geographical designations which it covers within the Community, and it introduced a requirement of Community registration so that they could enjoy protection in every Member State whereas the national protection which a Member State confers on geographical designations which do not meet the conditions for registration under Regulation No 2081/92 is governed by the national law of that Member State and is confined to the territory of that Member State."[112]

The intended improvement of the legal standing of goods which carry a geographical indication of origin would actually be turned on its head if one would attach generally an exclusive right of protection for all indications of origin to the Regulation. For then this would mean the fall, for the majority, of the presently protected geographical indications of origin for agricultural and food products because these do not correspond to the 'qualified' requirements of the EC law.[113] These, in the spirit and purpose of the Regulation oriented interpretation, are upheld via their legislative history. In particular, the German government had insisted upon it, that the national protection system remain intact.[114]

The scope of the Regulation does not extend itself, after all of that, to cover geographical indications that are protected on a national or regional level.[115] Hence, Art. 28 ECT cannot be displaced by the Origin Regulation in this framework.

The same must hold when national authorities advertise for a product protected at the national level - for example by the call to buy preferential cutting knives with the symbol "Solinger Stahlwaren." Because for such a situation the Regulation provides for no rules, as a result of which limited protective scope, in view of advertising for EC

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[110] See the Commission in *ECJ* C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 27; See the Communication in OJ 1993 Nr. C 273, p. 4 and GA *Jacobs*, in *ECJ* C-325/00 – CMA -, final argument of 14 March 2002, para. 42.

[111] *ECJ* C-312/98 – Warsteiner - ECR 2000, I-9187, para. 49. See *Fezer*, Vorb § 130 MarkenG, para. 21 b. Similarily *ECJ* C-3/91 – Exportur - ECR 1992, I-5529, para. 28 and GA *Jacobs*, C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 28.

[112] *ECJ* C-312/98 – Warsteiner - ECR 2000, I-9187, para. 49-50.

[113] *Beier* (fn. 35), p. 79; *Feze* (fn. 12), Vorb. § 130 MarkenG, para. 21 a.

[114] See *v. Mühlendahl*, Der Schutz geografischer Herkunftsangaben in der Europäischen Gemeinschaft nach der Verordnung Nr. 2081/92 vom 24. Juli 1992, in: ZLR 1993, pp. 187, 196.

[115] See *Fezer* (fn. 12), Vorb. § 126 MarkenG, para. 10, § 127 MarkenG, para. 4, Vorb § 130 MarkenG, para. 11; *Beier/Knaak* (fn. 37), p. 602, 606.

legally protected geographical indications of origin, could suppress Art. 28 ECT. What's more then, the Regulation does not hold for the unprotected geographical indications of origin.[116]

c) Seals of Quality

It is doubtful whether also the allocation of the seals of quality that contain geographical references (e.g. the logo "Gutes aus Hessen" or "geprüfte Qualität-Bayern") are caught by the Regulation. One could argue that the Regulation catches the action, of which it forms the basis of the allocation of such labels-seals, indirectly. Thereby such seals of quality would be protected from improper use at the same time.

However, all this is to be disputed on the same grounds as '(b)' explained above.[117] The purpose of the Regulation, namely to bring a broader protection to PGIs, would generally be reversed if one regarded the Regulation as an excluding rule for the protection of all geographical references. National rules that protect seals of quality from improper use through an allocation procedure are therefore not caught indirectly from the content of the Regulation. The legality of their use is solely focused on Art. 28 ECT. The view of the German government, who should be regarded as a simple PGI with a geographical reference-supplied mark of quality, need not therefore be pursued here.[118]

d) Generic Names/Terms

The national regulation of generic names (e.g. "Ahler Worscht" or "Schwarzwälder Kirschtorte“) could likewise be prohibited by Art. 3 (1) of the Regulation. As mentioned, "Names that have become generic may not be registered."

The ECJ has denied in a similar type case, where the allocation of a seal "Monts de Lacaune" was carried, the existence of such a prohibition. Their opinion dealt with a product labelling that was too remote from the relevant subject matter of the Regulation, for it to have been able to be caught even indirectly.[119] The statement in "Monts de Lacaune" was:

> "although the name 'Monts de Lacaune' is the name of a specific mountain area and could accordingly be registered under Regulation No 2081/92 if the links between the characteristics of the product in question and that area were to fulfill the requirements of the regulation, such links are not necessary for obtaining authorization to use that name under the French legislation in question.“[120]

This argumentation applies equally to the issue of designations at hand. Also here it is not necessary for there to be a direct connection between their quality and/or

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[116] See above p. 289.
[117] See above p. 29.
[118] That was the view of Germany in *ECJ* C-325/00 – CMA -, decision of 5 November 2002, para. 26. See below p. 77 ff.
[119] See *ECJ* C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 37.
[120] See *ECJ* C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 39.

characteristics and their specific geographical origin.[121] National rules that take up the domestic production place, serve alone for the securing of quality without having to refer to the origin.[122] Therefore such rules cannot be forbidden directly by the Origin Regulation. Correspondingly, the scope of application for Art. 28 ECT is opened also for generic names.

e) Information/Data

In the event of a mere reference to the origin of the product in the sense of objective consumer information, the above discussed dilemma does not come into being from the outset. Because pure information falls neither as an indication or as a designation under Art. 2 (2) of the Regulation,[123] nor as simple or qualified designations of origin under § 126 MarkenG.[124] Their use forms the basis accordingly of no sovereignty procedure act in the above depicted sense, that could confer on the indication a protection which is not allowed by the Regulation. Rather, the objective information should merely serve as explanation to the consumers, from which region or local cultivation area the product comes from. Therefore a scrutiny by means of Art. 28 ECT via the Regulation is in this respect not out of the question, since the mere information about the origin of a product is affected.

2. Trademarks (TM)

If an advertising measure stands for a TM with regional reference (e.g. "Saxony: the land of Messner Porzellan"), the question arises, whether its examination under the EC TM Regulation and/or on the TM Directive is to be carried out as a lex speciales to Art. 28 ECT.

In parallel to the above worked-out resolution path,[125] concerning registered trademarks it can be answered as follows:

The EC Trademark Regulation provides for no rules regarding the permissibility of advertising of EC TMs. Like in Art. 1 (2) and the consideration grounds of this Regulation, the purpose primarily consists of introducing a registration rule on community level in order to protect EC legal trademarks. Correspondingly, an advertising action for EC registered TMs may not mislead the consumer.[126] The indication on the TM must also exactly match the one that was registered at the community level. The Regulation does not set up further requirements on the permissibility of advertising campaigns in favor of registered TMs with regional reference and as a result of its limited jurisdiction cannot set them up. In this respect it all remains within the permissibility criterion of Art. 28 ECT.

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[121] See *ECJ* C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 31.

[122] See GA *Jacobs*, in *ECJ* C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343, para. 30.

[123] See the legal definition of indication of origin and the protected geographical indication in Art. 2 para. 2 lit. a, b of the Origin Regulation and the explanation above p. 10 ff.

[124] See the definitions in § 126 (1) MarkenG and the explanation above p. 13.

[125] p. 28 ff.

[126] See Art. 9 para. 1 lit. (b) the Community Trademark Regulation and *ECJ* C-362/88 – GB-INNO-BM - ECR 1990, I-667, para. 16.

The same goes for the TM Directive which harmonizes partially the MSs' rules for the protection of TMs.[127] Because of its limited regulated subject matter, this Directive also contains hardly any handicaps, for the permissibility of advertising for the national level type protected TMs. Accordingly, state aid measures may not mislead the consumers, according to Art. 5(1)(b) of the Directive. On the basis of its limited regulation scope, the Directive is not all-inclusive. The further permissibility requirements are focused on and according to Art. 28 ECT.

If the state advertises for TMs that are protected neither on a community nor on national level, then a collision with EC secondary legislation-law is virtually not to be feared. That is why also the legality of the advertising according to Art. 28 ECT is to be examined here.

3. Summary

It can be held that Art. 28 ECT is replaced by the EC Origin Regulation only as far as the permissibility of the protection under §§ 130-136 MarkenG is affected.[128] Products which are distinguished with a PDO or a PGI according to these rules can be regarded as compatible with EC law.[129] The other products require an examination by means of Art. 28 ECT.

II. Addressees of the Prohibition against Advertising

Art. 28 ECT is focused principally only on the MSs. The ECJ has -unlike for example with personal freedoms - emphasized within the free movement of goods that Articles 28 and 29 ECT

> "refer only to state measures, and not to the behavior of enterprises".[130]

A violation against the free movement of goods can certainly not only take place by the corresponding handicap of the state body, but also when the behavior from private persons and their initiatives on the uninvolved state is ascribed to:

1. Sovereign Measures

The prohibition of measures with equivalent effect according to Art. 28 ECT unproblematically concerns state measures that are taken in practice by sovereign authorities. For reasons of practical effectiveness (effet utile) this is valid for all organs and bodies of MSs in the same manner, as well as for the executive, judicial and legislative.[131] For the national organization- and decision-making level it is not important.[132] Art. 28 ECT binds not only the direct but also the indirect state actors

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[127] See above p. 13.

[128] See for the permissibility of indications of origin and geographical indications before the enactment of the Origin Regulation *ECJ* 13/78 – Eggers - ECR 1978, 1935, para. 24 ff.

[129] See *Müller-Graff*, in*:* v. d. Groeben/Thiesing/Ehlermann (eds.), Kommentar zum EU-/EC-Treaty, 4 Bände, 5. Auflage, 1997-1999, Art. 30, para. 107.

[130] *ECJ* Case 311/85 - Vlaamse Reisbureaus -, ECR 1987, 3801, para. 29.

[131] See *Leible*, in: Grabitz/Hilf (eds.), Das Recht der Europäischen Union, Kommentar, 19. EL 2002, Art. 28 ECT, para. 5, 44.

[132] See *Becker*, in: Schwarze (fn. 98), Art. 28 ECT, para. 83.

including the communities and municipalities.[133] Just as well, the activities of a professional association are covered as state measures, provided that the Association has regulating authority over their members according to the law of the MS.[134] Following, administrative bodies consequently cannot evade being bound to the Community law through the particular choice of legal entity or type of regulation, when and on the whole they perceive the matter as a public task.

2 Assessment of Private Advertising Measures

State measures are to be distinguished from the activities of privates. Under the concept of private persons come not only natural, but also legal persons and further institutions of private law. If the activities of private persons limit the free movement of goods, then they are not to be measured on Art 28 ECT, but rather on the competition rules of Art. 81 and 82 ECT.[135] They are certainly viewed somewhat differently, provided the activities of a third party lead back to a state action or toleration or omission despite their formal non-state character.[136]

a) Through State Action

An assessment of private activities means that a private person acts, technically speaking, on its own, however while being guided by state authorities. Thereby the question arises whether one can speak of state influence, or whether the form and type of support is to be differentiated according to their intensity. The starting point of this consideration is the following ECJ case law:

In the decision "Buy Irish",[137] the Republic of Ireland, according to the ECJ, violated Art. 28 ECT in that it allowed a series of measures that were to serve as aid for Irish products. Also belonging to the aid was the use of the labelling "Guaranteed Irish" as well as the organization of an intricate advertising campaign. The fact that the measures were taken by a private council - Irish Goods Council - did not help Ireland's cause. It was enough that the Council was founded upon the initiative of the Irish government.[138] The government also appointed the members of the management committee, granted it public subsidies which covered the better part of its costs, and finally defined the aims and broad outline of the campaigns to be conducted.[139] Under these circumstances, the actions of the Irish government are to be classified:[140]

> „the campaign cannot be likened to advertising by private or public undertakings, or by a group of undertakings, to encourage people to buy goods produced by those undertakings. ... The advertising campaign to encourage the sale and purchase of Irish products cannot be divorced from

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[133] *ECJ* Case 53/76 - Bouhelier –, ECR 1977, 197, 203; *ECJ* Case 222/82 - The Apple and Pear Development Council –, ECR 1983, 4083, 4119 f.; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 5.

[134] *ECJ* Case 266/87 - Royal Pharmaceutical Society - ECR 1989, 1295, 1327 para. 15; *ECJ* Case C-292/92 - Hünermund - ECR 1993, I-6787, para. 14 ff.; *Becker*, in: Schwarze (fn. 98), Art. 28 ECT, para. 84.

[135] *ECJ* Case 311/85 - VVR v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten - ECR 1987, 3801, para. 30; *ECJ* Case 65/86 - Bayer et al v. Süllhöfer - ECR 1988, 5249, para. 11 - 13.

[136] *Becker,* in: Schwarze (fn. 98), Art. 28, para. 86.

[137] *ECJ* Case 249/81 - „Buy Irish“ - ECR 1982, 4005 ff.

[138] See para. 24 of the judgement.

[139] Para. 15 of the judgement.

[140] See *ECJ* Case 249/81 - „Buy Irish“ - ECR 1982, 4005, para. 29.

> its origin as part of the government program, or from its connection with the introduction of the "guaranteed Irish" symbol and with the organization of a special system for investigating complaints about products bearing that symbol"[141]

The decision "Apple and Pear Development Council"[142] dealt with the issue whether the activities of a legislative body for the promotion of apple and pear products, primarily the implementation of a campaign for certain typical English and Welsh varieties, violated Art. 28 ECT. According to the opinion of the ECJ, the Council was established via a national decree and was made up of minister-appointed members and was financed via a contribution which the Parliament, according to the decree, levied on all English and Welsh local apple and pear producers. According to the ECJ:

> "a body such as the Development Council, which is set up by the government of a Member State and is financed by a charge imposed on growers, cannot under Community law enjoy the same freedom as regards the methods of advertising used as that enjoyed by producers themselves or producers' associations of a voluntary character."[143]

In their latest decision, "CMA",[144] the ECJ followed the above mentioned line further. The following holding formed the basis of this: there was set up a fund established on the basis of a law, the AFG, a public body, for the promotion of the marketing and exploitation of the German agricultural and food products, whether nationally or abroad. According to the AFG, the one organ of the fund, the board of directors, was to be appointed with the help of various community organizations by the federal government of Germany. The other organ, the management, was appointed via motion of the board by the relevant German Minister. To facilitate the accomplishment of its objectives, the fund was financed by a compulsory contribution by all the undertakings in the sectors concerned. The contributions were intended to be used exclusively to further the interests of the contributors.

According to the AFG, the fund used for the accomplishing of its tasks a private institution which was set up as a private company, the Centrale Marketing-Gesellschaft der deutschen Agarwirtschaft (CMA). The articles of association of CMA called for it to promote the sales and commercialization of the products of the German agricultural and food sector with financing from the fund. The CMA was also to observe the regulation that was given by the fund and that stated that the Manager of the fund was to oversee the activities of the CMA as well as the financial capital.

According to the articles of association, the CMA awarded a quality label which enables the mark "Markenqualität aus deutschen Landen“ (brand name quality from German regions) and the corresponding "CMA" label to be affixed to the products concerned. On the application of an agricultural or food company, that label is awarded to products satisfying certain quality requirements set by the CMA. The latter constantly verifies, with the help of independent laboratories, the use of its label for

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[141] *ECJ* Case 249/81 - „Buy Irish“ - ECR 1982, 4005, para. 23 f., 26.
[142] *ECJ* Case 222/82, ECR 1983, 4083 ff.
[143] *ECJ* Case 222/82 - Apple and Pear Development Council - ECR 1983, 4083, para. 17. Also *ECJ* Case 302/88 - Hennen Olie - ECR 1990, I-4625, para. 16.
[144] *ECJ* Case C-325/00 - CMA -, decision of 5. November 2002.

products made in Germany, whether they are made from raw materials produced in Germany or imported. When the CMA has verified that an undertaking's products fulfill the conditions for the grant of its label, it concludes a license contract with the undertaking.

Looking at the advertising activity of the CMA, in particular through the awarding of quality labels, the ECJ ascertained:

> "Such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character. ... Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme, open to all undertakings of the sectors concerned, which can have effects on intra-Community trade similar to those arising under the scheme adopted by the public authorities."[145]

After all this, an assessment of private activity could fundamentally already take place, if the measures undertaken by a private institution work themselves out as state regulations concerning intra-Community trade.[146] Whether this is the case or not must be ascertained by way of an examination. To be scrutinized for these purposes are the legal foundations, the leadership, and the functions and the financing of the private institutions.[147]

b) Through Omission to Act

Article 28 ECT forbids not only measures that are traceable to active state behavior but the rules can also be exercised whenever a MS takes no measures to combat disturbances of the free movement of goods, whose causes are to be traced back to the actions of private persons,[148] because the free movement of goods imposes on the MSs action and omission obligations to put aside all hindrance for the internal market and to not erect any new ones, respectively. Moreover, Art. 28 and Art. 10[149] in combination impose also a prevention rule that obliges the MSs to take up in their jurisdiction any necessary and suitable measures[150] to insure the observance of the free movement of goods.[151]

> "The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free

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[145] *ECJ*, Case C-325/00 - CMA -, decision of 5. November 2002, para. 18.

[146] See *ECJ* Case C-325/00 - CMA -, decision of 5. November 2002, para. 18.

[147] See GA *Jacobs*, *ECJ* Case C-325/00 - CMA - final argument of 14. March 2002, para. 13.

[148] *ECJ* Case C-265/95 - Commission v. France - ECR 1997, I-6959, para. 30. See as example *Streinz*, Europarecht, 5. Ed. 2001, para. 709; *v. Bogdandy*, in: Grabitz/Hilf (fn. 131), Art. 5 ECT, para. 24.

[149] Art. 10 ECT contains a special rule which exceeds the principle of public international law according to which a state can be held responsible for the behaviour of private persons only in cases of disregard of the so-called due diligence obligation. See AG *Lenz*, in *ECJ* Case C-265/95 - Commission v. France - ECR 1997, I-6959, para. 38 f.

[150] It must not be required, that „a Member State guarantees a certain result, here the free movement of goods (...). It is at least required however that it would undertake the necessary steps for the infrastructure of the accomplishment of the goals.“, AG *Lenz*, to *ECJ* Case C-265/95 - Commision v. France - ECR 1997, p. I-6959, para. 45.

[151] *ECJ* Case C-265/95 - Commision v. France - ECR 1997, I-6959, para. 32.

movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act."[152]

From this explanation it follows that a state omission already then is to be legally valued or assessed just as much as pro-active conduct, if it offends the legal duty to act from Art. 10 ECT and which therefore could lead to possibly one of the basic freedoms being obstructed seriously and more than just temporarily.[153] In this respect, any behavior of private persons justifies the assessment - with its objective intended on state action - in fulfillment of the contents of Art. 28 ECT.[154] It holds somewhat differently only when a MS has taken all of the suitable precautions to secure the full and effective application of EC law in the interests of all economic operators, or at least as far as the MS detects that its activity would have results on the public order with which it could not cope by its means.[155]

3. Consequences

Transferred on to the advertising for regional products, it is to be assumed that the ECJ, in case of doubt, would regard such advertising measures a state measures. The following can be said in detail:

All of the above named aid tools are to be qualified as sovereign acts, provided that the respective act from a sovereign body itself is implemented - like for example in the case of particular state recommendations or advertising campaigns. The circumstance that the sovereign body sets merely the first cause while the purchase decision itself deals with the own free will of the consumer is thereby without importance. After all, it was the sense and purpose of the state action to guide the behavior of the consumer.[156]

The same goes for the practice of commercial copyright-protective rights via private persons in favor of GIs that are displayed on a product. Such indications befit alone a sales promoting effect, because they are protected by means of sovereign acts against improper use.[157] The protection is brought about by the legal rules of the MSs,

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[152] *ECJ* ibid., para. 31.

[153] See *Schwarze*, Zum Anspruch der Gemeinschaft auf polizeiliches Einschreiten der Mitgliedstaaten bei Störungen des grenzüberschreitenden Warenverkehrs durch Private, Urteilsanmerkungen, in: EuR 1998, p. 53, 54; *P. Karpenstein/U. Karpenstein*, in: Grabitz/Hilf (fn. 131), Art. 226 para. 21. These thoughts are based on *ECJ* Case C-52/95 - Commission v. France - ECR 1995, I-4445, para. 31 and para. 39 and on the final argument of GA *La Pergola,* in *ECJ* Case C-16/94 - Garonor - ECR 1995, I-2421, para. 9 f.

[154] See final argument of AG *Jacobs* of 11. July 2002 in Case C-112/00 - Firma Eugen Schmidberger v. Austria - para. 84 ff.; *Meurer*, Verpflichtung der Mitgliedstaaten zum Schutz des freien Warenverkehrs, in: EWS 1998, p. 196, 197 f.

[155] See *ECJ* Case C-265/95 - Commission v. France - ECR 1997, p. I-6959, para. 56; AG *Fennelly,* in *ECJ* Case C-52/95 - Commission v. France - ECR 1995, I-4445, para. 32.

[156] See *Becker*, Der Gestaltungsspielraum der EG-Mitgliedstaaten im Spannungsfeld zwischen Umweltschutz und freiem Warenverkehr, 1991, p. 60 f.; *Gornig/Silagi*, Vom Ökodumping zum Ökoprotektionismus, Umweltzeichen im Lichte von EWG-Treaty und GATT, in: EuZW 1992, p. 753, 756. See also *ECJ* C-120/95 – Decker - ECR 1998, I-1831, para. 27.

[157] See *Müller-Graff*, in v.d. Groeben/Thiesing/Ehlermann (fn. 127), Art.30, para. 148 ff., 290, 302.

existing via § 128 MarkenG. Even if the holder must validly make and use his protective right, this changes nothing about the state origin of the measure.[158]

If a private undertaking carries on the advertising, an evaluation via a positive action must then take place, when the state - despite fundamental independence of the undertaking-retains a certain amount of control over the institution or body.[159] This is all judged according to factors like the controlling influence or the potential of the public hand being able to issue binding instructions to the institution-body, or the property, or on the financial involvement, on the - administrative or legal - independence from the public hand or the appointing of the members.[160] On the other hand it is to be put down whether the state possibly is trying to remove any responsibility that is imposed on it from the rules of the EC Treaty via an escape into private law.[161]

Under these requirements, the advertising activity seems to go at first glance with the state, regardless of whether the basis of a sovereign rule has been formed or whether, on the basis of private law, agreements with the relevant economic players have taken place - e.g. by the allocation of quality marks-seals.[162] The individual MS has the burden to cast off this first impression. This has - as far as is known - not yet happened.

An assessment on the basis of state omission could be advisable according to the above mentioned in 'b.)'[163] when private advertising actions are carried out that possibly disturb the free movement of goods. Certainly one must consider that it thereby regularly concerns a permissible improvement of the competition situation.[164] Commercial advertising is as a Community basic right protected according to Art. 10 (1) ECHR[165] and Art. 11 (1)-(3) of the basic charter, even though for the time being non-binding. The relevant state, on whose territory the advertising campaign takes place, cannot then be obliged to intervene according to Art. 10 ECT. Such an action would be not caught within the protection purpose of the basic freedoms.

From there the principles, installed by the ECJ,[166] at least in the existing case are, in a limited way, to be put into concrete terms.[167] Related to the punishable actions of the French farmers,[168] according to national law, it is suggestible that state protection

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[158] See ECJ C-3/91 - Exportur - ECR 1992, I-5529 ff.; see also *Leible*, in: Grabitz/Hilf (Note 129), Art. 28 ECT, para. 6.

[159] See ECJ C-188/89 -Foster et al - ECR 1990, I3313, para.20.

[160] ECJ Cases 67/85, 68/85 and 70/85 - Van der Kooy - ECR 1988, 219, para.36.

[161] *ECJ* Case 249/81 - „Buy Irish" - ECR 1982, 4005, para. 15. See also *ECJ* Case C-120/95 - Decker - ECR 1998, I-1831, para. 27.

[162] See *ECJ* Case C-16/94 - Garonor - ECR 1995, I-2421, para. 20; AG *Jacobs*, to *ECJ* Case C-325/00 - CMA -, final argument of 14. March 2002, para. 23.

[163] p. 37 f.

[164] *Meurer* (fn. 154), pp. 196, 198.

[165] *ECHR*, Series A, vol. 90, p. 20, quote 40 ff. - Barthold v. Germany; *ECMR*, Series A, vol. 165, p. 17 - markt intern v. Germany. See also *Frowein/Peukert*, Europäische Menschenrechtskonvention, EMRK-Kommentar, 2. Ed. 1996, Art. 10, para. 9.

[166] *Meurer* (fn. 152), p. 196, 198 ff. argues for a general restriction.

[167] See *Becker*, in: Schwarze (fn. 98), Art. 28 ECT, para. 86.

[168] *ECJ* Case C-265/95 - Commission v. France - ECR 1997, I-6959 ff.

duties are to be undertaken in case of forbidden or unfair advertising alone.[169] For the taking up of this idea one must look to the specific protection purposes of the free movement of goods. Only when private persons hinder the market access for foreign products in an unlawful way through their advertising must the state intervene according to Art. 10 ECT.[170]

The question arises under which conditions are the laid-out boundaries exceeded. An advertising strategy then undoubtedly exceeds the scope of the Community legally protected freedom to advertise, according to the case law of the French farmers, when it:[171]

- Concerns a broadly calculated methodical campaign from partly-organized private persons,

- Lasts a long time or is regularly repeated,

- Goes far over the normal amount of extolling of certain products,

- Poses from the start a recognizable serious danger for the free movement of goods.[172]

If the state in such a situation takes no or clearly unsuitable counter-measures, it must address the interference caused by private persons, provided that the state does not concretely detect that its potential-activity would have consequences for the public order that it with its means could not cope with.[173]

All state of affairs that are situated lie within this extreme situation - especially marketing aid activities of bio-movements, for example ecological producer mergers,[174] marketing initiatives,[175] or associations[176] - are to be judged according to the particular circumstances of the individual cases.

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[169] See also *Szczekalla*, Grundfreiheitliche Schutzpflichten - eine „neue" Funktion der Grundfreiheiten des Gemeinschaftsrechts - zugleich Besprechung of *ECJ* decision of 9. Dezember 1997 - Case C-265/95 (Kommission/Frankreich), in: DVBl. 1998, 219, 224.

[170] See *Meurer* (fn. 152), p. 196, 199 f.

[171] *ECJ* Case C-265/95 - Commssion v. France - ECR 1997, I-6959 ff.; see above p. 46 f.

[172] Similar *Kühling*, Staatliche Handlungspflichten zur Sicherung der Grundfreiheiten, in: NJW 1999, p. 403, 404. 42.

[173] *ECJ* Case C-265/95 – Commission v. France - ECR 1997, I-6959, para. 56.

[174] For example BIOPARK in Mecklenburg-Vorpommern.

[175] See for example the regional marketing initiatives „Rhön/Vogelsberg" and „Brücker Land" and the „Ökoregion Vorpommern".

[176] See for example the BUND.

III. Measures having Equivalent Effect

State advertising campaigns in favor of regional products fall normally under the aid concept of Art. 87 (1) ECT. That does not mean that a MS measure, that can be seen as aid, is clear from Art. 28's prohibition.[177] Art. 28 and Art. 87-89 ECT have namely no coinciding application scope. The rules of free movement of goods grant direct rights that have effect before the national courts and authorities. However, the rules concerning the control of state aid are only partly directly applicable.[178] Accordingly, a measure of equivalent effect can also then exist when it constitutes at the same time an aid according to Art. 87 (1) ECT.

According to Art. 32 (1) ECT, the common market covers also agriculture and the trade of agricultural goods. The rules for the free movement of goods are valid, hence, in accordance with Art. 32 (2) ECT, in principle also for agricultural products. Art. 34 (1) ECT certainly provides for the establishment of the common market for agricultural products through a common organization of the agricultural markets, which pursues the aims of Art. 33 ECT and can provide for special measures especially according to Art. 35 ECT. According to Art. 32 (2) the rules of Art. 28 ECT are valid for agricultural products only in as much as, in Art. 33-38 ECT, nothing is written to the contrary.[179]

1. „Dassonville"-Formula

Under measures of equivalent effect, in the sense of Art. 28 ECT, are according to the "Dassonville" formula of the ECJ:

> "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[180]

a) Trading Rules

Despite the use of the term "trading rules", a somehow natured compulsory effect of the state behavior is not essential. Not only are legal and administrative rules caught, but also administrative procedures, non-binding recommendations and pure moral suggestions as well as all other state activity, that can lead to a disturbance of the free movement of goods.[181]

Certainly Art. 28 ff. ECT forbids a sovereign body

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[177] *ECJ* Case C-351/88 - Laboratori Bruneau v. Unità sanitaria locale - ECR 1991, I-3641, para. 7.; *ECJ* Case C-21/88 - Du Pont de Nemour Italiana SpA v. Unità sanitaria locale - , ECR 1990, I-889, para. 20 f.; *ECJ* Case 249/81 - „Buy Irish" - , ECR 1982, 4005, para. 18; *Wallenberg*, in: Grabitz/Hilf (fn. 131), Art. 92 ECT, para. 90; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 176, 344.

[178] See *Bär-Bouyssière*, in: Schwarze (fn. 98), Art. 87 ECT, para. 15.

[179] See in detail *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 146; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 52.

[180] *ECJ* Case 8/74 - Dassonville - ECR 1974, 837, para. 5.

[181] *ECJ* Case 249/81 - „Buy Irish" - ECR 1982, 4005, para. 27 and 28; see also *Epiney*, in: Callies/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 44; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 5.

> „neither, in the framework of its activity to emphasize the special quality of the domestic member state cultivated fruit, nor to organize campaigns for the support of the sale of certain types of fruit with reference to their special features, even if the varieties are typical for the domestic production…"[182]

Therefore, a MS is allowed to advertise "special quality" and "special features" of a product. As explanation of this concept the ECJ stated,

> "Such standards and designations - unlike the position in the case of registered designations of origin and indications of origin - are not linked to a requirement that the production process for the products in question be carried on within the country but are dependent solely on the existence of the intrinsic objective characteristics which give the products the quality required by law. A presumption of quality which is linked to a requirement that the whole or part of the production process should take place on national territory, thereby restricting or treating unfavorably a process some or all of the phases whereof are carried out in other Member States is, always excepting the rules relating to registered designations or origin and indications of origin, incompatible with the common market."[183]

It all then depends on a certain product distinguishing itself through "objective internal features" in its quality or characteristics from similar products. Which raises the question whether the regional origin of a good also belongs to these above mentioned features. The ECJ has at least clearly given a thumb down to the national localization of a certain production level. However, nothing else can count for the linking on the production in a certain region. Because only such a feature is to be regarded as "objectively" available when such feature depicts, for every notified third party, a plausible reason for the distinction. We can only talk about an "internal" feature when the product brings to itself, by its nature, a peculiarity like for example its taste or its form. The sole fact that a product comes out of a certain region cannot objectively be the basis of special quality. The reference to a certain region as external factor is not a peculiarity that the product shows of itself. Hence, the regional origin of a good is not the "objective internal feature" of a good or product.

Not to be treated as "trading rules" are the measures, that are to be assessed under Art. 87 (2) ECT for qualification as aid, in as much as they would otherwise undermine Art. 87 (2) and (3) ECT.[184] This arises out of the fact that the compatibility with Art. 28 ECT is a fundamentally[185] necessary requirement for the compatibility according to Art. 87 (2) and (3) ECT. [186] In a reverse argument it can be concluded that the permissibility of an aid regularly also would mean permissibility before the background of Art. 28 ECT.[187]

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[182] *ECJ* Case 222/82 - Apple and Pear Development Council - ECR 1983, 4083, para. 33, p. 4128, quote 1 b) of summary; see also p. 4120, para. 19 and 21.

[183] *ECJ* Case 13/78 - Eggers - ECR 1978, 1935, para. 25 and para. 24; see also *ECJ* Case C-321/94, C-322/94 and C-324/94 - Pistre - ECR 1997, I-2343, para. 50.

[184] See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 176 and 342.

[185] An exception exists because of the „de minimis"-aid below the threshold of Art. 2 der Regulation (EC) Nr. 69/2001 of 12. January 2001 on the use of Art. 87 and 88 EC-Treaty for „de minimis"-aid (OJ 2001 L 10, p. 30 ff.).

[186] See *Bär-Bouyssière*, in: Schwarze (fn. 98), Art. 87 ECT, para. 15.

[187] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 49.

b) Trade Barriers

A measure then already comes into the scope of Art. 28 ECT when it is capable of restricting the intra-Community trade. The question whether the restricting effect actually occurs, or whether it is noticeable, is not important.[188] Unlike aid-subsidy law, Art. 28 ECT has no minimizing boundaries.[189]

Since the standardizing decision "Cassis de Dijon" it is settled that under Art. 28 ECT not only such national rules come in that directly discriminate against products of other MSs, but also rules which indiscriminatingly apply to domestic and member state products as long as these can impede the boundless movement of goods.[190] The consequence of this case law is that henceforth every good that finds itself legally marketed in one MS must be allowed to circulate in all other MS markets as well.[191]

Against this background campaigns fall out of the scope of Art. 28 ECT, where one MS puts its local goods into the sovereign territory of another MS. They are not capable of disrupting the common market; rather, they have an opposite effect which is beneficial for the common market.

One wonders whether the same goes for advertising campaigns in bordering areas. If the German region of North Rhine-Westphalia, for example, would advertise for the purchase of products that were produced within a maximal 200 kilometer radius of the respective place of residence, so this can potentially be sales-promoting for NRW goods as well as for goods from its neighboring German regions, and then also good for such goods from Belgium and Holland. Thereby the inter-state trade could even be strengthened. Certainly, the border region of each neighboring MS would be affected by a possible trade intensification. The remaining sovereign territories, as well as the other MSs, are not only excepted from this, but eventually even negatively affected. The possibility alone that an essential part of the intra-Community trade would be disturbed is enough, however, for the application of Art. 28 ECT. For this reason, advertising campaigns in border areas are potentially capable of hindering the free movement of goods.[192]

2. „Keck"-Jurisdiction

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[188] See *ECJ* Case 104/75 - De Peijper - ECR 1976, 613, para. 12/13; *ECJ* Case 249/81 - „Buy Irish" - ECR 1982, 4005, para. 25.

[189] See *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 15. See also final arguments of AG *Jacobs* of 11. July 2002 in Case C-112/00 - Firma Eugen Schmidberger Internationale Transporte et al. v. Österreich -, para. 65; „Generally there is no de-minimus rule for Article 28 ECT. As I had the chance to explain, the ECJ had affirmed the possibility that some restrictions have too unknown and indirect effects, other than was originally intended, to hinder trade. In my opinion they can be so insignificant and of such short duration that they fall in the same category." See similar *Sack*, Staatliche Werbebeschränkungen und die Art. 30 and 59 EC-Treaty, in: WRP 1998, p. 103, 116 f.

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

[191] For the substition of the principle of indication by the principle of the land of origin see *Dauses*, Die Rechtsprechung of the EugH zum Verbraucherschutz und zur Werbefreiheit im Binnenmarkt, in: EuZW 1995, p. 425; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 190 f.

[192] See *ECJ* Case C-254/98 - Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass - ECR 2000, I-151, para. 27; *ECJ* Case C-1 and 176/90 - Aragonesa de Publicidad Exterior and Publivía - ECR 1991, I-4179, para. 24; *ECJ* Case C-67/97 - Bluhme - ECR 1998, I-8033, para. 20; AG *Jacobs*, to *ECJ* Case C-325/00 - CMA - final argument of 12. March 2002, para. 29 with reference to *ECJ* Case C-321/94, C-322/94 and C-324/94 – Pistre - ECR 1997, I-2343 ff.

According to the „Keck“ decision, national rules that touch on certain modes of sale (selling arrangements) are compatible with Art. 28 ECT,

> “so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”[193]

Within the concept of selling arrangements come sales-related rules and not-production-related rules.[194] With the formulation “legally like actually” the ECJ meant measures which have the same effect on sales of domestic and imported products.[195] An application of Keck covers measures that, in a general way, touch upon the economic activity of a home MS market to insure that market access for non-domestic EC products is not more restricted than for those of the home market.

In the case of support of regional products, the sale of imported goods from other MSs can be disadvantaged exactly the same as goods from different parts of the same MS. Thereby, the market access for domestic and imported products are potentially equally hindered. Certainly, the advertising in favor of regional products does not fundamentally refer to the domestic economic activity in a general way. It touches also even domestic products from other regions. In essence and typically the other MS suppliers are also affected.[196] Therefore, such regional advertising measures are indirectly discriminating. The legal foundations of Keck have no application to them.

3. Consequences

Concerning state advertising for regional products it is, after all of this, clear that this - subject to a justification from superior interests - regularly violates against Art. 28 ECT. For all instruments of aid there exist valid (but unspectacular) exceptions merely in the case of a state-aid certified campaign, in accordance with Art. 87 and 88, as well as in the case in which a MS extols domestic products on the market of another MS. In detail, the following goes for the various advertising tools:

a) Geographical Indications of Origin (GI)

For simple and qualified GIs, like for example the „Regensburger Würstchen“ or the „Rhöner Wurst“ (sausage), § 127 (1) und (2) MarkenG prohibits such producers, who outside of the relevant locality produce goods of the same sort, from using such labels or labelling. If a market operator markets a product in violation of these rules, he can be held accountable for omission according to § 128 (1) MarkenG in combination with § 13 (2) UWG. The state protection of commercial exclusivity brings with it that this

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[193] *ECJ* Case C-267 and C-268/91 - Keck and Mithouard - ECR 1993, I-6097, para. 17; see also *ECJ* Case C-292/92 - Hünermund - ECR 1993, I-6787, para. 21 ff.; *ECJ* Case C-69 and C-258/93 - Punto Casa Spa v. Sindaco del Comune de Capena et al -ECR 1994, I-2355, para. 12 ff.; *ECJ* Case C-34-36/95 - De Agostini - ECR 1997, I-3843, para. 40.

[194] See *Kessler*, Das System der Warenverkehrsfreiheit im Gemeinschaftsrecht - Zwischen Produktbezug und Verkaufsmodalitäten, 1997, p. 94 ff.; *Streinz* (fn. 148), para. 733.

[195] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 28.

[196] See AG *Jacobs*, to *ECJ* Case C-325/00 - CMA - final argument of 14. March 2002, para. 29 with reference to *ECJ* Case C-321/94, C-322/94 and C-324/94 - Pistre - ECR 1997, I-2343 ff.

protection can be focused also against importation.[197] Although the products that are supplied with qualified GIs are from a special quality, there can be still be no discussion of the availability of an "objective internal feature" in the sense of the above mentioned case law.[198] This is because it is not allowed to give any reference to a domestic production location, which contrarily is exactly the case with indications of origin. The existence in the sense of § 127 MarkenG as well as the exercise of the right of protection according to § 128 MarkenG are accordingly tied to potential effects on the intra-Community trade with the consequence that the rules constitute measures having equivalent effect in the sense of Art. 28 ECT.[199] The Keck decision did nothing to change any of this.[200] § 127 (f.) MarkenG is formally indiscriminatingly applicable. The producers from other MSs are however actually more strongly affected by the "localization prohibition" than their domestic counterparts.[201] Imported products are completely locked out of the use of indications of origin. The discrimination-in-fact stands in contradiction to the foundations of Keck.

This result is confirmed through Art. 30 ECT, which allows an exception for the protection of indications of origin as an aspect of intellectual property. From there arises that MS rules, that offer protection to indications of origin, do not escape the application scope of Art. 28 ECT.[202]

Accordingly, the same goes for generic names like „Rügenwalder Teewurst"[203] (spread sausage) or „Berliner Pfannkuchen"[204] (pancake). A MS violates Art. 28 ECT when it reserves indications for regional products via legal provisions that can be used for the indication of products with arbitrary origin, and thereby forces undertakings in other MSs to use unknown or less respected indications.[205]

b) Seal of Quality

The allocation or awarding rules that form the basis of the seal of quality like for example the "Thüringer Öko-Herz" (eco-heart) can constitute measures of equivalent effect according to Art. 28 ECT, when they reserve the use of the logos to the region and/or to products that were cultivated, produced, prepared or packaged with regional raw materials.[206] Thereby, so that the quality of the relevant products can be expressly connected with the regional origin nationwide, the measures can give the impression that regional and thereby German products are supposed to be of better quality than others. They profit from the positive portrayal which can tempt the consumer to buy

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[197] *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 148 ff.

[198] See above p. 42 f.

[199] *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, quote 7 of Summary. See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 106; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 6.

[200] *ECJ* Case C-267 and 268/91 - Keck and Mithouard - ECR 1993, I-6097, para. 17.

[201] *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, quote 5 of summary.

[202] See *Becker*, in: Schwarze (fn. 98), Art. 28 ECT, para. 71.

[203] See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 108.

[204] *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 218.

[205] See *ECJ* Case 12/74 - Sekt/Weinbrand - ECR 1975, 181, para. 14; *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 29.

[206] See *ECJ* Case C-321/94, C-322/94 and C-324/94 - Pistre - ECR 1997, I-2343, para. 49; *ECJ* Case 13/78 - Eggers - ECR 1978, 1935, para. 25.

exclusively regional products and no imports.[207] The regional reference rules out that the stamp of quality refer to "objective internal features" in the sense of the above mentioned case law.[208] Seals of quality with regional reference are therefore are at least potentially capable to foster the purchase of only regional products and thereby domestic products.[209]

Nevertheless, the quality labels could be compatible with Art. 28 ECT if and when they pursue a national quality policy.[210] A violation of Art. 28 ECT is however to be determined by means of the effects of the measures on trade, and not by means of the aims that the MS had pursued.[211] The fact that the use of a quality label may have been optional changes nothing.[212] Decisive alone is whether the use of the indication can aid or further the sale of the products in question.[213] However, that is to be affirmed according to the above. That is why seals of quality are not compatible with Art. 28 ECT.

Because it locks out such allocation rules, that others as regional and/or especially foreign products can fulfill the requirements, from which the certification for the use of the quality label is dependent, is an exception in the sense of the "Keck" principles not foreseen.

c) Other Types of Aid Measures

For the same reasons also other aid measures collide - that begin with the statement „regionale Qualität" via recommendations, trade fairs and markets as well as information and data - with the free movement of goods. It goes somewhat differently for the sovereign body that extols a product in a general way without reference to the national origin. In this case the MS advertises "objective internal features", a behavior that does not fall within the concept of 'measure' in the sense of Art. 28 ECT.[214] The same goes for campaigns in which the state highlights certain features or types of products and does not separately point to the national origin of the product, or with those where the state extols the product with reference to the importance of a varied and balanced nutritional diet. These principles are valid then even when the advertised goods are typical for the national products.[215]

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[207] In this sense *ECJ* Case C-325/00 - CMA -, decision of 5 November 2002, para. 23; *ECJ* Case 249/81 - „Buy Irish" - ECR 1982, 4005, para. 29; *ECJ* Case 222/82 - Apple and Pear Development Council - ECR 1983, 4083, para. 18.

[208] P. 42 f.

[209] *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 109.

[210] Thus the argument of the German government in *ECJ* Case C-325/00 - CMA - decision of 5 November 2002.

[211] See *ECJ* Case C-325/00 - CMA - decision of 5. November 2002, para. 25.

[212] So however the German government in *ECJ* Case 13/78 - Eggers - ECR 1978, 1935 ff. and in *ECJ* Case C-325/00 - CMA -, decision of 5. November 2002.

[213] *ECJ* Case 13/78 - Eggers - ECR 1978, 1935, para. 26; *ECJ* Case C-325/00 - CMA - decision of 5 November 2002, para. 24.

[214] See above p. 42 f.

[215] *ECJ* Case 222/82 - Apple and Pear Development Council - ECR 1983, 4083, para. 33 and p. 4128, quote 1 b) of summary; see also p. 4120, para. 19 and 21.

IV. Justification

EC Law provides both written and unwritten grounds of justification for the infringement in the free movement of goods.[216] Apart from the difference in their codification they are parallel structured and agree with each other in their general requirements.

1. Mandatory Requirements of the „Cassis de Dijon“ - Decision

Accordingly, concerning indiscriminatingly applied measures,

> "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 in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements..."[217]

What mandatory interests of the general welfare can be drawn in for the justification of restrictions of the free movement of goods, do not permit themselves to be explicitly listed because of the conceptual openness to their access. It is only sure that mandatory requirements alone can refer to a Community legally protected right. Thereby the normative protection can arise from either EC Treaty legal principles or more generally from MS legal-system principles.[218]

a) Environmental Protection

The ECJ had already recognized in the 1980's environmental protection as a mandatory requirement[219] and later on reconfirmed this several times.[220] Within the concept of environment comes the "natural environment," including man-made environment. [221] Environmental protection aims can be pursued in various ways, each depending on whether the measures are directed at the environmental friendliness of the product itself or at its production and processing methods ("process and production methods" or so-called PPMs). Accordingly, products can be differentiated in general by means of their own features (product standards) and by means of their PPMs (production standards). While the former describe the features of the product during its use - like for example emissions - and hence are described as "direct product criteria," the latter refer to the ways and means of the production of the product (PPMs).

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[216] See for example *Schweitzer/Hummer*, Europarecht, 1996, para. 1135; *Nicolaysen*, Europarecht II, Das Wirtschaftsrecht im Binnenmarkt, 1996, p. 57; *Streinz* (fn. 148), para. 738 ff.; *Becker*, in Schwarze (fn. 98), Art. 28 ECT, para. 107.

[217] First see *ECJ* Case 120/78 - Cassis de Dijon - ECR 1979, 649, para. 8; then *ECJ* Case 113/80 - Irish Souvenirs - ECR 1981, 1625, para. 10; *ECJ* Case 90/86 - Strafverfahren gegen G. Zoni - ECR 1988, 4285, para. 9.

[218] See *Ahlfeld,* Zwingende Erfordernisse im Sinne der Cassis-Rechtsprechung of the Europäischen Gerichtshofs zu Art. 30 ECT, 1997, p. 267; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 22.

[219] *ECJ* Case C-302/86 - Danish Bottles - ECR 1988, 4607, para. 9.

[220] See nur *ECJ* Case C-57/89 - Leybucht - ECR 1991, I-883 ff.; *ECJ* Case C-355/90 - Santona - Slg 1993, I-4221 ff. *ECJ* Case C-379/98 - Preussen Elektra - ECR 2001, I-2099 ff; *ECJ* Case C-389/96 - Aher Waggon - ECR 1998, I-4473 ff.; *ECJ* Case C-2/90 - Wallon Waste - ECR 1995, I-4431 ff.; *ECJ* Case C-203/96 - Dusseldorp - ECR 98, I-4075 ff.; *ECJ* Case C-313/99 - Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne - decision of 17. September 2002.

[221] *Epiney*, Umweltrecht in der Europäischen Union, 1997, p. 7; *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 130 r, para. 3.

aa) Environmentally Friendly Processing & Production Methods (PPMs)

The practical question arises whether regional products can be advertised when they demonstrably contribute, for reasons of their specific PPMs, to the protection of the environmental sector(s) described.

The primary environmental protection legal aspect of consumption of regional products lies in the shortening and/or cessation of the transportation distance. Because transportation routes also regularly take place not by train but rather via roads, the exhaust and burning of fuel damages almost all environmental sectors, especially the air.[222] In this respect and for that reason, the Commission presumes in the pending case concerning "Mehrwegquote" (returnable-bottle quota) for drink containers ((ECJ C-463/01) and for "Dosenpfand" (deposit on cans) that a justification of the German deposit and return regulation within context of overlength transport route does not come into consideration.[223]

Further relevant environmental points of view that can be linked to the support of regional products lie in the handling and feeding of animals as well as in environmentally friendly production processes and in ecological cultivation.[224] Provided that a region here establishes "rewards" like for example the advertising for the respective product or the relative company, then it gives an incentive to the agricultural sector to alter their farms in the direction of environmentally friendly PPMs. Thereby not only animal protection is served, but also the atmosphere is protected against further ozone depletion.

If the state advertises for regional products, then in this sense it advertises at the same time for these environmentally protective effects that are embraced by Art. 174 (1) ECT. Hence, the environmental justification ground intervenes when regional products are advertised "simply" with regard to PPMs.

bb) Extraterritorial Effect

If after all this, fundamentally different interests of environmental protection are given for advertising actions in favor of regional products, that are in line with Community environmental policy, then the question follows whether making such actions valid is in line with the concept of extraterritoriality. If a MS bases or connects its advertising campaigns in the above described way not on product-related PPMs including the type of animal treating and feeding as well as the transport distance, does it influence the operations that exist outside of its own territory. So is the situation when the signet „Aus Baden-Württemberg" is not allocated to a good marketed in Baden-Württemberg (BW) but in produced Calabria, because first of all it had to be transported across Europe and secondly because it did not meet the predetermined production standards.

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[222] See *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 130r, para. 23. Also AG *Jacobs* in reference to energy networks, see his final argument to *ECJ* Case C-379/98 - Preussen-Elektra -, ECR 2001, I-2099, para. 235.

[223] See for example *Siegbert Alber*, Produktverantwortung und Produkthaftung in einer modernen Abfallwirtschaft aus Sicht der Europäischen Gemeinschaft, in: Hendler et al (ed.), Produktverantwortung: Chance - Verwirklichungsformen - Fehlentwicklungen, 2002, p. 19, 54 f.; *Jacobi/Karpenstein*, Der Rechtsstreit um das Dosenpfand, AbfallR 2003, p. 33 ff.

[224] The Community is in favor of ecological agriculture explicitly in Regulation (EEC) Nr. 2092/91 of the Council of 24. Juni 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, see OJ 1991 L 198, p. 1.

In this case it is not the German sovereign territory being environmentally protected, rather that of Italy and Austria.

According to the view of the ECJ, the MSs are justified in protecting in other MSs established legally protected rights, when there exists an identified interest in the sense that the measure is also considered in this other MS as necessary.[225] At issue is - remaining within the same example - concerning the interests of Austria, that the German Region of BW aggravates the sales of the Calabrian produced products in its own territory in favor of the environmental protection of Austria's territory. It is however not to be assumed from this that the same goes then for Italy in reference to their environmental-protection interests. On their interests is however competent to put them down because the goods produced there are alone affected by the BW measure.

The question whether a MS may take such extraterritorial measures to protect a legal right in the case of harmony of interests has been left open by the ECJ for quite some time.[226] In legal literature circles it has been discussed controversially.[227]

Necessarily, one must look at the overall sense and purpose of the justification grounds in order for it to be answered. This should make it possible for the MSs to protect the legally supported right, whereby fundamentally the intensity of this protection is incumbent upon their own judgment and assessment.[228] In accordance with the principle of limited state sovereignty,[229] the justification grounds can certainly not be used as an instrument for the purposes of forcing one's own values upon the other MSs.[230] That is why a MS must explain its own protection interest, that is to say, when its own territory is actually affected via operations in other states.[231] At hand, it can be assumed from such a "physical" damage, provided that the environmentally intensive production method or the long transport distance in and/or through the neighboring state leads to Emissions in the affected state. In addition, a "physical" disturbance in the sense of a legal responsibility must suffice for the protected property, that based on international obligations can account for the protection of the

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[225] *ECJ* Case 46/76 - Bauhuis - ECR 1977, 5, para. 43 and 45 having in mind controlling measures of the exporting state which concern the protection of sanitary interests of the importing state. The case was special in that the controlling measures were stimulating the free movement of goods. Whether this portrays a mandatory requirement is arguable; pro *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 38; contra *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT; para. 7. See for protection measures with extraterritorial effect also *ECJ* Case 89/76 - Kommission v. Niederlande - ECR 1977, 1355, para. 8/13 and 14/17.

[226] Case C-169/89 - Van den Burg- ECR 1990, I-2143 ff. The compatibility with Art. 30 EC and/or with the mandatory requirements was irrelevant because the secondary law has already been violated.

[227] See *Middeke*, Nationaler Umweltschutz im Binnenmarkt, 1994, p. 167 f.; ähnlich *Weiher*, Nationaler Umweltschutz and Internationaler Warenverkehr, 1997, p. 104 ff.; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 39; *Gornig-Silagi* (fn. 154), p. 753, 756; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 61.

[228] See also *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 43; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 22 f.; *Becker* (fn. 154), p. 84 f.

[229] See *Gloria*, in: Ipsen, Völkerrecht, 4. Ed. 1999, § 23, para. 3, 4, 6; *v. Heinegg*, in: Ipsen (ebda.), § 55, para. 8; *Verdross/Simma*, Universelles Völkerrecht, 3. Ed. 1984, § 32 f.; *Seidl-Hohenveldern/Stein,* Völkerrecht, 10. Ed. 2000, § 2, para. 6 f; *Doehring*, Völkerrecht, 1999, para. 124.

[230] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 7; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 20; *Gornig-Silagi* (fn. 154), p. 753, 756.

[231] See *Weiher*, (fn. 227), p. 104; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 20.

"global commons" like for example the atmosphere.[232] In this respect, namely every contribution complies to the global responsibility of one of

> "the priority objectives which the community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change, approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 (OJ 1994 L 33, p. 11), and by virtue of the Protocol of the third conference of the parties to that Convention, done in Kyoto on 11 December 1997, signed by the European Community and its Member States on 29 April 1998… ."[233]

In reference to the example of BW, this means that it, as a part of Germany, can be affected in its immaterial interests provided that producers of another MS located far away geographically, for example Greece, use environmentally damaging production processes or transport their goods over long distances, whereby the air is polluted.

After all, a MS may take measures for the protection of legally protected rights outside of its own sovereign territory, provided that it can actually explain or prove a legal interest. Because at least by protection measures for the climate and atmosphere is it always the case that their extraterritorial effect does not stand in the way of the justification of advertising campaigns in favor of regional products. This result corresponds to the legal and actual positional value scale of the environmental law in the Community,[234] which had contributed to its characterization as an environmental union and/or ecological community.[235] Even the mediation committee of the WTO has lately established the conformity of PPMs with the WTO regime, when and if they are aimed at the protection of global resources.[236] Considering the fact that the development of a world-trade legal environmental protection still finds itself in a developmental stage, it cannot be assumed that the Community would want to lag behind this decision.

Especially for the case at hand of advertising for regional products, the fears that a MS could impose its values on another MS are ungrounded. From the outset, this can only be the case in the context of obligatory protection measures in favor of the environment outside of one's own state territory. Already the concept of advertising implies certainly an element of free will. The same goes for the condition, that forms

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[232] See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 39; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 61; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 20; *Weiher*, (fn. 227), p. 104 ff.

[233] *ECJ on* the use of renewable energy sources in case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 74. See also *Ruffert,* Das Umweltvölkerrecht im Spiegel der Erklärung of Rio un der Agenda 21, in: ZUR 1993, p. 208, 209.

[234] See *Grabitz/Nettesheim*, in: Grabitz/Hilf (fn. 131), vor Art. 130 r, para. 1 ff; *Jahns-Böhm*, in: Schwarze (fn. 98), Art. 6 ECT, para. 2 ff.; *Calliess*, in: Calliess/Ruffert (fn. 56), Art. 6 EC-Treaty, para. 1 ff.; AG *Jacobs* in Case C-379/98 - Preussen-Elektra - 2001, I-2099, para. 231.

[235] See *Schröder*, in: Rengeling (ed.), Handbuch des europäischen Umweltrechts, 1998, § 9 Umweltschutz als Gemeinschaftsziel and Grundsätze des Umweltschutzes, para. 13; *Ress*, Umweltrecht und Umweltpolitik der EG nach dem Vertrag über die EU, Vorträge aus dem E.I., Nr. 291, 1992, p. 3, 5 and 22; *Epiney* (fn. 221), p. 285 ff.; *Schmitz*, Die europäische Union als Umweltunion, Entwicklung, Stand and Grenzen der Umweltschutzkompetenzen der EU, 1996, p. 296 ff.; *Grabitz/Nettesheim*, in: Grabitz/Hilf (fn. 131), Art. 130 r, para. 58 and 61.

[236] Appelate-Body-Report *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R., see also p. S. 580

the basis of the advertising measure, that the advertised product should satisfy certain criteria. Such an optional discretion regarding the compliance of environmental protection requirements cannot be qualified as imposing the will; rather, it reveals merely a trade or production alternative. In other words, the producers simply have the option to adhere to these standards and to achieve, through them, a "practical concordance" between the interests of environmental protection on the one hand and the principles of sovereignty and territorial integrity of the MSs on the other. However, if the fear that a MS could force its values upon another is unfounded, then the critical attitude towards the extraterritorial effect of national measures also lacks a foundation.

b) Consumer Protection

Consumer protection was referred to by the ECJ already in the foundation-laying "Cassis de Dijon" - decision as a mandatory requirement.[237] Within the concept of consumer is to be understood a natural person who is not active for advertising or professional purposes.[238] The protection of the consumer aims at the balance of his or her position of inferiority in the market.[239] Based upon the "EEC Program for a policy for consumer protection and information"[240] of 14 February 1975 and its five principles, the corresponding Community measures in accordance with Art. 154 (1) ECT aim, among others, at the protection of consumer health and security as well as economic interests, and to secure their appropriate information.[241]

A fundamental consumer protection legal standpoint in favor of regional products lies in the freshness, seasonality and the aroma of regional food products, that are contingent upon short or completely dispensed-with transport and storage time. Thereby, the consumption of regional goods serves the Community aims of consumer health and the betterment of the product quality. In following, the regional products become suitable to the expectations of the consumer, nourishing, vitamin-rich, and flavorful - in contrast to the often artificially flavored and sugared goods from distant regions.[242] Therewith this can contribute to restore once again consumer confidence in the food product industry, that had been disturbed through many "eco-crises." Moreover, the regionalization of agriculture brings transparency to the markets, informs consumers concerning animal feed and raw materials, satisfies their desire for

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[237] *ECJ* Case 120/78 - Cassis de Dijon - ECR 1979, 649, para. 8; see also *ECJ* Case C-239/90 - Boscher - ECR 1991, I-2023, para. 17.

[238] A uniform definition has not yet been established. The definition in use here corresponds to the international law, see point A. (i) of the Consumer Protection Charter of the *Europarats* v. 17.5.1973 (printed by *v. Hippel, Consumer Protection*, 3. Ed. 1986, p. 447 ff.); See also *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 129a, para. 3; *Wichard*, in: Calliess/Ruffert (fn. 56), Art. 153 EC-Treaty, para. 4; *Berg*, in: Schwarze (fn. 98), Art. 153 ECT, para. 6.

[239] *Kienle*, in: Bergmann/Lenz, Der Amsterdamer Vertrag, 1. Ed. 1998, Chapter 7, para. 8.

[240] OJ 1975 C 290, p. 1, quote 3: „a) Right of protection of his health and security, b) right of protection of his economic interests, c) Right of compensation for suffered damages, d) right to education and training, e) right to representation". Te program was supplemented by the decision of the Council of 19.5.1981 relating to a „Second program for a policy for the protection and information of the consumer" (OJ EC 1981, C 133, p. 1).

[241] See in detail for example *Grub*, in: Lenz (ed.), EC-Treaty, Kommentar zu dem Vertrag zur Gründung der Europäischen Gemeinschaften, in der durch den Amsterdamer Vertrag geänderten Fassung, 2. Auflage 1999, Art. 153, para. 20 f.; *Krämer*, EWG - Verbraucherrecht, 1985, p. 29 ff.

[242] See also *Starck*, Ökologische Landwirtschaft und regionale Vermarktung, in: Akademie aktuell, Informationsblatt der Akademie für Natur und Umwelt des Landes Schleswig-Holstein, Heft 8/1998, p. 1 ff.; *Bätzing*, Wirtschaftskreisläufe in der Region - Wo liegen die Probleme, wo die Chancen?, unpublished speech of 8 March 1999.

information,[243] and thereby supports their sense of security. Such effects can be strengthened through the advertising for regional products, provided that they honor certain quality performances on the part of producers. The advertising is therefore principally in harmony with the goals of consumer protection, as it is written in Art. 153 (1) ECT and in the Council Regulation (EEC) N. 2029/91 of 24 June 1991 concerning ecological agriculture and the corresponding labelling of agricultural and food[244] products.[245]

c) Protection of the Regional Sphere

As mentioned, the mandatory requirements through which the trade restricting measures can be justified are not all-including. Therefore, it is necessary to examine whether state advertising for regional products can be justified under the standpoint of "protection of regional sphere". Within the regions are to be understood regional and local public bodies in the sense of Art. 263 ECT.[246] A listed mandatory requirement means that it must be recognized throughout the entire Community.[247]

The specific role of the European regions is described by the so called "Committee for Regions" (AdR).[248] This Committee (AdR) represents the interest of the regions of Europe which are supposed to give them a voice and weight at the Community level. Its importance for the protection of the regional field of activity (sphere) must be looked at against the background of the original purposes of its creation. Out of concern for the depletion of regional competences during the ever increasing Europeisation, the Commission, who over the years has assigned a key role to the regions, has installed the 1988-formed advisory board as an internal consultation body.[249] This was substituted with the Maastricht Treaty of 7 February 1992[250] by this committee (AdR), which since then should prevent the competence of the regions from being usurped by the federal state and the Community.[251] This protection of regional competence must only take place where there exists an interest of conserving this competence. The AdR is therefore a result of Community interests in the protection of the regions and the conservation of their identities with regards to the other state levels.[252] The following comparison confirms this result. As politically autonomous bodies, the regions have

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[243] According to the Commission Information is the central right of consumers, see: Communication on the priorities in the european consumer protection policy 1996 to 1998 COM (95) 519, p. 3.

[244] OJ L 198, p. 1.

[245] The question as to the justification of extraterritorial effect does not arise in the framework of consumer protection. See also *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 61.

[246] See *Wiedmann*, in: Schwarze (fn. 98), Art. 263, para. 22 ff.

[247] See *Ahlfeld* (fn. 218), p. 267; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 37.

[248] In this case a solution cannot be deduced from the principle of subsidiarity.

[249] See *Wiedmann*, in: Schwarze (fn. 98), Art. 263 ECT, para. 2 and 12.

[250] OJ 1992 Nr. C 191, p. 1.

[251] See *Suhr*, in: Callies/Ruffert (fn. 56), Art. 263, para. 2 and 6; *Wiedmann*, in: Schwarze (fn. 98), Art. 263 ECT, para. 1 ff. and 35.

[252] Against this assessment it cannot be argued that according to Art. 7 ECT the AdR is not an organ of the Community according to Art. 7 ECT and that the political influence of the AdR in the Community is not decisive as according to Art. 263 ECT the AdR is only a consulting organ. In this respect it cannot be denied, however, that it at least qualifies as a secondary organ and that its influence is higher than that of other secondary organs. See *Blanke*, in: Grabitz/Hilf (fn. 131), vor Art. 263- 265, para. 18 ff.; *Nettesheim*, in: Grabitz/Hilf (fn. 131), Art. 4, para. 30 ff.; *Suhr*, in: Calliess/Ruffert (fn. 56), Art. 263, para. 11 f.; *Wiedmann*, in: Schwarze (fn. 98), Art. 263 ECT, para. 6 ff., 11 and 18 ff.; *Bieber*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 4, para. 43; *Kaiser*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Vorb. Zu den Art. 198a bis 198c, para. 15;

developed into a general element of the state.[253] Regionalism and tendencies towards regionalization in the MSs have inspired therefore the idea of a three-tiered federal Europe or even a "Europe of Regions."[254] The protection of the regional market can even be recognized a as mandatory requirement in the sense of "Cassis."

In order to be in accordance with Art. 28 ECT, the advertising measures here at hand should serve for the securing of the regional field of activity. However, this seems to be doubtful[255]. In reality, regional strategies generally support locality-bound circuits and strengthen thereby small and middle-sized undertakings (SMU), that have their sales market primarily in a certain region. As contrast and image strategy, regionality offers SMUs an alternative to the present "Price-war" in the international competition for market share. If this sales promotion by the state is effective, the entrepreneurs earn a higher profit. This makes it possible for them, in their pursuit of higher production, to create additional jobs with the consequences of a higher net product in the undertaking itself and an increased welfare of the regional population. Through the corresponding demand - presumably from the resulting increased welfare - the undertakings can obtain higher profits, which lead to the creation of new jobs, etc.

Certainly, according to the case law of the ECJ, exclusively non-commercial reasons can justify a violation against the free movement of goods.[256] Consequently, the ECJ has established the non-Community legal conformity of the program of "Buy Irish", where Ireland had implemented for the purpose of the strengthening of such a circulation on the national level.[257]

Two points are decisive here: first, the SMUs enjoy in the Community a highlighted position that, in the end, comes from the SMU Regulation.[258] They are the key players of the economy, create jobs and serve in fostering the general welfare. Even the creation of jobs in the setting of a long-term and environmentally wholesome development,[259] as well as the betterment of life- and working conditions under paragraph 8 EU (Preamble) and/or under paragraphs 2 and 3 of the Preamble of the EC Treaty, Art. 2 (1) EU as well as Art. 2 ECT are recognized as aims legally conforming the Community. The fact that also the ECJ values the strengthening of the SMU as not irrelevant because of its economic grounds of justification, arises from its evidentiary statement that state advertising provide instruments for simple GIs in a permissible way

> "for the producers established in places to which they refer to as an essential means of attracting customers. They are therefore entitled to protection."[260]

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[253] *Wiedmann*, in: Schwarze (fn. 98), Art. 263 ECT, para. 14 f.

[254] *Blanke*, in: Grabitz/Hilf (fn. 131), vor Art. 198 a-c, para. 1 f.; *Suhr*, in: Calliess/Ruffert (fn. 56), Art. 263, para. 3.

[255] *Giegerich*, Zulässige Förderung auf KMU-Schiene?, in: Marauhn (fn. 1)

[256] See *ECJ* Case 288/83 - Commission v. Irland - ECR 1985, 1761, para. 28; *ECJ* Case C-265/95 - Commssion v. France - ECR 1997, I-6959, para. 62. See *Epiney*, in: Calliess/Ruffert (fn. 56); Art. 30 EC-Treaty, para. 14.

[257] See *ECJ* Case 249/81 - Buy Irish - ECR 1982, 4005, para. 1.

[258] Commission Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33). It has replaced the community guidelines on state aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4).

[259] See the binding (also above p. 14) guidelines on national regional aid (OJ 1998. C 74, p. 9).

[260] *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 28; see also AG *Jacobs*, Case C-325/00 - CMA - final argument of 14. March 2002, para. 41.

Secondly, the non-recognition of the economic justification-grounds should merely prevent that, through them, the competition would be hindered.[261] However, the strengthening of the SMU achieves the opposite. The protected long-term economic perspectives make it possible for them to remain competitive and to withstand the threat of large-scale enterprises. This strengthens competition in the Community context, because then the agriculture market is not dominated by a few financially strong giants.

Against this background one can value the regional marketing as important for inter-state trade. This form of marketing secures to a certain extent the identity of the regions. Therefore, from the outset it is not out of the question, that state support of regional marketing is to be justified under the aspect of protection of regional markets.[262]

Nevertheless, it is necessary to heed the warning against an all-too-general position. The reference for the requirement of a regional marketing may never appear as an end in itself or a defense claim for the protectionist measure. Especially, it should be pointed out that after constant, consistent case law, the exceptions to Art. 28 ECT are to be narrowly interpreted.[263] Therefore, an IGES argues for the assessment carried out here not to be shared by the ECJ, and this, in the end, the dispute be decided analogously to the “Buy Irish” case.[264]

d) Use Against Discriminating Measures

Without getting into the details here, it can already be stated that, fundamentally, mandatory requirements’ in the sense of „Cassis“ case law can be consulted as justification for the support of regional products. Certainly such actions are not - as seen above - regularly indiscriminately applicable. Then, the question is whether the restriction of the scope of “Cassis” it is to be held for indiscriminately applicable measures. The explosive nature of this question is neutralized contextually by the fact that regional measures have, from their subject, a merely indirect discriminating character. They are formally indiscriminately applicable towards domestic and foreign products, as they exclude all out-of-the-region produced products from aid. Practically, however, they disadvantage foreign products because such products do not enjoy state-aid measures under any circumstances.

Although the case law of the ECJ has indicated that, on such matters, it recognizes future formally indiscriminating applicable measures as mandatory requirements,[265] at

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[261] See similar *Becker,* in: Schwarze (fn. 98), Art. 30 ECT, para. 60.

[262] The question of the permissibility of extraterritorial effects does not arise in this context.

[263] *ECJ* Case 29/72 - Marimex – ECR 1972, 1309, para. 4; *ECJ* Case 113/80 - Irish Souvenirs - ECR 1981, 1625, para. 7 and no. 1 of summary.

[264] Doubtful with regard to the pursuit of economic goals, see also *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 226 ff.

[265] See *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, para. 22 ff.; *ECJ* Case C-389/96 - Aher-Waggon - ECR 1998, I-4473, para. 19; *ECJ* Case C-254/98 - Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass - ECR I-2000, 151 ff., para. 25 ff; *ECJ* Case C-34-36/95 - De Agostini - ECR 1997, I-3843, para. 44 f. on the one hand and *ECJ* Case 229/83 - Leclerc - ECR 1985, 1, para. 26 and 29; *ECJ* Case 231/83 - Leclerc - ECR 1985, 305, para. 25 and 31 on the other hand.

the same time it does not allow for a clear line to be recognized. The opinions within the various legal scholarly circles are also divided.[266]

The following consideration seems to be decisive: the sense and purpose of mandatory requirements exists so as to secure a weighing of the respective legally protected rights.[267] The restriction on applicable non-discriminatory measures is only then proper, when sufficient protection of all relevant legally protected rights is guaranteed in every individual case. It is, however, not out of the question that demands under the mandatory requirements of the general welfare could play a roll also within the context of discriminating measures.[268] This confirms impressively the pragmatic line of the ECJ. Therefrom arises, that the mandatory requirements would not be suitable to their function, when every factual difficulty of "Cassis" case law were allowed to have a far-reaching negative or discrediting effect on their foundations.[269] Any eventual misuses can be dealt with during the examination and assessment of the appropriateness of the means.[270]

For this assessment also the concept of the weighing of protected rights can be consulted, which is in itself the basis for the mandatory requirements. A balance implies a trade-off process, which compares the relevant interests against each other and attempts to find through this judging consideration a result that includes all interests concerned. However, such a trade-off process takes place systematically in the setting of proportionality and may not, so to speak, in the sense of an anticipated appreciation leave unconsidered the one interest - that is, the materially discriminating measure - from the outset.

The inclusion of at least formally indiscriminating measures seems therefore necessary when one does not want to run the risk to foil measures whose purpose is the environment.[271] Considering the variety of opinions in the practice, and the uncertainty whether the case law of the ECJ actually is understood in the change, it should be furthermore examined whether the presently held opinions are not supported through the particular features of the prevailing mandatory requirements.[272] For the purpose of the expert opinion only those areas that are relevant for the advertising in favor of regional products will be given attention.

aa) Environmental Protection

There exists, in the environmental law more than in other areas, doubt whether the distinction between indiscriminately applicable measures and (materially) discriminating measures is to be kept. They were not in the end nourished through the

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[266] See *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 43 and *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 38. Dissenting *Keßler*, Das System der Warenverkehrsfreiheit im Gemeinschaftsrecht, 1997, p. 37 f.

[267] *Weiher* (fn. 227), p. 76; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 43.

[268] See AG *Jacobs*, to *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 226; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 38.

[269] AG *Jacobs*, *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 233; *Müller-Graff*, in: Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 196; *Weiher* (fn. 227), p. 76.

[270] *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 38.

[271] See AG *Jacobs*, *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 233; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 260 ff.; similar *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 130r, para. 24.

[272] AG *Jacobs*, *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 228.

case law of the ECJ, which even held formally discriminating measures for reasons of environmental protection as justified in the decision “Walloon Waste” and “Preussen Elektra.”[273] [274] In fact, the ECJ grounded this decision with the peculiarity of the respective subject matter and with the circumstance that the questionable discrimination stands inseparably connected to the territorial restriction of the sovereign authority, out of which arose the distinctiveness of the use of national measures also without any intention of protecting the domestic production and products. The question arises, however, whether the ECJ’s line of argumentation, which in following should be outlined concerning concretely decided cases not generally capable and in a first right conclusion (erst-recht-schluss) (a maiore ad minus), is applicable also to discriminating measures, namely, the advertising for regional products.

In the case of the Walloonish waste import prohibition, the ECJ justified formally discriminating measures with international obligations[275] by the principle of origin in accordance with Art. 174 (2) ECT[276] and the nature of waste law.[277] According to this principle, the creation and preparation of environmentally damaging goods is to be counteracted through measures that set in at the point of origin of the disturbance.[278] The principle is geographical and/or territory related, so that the environmental pollution can be counteracted locally as early and as close as possible to its source.[279] The ECJ established that it

> “Imperative requirements can indeed be taken into account only in the case of measures which apply without distinction to both domestic and imported products… However, in assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, … as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste … . That principle is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal.“[280]

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[273] *ECJ* Case C-2/90 - Wallon Waste - ECR 1992, I-4431, para. 34 f; *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 81. Not decided in *ECJ* Case C-203/96 - Dusseldorp - ECR 98, I-4075, para. 44.

[274] Agreeing with this case law, *Ahlfeld* (fn. 218), p. 79 f.; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 43; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 EC, para. 20; *Streinz* (fn. 148), para. 739.

[275] So also AG *Jacobs*, *ECJ* Case C-203/96 - Dusseldorp - ECR 98, I-4075, 4088, para. 39 ff.

[276] See also *ECJ* Case C-187/93 - Wallonie - ECR 1994, I-2857, para. 22; AG *Jacobs*, to *ECJ* Case C-203/96 - Dusseldorp - ECR 98, I-4075, para. 35 ff.

[277] *ECJ* Case C-2/90 - Wallon Waste - ECR 1995, I-4431, para. 34.

[278] *Frenz,* Europäisches Umweltrecht, 1997, para. 151.

[279] *Schröder,* in: Rengeling (fn. 235), § 9, para. 36 f.; *Grabitz/Nettesheim,* in: Grabitz/Hilf (fn. 131), Art. 130r ECT, para. 43; *Epiney* (fn. 221), p. 101 f.; *Schmitz* (fn. 235), p. 160.

[280] *ECJ* Case C-2/90 - Wallon Waste - ECR 1995, I-4431, para. 34 f.

Hence, the import prohibition would not be discriminating, as a justification on the basis of compelling requirements of environmental protection would be possible.[281]

Similarly, the ECJ grounded the applicability of mandatory requirements in the case of minimum purchase price for electricity from renewable energy sources, by the court ruling on the subject of the electricity market, on the cross-section clause of Art. 6 ECT[282] and suppressed the Community complied international obligations.[283]

Accordingly, the ECJ seems to recognize formally discriminating measures as mandatory requirements, provided that they are grounded in:

- existing international obligations
- the meaning of environmental protection, namely through the cross-section clause
- the origin principle, and
- the nature of the matter or cause.

Materially discriminating measures, especially aid actions for regional products, would also be justified out of environmental protection reasons, as long as they could be supported by these four criteria above.

The first three requirements are available here unproblematically. Advertising campaigns for regional products aim, as a matter of priority, at shortening the transport distance and thereby lessening the emissions of greenhouse gases.[284] The Community has committed itself in various international agreements to reduce such gases concerning climate, of which the most important are the Rio-Declaration and the Kyoto-Protocol.[285]

Concerning the fundamental significance of EC environmental protection, a position has already been taken.[286] It has been strengthened since the pronouncement of the "Walloon Waste" and "Preussen Elektra" decisions.[287] Concerning the value of environmental interests, AG Jacobs assessed already in 2000 that, for the environment-policy weighting, a precedent or justification is fair which assigns the distinction - such that during the times of economic dominance over environmental

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[281] Ibid., para. 35. Critical to this conclusion AG *Jacobs* in Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 225; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 197; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 28 EC-Treaty, para. 38; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 43.

[282] See also *ECJ* Case C-313/99 - Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne -, decision of 17 September 2002, para. 57.

[283] See *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 72 - 74, 76 and 79.

[284] See above p. 47 ff.

[285] See above p. 50.

[286] See p. 50 f.

[287] *ECJ* Case C-2/90 - Wallon Waste - ECR 1992, I-4431 ff.; *ECJ* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099 ff.

protection such a distinction was still considered to be in harmony with the Community goals - between discriminating and non-discriminating measures.[288]

Advertising measures in favor of regional products serve the origin principle. When a MS advertises for the purchase of regional goods, so advertises it at the same time - expressly or implicitly - for a contrarily non-regional product of a shorter or non-existent transport distance between place of production and the point of sale. The minimization of transport distance is emphasized in the origin principle because here the emissions' source itself is set in. The cause of the air pollution is fought directly with the result that there arise no, or very little, emissions.[289]

The climate protection facilitated by regional marketing should, as fourth requirement, make discriminations from the nature of the matter necessary. An unequal treatment arises from the regional approach to climate protection. The fact that the EC law sees such approaches as positive is confirmed through the already repeatedly mentioned origin principle in accordance with Art. 174 (2) ECT. As a result of the prime clause of Art. 174 (2) ECT such source-related measures always have priority.[290] Nothing else arises also from the principle of 'subsidiarity,' which means that, first and foremost, the respective, more pertinent level is appealed for action.[291]

The four requirements upon which the ECJ attaches the justification of formally and, even more, also materially discriminating measures are consequently given. Consulting the mandatory requirement of environmental protection for the justification of advertising for regional products corresponds with the case law of the ECJ.

bb) Consumer Protection and Protection of Regional Autonomy

Already because of the parallelism of the mandatory requirements, the same holds for consumer protection and the protection of regional autonomy. Differentiating between the requirements would run against the idea of the mandatory requirements. For this reason, the ECJ drew also further mandatory environmental protection requirements

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[288] See AG *Jacobs* Case C-379/98 - Preussen-Elektra - ECR 2001, I-2099, para. 230 and 232.

[289] That the fight against environmental pollution caused by car emissions almost constitutes an abolition of car circulation is argued by *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 130 r, para. 23.

[290] See *Burgi*, Das Schutz- und Ursprungsprinzip im europäischen Umweltrecht, in: NuR 1995, p. 11, 14; *Epiney* (fn. 221), p. 102; *Schröder,* in: Rengeling (fn. 235), § 9, para. 39.

[291] See Art. 5 (2) EC together with the protocol of the Treaty of Amsterdam on the use of the principles of subsidiarity and proportionality, OJ1997 C 340, p. 105. The principle of subsidiarity only regulates the relationship between the Community and the MSs but requires no corresponding plan of action in the MSs. See *Lambers*, Subsidiarität in Europa - Allheilmittel oder juristische Leerformel?, in: EuR 1993, p. 229, 235; *Schwarze*, Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht, in: DVBl. 1995, p. 1265, 1266. However it becomes clear from its establishment in Community law that the EC respects the priority of the lower over the higher level of public action and at least has a tendency to refer to the regions, too. See *Calliess*, Das gemeinschaftsrechtliche Subsidiaritätsprinzip (Art. 3b ECT) als „Grundsatz der größtmöglichen Berücksichtigung der Regionen", in: AöR 121 (1996), p. 509; *Häberle*, Verfassungsrechtliche Fragen im Prozess der europäischen Einigung, in: EuGRZ 1992, p. 429, 434.

for the justification even of formal discrimination,[292] and lied down uniform requirements even for the unwritten as well as for the written grounds of justification.[293]

Independently of this, arguments can be cited for consumer protection, and for the protection of the regional autonomy, that speak for a recognition of material discriminating measures.

With a view towards the latter, this arises already from nature of the subject.[294] It is not obvious just exactly how far the autonomy of a region should be protected without, at the same time, excluding in fact the other MS more than the other domestic regions of the relevant home MS. The concept of regionality contains necessarily an indirect discrimination. With the recognition of protection of regional autonomy by the Community, an actual unequal treatment is taken in purchase at the same time. On the other hand, the protection of regional autonomy delivers, legally to speak, to a nudum ius.

In a weakened form, a material unequal treatment with the nature of the matter lets itself be founded also for the consumer protection, provided that the protection should be achieved through regional approaches. The fact that the EC law sees such approaches positively arises correspondingly to the implementation of environmental protection through the principle of subsidiarity in general[295] and the fact that fresh and specially healthy products must compulsorily show a regionally-linked point, especially in the case of advertising in favor of regional products. Also, consumer protection shares fundamental principles and convictions with environmental protection, in its development, and in the highly value it places in the legal order of Community.[296]

Comparably to environmental protection,[297] consumer protection has experienced a massive upswing in the Community, which has found its expression in the currently embraced, protected legal position of the consumer.[298] Just like with the environment, one's wanting to hold on to the difference between discriminating and non-discriminating measures would contradict even the impressive development of the EC legal consumer protection,[299] as well as its legal anchorage in EC law on a high level[300] and its actual meaning in an industrial, fast-paced consumer society.

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[292] *ECJ* Case C-120/95 - Decker - ECR 1998, I-1831, para. 39 on the mandatory requirements of the "Protection of financial balance of the system of social security" The case concerned a measure that formally discriminated against imported goods by making recompensation for glasses bought abroad by the social security system conditional on a prior permission. The ECJ found a violation of Art. 30 ECT but did not base it on its discriminatory effects.

[293] See below p. 66 ff.

[294] The ECJ also uses this argument for the justification of formally discriminating regulations, see above p. 55 ff.

[295] See above p. 58 f.

[296] *Kienle*, in: Bergmann/Lenz (fn. 239), Kapitel 7, para. 35.

[297] For environmental protection see above p. 50 f.

[298] *Kienle*, in: Bergmann/Lenz (fn. 239), Kapitel 7, para. 1 ff.

[299] *Krämer*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Vorb. Zu Art. 129 a, para. 1 ff.; *Berg,* in: Schwarze (fn. 98), Art. 153 ECT, para. 1 ff.; *Wichard*, in: Calliess/Ruffert (fn. 56), Art. 153 EC-Treaty, para. 1 ff.

[300] See Art. 3 I lit. t, Art. 33 I lit. e, 34 II UA 2 EC, 81 III 3, 82 II lit. b, 87 II lit. a and 95 para. 3 EC. See also *Kienle*, in: Bergmann/Lenz (fn. 239), Kapitel 7, para. 26.

2. Art. 30 ECT

Art. 30 ECT justifies discriminating as well as indiscriminately applicable trade restrictions of the MSs.[301] According to this rule, the

> "provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

As an exception to the basic freedoms, this justification ground is, according to repeated case law, to be narrowly construed.[302]

a) Protection of the Health of Humans and of the Life of Animals

The sovereign-initiated support of regional products could be justified for health protection reasons. The requirement for this is that the relevant MS measures have the protection of human health as their object, that is to say, directly aimed at health protection.[303] The ECJ entitles the MSs to some maneuver room, both in the establishing of the level of protection considered necessary,[304] and also with regard to the assessment whether interests of health protection come at all into consideration, provided that, by the uncertainty still existing in the relevant science concerning the harmfulness of a material, it should only be assumed as a potential endangering of human health.[305]

The eventual higher demand for certain goods, caused by the advertising for regional products, should lead to such that the consumer takes on an appetite for fresher and healthier goods, which can be set in motion by the state's supervision of the quality-control identification process. Such a general quality-protection certainly does not fall under the protection of health in the sense of Art. 30 ECT (ex Article 36), because it is not carried out primarily in the interests of protection of health.[306]

> "Article 36 of the Treaty[307] does not cover a restriction imposed on trade which is linked to the right to use a national designation of quality, even where it is optional, which distinguishes a particular home-produced alcohol from similar home-produced alcohols, which may, even if they do not fulfill the condition on which the right to the designation of quality depends, and which restricts intra-Community trade, nevertheless be marketed on the

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[301] See *Streinz* (fn. 148), para. 734; *Zischka*, Die Rechtsetzungskompetenzen der Europäischen Gemeinschaft auf dem Gebiet des Verbrauerschutzes - Unter besonderer Berücksichtigung des Werberechts, 1997, p. 128 m.w.N.

[302] See *ECJ* Case 229/83 - Leclerc et al - ECR 1985, 1, para. 30.

[303] *Epiney/Möllers*, Freier Warenverkehr und nationaler Umweltschutz, 1992, p. 26 f.

[304] See *ECJ* Case 97/ - CMC Melkunie BV - ECR 1984, 2367, para. 18. See also *Leible,* in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 35.

[305] *ECJ* Case 53/80 - Eyssen - ECR 1981, 409, para. 13 ff.

[306] AG *Capotorti*, in Case 53/76 - Bouhelier - ECR 1977, 197, Nr. 2.

[307] After renumbering by the TA now Art. 30 EC.

territory of the MS concerned without any restriction and in particular without any risk to the health of consumers."[308]

Provided that the support of regional products aims at the general protection of quality to prevent health risks like mad cow disease, Art. 30 ECT could be appropriate. In order to distinguish permissible exceptions from inadmissible trade restrictions, comprehensible and factual connections must exist between the national regimentation to be justified and the protection of health.[309] Between the globalization of the agriculture and the health endangering products exists an inner connection. The agricultural operations are, as a result of their broad action radius, no longer to be effectively controlled; animal feeding and food product processing can no longer be comprehended.

The international fight for market share brings with it that less care is placed on quality than on quantity. Conversely, the regionalization of agriculture and the protection of health are connected. Farming operations are regularly straightforward, transparent and checkable. The probability of health risks through insufficient care of animal feeding or through the combining of harmful additives in food products decreases, just like the massive slaughtering of sick and diseased animals. These effects can be strengthened through the advertising for regional products, provided that they honor certain quality standards on the part of the producers, for example the Saxon eco-tested seal, a regional label of controlled ecological agriculture of Saxony, which is awarded[310] by the GAÄ.[311] The advertising effect issuing from this seal gives agronomists an incentive, in an economic sense, to comply with the quality requirements and to organize their operations regionally, ecologically and multifunctionally. Under this aspect, advertising for regional products can be fundamentally justified for preventive health reasons and life protection of humans and animals.[312]

b) Protection of Commercial and Industrial Property

Specially for the national protection of indications of origin and the advertising for trademarks of local undertakings, the protection of commercial and industrial property in the sense of Art. 30 (1) ECT could intervene as justification. It is considered under the form of protection of geographical indication of origin and the trademarks.[313] All are permissible; however also only the protection right, which count in the sense of Art. 30 ECT for a specific subject of commercial and industrial property.[314] For the rest, Art. 30

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[308] *ECJ* Case 13/78 - Eggers - ECR 1978, 1935, para. 31.

[309] *Becker* (fn. 135), p. 74.

[310] See *Sächsisches Landesministerium für Landwirtschaft, Ernährung und Forsten* (ed.), Bestimmungen für die Verwendung des Sächsischen Öko-Prüfsiegels, 1998, p. 1 ff.

[311] An association that aims at securing product quality and coordinating product marketing for agricultural bioproducts.

[312] In this framework there are no difficulties for the permissibility of extraterritorial effects, because the protection at least benefits the own population. See *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 61.

[313] The problem of the legitimacy of extraterritorial effects does not arise here because the protection of commercial property from the outset exclusively serves the local producers located in the sovereign territory. For a parallel situation in the case of consumer protection see fn. 245, above.

[314] See *ECJ* Case 78/70 - Deutsche Grammophon v. Metro - ECR 1971, 487, para. 11; *ECJ* Case 3/91 - Exportur - ECR 1992, I- 5529, para. 24 f.

ECT is only appropriate under certain pre-conditions, that the national measures concern exactly the specific object of the respective right of protection.[315]

aa) Geographical Indications of Origin (GI)

The question arises, which type of GIs come under the justification grounds of commercial and industrial property according to Art. 30 (1) ECT. The Origin Regulation does not refer to this.[316] It is only clear that qualified GIs are included.[317] Their specific protection subject matter is grounded in the guarantee that the products which are supplied along with them come from a certain geographical area and display certain special features.[318] According to § 127 (2) and 128 MarkenG, an IP protection exists against the use of qualified GIs for good of another quality or origin.[319] The rules protect therewith exactly the specific subject matter of he qualified indication of origin. Both the existence of the protective right (copyright) according to § 127 (2) MarkenG and its exercise under § 128 MarkenG fall then under the justification ground of Art. 30 (1) ECT.

It is doubtful, however, whether also the MS-protection of simple geographical indications would be covered by Art. 30 (1) ECT. Corresponding to the decision „Sekt/Weinbrand" and in the „Bocksbeutel" decision of the ECJ, the protection worthiness of a geographical indication requires not just that the so marked products come from the respective area; rather, in addition, that the products show special features and traits that they owe to their geographical origin and that individualize them at the same time.[320] Therewith, simple indications of origin, which usually make up the largest part of the national-state protected indications, would fall out of the protective scope of Art. 30 (1) ECT.[321] Keeping in mind this circumstance, the ECJ later held also that simple GIs fall under the protection of commercial and industrial property.[322] Stating:

> „The Commission's position... cannot be accepted. It would have the effect of depriving all protection of geographical names used for products which cannot be shown to derive a particular flavor from the land and which have not been produced in accordance with quality requirements and manufacturing standards laid down by an act of public morality, such names being commonly known as indications of provenance. Such names may nevertheless enjoy a high reputation amongst consumers and constitute for

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315 *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 30 EC-Treaty, para. 42.

316 Above p. 29 ff.

317 See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 73. However it is not yet clear whether indirect geographic indications of origin also come under the term of commercial and intellectual property. There is not yet any relevant case law of the ECJ on this question, see *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, para. 35; the Cassis-criteria apply, however, see *ECJ ibid.*, 1299, para. 27 ff.

318 *ECJ* Case C-47/90 - Delhaize - ECR 1992, I-3669, para. 17; *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 25.

319 See *Fezer* (fn. 12), § 127 MarkenG, para. 9. See also above p. 9 and 29 ff.

320 *ECJ* Case 12/74 - Sekt/Weinbrand - ECR 1975, 181, para. 7, see also p. 181 quote 1 of Summary; *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, para. 34 ff. Critical *Beier/Knaak* (fn. 37), 411, 420.

321 See for the consequences *Beier/Knaak* (fn. 37), p. 602, 603 f.; *Fezer* (fn. 12), § 126 MarkenG para. 1.

322 *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 28. See also *ECJ* Case C-312/98 - Warsteiner - ECR 2000, I-9187, para. 44 ff. See *Obergfell* (fn. 107), p. 313, 316.

> producers established in the places to which they refer an essential means of attracting custom. They are therefore entitled to protection."[323]
>
> Therefore, the MS IP protection is recognized for simple GIs fundamentally[324] on an EC level.[325] The specific subject of such an indication is alone to be seen in the reference to the origin of the marked good out of a certain geographical area.[326] According to § 127 (1) MarkenG, § 128 MarkenG exists for simple GIs an IP as a protection against their use for goods of another origin.[327] The rules protect therewith exactly their specific subject matter. Both the existence of the protection right according to § 127 (1) MarkenG as well as its exercise under §128 MarkenG fall then under the justification ground of Art. 30 (1) ECT.

In summary one could conclude that the specific subject matter of GIs in the sense of Art. 30 (1) ECT consists of eliciting awareness of the geographical origin of the product, should the situation arise also the special taste or other features.[328] From here it is clear that the protection of generic names is out of the question from the outset.[329] Because the geographical reference is not there to remind of a certain geographical area in this situation; rather; merely to identify the affiliation of the goods to a certain product-type.[330]

The question arises whether equivalent goes for seals of quality, like the logo „Aus Baden-Württemberg" (from BW) or the CMA-Seal „Markenqualität aus deutschen Landen", or whether such labels are to be seen as simple GIs. Against the background of the ECJ's definition, according to which a

> " Comparative examination of the national laws shows that indications of provenance…are intended to inform the consumer that the product bearing that indication comes from a particular place, region or country."[331]

Accordingly, the following arises: Products which are marked with such labels must usually come, according to the allocation guideline, necessarily from the respective area, which the seal shows. They should make the consumer aware of this. Because it is exactly the specific geographical origin that should guarantee the products' special quality which is traceable to the strong control system behind them.[332] Brought about by the guaranteed special quality of the products, they enjoy in general an enhanced esteem in the eyes of the consumer. Therefore, area or regional-related quality indications fall principally under the definition of the ECJ to the simple GIs.

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[323] *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 28.

[324] Subject to the above p. 61 f. named requirements. It is not yet clear whether indirect indications of origin fall under the protection of commercial property in accordance with Art. 30 (1) ECT. See fn. 314 above.

[325] See the explanation to MarkenG, BT-Drcks. 12/6581 of 14 January 1994, p. 119; *BGH*, GRUR 1994, p. 307, 308 f. - Mozarella I; *BGH*, GRUR 1995, p. 354 - Rügenwalder Teewurst; *Beier/Knaak* (fn. 37), p. 602, 607; *Hohmann/Leible* (fn. 30); p. 265, 282 f.

[326] *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 89.

[327] *Fezer* (fn. 12), § 127 MarkenG, para. 9. See also above p. 9.

[328] See *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 30 EC-Treaty, para. 41.

[329] See *ECJ* Case C-87/97 - Gorgonzola v. Champignon - ECR 1999, I-1301, para. 20.

[330] See above p. 9.

[331] *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 11; see also p. 9.

[332] See also p. 51 f.

The ECJ certainly places enhanced requirements on the character of the area of origin, to which the stamp of quality refers. It must show homogenous natural factors, which delimit them from the neighboring areas.[333] Signs and symbols which refer to the complete MS area - for example the CMA-stamp of quality „Markenqualität aus deutschen Landen“ - can build no milieu or environment.[334]

> “as the natural characteristics of the basic products used in the manufacture of the products in question do not necessarily correspond to the line of the national frontier.”[335]

On the other hand, the situation is fundamentally different concerning the case of regional quality seals in some of the German region. It could hardly be affirmed whether areas or regions of this dimension would show the ECJ promoted homogeneity. It can be assumed that the ECJ applies a stringent assessment mechanism so as to prevent misuse. Should the need arise in city-states or in smaller German regions, like Saarland, one could speak of a certain uniform Milieu. However, this would be in no way the case regarding a region the size of BW, for instance, so that the corresponding label does not fall under the term of simple GI.

However, also in the case of smaller German regions with homogenous geographical features there is some doubt whether the ECJ would not speak out against the availability-existence of simple GIs in the end. While these refer to a special product, seals of quality have in view a whole panoply of products which are produced in the relevant region.[336] They characterize, in abstract, the whole assortment of goods originating from a certain region and of a certain quality, comparable to a generic name, or to the pseudo-indication of origin[337] “Rheinischer Sauerbraten”, which abstractly indicates a type of roasted meat good made in accordance with certain special preparation methods. Against this background one should approach the question whether the ECJ will recognize quality-type labels as simple GIs with caution.

bb) Trademarks

The ECJ denotes in passing the specific subject matter of commercial property in the context of trademark law, that affords the holder protection from competitors who illegally sell with this mark through the exclusive right to bring a product into circulation, and to thereby to use the trademark.[338] When a sovereign body makes reference to the trademark of a local regional undertaking in an advertising statement, like for example the city of Cologne (Köln) for “Kölnisch Wasser”, therewith the sovereign body does not protect the advertising position of the trademark holder from misuse in such a way. Such a reference hence does not fall under the specific subject matter of trademark law.

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[333] See *ECJ* Case C-325/00 - CMA - decision of 5. November 2002, para. 27; see also *ECJ* Case 12/74 - Sekt/Weinbrand - ECR 1975, 181, para. 8 and p. 181 no. 1 of summary.

[334] See *ECJ* Case C-325/00 - CMA - decision of 5. November 2002, para. 27.

[335] *ECJ* Case 12/74 - Sekt/Weinbrand - ECR 1975, 181, para. 8.

[336] *ECJ* Case C-325/00 - CMA - decision of 5 November 2002, para. 27.

[337] *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 205.

[338] *ECJ* Case C-10/89 - SA CNL-SUCAL v. HAG - ECR 1990, I-3711, para. 14; *ECJ* Case C-9/93 - Ideal-Standard - ECR 1994, I-2789, para. 33.

c) Public Law and Order

Especially for the sales promotion through the protection of certain indications or through the award of certain honors and/or labels, a justification based on grounds of public law and order comes into consideration. The essential non-economic ground rules of a community are to be understood under the concept of this framework.[339] The MSs have a materializing-margin of their respective basic interests whose recognition, however, is from an EC perspective limited under the standpoint of the claims of the exception oriented Art. 30 (1) ECT.[340]

As such a fundamental basic interest it is recognized, among others, the prevention of fraud concerning product quality and processing, that the state supports for reasons of its apparent special features.[341]

When MS rules connect or base the protection of product indications or the awarding of product labels to the carrying out of certain regional monitored production methods or regionally controlled quality requirements, the examination whether products produced outside the region correspond to the implemented standards is usually impossible.[342] For the guarantee that all marked products correspond to these standards, a uniform responsibility and control makes sense.[343] The state then can be kept from supporting products that do not correspond to the special requirements despite declarations to the contrary by the producer.[344] Rules which are based on the conditions of protection of product indications, or the award of product labels, that it was produced in the region, serve hence fraud prevention. They can be judged as grounds of public law and order.

3. Results

Without going into the individual advertising instruments,[345] it can be ascertained that advertising for regional products can be supported in principle both by unwritten and written justification grounds, namely out of interests of the protection of environment, consumer and health, of the protection of regional autonomy, for GIs as well as public law and order. In parallel to Art. 30 ECT, materially discriminating advertising methods can be taken into account within the framework of the mandatory requirements. Certainly, they require special and critical consideration in the framework of 'proportionality.' Timely aid strategies of a MS in favor of regional products with environment-protecting effects on foreign territory do not hinder its reference to the mandatory requirement of environmental protection, if and when the MS is affected in its own interests by operations on the foreign sovereign territory factually or legally.

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[339] See *Karpenstein*, in: Schwarze (fn. 98), Art. 297 para. 12; *Epiney*, in: Calliess/Ruffert (fn. 56), Art. 30 EC-Treaty, para. 31. For this reason the protection refers from the outset exclusively to national interests with the consequence that the problem of extraterritorial effect does not arise. See *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 61.

[340] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 12; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 51.

[341] See as example for a product for which export aid has been given, *ECJ* Case 426/92 - Deutsches Milch-Kontor - ECR 1994, I-2757, para. 44.

[342] See AG *Jacobs ECJ* Case 325/00 - CMA -, final argument of 14 March 2002, para. 34.

[343] This was the allegation of the German government in *ECJ* Case 13/78 - Eggers - ECR 1978, 1935, para. 1.

[344] Similar the German argument in *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 17.

[345] See p. 66 ff.

V. The Limits of Justification

1. Proportionality

All of the above named justification grounds must satisfy the principle of proportionality, which regularly becomes or plays a key role. Accordingly, the national measures must be 'necessary and appropriate' to guarantee the realization of the pursued consumer protection goals. If a MS has the choice between several measures which are equally capable of achieving the desired goal, it must decide for the one which disturbs the free movement of goods the least.[346] The national measure may also not go beyond that which is sufficient to achieve the already assessed goal.[347] This accrues from a sweeping trade off of the MS's interests in the efficient national policy with the EC interests in the effective guarantee of the Common Market. Here the ECJ certainly reacts to the issue with restraint, through leaving some maneuver margin to the MSs, which corresponds to their political responsibility.[348] With the decision, the advantages and disadvantages of the judging measure must be determined each time in the concrete case. Thereby it is also to be considered abstractly, at the same time, which value is to be attached to the affected legally protected rights.[349]

2. Consequences

With the above assessments already in place, the individual advertising instruments will be examined concerning their justification in what follows. In doing so, the obvious justification possibilities for the respective tools and means of aid will alone be dealt with.

a) Geographical Indications of Origin (GIs)

If the state protects the sales of products which are provided with a simple or qualified indication of origin, for example „Schwarzwälder Uhren" (Black Forest clock),[350] whether by §§ 126 ff MarkenG, by a § 131 MarkenG enacted regulation or by a further statute, namely the Wine Act or the Food Products Act,[351] this can be justified for

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[346] Standard case law starting with *ECJ* Case 120/78 - Cassis de Dijon - ECR 1979, 649, para. 8; *ECJ* Case 261/81 - Walter Rau Lebensmittelwerke v. De Smedt P.v.b.A. - ECR 1982, 3961, para. 12; *ECJ* Case 216/84 - Commission v. France - ECR 1988, 793, para. 7.

[347] See *ECJ* Case 42/82 - Commission v. France - ECR 1983, 1013, para. 54; *ECJ* Case C-180/96 - BSE - ECR 1998, I-2265, para. 96; *ECJ* Case 120/78 - Cassis de Dijon - ECR 1979, 649, para. 8.

[348] *ECJ* Case C-180/96 - BSE - ECR 1998, I-2265, para. 97.

[349] For the environmental protection see *Zuleeg,* Vorbehaltene Kompetenzen der Mitgliedstaaten der EC auf dem Gebiet des Umweltschutzes, NVwZ 1987, p. 280, 283 f.; *Zuleeg*, Umweltschutz in der Rechtsprechung des Europäischen Gerichtshofs, in: NJW 1993, p. 31, 35. *Wiegand*, Bestmöglicher Umweltschutz als Aufgabe der Europäischen Gemeinschaften, in: DVBl. 1993, p. 533; *Schröder*, Die steuernde und marktbegrenzende Wirkung umweltschutzrelevanter Prinzipien des EG-Vertrages am Beispiel des Abfallexports, in: NVwZ 1996, p. 833, 836 f.; *Hailbronner*, Stand and Perspektiven der EC-Umweltgesetzgebung, in: Calliess/Wegener, Europäisches Umweltrecht als Chance, 1992, p. 15, 20. For consumer protection see *Reich*, Zur Theorie des Europäischen Verbraucherschutzrechts, in: ZEuP 1994, p. 381, 393 ff.; *Wichard*, in: Calliess/Ruffert (fn. 56), Art. 153 EC-Treaty, para. 14 and 21; *Sack*, Das Verbraucherleitbild und das Unternehmerleitbild im europäischen und deutschen Wettbewerbsrecht, in: WRP 1998, p. 264. For health protection see *ECJ* Case 104/75 - de Peijper - ECR 1976, 613, para. 14/18; *Becker*, in: Schwarze fn. 98), Art. 30 ECT, para. 13; *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 16.

[350] See *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 213.

[351] See *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 186.

reasons of commercial property according to Art. 30 (1) ECT.[352] In this respect, a redress to the mandatory requirements of consumer protection rules out.[353] To which extent the protection is allowed, remains principally reserved for the national law.[354] The rules are suitable when the state gives protection to an indication on the basis of their origin function and, therewith, puts an important means for the creation and preservation of an economic valuable mark or label at the disposal of local producers.[355] The MS protection must restrict itself to the measures which are necessary, for the indications of origin to comply with their specific function as origin (and, should the situation arise) and quality guarantees. This is not against the case, provided that a national regulation scheme - like § 128 MarkenG - grants to the producer a omission claim, provided that the national measure makes the use of the indication of origin dependent upon the bottling or packaging of the goods in the land of origin.[356] Whether and how far the stressed protection is adequate or fair against importation for reasons of commercial property, must be settled or cleared up through a balance between the exclusion right (coming from national law) and the Community grounded right to free movement of goods in individual cases.[357] In this respect there exist no doubt however against rules which are arranged in the same way as §§ 127 - 128 MarkenG.

In any event, demarcation difficulties cause the question, in this context, whether a GI is to be seen actually as a protection worthy simple or qualified indication or if, however, it portrays in truth a generic name. When the latter is the case - for example with the indication “Leipziger Allerlei” (Leipzig variety) - the state protection of their existence or their practice can not be supported according to the above[358] stated items on the justification ground of commercial and industrial property. In this respect the necessary protected right already falls short for a lack of protection worthiness.[359]

The same holds for a justification from a consumer protection legal standpoint. In as much, the requisite dangerous situation for consumer protection is lacking, which is to be assumed alone when the consumer must be protected from mistakes and misleadings.[360] The consumer requires such a protection in the case of GIs only then when the knowledge about it is important as to whether a product actually comes from the named place. In this context, the knowledge is important when an average-informed citizen makes a connection with the indication of origin a certain product-quality, especially raw materials, a particular production process, or a certain meaning

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[352] See above p. 62 ff.

[353] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 19; wohl also *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 49.

[354] *Becker,* in: Schwarze (fn. 98), Art. 30 ECT, para. 28.

[355] *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 28; see also AG *Jacobs*, Case C-325/00 - CMA - final argument of 14 March 2002, para. 41.

[356] *ECJ* Case 47/90 - Delhaize - ECR 1992, I-3669, para. 18. An exception exists when it is imperative to keep and create special product characteristics.

[357] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 20.

[358] See p. 63.

[359] See *ECJ* Case C-321/94, C-322/94 and 324/94 - Pistre - ECR 1997, I-2343, para. 53; *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 10 and 15 and p. 181 f., quote 2 of the summary. See preferably *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 39, para. 96 ff.

[360] See *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, quote 7 of the Summary. For the endangerment generally see *Weiher* (fn. 227), p. 79 f.; *Epiney*, in: Calliess/Ruffert (fn. 131), Art. 30 EC-Treaty, para. 24 f.

within the Folklore or tradition of the relevant area.[361] However, exactly this must be reconciled with generic names.[362] The circumstances of this principle can substantiate no exceptions, for example to say that the indications have been in existence since eternity in connection with certain special German methods of product manufacture for which they are used and that, thanks to this, the products can preserve their "deutsches Flair."[363]

> „Although the method of production used for such products may play some part in determining their characteristics, it is not alone decisive, independently of the quality of the grape used, in determining its origin. Moreover, the method of production of a vine product constitutes a criterion which is all the less capable of being by itself sufficient to prove its origin as, to the extent to which it is not linked with the use of a specific type of grape, the method in question may be employed in other geographical areas."[364]

For this reason, also the argument that there exists a corresponding idea of German consumers who are to be taken into account does not help any further.[365]

> "As, however, the protection accorded by the indication of origin is only justifiable if the product concerned actually possesses characteristics which are capable of distinguishing it from the point of view of its geographical origin, in the absence of such a condition this protection cannot be justified on the basis of the opinion of consumers such as may result from polls carried out on the basis of statistical criteria."[366]

Even when in an individual case there exists a corresponding consumer opinion, the protection would not be necessary of a generic name. In pursuit of the Community protection interests for consumers there is namely a milder, yet equally effective tool, at their disposition.[367] In this respect, the consumer can be sufficiently protected from being misled through labelling with the actual origin or source location, in accordance with Art. 3 (1)(7) of the Council Directive 79/112/EEC of 18 December 1978 for the alignment (harmonization) of legal provisions of the MSs concerning the labelling and presentation of certain end-user consumer food products as well as the advertisement for such (Advertising Directive).[368] The considerations of the ECJ, in the framework of consumer protection, are applied to the justification grounds of public law and order. We cannot speak of an endangering of essential basic interests of the state when a product can mislead the consumer through the above - that it, contrary to its geographical reference, does not originate from the area which it displays.[369] Notwithstanding the fact that the ECJ does not recognize consumer protection as a

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[361] See the view of the Commission in *ECJ* Case 113/80 - Irish Souvenirs - ECR 1981, 1625, para. 13, which the Court did not expressly agree with, that however corresponds to the model of a reasonable consumer.

[362] See above p. 9 f.

[363] So for example the argumentation of the German government in *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, Nr. 2 f.

[364] See *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 9.

[365] See the comment of the German government in *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 2 f.

[366] *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 12.

[367] The leading case is *ECJ* Case 104/75 - De Peijper - ECR 1976, 613, para. 14 ff.; see also *ECJ* Case C-3/91 - Exportur - ECR 1992, I-5529, para. 27 and *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 47.

[368] OJ 1979 33, p. 1.

[369] *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, quote 8 of the summary; *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 17.

right of protection of the public law and order,[370] the manufacture of products with generic names is, without more ado, possible in every location. Then, the protection of generic names can be justified under no point of view. It violates Art. 28 ECT.

b) Seal of quality

When a sovereign body advertises for regional products which must satisfy particular requirements through their labelling with a quality seal, all of the above mentioned reasons come into consideration for its justification. The justification for the protection of commercial property alone is eliminated through realistic examination, because seals of quality with regional reference would doubtfully be recognized by the ECJ as geographical indications of origin (GIs).[371]

aa) Environmental Protection

If the awarding of quality seals, for example the signet „Regionalmarke Hessen," is based on the production in the respective region and therewith corresponding PPMs, then with these seals they signal to the buyer outstanding products that conserve the environment in several respects.[372] This can have a stimulating effect on the sales of the portrayed indication-labeled products, and vice versa for the products without the labels. When less products are imported because of lower sales, the transport distances are reduced, which especially benefits climate protection. Conversely, the sales-promoting effect of such seals gives regionally local producers an incentive to satisfy the certification requirements through rearrangement of their operations in the direction of an ecological production process and an adjusted animal treatment. The awarding of signets which require a regional production is then fundamentally suitable to serve the interests of the environment. Not suitable to carry environmental-interest bills/labels are on the other hand quality seals which, like the oft-mentioned quality CMA-stamps, are tied neither to a regional production nor to any other ecological production process.[373] This appraisal is questioned with a view to minimizing the transport distance, in that the suitability depends not just on the consumer purchase behavior but, rather decisively, on the reaction of the foreign importers to the possible sales drop-off. If goods are imported nevertheless on an undiminished scale in the state that advertises for regional products, the environment is therewith not served. Because the strengthened purchase of regional products alone does not yet reduce the transport distance. Certainly at first sight at least, economic considerations speak in favor of an economically reasonably calculating importer reducing his imports. As long as this prima facie evidence is not shaken, it can be assumed from the environmentally protecting suitability of state advertising for regional products.

However, quality seals with regional reference could be deprived of their environmentally protective work, because they eventually could lead to a mere shift in supply from an advertising MS to another - non-advertising - MS. To all intents and

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[370] *ECJ* Case 177/83 - Kohl - ECR 1984, 3651, para. 19.

[371] See above p. 66 ff.

[372] Namely via the minimization of the transportation and via the observance of the PPMs, which also require fair treatment of animals, see above p. 48.

[373] As already mentioned, the CMA-Seal is supposed to only guarantee to the consumers a high degree of quality. For this reason, in Case 325/00, environmental protection was not given consideration by the parties or by the *ECJ* (see in full above p. 36 f.).

purposes, insofar as it is conceivable that, as the import of goods diminishes in the advertising MS, it correspondingly accrues in a non-advertising one. In this case, nothing would be gained for the environment.[374] Admittedly, cross-border environmental disturbances are connected with barely manageable cause-effect contexts and considerable scientific uncertainties. Should one tolerate such uncertainties to deprive quality seals of their environmentally protective work, it would run counter to precautionary thought[375] and to the principle of a wide maneuvering room for the state regarding prognostic decisions.[376]

Finally, the fact that the advertising MS - here, then, the Federal Republic of Germany - does not follow consequently the "principle of the shortest distance" causes complications. No consideration is afforded to the long-term advancement in many other areas of the economic and political life. Comparable circumstances and the hazards issuing from them have not been dealt with in equal measure in this regard.[377] Should a MS bar the hazards issuing only from certain commodities, without adopting protective measures against other commodities with the same applications, then the measures adopted must be routinely assessed as inappropriate.[378] It is incumbent to consider, however, that the environmental protection in general, and the principle of origin upon which the minimizing of transportation can be relevantly retraced,[379] are complex matters in particular. Their procurement cannot be served at once, but only with the help of methodically thought-out concept, planned over the long-term. Under the circumstances it cannot be expected that the Federal Republic of Germany would proceed simultaneously against all the deficits with respect to the minimizing of transportation distance. It must suffice, rather, that Germany seizes the environmental protection shortages according to concept sustainable and appropriate to the circumstances, and proceed gradually to the accomplishment of all the breakthroughs enabling it to access the "principle of the shortest distance." Although, given the political avowal, the presentation of such a concept can be assumed, it is incumbent upon the Federal Republic of Germany to question and prove it. After all this, the principle remains that a quality seal, the allocation of which presupposes regional production, is objectively suitable to the defense of the legally protected good of the environment.

Regional quality seals, the allocation of which depends on the production in the respective region, should represent the mildest conceivable instrument in the context of transportation reduction and ecological production methods, including the maintenance of animals. However, this is doubtful in a threefold respect. First the question arises, whether the minimizing of the transportation way is necessary. A shortest distance is not bound to the borders of the respective region and, with regard to the Federal Republic of Germany, it is not bound to the borders of the federal states. The transportation of a good produced in the city of Aschaffenburg to be

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[374] See *Weiher* (fn. 227), p. 82.

[375] See Art. 174 para. 2 ECT and *ECJ* Case C- 180/96 - BSE - ECR 1998, 2265 ff.; *Calliess*, in: Calliess/Ruffert (fn. 14), Art. 174 EC-Treaty, para. 25 ff.

[376] See *Weiher* (fn. 227), p. 81 f. That scientific uncertainty with the assessment of a measure is not decisive has been argued above p.60 f.

[377] See *Becker*, in: Schwarze (fn. 26), Art. 30 ECT, para. 64.

[378] See *ECJ* Case 178/84 - Commission v. Germany - ECR 1987, 1227, para. 49 concerning the German Beer Law that could not be justified for reasons of health protection because the additives forbidden for use in beer are allowed in other drinks.

[379] See above p. 69 ff.

marketed in the state capital Munich is more environmentally intensive than a product manufactured in the city of Linz and sold in Munich as well. In this respect, the transportation itineraries should not depend statically on the location of the federal borders, but on the adherence to determined upper mileage limits. In other words, regional quality seals must be open also to products from the respective neighboring regions.

Secondly, the environment can be spared despite a long transportation of imported products if an environmentally friendly means of transport is employed - like rail transportation for instance. To avoid a finding of non-proportionality, the allocation of quality seals must be issued to such products as can be provably carried by environment sparing means of transport. Their inclusion not only represents a means of transportation of goods that poses little hindrance but, in addition, one that protects the environment effectively. The incentive for importers, of the distinction of their imported goods with a quality seal, can be reinforced in letting it resort to environmentally friendly means of transport. Because of the allocation of the burden of proof, the inclusion of environmentally friendly transported goods would bring with itself an only slight increase in the administrative practice for the region allocating the label.[380] By the same token, just as it is incumbent upon the regional producers to prove the regional provenance of their products, it is the importers' business to prove the environmentally friendly transport of their goods. However, in order not to render the awarding of a quality seal practically impossible, the sovereign authority may not impose overreaching demands on this proof.[381] Nevertheless, should the producers not succeed, the signet can be denied to them.

Thirdly, it is not precluded, with a view to the adherence to determined PPMs, that goods produced in another MS also conform to the requirements of an ecological production method, or to the observation of maintenance of animals appropriate to the species. Hence, the inclusion of these goods also represents a little-cumbersome alternative which serves the purposes of environmental protection at least just as much.[382] If the other producing MS actually adheres to the PPMs, then it could not be retorted that, in this case, the protection of the environment would be little effective because it would not be able to be tested by the authority issuing the quality seal. An effective control of the production methods can be guaranteed by regionally independent measures that do not limit the free transportation of goods.[383] The proof that the production method or, as the case may be, the maintenance of animals, corresponds to the issuing criteria, is incumbent upon the importer. According to the principle of mutual recognition,[384] it is rendered that, if the goods produced in another MS are tested successfully, then the requirements of the control methods in the

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[380] Even a considerable administrative costs would not provide any grounds for justification according to the case law of the *ECJ* refer to it, see *ECJ* Case 104/75 - De Peijper - ECR 1976, 613, para. 14/18; *ECJ* Case C-128/89 - Commission v. Italien - ECR 1990, I-3239, para. 22.

[381] See *ECJ* Case C-228/96 - Aprile - ECR 1998, I-7141, para. 18; *Kahl*, in: Calliess/Ruffert (fn. 14), Art. 10 EC-Treaty, para. 24.

[382] The argument is that same as in the context of ecological transportation. The fact that their goods can be labelled with a seal can cause the importer to respect the requirements of ecological production processes.

[383] See *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 17.

[384] See only *ECJ* Case C-184/96 - Commission v. France - Slg 1998, I-6197, para. 28; *Leible*, in: Grabitz/Hilf (fn. 34), Art. 28 EC, para. 21 and 26; *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 28, para. 191.

respective region are met.[385] Quality seals which are enhanced in the three aspects as described, can be qualified as the most sparing conceivable means. Such quality marks are therefore essential to the protection of the environment. Finally, there must exist an appropriate relationship of means to ends between the environmental protection accompanying the allocation of regional quality seals and the limitation of the free transport of goods. The weight of the expected intervention in the free movement of goods must be balanced, in this context, against the meaning of the quality seal for the environmental protection.[386] The fact that regional quality seals represent an intermediate incentive for an integrated reduction and avoidance of environmental pollution speaks in favor of the protection of the environment.[387] In as far as they would lead to a strengthened acquisition of environmentally friendly produced and transported goods, the environmental protection effected thereby would therefore be valued very highly. The global significance draws on the protection of the climate in addition to this.[388] Even if a quality seal should have only little resonance with the purchaser, the accompanying small contribution to the protection of the ozone layer can be relativized through the explosiveness of the matter,[389] especially as the exemplary function resulting of the action of a single state, or its prestige as may be the case, should not be underestimated.[390] Conversely, considerable damage might be expected in the event that producers, importers, and purchasers would alter their environmentally intensive behavior - brought about by the quality seals.

However, an examination of legal repercussions could also be carried out at the expense of the label. If all MSs would advertise their regional products, a return to the situation of the institution of the Single Market would be heralded, at the end of which there would stand an encapsulation of the market. Admittedly, upon realistic consideration this scenario remains confined to the purely theoretical domain. Namely, the example of the Federal Republic of Germany demonstrates the contrary. Regional publicity activities are allowed on its sovereign territory without further ado, without this being the reason for a destabilization of the domestic German Market. If this is possible for Germany as a federally structured state without its domestic market taking any harm because of it, then, more than ever, this has to be possible for the Community, which cannot (yet) be perceived as a state in the sense of the three-elements doctrine.[391]

Lastly, the following aspect is decisive: quality seals do not impede the free play of the market forces - as prescriptions and prohibitions might - but, on the contrary, they

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[385] See *ECJ* Case 188/84 - Commission v. France - ECR 1986, 419, para. 16; *ECJ* Case 73/84 - Denkavit - ECR 1985, p. 1013, para. 14. There are high thresholds for mutual recognition, see also *Becker* (fn. 154), p. 87 f.; *Becker*, in: Schwarze (fn. 26), Art. 30, para. 68 ff.

[386] *Weiher* (fn. 227), p. 88.

[387] See Art. 1 of the Council Directive 96/61/EC on the integrated avoidance and reduction of the environmental pollution of 24 September 1996 (IVU-Directive, OJ 1996 Nr. L 257, p. 26) and the Council Directive 91/156/EEC of 18 March 1991 for the change of the Directive 75/442/EWG on waste (Waste Directive), OJ 1991 78, p. 32.

[388] See above p. 50.

[389] *Weiher* (fn. 227), p. 89. The Commission´s view that in any case substantial advantages for the environment are required can therefore not be accepted.

[390] See *Weiher* (fn. 227), p. 89, who regards national campaigns as inducing global environmental protection measures.

[391] BVerfGE 89, 155, 184 f.; *Bleckmann*, Europarecht, 6. Ed. 1997, Rdnr. 142 ff.; *Everling*, Überlegungen zur Struktur der Europäischen Union und zum neuem Europaartikel des Grundgesetzes, in: DVBl 1993, p. 936, 941 f. This remains unchanged by the charter of fundamental freedoms, see *Lindner*, EC-Grundrechtscharta and gemeinschaftsrechtlicher Kompetenzvorbehalt, in: DÖV 2000, p. 543, 545.

promote them. Conditioned by their informational effect, these instruments enable the purchaser to choose products that suit his or her personal preferences. Consequently they fulfill the assumption that, in a free market, resources are introduced according to the needs of market participants. Pressure can be exerted on the market counterparts for them to join the legally required measures overlapping the label criteria for the good of the environment. The intervention in the freedom of movement of goods is to be regarded as small. No specially strict assumptions due to a possible factual discriminating effect of quality seals hold here.[392] Because of what was said above about the requiredness of the seal,[393] it cannot be the reason for such collateral unequal treatment. As a result, the seal is to be allocated to every importer who introduces his goods from a neighboring region, respectively using demonstrably environmentally friendly means of transport, and adhering verifiably to the required PPMs. Against this background, the account of the Commission dispenses with every basis for the subordination of a reference - literal or symbolic - to the national provenance of the product under the listing of its characteristics.[394] It is merely to be expected that the indication to the regional provenance of the goods will not take place without one to the special quality.[395] Assuming these modified allocation criteria, which are mindful of the fact that, when in doubt, the protection of the environment takes precedence against the free movement of goods,[396] then advertisement with regional quality seals is to be seen as appropriate to the protection of the environment and, thereby, altogether proportional.[397] That, under the circumstances, domestic producers from other regions of Germany could be discriminated only regarding enhancements on foreign goods (the so-called “discrimination à rebours“), does not run counter to this. The Community law is not applicable to purely internal circumstances of each state in the first place.[398]

bb) Consumer Protection

When the awarding of quality seals is tied to the respective regional manufacture and the PPMs connected with it, in a fashion similar to the “Thüringer Eco-hearts” seal, then the goods marked with this logos signal to the purchaser that they promote the protection of environment, consumer and health in multiple ways.[399] With this, quality seals are appropriate as means of information for the consumer about the availability of particular qualities, supplementarily and voluntarily guaranteed by the manufacturer, that exceed the pure requirements for market placement. Because they permit the consumer an enhanced consumption of regional, and therefore fresh and aromatic

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[392] See above p. 55.

[393] See p. 71 f.

[394] See above p. 16.

[395] Additionally the seal must not mislead the buyer by giving him the impression that the product is produced in the respective region although in reality it has been, for example, produced in a neighboring region. It must be clear for the buyer that the quality label simply states that the labelled product fulfills the specific requirements of the respective region. However in this respect, a label is sufficient which gives the product’s production location, see *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, para. 29; *ECJ* Case C-383/97 - Van der Laan - ECR 1999, I-731, para. 24; *ECJ* Case C-362/88 - GB-INNO-BM v. CCL - ECR 1990, I-667, para. 18.

[396] See *Zuleeg* (fn. 349), *p.* 280, 283 f.; *ders.* (fn. 349), p. 31, 35. *Wiegand* (fn. 349), p. 533. Dissenting *Schröder* (fn. 349), p. 833, 836 f; *Hailbronner*, in: Calliess/Wegener (fn. 349), p. 15, 20.

[397] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 28 ECT, para. 38.

[398] *ECJ*, Case 44/84 - Hurd - ECR 1986, 29, para. 55. See *Holoubek*, in: Schwarze (fn. 26), Art. 12 ECT, para. 33 ff.; *Epiney*, in: Calliess/Ruffert (fn. 14), Art. 12, para. 24 ff. A further - in this framework not to be discussed – question is whether or not Art. 3 (1) GG offers equal treatment.

[399] For environmental-, consumer- and health protection effects, see above p. 48 ff., 51 ff. and 60 ff.

products they serve, in addition, a quality-oriented and health-promoting consumer policy. The same holds for the market counterpart. The publicity effect stemming from this seal affords producers an incentive, in the economic sense, to introduce particular PPMs under the auspices of biological and, as it were, transparent production. Hence, quality seals are also visibly to improve the quality of the means of nourishment, to afford security to consumers, and to restore their trust in the food industry.

Meanwhile, there are doubts about their necessity. With a view to biological PPMs, they must be denied in parallel to ecological PPMs.[400] In this respect, the award criteria are to be extended to such products as might have been produced in fact in another MS, but the production methods of which correspond, as has been proved, to the ones which the respective region imposes to the award of its seals.

There could also be shortcomings with regard to the informational effect of regional quality seals in that they do not lend themselves to point at their advantages through a neutral indication but, in addition, they are related to a publicity collateral effect, namely, a demonstration of origin. A clear and aware consumer in the sense of the ECJ[401] will, however, can consider himself satisfied with the milder means of the objectively retained information, in order to draw his or her own conclusions from it. The consumer policy of the Court certainly must be seen in the context of each decided legal case which, without exception, lies at the basis of the MS's product prohibition or ordinance. In such cases, the ECJ has supported the majority of the consumers and accounted for the "labelling doctrine" to account sufficiently by means of a labelling through which reckoning can be borne, as a result of a product which does not harm the health and security of the consumer, but only disappoints the expectations of quality.[402] It is evident that the situation of publicity by means of a quality mark lies qualitatively on a different realm than that of legal cases decided in court. The sovereign authority exercises no compulsion already by the application of mandatory measures, but it serves itself of market economic instruments. These consist in an - optional - designation of the wares, then just as it is available from the labelling advanced by the ECJ.[403] Accordingly, the consumer information by means of a quality seal corresponds to the Court pronouncement with the consequence that it is necessarily to be recognized. This assessment is confirmed when one brings to mind the background of the pronouncement. It consists in the Court's misgivings about the MSs that quasi-cement the nutritional habits prevailing in their land.[404] Precisely this misgiving, however, is baseless with a market economic measure like the quality seals. In this case it is left only to the preference of the consumers, for what product they decide.

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[400] See p. 71 f.

[401] For a consumer model, see only *ECJ* Case C-470/93 – Mars GmbH - ECR 1995, I-1923, para. 24; *ECJ* Case C-210/96 - Gut Springerheide GmbH and Rudolf Tusky - ECR 1998, I-4657, para. 31; *ECJ* Case C-303/97 - Verbraucherschutzverein e.V. v. Sektkellerei G.C.Kessler GmbH and Co. - ECR 1999, I-513, para. 36 f.

[402] See *ECJ* Case 178/84 - Commission of Germany - ECR 1987, 1227, para. 21 and 35 (German Beer Purity Law); *ECJ* Case 198/87 - SMANOR - ECR 1988, 4489, para. 19 ff.; *ECJ* Case 90/86 - Criminal Proceedings against G. Zoni - ECR 1988, 4285, para. 12 ff.; *Oppermann*, Europarecht, 2. Ed. 1999, para. 2043; *Everling*, Der Einfluß des EC-Rechts auf das nationale Werberecht im Bereich der Täuschung, in: ZLR 1994, p. 221, 230; *Lecheler*, in: Dauses (ed.), Handbuch des EG-Wirtschaftsrechts, Loseblattsammlung, 2000, H. V para. 40; *Zipfel*, Der lebensmittelrechtliche Täuschungsschutz im Blickfeld des EG-Rechts, in: ZLR 1994, p. 557, 567.

[403] See the argumentation of the *ECJ* in Case C-362/88 - GB-INNO-BM - ECR 1990, p. I-667, para. 17. See fn. 402.

[404] *ECJ* Case 178/84 - Commission v. Germany - ECR 1987, 1227, para. 32; see *Leisner,* Der mündige Verbraucher in der Rechtsprechung des EuGH in: 1991, 498, 500 ff.

With regard to the allocation criteria of the region-bound freshness of the foodstuffs, something different arises. In a parallel to the case of the short transportation distance,[405] it is in no way related to the borders of the respective region and, in the case of the Federal Republic of Germany, not connected to the boundaries of the federal lands. Products from the Alsace which are marketed in Karlsruhe can be produced at least as directly as goods from Konstanz. With the opening of the seals also for neighboring regions, a more sparing alternative is provided.

If regional labels adhere to these enhancements of their allocation criteria, then they are necessary for the protection of consumers.

They would also have to weather a balance of goods against interests, by which the weight of the interventions in freedom of trade in goods is to be balanced against significance of the quality seals for the protection of the consumer.[406] The circumstance that the informational effect of regional seals is desirable to Community law[407] speaks of their appropriateness and thereby axiomatically permissible. The ECJ is of the opinion,

> „that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.“[408]

This determination can be transferred to the following case. In the course of a biological scandal, namely the BSE-crisis, it gained even more in its actuality. The concern of consumers about foodstuff security can be dismantled only by their comprehensive information, and through state take-over of guarantees regarding the quality of the foodstuff. The concerns of consumer protection in relation to informational and confidence-building measures are to be valued correspondingly highly. Already for a long time, it has been a priority task for the Commission - also at the expense of the domestic market - to restore the confidence of the consumer in the security of the foodstuffs.[409] In this respect, the Commission has worked out the following priorities in her consumer protection policy:

> „The self-protection of the consumer lies within consumer information and education. (...) A high level of consumer information is imperative. Consumer protection must emancipate itself still more from the aims of the realization and/or fulfillment of the internal market and of the economical and currency union, in order to allow the conditions for a long-lasting consumer protection to grow.“[410]

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[405] See above p. 71.

[406] *Weiher* (fn. 227), p. 88.

[407] For the right to information see Art. 11 para. 1 of the Charter of Fundamental Rights.

[408] *ECJ* Case 362/88 - GB-INNO-BM v. CCL - ECR 1990, I-667, para. 18.

[409] See Commission Communication on the food product security for the protection of consumer health of 30 April 1997 (COM (97) 183); also *Kienle*, in: Bergmann/Lenz (fn. 239), Chapter 7, para. 33.

[410] Commission Communication on the priorities in the European Consumer Protection Policy 1996 to 1998 of 31 Oktober 1995 (COM (95) 519, p. 3).

Building on this, the Commission has postulated ten overriding activity maxims, ranging from consumer education about the enhancement of consumer confidence in foodstuffs, culminating in behavior control with a view to sustainable consumption.[411] Along this line lie also the regional labels, in that they send a necessary political signal pointing toward a quality-oriented, transparent nourishment industry. They inform the consumership about the characteristics of a product, while letting them exert an influence on the product offer and product development through their purchasing behavior - somewhat through strengthened purchases of labeled products. Thereby they represent an indispensable instrument through which the regions seek to transform current production and consumption models into sustainable nourishment.

On the other hand it is to be borne in mind that, precisely in the vie of the agrarian and foodstuff sector, one of the great advantages of the domestic market consists in enabling, for the consumer, access to a very broad range of products, which are respectively cultivated of manufactured in MSs in accordance to different methods and traditions, and which lead to an enhancement of the market offer.[412] In this respect, the freedom of trade in goods touched upon here builds the basis of the domestic market.[413] Against this background, as well as in consideration of the facts, the appropriateness of regional labels is to be viewed critically,[414] as - contrarily to the case of the environmental protection - neither the corresponding global obligations to the protection of consumers, nor the concerns of consumer protection exist which are preceded by free trade of goods.[415]

Also here, it will be decisive to determine in how far do regional logos stimulate or bind cross-border demand. This depends proportionally on their discriminating effect. Insofar their allocation is merely tied to the compliance with certain PPMs, a factual discrimination cannot be established according to what was previously said[416] about the necessity of the seal. Consequently, the seal is to be allocated to every importer who demonstrably adheres to advanced PPMs. In this case, the account of the Commission dispenses with every basis for the subordination of a reference - literal or symbolic - to the national provenance of the product under the listing of its characteristics. The freedom of trading in goods is not impeded but promoted. It is merely to be expected that the indication to the regional provenance of the goods will not take place without one to the special quality.[417]

If, in addition, the allocation is tied to the special freshness of the goods, then it necessarily presumes a production in the immediate vicinity of the location of sales. The seal is thus connected collateral damaging effects. Correspondingly, the disturbance in the free marketing of goods weighs especially heavily. In order to restore a legal balance which also does justice to the domestic market, the regional

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411 *Kienle*, in: Bergmann/Lenz (fn. 239), Chapter 7, para. 27.

412 See section 4.1 para. 37 der Community Guidelines (see above Fn. 53 and 54); *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 30, para. 218.

413 See *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975,1811, para. 4.

414 It does not matter that the *ECJ* has decided that the introduction of the labels „Guaranteed Irish" for products that were produced in Ireland was contrary to EC Law (see *ECJ* Case 249/81 - „Buy Irish" –, ECR 1982, 4005 ff). In this decision non-economic grounds of justification were irrelevant.

415 See *Wichard*, in: Calliess/Ruffert (fn. 56), Art. 153 EC-Treaty, para. 14 and 21; *Berg,* in: Schwarze (fn. 98), Art. 153, para. 13; Dissenting *Reich* (fn. 349), p. 381, 393.

416 See p. 74.

417 The consumer must not be misled be the seal, see fn. 395 above.

reference of the logos is to be subordinated - corresponding to the recommendation of the Commission - to the qualitative statement. In this manners, the information requirements of consumers are met an, at the same time, the restrictions to the trade of goods are reduced to a minimum.

cc) Other Grounds for Justification

Regional labels are appropriate to serve for the protection of health and animals. The publicity effect issuing from them affords producers with an incentive, in the economic sense, to adopt particular PPMs such as a biological cultivation method, or the introduction of animal feed appropriate to the species. The risk of animal contamination, or of harmful substances in foodstuffs, is thereby reduced.

Within the setting of necessity the circumstance should be kept into account that, besides the effect of the labels as merely optional instrument, the MSs have an especially wide discretionary latitude in the realm of health protection.[418] The question emerges, however, if other than the opening of regional seals to goods from other MSs whose produces adhere to the recommended PPMs, there can be a milder and equally effective means. In contrast to the considerations in the context of environmental and consumer protection,[419] this must be rejected here. The improvement in foodstuff legal circumstances is directly effected by the regionalization of companies and, thereby, through their small scale structures. Should one wish to make quality seals available for goods that, although produced according to the standards of special PPMs, are manufactured outside of the respective region, then the nourishment market would retain its widely ramified and therefore non-transparent character. Therewith the desired regionalization of the companies would be counteracted.

However, quality marks could be superfluous in this regard if their reference to the regional provenance of the goods would not take up a subordinate position in relation to the quality-oriented message. In order to assess this, the relation between costs and purposes of the free trade of goods and the promotion of health protection should be investigated. The more conspicuous the reference to the regional provenance, the more motivating it will be for regional producers to label their products with the seal. This would lead them to introduce strict PPMs in their companies. Thereby the health protection would be afforded an incomparably larger service than would be in the opposite case, in which due to considerations of the freedom of trade in goods there would follow a merely subordinated regional indication, which would be connected with little sales-promoting effect and, thereby, would motivate few producers to adopt strict PPMs. Considering the fact that health protection takes precedence over all other Community legal concerns[420], namely free trade of goods, the greater profit for the protection of health is to be given preference. A boundary can only be set when, besides the reference to origin, there is no room left for a quality-oriented statement. Regional product seals cannot be justified with the mandatory requirement of the protection of regional effects. Thus far, at least the proportionality in a narrow sense is lacking. The intervention in the freedom of trade in goods is deep; the profit for the

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[418] *ECJ* Case 104/75 - de Peijper - ECR 1976, 613, para. 14/18; *ECJ* Case 174/82 - Sandoz - ECR 1983, 2445, para. 16.

[419] See above p. 71 and 74.

[420] See *ECJ* Case 104/75 - de Peijper - ECR 1976, 613, para. 14/18; *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 74.

regional effect circles is small. Mainly, it remains confined to the economic domain. But the ECJ, precisely, does not content itself with this criterion in any case.[421]

Something similar holds for the justification grounds of the public order. Trade restrictions based on the public order require a particularly strict proportionality scrutiny.[422] The justification ground at hand will only be relevant insofar the label allocation is contingent upon the product's manufacture through a biological, respectively ecological method, and that it be controlled by regional experts.[423] In such a case, the argument that a consistent control offers the best possible assurance of quality[424] cannot be maintained. Apart from the fact that the ECJ does not conceive of the guaranty of quality standards under the concept of public order, a purely technical manufacture transaction can be carried out in another MS as appropriately as in the Federal Republic of Germany.[425]

c) Advertising More Narrowly Defined

When the state promotes regional products by extolling concrete advantages which can be retraced directly to the regionality of the wares, such as the short distance of animal transport or the small-scale structure of an agrarian company, then this can be fundamentally justified, according to what was expressed previously,[426] as much on the basis of the environmental protection as on the basis of consumer protection, provided the previously mentioned restrictions[427] are observed.

Should the state praise regional goods by means of across-the-board publicity claims such as "regional is the first choice," then this cannot be justified from any point of view. In this case a content-valid statement is missing, which would be appropriate to shelter one of the legally protected rights mentioned above.[428] Publicity which hinders can not contribute to the promotion of legally protected rights in any case. The regional sphere, notably - when it is at all recognized as a justification grounds for trade restrictions - is not served, because a global slogan does not permit to establish its identity and autonomy.

Something similar holds in the case in which a region advertises products which possess a specific reference to it - for instance, the Federal State of Thüringen with "Thüringen sausages" or the city of Bielefeld with "Bielefeld clothing."[429] Regarding the protection of the environment, consumer, or health, there is no relationship between free trade restrictive publicity measure and a recognizable legally protected right.[430] Nor can it be made to bear fruit for the protection of the regional sphere. The deep

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[421] See above p. The ECJ also recognizes economic interests, like for example in the case of financial balance of the social security system; see *ECJ* Case C-120/95 - Decker - ECR 1998, I-1831, para. 39.
[422] *Leible*, in: Grabitz/Hilf (fn. 131), Art. 30 ECT, para. 12.
[423] See above p. 65.
[424] See above p. 65.
[425] See *ECJ* Case 16/83 - Prantl - ECR 1984, 1299, quote 8 of the Summary; *ECJ* Case 12/74 – Sekt/Weinbrand - ECR 1975, 181, para. 17.
[426] See p. 69 ff.
[427] See p. 71 and p. 74 f.
[428] See p. 47 ff.
[429] See *Baumbach/Hefermehl* (fn. 14), § 3 UWG, para. 186 and 213.
[430] See *ECJ* Case 90/86 - Criminal proceedings against G. Zoni - ECR 1988, 4285, para. 13 f. Also *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 64.

interference in the free trade of goods at the expenses of the overwhelming majority of market participants looks eye-to-eye to the valorization of a few economic actors and an insignificant and doubtful profit for the regional identity. There can be no question of an appropriate meeting of legally protected rights.

d) Consumer Advice, Expositions, etc.

When the state informs or clarifies the consumer objectively about the advantages of purchasing regional wares - the early tips of the website of the Federal Office of the Environment[431] about the purchase of regional drinks would be an example here - it fulfils therewith the assumption that the consumers can exercise their purchasing decisions on their own responsibility and with an economically reasonable insight.[432] Such promotional measures are justified on the given grounds[433] of the protection of consumers, environment and health. This is not opposed in the decision of the ECJ in the legal case of "Buy Irish."[434] In that case, the Court declared illegal the erection of an information service free of cost ("Shoplink-Service") that would educate consumers about the outlets in which Irish goods could be acquired.[435] In the case at hand, consumers should be educated about the advantages of the products with regard to the protection of the environment, the consumer, and health - not about points of sale. This is a mandatory requirement for the protection of consumers, according to what has been expressed above.[436] The equivalent holds regarding the advice to consumers about the consumption of regional products, as by means of consumer tips. While the purely objective information represents the sparing means, it does not clarify in the same way to consumers about the manifold advantages of regional products. The advice represents therefore the effective means at hand for the protection level that may be afforded to him by the MS.

The question arises whether this argument can be drawn upon also for recommendations and calls to purchase regional products. Doubtless, such actions could be carried out with a high grade of efficacy. However, the reduction of the free trade of goods would be set at least as high. In this regard, the Court declared that the execution of a large publicity campaign in favor of Irish products, during which purchasers would be incited to buy exclusively Irish products by means of slogans such as "Guaranteed Irish - That's the Ticket!", incompatible with Art. 28 EC.[437] It holds, then, to divide regional recommendations and calls into product-specific measures (such as the advice to be attentive to environmentally friendly means of transportation while purchasing), and product-specific actions (in particular the praising of particular regional products). The former can be assessed to correspond unrestrictedly, through the determinations found above,[438] with the concerns of environmental protection. The latter, on the other hand, does not conform to the requirements imposed on measures which restrict the free trade of goods. In this

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[431] http://www.umweltbundesamt.de.

[432] See *Dauses/Sturm*, Rechtliche Grundlagen des Verbraucherschutzes im EU-Binnenmarkt, ZfRV 1996, p. 133, 134 f.; *Reich* (fn. 349), p. 381, 387.

[433] See p. 69 ff. and **Fehler! Textmarke nicht definiert.** ff.

[434] *ECJ* Case 249/81 - „Buy Irish" –, ECR 1982, 4005 ff.

[435] *ECJ* Case 249/81 - „Buy Irish" –, ECR 1982, 4005, para. 3 and 29 f.

[436] See p. 51 ff.

[437] *ECJ* Case 249/81 - „Buy Irish" –, ECR 1982, 4005, para. 3 and 29 f.

[438] See p. 79 ff.

regard, the sovereign authority discounts that products from neighboring regions or products transported in an environmentally friendly manner spare the environment just as well. The campaign would be disproportionate in this case.

When the State promotes regional products for which it organizes weekly- or farmer-markets, sets up exhibits and expositions, or compiles catalogs or databanks about the respective regions' assortment of products, this could hardly be justified by an appeal to compelling requirements regarding the protection of consumers. It is not obvious, namely, on which factual grounds does the informational content of campaign restrict itself to regional products. The protection of consumers would have been served better, had they been educated also about, at least, healthy and nourishing products from neighboring regions. In a comparable case, in which the Irish government reserved a large center in Dublin for domestic producers to expose their products, the ECJ did not even consider the case with regard to aspects of consumer protection.[439] In this regard, however, the protection of the regional sphere can intervene justifiably. The presentation of regional products is appropriate to exhibit regional particularities and to distinguish the region from others. A milder and equally effective means is not available with regard to the voluntariness of such actions. It behooves the balance of goods and interests for the intervention in the free trade of goods not to weigh too heavily, because the regional assortment of products cannot satisfy, by far, the claim of average consumers to a widely varied range of nourishment. They would consume, in addition, goods from other MSs as well. On the other hand, the profit for the regional sphere is enormous. Such expositions preserve the identity of each region and strengthen the character of each area. They cultivate the regional image and contribute to the intensification of regional circuits. Altogether they represent, consequently, a proportionate restriction of the free trade of goods.

3. Arbitrary Discrimination or Disguised Restriction On Trade

As established above, the allocation of regional quality seals is proportionate exclusively to producers located in the region, on the basis of health protection.[440] However, it would only be compatible with Art. 28 EC if it would not discriminate arbitrarily against producers from other MSs. Whether that is the case depends significantly on the understanding of the concept of arbitrary discrimination. In order to fulfill an autonomous goal in the face of the proportionality principle, this concept must be extended beyond its meaning as a merely objective restriction, and encompass a subjective element. To this end, an additional meaning must be added to the factual attribute of arbitrariness. It requires therefore the intent of MSs purposely to hinder the introduction of goods. Conceived thus is the case in which an exculpatory ground has apparently played no role in the restricting measure.[441] However, such open, intentional hindrance of the free trade of goods should not be assumed insofar the State had a grounded hope and the stated goal to serve a lawful Community purpose through its measure. Where regional quality mark allocation is granted exclusively to locally established producers with a view to protecting the health, this is the case. Accordingly, such publicity action does not stand against Art. 30 (2) ECT.

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[439] *ECJ* Case 249/81 - „Buy Irish" –, ECR 1982, 4005, para. 3 and 29 f.

[440] See above p. **Fehler! Textmarke nicht definiert.** f.

[441] See *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 82.

Admittedly, the Court would let the measure fail on Art. 30 (2) ECT, contrarily to the assessment made here. In its opinion, there is arbitrary discrimination already at hand when the unequal treatment is not objectively justified.[442] At any rate, there is no obvious practical requirement worth naming for publicity measures to be oriented exactly according to regional boundaries, hence those of the Federal States. One such a measure elicits artificial consumer preferences which must be assessed as arbitrary discrimination. The discriminating character is not relativized if the campaign is also prejudicial to domestic goods. In this regard the mere hindrance to products from other MSs suffices, according to the ECJ.[443]

Art. 30 (2) ECT does not only restrict the exceptions to para. 1, but also the mandatory requirements of the "Cassis" decision.[444] The circumstance by which a sovereign authority attaches the advertisement for a product - among others - to a shortest distance of transportation could represent a disguised restriction of trade. There is no unanimity regarding the precise meaning of the term;[445] in practice it can remain open as, even after the strictest understanding of the factual attributes, a concealed restriction could emerge. According to this understanding, it is at hand when a MS pursues protectionist goals on contrived bases.[446] Long transportation ranges are inherent to the domestic market. Accordingly, the national goal to minimize them could in truth succeed on the basis of a compartmentalization of the national market. It is certainly to be taken into account that the shortening of transportation ways serves directly the protection of the environment and there by the restriction also serves MSs' imports.[447] Hence, the restriction can only be perceived as an emergency accompaniment of measures whose primary goal is environmental protection. From the standpoint of environment protection this is a desirable effect, and it corresponds to the self-image of the MSs as environmental community.[448] Therefore, there cannot be any question of contrived grounds for the protection of their own products.[449]

4. Basic Freedoms

The ECJ gathers reference to the possibly affected basic rights and emphasizes that the justification for restricting measures by the MSs, provided for in the Community law, should be explained in the light of general principles of law.[450] In particular, the measures must stand in harmony with the basic Community rights proclaimed by the European Council on 07 December 2000 in Nice as the "Charter of Basic Rights of the European Union." The values of the European Convention of 04 November 1950

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[442] See *ECJ* Case 152/78 - Commission v. France - ECR 1980, 2299, para. 18. Also *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 166 ff.

[443] *ECJ* Case C-1 and C-176/90 - Aragonesa de Publicidad Exterior and Publivía - ECR 1991, I-4151, para. 24.

[444] See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 160.

[445] See *Müller-Graff*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. 36, para. 173 ff.; a subjective element is demanded also by *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 83.

[446] *ECJ* Case 40/82 - Commission v. UK - ECR 1982, 2793, para. 40.

[447] See *Weiher* (fn. 227), p. 92 f., regarding arbitrary discrimination.

[448] See above p. 50 f.

[449] Similar *Weiher* (fn. 227), p. 92.

[450] *ECJ* Case C-62/90 - Commission v. Germany - ECR 1992, I-2575, para. 23; *ECJ* Case C-368/95 - Familiapress v. Bauer - ECR 1997, I-3689, para. 24; *ECJ* Case C-260/89 - ERT/DEP et al - ECR 1991, p. I-2925, para. 43. See *Becker*, in: Schwarze (fn. 98), Art. 30 ECT, para. 62. See at this point also Art. 51 para. 1 Charter of Fundamental Rights.

regarding basic freedoms and human rights protection also flow over into Art. 6 of the Charter.[451]

Considered here is a breach of property rights according to Art. 17 para. 1 of the Charter and against professional freedom as right to corporate freedom in the sense of Art. 16 of the Charter.

The scope of protection of property rights is opened insofar the legal position of an asset is touched.[452] Advertisement for regional products could touch the erected and practicing advertising company as well as the customer base of producers from other MSs, whose goods are not advertised. The question whether an erected and practicing advertising company or a customer base, represent the legal position of an asset, has so far not been clarified.[453] Since the coming into force Basic Rights Chart this could be affirmed. According to its Art. 52 para. 3 and Art. 53, it guarantees at least the protection scope and level of the European Convention for Human Rights, and guarantees the corresponding rights with Art. 17 para. 1 and Art. 1 para. 1 of the first Annex Protocol to the EHRC. Hence the jurisdiction adopted by the European Convention for Human Rights can be retraced to the *European Court for Human Rights (ECHR)*. Hereafter the erected and practicing advertising company, as well as the customer base, belong to the position of an asset susceptible of protection.[454] Hence the producers from other MSs whose products are not advertised can exercise proprietary positions susceptible of protection in the sense of Art. 17 para. 1 of the Charter. Admittedly, the advertising MS does not intervene in this position through the advertisement for regional wares - at least not unjustifiably. Thereby it can remain open whether the publicity represents[455] a utilization arrangement in the sense of Art. 17 para. 1 of the Chart, or another limitation.[456]

Should the publicity be perceived of a utilization arrangement, in the sense that it prohibits[457] or commands the utilization of a property, then its interventional character can be denied. Hence, this arises out of the fact that the ECJ does not recognize measures which are merely collaterally encumbering as interventions.[458] Regarding publicity for regional products, the State influences the competitive conditions, and thereby does not aim immediately at the market participants' property. This is a case of a merely collaterally encumbering measure. From day to day, the ECJ resorts back to an assessment of utilization arrangements for the case-law practice.[459] In accordance to the case law of the BVerfG, the property guarantee of Art. 17 para. 1 of

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[451] *ECJ* C 260/89 - ERT - ECR 1991, I-2925, para. 44; *ECJ* Case C-368/95 - Familiapress - ECR 1997, I-3689, para. 25.

[452] *Kingreen*, in: Calliess/Ruffert (fn. 56), Art. 6 EU-Treaty, para. 142; *Frowein/Peukert* (fn. 165), Art. 1 of the 1.ZP, para. 4 ff.

[453] *Kingreen*, in: Calliess/Ruffert (fn. 56), Art. 6 EU-Treaty, para. 145.

[454] *ECHR*, Series A, vol. 101, p. 13, quote 41 - van Marle et al v. The Netherlands; *ECHR*, Series B, vol. 127, p. 23, quote 47 b - H. v. Belgien.

[455] Art. 17 para. 1 p. 2 of the Charter does not apply because it concerns only formal withdrawals. See *Kingreen*, in: Calliess/Ruffert (fn. 56), Art. 6 EU-Treaty, para. 151 and 158 ff.; *Frowein/Peukert* (fn. 165), Art. 1 of the 1. ZP, para. 25 ff. to Art. 1 para. 1 p. 2 ZP 1.

[456] For this type of injury to property see *Frowein/Peukert* (fn. 165), Art. 1 of the 1. ZP, para. 39 ff.

[457] *Frowein/Peukert* (fn. 165), Art. 1 of the 1. ZP, para. 37.

[458] *ECJ* Case 59/83 - Biovilac v. EEC - ECR 1984, 4057, para. 22; *ECJ* Case 281/84 - Zuckerfabrik Bedburg v. Council and Commission - ECR 1987, 49, para. 25 ff.

[459] *ECJ* Case 44/79 - Liselotte Hauer - ECR 1979, 3727, para. 20. for the relevant case law of the *ECHR* see *Frowein/Peukert* (fn. 165), Art. 1 of the 1. ZP, para. 38.

the Charter requires the maintenance of the allocation relations and the guarantee of the substance of the property.[460] From this it follows that, according to German law, only what is already acquired belongs to the protected realm, and not the gainful employment, which is somewhat similar to purely factual sales potential.[461] Mere irruptions on turnover or profit chances, which can affect producers as a consequence of a sovereign authority's advertising activity in favor of regional products, are not protected according to Art. 17 para. 1 p. 1 GG. Given this assessment, their interventional character at Community level is to be denied. Even if the advertising is perceived as a miscellaneous restriction,[462] its interventional character can hardly be affirmed. It is justified, however, in that it corresponds to goals serving the general welfare, it represents a proportionate intervention, and does not affect property rights in their essence.[463] Protection of the environment, consumer, and health, are recognized as goals of the common welfare.[464] Because of their parallel structures, however, the same must hold for the other justification grounds Of Art. 30 S. 1 EC, and the compulsory requirements must be valid.[465] Also according to the pronouncements of the ECHR, such measures should follow the general interest, the legitimate political interests, regardless of whether they affect economic, social, or other public interests.[466] Correspondingly, the protection of geographic indications and the protection of the regional sphere also fall under them. To the extent determined above,[467] publicity for regional products serves in proportional manner the interests of the protection of the environment, the consumers, and the health, as well as geographic denominations and regional autonomy. Consequently, State publicity for regional products does not breach the Community basic right to property.

According to Art. 16 para. 1 of the Basic Rights Charter, the same must be valid for the basic right to corporate freedom. In this regard, it underlies the same requirements for justification as does the property right; hence, the ECJ does not distinguish,[468] in basic right testing, between property- and entrepreneurial freedom. Publicity for regional products does not breach Art. 16 para. 1 of the Basic Rights Charter.

VI. Result

Altogether, the investigation has shown that state- or state-supported publicity for regional products hardly breaches Art 28 EC as a rule, but requires a series of justifications for such actions. The restrictive attitude of the Commission, which comes to expression in the Community guidelines, can only be followed in part. An incorrect understanding of Art. 28-30 ECT lies at the basis decisive points in the guidelines, because these had in sight the functioning of the internal market alone. Legal

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[460] BVerfGE 52, p. 1, 30.

[461] *BVerfG*, Beschl. v. 26. Juni 2002 - 1 BvR 558/91 et al = NJW 2002, p. 2621, 2625.

[462] See *ECHR*, Series A, vol. 52, p. 24, quote 63 - Sporrong and Lönnroth v. Sweden.

[463] See for these requirements *ECJ* Case 44/79 - Liselotte Hauer - ECR 1979, 3727, para. 23; zur ECHR *ECtHR*, Series A, vol. 52, p. 24, quote 62 ff. - Sporrong and Lönnroth v. Sweden.

[464] *ECJ* Case 44/79 - Liselotte Hauer - ECR 1979, 3727, para. 19; *ECJ* Case 240/83 - Procureur de la République/ADBHU - ECR 1985, 531, para. 13; *ECJ* Case C-306/93 - SMW Winzersekt - ECR 1994, I-5555, para. 20 and 25; *ECJ* Case C-183/95 - Affish - ECR 1997, I-4315, para. 43.

[465] See *Epiney*, in: Callies/Ruffert (fn. 56), Art. 30 EC-Treaty, para. 27.

[466] *ECHR*, Series A, vol. 98, quote 45 - James et al v. UK.

[467] See p. 66 ff.

[468] See *ECJ* Case 149/77 - Defrenne III - ECR 1978, 1365 ff.; *Kingreen*, in: Calliess/Ruffert (fn. 56), Art. 6 EU-Treaty, para. 131; *Beutler*, in: v. d. Groeben/Thiesing/Ehlermann (fn. 129), Art. F, para. 57.

concerns of consumer protection were hardly taken into account; the protection of health and environment were totally omitted. In addition, the Commission leaves out of consideration that the issue was not national, but regional advertising strategy. The standpoint of environmental protection - somewhat similarly to the short transportation distance - falls directly here with special weight. On the other hand, the intervention in the market processes is small, due to the non-mandatory character of the measures. The Commission also leaves this cost-goal relationship unconsidered, as well as the fact that publicity through quality seals can contribute directly to a frictionless functioning of the domestic market and to an efficient use of the resources at the measure of consumer wishes. Having said this, a differentiated manner of consideration is altogether necessary in order to appreciate the weight of each justification ground and the weight of the intervention in the market processes. Correspondingly, there must be a distinction between

- the different advertising strategies, in particular their intensity and design

- product-related and production-related marketing

- the advertised products, which directly because of their regionality possess a higher quality than non-advertised products, and such with which this is not the case and

- advertising statements with qualitative messages (short transportation) and such with purely economic goals (“Goodness from Hessen”)

Once this ground is lied, the following summary image emerges:

Publicity Instruments	Applicability of Art. 28 EC	State Measures	Measures with Equal Effect	Justification	Problem Cases
Geographic denomina-tions of origin	Wg. Origin-VO (-) for g.g.A. u.g.U. => permissible		Grds. (+). except: - supporting publicity actions	Protection of publicity property for simple or qualified geographic origin references **=> permissible** (-) for collective indication **=> non-permissible**	Justification of collateral origin indications
Regional Quality Seals	Art. 28 EC applicable	(+) Mandatory regulation campaigns and state grants for private publicity. State default together with private publicity actions => permissible	- Publicity campaigns organized by a MS on the market of another MS - publicity for specific products or product types, resp. Special qualities, without reference to national origin	Environmental protection for marks: - for neighboring regions, environment-friendly transportation, as well as region-independent proof of observed PPM - reference to a determinate quality of the good and - do not mislead consumers **=> permissible** Consumer protection for signets: - open to neighboring regions an region-independent proved PPMs - according to each allocation modality, subordinate to a reference to the quality of the ware and - do not mislead consumers **=> permissible** otherwise non-permissible	- Justification on commercial property grounds - Justification on health grounds

Publicity Instruments	Applicability of Art. 28 EC	State Measures	Measures with Equal Effect	Justification	Problem Cases
Publicity in the narrow sense			- Promotion of agricultural products through general health and nourish-ment indications => permissible	Environment and consumer protection for publicity for advantages of regional wares, if also other MSs are advertised for similar advantages**=> permissible** (-) for global slogans, goods with geographic indication of origin and seals => non-permissible	
Miscel-laneous			Actions of public work, if they support only market participants	Consumer protection for purely objective information, resp. Clarification, consumer advice, consumer tips, product-specific recommendations and calls **=> permissible** (-) product specific recommendations and calls => non-permissible	Justification of exhibits and expositions, weekly- and farmer-markets, catalog compilation for the protection of the regional sphere

D. Compatibility with Art. 87 (1) ECT

The question of if and to what extent does state- or state-induced publicity for certain regional products represent a forbidden grant in the sense of Art. 87 (1) ECT, and whether it should be permitted by the EC-Commission according to Art 88 ECT acquires, finally, practical meaning. As executed, the EC-Commission has published her *"Community guidelines for State grants for publicity for products named in Annex I and certain products not named,"* in which it clarified its permissions policy at the time. Hereafter, according to the Commission, the aid prohibition is to be applied

> „when advertising actions, financed with public funds, through the preferential treatment of certain undertakings or production methods, distort or threaten to distort the competition. Such advertising measures refer to the national or regional origin of the relevant products, certain products are clearly preferred, so that Art. 87 (1) ECT can be applied."[469]

The question under what assumptions do state publicity actions or similar state measures for consumer guidance fall under the concept of aid in the sense of Art. 87 (1) (under 1) ECT is examined in what follows. Thereupon it is to be argued to what extent does the EU-Commission permit any playing room for judgments in the matter of aid permissions (under 2), which leads to the concluding question whether the Community guidelines (restricted, sure enough, only to foodstuffs and agricultural produce) are convincing (under 3).

I. State Advertising for Regional Products as Aid

State support measures for the support of domestic products have always been an integral aspect of state and regional economic policy. Because such measures can lead to biases in interstate commerce and competition distortions, Art. 87-89 ECT (earlier: Art. 92-94 ECT) provide special rules for the material and methods, which subject aid to the control of the Commission:

> „(1) Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
>
> (2) The following shall be compatible with the common market:
>
> a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
>
> b) aid to make good the damage caused by natural disasters or exceptional occurences;

[469] Para 10 of the Community Guidelines, OJ 2001 C 252/6.

c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

(3) The following may be considered to be compatible with the common market:

Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interests (...)“

Thus, Art. 87 ECT subjects such grants to a prohibition with permission provisos. Hence, concept of grants comes for the test of the essential question that must be decided in every case: which publicity measures for the purchase of certain products actually vouchsafe selective financial advantages. In particular, the question arises whether, above the executed publicity actions - like state-financed eco-labels allocation or, for instance, a general campaign about the advantages of regional products - fulfill the concept of state grants. EC law does not define grants. It is clear, however, that the concept of grant is widely more encompassing that the traditional concept of subvention. Hence, the literal notion of aid in the sense of Art. 87 para. 1 EC (“no matter what kind”) and the goal of the EC legal rulings is to be explained. In its decision on Case 30/59 the ECJ defined aids early on as state

„measures, which in various forms reduce the strain-load, which an undertaking normally must bear“.[470]

Furthermore, the ECJ establishes:

„The concept of aid is however broader than that of subsidy because it covers not only positive or pro-active performances like for example subsidies themselves, but also measures which in various forms lessen the burden that undertakings normally must carry and thereby do not constitute subsidies in the more narrow sense of the word, these however in effect are the same.“

Decisive, therefore, is that the public hand accords a business - directly or indirectly - financial and comparable economic advantages: grants are characterized by their affording their beneficiaries an inappropriate economic advantage.[471] Whereas positive monies accrue, the economic advantage can lie, rather, in tax reductions for the beneficiaries. The inappropriate availability of space favoring the offer of regional

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[470] *ECJ,* Case 30/59 - De Gezamenlijke Steenkolenmijnen -, ECR 1961, p. 1

[471] *ECJ,* Case 78/76 - Steinike und Weinlig -, ECR 1977, 595, para. 8; Rawlinson, in: *Lenz* (Fn. 241), Art. 87, para. 3.

products, for instance, can also represent such preferential treatment.[472] In practice, promotional measures for regional products are financed mainly by private institutions commissioned thereto by the State. The Free State of Bavaria, for instance, financed the ongoing costs of a privately constituted company in order to promote Bavarian winegrowing. The purpose of the company, which exercised no economic activity, was the commissioning of orders with third parties for the implementation of publicity and promotional measures. The company financed itself with mandatory contributions of wine commerce. In this, the EC-Commission saw a grant in favor of wine growing concerns.[473] On the basis of the distinction applied in Art. 87 (1) ECT between grants allocated by the state and by „stately means" it became clear that not only did the benefits accorded directly by the State fall within the realm of the grant prohibition. Even more so, grants were included

> „which were accorded by a public institution, a private one, or one erected by the state."[474]

Accordingly, the ECJ took up a whole series of cases in which, each time, a MS established funds with state means which they, on the basis of state regulations, allocated for the support of certain businesses or agricultural branches.[475] After all this it should be clear that, in general, it is necessary to start off from a generous understanding of the concept of grants. On the other hand, the application of grant law only comes into consideration when publicity measure factually - directly or indirectly - is financed with public means. The realm of grant law therefore excludes, in particular, the geographic indications of origin discussed above and quality seals (environment seals, bio-seals, and energy seals in particular), even when the administrative fees for their allocation do not cover the costs. There remain only such publicity activities which, on the basis of a direct or indirect financial promotion on the part of the public hand, give rise to a benefit for a particular business or agricultural branch and, thereby, that could adulterate or threaten to adulterate the competition. Under this category fall, for instance:

- Financial promotion of consumer oriented qualification of regional initiatives for the promotion of special achievements in animal and environment protection.[476]

- Grants for participation in exhibits and expositions outside the marketing region for local agricultural products.[477]

- Direct financial benefits for the promotion of quality and sales of Bavarian agricultural products, for which numerous individual measures were required

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[472] See Bär-Bouyssièr, in: *Schwarze* (fn. 98), Art. 87, para. 27.
[473] Aid Nr. 57/2002 (not published).
[474] *ECJ* Case C-52/97, C-53/97 and C-54/97 - Viscido -, ECR 1998, I-2629, para. 13.
[475] *ECJ,* Case C-173/73 - Italy v. Commission -, ECR 1974, 709, para. 33/35; *Koenig/Kühling/Ritter*, EG-Beihilfenrecht, 2002, p. 72.
[476] Aid Nr. 201/02 of 02.10.2002 (not published).
[477] Aid Nr. 22/2002 of 19.03.2002 (not published).

(promotion of producers merger control in the area of processing and marketing; general public works).[478]

- Financial benefits for the restoration of consumer confidence in the domestic beef market following the BSE-crisis.[479]

- State-subventioned publicity measures for the announcement of a new Hessen quality seal ("Proved Quality - Hessen") through which consumers are informed about the criteria and achievements connected with this sign, with the aid of different publicity media (for instance informational events, tasting activities, and brochures).[480]

II. Aprovability Of Aid

As it has been exhaustively exposed, the EC-Commission has published detailed permission guidelines on the basis of Art. 87 (3)c ECT. The Commission made use of the wide discretion conceded by the European Court in the application of this prescription.[481] The scope for judgment evaluation granted by the ECJ also encompasses the testing of the partly widely understood assumptions of the facts of the case of each single exemption clause.[482] The Commission had to fill in the assumptions of the exemption clauses of Art. 87 (3) ECT proportionally according to economic and social values which could also draw from the Community as a whole.[483] The Community Courts (ECJ and Court of First Instance) are not entitled to supersede the Commission with their own economic judgments.[484] Correspondingly, they only audit whether the findings of case facts of the Commission bear her decisions. Only in case of obvious grave errors or misuse of discretion do these courts annul the Commission's decisions.

Art. 87 (3)c ECT represents the main facts of the case for permissions under the exemption prescriptions of para. 3. It refers as much to sector as to regional grants. It is required that the grants contribute to economic areas or branches and their development. In this connection, the trade conditions may not be altered in a way that runs counter to any Community interests. On this basis, the Commission has decreed numerous guidelines for sector grants (for instance, for grants for small and medium businesses, export grants, etc.) without any of these being objected to by the Court.

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[478] State aid Nr. 301/01 of 29.04.2002 (not published).

[479] Aid Nr. NN58/2002 of 25.07.2001 (not published).

[480] Aid Nr. N 260/A/2002 of 11.06.2003 (not published)

[481] *ECJ* Cases 62 and 72/87 - Exécutif régional Wallon v. Commission -, ECR 1988, 1573, para. 21; *ECJ*, Case 310/85 - Deufil v. Commission -, ECR 1978, 1910, para. 18; *ECJ*, Case 730/79 - Philip Morris -, ECR 1980, 2671, para. 24.

[482] *ECJ,* Case 78/76 - Steinike und Weinlig -, ECR 1977, 595, para. 8; *ECJ,* Case 74/76 - Iannelli/Meroni -, ECR 1977, 557, para. 11/12.

[483] *ECJ,* Case C-142/87 - Belgium v. Commission -, ECR 1990, I-959, para. 56; *ECJ*, Case C-301/87 - France v. Commission -, ECR 1990, I-307, para. 49.

[484] CFI Case T-149/95 - Ducros/Kommission -, ECR 1997, II-2031, para. 63.

III. Legitimacy of the Community Guidelines

Against this background there are no misgivings about the permission policy as published by the EC-Commission in the exposed Community guidelines. In this, the EC-Commission made use of its wide discretion, and correctly applied the requirements of Art. 87 (3) c ECT, as she anchored the “common interest” in the goals defined by Art. 33 EC for the common agrarian policy as well as Art. 6 EC for the common environment policy. Any clues left unobserved by these primary legal clauses with the application of Art. 87 (3) c ECT are not obvious. In every single case, therefore, it must be tested whether an objection raised a grant is compatible with these guidelines.

E. Compatibility with WTO-Law

Before we approach the question in detail, in just how far state advertising for regional products concerns the World Trade Organization (WTO) legal system, it is necessary - in advisable brevity - to make some general clarification. First of all it is to be recorded that all of the member countries of the WTO - meaning also the EC and its MSs,[485] Art. XI:1 WTO-Agreement[486] - are subject to the rules and regulations of the WTO-Treaty Regime.[487] In as much as Art. XVI:4 WTO Agreement sets the obligation under international law to bring the entire national law in unison with the WTO.[488] This is valid independently from the fact that the ECJ disputes the direct effect of WTO rules.[489]

In reference to state advertising for regional products this means concretely that the advertising sovereign body must observe world trade law. Special attention must be given by states to the multilateral agreement for trade in goods in the sense of Annex 1A of the WTO-Agreement, namely to the part known as the General Agreement on Tariffs and Trade 1994 (GATT),[490] to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS-Agreement),[491] to the Agreement on Technical Barriers

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[485] See the corresponding decision on accession 94/800/EC of the Council of 23 December 1994 (OJ 1994 L 336, p. 3 ff.; BGBl. 1994 II, p. 1441 ff.). See *Oppermann*, Die Europäische Gemeinschaft und Union in der WelthandelsorganisationTO (WTO), in: RIW 1995, p. 919, 922.

[486] Agreement on the establishment of WTO of 15 April 1994 (BGBl. 1994 II, p. 1625; OJ 1994 Nr. L 336, p. 3).

[487] *Wetzig*, Einfluß der EC und der WTO auf das Lebensmittelrecht, Frankfurt am Main 2000, p. 101; *Eckert*, Die neue Welthandelsordnung und ihre Bedeutung für den internationalen Verkehr mit Lebensmitteln, in: ZLR 4/95, p. 363, 389 f.

[488] See *ECJ*, Case 341/95 - Gianni Bettati - ECR 1998, I-4355, para. 20. See also *Schroeder/Selmayr,* Die EG, das GATT und die Vollzugslehre oder: Warum der *ECJ* manchmal das Völkerrecht ignoriert, in: JZ 1998, p. 344. See on the general obligation under public international law to harmonize national law with international treaties PICJ, Exchange of Greek and Turkish Populations, PCJ Series B para. 10, p. 20: „(U)n Etat (...) est tenu d´apporter à sa legislation les modifications récessaires pour assurer l´exécurien des engagements pris“. *Stoll*, Freihandel und Verfassung. Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung, in: ZaöRV 1997, p. 83, 125 ff.

[489] See *ECJ,* Case-149/96 - Portugal v. Council - ECR 1999, I-8395, para. 47. A different view is expressed in the panel-communication *United States - Section 301-310 of the Trade Act of 1974*, of GATT-Council, WT/DS152/R (URL: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm). The question of the immediate applicability of the WTO-Agreement should not be discussed in this context. See *Neugärtner/Puth*, Die Wirkung der WTO-Agreement im Gemeinschaftsrecht - *EuGH*, in: EuZW 2000, 276, in: JuS 2000, p. 640, 642; *Petersmann,* Darf die EC das Völkerrecht ignorieren?, in: EuZW 1997, p. 325 ff.; *Sack,* Von der Geschlossenheit und den Spannungsfeldern in einer Weltordnung des Rechts, in: EuZW 1997, p. 650 f.; *Petersmann*, GATT/WTO-Recht: Dublik, in: EuZW 1997, p. 651 ff.; *Sack,* Noch einmal: GATT/WTO und europäisches Rechtsschutzsystem, in: EuZW 1997, p. 688.

[490] Of 15 April 1994, OJ 1994 L 336, p. 11, also referred to as GATT 1994 and according to Art. II:4 WTO-Agreement different from GATT 1947 of 30 October 1947, BGBl. 1951 II, p. 173.

[491] 15 April 1994, OJ EC 1994, Nr. L 336, p. 40.

to Trade (TBT-Agreement),[492] and the Agreement on Agriculture (AA).[493] Thereby, the agreements stand in several ways in a special relationship to each other. The AA acts as a lex speciales towards the other agreements.[494] The SPS and TBT in turn enjoy, as interpretation- and implementation regulations for the exceptions of Art. XX GATT for non-tariff trade impediments,[495] priority over the GATT.[496] Finally, the scope of the TBT is only open, in accordance with Art. 1.5 TBT, provided that the questionable measure cannot be qualified as sanitary or phytosanitary in the sense of the SPS. From this it can be reckoned that the SPS is the more special or specialized of the two.[497]

Just like Art. 28 ECT, the multilateral agreements are only applicable to trade in goods provided that the situational context concerns state advertising measures. The assessment is focused upon the general principles of international law. After that a state is liable for the illegal (non-conforming to WTO principles)[498] activities and inactivities of its organs, in so far as these sovereign state authorities of the respective states carry on or at least appear to carry on as such.[499] It depends very little on the function of the organ or the chosen form of trade, and just as little on the level of the hierarchy of the structure of the state or state's apparatus.[500] Such a sovereign action is available, for instance, when the sovereign body itself advertises for the brand or trademark „Rosenheimer Gummimäntel"[501] or for „Regionale Qualität".

In addition, activities are chargeable to the state from public- or private legal institutions without the features of an actual organ or body, and from natural persons without organic status, provided that they become active in exercising public functions or provided that the state supports and/or fosters them.[502] Such an assessment is rendered, for example, provided that the state delegates the awarding of stamps of quality to legally privately organized undertakings.

However, the state is in principle not responsible for the behavior of private persons in non-public functions, because there is in this respect a want of a causality.[503]

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[492] 15 April 1994, OJ EC 1994, Nr. L 336, p. 86.

[493] 15 April 1994, OJ EC 1994, Nr. L 336, p. 22.

[494] See Art. 21.1 of Agreement on agriculture; *Pitschas*, Ausfuhrsubventionen nach dem WTO-Übereinkommen über die Landwirtschaft - gegenwärtiger Stand und zukünftige Perspektiven, in: RIW 2001, p. 205, 206.

[495] See *Godt*, Der Bericht des Appelate Body der WTO zum EC-Einfuhrverbot von Hormonfleisch, in: EWS 1998, p. 202, 203; *Eckert*, p. 363, 369; *Wetzig*, p. 81.

[496] About the SPS-Agreement see panel-communication *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, accepted by the council GATT, WT/DS26/R/USA (appeal of USA), para. 8.36, and WT/DS48/R/CAN (appeal of Canada), para 8.39(URL:http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm). Not altered by the Appelate-Body, see Appelate-Body-communication *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, accepted by the council of GATT, WT/DS26/AB/R/USA und WT/DS48/AB/R/CAN (URL: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm). *Burchardi*, Labelling of Genetically Modified Organisms: A possible Conflict with the WTO?, in: ZLR 2002, p. 83, 88; *Wetzig*, p. 86 f. Police health measures compatible with the SPS-agreement are regarded, according to Art. 2:4, as compatible with GATT.

[497] Godt, p. 202, 203; Burchardi, p. 83, 98; Eckert, p. 363, 375.

[498] See Doehring (fn. 227), para. 846 ff.

[499] *Seidl-Hohenveldern* (fn. 229), § 77, para. 1658, 1661 ff.

[500] *Verdross/Simma* (fn. 229), § 1271 ff.; *Ipsen*, in: Ipsen (fn. 229), § 36, para. 5 and 8 f.

[501] See *Baumbach/Hefermehl*, § 3 UWG, para. 186 and 213.

[502] *Gornig/Silagi*, p. 753, 758; *Ipsen*, in: Ipsen (fn. 229), § 36, para. 10 ff.; *Verdross/Simma* (fn. 229), § 1276 and 1282.

[503] *Ipsen*, in: Ipsen (fn. 229), § 36, para. 29; *Verdross/Simma* (fn. 229), § 1281.

Somewhat different is the situation when the state organs have not complied with their duty to secure the international public lawful conduct of their state towards disturbances from private persons, or have not complied with the necessary due diligence.[504] The extent or size of the to-be-expended due diligence depends on the circumstances of the individual case.[505] In the case of the advertising for regional products via private persons, a violation of due diligence usually does not comes in through state inactivity or omission. Accordingly, in this respect that goes for what was said about EC law.[506]

I. Compatibility with the Agreement on Agriculture (AA)

First of all, the question arises whether advertising for regional products is compatible with the AA. Certainly some doubt must already exist as to whether the problems presently at issue belong at all in the scope of the Agreement. According to Art. 2 in Annex 1 of the Agreement, the better part of raw materials like cotton and protein-stuff fall under it, for which it is not advertised. Even when one would want to assume the applicability of the agreement, the appropriate obligations are not obvious. Art. 4 regulates the market entrance but, as such, it does not refer to the already executed import. Advertising for regional products limits however not the entrance to the national market, but merely the sales possibilities. Such effects are caught alone by Art. 6 of the Agreement which concerns the internal support of the agricultural economy. However, it becomes clear in the formulation of paragraph 1 of the rule and in the purpose determination in Art. 1 (a) and (h), that the financial support of the producers is exclusively meant. Advertising for regional products is, however, neither tied with a monetary subsidy nor with a direct support of the producer. Rather it has an effect on the purchase behavior alone of the consumers in favor of certain products. This situation is not caught by Art. 6 of the AA.[507] For this reason, such aid measures are excepted as state service programs through the - non-exhaustive - list of Annex 2 of the Agreement,[508] which according to Art. 21.2 is part of the AA, expressly excluded from the obligations of Art. 6.

II. Compatibility with the SPS-Agreement

When the AA holds accordingly no regulation for the support of regional products already, the SPS could come into use. This Agreement "to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade." (Art. 1.1 SPS). The concept of sanitary measures is to be understood in a comprehensive sense.[509] It is transcribed in Number 1 (b) of the Annex I SPS as:

> "Any measure applied: to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or foodstuffs."

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[504] *Seidl-Hohenveldern* (fn. 229), § 77, para. 1671; *Ipsen*, in: Ipsen (fn. 229), § 36, para. 29 ff.
[505] *Verdross/Simma* (fn. 229), § 1281.
[506] See p. 135 ff. above. See also *Gornig/Silagi*, p. 753, 758.
[507] This result is compatible with the aim of the Agreement to limit State´s subvention to agricultural producers. It would be unproportionate to subject publicity for regional products to the same rules as subventions.
[508] See lit. f. Nr. 2 Annex 2.
[509] See *Eckert*, p. 363, 370.

Also the concept of the measures as such is deliberately broadly prepared.[510] It contains according to Nr. 1 and 2 Annex A SPS

> "all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; …requirements associated with the transport of animals or plants or with materials necessary for their survival during transport; …and packaging and labelling requirements directly related to food safety."

From this legal definition arises that advertising for regional products does not fall under the heading of health policing measure. Firstly, health protection is not aimed at primarily with advertisement in the sense of Art. 1 SPS in connection with Annex A (1) b, but rather first and foremost a general quality protection.[511] Striving to better the quality of a good falls however not under the SPS, even when therewith also - secondarily - the protection of health is intended.[512] In addition, the enumeration in number 1 (2) of Annex A of the SPS makes clear that with the concept of the measure alone are intended compulsory measures, meaning those whose observance is mandatory.[513] This is exactly not the case with advertising of regional products. Neither the producers nor the consumers are forced into any particular behavior. Therewith, the scope of the SPS is not opened. A violation against this agreement is eliminated from the start.

III. Compatibility with the TBT-Agreement

Especially the advertising via the awarding of regional seals of quality could come to be measured on the rules of the TBT. The scope of the TBT contained in Art. 1.3 "all goods including industrial products and agricultural products," as far as the food-product rules of the SPS are not appropriate, in Art. 1.5 TBT.[514] The latter is, as already seen, not the issue at hand.

The scope is defined more concretely through the terms, found in Annex 1 TBT,[515] "technical Regulation" and "standard", which are meant to refer to the nature of the product as well as the processing and production methods, as also to all rules concerning the labelling, marking and packaging. Under the idea of technical regulation a technical specification is to be understood, that befits a legal liability, cf. Nr. 1 Annex I TBT. Under those of the standard technical specifications fall, which are legally non-binding, under Nr. 2 Annex I TBT. For regional seals of quality as voluntary product labels, the idea of the standard alone is therefore of interest. The seal is caught from it, without anything further to be considered, provided that their environmental- consumer- or health- friendly effect is reflected in the product itself (i.e. "direct product criteria")[516] Concerning environmental protection, the question arises whether the same applies for PPM-based labels. Because on this issue there has

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[510] *Eckert*, ibid. p. 363, 371.
[511] See p 60.
[512] *Burchardi*, p. 83, 86 ff.
[513] The authentic English text speaks only of „sanitary measures".
[514] See on the supremacy of the SPS-Agreement p. 92.
[515] According to Art. 15:5 TBT-Agreement the addendum is part of the Agreement.
[516] See p. 221.

been for quite some time no settlement, one is to consult the definition of the idea of standard in Nr. 2 Annex I TBT. It suggests a narrow understanding for the PPM-based standards. The original English text states „product characteristics or *their related*[517] processes and production methods“ are to be understood containing only processing standards which have a direct effect on the characteristics of the end product („product-related criteria“).[518] This can be the case for instance with biologically cultivated products, but not with low-pollution industrial products or with short transport distance. From all of this is clear that product-related PPMs fall within the scope of the TBT, while this cannot be assumed with non product-related PPMs („non product-related criteria“).[519]

The consequences concerning all of this are unclear: the background of the legislative history suggests that the TBT regulates exclusively the permissibility of technical regulations and, for this reason, non product-related PPM-based seals per se violate the TBT.[520] However, this would have broad consequences: non product-related PPM-based seals of quality would also not be then invalid, when they would be enacted, via international agreement, based in the form of international standards. This would not only contradict the clear preference of the TBT for international standards, but moreover also would mean that all non product-related PPM-based standards, which are contained in international agreements or which are developed via other international standard-setting committees, would be adverse to the WTO. Considering the importance of such standards for the national environmental protection policy of the WTO-Members, such a broad consequence cannot have been intended. Moreover, there exists in the whole TBT-Agreement no rule which would or could order such a result. However, this would be for the sovereignty-limitation importance of this interpretation to require.[521] It can therefore be correctly assumed that non product-related PPMs neither fall under the TBT nor are they excluded from this Agreement. Their permissibility is focused more towards the general rules of the GATT 1994.[522]

The result is the same for the „direct product criteria“ as well as the „product-related criteria“, although they - as already seen - in principle do actually fall within the TBT.[523] In this respect it is the code of conduct of Annex 3 TBT to be referred to, which takes into reference Art. 4 TBT. According to section (b) of the code of conduct, it is merely to be „open to acceptance by any standardizing body within (...) a Member of the WTO”, with the consequence that it triggers no concrete obligations for the WTO-Members.

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[517] Author’s accentuation.

[518] *Dröge*, Ecological Labelling and the World Trade Organization, 2001, p. 10 f. (URL: http://www.diw.de); *Falke*, Das WTO-Agreement über technische Handelshemmnisse, 2001, p. 3 f. (URL: http://www.kan.de/content/pdf/dt/InternatHarmonisierung/Falke.pdf).

[519] See *Dröge* (fn. 515), p. 11; also *Kohlhaas/Dröge*, Neue Welthandelsrunde: Umweltpolitische Reformvorschläge der Europäischen Union, p. 4 (URL: http://www.diw.de).

[520] See *WTO Committee on Trade and Environment* (ed.), Note by Secretariat on the Negotiating History of the Agreement n Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Process and Production Methods unrelated to Product Characteristics, WT/CTE/W/10-G/TBT/W/11 of 29 August 1995; See also *Falke* (fn. 515), p. 3 f.

[521] *Buck/Verheyen*, Nationale Klimaschutzmaßnahmen und Welthandelsrecht: Konflikte, Synergien und Entwicklungsperspektiven, in: ZUR 2002, p. 89, 94.

[522] also *Falke* (fn. 515), p. 5 f.

[523] Dissenting *Buck/Verheyen* (Fn.), p. 89, 95, which measure the norms on the material obligations of the TBT-Agreement.

IV. Compatibility with the GATT

Therefore, neither the SPS, the TBT, nor the Agriculture Agreement are applicable to advertising campaigns in favor of regional products. Regional aid campaigns must be measured to the full extent on the standard of GATT. Aid measures for regional goods can wind up in conflict with the GATT when they unjustifiably violate its principles and, correspondingly, must be considered as invalid trade restrictions.

1 Relevant Trade-Law Obligations

The central liberalization rule is the Most Favored Nation principle (MFN) of Art. I GATT.[524] According to MFN, every member is obliged to grant to all members the same preferences for imported products that are granted to any other single member. Advertising for regional products give preferential treatment and/or disadvantage not the products of a certain fellow WTO-Member, but concerns generally the imported products all other members.[525] A discrimination towards lands of origin and therewith a violation against MFN can of course then not be at issue - independent from the concrete aid action - from the outset.

The MFN of Art. I GATT finds its companion in the rule of National Treatment of Art. III GATT,[526] which prohibits worse or 'unfavorable' treatment of imported products as compared to that accorded domestic products through national rules, after the goods have crossed the border and become a part of the national stream of goods.[527] Art. III:4 GATT especially forbids to the members to give imported goods a less favorable treatment than domestic products through internal rules. Contrary to Art. 28 ECT, Art. III:4 GATT does not function on the principle of mutual recognition of different national rules. It covers however just like such rules also de facto discriminating measures.[528] Accordingly, since advertising for regional products regularly disadvantages goods from other member states, it seems that a violation against the principle of National Treatment is then quite possible.

Art. IX GATT ('Marks of Origin') regulates the labelling of goods and multilateralizes in the sense of MFN all advantages which the members grant to one another.[529] It is disputed whether the idea of the label or mark under Art. IX:1 GATT concerning the designations of origin also embraces other marks[530] and labels.[531] The title of the rule

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[524] The principle is repeated or applied to specific facts in Art. III:7, IV (b), V:2, V:5, V:6, IX:1, XIII:1, XVII:(a), XVIII:20 and XX GATT.

[525] See on the environmental mark „Dolphin Safe" (tuna products during the catch of which certain ratios of dolphin death rates are observed) Panel-communication *United States-Restrictions on Imports of Tuna („Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.42.

[526] Art. XI, XVII:1 (a), XX und Art. XXIV: 12 GATT refer to the inland principle, as well as Art. 2:3 of the SPS-Agreement and the Preamble, Art. 5 and, according to Art. 15:5, the authoritative addendum 3 of the TBT-Agreement; see *Senti*, WTO-System und Funktionsweise der Welthandelsordnung, 2000, para. 430.

[527] See Panel report *Italian - Discrimination Against Imported Agricultural Machinery*, admitted by GATT-Council, BISD 7 th S, p. 60, para. 5. On Art. III also see complementary remarks in Addendum I of the GATT; as well as *Jackson*, World Trade and the Law of GATT, 1969, p. 273 f.

[528] *Epiney*, Welthandel und Umwelt - Ein Beitrag zur Dogmatik der Art. III, IX, XX GATT -, in: DVBl. 2000, p. 77, 80; *Falke* (fn. 515), p. 4.

[529] See *Herdegen*, Internationales Wirtschaftrecht, 2. Edition, 1995, § 7, para. 23; *Hahn/Schuster*, Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT - Die gemeinsame Marktorganisation für Bananen vor dem *ECJ* -, in: EuR 1993, p. 261, 264; *Koehler*, Das Allgemeine Übereinkommen über den Handel mit Dienstleistungen (GATS), 1999. p. 103.

[530] Jackson (fn. 523), p. 460.

('Marks of Origin'); the application of the idea of said title in paragraphs 2,3 and 6 of Art. IX GATT; and the fact that Art. IX GATT only contains an obligation to MFN and not to National Treatment; these all speak out against such a generalization.[532] Accordingly, general markings do not fall within the scope of Art. IX GATT.[533] The rule is therefore of no consequence to regional advertising strategies.[534]

Art. XI:1 GATT forbids inter alia quantitative restrictions on imports of products from another member's territory. In legal literature circles, the opinions vary whether out of Art. XI GATT a general prohibition of non-tariff barriers[535] can be interpreted.[536] Only in this situation could advertising for regional products come into conflict with Art. XI:1 GATT. The heading of the rule seems to be against it. However, there arises from the open list in Art. XI:1 GATT, which speaks about prohibitions and restrictions of every type that, in addition, a fundamental prohibition of non-tariff barriers as such is meant.[537] Also, the rule that besides tariff barriers absolutely no prohibition or restriction may be carried out, indicates that the rules do not foresee merely a prohibition of quantitative restrictions.[538]

In the end, this question can certainly remain open. Art. XI GATT regulates namely the market entrance alone as such; it refers not, however - unlike Art. III GATT - to the already effectuated import.[539] Advertising for regional products does not however restrict - as mentioned[540] - the entrance to the national market, rather only the sales opportunities. Such effects are themselves caught alone by Art. III:4 GATT.[541] Art. XI GATT then accordingly is equally of no interest for the existing document.

2. The Concept of Product Likeness

The lone-existing appropriate prohibition on discrimination (Art. III:4 GATT), i.e. the prohibition on treating imported products less favorably than domestic ones, contains the condition that it must concern like products.[542] Therewith arises the question whether for this purpose it should be put alone on "direct product criteria" or in addition to that also on "product-related" and non product-related" PPMs. The GATT itself does not deliver a definition of the concept of product likeness. In Annex I of Art. III:2 GATT, the message is merely about "other directly competing or suited for the same purpose" goods. The starting point is hence the WTO case law which stands in connection with

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[531] See the Mexican point of view in Panel-report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.41.

[532] See Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.41.

[533] Also *Diem*, Freihandel und Umweltschutz in GATT und WTO, 1. Auflage 1996, p. 160.

[534] See for quality seals *Dröge* (fn. 515), p. 15; a differnt view is expressed by *Gornig/Silagi* (fn. 154), p. 753, 757 f.

[535] This only refers to the so-called „Quotas". For customs the special requirements of Art. XIII:5 GATT apply. See *Jackson* (fn. 524), p. 321; *Jackson*, The World Trading System, 2nd ed. 1997, pp. 218ff.

[536] *Ott*, Gatt und WTO im Gemeinschaftsrecht, Die Integration des Völkervertragsrechts in die Europäischen Gemeinschaften am Beispiel des Gatt-Vertrages und der WTO-Übereinkünfte, 1997, p. 94.

[537] See *Senti* (fn. 523), para. 549.

[538] See *Ott* (fn. 533), p. 91, 94 ff.

[539] See *Epiney* (fn. 525), p. 77, 79.

[540] See above p. 93

[541] Also *Dröge* (fn. 515), p. 11 ff., who does not mention Art. XI GATT. A different view expressed by *Gornig/Silagi* (fn. 154), p. 753, 757.

[542] See also Art. I:1, IX:1 and XI:2 (c) GATT.

these rules [cf. Art. 31 (3) WVRK][543] As criterion for like products it has been consulted for quite some time now the classification of the products in the customs tariff, the use of the products, the consumer's tastes and habits, products characteristics and the product quality level.[544] From this it is clear that a likeness of products was only negated with a variety of product standards and not, however, with different PPMs.[545]

In recent Panel decisions, the definition of product likeness has certainly experienced a new dimension. Starting from the main goals of GATT like opening of markets, non-discrimination and the renouncing of protection for domestic economy, it is geared towards whether the less favorable treatment is based on a difference which protects domestic production.[546] This is answered in the affirmative, for example, for the EC-Banana Regime, which favors ACP bananas over dollar bananas,[547] and can be negated provided that it is geared toward other points of view than the origin of the goods - for example environment or health[548] policies.[549] In the result, not only "direct product criteria" but also product-related PPMs can thereby, according to past decisions, stand contrary to the likeness of goods with the result that a characteristic-related difference between otherwise identical products does not violate Art. III:4 GATT.[550] However, they are not able to justify after the predominant legal practice up to present differences in the production and processing an inequality of the products; on the whole, these differences do not manifest themselves in the goods or are not otherwise product-characterized ("non product-related criteria").[551] This restriction is grounded in the fear that otherwise a pretext for the export of the own product methods will be given and therewith will encourage new opportunities of trade protectionism.[552]

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[543] Vienna Convention on the Law of Treaties of 23 May 1969 (BGBl. 1985 II, p. 926).

[544] Panel report *United States - Taxes on Petroleum and certain imported Substances*, admitted by GATT-Council BISD 34 th, p. 136 ff., para. 5.1.1; Panel report *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, admitted by GATT-Council, BISD 34 th S, p. 83 ff., para. 5.5. See also *Senti* (fn. 523), para. 380; *Burchardi* (fn. 493), p. 83, 99. With further distincitions *Tietje*, Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse in der WTO/GATT-Rechtsordnung, 1998, p. 204 ff., who applies the theory of comparative cost advantages and highlights therefore the level of offer and demand.

[545] Critical on this, *Tietje* (fn. 541), p. 229 ff.; *Petersmann*, International Trade Law and International Environmental Law, Prevention and Settlement of international Environmental Disputes in GATT, in: JWT 1993, p. 43, 64; *Weiher* (fn. 227), p. 119, 121 ff.

[546] See Panel report *United States - Taxes on Automobiles*, ILM 1994, p. 1397, para. 5.9. See also *Diem* (fn. 530), p. 46 ff.; *Epiney* (fn. 525), p. 77, 79; *Senti* (fn. 523), para. 380.

[547] *Petersmann* (fn. 486), p. 325, 327; *Hahn/Schuster* (fn. 526), p. 261, 264 ff.; *Trachtmann*, Bananas, Direct Effect and Compliance, in: EJIL 1999, p. 655, 660 ff.

[548] Similarly, the equivalence was denied with regard to beer with higher or lower alcohol content. See Panel report *United States - Measures Affecting Alcoholic and Malt Beverages*, admitted by GATT-Council, BISD 39 th S, p. 206, para. 5.74; Appelate-Body-Report *European Communities - Measures affecting asbestos and products containing asbestos*, admitted by GATT-Council WT/DS135/AB/R, para. 59 ff (URL: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm).

[549] *Epiney* (fn. 525), p. 77, 80.

[550] *Dröge* (fn. 515), p. 9 ff.; *Falke* (fn. 515), p. 5 f.; *Epiney* (fn. 525), p. 77, 81.

[551] This corresponds to the words of Nr 1 and 2 of Addendum 1 to TBT-Agreement, which opens the applicability of the TBT-Agreement to measures rulings which determine „characteristics of a product or corresponding production methods." The addition of the word „corresponding" marks the compromise reached in the framework of the Uruguay-Round only to allow such PPMs which are product-related. *Burchardi* (fn. 493), p. 83, 99; *Dröge* (fn. 515), p. 10 f.; *Falke* (fn. 515), p. 3 f.

[552] See Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin II")*, dismissed by GATT-Council, ILM 1994, p. 839, para. 5.26. See also *Falke* (fn. 515), p. 4.

3. Consequences

The preceding assessments form the basis whether the state may advertise for regional products, when:

- The regional products differ from the outside-the-region products as a result of their regional origin or as a result of special characteristics; in this respect there is already missing fact(ual) features of like products in the sense of Art. III:4 GATT,

- The state does not give lesser treatment to like imported products via the advertising of regional products [see below (b)]; in this respect there is lacking on the feature of unequal treatment in the sense of Art. III:4 GATT

a) Permissible Distinctions

Permissible distinctions are for example the ingredients of regional products, their preparation, or their unmistakable taste. Hence, a Sovereign body may as well extol products which are holding EC legally protected designations of origin or protected geographical indications of origin - for example„Lübecker Marzipan“ - like such products with simple and qualified indications of origin, e.g. „Bad Vilbeler Urquelle“ (spring).

Additionally, the state is allowed to advertise for regional products according to their quality. The special quality can be founded in the interest of environmental-, consumer-, or health protection, provided that this is expressed in the product itself. Then, there is the allowance of advertising for especially fresh regional products, for their biological cultivation methods or for their environmentally friendly disposal. The same goes for meat coming from slaughterhouses which have implemented strict sanitary rules and veterinary controls,[553] or for the use of animal feed without additives. An exception is then only to be made when similar standards are observed in other member countries. In this case, the products do not differ from one another.[554] The regionality of the goods alone does not justify namely the dissimilarity of the products, because they are not reflected in the product itself. The short transport distance does not help either (concerning the regionality). This also is not reflected in the product itself.

b) National Treatment

So then, which requirements are to be placed on the state support of regional goods, so that they satisfy the principle of National Treatment. This is unproblematic in the case of the informing of the consumer over the positive effect of regional goods. Provided that such an explanation is objective and speaks the truth, then there exists no doubt about their permissibility. More difficult to answer is the question of aid actions which go beyond the mere informing. According to the view of the Panel in

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[553] See *Senti* (fn. 523), para. 449, 702.

[554] The products have to be treated equally as a consequence of this. See point b below.

Tuna-Dolphin,[555] the rules of an importing state do not or cannot oblige others to produce (competitively) equally. The measures require simply that - firstly - a certain production method not be made a requirement for free trade and sale. This would not be the case when the goods could be sold with or without seals of quality. Secondly, no requirements for the granting of a state advantage may be established which have an effect on the sale of goods. Not included in this are the advantages which arise via a preferential treatment on the part of the consumer.[556] Hence, advertising for example with the seal "dolphin safe" for products of tuna, in which their catch did not exceed a certain quota of killed dolphins, is compatible with Art. III:4 GATT.[557]

Therefore, state advertising for regional products is not in accordance with Art. III:4 GATT when and if these are alike out-of-region products. Actually, via such advertising, neither would the market entrance be restricted nor the regional products be given a direct advantage. Moreover, they merely have an effect on the consumer and therewith on the sales of goods. In contrast to the label of "dolphin safe", which under the named requirements every product regardless of its origin is entitled to, [558] the advertising for regional products is related only to regional products. It excludes from the outset out-of-region products has therefore a discriminating effect. So in this respect we cannot speak of equal national treatment.

In order to satisfy Art. III:4 Gatt, the sovereign body must promote therefore the like imported goods in an equal fashion as the regional goods. If Bavaria bases for example the awarding of the quality seal „Geprüfte Qualität - Bayern" (proven quality from Bavaria) on the special freshness of a product, in such way Bavaria must also distinguish goods from neighboring Austria, provided that these are exactly as fresh. If the German region of Niedersachsen (Lower-Saxony) highlights the intensive controls and security of its agricultural products, then must it also include products from other members who control in an equal manner their agrarian production. If the advertising sovereign body does not open its aid campaigns to like products of other members then it violates Art. III:4 GATT.

4. Justification

Advertising for regional products which are not in harmony with the relevant trade law obligations of Art. III:4 GATT can nevertheless be permissible, provided that they satisfy the requirements of Art. XX GATT.[559] Until now, the Panels have been

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[555] Panel report *United States-Restrictions on Imports of Tuna ("Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598 ff.

[556] See Panel report *United States-Restrictions on Imports of Tuna ("Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.42.

[557] Thus also Panel report *United State -Restrictions on Imports of Tuna ("Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.44.

[558] The same holds for environmental seals as the „Blauen Engel".

[559] The context of the Protection Clause Art. XXI (a) GATT shows that „essential security interests", are in particular major political interests of members, that cannot be used for purposes of environment, health, or consumer protection. About the „escape-clause" See *Ott* (fn. 533), p. 99 f. For the possible grant of a „waiver" when extraordinary circumstances appear according to Art. XXV:5 GATT or Art. IX:3 WTO-Agreement see *Ott*, ibid., p. 101 f.; *Senti* (fn. 523), para. 694. About the agreement on self-restrictive measures, referred to as grey areas measures see *Ott*, ibid, p. 102 ff.; *Hauser/Schanz*, Das neue Gatt · Die Welthandelsordnung nach Abschluß der Uruguay-Runde, 2. Auflage 1995, p. 109 f.

restrained in accepting these justification grounds.[560] The exceptions contained in Art. XX GATT are of fundamental importance for advertising measures in favor of regional goods.[561]

a) Scope

For national protection policies, Art. XX(b) GATT enjoys prevalence because it grants to the members the ability to take measures for the protection of the life and health of humans. An interpretation of the sense and purpose of this rule yields that it extends its scope also to measures which would only indirectly serve this right of protection. Via Art. XX (b) GATT it is made directly possible for members to follow certain non-protectionist national goals, even when a trade restriction is thereby accompanying.[562] However in such case there is no obvious ground for a restrictive interpretation of the scope, despite the exception-type character of Art. XX GATT.[563]

Therefore, measures can also be justified via Art. XX (b) GATT for the protection of the environment like for example keeping the air clean, as long as they also protect the life and health of humans, animals and plants.[564] Art. XX (b) GATT can then be consulted in order to justify advertising campaigns of regional products for environmental- and health protection.[565]

Art. XX (d) GATT allows measures which are necessary for the application of laws or other rules, including the regulation over the prevention of misleading practices. Thereby, the such application oriented regulations must conform to the GATT.[566] The regulation is then suited to justify regional advertising strategies from the standpoint of consumer protection.

b) Extraterritorial Effect

Analogous to the Community legality difficulties, the question also arises in the GATT setting whether extraterritorial effect can be attached to the environmental-protection interests of Art. XX (b) GATT. This question becomes relevant in the context of product likeness (Art. III:4 GATT), provided that advertising for regional products is made dependent on the compliance of “non product-related PPMs” - like for example

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[560] Panel report *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, admitted by GATT-Council, BISD 29 th S, p. 91 ff; Panel report *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, admitted by GATT-Council, BISD 35 th S, p. 98 ff.; Panel report *United States - Restrictions on Imports of Tuna (“Tuna-Dolphin I”),* dismissed by GATT-Council, ILM 1991, p. 1598 ff.; Panel report *United States - Restrictions on Imports of Tuna (“USA-Thunfisch/Delphine II”),* dismissed by GATT-Council, ILM 1994, p. 839 ff.; Panel report *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, admitted by GATT-Council, BISD 37 th S, p. 200 ff; Panel report *United States - Taxes on Petroleum and Certain Imported Substances (“USA-Superfund Act"),* admitted by GATT-Council, BISD 34 th S, p. 136 ff.

[561] Art. XX (g) GATT, permitting measures to maintain exhaustible natural treasures such as landscape protection (see *Epiney* (fn. 525), p. 77, 81), cannot be used as grounds for justification because regional publicity campaigns are not linked with the assumed restrictions of inland production.

[562] *Weiher* (fn. 227), p. 133 f.

[563] *Epiney* (fn. 525), p. 77, 81, tending to a reversal of the SPS-Agreement explicitly and exclusively applicable to health protection measures.

[564] In results, also *Buck/Verheyen* (Fn.), p. 89, 92.

[565] See also *Cottier/Tuerk/Panizzon*, Handel und Umwelt im Recht der WTO: Auf dem Weg zur praktischen Konkordanz, in: ZUR 2003, p. 155, 160.

[566] See Art. XX (d) GATT *Senti* (fn. 523), para. 956 f.

shorter transport - or the adherence to "product related" PPMs, that also are preserved by certain extra-regional products (e.g. biological cultivation methods).

The universal character of the environment speaks in favor of extraterritorial environmental measures. The various interactions and the complexity of the ecological system mean that practically every environmental damage carried out by one member touches physically or psychologically every other. The limited authority, on one's own territory, of or for the exercise of national jurisdiction shows itself hence as inadequate.[567] Even according to the wording of Art. XX (b) GATT is there no evidence that the legally protected rights must absolutely be located in the sovereign territory of the respective states.[568] While Art. XX (f) GATT expressly speaks of the protection of "national treasures", this adjective is missing in subsection (b). If the members had only aimed at the protection of their own individual territories, then they would have added the term, especially since the discussion about the extraterritorial effect of environmentally friendly measures is well known by them.[569]

The legal practice (norm) unmistakably stands rejectingly opposite, however, to the environment- and nature- protecting measures which have an effect outside of their own jurisdiction. In Tuna-Dolphin I[570] the Panel objected to the use of environmentally protecting measures outside of one's own jurisdiction, which then every member could set unilaterally the policy for the protection of the life and health also beyond their sovereign territory, and from which other members cannot deviate without having to deal with claims of trade restrictions.

> „The Panel considered that if the broad interpretation of Article XX (b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical regulations."[571]

Since this decision, the protection of natural life-foundations has certainly developed into a general, in the interest of all members, existing right. Therefore, environmental protection and especially the principle of sustainability have received greater consideration in the WTO[572] since the Uruguay Round.[573] In such way, the concept of sustainable development in paragraph 1 of the Preamble of the WTO-Agreement found its way into matters, in Art. 2.2 TBT environmental protection is expressly named as a legitimate interest which the members may follow, and in the framework of Art. III GATT environmentally political interests can be consulted as distinction criteria.[574] The growing importance of national environmental protection in the WTO

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[567] *Epiney* (fn. 525), p. 77, 82.
[568] See *Petersmann* (fn. 542), p. 43, 69.
[569] Thus *Senti* (fn. 523), para. 677; like *Diem* (fn. 530), p. 131 and *Weiher* (fn. 227), p. 158 ff.
[570] Panel report *United States - Restrictions on Imports of Tuna*, dismissed by GATT-Council, ILM 1991, p. 1598 ff.
[571] Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin I")*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.27.
[572] See *Stoll* (fn. 485), p. 241, 245 ff.; *Eckert* (fn. 484), p. 363 f.
[573] See *Senti* (fn. 523), p. 301, 305 f; *Epiney* (fn. 525), p. 77, 82.
[574] On Art. III GATT see above p. 97 ff.

framework could mean that contours of a new legal conviction may be becoming apparent also in the area of extraterritorial environmental protection.[575]

For this reason, the Panel expressly stated in Tuna-Dolphin II[576] that the members are in principle not to be impeded in the framework of Art. XX (b) GATT from pursuing the protection of environmental rights situated also outside their own national territory:

> "(The Panel) observed that the text of Article XX (b) does not spell out any limitation on the location of the living things to be protected. (…) The Panel further recalled its observation that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory (…). The Panel therefore found that the policy to protect the live and health of dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (b)."[577]

However, the US measures are apparently illegal because they would force the other members to modify their policies, within the confines of their own legislative sovereignty, to correspond to US standards:[578]

> „If (...) Article XX were interpreted to permit contracting parties to take measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such interpretation the General Agreement could no longer serve as multilateral framework for trade among contracting parties."[579]

This approach is confirmed by the "Shrimp-Turtle" [580] decision - even if not exactly explicitly. The decision is to be interpreted to mean that the justification of unilateral measures with extraterritorial effect are not totally out of the question when they serve for the protection of a global resource and can be directly supported by a multilateral agreement that aims at the protection of such a resource.[581]

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[575] Similarly, *Buck/Verheyen* (fn. 518), p. 89, 93, however not explicit about extraterritorial effects.

[576] Panel report *United States - Restrictions on Imports of Tuna,* dismissed by GATT-Council, ILM 1994, p. 839 ff.

[577] Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin II")*, dismissed by GATT-Council, ILM 1994, p. 839, para. 5.31, 5.32 und 5.33.

[578] Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin II")*, dismissed by GATT-Council, ILM 1994, p. 839, para. 5.26 f und 5.38. See *Petersmann*, Umweltschutz und Welthandelsordnung im GATT-, OECD- und EWG-Rahmen, in: Europa-Archiv, 9/1992, p. 257, 261.

[579] Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin II")*, dismissed by GATT-Council, ILM 1994, p. 839, para. 5.26.

[580] Appelate-Body-Communication *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R (URL: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm).

[581] Appelate-Body-Report *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R, para. 133; Appelate-Body-Report *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R, Recourse to Art. 21.5, para. 117 ff. The process concerned Art. XX (g) GATT, and the described pleadings were about Chapeau of Art. XX GATT; but nothing hinders the transferring of these findings to Art. XX (b) GATT. In this regard, only its narrower scope (in comparison to lit (g)) concerning the extraterritorial effect of measures has to be observed. Thus the pleadings of the Panel concerning Chapeau of Art. XX GATT are already discussed in the context of the scope of lit (b).

It can be summarized then that a national measure for the protection of the environment outside of one's own jurisdiction is permissible, provided that:

- It does not force upon other members the environmental standards of the acting state,

- It serves for the protection of a global environmental right, and

- It is covered by an international convention for the protection of the respective resource.

In such context, state advertising of regional products can in principle be allowed even when it is generally connected with extraterritorial effects. Provided that the relevant sovereign body makes the aid action, like for example the awarding of a seal of quality such as „Regionalmarke Hessen", dependent upon that certain „non-product-related PPMs" - e.g. environmentally friendly product in methods or transportation - are adhered to, and that the member does not force the measures on others. It restricts namely not the market entrance for their products, rather gives them the option of an additional marketing opportunity to choose.[582] Regional seals serve also regularly for the protection of the global environmental rights, whose observance is aimed at by the appropriate multilateral environmental agreement (MEA). In this way, environmentally friendly production methods and short-distance transportation serve the global resource of 'Climate' that through various international treaties is protected, most recently via the Kyoto-Protocol. Accordingly, it does not hurt that this protocol has not yet taken full effect.[583] Its evaluations already have an influence in the interpretation of Art. XX (b) GATT, even if some WTO-Members - like the USA - have not acceded to the protocol.[584] The scope of Art. XX (b) GATT is therefore principally open to advertising, with extraterritorial effects - like environmentally friendly transport or environmentally friendly PPMs.

c) Proportionality

All exception-type situations would require that there exist between trade on the one hand and the endangering of the protected object on the other a causal relationship and that the measures taken by a state be necessary.[585] In this sense, a national measure is necessary that is suitable for meeting the endangerment, and when there exists no GATT compatible less restrictive measure at their disposal, or when it cannot be reasonably expected of the member to be able to implement such a less restrictive measure.[586] Lately, this necessity test is generously handled. The Appellate Body (AB)

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[582] This is ignored by *Gornig/Silagi* (fn. 154), p. 753, 758.

[583] See on the „Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD)" *Burchardi (fn. 491*), p. 83, 100 f. See also *ECJ* Case-379/98 - Preussen Elektra -, ECR 2001, I-2099 ff, which explicitly refers to the Kyoto obligations to justify trade restrictions.

[584] Appellate Body-Report *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R, para. 130.

[585] This adjective is not found in the German translation, but it says, according to Art. XXVI:3 GATT, authentic English Text, that the measures foreseen in Art. XX (a) - (d) GATT must be „necessary to...", See GATT, BISD 1969, p. 1 ff.

[586] See Art. XX (d) GATT *Panel report United States - Section 337 of the Tariff Act of 1930,* BISD 36 th S, p. 345 ff., para. 5.25 f; Panel report *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, admitted

implemented in the “French Asbestos” decision an interesting trade-off, in which the health protecting - and the trade restricting - effects were weighed against each other.[587] With regard to the chosen administered level of protection, the member is free to decide, so that it cannot be mandated to employ a less trade-distorting means or measure, unless of course this less distorting means can equally effectuate the realization of the chosen level of protection.[588] This is in line with the requirements which have been discussed on a Community level within the framework of proportionality under the criterion of “suitability” and “necessity”. On the implementation, these points can then here be mandated, as far as it concerns the protection of environment, consumer or health.[589] Advertising for regional products is therefore considered necessary, according to Art. XX (b) and (d) GATT, to the extent in which it (advertising) is ‘suitable’ and ‘necessary’.

Doubtful is whether also the principle of proportionality in a narrower sense has found its way into Art. XX GATT. The opinions of some Panels point to similarities with the principle,[590] and also Art. 2.2 TBT provides for the corresponding international law principle of proportionality. In GATT itself there is however no hint for the validation of this principle and also the evaluations of the TBT cannot be automatically transferred over to the GATT.[591] Hence, the proportionality principle, more narrowly observed, is not applicable in the framework of Art. XX GATT.[592] To avoid misuse, the hazardous condition however must be at least probable and it requires a specially close scrutiny of any potential intention to discriminate.[593]

d) „Chapeau“ of Art. XX GATT

According to the „Chapeau“ of Art. XX GATT, national protection measures may represent neither an arbitrary and unjustified discrimination between nations in which the same conditions exist, nor a disguised restriction of international trade. National measures may not therefore undermine the multilateral trade system including its market entrance rules and prohibitions against discrimination.[594]

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by GATT-Council, BISD 37th S, p. 200, para. 21 ff. Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin I“),* dismissed by GATT-Council, ILM 1991, p. 1598, para. 5.28. See also Art. 2.2. TBT.

[587] Appelate Body-Communication *European Communities - Measures affecting asbestos and products containing asbestos*, admitted by GATT-Council, WT/DS135/AB/R, para. 172 und 175.

[588] Panel report *United States - Restrictions on Imports of Tuna („Tuna-Dolphin I“)*, dismissed by GATT-Council, ILM 1991, p. 1598, para. 6.2. See also *von Bogdandy*, Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT, in: EuZW 1992, p. 243, 245; Petersmann (fn. 542), p. 43, 81.

[589] See above p. 69 ff.

[590] Appelate Body-Report *European Communities - Measures affecting asbestos and products containing asbestos*, admitted by GATT-Council, WT/DS135/AB/R, para. 172; Panel Report *United States - Restrictions on Imports of Tuna (Tuna-Dolphin I)*, dismissed by Gatt-Council, ILM 1991, p. 1598, para. 5.28. See also v. Bogandy (fn. 584), pp.243, 246.

[591] See *Diem* (fn. 530), p. 92 f.; *Weiher* (fn. 227), p. 135 f.

[592] *Weiher* (fn. 227), p. 135 f.

[593] See *Jackson*, World Trade Rules And Environmental Policies: Congruence Or Conflict?, Wash. & Lee Law Rev. 49 (1992), p. 1227, 1238; *Senti* (fn. 523), para. 948; similar to *Diem* (fn. 530), p. 87 ff.

[594] See *Senti* (fn. 523), para. 945 ff.; *Hohmann*, Der Konflikt zwischen freiem Handel und Umweltschutz in WTO und EC, in: RIW 2000, p. 88, 94.

An arbitrary and unjustified discrimination in the sense of Art. XX GATT does not exist then when the national protection measures are equally valid for all members.[595] In the case of support of regional products, the advertising sovereign body does not distinguish between the various WTO members; rather, it treats all imported products equally by not advertising for any of them. Accordingly, there can be no discussion of discrimination between other members.

The prohibition against disguised restrictions on trade makes an exception for measures of the justification according to Art. XX GATT, which cause a restriction on trade and which are carried out with a protectionist intention.[596] Such a motivation is to be found determined from the objective circumstances in each individual case.[597] Here, disguised trade restrictions could in this respect arise, as the advertising sovereign body focuses on the regionality of the goods as such or on the short transportation distance. Both could imply a protectionist intention, because it is extra-regional products and great distances which are actually inherent to world trade.

In this respect, the implementations, effectuated for Community law purposes, are appropriately valid.[598] The regionality of a product is hence to be regarded as a non-permissible disguised trade restriction, while the minimization of the transport distance comes under the „Chapeau“ of Art. XX GATT.

V. Conclusion

Having said all of this, state advertising for regional products is allowed by world trade law in a comparable extent as from the EC law. Merely in a three-way regard do the system of laws take different paths: First, the EC law offers a broader selection of justification possibilities than the world trade law system, so that the promotion of weekly- and farmers- markets or of trade fairs and exhibitions on a EC level are easier to justify than on the international trade law level. However, this difference is in practice already for this reason irrelevant, because such actions are much too insignificant to the current prohibition on import; for this reason WTO-Members do not pay attention to them (de minimus non curat lex).

In this respect, the restricted flexibility or scope, in comparison to EC law, is of a purely academic nature. Secondly, all state aid actions violate, in EC law, against the free movement of goods and must necessarily be put through a justification test. In contrast, in the framework of world trade law to a certain extent they do not violate trade law obligations at all. This can all be traced back to the fact that WTO Law - unlike EC Law - has no general restrictions, rather only a prohibition against discrimination[599] and already on a factual level refers to the likeness of products. In the end result all this does not really make a difference, because a justification in the EC context usually is not granted when the advertising has a discriminating character.

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[595] Panel report *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, admitted by GATT-Council, BISD 29th S, p. 91, para. 4.8; Panel report *United States - Imports Of Certain Automative Spring Assemblies,* BISD 30th S, p. 107, para. 5.5.

[596] *Diem* (fn. 530), p. 74 ff.

[597] *Weiher* (fn. 227), p. 145.

[598] Above p. 80 ff.

[599] Apart from the controversial exception to Art. XI:1 GATT, which however has no meaning for promotion campaigns in favour of regional products, see above p. 97 f.

Thirdly, a test of reasonableness is foreign to the WTO realm. This means that the size of the origin indication concerning seals and labels, like for example with the Thüringer „Öko-Herz“, is not subject to a strict proportionality test. In the end, there arise however also no noticeable differences. A label without qualitative indications would also be incompatible with the GATT, because it would qualify as a disguised restriction in the sense of the introductory paragraph to Art. XX GATT.

This accordance between the two legal systems may at first be surprising, as the environmental-, consumer- and health- protection in EC Law has a much higher status than they have in WTO Law. So the latter (WTO), for example, recognizes neither the Origin Principle nor the Causality Principle[600], and the idea of “ecological world trade” being equal with “environmental community” will surely not become a reality for a long time. On a second glance, it becomes clear however that the WTO Law is more generous than its EC counterpart. For environmental- and consumer- protection reasons WTO Law allows without further ado even discriminatory measures and generally does not catch non-mandatory trade restrictions. In any event, the WTO system does not set up more narrow rules-boundaries for the advertising of regional products as the EC system.

F. SYNOPSIS

State advertising for regional products, within the WTO and EC, is neither unrestrictedly prohibited nor generally permitted. It is agreed, that it has to be assessed in every single case, whether form, content and the object of the state sales-promoting measures are in accordance with the principles of free movement of goods, the EC state-aid policy and the WTO-Law (see **A**.).

State advertising for regional products includes all sales-promoting measures guided or initiated by the public body, that are focused on stimulating the market operators to buy certain regional- specific products. Under this come not only the classic financial aid for sales-promotion and the appeals to buy regional products, but also and primarily geographical indications of origin and quality labels (for example eco-labels), that are awarded by state organs with the aim of sales-promotion (see **B.I.**).

The Commission has written down its point of view concerning the permissibility of such advertising measures in regard to - the mainly advertised - agricultural and food products in the detailed but non-binding “Community Guidelines”.

The legal opinion concerning the accordance of state advertising with the principles of free movements of goods (Art. 28 to 30 ECT) expressed in those guidelines suffers *prima facie* from the “natural advantages” of the regional marketing - shorter distances for distributation – that are remaining unconsidered. This is questionable, as far as regional products generally show provable advantages for the environment and the consumer, that either have an effect on the product itself (for example freshness; retraceability of its origin) or refer to the production process (for example low transport emissions).

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[600] See on the Causality Principle Panel report *United States - Taxes on Petroleum and Certain Imorted Substances (“USA-Superfund Act”),* admitted by GATT-Council, BISD 34 th S, p. 136 ff.

The various approval criterion are however covered by a wide scope of flexibility and are by their nature reasonable, and upon their basis the Commission wishes to assess state aid for agricultural and food (see **B.II.**).

In particular, the requirements, which place the principles of the free movement of goods upon state advertising measures in favor of regional products, are to be assed in a very complex and detailed manner (see **C.**)

It is certain, that Art. 28 ECT in this respect will be displaced by the special EC Origin Regulation as far as it concerns registered trademarks with their own geographical indication of origin (§§ 130 to 136 MarkenG). In all other cases, (for example geographical indications of origin not protected by EC-Law and regional quality labels) secondary EC-Law, that could potentially exclude the application of Art. 28 ECT, is not clear and obvious (see **C.I.**)

Difficult to resolve conflicts with the EC-Law arise from the fact that Art. 28 - in a very broad sense – is not only applicable to all sovereign-induced advertising measures, but also to private activities, that are watched by the public body without its interference. If private organizations advertise through scheduled and long-lasting campaigns for regional products, the responsible authorities, if necessary, are obliged to intervene against the arising discrimination of imported products (see **CII.**).

Every (although somewhat insignificant) advertising action for regional products has to be regarded fundamentally as a measure that is suitable to obstruct trade, even if only indirectly and/or potentially, within the Community; it comes therefore under Art. 28 ECT (so called: measures of equivalent effect). Though Art. 28 ECT does not prohibit the national authorities to emphasize in their advertising framework the special characteristics and qualities of certain regional products, unless it would suggest an assumption, according to which the respective products should be regarded as preferable only because of their regional origin (see **C.III.**).

Other advertising measures can be justified, if either the advertised product or the its production process are proved as fulfilling mandatory requirements (so called: „*éxigences impératifs*“) that are also accepted by EC-Law, and furthermore, the advertising measures must be suitable, necessary and appropriate to implement these mandatory requirements. Under these narrow conditions, environmental and consumer protection can also in exceptional situations be used to justify such advertising measures, which have not include imported products.

It is always advisable to proceed with a graded and detailed point of view that weighs and balances the importance of the individual justification and the severity of the infringement. Accordingly, advertising with regional quality labels (for example “ Qualität aus Bayern”) is permissible, if (1) it is open for products from neighboring (also foreign) regions with the same quality merits, (2) the labels are awarded because of proven environmental or consumer-friendly qualities of the product (for example short animal transport; ecological cultivation etc.), (3) it contains references of these merits and (4) does not mislead the consumer. Simular objective requirements are valid for other commercializing strategies of state authorities: According to this, advertising measures, that extol themselves purely for gratuitous praise, are not permissible (see **C.IV.**).

From the view of european subsidy law, an approval of the Commission is always then required, if the sales of regional products shall be supported through financed measures. As far as concerns state aid or other financial (preferential treatment) advertising performed on behalf of regional agricultural or food products, the Commission in its Community Guidelines has geared itself to the aims of the Common Agricultural Policy and lasting environmental protection (see **D.**).

Although WTO Law - in contrast to EC Law - does not recognize any appropriate reasons for justification, in the end it actually does permit state advertising for regional products in a simular way as it does EC Law. Due to the fact that WTO Law is not given direct effect in the European Union and to the fact that advertising for regional products is not a priority focus of the WTO, conflicts with the WTO Law may well not arise in the foreseeable future (see **E.**).