

Whilst it would be relatively easy to devise a helpful norm for 'simple' losses such as that of an arm or eye, this task would prove more difficult in relation to complex injuries such as industrial deafness, brain damage, head or back traumas or diseases such as cancer, asbestosis or mesothelioma.<sup>5</sup> However, as the English Law Commission has observed,<sup>6</sup> this problem is not insurmountable and, it is suggested, does not warrant the abandonment of the legislative tariff approach. Perhaps some assistance could be gleaned from the extensive coverage of the various impairments contained in the U.S. Medical Guides. Although it is proposed not to use the American percentage formula, a check list of this nature would provide a helpful starting point in the allocation of dollar guides. It would need to be made clear that in the case of multiple injuries the tariff does not operate cumulatively and that, with reference to the listed figures, the loss in question is to be analysed as a whole.<sup>7</sup> Any judgment made would be based upon the most appropriate tariff figure after consideration of the closeness of its relationship with the particular injuries sustained.

The question arises as to who or which body ought to determine the list of norms. The formation of a multifaceted body designed to attract input from a wide cross-section of persons interested in the issue may be more appropriate and prove more fruitful than simply relying upon parliamentarians to fix what they consider as the most desirable scale. One attractive option would be to convene conferences attended by judges, expert legal practitioners, leading academics and lay experts (including doctors, economists, representatives from the paraplegic, quadriplegic, head injuries and similar associations as well as other persons conversant with the problems faced by the disabled) to debate the question of the most appropriate figures.<sup>8</sup> Discussions would need to include considerations of not only the amount necessary to adequately compensate victims of specified injuries, but the wider ramifications of any decisions made. As evidenced by the American experience,<sup>9</sup> for example, the undesirable effects upon insurance premiums which flow from large court awards would have to be borne in mind to protect against the average figures being set at too high a level.<sup>10</sup>

<sup>5</sup> Note ss. 38A(3) and (5) of the Limitation Act 1935 (W.A.).

<sup>6</sup> *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11.

<sup>7</sup> English Law Commission, *Personal Injury Litigation – Assessment of Damages: Working Paper No. 41* (1971) 52.

<sup>8</sup> There is precedent for this in the form of Judges Conferences on Sentencing in criminal cases. The English Law Commission favoured this type of informed discussion in its *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 79-80. The proposed forum is to be distinguished from damage tribunals, the setting up of which was disapproved of by both the Commission and the earlier Winn Committee, *Report of the Committee on Personal Injuries Litigation* (1968) Cmnd. 3691, 114-116. The Commission's rejection of this latter strategy was based largely upon the unsatisfactory operation of The Western Australian Third Party Claims Tribunal which was established by the Motor Vehicle (Third Party Insurance) Act 1967 (W.A.) and disbanded soon after.

<sup>9</sup> See n. 22 above.

<sup>10</sup> Note *Heaps v. Perrite Ltd* [1937] 2 All E.R. 60; *Hately v. Allport* (1953) 54 S.R. (N.S.W.) 17; *Fletcher v. Autocar & Transporters Ltd* [1968] 2 Q.B. 322; *Arnold v. Teno* (1978) 83 D.L.R. (3d) 609; *Andrews v. Grand & Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452; *Lim Poh Choo v. Camden & Islington Area Health Authority* [1979] Q.B. 196 and *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263. But see *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] A.C. 174, 187 per Lord Scarman.

Although it came to no final conclusion upon the desirability of a tariff system in its 1971 Working Paper,<sup>11</sup> the English Law Commission ultimately rejected its legislative adoption.<sup>12</sup> It appeared to do so, not on the basis of sound legal justifications, but rather because of an 'absence of any real enthusiasm for this innovation'.<sup>13</sup> With respect, this is a dubious basis for any recommendation relating to law reform. As noted previously, the benefits of legislative guidance in the context of the assessment of non-pecuniary damages have been recognized by members of the judiciary<sup>14</sup> and would go a long way to ensuring that all claimants and defendants are treated equally before the courts. Irrespective of public and legal sentiment on particular proposals, this is, and must always remain, the primary objective of every legal system. The rejection of the tariff system was justified, at least in part, by the High Court in *Planet Fisheries* on the ground that:

the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused.<sup>15</sup>

Their Honours' approach does not, however, lend itself to the fair and reasonable resolution of personal injury disputes. Their justification is better advanced as a reason for implementing a legislative scheme based upon a tariff system (with an overriding upper limit) which would avoid the onerous burden presently faced by trial judges and guarantee, so far as is possible, consistency between awards.

<sup>11</sup> *Personal Injury Litigation – Assessment of Damages: Working Paper No. 41* (1971) 54.

<sup>12</sup> *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11. The *Pearson Report* 88-89 also rejected a legislative tariff to control awards.

<sup>13</sup> *Ibid.*

<sup>14</sup> For example, *Naylor v. Yorkshire Electricity Board* [1968] A.C. 529 (HL).

<sup>15</sup> (1968) C.L.R. 118, 125.

In *Dassonville*, the Court also developed the *judicial* exception, referred to above, to the prohibition in Article 30. This exception has become known in the relevant literature as the 'rule of reason'. The Court said:

In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a member-State takes measures to prevent unfair practices in this connection it is subject to the condition that these measures should be reasonable and . . . they must not, in any case . . . constitute a means of arbitrary discrimination or a disguised restriction on trade between member-States.<sup>6</sup>

The effect of the 'rule of reason' as developed by the E.C.J. in *Dassonville* is that, *in the absence of relevant Community regulations*, national measures to prevent unfair business practices may be taken by the Member States. These measures are exempted from the prohibition in Article 30 if they do not constitute a means of arbitrary discrimination. Although we know that even reasonable rules will not survive if they constitute a means of arbitrary discrimination, the Court in *Dassonville* fails to provide guidelines enabling us to determine when national measures are reasonable. The 'rule of reason', however, was further elaborated in the leading case of *Rewe-Zentral A.G. v. Bundesmonopolverwaltung Fuer Branntwein*,<sup>7</sup> popularly referred to as the *Cassis de Dijon* case.

The plaintiff in *Cassis de Dijon* intended to import into the Federal Republic of Germany a consignment of Cassis de Dijon, a French liquor, for the purpose of marketing it in that country. He was informed by the Bundesmonopolverwaltung (Federal Monopoly Administration for Spirits) that the liquor did not have the required characteristics in order for it to be marketed in Germany. In particular, the product had insufficient alcoholic strength. The relevant West German rules governing the marketing of alcoholic beverages fixed a minimum alcoholic content (25 per cent of alcohol per litre) for various categories of alcoholic products. The liquor could not be marketed in Germany because it had an alcohol strength of between 15 and 20 per cent. In its judgment, the Court restated the 'rule of reason' in the following language:

In the absence of common rules relating to the production and marketing of alcohol . . . it is for the member-States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. 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 relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.<sup>8</sup>

This statement is much clearer than the description of the 'rule of reason' in *Dassonville*. First, it lists four mandatory aims which national measures are allowed to achieve. These aims are 'mandatory' in the sense that they are indispensable for the welfare of a Member State. These requirements are the fairness of commercial transactions (which had already been recognized as a requirement in *Dassonville*), the effectiveness of fiscal supervision, the protection of public health and consumer protection. Secondly, the Court stipulates that national laws restricting the free movement of goods, if they are to qualify under

<sup>6</sup> *Ibid.* 454.

<sup>7</sup> [1979] 3 C.M.L.R. 494.

<sup>8</sup> *Ibid.* 508-509.

the 'rule of reason', must be 'necessary' in order to satisfy these aims. Thus, not *all* measures aimed at protecting the consumer or public health will be exempted from the prohibition in Article 30. Indeed, those measures which are not *necessary* for the achievement of that aim will not be exempted. In other words, the 'necessity' rule involves an application of the familiar principle of proportionality according to which 'a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure'.<sup>9</sup>

In *Cassis de Dijon*, the German Government relied on health and consumer protection concerns to justify its legislation. The German representatives argued, with regard to health, that its rules relating to the minimum alcohol content of alcoholic beverages were justified since these beverages 'may more easily induce a tolerance towards alcohol than more highly alcoholic beverages'.<sup>10</sup> This argument did not persuade the E.C.J. since the German consumer 'can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form'.<sup>11</sup> The German government also submitted that its rules were designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages. In particular, they submitted that a lowering of the alcohol content would secure an undue competitive advantage to low alcohol beverages since the high alcohol beverages are, in general, more expensive. The Court admitted that 'the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations'.<sup>12</sup> Nevertheless, the fixing of limits is not 'necessary' to guarantee the fairness of commercial transactions, because it is also possible to protect the consumer by affixing appropriate information on the packagings of products.

The 'rule of reason' has been applied in a number of recent cases. It is not the purpose of this article to comprehensively discuss all these cases. Instead, we propose to concentrate on a number of recent cases which, owing to the Court's reasoning or the subject matter of the litigation, have contributed to the judicial development of the 'rule of reason'.

The first case, *Re Disposable Beer Cans: E.C. Commission v. Denmark*,<sup>13</sup> decided on 20 September 1988 by the E.C.J., raised, as the Advocate General, Sir Gordon Slynn, remarked, 'a difficult and sensitive issue — the compatibility of measures taken to protect the environment with the fundamental rule of the E.C. Treaty that quantitative restrictions and measures of equivalent effect in relation to imports into one member-State from another are unlawful'.<sup>14</sup> Danish legislation required that all beer and soft drinks sold in Denmark should be

<sup>9</sup> Hartley, T.C., *The Foundations of European Community Law* (2nd ed., 1988) 146.

<sup>10</sup> *Rewe-Zentral A.G. v. Bundesmonopolverwaltung Fuer Branntwein* [1979] 3 C.M.L.R. 494.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> [1989] 1 C.M.L.R. 619.

<sup>14</sup> *Ibid.* 621.

packaged in containers which were re-usable and had been approved by the National Environmental Protection Agency. The Agency could refuse approval of a new type of container, especially if the container was not technically adapted to a system of return or did not ensure actual re-use of a sufficient proportion of containers, or if a container of general capacity which was both available and suited to its intended use had already been approved. In order to avoid the possible adverse consequences of these national rules for interstate trade, the Danish Government allowed the use, provided that a deposit and return system had been set up, of non-approved containers, 'but excluding metal containers, within a limit of 3,000 hl per producer per year'.<sup>15</sup> The Court reiterated its adherence to the 'rule of reason' as follows:

For the purpose of deciding the present case it should be observed that, firstly, in accordance with settled case law . . . in the absence of common rules relating to the marketing of the products concerned, obstacles to movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements of Community law. It is also necessary for such rules to be proportionate to the aim in view. If a member-State has a choice between various measures to attain the same objective, it should choose the means which least restrict the free movement of goods.<sup>16</sup>

The above quotation is important, not so much for the Court's re-affirmation of the continuing validity of the 'rule of reason', but because it extends the list of mandatory requirements, justifying national measures designed for the protection of the environment. The protection of the environment is a Community (as opposed to a purely national) mandatory requirement. Indeed, in 1985, the Court confirmed in *Association de Défense des Brûleurs D'huiles Usagées*<sup>17</sup> that the protection of the environment is 'one of the essential objectives of the Community' which may 'justify certain restrictions on the principle of the free movement of goods'.<sup>18</sup> In addition, the enviable position of the environment is further underscored by the fact that the Single European Act, 1986, which was adopted to facilitate the completion of the Internal Market by the end of 1992, contains a number of Articles on the environment. These Articles have now been incorporated in the E.C. Treaty. Article 130r states that Community action 'relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay'. Environmental protection policies are to form a part of all Community policies.

The Court in the *Disposable Beer Cans* case decided that the re-use of containers was necessary for the achievement of a mandatory requirement, namely the protection of the environment, and that a deposit-and-return system was an essential element of such a system. Nevertheless, the Danish rules were incompatible with Article 30 of the E.C. Treaty because the legislative requirement that only approved containers were to be used was not necessary to achieve the Government's stated aim and the concession for the limited marketing of

<sup>15</sup> *Ibid.* 630.

<sup>16</sup> *Ibid.* 630.

<sup>17</sup> [1985] E.C.R. 531.

<sup>18</sup> *Re Disposable Beer Cans: E.C. Commission v. Denmark* [1989] 1 C.M.L.R. 619, 630.

beverages in unapproved containers was insufficient to remedy the defect.

This case also clarifies our understanding of this part of European law because the E.C.J. clearly stipulates that a national rule will inevitably be incompatible with Article 30 if it discriminates between domestic and interstate products. Prior to *Re Disposable Beer Cans: E.C. Commission v. Denmark*, discriminatory legislation had been held to be in conflict with Article 30. For example, in *Commission v. France*,<sup>19</sup> the Commission had initiated legal proceedings against France for adopting a preferential postal tariff system. Newspapers and periodicals printed in France and satisfying certain qualitative criteria enjoyed a preferential tariff whereas newspapers and periodicals, printed wholly or in part in other Member States, were subject to the ordinary printed matter tariff. The Court did not have any problem coming to the conclusion that the French regulations established a difference in treatment between domestic products and interstate products and were likely to hinder the distribution in France of publications from other Member States. The regulations therefore fell within the prohibition laid down in Article 30.

Equally, a national campaign to promote the purchase of domestic products, even if the promotion is undertaken by a State-sponsored or State-supported private company, is incompatible with Article 30. Such a campaign constitutes an establishment of a national practice and 'may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community'.<sup>20</sup>

As illustrated in a case<sup>21</sup> decided by the Court in 1985, even a discriminatory practice (as opposed to a discriminatory regulation) may be against Article 30. In France, the approval of the postal authorities is needed to market a letter franking machine. This authorization aims at preventing fraudulent use of these machines. A major British manufacturer tried for approximately fifteen years to obtain French approval, although its franking machines had been approved in many countries. The Court decided that such a practice violated Article 30:

[F]or an administrative practice to constitute a measure prohibited under Article 30 that practice must show a certain degree of consistency and generality. That generality must be assessed differently according to whether the market concerned is one on which there are numerous traders or whether it is a market, such as that in postal franking machines, on which only a few undertakings are active. In the latter case, a national administration's treatment of a single undertaking may constitute a measure incompatible with Article 30.<sup>22</sup>

### *The Necessity Principle*

The necessity principle, as enunciated in the above cases, must be examined in more detail because, as is not unusual with statements which appear to be clear, it raises a number of issues. Indeed, how are we to interpret the 'necessity' requirement? Assume that Member State A enacts a number of legislative measures prohibiting the use of flavouring additives in beer. These measures, in

<sup>19</sup> [1985] E.C.R. 843.

<sup>20</sup> *Re 'Buy Irish' Campaign: E.C. Commission v. Ireland* [1983] 2 C.M.L.R. 104 at 124.

<sup>21</sup> *Commission v. France* [1985] E.C.R. 1360.

<sup>22</sup> *Ibid.* 1364-1365.

their totality, are deemed by State A to be *necessary* to protect the health of its beer drinking citizens. Also assume that Member State B equally wants to protect the health of its beer drinking citizens but decides that, in addition to laws prohibiting the use of flavouring additives, a number of other purity requirements for beer are necessary to achieve the State's aim. Obviously, both States agree that measures prohibiting the use of flavouring additives are necessary to protect the health of their citizens but these measures are not considered *sufficient* by Member State B. It is equally evident that the totality of measures taken by State B are more likely than the measures taken by State A to inhibit interstate trade within the Community, as interstate products which do not satisfy the stringent health requirements of State B cannot be imported or marketed. In the context of this example it is fair to say that the Court would be tempted to decide that State B measures are disproportionate, in the sense that they are not strictly necessary to attain the State's legitimate interest in protecting the health of its beer drinking citizens. In such a case, the Court's decision could not be described as arbitrary since it can reasonably be assumed that State A's health regulations would only have been adopted following a judicious study of all the relevant health factors. Thus, if the Court is faced with two sets of health regulations, enacted by two Member States, both acting in the best interests of their people, it may not be unreasonable for the Court to give preference to the set of regulations which least impedes interstate trade. However, if the E.C.J. were to give preference to national legislative measures which least inhibit (or most promote) interstate trade, the 'necessity' principle could easily become meaningless. Indeed, taken to its logical extreme, such an application of the 'necessity' principle could lead to the conclusion that, in cases where a State does not consider it necessary at all to legislate for the protection of the health of its citizens, any relevant legislative measure taken by another State could be interpreted as violating Article 30 of the Treaty. On this interpretation of the 'necessity' principle, any product that is legally produced and sold in one Member State, can be legally marketed in another.

The above analysis cannot be dismissed as the product of an imaginative flight of logic, as it is supported by judgments of the E.C.J. itself. In fact, the above scenario is not hypothetical, but based on the celebrated German beer case of 1987, *Re Purity Requirements for Beer: E.C. Commission v. Germany*.<sup>23</sup> German food purity laws laid down stringent rules regarding the permitted ingredients for beer and the prohibition of all additives. Interstate beers which contain other ingredients but have no additives may be imported in Germany but may not be marketed under the designation 'Bier'. If these interstate beverages contain additives, they cannot be marketed in Germany at all. The German Government sought to justify its *Reinheitsgebot* (purity rule) on grounds of the protection of human health. However at the hearing, the German Government conceded that the rule on designation was merely intended to protect consumers. Its representative explained that in Germany, beer drinkers associated 'Bier' with

<sup>23</sup> *Re Purity Requirements for Beer: E.C. Commission v. Germany* [1988] 1 C.M.L.R. 780.

a beverage produced in conformity with German legislation. The Government also pointed out that its purity rule could be complied with by interstate producers of beer wishing to export their product to Germany.

The Court decided that the German rule, which prohibited the designation of a beverage as 'Bier' if it contained non-approved ingredients, was not necessary in order to protect the consumer:

It is admittedly legitimate to seek to enable consumers who attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration. However, as the Court has already emphasized . . . that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other member-States and, in particular, 'by the compulsory affixing of suitable labels giving the nature of the product sold'. By indicating the raw materials utilized in the manufacture of beer 'such a course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public'.<sup>24</sup>

Turning its attention to the absolute prohibition on the marketing of beers containing additives, the Court decided that this ban cannot be justified on human health grounds. The Court applied the necessity requirement to the statutory exception of Article 36, even though it could have as easily presented its decision as involving an application of the 'rule of reason'. Indeed, both the 'rule of reason' and the statutory exception allow the adoption by Member States of national measures aimed at safeguarding public health. In applying the necessity requirement, the E.C.J. unequivocally indicated that it preferred that set of State regulations which is least restrictive of interstate trade. Indeed, the Court pointed out that other Member States also have strict rules on the utilization of additives in foodstuffs 'and do not authorize the use of any given additive until thorough tests have established that it is harmless'.<sup>25</sup> The Court decided that 'in so far as the German rules on additives in beer entail a general ban on additives, their application to beers imported from other member-States is contrary to the requirements of Community law as laid down in the case law of the Court, since that prohibition is contrary to the principle of proportionality'.<sup>26</sup> It also approvingly referred to the E.C. Commission's view that 'there should be a presumption that beers manufactured in other member-States which contain additives authorized there represent no danger to public health' and that 'if the Federal Republic of Germany wishes to oppose the importation of such beers then it bears the onus of proving that such beers are a danger to public health'.<sup>27</sup>

The Court's inclination to select State legislation which is least intrusive of interstate trade had also been foreshadowed in *Cassis de Dijon*. There it rejected a German argument that, if alcoholic products are allowed into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production, the application of the 'necessity' principle 'would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the member-States, and even of rendering any requirements in this field inoperative since a lower limit of this

<sup>24</sup> *Ibid.* 807-808.

<sup>25</sup> *Ibid.* 808.

<sup>26</sup> *Ibid.* 811.

<sup>27</sup> *Ibid.* 808.



nature is foreign to the rules of several member-States'.<sup>28</sup>

Subject to the validity of arguments developed above, the 'rule of reason' has been reduced to the simple proposition that once products have lawfully been produced and marketed in one Member State, their importation and sale in another Member State cannot be prevented without contravening Article 30 of the Treaty. There are, of course, a number of other problems with the application of the 'necessity' principle to Article 30. For example, the application of the principle does not usually involve a scientific examination of the extent to which a set of national measures are necessary *and* sufficient to attain the State's aim. The question whether, and if so, to what extent, an Article 30 judgment should depend on, and largely be determined by, scientific data is not usually seriously considered by the Court. The effect of the rigid application of the 'necessity' principle is certainly that the least (or the least cumbersome) national rules would, in the usual and simplest case, be selected as a yardstick by which to determine the extent to which a measure is 'necessary'. Thus, the 'necessity' principle, while significantly facilitating the free movement of goods within the Community, has some obvious disadvantages. In particular, the principle, to the extent that it enables the Court to select national measures which least infringe Article 30 of the Treaty, may actually undermine the achievement of the legitimate aims of other Member States that introduce protective measures.

It is clear that the Court has, in its own way, hastened the implementation of one of the fundamental freedoms of the European Community, namely free movement of goods. Indeed, as my analysis shows, the Court has interpreted the 'necessity' principle restrictively so as to remove, what it regards as impermissible barriers to interstate trade in the European Community. The Court has facilitated the free movement of goods by declaring national regulations to be incompatible with Article 30 of the E.C. Treaty. Therefore, subject to the validity of my analysis, the Court's jurisprudence has had the effect of invalidating many technical barriers to interstate trade. These technical barriers include a bewildering array of different national product regulations and standards. The E.C. Commission's White Paper on *Completing the Internal Market* released in 1985, commenting on these barriers, stated that they 'have a double-edged effect: they not only add extra costs, but they also distort production patterns; increase unit costs . . . discourage business cooperation, and fundamentally frustrate the creation of a common market for industrial products'.<sup>29</sup> Of course, the Court's contribution to deregulation proceeds in an *ad hoc* manner since the E.C.J. can only act in cases submitted to it for decision.

### *Harmonization*

The Court's deregulation approach has, however, disadvantages as well. First, the legitimate aims of a Member State are frustrated each time its legislation is held to be incompatible with Article 30. Secondly, the Court's interpretation of

<sup>28</sup> *Rewe-Zentral A.G. v. Bundesmonopolverwaltung Fuer Branntwein* [1979] 3 C.M.L.R. 494.

<sup>29</sup> Commission of the European Communities, *Completing the Internal Market. White Paper from the Commission to the European Council*, Luxembourg, Office for Official Publications of the European Communities (1985) 17.

Article 30 results in the adoption of the least restrictive and, therefore, the most basic level of product regulation compatible with the necessity principle, thereby potentially affecting the quality and safety of consumer products. Under these circumstances it is not totally surprising that the E.C. in the past promoted, and is now actively involved in, the harmonization of the relevant national rules. In harmonizing national rules, the E.C. not only creates rules which are valid throughout the Community but it also obviates the need for the Court to apply the necessity requirement, both in its judicial and statutory versions. Indeed, the Court has, on many occasions, indicated that the judicial and statutory exceptions to Article 30, which involve the application by the E.C.J. of the 'necessity' principle, only apply in the absence of relevant Community rules.

The earliest Directive on free movement of goods was issued by the E.C. Commission on 22 December 1969.<sup>30</sup> It sets an objective that Member States are compelled to achieve, but it leaves to them the choice of means capable of achieving the stated objective. The 1992 project relating to free movement of goods has to be seen as an attempt by the Community to respond to the vacuum which is often created by the Court as a consequence of the application of the 'necessity' principle. But the mammoth legislative effort required to harmonize the often complicated and complex national technical standards relating to the manufacturing and production of goods, has inevitably and unfortunately, lead to the growth, perhaps the uncontrolled growth, of a strong European bureaucracy in Brussels, lording over the harmonization effort. This centralization of power may also diminish the sovereignty of Member States in the areas to which the harmonization is directed. The growth of a central bureaucracy may, in turn, defeat the very reason for which the Community embarked on this harmonization process, namely the promotion and ensuring of free movement of goods. In such a situation, a person's freedom to trade could depend on the extent to which the Eurocrats are inclined to embrace interventionist regulations and policies.

The enormous number of directives needed to harmonize the existing national restrictions on free movement of goods has precipitated the development of the principle of mutual acceptance of goods. This principle involves the recognition by Member States of 'the different national standards concerned, so that goods lawfully manufactured or marketed in one Member State can be presumed to comply with the standards of other States'.<sup>31</sup> Thus, Member States are able to control the production and manufacturing of products on their own territory but they may not prevent the importation or sale of interstate products which have legally been made in another Member State. The principle of mutual acceptance of goods, as a means to achieve free movement of goods, is to be preferred to the harmonization technique because it preserves existing and future national legislation, thereby enabling Member States to achieve their national priorities and aims. The implementation of this principle also avoids the single most disadvantageous consequence of the application of the 'necessity' principle, namely the

<sup>30</sup> Directive 70/50/E.E.C.

<sup>31</sup> 'The Single European Act: Its Implications for the Internal Market and for the Development of the European Community', Brussels, Belmont, European Community Law Office, 1986, annex at 4.

potential erosion of standards of excellence which may occur if the E.C.J. selects the national regulations which are least restrictive of interstate trade. The principle of mutual acceptance of goods also promotes true competition because the Member States retain the privilege to implement their vision of product excellence, a vision which, however, will be compared by consumers with similar interstate products made under different conditions using different manufacturing techniques. Thus, the free market would become the true arbiter, and would determine which products were to fail, and which would succeed.