

The policy origins of the European economic constitution

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Abstract: This article traces the origins of the European economic constitution in the debate on Article 30 of the EC Treaty (general rule on the free movement of goods) between 1966 and 1969, which resulted in Directive 70/50. In this, the first archive-based analysis of the policy origins of the Court's *Dassonville* (1974) decision, the article demonstrates that there was a strong continuity in the investment by a number of key actors in focusing on Article 30 to create the single market from the mid-1960s. These civil servants and lawyers provided the backbone for the Commission's transformation of the *Cassis de Dijon* judgment (1979) into a powerful tool, driving back the need for legislative harmonisation and making it a cornerstone of the Single European Act of 1986. The article therefore analyses one of the key moments in the transformation of European law.

[141 words]

I Introduction

This article is the first archive-based work focusing on the policy origins of the European 'economic constitution' to provide an initial building block for a more comprehensive reassessment of the role of the European Court of Justice (ECJ) in paving the way for the launch of the single market program.¹ This issue has been examined by legal and social science literature, which has claimed that the Court's case law, giving effect to the common market provisions of the European Community (EC) Treaty was instrumental to the breakthrough of the Single European Act (1986).²

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¹ Two articles in preparation for publication deal with: the move from *Dassonville* to *Cassis de Dijon*; and the Commission's transformation of the *Cassis de Dijon* judgement and the reception of the decision in the Member States.

² M. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart, 1998); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), esp. chapter 3, 'Free movement of goods' (with Margaret McCown), 109-145.

The argument that the Court played a central role in the launch of the single market program by developing the European economic constitution builds on the notion of the constitutionalisation of EC law. Accordingly, the ECJ constitutionalised the Treaty in a number of milestone judgements from the early 1960s through the doctrines of direct effect and supremacy. Direct effect recognizes that the provisions of the EC Treaty could enjoy positive legal force directly in national law, if they met certain conditions. Later ECJ judgements also extended this provision to certain secondary rules. Supremacy, in turn, recognizes that EC law is the ‘supreme law of the land’. Legal and social science scholarship has argued that this process has been informed by the ‘constitutional paradigm’.³ However, only the case law on the common market in goods in particular, gave life to the constitutional paradigm. In the words of Joseph Weiler: ‘The common market, the heart of the material or substantive constitution of the Community, was in large measure judicially ‘constituted’...’⁴ Through a progressive interpretation of Article 30-36 on the free movement of goods the Court initiated a move towards deregulation and thereby directly intervened in the legal spheres of the Member States.

In this narrative *Dassonville* (1974)⁵ and *Cassis de Dijon* (1979)⁶ were two of a series of landmark cases that facilitated the development of the European economic constitution. In *Dassonville*, the ECJ for the first time defined the ‘measures having equivalent effect to quantitative restrictions’ of Article 30 of the EC Treaty.⁷ Crucially, the Treaty itself had not provided a definition of measures having equivalent effect to quantitative restrictions. Measures included a variety of rules. To give only two examples, measures ranged from rules on the consumption of domestically produced (or ‘national’) goods – a case in point would be ‘buy British,

³ Recent historical research has proposed referring to the ‘constitutional practice’ of the Court. M. Rasmussen and B. Davies, ‘Towards a New History of European Law’, (2012) 21 *Contemporary European History*, 305-318, here 306.

⁴ J.H.H. Weiler, ‘The Constitution of the Common Market Place: Text and Context in the Free Movement of Goods’, in: P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), 349-376, here 350.

⁵ Case 8/74 Procureur de Roi v Benoît et Gustave Dassonville; et SA Ets Fourcroy et SA Breuval et Cie v Benoît et Gustave Dassonville

⁶ Case 120/78 Rewe Zentral AG v Bundesmonopolverwaltung f. Branntwein.

⁷ ‘Quantitative restrictions on imports and *all measures having equivalent effect* shall, without prejudice to the following provisions, be prohibited between Member States.’

or German, or French' clauses – to rules rendering the sale or use of imported goods more burdensome than the sale or use of domestic products. The definition of measures having equivalent effect the Court provided in *Dassonville* was spectacularly wide. Following the argument of the European economic constitution *Dassonville* served as the foundation, but it was *Cassis de Dijon* that made the broad 'Dassonville formula' manageable.⁸

Cassis de Dijon has been hailed 'a milestone in the jurisprudence'⁹ of the Court and has become its most frequently cited decision in the leading textbooks on EC law.¹⁰ The 1979 judgment served as the point of departure for the doctrine of mutual recognition, according to which goods complying with technical requirements in one Member State could be marketed and sold without restrictions in any other Member State.¹¹ Moreover, following *Cassis de Dijon*, Member States could only prevent the circulation of goods from other member states when they were able to demonstrate this was necessary for the protection of either public health or consumers. *Cassis de Dijon* therefore provided an important new tool in the creation of the common market and an alternative to legislative harmonisation – the strategy pursued with only limited success by the European Commission.¹² Notably, Member State governments also resorted to protectionist measures to respond to the world economic crises from 1973-74. Subsidies and administrative regulations were enacted

⁸ Weiler, *Constitution of the Common Market Place*, 458-459.

⁹ T. Carney, 'What Rule of Reason? *Cassis de Dijon* (1979): A Flawed *Locus Classicus*?', in: E. O'Dell (ed.), *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, 2000), 310-326, here 310.

¹⁰ M. Derlén and J. Lindholm, 'Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments', (2014) 20 *European Law Journal* 667-687, here 670.

¹¹ Joseph Weiler has promoted using the more accurate concept of 'functional parallelism' instead of 'mutual recognition', following the British lawyer Alan Dashwood. Since mutual recognition has dominated the literature, however, this article will continue using it. See, Weiler, *Constitution of the Common Market Place*, 365-367. Cf. also N. Bernard, 'Flexibility in the European Single Market', in: J. Scott and C. Barnard, *The Law of the Single Market: Unpacking the Premises* (Hart, 2002), 101-122, here 104-105.

¹² The Commission's approach to common market building was hampered by the unanimity requirement regarding common market issues and only 270 directives and laws were harmonised in lengthy negotiations between the Commission and Member State governments between 1969 and 1985. M. Egan, 'The single market', in: M. Cini (ed.) *European Union Politics* (Oxford University Press, 2003), 28-45, here 32. See also M. Egan, *Constructing a European Market. Standards, Regulation, and Governance* (Oxford University Press, 2003).

and voluntary restraints encouraged by the Member States to protect national economies, while effectively creating new non-tariff barriers to trade between the Six.¹³

This article approaches the European economic constitution by focusing on the policy origins of the Court's jurisprudence. The European Commission addressed the measures having equivalent effect to quantitative restrictions in a directive, which was adopted on 22 December 1969 and published as Directive 70/50/EEC on 19 January 1970.¹⁴ The article evaluates for first time the historical sources from the Archives of the European Commission on the development of Directive 70/50. This archive-based approach brings to the fore the individual and collective actors who created the legal foundations of the jurisprudence of the Court. The article will show that there was a strong continuity in the investment by a number of key actors in focusing on Article 30 to create the single market from the mid-1960s. This small group of civil servants and lawyers provided the backbone for the Commission's transformation of the 1979 judgment into a powerful tool driving back the need for legislative harmonisation and making it a cornerstone of the Single European Act of 1986. This archive- and actor-based approach highlights, moreover, that key elements of the Court's '*Cassis* jurisprudence' were developed in the deliberations on the Commission directive.

The article will proceed by elaborating briefly on the broader question of the role of the Court in the launch of the single market program (II), which will be resumed in the conclusions (IV). The legal foundations of *Dassonville* and *Cassis de Dijon* will be introduced in an empirical section dealing with the stages in the evolution of Directive 70/50 (III).

II A European economic constitution?

In recent years archive-based historical research has recast the narrative of the constitutionalisation of the EC Treaty by the Court. This research has highlighted the role of judges and lawyers with strong activist European integrationist credentials in generating the landmark decisions of the early 1960s, on the one hand, and has

¹³ E. Bussière, 'Devising a Strategy: The Internal Market and Industrial Policy', in: Michel Dumoulin (ed.), *The European Commission, 1973-1986. History and Memories of an Institution* (Publications Office of the European Union, 2014), 263-276, here 268-269.

¹⁴ *Official Journal of the European Communities*, 19.1.70, No L 13/29.

provided a nuanced picture of the ‘reception’ of the ECJ case law in the Member States, on the other, stressing the contestation and sometimes disregard of landmark decisions.¹⁵ This article will contribute to this research agenda by: (a) applying the archive-based historical approach for the first time to the *substantive* constitution of the Community; and (b) assessing for the first time the individual and collective agency behind the policy origins of *Dassonville* and *Cassis de Dijon* as cornerstones of the European economic constitution.

Historical research allows us to draw an important connection between the constitutional reading of EC law and the economic constitution. The Italian judge Alberto Trabucchi who played a key role in the *Van Gend en Loos* decision, as historian Morten Rasmussen has demonstrated,¹⁶ crucially was the Advocate-General in *Dassonville*. An expert in civil law and comparative private law and a career academic before he joined the ECJ in 1962, Trabucchi argued forcefully for the direct effect of Article 12 in the deliberations on *Van Gend en Loos*. The behind-the-scenes account of the debate within the panel of judges is in part based on a memorandum Trabucchi wrote at the time. Unfortunately, no equivalent documentary evidence exists for the *Dassonville* case and we are left with the opinion Trabucchi presented to the Court in 1974.¹⁷ But given that as a judge the Italian promoted an understanding of European law as different from traditional international public law, it is likely that Trabucchi was keen to pursue this approach to the Treaty’s economic freedoms, too. This article reconstructs the making of Directive 70/50 to reveal further personal connections between the Court and Commission, between jurisprudential development and policy debates, from the mid-1960s to the 1970s.

Although this is the first archive-based work addressing the policy foundations of the European economic constitution, the claim that the Court’s case law gave effect

¹⁵ See, Bill Davies’ pioneering: *Resisting the European Court of Justice. West Germany’s Confrontation with European Law, 1949-1979* (Cambridge University Press, 2012); M. Rasmussen and B. Davies, *Towards a New History of European Law* (supra note 3); and M. Rasmussen, ‘Establishing a Constitutional Practise of European Law: The History of the Legal Service of the European Executive, 1952-1965’, (2012) 21 *Contemporary European History*, 237-397.

¹⁶ M. Rasmussen, ‘Revolutionizing European law: a history of the *Van Gend en Loos* judgment’, (2014) 12 *International Journal of Constitutional Law*, 136-163, here 153-154.

¹⁷ Case 8/74, Opinion of Mr Advocate-General Trabucchi, delivered on 20 June 1974, 864-65.

to the EC Treaty's common market provisions and was crucial to the breakthrough of 1986 has been contested. Weiler himself has emphasised the limited impact of the mutual recognition doctrine on market liberalisation, and has referred to it as 'perhaps, an intellectual breakthrough but a colossal market failure'¹⁸ without however softening the overall interpretation of the power of the Court in creating a European constitution. In other words acknowledging the limited contribution of *Cassis de Dijon* to market liberalisation has not diminished its appraisal as: (a) a source providing for *political* impetus towards the Single European Act; and (b) an element of the *legal* argument about the constitutionalisation of the common market.

Moreover, in a seminal article in 1994 Karen Alter and Sophie Meunier have qualified the role of the ECJ in this process from a political science perspective. The authors highlight that the Court's decision did not establish new doctrinal ground. Instead they argue that the *Cassis de Dijon* judgment provided an important tool for the activist European Commission to introduce their 'new approach to harmonization'.¹⁹ Crucially however, policy consequences were only created, and market liberalisation facilitated, when societal interest groups began mobilizing the Commission's new approach. Alter and Meunier argue that from the early 1980s, consumer groups in particular began lobbying the newly elected governments in Britain (1979), Germany (1982) and France (following its departure from the socialist programme, 1981-83). These governments championed neoliberal policy preferences and were open to using the EC to advance these preferences. As a result they were more receptive to the Commission's bold reading of the *Cassis de Dijon* decision. According to Alter and Meunier, the ECJ introduced the concept of mutual recognition into the European debate and therefore acted as 'a catalyst' and 'a provocateur'.²⁰

Furthermore, Nick Bernhard has cast doubt on the European economic constitution in a contribution to a volume on the fiftieth anniversary of the Treaty of Rome. Focusing on the move from *Dassonville* to *Cassis de Dijon*, Bernard argues that legal scholarship has scrutinised the legal origins of *Cassis de Dijon* – the Treaty

¹⁸ Weiler, *Constitution of the Common Market Place*, 368.

¹⁹ K. Alter and S. Meunier-Aitsahalia, 'Judicial Politics in the European Community. European Integration and the Path-Breaking *Cassis de Dijon* Decision', (1994) 26 *Comparative Political Studies*, 535-561.

²⁰ *Ibid.*

provisions (Articles 30-36); secondary legislation (especially Commission Directive 70/50); the jurisprudential origins (case law); and the doctrinal development (case law and legal commentary) – but has not sufficiently considered its contextual origins. This distinction is vital because a purely legal reading of the evolution of *Cassis de Dijon* fails to include important contextual dimensions of the evolution of the judgment including in particular legislative harmonisation, trade liberalisation, and market creation.²¹ A contextual perspective on the relationship between the two landmark cases shows that the legal problem in *Dassonville* could not have been resolved by means of harmonisation. This is important; for if harmonisation would not have resolved the issue at stake in *Dassonville*, it makes no sense to suggest that the Court stepped in to improve on the painful process of legal harmonisation by handing down this decision in 1974. But this is precisely the role ascribed to the ECJ in the narrative of the constitutionalisation of the common market provisions as proposed by Weiler.²²

Building on the important distinction into the legal and contextual origins of the Court's case law, the following section will introduce the individual and collective actors involved in the making of Directive 70/50. It will also scrutinise to which extent these actors continued to be involved in the debate on Article 30, specifically in the ECJ's *Dassonville* and *Cassis de Dijon* decisions. At the same time, the section will trace the policy development and the evolution of the directive.

III The Commission takes a stand: Directive 70/50

Archival records helped to identify three periods in the development of what was to become Directive 70/50. These three periods differed with regard to the intensity of the debate on the measures having equivalent effect to quantitative restrictions as well as on the types of questions discussed. While this provision did not take centre stage when the Treaty of Rome came into force in 1958, it became crucially important, and the debate intensified, towards the end of the transition period in 1970. From the end of the transition period, Article 30 would become immediately effective and the EC

²¹ N. Bernard, 'On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis de Dijon* Revisited', in: M. P. Maduro and L. Azoulay (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), 456-464.

²² Weiler, *Constitution of the Common Market Place*, 458-459.

Treaty would prohibit all measures having equivalent effect to quantitative restrictions *unless* they fell within the scope of Article 36. Article 36 enumerates specific exceptions from the principle of the free movement of goods.²³ As they knew the end of the transition period was approaching, a number of actors in European institutions therefore began pushing for a clarification of the Treaty provision from 1966.

III.1 The establishment of an institutional framework for discussing Article 30 (1958-1966)

In 1958, when they began work on the elimination of quantitative restrictions, officials from the Commission's Directorate-General (DG) III (Internal Market) and its Legal Service were already discussing the interpretation of the measures having equivalent effect with representatives of the Member States. Notably these Commission departments continued to provide the core platform for the exchange of views between legal experts beyond this initial time period and into the time of the landmark cases of the 1970s. It was decided in 1958 that a special working group would be established to develop the application of the Treaty provisions by means of directives (based on Article 33/7 EC).²⁴ Only a few years later, in 1962, the Commission formalised work on the interpretation of the measures having equivalent effect and quite naturally, DG III was charged with taking the lead on this question. DG III then composed a report, which was pencilled onto the agenda of the 235th meeting of the Commission on 10 July 1963.²⁵ As a result, from 1963, *a special working group on quantitative restrictions and measures having equivalent effect*

²³ 'The provisions of Articles 30 to 34 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.'

²⁴ Réunion d'information sur l'élimination des restrictions quantitative, F 1021/58, 22-23 September 1958, Archives of the European Commission, BAC 173/1995 4041.

²⁵ Report, III/COM(63) 265, 9 July 1963, BAC 492/1995 7.

(from here onwards: *special working group*) composed of Commission officials and experts from the Member States met to discuss Article 30.²⁶

Two officials who represented the Legal Service of the Commission in the *special working group* need introducing here:²⁷ first, René-Christian Béraud who became intimately associated with the drafting of Directive 70/50 in the contemporary legal literature.²⁸ Béraud was mentored by and worked closely with Michel Gaudet,²⁹ the French lawyer and legendary first head of the Legal Service of the Commission and later, of the Joint Legal Service.³⁰ Béraud was involved in all stages of the making of the Commission directive and would, moreover, represent the European Commission in the proceedings leading to the *Dassonville* judgment in 1974. Béraud therefore provides a vital link between policymaking in the Commission and the development of the jurisprudence of the Court.

The second civil servant representing the Legal Service in the meetings of the *special working group* was Hubert Ehring. The German lawyer first joined the European Coal and Steel Community's Legal Service of the Secretariat of the Special Council of Ministers in 1954. In 1956-57, he participated in the intergovernmental conference on the common market and Euratom.³¹ Ehring contributed to triggering and shaping the second stage of policymaking. In contrast to Béraud however his involvement did not go beyond the development of Directive 70/50. Ehring's

²⁶ Bericht, Sitzung der Arbeitsgruppe der Regierungssachverständigen für mengenmäßige Beschränkungen und Massnahmen gleicher Wirkung, 14-15 February 1963, 2858/III/63-D, 15 March 1963, BAC 173/1995 4052.

²⁷ See, for the participants of the working group, for example, Compte-Rendu, Group des experts pour les restrictions quantitatives et les mesures d'effet équivalent, de la reunion tenue le 15 juillet 1966, 12/086/III/66-F, 25 August 1966, BAC 173/1995-4053.

²⁸ R.-C. Béraud, 'Les mesures d'effet équivalent au sens des articles 30 et suivants du Traité de Rome', (1968) 1 *Revue trimestrielle du droit Européen*, 265-292.

²⁹ For the relationship between Gaudet and Béraud, see, Alexandre Bernier, *La France et le droit communautaire 1958-1981: Histoire d'une réception et d'une co-production*, Doctoral thesis in progress.

³⁰ M. Rasmussen, Establishing a Constitutional Practise (supra note 15); J. Bailleux, 'Michel Gaudet, A Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review', (2013) 50 *Common Market Law Review*, 359-367.

³¹ Short biography of Hubert Ehring, retrieved from: <http://www.cvce.eu/en/histoire-orale/unit-content/-/unit/d20058df-0c9b-4b6b-bb22-bf9f06151aa6>

authority in EC law was acknowledged by the young Italian official Alfonso Mattera Ricigliano, who referred to the German as the ‘legal conscience’³² of the first president of the European Commission, Walter Hallstein.

Alfonso Mattera was a recent recruit to DG III, who had only started working for the Commission in the beginning of 1966,³³ and was one of the representatives of DG III in the *special working group*. Mattera contributed to the drafting of Directive 70/50. At the time of *Dassonville*, the Italian official was no longer a new civil servant but a recognised expert on the measures having equivalent effect. For example, Mattera prepared the first part of a working document regarding the measures having equivalent effect and Article 42 of the Act of Accession of the United Kingdom in 1974.³⁴ Moreover, for the plaintiffs’ lawyer in the *Dassonville* case, Roger Strowel, a lawyer at the *Court d’Appel* at Brussels, Mattera became the key contact in the Commission in 1973.³⁵ Mattera and Strowel not only met in person in April 1973,³⁶ but, later in the same year, Strowel shared with the Court and with Mattera his conclusions regarding the preliminary reference to the Court.³⁷ Further, Mattera assumed a prominent role in the aftermath of *Cassis de Dijon* in developing and promoting the Commission’s approach to the decision, which earned him the nickname of ‘Mr Cassis’ in Brussels circles.³⁸ Mattera therefore provides further evidence for the connection between policymaking and jurisprudence, between Commission and Court.

As regards the work on the measures having equivalent effect during the initial stage of policymaking, three directives were issued, one in 1964 and two in

³² A. Mattera, *Notre européenité. Une Histoire millénaire, de l’épopée de Marathon à la réunification des peuples de l’Ancien Continent* (LGDJ, 2014), 170.

³³ Curriculum vitae Alfonso Mattera, 31.1.2011, retrieved from: <http://www.europeancollege.it/en-US/Alfonso-Mattera.aspx>

³⁴ This document is part of a folder preparing a visit of a Commission delegation to London, in which Mattera participated. Document de travail, 19 February 1974, BAC 179/1991 133.

³⁵ <http://avocats.be/fr/avocat/strowelroger>;
http://www.barreaudebruxelles.info/scripts-recherche/DetailsAnnuaire_n.php?ID=339

³⁶ For example, letter Roger Strowel to the President and Members of the Commission of the EEC, 3 April 1973, BAC 371/1991 1737 (p. 5).

³⁷ Letter Roger Strowel to Mattera, 10 December 1973, BAC 304/1993 34.

³⁸ L. Gormley, ‘Cassis de Dijon and the Communication from the Commission’, (1981) 6 *European Law Review*, 454-459, here 545, note 8. See also, A. Mattera Ricigliano, ‘L’arrêt «Cassis de Dijon»: une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur’, (1980) *Revue du marché commun*, 505-513.

1966. But the main question facing the Commission remained unresolved, namely how to ensure that the Member States would comply with the obligations arising from Article 30 following the end of the transition period in 1970. From a legal point of view it would have been sufficient for the Commission to simply continue reminding the Member States of their obligations. However, the Commission decided to issue another directive addressing all remaining measures of equivalent effect.³⁹

In conclusion, the main achievement of the first period of work on Article 30 was the formation of the *special working group* in the Commission. This group functioned as an important hub for the negotiations on the future Directive 70/50 in the second and third period of its evolution. Moreover, with René-Christian Béraud and Alfonso Mattera two key actors have been introduced who not only contributed to the legal debate and the making of Directive 70/50, but who were moreover linked to the *Dassonville* and/or *Cassis de Dijon* cases. In terms of the substance matter however the second period of policymaking was decisive.

III.2 The intensification of the legal debate and its politicisation (1966-67)

The debate on Article 30 intensified and changed in terms of the issues debated in 1966-1967. The first of two developments triggering this change was a contribution by Hubert Ehring regarding the scope of the measures having equivalent effect. The German official raised the question if measures having equivalent effect would include non-discriminatory trade regulations, i.e. trade regulations applicable in the same way to domestic and imported products, as long as these regulations pursued legitimate objectives that fell within the competence of the state.⁴⁰ What Ehring queried was if the Treaty in fact prohibited *all* measures interfering with intra-Community trade. If this were the case, the free movement of goods between the Member States would be regarded as more important than their respective regulatory competences. Such a wide interpretation, or extensive reading, of Article 30 represented an opportunity to advance European market integration.

³⁹ Vorbereitung der Dokumente, ca. November 1969, BAC 138/1992 274.

⁴⁰ Interview with Alfonso Mattera, Collection: *The European Commission 1958-1972. Memories of an institution*, 25 November 2004, Retrieved from: http://archives.eui.eu/en/oral_history/INT773, 15.

Ehring's input was significant for two reasons. *First*, it generated the formation of another, more informal *reflection group* on the measures having equivalent effect. *Second*, Ehring's question introduced the important distinction into: (a) measures differentiating between domestic and imported products (also referred to as distinctly applicable measures); and (b) measures equally applicable to domestic and imported products (or indistinctly applicable measures) into the debate. This distinction shaped the discussions on Article 30 in 1966-67 and it structured the future Directive 70/50.

The informal *reflection group* on the measures having equivalent effect is based on the recollections of Alfonso Mattera. The Italian official recalls his surprise when the reflection group of the 'leading authorities of the emerging legal community' charged him and a German colleague with formulating the Commission's action plan following the transition period.⁴¹ The young Commission officials were to base their work on the deliberations of this group, which included, among others: Michel Gaudet; Hubert Ehring; Director-General for the Internal Market, Robert Toulemon; Director-General for Competition Pieter VerLoren van Theemat; and Béraud.⁴² It has not been possible to locate written records pertaining to the *reflection group*. However, its composition, which included Béraud, Ehring and Mattera, suggests a significant overlap with the institutionalised *special working group*. And while it is unlikely that high-ranking Commission officials like Gaudet, Toulemon and VerLoren van Theemat regularly participated in the *special working group* meetings, it is likely they met informally in the *reflection group* to discuss the scope of the measures having equivalent effect.

Pieter VerLoren van Theemat's contribution to the debate is well known and matches his strong pro-European beliefs. VerLoren van Theemat had been involved in the European project from the days of the interstate conference on the Schuman Plan (1950-51), when he advised the Dutch delegation, and became the first Director General of DG IV (Competition) (1958-1967). In 1967, the future Advocate-General at the European Court of Justice (1981-86)⁴³ joined the University of Utrecht where he also supervised doctoral dissertations on the economic law of the EC, including, for example, Pieter Jan Slot's thesis on *Technical and administrative obstacles to*

⁴¹ Mattera, *Notre européenité*. 172.

⁴² *Ibid.*

⁴³ http://curia.europa.eu/jcms/jcms/Jo2_9606/anciens-membres

trade in the EEC, which included a comparison of the EC and the construction of the US single market, in particular the ‘commerce clause’ of the US constitution.⁴⁴ As regards the scope of Article 30 VerLoren van Theemat argued that *all* state measures with the potential to hinder trade between the Member States should be considered as measures having equivalent effect to quantitative restrictions. Notably, this would include measures not differentiating between domestic and imported products (indistinctly applicable measures). Measures enacted by the Member States therefore could only be upheld when they came within the scope of Article 36. In short, for VerLoren van Theemat the discussions on Article 30 presented a chance to push for more European integration.⁴⁵

Michel Gaudet’s involvement in the debate is not well-known. Unlike VerLoren van Theemat, Gaudet did not contribute to the discussion on Article 30 in the law journals. But as the head of the Legal Service, he was at all times kept in the loop about the debate on the measures having equivalent effect. Gaudet even discussed the issue in a written response to a questionnaire on ‘non-tariff discrimination on the international movement of goods’ by the London-based International Law Association in early 1966.⁴⁶

In summary, by 1966, the debate on Article 30 was in full swing, in the *reflection group* and beyond. The push for the Commission to take a firm stand on the measures having equivalent effect however originated from outside of its own departments. The crucial second development responsible for the change of the debate characterizing the second period of policymaking on the future Directive 70/50 was a written question by the German Member of the European Parliament (MEP) and *rapporteur* of the EP Internal Market Committee, Arved Deringer, on 8 December 1966. If Hubert Ehring’s query had intensified the legal debate on Article 30, Deringer’s written question now politicised this debate.

⁴⁴ Pieter Jan Slot, *Technical and administrative obstacles to trade in the EEC. Including a comparison with interstate trade barriers in the USA*, PhD dissertation Utrecht, Sijthoff, Leyden/T.M.C. Asser Instituut, Den Haag, 1975; see, chapter 7, 125-146.

⁴⁵ P. VerLoren van Theemat, ‘Bevat art. 30 van het EEG-Verdrag slechts een non-discriminatiebeginsel ten aanzien van invoerbepalingen’, (1967) 15 *Sociaal-Economische Wetgeving*, 632. See also, J.P.H. Donner, ‘Report of the Netherlands on Articles 30-36, in: Fédération internationale pour le droit européen’, *Reports for the 10th Congress. Consumer protection and the common market* (FIDE, 1982).

⁴⁶ Gaudet to J.B.S. Edwards, 14 February 1966, BAC 492/1995 8.

Deringer's written question was drafted against the backdrop of progress with the removal of customs and quantitative restrictions between the Member States. Deringer called on the Commission to clarify their understanding of the measures having equivalent effect in order to provide legal certainty for both national administrations and enterprises.⁴⁷ However the timing of Deringer's parliamentary question cannot be explained by reference to the end of the transition period alone. Both Deringer's background and developments in German politics provide additional clues for this. Deringer was a Christian Democrat parliamentarian (1958-70) and a lawyer close to the Freiburg school of ordoliberalism. This school of thought originated in the interwar period and emphasised the importance of the state in providing a framework for competition. A distinguished expert on EC competition law, Deringer had been involved in the negotiations on Regulation 17/1962, which specified the rules for the implementation of the EC Treaty's competition provisions (Articles 85 and 86).⁴⁸ Like VerLoren van Theemat, the German lawyer was involved in both competition policymaking and the development of the free movement of goods, which shows that actors employed different strategies in the creation of the common market. While competition policy and the broader goal to protect competition in the common market from distortions facilitated market building through new regulatory activities at the European level, the Treaty articles on the free movement of goods provided a means to directly intervene in the legal spheres of the Member States by deregulation.

However Deringer's work for the common market project went beyond the community institutions. The German MEP participated in the meetings of the *Fédération internationale pour le droit européen* (FIDE), a pan-European association of lawyers created in Brussels in 1961. FIDE actively promoted European integration through law and both Michel Gaudet and Pieter VerLoren van Theemat were instrumental in establishing the European association.⁴⁹ Deringer, for his part,

⁴⁷ Written question no. 118, PE 16.591/F, 8 December 1966, *ibid.*

⁴⁸ K. Seidel and L. Pace, 'The drafting and the role of regulation 17: a hard-fought compromise', in: K.K. Patel and H. Schweitzer (eds.) *The historical foundations of EU competition law* (Oxford University Press, 2013), 54-88, here 74-75.

⁴⁹ A. Vauchez, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, (Presses de Sciences Po, 2013); M. Rasmussen, 'Establishing a Constitutional Practice: The Role of the European Law Associations', in: W. Kaiser and J.-H. Meyer (eds.) *Societal Actors in European Integration. Policy-Building and*

contributed to a FIDE conference on the question of the ideal economic system to underpin a juridical system of free competition in 1966, for example.⁵⁰ Finally, after returning to private practice, Deringer's law firm, *Deringer, Tessin, Herrmann & Sedemund*, advised the German government in the aftermath of the *Cassis de Dijon* judgment.⁵¹

Lastly, his European parliamentary question in December 1966 was arguably shaped by the simultaneous role Deringer fulfilled as a member of the German *Bundestag*. 1966 represented a turning point in German politics. Chancellor Ludwig Erhard – an economics professor associated with the ordoliberal camp, the first economics minister of the Federal Republic and the face of the German economic miracle – curiously failed on issues of economic and financial policy during his relatively brief tenure as a chancellor (1963-66). The inability to counteract stagnating growth and budget deficits threw the coalition government between Christian Democrats and Free Democrats into crisis and Erhard resigned, following the Free Democrats' departure from the coalition on 27 October 1966 and the failure to pass the 1967 budget in the *Bundestag*.⁵² This crisis paved the way, for the first time since 1933, for the Social Democratic Party to assume a role in government when they became the partner of the Christian Democrats in the 'grand coalition'. Political change was accompanied by a reorientation of economic policy. Like Erhard, the new Social Democrat Economics Minister Karl Schiller had an academic background in economics. But unlike Erhard, Schiller introduced counter-cyclical spending, giving a greater role to financial policy and, more generally, the role of the state in the economy, and he promoted 'concerted action' between workers, employers and the state to overcome the slump in the German economy.⁵³ Liberal economics gave way to Keynesian policies. Arved Deringer probably experienced these changes as a

Policy-Making, 1958-1992 (Palgrave Macmillan, 2013), 173-197.

⁵⁰ Modèles de concurrence et réglementation des ententes dans le marché commun, Rennes 15-16 avril 1966, (1966) 4 *Cahiers de droit européen*, 442-445.

⁵¹ Statement by the German government (Reg.nr. 95357), Deringer, Tessin, Herrmann & Sedemund, 4 August 1978, BAC 371/1991, case 120/78.

⁵² Gerhard Schröder, 'Das Ende einer Kanzlerschaft', *Die Welt*, 1 December 1966, translation into English by Allison Brown, retrieved from: http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=867

⁵³ German Federal Minister of Economics Karl Schiller on the State of Economic Policy, Bavarian Radio, 9 January 1967, translation into English by Allison Brown, retrieved from: http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=928

waning of power in the domestic framework, providing all the more reason to concentrate his efforts on the European level.

Returning to the policy dimension, Deringer's written question in late 1966 provided the decisive input for the Commission to provide a definition through a new directive in this story of the measures of equivalent effect. A few days after Deringer's written question Gaudet wrote to Béraud, cautioning his colleague at the Legal Service to treat the question with great care and asking Béraud to liaise with DG III in the matter.⁵⁴ Béraud then took the lead in drafting the Commission's response to the parliamentary question, which was published on 14 March 1967. The reply featured two main arguments initially developed by Béraud and Ehring. The *first* argument started from the observation that Article 30 defined the 'measures' with regard to their 'effect'. It would therefore be impossible to provide a conclusive definition of the provision. Further, as the Court had not yet defined this Treaty provision, it would be necessary to evaluate the experiences of the Commission and, in particular, the directives already issued under Article 33/7, in order to identify what *types* of measures could fall under the provision, including, for example: rules favouring domestic products; measures resulting in higher fees for imported products or reducing their value; and measures indistinctly applicable to domestic and imported products, which, under certain conditions, impacted negatively only on imports.⁵⁵ The assertion that in principle indistinctly applicable measures *could* constitute measures having equivalent effect represented the *second* argument, which featured in the Commission's response to Deringer's question.

Deringer was not content with the Commission's reply, however. The German MEP criticised the Commission's approach to defining the measures having equivalent effect by providing an overview of different types of measures. According to Deringer this solution was inadequate as it failed to spell out the Commission's underlying conception of the measures having equivalent effect to quantitative restrictions. Deringer therefore asked the Commission to clarify this point in a follow-up question on 11 May 1967.⁵⁶ In the ensuing debate the focus shifted from the issue of the appropriate approach to defining measures having equivalent effect to quantitative restrictions to the argument that indistinctly applicable measures could

⁵⁴ Michel Gaudet, Note pour M. Béraud, 13 December 1966, BAC 492/1995 8.

⁵⁵ Béraud, Note pour M. Gaudet, 21 December 1966, *ibid.*

⁵⁶ Written question no. 64, *ibid.*

constitute measures having equivalent effect. This hotly contested issue changed the quality of the debate and introduced new voices into it including, most importantly, Pieter VerLoren van Theemat.

The Commission's reply to Deringer's follow-up question originated in DG III, in close cooperation with the Legal Service,⁵⁷ and began by reiterating the interpretation of the measures having equivalent effect articulated in the Commission's initial reply. Accordingly, measures comprised:

'Laws, regulations, administrative provisions and practices hindering imports or exports, which could take place in the absence thereof, including those regulations and practices which make imports and exports more difficult or costly than the disposal of domestic production.'⁵⁸

This broad interpretation was followed by a formula narrowing down the scope of the Treaty provision significantly: '[I]t must be remembered that measures indistinctly applicable to imports and domestic products, for the most part, do *not* constitute measures having equivalent effect.'⁵⁹ It is noteworthy that the phrase 'for the most part' meant that technically, indistinctly applicable measures could fall under the provision of Article 30.

A note from Hubert Ehring to Michel Gaudet, written on 28 June 1967, just two days before the Commission released their official reply to the European Parliament, highlights the controversial nature of the formula. Ehring reports having learned that Guido Colonna di Paliano, the Commissioner for the Internal Market, had the section eliminated from the Commission's reply, apparently with Gaudet's approval. The German lawyer protested in the strongest possible terms against deleting the reference to indistinctly applicable measures. Ehring warned that leaving this section out would mean losing an important restriction on what could constitute measures having equivalent effect. The Commission would therefore confirm the wide interpretation of Article 30 proposed by Pieter VerLoren van Theemat.⁶⁰

The episode shows *first* that Ehring was aware of VerLoren van Theemat's position *before* the Director-General for Competition published his interpretation of

⁵⁷ Projet de réponse, 31 May 1967, *ibid.*

⁵⁸ Reply to written question no. 64, *ibid.*

⁵⁹ *Ibid.* Emphasis added.

⁶⁰ Hubert Ehring, Note à l'attention de Monsieur Gaudet, *ibid.*

measures having equivalent effect in late August 1967.⁶¹ This underlines informal consultations on Article 30 took place across Commission departments, very likely in the informal *reflection group* remembered by Alfonso Mattera. *Second* Ehring's note suggests that DG III, supported by VerLoren van Theemat, favoured a wider interpretation of the scope of Article 30 than the Legal Service. There was therefore disagreement within the Commission, although, officially, the Commission spoke with one voice in their reply to Deringer. *Finally*, the controversial formula was reintroduced into the Commission's reply, which can be regarded as a reflection of the influence of the Legal Service, possibly of Michel Gaudet, the addressee of Ehring's warning.

In conclusion, the ideational foundations for what was to become Directive 70/50 were developed during the second period of policymaking. On the one hand, this concerned the notion that it was impossible to provide *the* conclusive definition for the measures having equivalent effect, precisely because the 'effect' of measures needed to be established. This recognition required developing a pragmatic approach and drawing on the concrete experiences of the Commission in defining Article 30. Article 2 of Directive 70/50 reflects this argument by enumerating examples of measures covered by the Treaty provision. On the other hand, the distinction into distinctly and indistinctly applicable measures was there to stay. Not only did lawyers in European institutions disagree on the scope of indistinctly applicable measures in particular, but it also shaped the structure of Directive 70/50. Article 2 provided for a general prohibition of distinctly applicable measures and Article 3 for the prohibition of certain indistinctly applicable measures. The specific conditions for indistinctly applicable measures to qualify as measures having equivalent effect to quantitative restrictions however were only developed in the third period of policymaking.

III. 3 The making of Directive 70/50 (1968-69)

The third and final period of policymaking can be dated from 11 March 1968, when René-Christian Béraud presented at a conference organised by the Paris Bar and the

⁶¹ Pieter VerLoren van Theemat, L'article 30 du Traité CEE contient-il uniquement un principe de non-discrimination en ce qui concerne les restrictions à l'importation? BAC 138/1992 273; and VerLoren van Theemat, Bevat art. 30 (supra note 45).

Association des Juristes européens, the French branch of FIDE. This presentation, entitled ‘Les mesures d’effet équivalent au sens des articles 30 et suivants du Traité de Rome’, was subsequently published in the *Revue trimestrielle du droit Européen* and established Béraud as *the* authority on Directive 70/50 in the Commission and the legal community.⁶² The first part of the paper provides a systematic discussion of different types of measures having equivalent effect to quantitative restrictions as the basis for deducting a general doctrine of the Treaty provision. This doctrine is developed in the second part of the article. The *first* of three points proposed here is that only state measures can qualify as measures having equivalent effect. *Second* since measures need to have the same *effect* as quantitative restrictions the provision also includes measures other than those discriminating between imports and domestic goods. The *third* point deals with limitations and exceptions to the doctrine. For our story, this is the most interesting part of the paper, as it discusses which indistinctly applicable measures would be covered by the Treaty provision.⁶³

Béraud highlights that indistinctly applicable measures are, in principle, *not* measures having equivalent effect, very much in line with the formula, which was reinserted in the last minute into the Commission’s reply to Deringer’s second parliamentary question. But this definition also means that certain indistinctly applicable measures are covered by the prohibition of Article 30. The challenge therefore is figuring out which ones. According to Béraud a conflict between the prohibition of the measures having equivalent effect and the freedom of the Member States to regulate trade needed resolving. Béraud then proceeds to reject VerLoren van Theemat’s thesis that measures enacted by the Member States could only be upheld when falling within the scope of Article 36. Instead the French lawyer proposes applying the abuse principle (*la notion d’ «abus de droit»*), known from French and German law in particular, to draw the boundaries between the competences of Community and the Member States.

‘Indeed the right to regulate trade somehow neutralises the principle of the prohibition of the measures having equivalent effect... This right finds its limits in its very foundations, its *raison d’être*. This has two consequences, the first of which is that this right can only be used to meet the objectives for which it has been developed in our states, namely public security, public order, but also quality, standardisation of

⁶² See Béraud, *Les mesures d’effet équivalent* (supra note 28) and BAC 492/1995 8.

⁶³ Béraud, *Les mesures d’effet équivalent*, 287-291. The following section draws on these pages.

products... The second consequence is that the regulation be both necessary and sufficient or, if we want, *effective and not excessive for this purpose*. A Member State using this right outside these limits by hindering imports more than the domestic production would in fact pursue the same objective as the introduction of a quota.’⁶⁴

Thus it can be seen that this section of Béraud’s argument is crucial as it provides the basis for introducing the principle of proportionality into Directive 70/50. It was only a small step from arguing measures enacted by Member States should ‘not be excessive for this purpose’ to the language of Article 3, which prohibits indistinctly applicable measures where ‘the restrictive effects on the free movement of goods are out of proportion to their purpose.’ The doctrine of proportionality not only features in Directive 70/50 however. Proportionality provided the basis for what became known as the ‘*Cassis test*’ – an assessment of the lawfulness of trade barriers resulting from the diversity of national rules.

The Commission’s approach to indistinctly applicable measures also stirred debate in the negotiations on the draft directive in 1969. Officials in DG III and the Legal Service had developed the directive between April and July 1969.⁶⁵ On 9 and 30 June 1969 Commission officials and experts from the Member States discussed the draft directive in a meeting of the *special working group*. The revised draft was then presented to the Member States, all of which, except France, agreed on the desirability of issuing a directive. The Commission prevailed over the protest of the French permanent representative, articulated in a letter of 30 October 1969, however, arguing it was necessary to provide for legal certainty at the end of the transition period. Returning to Article 3 of the draft directive, the Commission’s approach to indistinctly applicable measures was approved by Italy and the Benelux countries but challenged by Germany and France who objected to the argument that indistinctly applicable measures could constitute measures having equivalent effect. The German delegation in particular wanted to delete Article 3 and argued that the measures of Article 30 applied only to measures discriminating against imported products – a proposition Commission officials could refute with arguments developed by Béraud in his 1968 article.

⁶⁴ *Ibid.* 290. Author’s translation. Emphasis added.

⁶⁵ The first draft dates from 30 April 1969. BAC 173/1995 4084. This section draws on the summary in: Vorbereitung der Dokumente, ca. November 1969, BAC 138/1992 274.

But why did Germany and France oppose the Commission's reading that Article 30 covered certain indistinctly applicable measures? A precise analysis of their resistance to the Commission's position would require further research in German and French governmental archives. However, that the EC Treaty had something to say on the validity of rules concerning nationally produced goods posed a potential threat to the autonomy of the Member States in socio-economic policy. In Germany, the years between the 1967 recession and the first oil shock were dedicated to expanding the Keynesian welfare state.⁶⁶ It is unlikely therefore that Karl Schiller's Economics Ministry would have easily agreed to give up powers for steering the German economy, even more so, since the 1969 federal elections consolidated Social Democratic power and brought in the first social-liberal coalition government under the new Chancellor Willy Brandt. France, in turn, was dealing with the repercussions of May 1968, which had considerably weakened President Charles De Gaulle, ultimately leading to his resignation in April 1969. But May 68 also shook the French economy turning the country's positive commercial balance in 1967 into a strongly negative one in 1968. France lost almost a third of its gold reserves and the franc was significantly weakened. The resulting balance-of-payment problems made the potential transfer of socio-economic powers to the European level an implausible policy option.⁶⁷

Finally, returning to the drafting of the directive, it is not possible to establish the precise authorship of the directive and its different parts; only a few names appear in the archival records. Not surprisingly Béraud is one of them; another one is Heinrich Matthies who later represented the European Commission in the *Cassis de Dijon* case. What is clear however is that: (a) between 1966 and 1969, a small group of lawyers and civil servants in DG III and the Legal Service established the ideational foundations for *Cassis de Dijon*; and (b) important personal continuities existed from the initial debate on the Commission directive to the time of the *Cassis*

⁶⁶ W. Süß, 'Der keynesianische Traum und sein langes Ende. Sozioökonomischer Wandel und Sozialpolitik in den 1970er Jahren', in: K. Jarausch, (ed.) *Das Ende der Zuversicht. Die Siebziger Jahre als Geschichte* (Vandenhoeck & Ruprecht, 2008), 120-137, here 120-124. Notably Economics Minister Karl Schiller played an important role in the electoral success of the Social Democrats. For the first time in Germany's post-World War II history, the Social Democrats rather than the Christian Democrats were considered the party of economic competency.

⁶⁷ Cf. G. Martin, *General De Gaulle's Cold War: Challenging American hegemony* (Berghahn, 2013), 188-191.

de Dijon decision. The following section addresses the link between policymaking on Directive 70/50 and the Court's jurisprudence by focusing on the mobilisation of the directive in *Dassonville*, a key building block of the European economic constitution.

III.4 Directive 70/50 and the European Court of Justice (1970-74)

The primacy of the jurisprudence of the ECJ means that the Court is not bound by a Commission directive. However Directive 70/50 was first mobilised in *Dassonville* in the written submission to the Court by the plaintiff's lawyer, Roger Strowel. The *Dassonville* case originated, when the Belgian Public Prosecutor initiated proceedings against French trader, Gustave Dassonville and his son Benoît, who managed a branch of his father's business in Belgium. The Dassonvilles offered 'Scotch whisky' of the brands *Johnny Walker* and *Vat 69* for sale in Belgium without however being able to produce the certificates of origin of the goods issued by the British authorities (the country of origin of Scotch whisky). Belgian law stipulated (a) that the recognition of a designation of origin would be subject to a declaration by the government concerned to the Belgian government that this designation of origin was 'officially and definitely adopted'.⁶⁸ (b) The import and sale of spirits with a designation of origin duly adopted by the Belgian government would be prohibited if these spirits were not accompanied by any official document certifying their right to this designation. If the Dassonvilles were found in violation of Belgian law they could face imprisonment, amongst other penalties.

Notably, Gustave Dassonville had not purchased the bottles, which were to be offered by his son for sale in Belgium, directly from the British producers of Scotch whisky. The goods were purchased from the *French* importers and distributors of *Johnny Walker* and *Vat 69*. Crucially, therefore, the bottles had already been imported into a Member State of the community. In contrast to Belgium, however, France did not require a certificate of origin for Scotch whisky. When they prepared the bottles for the import (from France) into Belgium and for the sale in Belgium, the Dassonvilles only affixed labels bearing the words 'British customs certificate of origin' on the bottles and noted the information on the French excise bond (the official document required by France to accompany a designation of origin) on the

⁶⁸ Case 8/74, 839.

permit register. In the eyes of the Public Prosecutor, this procedure constituted forgery and a violation of Belgian law.

Strowel addressed the incompatibility of Belgian law and the Treaty's prohibition of measures having equivalent effect arguing that the Belgian law in question '...renders impossible imports into Belgium from any country other than that in which the goods originate, in the case where the country concerned has no rules similar to those operating in Belgium with regard to certificates of origin.'⁶⁹ This would amount to discrimination, or a disguised restriction of trade between the Member States, which was not covered by Article 36. Moreover, Strowel's original written submission to the ECJ included an important reference to Directive 70/50, which did not make it in full into the 'Summary of written observations' published by the Court.⁷⁰ The lawyer referred to the directive arguing that:

'...a restriction [i.e. a certificate of originality] is never legitimate if its goal can be achieved just as well by other means impeding less on trade; or if the restrictive effects on the free movement of goods resulting from the regulation are out of proportion to its purpose.'⁷¹

Strowel therefore resorted to the important principle of proportionality to support the argument that Belgian law was in violation of Article 30. The Commission, represented by Béraud, supported Strowel in their written statement to the Court.

Advocate-General Trabucchi who played a fundamental role in crafting the *Van Gend en Loos* decision a decade earlier also discussed Directive 70/50 in his opinion to the Court. It is perhaps not surprising that Trabucchi sided with the Dassonvilles and the Commission, when he advised the ECJ that:

'The prohibition on importation into a Member State of foreign products bearing a protected designation of origin and already in free circulation in another Member State, imposed on the sole ground of inability to produce the certificate of origin, constitutes a measure having an effect equivalent to a quantitative restriction prohibited in principle by Article 30 of the EEC Treaty and not admissible on the basis of Article 36.'⁷²

In its judgment of 11 July 1974 the ECJ followed Trabucchi holding that:

⁶⁹ *Ibid.* 840.

⁷⁰ *Ibid.* 841-42.

⁷¹ Conclusions attached to the letter Roger Strowel to Mattera, 10 December 1973, BAC 304/1993 34.

⁷² Case 8/74, 864-65.

‘...the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.’⁷³

More important for the argument of the European economic constitution and arguably, the wider future jurisprudence, however, the ECJ linked this precise response to the question before it – the question if the requirement of a certificate of origin constituted a violation of the prohibition of measures having equivalent effect – to a comprehensive definition of measures having equivalent effect in the Court’s ‘most famous pronouncement ever’⁷⁴: ‘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.’⁷⁵ This means that the ECJ did *not* follow the approach promoted by the Commission in Directive 70/50, namely to enumerate a number of concrete cases in which equally applicable measures could breach the prohibition of Article 30.⁷⁶ Instead it went further – further than Trabucchi’s opinion, too – so that its all-embracing definition of measures having equivalent effect put the ECJ in close proximity to legal scholars favouring an extensive reading of the provision, as argued specifically in Pieter VerLoren van Theemat’s 1967 article.

At the same time the Court held that under certain circumstances and in the ‘absence of a Community system’, Member States could take measures to prevent unfair practices as long as these measures were ‘reasonable’ and ‘the means of proof required’ would ‘not act as a hindrance to trade between Member States and ... in consequence, [would] be accessible to all Community nationals.’⁷⁷ Taking on board the argument proposed by Roger Strowel the Court continued:

‘Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’⁷⁸

⁷³ *Ibid.* 852.

⁷⁴ Weiler, *The Constitution of the Common Market Place*, 353.

⁷⁵ Case 8/74, 852.

⁷⁶ Carney, *What Rule of Reason?*, 311-312.

⁷⁷ Case 8/74, 852.

⁷⁸ *Ibid.*

This part of the judgment was interpreted as the basis for a ‘rule of reason’ approach, which the ECJ developed in its *Cassis de Dijon* judgment.⁷⁹ In *Cassis de Dijon* the Court therefore developed from, and went further than *Dassonville* and other case law in (implicitly) introducing a ‘rule of reason’ approach. This part of the judgment has been subject of much criticism from the legal community for creating legal uncertainty and for giving way to a contradictory body of case law.⁸⁰

IV Conclusions

The archive- and actor-based approach of this article has highlighted *first* that there was a strong continuity in the investment by a small number of key actors in focusing on Article 30 to create the single market from 1966. Béraud, Mattera, Deringer and lastly, Matthies, were intimately involved in the making of Directive 70/50 and at least one of the two landmark cases on the measures having equivalent effect, *Dassonville* and *Cassis de Dijon*.

Second, the focus on key actors and the ideas they developed alerts us to the fluid boundaries between politics and the law. The second period of policymaking in particular (discussed in section III.2) shows a pendulum between the debate in the legal community and political impetus, epitomised by the interventions of MEP Deringer, which crucially advanced this debate.

Moreover, and this is the *third* conclusion that this archive- and actor-based approach made it possible to trace the missing policy dimension of the origins of *Cassis de Dijon*. The focus on a small number of key actors and the ideas and legal arguments they mobilised has shown the fluidity of boundaries between policymaking and jurisprudence. This is not to contradict the theory of the hierarchy of laws. Instead the argument here is that ideas and legal concepts are generated and distributed aside of this hierarchy. The notion of distinctly and indistinctly applicable measures, on the one hand, and the principle of proportionality, on the other, support this point.

Finally, and following from the previous arguments, the findings of this article change the picture we get of the ECJ in building the European economic constitution. This examination of the policy origins of the jurisprudence of the Court has shown how the ECJ’s activities were embedded in the attempts of a wider legal community to advance the creation of the common market. This view is in line with the

⁷⁹ Carney, What Rule of Reason? 312.

⁸⁰ See, e.g., *ibid.*

demystification of the Court and its jurisprudence by showing the political nature of interpreting the law, which scholars from Alter and Meunier to the more recent 'new history of EU law' have been undertaking for a number of years.

[9,804 words]