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*Subsidiarity and Food: The Political Economy of Mutual Recognition*

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SUBSIDIARITY AND FOOD: 
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The principle of mutual recognition is therefore nothing less than a specific application of that other fundamental aspect of building the Community: the principle of subsidiarity enshrined in Article 3b of the EC Treaty as amended by the Treaty on European Union [Commission, 1994, p. 35]

ABSTRACT
The principle of mutual recognition has been derived from Article 30 of the Treaty of Rome, and is claimed to be a practical example of subsidiarity. Mutual recognition, however, whilst striking down trade barriers does not create a Single Market for it results in product characteristics being determined by location of production. Furthermore, the Article 30 freedoms, embraced in the principle of mutual recognition, are not fully elaborated. Subsidiarity is inherently unsuited to the determination of product characteristics, but could usefully be applied to determine production [process] characteristics. Mutual recognition, in fact, has been used by the Commission as a form of deregulation, but by linking the concepts of mutual recognition and subsidiarity, the Commission is liable to bring the latter into disrepute.

INTRODUCTION 
All economic activity takes place within institutional and legal constraints which may in themselves hinder or facilitate commercial operations and in particular act as non-tariff barriers to trade. This paper focuses on legislation relating to food, and the European Union’s [EU] quest for a Single Market. Long before ‘subsidiarity’ became a household word, the EU had abandoned its ambitious programme of food law harmonisation, embracing all facets of food law, and instead had focused on a more limited rage of harmonisation measures establishing minimum standards within the EU, but focusing on ‘mutual recognition’ as a means of breaking down residual trade barriers.

However mutual recognition does not create a Single Market, and this paper explores some of the economic consequences that are likely to flow from the EU’s stance. It considers the potential impact of mutual recognition on the food industries and consumers. Furthermore, although a considerable body of cases has been considered by the European Court, some confusion still remains regarding the precise requirements that have to be met if a product is to enjoy the benefits of mutual recognition within the EU. This centres on the question whether a product has to be both manufactured and marketed in a Member State, and the implications this has for products manufactured in Third Countries.

1. This paper draws on the author’s earlier writings, notably Swinbank [1993 and 1994b].
ARTICLES 30 and 100 EC, AND CASSIS DE DIJON

Whilst there is considerable room for debate as to the appropriate level of food law required in a modern market economy, it cannot be denied that in the past food adulteration and deceptive practices have been rife, and that food-borne disease continues to claim many victims. Consequently, it is not difficult to understand that countries the world over have an array of legislation concerning food, ranging from, for example, controls on pesticide and veterinary residues in raw materials, through processing methods, compositional standards, packaging materials, to pack size and labelling requirements. Given differences in climate, dietary habits, per capita incomes, and perceptions of risk, let alone the fact that the same objective might be achieved through the use of alternative policy mechanisms, it is not surprising that differences have emerged between the legislative provisions of sovereign states, even when there has been no protective intent. A food colour acceptable in one country, for example, might not be accepted in another, and potent non-tariff barriers thus emerge.

The EEC Treaty provided two mechanisms to break down, or remove, non-tariff barriers to intra-Community trade. Under Article 30, but subject to the constraints of Article 36, the European Court could be asked to decide that such measures amounted to ‘quantitative restrictions on imports’ or ‘measures having equivalent effect’ which were ‘prohibited between Member States’. Alternatively, under Article 100, the Council acting unanimously could ‘issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market’. Initially, the potential impact of Article 30 was not fully recognised, and the EU embarked on an ambitious programme of food law harmonisation. It was soon recognised, however, that the timetable was unrealistic: there was a labyrinth of very detailed legislation to consider, popular opposition to the hegemony of Eurobread or Eurobeer was easily aroused, and the unanimity rule was inimical to speedy decision-making.

Cassis de Dijon was the most celebrated of the Court cases demonstrating the power of Article 30. In essence, Germany had tried to ban the sale in Germany of this French-made blackcurrant liquor arguing that its alcohol content was too low. German law, in an attempt to protect consumers from deception, laid down a minimum alcohol content for alcoholic liquors. The Court concluded that this policy objective could be achieved through the use of less draconian measures, such as a label with an indication of origin and alcohol content, which would not prohibit the sale of this French-made product and thus infringe Article 30. In particular the Court said that such a measure should not restrict the “importation of alcoholic beverages lawfully produced

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2. The paper does not attempt to deal with questions of mutual recognition within the European Economic Area [EEA], though the author understands that the same issues arise. See Fine [1992].
3. See, for example, Collins [1993] on the history of food adulteration in the UK in the 19th and early 20th centuries; and Sockett [1993] on the growing number of notified cases of food poisoning in recent years.
4. Legislation that specifies the components of a food product, for example the lean-meat content of sausages, and sometimes termed ‘recipe law’.
5. Judgement of 20 February 1979 in Case 120/79 [European Court Reports, 1979, 9, 649].
and marketed in another Member State”. The ruling did not rewrite German law, it simply confirmed that under EU law this particular French-made product could be sold in Germany provided it was adequately labelled.

**MUTUAL RECOGNITION**

As a result of this and similar rulings, and the impasse faced by its food law harmonisation programme, the Commission developed the concept of mutual recognition. As late as 1988 it said:

The Court of Justice has developed this principle in its case law, notably in the *Cassis de Dijon* judgement. It signifies acceptance by all Member States of products lawfully and fairly manufactured and sold in any other Member State ... [Commission, 1988, p. 24].

More recently the Commission has modified its stance, and now refers to the principle of mutual recognition

whereby any product lawfully produced or marketed in one Member State of the Community must enjoy access to all other Member States .... [Commission, 1993, p. 3; emphasis added].

Whether or not products must satisfy the coupled requirement that they be both lawfully produced and lawfully marketed in another Member State, or the decoupled requirement that they be lawfully produced or lawfully marketed in another Member State, before they can benefit from mutual recognition is a matter of some concern to the food industries. It rests on various interpretations of EU law, and has not yet been resolved by the European Court, even though Article 30 dates back to 1958 and the *Cassis de Dijon* ruling to 1979. This paper will not attempt to arbitrate on the matter, but it will outline some of the commercial uncertainties that the food industries face. 7

Four points should be noted before we progress. First, that the principle of mutual recognition is not explicitly written into EU law: it is simply the Commission’s interpretation of how the European Court is likely to rule on cases brought before it under Article 30 EC. Member States can save the expense and political embarrassment of a protracted Court case by accepting products on their market which meet the legislative requirements of another Member State, though they are still free to ban the sale of imported products provided they can justify that action in the European Court by reference to Article 36 EC.

Second, Member States may nonetheless resort to the Courts in an attempt to defend a seemingly indefensible position; and the expense and delay this could impose on the potential importer might act as an effective deterrent. An interesting case is currently being pursued through the Courts. In Greek law feta cheese can only be made with goats’ or sheeps’ milk, whereas in other Member States feta cheese is also made with cows’ milk. Greece has blocked the sale, in Greece, of cows’ milk feta sourced from MD Foods in Denmark. According to MD Foods, the principle of mutual recognition should apply as no safety considerations are at stake, and it is seeking to

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6. The phrase ‘mutual recognition’ has been used by the EU in a number of different contexts. In this paper it refers only to food products and the laws of the Member States.

7. For further discussion see Swinbank [1994b].
secure its Article 30 freedoms to sell in Greece products lawfully manufactured and sold in Denmark. It seems likely that MD Foods will succeed in this challenge, and that Greek laws on feta cheese will be deemed to be incompatible with the free trading provisions of the EC Treaty: —as were Italian laws on pasta, the beer purity laws of Germany, and many other examples.

Third, a ruling by the European Court under Article 30 does not of itself over-turn national legislation which can still be applied against products produced and marketed in the Member State: it simply asserts that as far as imported products are concerned EU law over-rides national law.

Fourth, it must not be presumed that mutual recognition has ousted EU food law: the two mechanisms are used in tandem. In 1985 the Commission set out a new strategy for achieving a single market in foodstuffs which would involve Community legislation to the extent necessary

- to protect public health;
- to provide consumers with information and protection in matters other than health and ensure fair trading
- to provide for the necessary public controls [Commission, 1985, points 7 and 9; and Gray, 1990, p. 113].

Otherwise, Member States are free to maintain national provisions, but here Article 30 and mutual recognition regulates trade. This split responsibility, between Community and Member State legislation, could be seen as an application of the principle of subsidiarity. However, a conclusion to be drawn from this paper is that while subsidiarity can be appropriate when a Member State or a local community seeks to exercise control over production methods [ie process characteristics], in a Single Market it is an unsuitable mechanism for determining product characteristics.

MANUFACTURERS AND THE LOCATION OF PRODUCTION

In the absence of a detailed research study, it is impossible to say with confidence whether or not mutual recognition of product characteristics is a significant or a trivial issue influencing manufacturers’ decisions on the location of production. Its importance will undoubtedly vary from sector to sector; but in the author’s judgement, in certain circumstances mutual recognition could be of major significance.

Table 1, reporting on three facets of the national rules to be found within the EU regulating the manufacture of margarine, gives an insight into the maze of national provisions determining product characteristics that pervade European food law. It is by no means an exhaustive coverage of the various characteristics of retail packs of margarine that are determined by national laws, and nor does it indicate the diversities that are to be found within columns.

The Limits of Subsidiarity

From Table 1 we learn that if a company decided that there was a marketing advantage to be gained in France by selling a margarine with added vitamins, and an added yellow colour, that product could not be manufactured in France. Nonetheless, there are other Member States in which such a product could lawfully be manufactured and sold, and
then —according to the principle of mutual recognition— sold in France. The locally based manufacturer would then be at a competitive disadvantage in that, under French law, it would not be able to match the distinguishing characteristics of the imported product. MD Foods found itself in such a dilemma in 1990. It wanted to launch, in Denmark, a mixed vegetable oil-butter spread, which was not permitted under Danish law. At the time, the Managing Director of MD Foods, Ole Willemann, was quoted as saying:

We are in a totally grotesque situation, since we must choose between importing legally, or producing illegally. It is a serious matter for a large company of excellent repute to break the law. But we have opted for home-based production using domestic raw materials, rather than accepting a hair-splitting interpretation of legislation. [Eurofood, May 1990, p. 18]

MD Foods was fined for this transgression, but in this instance Danish legislation was quickly amended to allow Danish manufacturers to compete legally with imported products.

Table 1: Standards for Margarine

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum Fat Content</th>
<th>Colouring</th>
<th>Vitamin Fortification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>82</td>
<td>Specific Rules</td>
<td>Required</td>
</tr>
<tr>
<td>Denmark</td>
<td>80</td>
<td>Forbidden</td>
<td>Required</td>
</tr>
<tr>
<td>France</td>
<td>none</td>
<td>Forbidden (but allowed in butter)</td>
<td>Forbidden</td>
</tr>
<tr>
<td>Germany</td>
<td>80</td>
<td>Specific Rules</td>
<td>Allowed</td>
</tr>
<tr>
<td>Greece</td>
<td>80</td>
<td>Specific Rules</td>
<td>Allowed</td>
</tr>
<tr>
<td>Ireland</td>
<td>none</td>
<td>No Specific Rules</td>
<td>Allowed</td>
</tr>
<tr>
<td>Italy</td>
<td>84</td>
<td>Specific Rules</td>
<td>Allowed in dietetic products</td>
</tr>
<tr>
<td>Netherlands</td>
<td>80</td>
<td>Specific Rules</td>
<td>Required</td>
</tr>
<tr>
<td>Portugal</td>
<td>80</td>
<td>—</td>
<td>Allowed</td>
</tr>
<tr>
<td>Spain</td>
<td>80</td>
<td>Specific Rules</td>
<td>Allowed</td>
</tr>
<tr>
<td>UK</td>
<td>80</td>
<td>No Specific Rules</td>
<td>Required</td>
</tr>
</tbody>
</table>

Source: Adapted from International Federation of Margarine Associations, National and International Standards for Margarine, undated; IFMA: Brussels.

The pressure on national governments is clear: if national legislation restricts the ability of locally based producers to compete with imported products then local industry will campaign for repeal of the national legislation [or possibly for the EU to adopt the national provisions into EU law]. It makes no sense to maintain national laws
determining product characteristics in locally produced goods, when the national government has no control\(^8\) over the same product characteristics of imported goods.

It is not necessarily easy to distinguish between product and process characteristics,\(^9\) but a contrived example may illustrate the point. It would, for example, probably be judged to be illogical to ban the local production and sale of white eggs [a product characteristic]. As a result of Article 30 and mutual recognition, buyers would have unrestricted access to imported white eggs which could capture market share at the expense of locally produced brown eggs. However, if on ascetic grounds the national government should decide that all egg-packing plants should be painted brown [a process characteristic], this would be an appropriate use of subsidiarity. If this legislation imposed higher costs on local egg producers, imports from other EU States would capture market share at the expense of local producers, but the policy objective —that of having brown egg-packing plants— would be achieved notwithstanding mutual recognition.

If the distinction between product and process characteristics can be sustained, there are four possible variants:

- the government of the country in the location of production legislates to determine process characteristics. This would seem to be a legitimate use of subsidiarity within the EU, though problems can arise with legislation relating to environmental standards particularly if externalities transcend national boundaries.
- the government of the country of sale legislates to determine product characteristics. This is the traditional stance adopted by sovereign states, and provided there is no discrimination between the imported and the domestically produced good, international trade relations can be reasonably harmonious. However, within the EU, Article 30 EC and the principle of mutual recognition would not permit this outcome unless Article 36 EC could be successfully invoked.
- the government of the country of manufacture legislates to determine product characteristics. In the EU, the principle of subsidiarity allows this to happen, but in terms of ‘protecting’ the domestic consumer mutual recognition renders the operation meaningless. It is this option which forms the focus of this paper.
- the government of the country of sale legislates to determine process characteristics. This outcome is in essence outlawed in international trade, and is currently of much concern to environmentalists who want importing countries to have some control over the environmental impact of production methods in the exporting state.

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\(^8\) Strictly speaking, not ‘no control’, as the product must satisfy minimum safety standards otherwise Article 36 EC could be invoked to forbid sale.

\(^9\) Sometimes process characteristics can also determine product characteristics, as with food irradiation, organic production methods, and animal welfare concerns [Swinbank, 1994a].
MARKETED, OR MANUFACTURED AND MARKETED?

*Cassis de Dijon*, and most case law, related to products manufactured and marketed within a single Member State; and understandably the Commission’s early elaborations of the principle of mutual recognition adopted the Court’s phraseology and referred to products “lawfully produced and marketed in another Member State”. Most legal experts now believe, however, that the location of production is irrelevant, and all that is required is that the product be legally marketed in another Member State. It should be stressed, however, that this interpretation has not yet been definitively established in the European Court.

If a product has only to be legally marketed in another Member State for it to benefit from the principle of mutual recognition, this potentially extends mutual recognition to products manufactured in Third Countries, but also raises additional complications. Consider, say a manufacturer in Switzerland [not a member of the EEA] wanting to sell a product over the border into Germany. If the product is only sold in the German market, and in no other EU Member State, it seems clear that German law would apply to determine the product characteristics of the imported Swiss product — or would it?

If the Swiss product were sold first, say, in the Spanish market then it would appear that it could be sold on into the German market under the principle of mutual recognition, provided it had been lawfully marketed in Spain, and without having to meet the precise legislative requirements of the German market. But does this mean that the product has to be shipped via Spain, or would it suffice for some shipments to be delivered directly to Germany whilst identical products are sold in Spain? Economically and commercially it would make no sense to insist on shipments via Spain; but the interpretation of the European Court is awaited on this issue. As the principle of mutual recognition stems from the application of Article 30 EC, which is concerned with trade between Member States, it might be argued that the product has to be sourced from the country in which it is legally marketed, even though this might involve wasteful transport. One can press the example further: if shipments can be made direct to Germany, without having to travel via Spain, would it be necessary to sell the product in Spain at all? Would it not suffice to show that the product would meet the legislative provisions in Spain if sold there? But if this point is conceded, what it implies is that Third Country producers will be able to pick and choose from twelve separate sets of legislation the standards they must adhere to, in selling their product into the market of any EU Member State.

Analogous arguments can be developed with respect to EU-based manufacturers. To sell into their own market they must meet domestic requirements. To sell into another Member State, can they choose to manufacture to the least restrictive conditions established within the EU, and if so do they: i) have to ship the product via that Member State, or ii) would it suffice to show that the product could be legally marketed in that third Member State?
CONSUMERS
The Commission has recently commented:

> European consumers can also thank the principle of mutual recognition for the increase in the range of products on sale at ever-decreasing prices. Selling their products on a market which covers half a continent enables businessmen to make economies of scale and hence reduce their costs, to the greater benefit of the man in the street. Freedom of movement, as achieved through mutual recognition, attacks national rules which tie consumers to a given product, eg by laying down a particular composition for this or that foodstuff [‘recipe-laws’]. Such provisions crystallize given consumer habits so as to consolidate an advantage gained by domestic industry, which then devotes itself to satisfying those habits. This type of rule, apart from arbitrarily depriving consumers of the opportunity to discover the specialities and traditional products of other Member States, whose composition differs from that laid down by the law of the importing country, prevents the interpenetration of markets —to the detriment of both business and consumers. [Commission, 1994, p. 35].

This quotation raises three important issues. First, it refers to economies of scale, and cost reductions. Whilst these are undoubtedly of major importance in many industries, including some branches of food and drink manufacture, the scale of such achievable economies throughout the food industries remains unclear. The Groupe Mac report of 1988 [Groupe Mac 1988] did not attempt such an estimate.

Second, the quotation implies that consumers are unambiguously made worse off as a result of compositional standards [recipe law]. However, consumers face a bewildering array of products in a modern food-store, and it could be argued that compositional standards in determining basic product attributes limit search time. Compositional standards do of course limit choice [and thereby probably restrict new product development] and so there is a trade off between the degree of choice and the search time needed to establish the characteristics of products in the store [see Figure 1].

The Figure assumes that if compositional standard are tightly defined, then the difference between products is reduced [choice is restricted] and search time is minimised. If there are no compositional standards, then a much wider divergence in product characteristics will be found [choice is expanded] but search time, to determine the characteristics of products, is increased. Thus the horizontal axis implies a diminishing range of choice moving to the right. Collectively, we might prefer some degree of product uniformity.

In the EU, in the absence of EU determined compositional standards, the principle of mutual recognition means that consumers must assume that product characteristics are highly variable —despite the assertion that the principle of subsidiarity allows Member States to determine product characteristics of foodstuffs produced and sold in the Member State.
Figure 1: Hypothetical trade-off between the degree of regulation of product composition and the search time needed to determine the characteristics of the good

Third, the quotation makes clear that the impact, if not the intent, of mutual recognition is deregulation. Deregulation may be a desirable economic and social objective; but if this is the Commission’s intent then this policy should be pursued openly and not surreptitiously. The Member States have in the past rejected EU compositional standards leading to Euro-products, but the Commission’s present agenda seems just as single minded: to emasculate national rules determining compositional standards whilst maintaining the pretense that subsidiarity allows Member States to maintain meaningful national rules.

ENFORCEMENT
If consumers face a bewildering range of products in the stores, satisfying the national compositional standards of a range of Member States, so too do the enforcement agencies. National authorities can, of course, insist that products are safe and that purchasers are not defrauded, but do they have a role beyond that? If a retailer/importer claims that the product on sale meets the compositional standards laid down in another Member State, does the national enforcement agency have the expertise to confirm the validity of the claim, and does the national law have the authority to adjudicate on the matter? If compositional standards cannot, effectively, be imposed, mutual recognition
not only sweeps away trade barriers, but also most compositional standards —except those residual national rules regulating the hapless manufacturer producing for the home market.

The Single Market, with no border controls, also raises another enforcement concern. If products are to flow freely from one Member State to another then the importing Member State must show mutual trust in the manufacturing country’s enforcement capacity of minimum safety standards.

CONCLUSIONS

It is the Commission’s claim that “the Treaty of Rome, as amended by the Single European Act, seeks to merge national markets into a single market with all the characteristics of a domestic market” [Commission, 1994, p. 37]. The principle of mutual recognition is seen as a powerful mechanism for pursuing this end, while respecting the principle of subsidiarity enunciated in the Treaty on European Union.

Mutual recognition does break down trade barriers, but from the perspective of manufacturers this does not create a Single Market. This is because national rules continue to regulate product characteristics of goods manufactured and marketed within a Member State, whereas imported products are subject to different rules. The situation is further confused because, fifteen years after the *Cassis de Dijon* ruling, the exact requirements a product has to meet to benefit from the principle of mutual recognition remains unclear.

The Commission justifies mutual recognition as a practical expression of the principle of subsidiarity. In fact, quite the reverse is the case, as mutual recognition and subsidiarity are conflicting principles when applied to product characteristics. Subsidiarity allows Member States to determine the product characteristics of goods manufactured and sold within the Member State, but mutual recognition denies Member States the ability to determine the product characteristics of imported products. By implying the opposite, the Commission will bring the principle of subsidiarity into dispute. If applied to process characteristics [production methods] however, mutual recognition and subsidiarity can operate harmoniously together.

Mutual recognition, it would appear, is merely a surreptitious form of deregulation, striking down national compositional standards by rendering them ineffective. Whilst many of these national rules were probably outdated and anti-competitive, a reasoned case for their repeal has not been advanced. Nor is it clear why the Member States should not adopt a more transparent method of removing outdated legislation. The prevailing climate of the times might favour free markets and deregulation, but it does not necessarily follow that all compositional standards are redundant. It might be that in future years some element of re-regulation, on an EU-wide basis, will be pursued to protect the legitimate interests of EU consumers and producers.
REFERENCES


Commission of the European Communities (1985), *Completion of the Internal Market: Community Legislation on Foodstuffs*, COM(85)603, CEC: Brussels.


