

COMBATTING ECONOMIC PROTECTIONISM IN THE EEC: THE *Buy Irish* DECISION

In January 1978, Ireland launched the "Buy Irish" campaign,¹ a three-year program designed to promote domestic sales of Irish goods. This program consisted of public advertisements encouraging consumers to buy only Irish goods and a "Guaranteed Irish" symbol which was affixed to domestic products.² The goal of the campaign was a three percent increase in the total market share for domestic products which, if achieved, was expected to create ten thousand full-time jobs for Irish workers.³ Private industry and the government were to fund the program in equal shares.⁴ Management was provided by the Irish Goods Council, whose chairman and management committee were appointed by the Minister for Industry, Commerce, and Energy.⁵

Following implementation of the "Buy Irish" campaign, the Commission of the European Communities (Commission) stated in a reasoned opinion⁶ that it viewed the Irish Goods Council as a

¹ See Speech by Mr. O'Malley, Minister for Industry, Commerce and Energy, (Jan. 18, 1978), reported in *Irish Times*, Jan. 19, 1978, at 13, col. 4 [hereinafter cited as O'Malley].

² There were originally two other features of the "Buy Irish" campaign: the "Shoplinc Service" which informed consumers as to the availability of Irish products and exhibition facilities operated in Dublin which were used to display Irish goods. These services were discontinued, however, prior to the lodging of the Commission's complaint. *Commission of the European Communities v. Ireland*, 1982 E. Comm. Ct. J. Rep., 1983 Comm. Mkt. L.R. 104 [hereinafter cited as *The Buy Irish Case*].

³ O'Malley, *supra* note 1.

⁴ Speech by Mr. Burke, Minister of State, (May 11, 1978), quoted in *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 106. It appears from the Irish government's answers to the Court's written questions that the actual share of public funding was approximately 80 percent. *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 110.

⁵ *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 107, 121.

⁶ The term "reasoned opinion" appears in article 169 of the Treaty establishing the European Economic Community:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

Treaty establishing the European Economic Community, done March 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as EEC Treaty]. Before delivering its reasoned opinion, the

public authority whose acts to promote the sale of Irish goods violated article 30 of the Treaty establishing the European Economic Community (EEC Treaty).⁷ Accordingly, the Commission brought an action before the European Court of Justice.⁸ *Held*, the Irish government, by promoting the sale and purchase of Irish goods within its territory, failed to fulfill its obligations under article 30 of the EEC Treaty.⁹

As part of the EEC Treaty's regulation of competition between member states, article 30 prohibits not only quantitative restrictions on imports, but also "all measures with equivalent effect."¹⁰ While the term "measures of equivalent effect" is not defined in the EEC Treaty, the court provided a definition in the 1974 case of *Procureur du Roi v. Dassonville*.¹¹ That case held that "measures" included "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"¹² It appears from this formula that the effect, not the aim, of a measure determines whether it is prohibited by article 30.¹³ Furthermore, a measure need not actually curtail imports in order to be prohibited, but must only have the potential to do so.¹⁴ Finally, it should be noted that *Dassonville* involved a measure which was binding on those to whom it was addressed.¹⁵ It would therefore be possible to construe the *Das-*

Commission had requested the observations of the Irish government as required by article 169 of the EEC Treaty. See *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 106.

⁷ *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 108. Article 30 provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to [articles 31-37], be prohibited between Member States."

⁸ The action was brought pursuant to the EEC Treaty, *supra* note 6, art. 169.

⁹ *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 124.

¹⁰ EEC Treaty, *supra* note 6, art. 30. Article 34 makes similar provisions regarding restrictions on exports. Article 36 allows certain enumerated exceptions to the general prohibitions of articles 30 and 34, but these exceptions are not economically oriented and, thus, were not raised in this case. For two recent discussions of articles 30, 34, and 36, see Barents, *New Developments in Measures of Equivalent Effect*, 18 COMMON MKT. L. REV. 271 (1981); Oliver, *Measures of Equivalent Effect: A Reappraisal*, 19 COMMON MKT. L. REV. 217 (1982).

¹¹ *Procureur du Roi v. Dassonville*, 1974 E. Comm. Ct. J. Rep. 837.

¹² *Id.* at 852. For a thorough analysis of this definition, see Barents, *supra* note 10, at 273-77.

¹³ See Oliver, *supra* note 10, at 223.

¹⁴ See *id.* (noting that this is one reason statistical evidence of a measure's effect has been considered irrelevant).

¹⁵ The measure in question in *Dassonville* was the requirement of a certificate of authenticity for certain products. *Procureur du Roi v. Dassonville*, 1974 E. Comm. Ct. J. Rep. at

sonville formula as applying only to similarly binding measures, and not to merely persuasive measures such as the "Buy Irish" advertising campaign.

Prior to *Dassonville*, the Commission had proposed its own definition of "measures" in its 1970 Commission Directive No. 70/50.¹⁶ The relevant provisions of Directive 70/50 prohibit all regulatory and administrative acts of public authorities, including non-binding measures, which encourage, require, or give preference to the purchase of domestic products to the exclusion of imports.¹⁷ Whether Directive 70/50 is binding on member states is a disputed subject.¹⁸ The court has taken no position on the issue, but has frequently cited the Directive with approval.¹⁹

The central issue in *The Buy Irish Case* was whether article 30 should, as the Commission asserted, be interpreted as prohibiting non-binding measures.²⁰ In as much as earlier cases involving the

839.

¹⁶ Directive No. 70/50, 13 J. O. Comm. Eur. (No. L13/29) (1970) [hereinafter cited as Directive 70/50].

¹⁷ Article 2(2) of Directive 70/50, *supra* note 16, prohibits "measures which favor domestic products or grant them a preference other than an aid, to which conditions may or may not be attached." Article 2(3)(K) elaborates on this prohibition by including measures which "hinder the purchase by private individuals of imported products only, or which encourage, require or give preference to the purchase of domestic products only."

The second recital in the Directive's preamble defines the term "measures" as "all instruments issuing from a public authority, including recommendations which, while not legally binding on the addressees thereof, cause them to pursue a certain conduct." *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 107, 114, *citing* Directive 70/50, *supra* note 16 (official English version).

¹⁸ Directive 70/50 was issued in accordance with article 33(7) of the EEC Treaty, which empowers the Commission only to "issue directives establishing the procedure and timetable in accordance with which Member States shall abolish, as between themselves, any measures in existence when this Treaty enters into force which have an effect equivalent to quotas." EEC Treaty, *supra* note 6, art. 33(7). Therefore, Directive 70/50 may apply only to measures in existence when the Treaty entered into force. *See* Oliver, *supra* note 10, at 221 n.24 (listing sources engaged in this dispute).

¹⁹ Oliver, *supra* note 10, at 221 n.24. The court has also implicitly overruled the Directive in certain respects. These instances are limited to Directive 70/50's treatment of certain import licenses and its policy concerning the burden of proof. *Id.* at 221 n.24, 230. They do not appear to have affected the court's generally favorable view of the Directive in *The Buy Irish Case*. *See infra* text accompanying note 34.

²⁰ Before reaching this question, the Court had considered two preliminary issues: (1) whether the campaign was an act of a public authority, and (2) whether the campaign was a legitimate state aid under article 92 of the EEC Treaty and, consequently, outside the scope of article 30.

Regarding the first of these questions, it was found that the Irish Goods Council, which directed the campaign, was sufficiently related to the Irish government to constitute a public authority. In support of this conclusion, the court observed that the Irish government appointed the management committee of the Council and that the government defined the

doctrine of "measures of equivalent effect," including *Dassonville*, were concerned with only binding measures such as inspection and licensing requirements,²¹ this issue was one of first impression for the court.

The Advocate-General's²² suggestions regarding this issue differed substantially from the court's conclusion. In the Advocate-General's opinion, the Commission's attempted application of Directive 70/50 was *ultra vires*.²³ The Directive, he pointed out, had been issued under article 33(7), which limits the Directive's scope to abolishing measures already in existence when the EEC Treaty entered into force.²⁴ Noting that the applicability of article 30 to non-binding measures had not otherwise been addressed, he argued strongly against its application to the "Buy Irish" campaign.²⁵ He claimed that the article's scope had been made broad enough by the *Dassonville* formula and that further enlargement could not be justified.²⁶

The court, however, held that article 30 was controlling.²⁷ The "Buy Irish" campaign, the court found, reflected a national prac-

Council's aims and granted it public subsidies. The second question—the applicability of article 92—was also decided in the Commission's favor. Article 92 was ruled inapplicable because Ireland had failed to notify the Commission of the "Buy Irish" campaign in advance. Such prior notification of plans to grant state aid is required by article 93 of the Treaty. *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 122.

²¹ *Id.* at —, 1983 Comm. Mkt. L.R. at 116. See, e.g., *Procureur du Roi v. Dassonville*, 1974 E. Comm. Ct. J. Rep. 837 (licensing requirement); *Commission of the European Communities v. French Republic*, 1980 E. Comm. Ct. J. Rep. 2299 (legislative restriction on freedom of advertising for certain products); *REWE—Zentralfinanz v. Landwirtschaftskammer*, 1975 E. Comm. Ct. J. Rep. 843 (requirement of inspection of imported plant products).

²² The EEC Treaty, *supra* note 6, explains the role of the Advocate-General as follows:

The Court of Justice shall be assisted by four Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it

EEC Treaty, *supra* note 6, art. 166.

²³ *The Buy Irish Case*, 1982 Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 114. See also *supra* note 18.

²⁴ *Id.* For the text of article 33(7), see *supra* note 18.

²⁵ *The Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 113-14.

²⁶ *Id.* The Advocate-General cited two other arguments against applying article 30 to non-binding measures. First, he noted the close relationship between articles 30, 34, and 36 and suggested that because article 36 refers only to the "prohibitions or restrictions" governed by article 30 and 34, these articles should not be read as also governing "recommendations" such as advertising campaigns. His second argument favored the application of article 92, but failed to note that this was not possible under article 93. *Id.* See *supra* note 20 (noting that Ireland's failure to comply with article 93 precluded application of article 92).

²⁷ *Buy Irish Case*, 1982 E. Comm. Ct. J. Rep. at —, 1983 Comm. Mkt. L.R. at 122.

tice intended to check the flow of trade between member states by substituting domestic products for imports.²⁸ That the effort was unsuccessful²⁹ was held to be irrelevant; the mere possibility that trade could be affected was sufficient to trigger the prohibition of article 30.³⁰ Most importantly, the court determined it irrelevant that the measures used to implement the campaign were non-binding.³¹ Instead, the campaign was held to constitute a prohibited "measure of equivalent effect" since the potential effect of the campaign was comparable to that of a binding measure.³²

The court did not address the validity of Directive 70/50, but instead made only an oblique reference to that document.³³ Nevertheless, the court's failure to overrule the Directive or to acknowledge the Advocate-General's arguments against it indicates that the Directive continues to have the court's approval.³⁴

Even without expressly validating Directive 70/50, the *Buy Irish* decision significantly expands the scope of article 30's prohibition of "measures of equivalent effect." Never before has that prohibition been directed against programs having no binding effect. One explanation for the court's liberal reading of article 30 may lie in the current trends favoring protectionist measures within member states of the European Economic Community. Non-binding programs have been directed against imports by at least two member states suffering from depressed economies. France has installed a "consultative commission for international trade" whose task is to monitor "abnormal" and excessive imports and to investigate domestic complaints of unfair import practices.³⁵ In addition, Ireland's new government plans to establish a "National Development Corporation" to create jobs partly through state funding of projects encouraging the substitution of domestic products for

²⁸ *Id.* at —, 1983 Comm. Mkt. L.R. at 123.

²⁹ The market share of domestic products was found to have actually decreased from 49.2% to 43.4% during the course of the campaign. *Id.*

³⁰ *Id.* It is not clear what role, if any, intent plays in this standard. It was uncontroverted in this case that the Irish government intended to affect the flow of imports. Even if such intent were absent, however, a potential effect on trade would appear to trigger article 30. See *supra* note 12 and accompanying text.

³¹ *Id.* at —, 1983 Comm. Mkt. L.R. at 124.

³² *Id.*

³³ The Court's only reference to Directive 70/50 was in its summary of the Commission's argument. *Id.* at —, 1983 Comm. Mkt. L.R. at 122-23.

³⁴ See *supra* note 19 (enumeration of prior cases where the court has cited Directive 70/50 with approval).

³⁵ [Euromarket News] COMMON MKT. REP. (CCH) No. 455, at 4 (Aug. 17, 1982).

imports.³⁶

The expansion of article 30 in the *Buy Irish* case makes future Commission action against these programs appear likely to succeed. In addition, the decision may deter other member states from implementing similar protectionist measures. Nevertheless, the meaning of "measures of equivalent effect" may now be so broad as to render consistent enforcement of article 30 impossible. By including even the non-binding acts of public authorities capable of affecting trade in any fashion within the definition of "measures of equivalent effect," the court would seem to have made article 30 applicable to virtually every governmental act. It is doubtful that the court intended for article 30 to have so sweeping a scope. Having eliminated one possible limitation, however, it remains for the court in future cases to redefine the limits of the phrase "measures of equivalent effect."

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³⁶ [Euromarket News] COMMON MKT. REP. (CCH) No. 728, at 4 (Dec. 30, 1982). Surprisingly, this program seems substantially similar to the "Buy Irish" campaign.