OPINION OF ADVOCATE GENERAL POIARES MADURO
delivered on 30 March 2006 [1]

1. Are national rules which make the marketing of frozen 'bake-off' bread conditional upon obtaining a prior licence imposed by the legislation concerning the operation of bakeries compatible with Article 28 EC? This is essentially the question put to the Court by the Diikitiko Protodikio Ioanninon (Administrative Court of First Instance, Ioannina) (Greece) in these joined cases.

2. These references for a preliminary ruling call the attention of the Court once again to the development of the rule laid down in *Keck and Mithouard* [2] concerning the free movement of goods. This development rests, theoretically, on solid foundations. [3] However, it appears that, in practice, its application creates significant difficulties. These cases are an example of this.

1 — Original language: Portuguese.

2 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

3 — See, in that connection, Joliet, R., 'La libre circulation des marchandises: l'arrêt *Keck et Mithouard* et les nouvelles orientations de la jurisprudence', *Journal des tribunaux — Droit européen*, 1994, p. 145.

I — Legal and factual context

3. In Greece, the basis for the current legislation on the conditions for establishing and operating baking premises and bakeries generally is Presidential Decree No 25.8 of 13 September 1934 (FEK A' 309). This decree sets out the requisite procedure for obtaining a licence to establish and operate a bakery and lays down the construction and equipment conditions which must be met in order to obtain this licence. These conditions are more precisely regulated by Law No 726/1977 (FEK A' 316), amending and supplementing the legislation in force concerning bakeries and bread shops. Article 16 thereof provides that 'in order henceforth to establish a bakery or bread shop, a licence must first be obtained, issued by the competent prefect after it has been ascertained that the requirements laid down by this Law are met'. The term 'bakery', as defined in Article 65 of Law No 2065/1992 (FEK A' 113), is to be understood as 'a permanent, specially laid out and suitably equipped building, whatever its capacity, for the production of bread, bakery products generally and other food products having flour as their basis, except pasta, and for the cooking of meals and other products for the public'. Presidential Decree No 369/1992

(FEK A' 186), issued on the basis of the latter legislative provision, lays down the procedure and the supporting documents necessary for the issue of licences for the establishment and operation of bakeries and bread shops and sets out the conditions imposed on the packaging of bakery products.

4. A document produced by the Greek Ministry of Development in 2001 and sent to the competent divisions states that the operation of ovens for the baking of frozen bread or frozen dough within premises for the sale of bread constitutes a part of the bread manufacturing process. It follows that, in order to operate those ovens, the persons concerned must hold a bakery operating licence. Taking formal notice of that document, the Nomarkhiaki Aftodiikisi Ioanninon (Prefectural Authority of Ioannina; 'the Prefectural Authority') decided to carry out inspections of the food supermarkets of Trofo Super-Markets AE and Carrefour Marinopoulos AE. Having established that bread shops and equipment for baking frozen bread were on the premises in the absence of the operating licence prescribed by the legislation on bread-making, the Prefectural Authority, by means of two decisions taken on 27 November 2001, ordered the cessation of operation of the bread ovens which had been installed at the two supermarkets.

5. The two undertakings concerned brought actions for annulment of those decisions before the national court. These undertakings submit, in particular, that the national legislation as implemented by the Greek administration is equivalent to a quantitative restriction on importation contrary to the prohibition laid down by Article 28 EC. In addition, they bring to the attention of the national court the fact that a complaint had been submitted to the Commission of the European Communities by the Panhellenic Union of Bread Industries, seeking a declaration that, in reserving the sale of 'bake-off' bread to bakeries, the Greek legislation creates unjustified barriers to the import and marketing of that product in Greece. It should be noted that the Commission responded to this complaint by initiating the procedure for failure to fulfil obligations under Article 226 EC, following which it addressed a reasoned opinion to the Hellenic Republic on 7 July 2004 requesting that it no longer impose the conditions referred to in the national legislation on bread-making upon the 'bake-off' process. This procedure gave rise to proceedings before the Court. [4]

6. It is in this context that the Diikitiko Protodikio Ioanninon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the requirement for the prior licence referred to in the grounds of

4 — Case C-82/05 *Commission* v *Greece*, pending before the Court, which gave rise to a joint hearing with these cases.

the decision in order to market "bake-off" products constitute a measure equivalent to a quantitative restriction within the meaning of Article 28 EC?

(2) If it were considered to be a quantitative restriction, does the requirement for a prior licence in order to make bread pursue a purely qualitative objective, that is to say, establish a mere qualitative differentiation with regard to the characteristics of the bread marketed (of smell, taste, colour and the appearance of the crust) and its nutritional value (judgment of the Court of Justice in Case C-325/00 *Commission* v *Germany* [2002] ECR I-9977) or does it seek to protect consumers and public health from any deterioration in the bread's quality (Simvoulio tis Epikratias (Council of State) [judgment] 3852/2002)?

(3) On the basis that the abovementioned restriction concerns both domestic and Community "bake-off" products without distinction, is there a link with Community law and is that restriction capable of affecting, whether directly or indirectly, actually or potentially, the free trading of those products between Member States?'

II — Analysis

A — *The existence of a restriction on importation*

7. By its first and third questions referred for a preliminary ruling, which should be examined together, the national court essentially asks the Court whether the requirement to obtain a prior licence prescribed for the operation of a bakery, which a Member State imposes on the marketing of frozen 'bake-off' bread, constitutes a quantitative restriction or a measure having equivalent effect within the meaning of Article 28 EC.

8. It is certainly possible to find in the case-law of the Court sufficient resources to reply to this question. None the less, it is difficult to deny that, in practice, the application of this case-law is a source of uncertainty. The present cases provide us with a good opportunity to clarify the existing body of case-law.

1. The classic approach

9. In the absence of common or harmonised rules on the making and marketing of bread and other bakery products, it is established that 'it is for Member States to regulate all

matters relating to the composition, making and marketing of those foodstuffs on their own territory, provided that they do not thereby discriminate against imported products or hinder the importation of products from other Member States'. [5] The freedom of Member States on the subject is thereby recognised. They are therefore at liberty to prescribe that the marketing of bread and other bakery products be conditional upon obtaining a prior licence, in order to verify that manufacturing and consumer protection standards are complied with. However, this power cannot be exercised in an unlimited manner. It is limited, in particular, by the duty to respect the fundamental freedoms laid down in the EC Treaty, among which is included the free movement of goods. As set out in Article 28 EC, that freedom guarantees, in particular, that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

10. It is classically established that any State measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction. [6]

11. Furthermore, it follows from the *Cassis de Dijon* judgment that, in the absence of harmonisation, measures which are applied without distinction to domestic products and products imported from other Member States are capable of constituting a restriction on the free movement of goods. [7] It is clearly apparent from the documents before the Court that the requirement for a prior licence called into question in the main proceedings is a measure which is applied without distinction.

12. However, one must still ask the question whether such a measure falls within the category of national measures relating to the characteristics of products or whether it falls within the category of measures relating to selling arrangements. Since *Keck and Mithouard*, the application of national provisions restricting or prohibiting 'certain selling arrangements' to products from other Member States falls outside the scope of the prohibition laid down by Article 28 EC, so long as those provisions 'apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. [8]

13. In that judgment, as in the case-law which followed it, the Court did not give a

5 — Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 10.

6 — *Keck and Mithouard*, cited above at footnote 2, paragraph 11, the source of which is to be found in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

7 — Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECR 649.

8 — *Keck and Mithouard*, cited above at footnote 2, paragraph 16.

precise definition of the notion of 'selling arrangements'. However, through its decisions it has compiled an inexhaustive inventory of the measures which fall within this category. [9] It thus includes within this category rules relating in particular to conditions and methods of marketing, [10] as well as the times and places of the sale of goods. [11] By contrast, the Court has refused to include rules which appear to relate to selling arrangements but which in reality affect the characteristics of products. [12] Similarly, Article 28 EC precludes rules which require a prior licence before marketing products or undertaking an economic activity and which make the grant of this licence conditional upon compliance with certain standards relating to the characteristics of products. [13]

14. The defending authority in the main proceedings together with the Greek Government contend that the legislation which makes the sale of bread and bakery products conditional upon having the prior licence required to operate a bakery constitutes a 'selling arrangement'.

15. In my opinion, this categorisation is incorrect. It is true that the national legislation at issue in the main proceedings is concerned with bakeries and other bread shops. However, an examination of its provisions shows that the legislation aims to specify the preparation and production conditions which these products must meet. The grant of the licence to operate a bakery is conditional upon compliance with certain manufacturing processes and the installation of appropriate equipment. Accordingly, in the main proceedings, the Greek authorities specifically refer to failure to comply with certain conditions relating to the preparation of products put on sale, such as the presence on the premises of an area for kneading, a flour store or a machine for sifting flour. It is indisputable that these conditions are part of the production process and therefore concern the inherent characteristics of 'bake-off' products intended for sale. [14] The application of the rules in issue has the effect of preventing the sale of 'bake-off' bread on premises other than bakeries for the reason that a *characteristic* of this bread is its preparatory baking on the shop premises. It follows that the contested legislation, as it has been applied in the two cases before the Court, cannot be considered to be a 'selling

9 — By way of illustration, see the summary set out in point 18 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-416/00 *Morellato* [2003] ECR I-9343, or that set out in point 61 et seq. of the Opinion of Advocate General Stix-Hackl in Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887.

10 — See thus Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 22, and Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 46.

11 — See, to that effect, Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paragraph 14, and Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 15.

12 — See, to that effect, Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 13, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 11.

13 — See thus Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paragraph 18, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 29.

14 — In *Morellato*, cited above at footnote 9, paragraph 32, the Court acknowledges to that effect that this type of product may have been imported although 'its production process was not yet finished'.

arrangement' within the meaning of the case-law of the Court.

16. This conclusion is not called into question by the comparisons made by the Prefectural Authority and the Greek Government. The judgment in *Gauchard*, [15] relied upon by these parties, concerned an authorisation relating to the opening or extension of commercial premises above a certain size. In that case, only the layout of the commercial premises was referred to. Such a national rule was clearly not capable of altering the goods for sale or directly affecting access to the imported products market. Furthermore, in its judgment the Court held that such a rule should in principle be examined only in the light of the principle of freedom of establishment. [16] By contrast, in the present cases the licence in issue directly concerns the manufacturing conditions of the products to be sold. Access to the national market of this type of product of foreign origin is therefore directly concerned. Accordingly, such a comparison is irrelevant.

17. The same parties rely on the judgment of the Court in Case C-391/92 *Commission* v *Greece*. This judgment concerned legislation which reserved the sale of processed milk for infants to pharmacies. As the Court saw it, this legislation was '*confined to limiting the places where the product concerned may be distributed by regulating the marketing of that product*'. [17] In not imposing any particular conditions on the products themselves, the Court analysed the legislation as 'a national measure for the general regulation of commerce'. [18] In the present cases, the Greek legislation at issue directly relates to the preparation conditions and the manufacturing processes of 'bake-off' products intended for sale. It cannot therefore be regarded as no more than a rule concerning the places of sale.

18. As for the judgment in *CIA Security International*, [19] which was also invoked, it merely determines that a rule according to which only persons who have been approved by the Home Affairs Ministry may operate a security firm, 'since such a provision imposes a condition for the establishment and carrying-on of business as a security firm', does not directly concern the free movement of *goods*. [20] That judgment cannot be used as a point of reference in the present cases.

19. The parties conclude by suggesting that a parallel be drawn between the present cases and *Morellato*, on the ground that the latter concerns the same type of product. It is true that in that case the Court held that a requirement for prior packaging imposed by a Member State on the sale of bread

15 — Case 20/87 [1987] ECR 4879.

16 — However, the absence of any factor going beyond the purely national context made that principle inapplicable in that case.

17 — Paragraph 20 (emphasis added).

18 — Paragraph 17.

19 — Case C-194/94 [1996] ECR I-2201.

20 — Paragraph 58.

obtained by completing the baking, in that Member State, of partly baked bread is in principle such as to fall outside the scope of Article 28 EC. However, the fact remains that that decision was entirely based on a particular element specific to that case. [21] The decisive element in the approach adopted in *Morellato* is the fact that compliance with the packaging requirements laid down by the Italian legislation in question did not result in the modification and alteration of the product prior to its marketing in the State of import. [22] Those requirements related only to the marketing of the bread which results from the final baking of pre-baked bread. [23] By contrast, the requirements laid down by the Greek legislation at issue directly relate to the process of final production and baking of bread, which affect the nature of the product put on sale. In such circumstances, it is difficult to see how a rule imposing such requirements could fall outside the scope of Article 28 EC. The outcome of *Morellato* is not therefore capable of being applied to the present cases. If that judgment can be of use in such a context, it is only in illustrating the difficulty in applying, in certain circumstances, the distinction made by the rule in *Keck and Mithouard*. [24]

20. It follows from this analysis that all the comparisons put forward must be found to be irrelevant. In the circumstances of the main proceedings, the contested legislation falls within the category of national measures relating to the characteristics of products. In any case, even if the measure at issue were to be considered to be a 'selling arrangement', it does not meet the conditions laid down by case-law which exclude it from the application of Article 28 EC. Indeed, it is clear that it does not affect in the same way, in law or in fact, the marketing of domestic products and those from other Member States.

21. A characteristic of 'bake-off' bread is that it has already gone through certain stages of bread production, such as kneading and the first stage of baking. In those circumstances, making it subject to manufacturing requirements identical to those imposed upon fresh bread clearly leads to unnecessary costs, such that marketing is thereby rendered more onerous and therefore more difficult. Furthermore, those costs particularly concern frozen products which, by their nature, are intended to be preserved and transported, particularly from other Member States. [25] Therefore, it seems clear to me that with regard to imported products the legislation at issue is in fact discriminatory and accordingly constitutes a barrier to intra-Community trade.

21 — See the Opinion of Advocate General Geelhoed in Case C-366/04 *Schwarz* [2005] ECR I-10139, footnote 11, where a similar interpretation is adopted.

22 — Paragraphs 34 and 35

23 — Paragraph 36

24 — See point 24 et seq. of this Opinion

25 — See, to similar effect, the Opinion of Advocate General Ruiz-Jarabo Colomer in *Morellato*, cited above at footnote 9, point 20.

22. So as to mitigate the harshness of such a conclusion, the Greek Government suggests, lastly, that licences are not in fact granted in the same circumstances according to the kind of shop concerned. Such a line of defence is unacceptable. Even if such a practice were followed, of which there is no evidence, it must be observed that it is not based on any clear foundation. The requirement for legal certainty protected by the Community legal order means that the legal situation resulting from national legislation must be sufficiently clear and precise to enable the traders concerned to know the extent of their rights and obligations. [26] In the absence of this requirement being met, the alleged practice cannot be considered to be a ground of justification of the contested legislation.

23. In those circumstances, the combined answer to the first and third questions must be that national rules, such as those at issue in the main proceedings, which make the marketing of 'bake-off' products conditional upon obtaining a prior licence which is issued after it has been ascertained that the requirements laid down for the operation of a bakery have been met, constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC.

26 — Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 52.

2. The difficulty in applying *Keck and Mithouard*

24. The analysis up to this point has followed the approach set out by the Court in *Keck and Mithouard*. However, the application of this approach almost inevitably raises doubts as to the categorisation of the national measure complained of. It has thus given rise to the development on the subject of a complex and flexible body of case-law. I consider that it would now be useful to assess this approach in the light of the subsequent case-law. Such an analysis might also make it possible to define a harmonised approach to restrictions on the freedoms of movement.

25. I would, however, like to make clear that there is absolutely no question of contesting the development of the rule laid down in *Keck and Mithouard*. My intention is only to clarify the various criteria for restricting free movement and to work out a common general approach so as to promote a simpler and surer approach to these questions.

26. First, it must be borne in mind that following *Keck and Mithouard* the Court had to qualify the simplicity of the distinction laid down in that judgment.

27. Consequently, certain rules which seem to fall into the category of selling arrangements are treated as rules relating to products. That is true, in particular, of rules relating to advertising where it appears that they affect the conditions which the goods must meet. Thus in *Mars*, the Court decided that 'although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such as to hinder intra-Community trade'. [27] The reason is that such a measure can 'compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs'. [28]

28. Conversely, rules concerning the packaging of products which, following *Keck and Mithouard*, are prima facie included among the rules relating to products, have, after individual examination, been categorised as 'selling arrangements'. The case of *Morellato* illustrates this, the Court holding in that case that 'in those circumstances, the requirement for prior packaging, since it relates only to the marketing of the bread which results from the final baking of pre-baked bread, is in principle such as to fall outside the scope of Article 30 of the Treaty, provided that it does not in reality constitute discrimination against imported products'. [29] It seems that the Court based its decision on the fact that the packaging requirement and, therefore, the requirement to alter the product was imposed only at the final stage of the marketing of the product, in such a way that the access of the imported product to the national market was not itself at issue. [30]

29. Finally, the Court may depart from the alternative proposed in *Keck and Mithouard* in order to pursue an analysis based solely on the restrictive effects of the legislation called into question. The Court decided in that way in respect of French legislation which required economic operators importing semen from another Member State to store it in a centre which enjoyed an exclusive concession. [31] Another example is provided by the judgment regarding the Swedish licensing system relating to the importation and marketing of alcoholic beverages. [32]

30. Such solutions demonstrate the pragmatism that the Court has displayed in this field. The case-law has been able to adapt to the

27 — *Mars*, cited above at footnote 12, paragraph 13.

28 — Ibid., paragraph 13

29 — Paragraph 36.

30 — To that effect, see also the Opinion of Advocate General Stix-Hackl in *Deutscher Apothekerverband*, cited above at footnote 9, point 77.

31 — Case C-323/93 *Centre d'insemination de la Crespelle* [1994] ECR I-5077, paragraph 29

32 — Case C-189/95 *Franzen* [1997] ECR I-5909, paragraph 71

circumstances of each case and to the economic realities encountered. However, these solutions also reveal the three major disadvantages of the approach developed in *Keck and Mithouard*.

31. Firstly, although the distinction set out in that judgment was adopted with a view to clarifying the nature of the prohibition laid down by the principle of free movement of goods, it has in fact proved to be a source of uncertainty for economic operators, the European Community institutions and Member States. In some cases, it is difficult to distinguish selling arrangements from national rules relating to the characteristics of products, for the very reason that the existence of a restriction on trade is dependent on the method of application of a rule and its concrete effects. [33] In other cases, it is impossible to include a measure within one or other of these categories because the variety of rules which may be called into question does not fit easily into such a restricted framework. [34]

32. Secondly, while this case-law aims to facilitate the application of the principle of free movement of goods, its application has appeared to be very complex. This complexity results, in particular, in a tendency on the part of the Court to refer back to the national court the responsibility of ascertaining the character and scope of the rule in question. [35] For a court which has asked for the Court's assistance to resolve a case, such a responsibility may appear to be rather heavy to bear.

33. Thirdly, it has been apparent that the rule in *Keck and Mithouard* is not easily transposed into the fields of the other freedoms of movement. The Court has never in fact adopted the 'selling arrangement' classification in its case-law relating to the other freedoms. In such cases, it merely generally regards as restrictions on freedom of movement 'all measures which prohibit, impede or render less attractive the exercise of that freedom'. [36] This difference in approach raises a problem of consistency in the case-law. This problem appears to be even greater as many national measures examined by the Court from the perspective of the free movement of goods can also be treated as restrictions on the other freedoms of movement. [37]

33 — See, to that effect, the Opinion of Advocate General Jacobs in *Leclerc-Siplec*, cited above at footnote 10, point 38. See also Weatherill, S., 'After *Keck*: Some Thoughts on How to Clarify the Clarification', *Common Market Law Review*, 1996, p. 885.

34 — See, to that effect, Picod, F., 'La nouvelle approche de la Cour de justice en matière d'entraves aux échanges', *Revue trimestrielle de droit européen*, 1998, p. 169.

35 — Significant in that connection are, for example, Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843; *Morellato*, cited above at footnote 9; and Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133.

36 — See, most recently, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11, a formulation which finds its origin in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

37 — See, in that connection, Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, Case C-120/95 *Decker* [1998] ECR I-1831 and Case C-158/96 *Kohll* [1998] ECR I-1931, with the single Opinion of Advocate General Tesauro.

34. It follows from the above that although *Keck and Mithouard* was intended to limit the number of actions and to restrain the excesses which resulted from the application of the principle of free movement of goods, in the end it increases the number of questions about the precise scope of the principle.

35. Yet is there cause to abandon this case-law? I do not think so. However, it is important to clarify it, in particular by reference to the case-law developed in the other fields of free movement.

36. The essential question was asked by Advocate General Tesauro at the outset of his Opinion in *Hünermund and Others*: [38]

'Is Article 30 of the Treaty a provision intended to liberalise intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?'

37. In that connection, the Court had clearly pointed out in *Keck and Mithouard* that Article 28 EC was not an adequate basis for the actions of traders wishing to 'challenge any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States'. [39] Community nationals cannot draw from this provision an absolute right to economic or commercial freedom. Indeed, the Treaty provisions relating to the free movement of goods aim to guarantee the opening-up of national markets, offering producers and consumers the possibility of fully enjoying the benefits of a Community internal market, and not to encourage a general deregulation of national economies.

38. It is indeed true that the opening-up of national markets imposed by the Community provisions relating to freedom of movement can also, in some cases, have an effect of liberalising national economies. The reason is that it is often difficult to distinguish between a measure which aims to protect national operators from external competition and a measure which protects certain operators established on the national market from all potential competition on this market. Consequently, a State measure which protects certain national operators from internal competition often also protects them from external competition. That explains why some measures deemed prejudicial to the freedom of economic activity in a national market can also be regarded as restricting the access of external operators to this market. This is true of measures which,

38 — Case C-292/92 [1993] ECR I-6787.

39 — Paragraph 14. To the same effect, see the Opinion of Advocate General Fennelly in Case C-190/98 *Graf* [2000] ECR I-493, points 31 and 32.

without discriminating against products, services, undertakings or workers from other Member States, protect the status quo of the national market and, therefore, make it more difficult for new economic operators to access this market. To the extent that the objectives of the internal market require not only combating discrimination based on nationality but also the opening-up of national markets to new products, services or economic operators, it is clear that their application can have a certain effect of liberalising national economies.

39. The fact remains that, in the context of the establishment of an internal market, the fundamental objective of the principle of free movement of goods is to ensure that producers are put in a position to benefit, in fact, from the right to carry out their activity at a cross-border level, while consumers are put in a position to access, in practice, products from other Member States in the same conditions as domestic products. Such was the intention of the Treaty draftsmen; such has been the approach of the Court which has implemented it.

40. However, it appears to me that it would be neither satisfactory nor true to the development of the case-law to reduce freedom of movement to a mere standard of promotion of trade between Member States. It is important that the freedoms of movement fit into the broader framework of the objectives of the internal market and European citizenship. At present, the freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of nationals of the Member States'.[40] They represent the cross-border dimension of the economic and social status conferred on European citizens. However, the protection of such a status requires going beyond guaranteeing that there will be no discrimination based on nationality. It means Member States taking into account the effect of the measures they adopt on the position of all European Union citizens wishing to assert their rights to freedom of movement. As the Court pointed out in *Deutscher Apothekerverband*, that requires consideration of a broader scale than a strictly national context.[41]

41. In such circumstances it is obvious that the task of the Court is not to call into question as a matter of course Member States' economic policies. It is instead responsible for satisfying itself that those States do not adopt measures which, in actual fact, lead to *cross-border situations being treated less favourably than purely national situations.*[42]

40 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

41 — Paragraphs 73 and 74.

42 — See, to that effect, my Opinion in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, points 37 to 40, and my Opinion of 1 February 2006 in Case C-94/04 *Cipolla* and Case C-202/04 *Macrino and Capodarte*, pending before the Court, points 55 and 56.

42. In order to carry out such a review, it is necessary to rely on concrete criteria. Three principal criteria can be drawn from the relevant case-law.

43. Firstly, the Court maintains, in this respect, that any discrimination based on nationality, whether direct or indirect, is prohibited. For example, it is clear that a publicity campaign promoting the purchase of national products to the detriment of intra-Community trade constitutes a breach of Treaty rules. [43]

44. Secondly, it is established that imposing supplementary costs on goods in circulation in the Community or on traders carrying out a cross-border activity creates a barrier to trade which needs to be duly justified. However, it should be made clear, in this respect, that not every imposition of supplementary costs is wrongful. Some costs can arise from a mere divergence between the legislation of the Member State in which the goods are produced and that of the Member State in which they are marketed. Such costs, which arise from disparities in the laws of the Member States, cannot be considered to be restrictions on freedom of movement. To be considered a restriction on trade, the supplementary cost imposed must stem from the fact that the national rules did not take into account the particular situation of the imported products and, in particular, the fact that those products already had to comply with the rules of their State of origin. Rules relating to the characteristics of products easily fit into this category. Therefore, in my opinion, although the Court has excluded rules relating to selling arrangements from the scope of Article 28 EC, it is because, in general, those rules do not impose such costs. Such was the case of the rules concerning resale at a loss examined in *Keck and Mithouard*, or the rules relating to the prohibition of Sunday trading. Nevertheless, the possibility remains that rules relating to selling arrangements may be adopted without taking into account the particular situation of the imported products. In such a case, it is legitimate to make them subject to Article 28 EC. A system which allowed only traders holding a particular licence to import alcoholic beverages was accordingly held to be contrary to that article since it had the effect of exposing beverages imported from other Member States to supplementary costs. [44]

45. Thirdly, any measure which impedes to a greater extent the access to the market and the putting into circulation of products from

43 — Case C-249/81 *Commission* v *Ireland* [1982] ECR 4005.

44 — *Franzen*, cited above at footnote 32, paragraph 71. See also, most recently, *Schwarz*, cited above at footnote 21, paragraph 29.

other Member States is considered to be a measure having equivalent effect within the meaning of Article 28 EC. A measure constitutes a barrier to access to a national market where it protects the acquired positions of certain economic operators on a national market [45] or where it makes intra-Community trade more difficult than trade within the national market. [46] For example, in *Deutscher Apothekerverband*, the Court considered a measure prohibiting the sale of medicinal products by mail order to be a measure having equivalent effect on the ground that it could impede access to the market for products from other Member States more than it impedes access for domestic products. [47]

46. It seems to me that a consistent approach emerges from this case-law. These three criteria, as they have been applied by the Court, amount in substance to identifying *discrimination against the exercise of freedom of movement.*

47. It is true that rules concerning selling arrangements are prima facie included among measures which do not specifically disadvantage the access and circulation of products from other Member States. However, as the case-law developed by the Court following *Keck and Mithouard* demonstrates, presumptions based on the character of these rules are not sufficient in that regard. In order to ascertain whether Article 28 EC must be applied to such measures, they must be examined in the light of the stated criteria. Provided that the criteria are applied in the light of the objective of combating discrimination affecting cross-border situations, they appear to me both necessary and sufficient to decide, in every case and for all kinds of rules, whether there exists a barrier to trade.

48. In response to a legitimate question on the meaning and scope of the rules relating to the free movement of goods, the Court chose in *Keck and Mithouard* to give an apparently formal answer, by limiting the scope of those rules to certain types of rules according to their subject-matter. It is suggested that this judgment should be understood in the light of the subsequent case-law based on the application of certain substantive criteria. This reply is admittedly not able to remove all the difficulties which the Court may face in assessing each individual case, but it would at least have the advantage of clarifying the method to be followed.

45 — See, for example, *CaixaBank France*, cited above at footnote 36, paragraph 13.

46 — See, for example, concerning the freedom to provide services, Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraphs 25 to 27, and Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 26.

47 — *Deutscher Apothekerverband*, cited above at footnote 9, paragraph 74.

49. If such a direction were followed, it would enable the Court's approach to be the same in all cases relating to the application of Article 28 EC.

50. Furthermore, this approach would allow the case-law relating to the freedoms of movement to be harmonised. As pointed out, the distinction laid down in *Keck and Mithouard* is undoubtedly difficult to transpose into the context of the other freedoms of movement. [48] Nevertheless, the considerations which governed the adoption of the decision are to be found in those areas. In all those fields, it seems necessary to define limits to the application of the principles of freedom of movement and to provide a better framework for review by the Court. [49]

51. I would add that such a harmonisation of the systems of free movement seems to me to be essential in the light of the requirements of genuine Union citizenship. [50] It would be desirable for the same system to be applied to all the citizens of the Union wishing to use their freedom of movement or freedom to move services, goods or capital as well as their freedom to reside or to set up the seat of their activities in the Community. Accordingly, any measure liable to impede or make less attractive the exercise of these fundamental freedoms should be held to be contrary to the Treaty. [51] It is not a question of guaranteeing that the exercise of those freedoms is entirely neutral; it may be more or less advantageous for European citizens. It is more a question of ensuring that Member States take into account the extent to which the rules they adopt are liable to affect the position of nationals from other Member States and make more difficult their full enjoyment of the freedoms of movement.

52. If we now apply this new approach to the present cases, it is apparent that the analysis is thereby simplified. As a measure applied without distinction, the Greek legislation satisfies, at first sight, the test of non-

48 — See, to that effect, the Opinion of Advocate General Fennelly in *Graf*, concerning freedom of movement for workers, cited above at footnote 39, point 18, where he states that 'persons are not products and the process of migration for the purposes of employment or establishment abroad, including preparation therefor, cannot be so neatly divided into (mass) production and marketing stages'. See also, concerning the freedom to provide services, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, and *De Agostini and TV-Shop*, cited above at footnote 35.

49 — See, most recently, concerning the freedom to provide services, Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 31.

50 — See Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

51 — Concerning freedom of movement for persons, the Court has already had the opportunity to compare the principle of freedom of movement for workers with the freedom of movement conferred on every citizen of the Union. See, to that effect, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33. For a similar formulation common to all the freedoms of movement, see *Gebhard*, cited above at footnote 36.

discrimination based on nationality. However, as demonstrated in point 21 of this Opinion, this measure clearly creates unnecessary supplementary costs in relation to the marketing of frozen bread from other Member States. It does not, therefore, satisfy the second criterion. Accordingly, it is for the Member State concerned to justify the adopted measure.

B — *The quest for a justification*

53. By its second question referred for a preliminary ruling, the national court seeks to ascertain whether, if the measure at issue constitutes a restriction theoretically prohibited by the Treaty, it can nevertheless be justified by legitimate reasons. The Court has consistently held that a barrier which results from a rule applicable without distinction is not contrary to Community law if it can be justified by one of the public interest grounds set out in Article 30 EC or by one of the overriding requirements laid down by the case-law of the Court. [52] In the present cases, three kinds of justification have been put forward, relating to product quality, the protection of public health and consumer protection.

1. Justification relating to product quality

54. It is admittedly beyond doubt that the protection of the nutritional and organoleptic characteristics of food products constitutes an objective recognised and pursued by Community law. [53] However, that does not justify either an exclusion from the scope of Article 28 EC or a derogation from the prohibition laid down in that provision.

55. Firstly, the Court has already held, in a judgment cited by the national court, that the fact that a contested national scheme pursues a quality policy does not take it outside the scope of Article 28 EC. [54] Secondly, it does not appear from an examination of the case-law of the Court that the protection of the quality of products

52 — See, most recently, *Schwarz*, cited above at footnote 21, paragraph 30.

53 — See Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), and Council Regulation (EEC) No 2082/92 of 14 July 1992 on certificates of specific character for agricultural products and foodstuffs (OJ 1992 L 208, p. 9).

54 — *Commission* v *Germany*, cited above at point 6, paragraph 25.

can in itself constitute an overriding requirement or a public interest objective justifying a barrier to intra-Community trade. Therefore, such a concern can be taken into consideration only in connection with other requirements expressly recognised as being overriding requirements, such as the protection of health and consumer protection.

2. Justification based on the protection of public health

56. Included among the grounds set out in Article 30 EC which may be invoked by way of justification is the protection of health of humans. [55]

57. However, any exception to the fundamental principle of free movement of goods must be strictly interpreted. [56] In such circumstances, it is for the national authorities to establish, firstly, that the rule is necessary in order to achieve the public health objective and, secondly, that the rule is proportionate with regard to that objective. [57]

58. However, it must be stated that the Greek authorities do not rely on any specific evidence which establishes that the requirements imposed are necessary for the purpose of effectively protecting public health. In that respect, their written observations merely maintain, in a very general manner, that 'the fact that the hygiene rules have been complied with during the first stage of manufacturing semi-prepared bread does not relieve the undertaking responsible for the final stage of production from complying with similar rules' since 'bread and comparable products are sensitive to alteration and can become contaminated, in particular by insects, mould, yeast, bacteria and viruses'.

59. In any event, even if it were accepted that the imposition of this type of requirement is necessary, it appears clearly disproportionate to apply the same licensing procedure to those products and, consequently, the same manufacturing requirements as those imposed upon fresh bread products. The Greek authorities have themselves recognised in their observations that, with regard to those products, some of the requirements imposed were superfluous and disproportionate. Such is, in particular, the case 'of the obligation to have an area

55 — Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 11.

56 — Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361, paragraph 9.

57 — Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 22.

reserved for kneading, a flour store and toilets' since 'these areas do not [concern] "bake-off" products'.

60. Moreover, far from justifying the existence of the Greek legislation, the foreign legislation relied on by those authorities only goes to show that specific procedures adapted to frozen products exist. Therefore, although it appears permissible to adopt a rule requiring a licence to market 'bake-off' bread products, it would be necessary to provide for a procedure and conditions *adapted* to the specific nature of these products, the restrictive effects of which do not go further than required to achieve the pursued aim. [58]

3. Justification based on consumer protection

61. It is established that consumer protection constitutes an overriding requirement which may justify, in certain circumstances, a barrier to goods trade in the Community. [59]

62. However, in the present cases, the Greek authorities do not put forward any information, distinct from that relating to public health reasons, which could support such a justification. If it is a question of permitting the consumer correctly to identify the character of a product and to enable him to avoid any confusion, it is clear that this objective could be achieved by less restrictive means than the requirements imposed, such as appropriate information and labelling. [60]

63. It follows from all the above analysis that the Greek authorities have not established that the legislation in issue is justified in the light of Community law. In these circumstances, the answer to the second question must be that a requirement for a prior licence imposed in order to market 'bake-off' products, which is identical to that required for operating a bakery, cannot be regarded as justified by a purely qualitative objective or by consumer protection or public health reasons. Moreover, the Greek Government acknowledged, at the joint hearing in these cases and *Commission* v *Greece*, [61] that the Hellenic Republic had failed to fulfil its Community obligations in this instance.

58 — See, by analogy, Case C-212/03 *Commission* v *France* [2005] ECR I-4213, paragraph 45.

59 — *Cassis de Dijon*, cited above at footnote 7, paragraph 8.

60 — See, for example, Case 261/81 *Rau* [1982] ECR 3961, paragraph 17.

61 — Case C-82/05.

III — Conclusion

64. In the light of the foregoing considerations, I propose that the Court should rule as follows on the questions referred to it by the Diikitiko Protodikio Ioanninon in these cases:

(1) Member State legislation which makes the marketing of 'bake-off' products conditional upon obtaining a prior licence normally required in order to make bread constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC.

(2) Such legislation cannot be considered to be justified, by reason of Article 30 EC or one of the overriding requirements laid down by the case-law of the Court, by the objectives of product quality, the protection of public health or consumer protection.