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Chase G. McClister

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Prohibition of Obscene Imports in the United Kingdom — A Violation of Article 36 of the Treaty Establishing the European Community?

I. Introduction

Trade regulations in Europe have undergone many dramatic changes in the last fifty years. While the general trend has been toward greater trade freedom between the European nations, some restrictions still apply. The Treaty Establishing the European Community [hereinafter EC Treaty] prohibits quantitative restrictions on trade between Member States.¹ Nevertheless, article 36 of the EC Treaty creates an exception to this rule for restrictions that are justified on grounds of public morality.² Such restrictions may not constitute discrimination against the goods of another Member State, however.³

Many European signatories to the EC Treaty utilize article 36 to restrict the trade of certain goods for reasons of public morality. The United Kingdom, for one, prohibits the importation of obscene articles.⁴ The Court of Justice of the European Community is the final appellate court for questions concerning the EC Treaty and its interpretation by the Member States.⁵ The Court of Justice recently held that, to satisfy the requirements of article 36, Member States may not restrict importation of obscene articles unless the articles in question are also prohibited

1. Treaty Establishing the European Community [hereinafter EC Treaty], Mar. 25, 1957, 298 U.N.T.S. 11, art. 30. Article 30 provides that: "Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States." *Id.*

2. *Id.* art. 36. Article 36 provides:

The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of natural treasures of artistic, historical or archeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

3. *Id.*

4. Customs Consolidation Act, 1876, 39 & 40 Vict., ch. 36, §42 (Eng.).

5. For the EC Treaty provisions establishing the Court of Justice, see EC TREATY pt. 5, tit. I, § 4.

domestically.⁶ In the Court's opinion, this restriction was necessary to prevent discrimination against foreign products.⁷

The laws prohibiting obscene articles within the United Kingdom are less strict in several respects than the laws prohibiting the importation of obscene articles.⁸ Consequently, despite the Court of Justice's rule, there are some articles that can be lawfully manufactured and marketed in the United Kingdom that may not be legally imported from another Member State.⁹ This disparity between the domestic laws and the trade laws of the United Kingdom appears to defy the spirit of article 36 of the EC Treaty, as interpreted by the Court of Justice.

The Court of Justice has not yet specifically addressed the question of whether the domestic prohibitions and trade restrictions must be identical. The only indication of the Court's likely approach may be found in dicta.¹⁰ Presumably, the Court of Justice is not likely to uphold a law restricting the importation of a book into the United Kingdom when the same book is perfectly legal under the domestic laws. Presently, however, the English Courts have interpreted the Court of Justice opinions to leave open the possibility of such a glaring inconsistency.¹¹

This problem is of great significance to all of the EC Member States because it reflects a "loophole" that may be used to discriminate against other goods produced in other nations. While this Comment is limited to an examination of restrictions on obscene articles, it is important to recognize that the questions addressed here have implications that are not restricted to obscene materials. Indeed, the Court of Justice opinions are binding on all of the EC Member States. Consequently, the Court of Justice's resolution of the legal dispute concerning the United Kingdom's

6. Case 34/79, *R. v. Henn, R. v. Darby*, 1979 E.C.R. 3795, 3815, 1 C.M.L.R. 246 (1980).

As stated by the Court:

If a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36.

Id.

7. *Id.* Note that article 36 stipulates that its exceptions to trade prohibitions may not be used to further discriminatory purposes. *See supra* note 2.

8. *Id.*

9. *R. v. Bow St. Metro. Stipendiary Magistrate, Ex parte Noncyp*, 1990 Q.B. 123 (Eng. C.A.) (holding that certain books are permissibly prohibited from importation since certain defenses available under domestic laws need not be considered).

10. *See Henn & Darby*, 1979 E.C.R. at 3828.

11. *Id.*

prohibition of obscene imports demands attention from the legal communities in both Europe and America.

This Comment attempts to fully evaluate the Court of Justice's recent decisions and their effect on the laws of the United Kingdom. Part II of this Comment introduces the relevant statutory provisions of United Kingdom law, as well as the relevant provisions of the EC Treaty and the three most significant court decisions lying at the heart of the dispute. Part III then discusses whether these decisions impose a requirement that domestic and trade legislation be coextensive in all aspects, while Part IV discusses the appropriate standard of review for article 36 cases. Finally, Part V concludes that through its recent decisions, the Court of Justice has inadvertently created "loopholes" that extend beyond the laws of the United Kingdom to affect all of the EC Member States.

II. Laws and Decisions Pertaining to Obscene Materials in the United Kingdom

A. *Statutory Provisions of the United Kingdom*

There are two statutory acts governing obscene articles in the United Kingdom. The more general is the domestic law, the Obscene Publications Act 1959, which prohibits the publication of obscene articles in the United Kingdom.¹² The scope of the Act is expansive, applying to anything to be viewed or read, including sound recordings, films, or other records of a picture or pictures.¹³ Moreover, the geographical scope of the Obscene Publications Act is very broad, applying to any materials or articles distributed, sold, or otherwise "published" within the borders of the United Kingdom.¹⁴

Section 1 of the Act defines an article as "obscene" if its effect tends to "deprave and corrupt" those who are likely to read, see, or hear it.¹⁵

12. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66 (Eng.).

13. *Id.* § 1(2). "In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures." *Id.*

14. *Id.* § 2. The Obscene Publications Act does not extend to Scotland or to Northern Ireland, however. *Id.* § 5(3). Although the laws regulating and restricting obscenity are not uniform throughout the United Kingdom, the Court of Justice has held that these variations are irrelevant. The fundamental concepts that they embody may still be uniformly applied. *Henn & Darby*, 1979 E.C.R. at 3813.

15. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1(1) (Eng.). Articles of a sexual nature are not necessarily obscene. See *John Calder (Publications), Ltd. v. Powell* 1 Q.B. 509 (1965) (holding that articles that are merely indecent are not necessarily obscene); *R. v. Stanley*, 2 Q.B. 327 (1965). Therefore some articles that are seized under the "indecent or obscene" standard of the Customs Consolidation Act are not necessarily prohibited by the Obscene Publications Act. See *R.*

If an article has been found to be obscene under section 1, section 4 provides an affirmative defense which has become known as the "public good" defense.¹⁶ This "public good" defense serves as a complete defense if the publication "is in the interests of science, literature, art or learning, or of other objects of general concern."¹⁷ Without further definition, a defense of this sort is open to varying interpretations.

The other act, the trade legislation, namely the Customs Consolidation Act of 1876, prohibits importation of "indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles."¹⁸ While the Customs Consolidation Act provides no definition of "indecent or obscene," English courts have interpreted "indecent or obscene" to refer to articles that are "repulsive, filthy, loathsome, or lewd."¹⁹ This standard covers a wide range of objectionable articles, "indecent" being at one end of the spectrum and "obscene" at the other.²⁰ By virtue of the language itself, the prohibition of "indecent or obscene" articles must be broader in scope than the prohibition of "obscene" articles as defined in the Obscene Publications Act.²¹

Indeed, most courts agree that it is easier to obtain a conviction under the "indecent and obscene" standard found in the Customs Consolidation Act than under the "obscene" standard found in the Obscene Publications Act.²² When investigating certain articles in the United Kingdom, police often conduct background checks hoping to discover that the articles in question have been imported.²³ These background checks make for a better chance of a conviction and, in many

v. *Calder and Boyars Ltd.*, 1 Q.B. 151 (1969) (holding that articles that are extremely unpleasant or disgusting are not obscene if their effect is to shock people rather than to "deprave and corrupt" people).

16. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 4 (Eng.).

17. *Id.* § 4(1). A film or sound track must be justified on the ground that it is "in the interests of drama, opera, ballet or any other art, or of literature or learning." *Id.* § 4(1A).

18. Customs Consolidation Act, 1876, 39 & 40 Vict., ch. 36, § 42 (Eng.).

19. *E.g.*, *Henn & Darby*, 1979 E.C.R. at 3798. An article is not necessarily obscene for purposes of the Obscene Publications Act because it is repulsive, filthy, loathsome, or lewd. *R. v. Anderson*, 1 Q.B. 304 (1972).

20. *Henn & Darby*, 1979 E.C.R. at 3798.

21. *See supra* note 15 and accompanying text.

22. *Id.* Some courts have held that the definition of "obscene" in the Obscene Publications Act is to be the standard in cases brought under the Customs Consolidation Act as well. *See infra* Part IV.

23. Gavin McFarlane, *Indecency and Obscenity: The View from Europe*, 140 NEW L.J. 50 (1990).

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instances, publication of certain materials results in criminal convictions under both acts.²⁴

As explained above, the language of the Customs Consolidation Act is broader than the language used in the Obscene Publications Act.²⁵ However, the Customs Consolidation Act and the Obscene Publications Act also are different in terms of the types of materials sought to be prohibited. While articles prohibited by the Customs Consolidation Act must have been imported, they need never have been "published."²⁶ Possession of obscene matter that has been imported is all that is needed for a conviction under the customs law.²⁷

Conversely, the Obscene Publications Act does not prohibit mere possession of obscene materials. One must publish these materials in some way before one may be criminally liable under the Obscene Publications Act.²⁸

While it is important to recognize that these laws have somewhat different purposes and apply to different types of materials, it is equally important to note that many materials fall within the ambit of both of these laws. It is precisely these types of materials that are at the center of this controversy.

B. EC Treaty Provisions

The EC Treaty restricts the degree to which a Member State may regulate imports from another Member State. Specifically, article 30 of the Treaty prohibits "quantitative restrictions on importation and all measures with equivalent effect."²⁹ Nevertheless, article 36 of the Treaty excepts restrictions that are justified by a domestic priority including public morality, public safety, and protection of the environment.³⁰ However, article 36 stipulates that no restriction on importation is justified if it constitutes "a means of arbitrary discrimination or a disguised restriction on trade between Member States."³¹ All EC Member States are bound by the EC Treaty.³²

24. R. v. Henn, R. v. Darby, 2 All E.R. 166, 167 (E.C.J. & H.L. 1980) (disposition of the case after the Court of Justice answered preliminary questions of interpretation of the EC Treaty). "The articles which were the subject of count 15 [the Obscene Publications Act offense] were the same as those the subject of count 13 [the Customs Consolidation Act offense]." *Id.* at 167.

25. See *supra* notes 15, 19, and accompanying text.

26. Customs Consolidation Act, 1876, 39 & 40 Vict., ch. 36, § 42 (Eng.).

27. *Id.*

28. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66 § 2 (Eng.).

29. EC Treaty, *supra* note 1, art. 30.

30. *Id.* art. 36. See also *supra* note 2 and accompanying text.

31. EC Treaty, *supra* note 1, art. 36. The two sentences of article 36 are thus mutually exclusive. See *supra* note 2. Either a restriction is justified under the first sentence, or it is arbitrary

C. *Decisions*

The European Court of Justice first examined the United Kingdom's prohibition of obscene imports in 1979, in *R. v. Henn, R. v. Darby*.³³ Henn and Darby had been convicted in the lower courts of importing obscene articles into the United Kingdom in violation of section 42 of the Customs Consolidation Act 1876.³⁴ On a hearing of the appeals, the House of Lords determined that an interpretation of the EC Treaty by the European Court of Justice was required.³⁵ Consequently, the House referred seven preliminary questions to the Court of Justice, pursuant to article 177 of the EC Treaty.³⁶

Henn and Darby were involved in a mail order business in England that distributed sexually explicit films and magazines.³⁷ The particular shipment of films and magazines in question had been imported from the Netherlands.³⁸ At trial, Henn and Darby contended that article 30 of the EC Treaty invalidated section 42 of the Customs Consolidation Act 1876, insofar as that Act applied to goods imported from EC Member States.³⁹ This argument was rejected in the lower courts, but was raised on appeal to the House of Lords.⁴⁰ The House of Lords accordingly referred the questions to the Court of Justice.⁴¹

discrimination or a disguised restriction on trade under the second sentence. *Id.*

32. The 15 European Community Member States are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

33. *Henn & Darby*, 1979 E.C.R. at 3795.

34. *Id.* at 3799.

35. *Id.* at 3800.

36. *Id.* Article 177 of the EC Treaty provides that when a question of Treaty interpretation is raised in a domestic court from which there is no appeal, that court must refer the matter to the Court of Justice. EC Treaty, *supra* note 1, art. 177.

37. *Henn & Darby*, 1979 E.C.R. at 3798-99. The materials seized by the police included child pornography and sexually violent films. *Id.*

38. *Id.* at 3799. The Netherlands is a Member State of the European Community. EC TREATY, *supra* note 1, pmb1.

39. *Henn & Darby*, 1979 E.C.R. at 3799.

40. *Id.* at 3800.

41. The seven questions submitted to the Court of Justice can be paraphrased as follows:

- (1) Is a prohibition of the importation of pornographic imports a quantitative restriction on trade within the meaning of article 30?
- (2) If the answer to question 1 is in the affirmative, does article 36 permit states to make such prohibitions?
- (3) In particular:
 - (a) is a state entitled to make such prohibitions in order to prevent breaches of the domestic laws regarding obscene materials?
 - (b) is a state entitled to make such prohibitions in conformance with the state's national standards and characteristics, notwithstanding variations between the laws within the parts of the member state?

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The European Court held that the prohibition on trade imposed by the Customs Consolidation Act is an absolute prohibition and thus constitutes a "quantitative restriction" within the meaning of article 30.⁴² However, the Court further held that such restrictions on imported articles are justified under article 36 only if there is no lawful trade in the materials within the Member State.⁴³ In the Court's opinion, this rule would not be violated when there are variations in the laws which apply to different parts of the Member State.⁴⁴ In so holding, the Court set a standard of review that calls for an examination of the purpose of the laws taken as a whole. For example, the European Court found that the laws regarding obscene articles in the United Kingdom, taken as a whole, have the purpose of prohibiting, or at least restraining the manufacture and marketing of obscene articles domestically.⁴⁵ The Court made this finding while nonetheless specifically acknowledging the existence of certain exceptions, such as the "public good" defense, that are found in the domestic legislation, but not in the trade regulations.⁴⁶ The facts of *Henn & Darby*, however, did not give the Court of Justice cause to address the question of whether an article that was legal within the United Kingdom's borders could nonetheless be banned from importation under the Customs Consolidation Act.⁴⁷

(4) If such a prohibition is justified on grounds of public policy or public morality, can that prohibition nonetheless constitute arbitrary discrimination or a disguised restriction on trade contrary to article 36?

(5) If the answer to question 4 is in the affirmative, does the fact that the customs law is different in scope than the domestic law necessarily constitute arbitrary discrimination or a disguised restriction on trade contrary to article 36?

(6) Would the answer to question 5 be any different if customs officials are capable of administering the simpler prohibition found in the customs law, but are not capable of administering the more detailed type of prohibition as found in the domestic law?

(7) May a state impose prohibitions on obscene imports from another Member State by reference to obligations arising from the Geneva Convention of 1923, and the Universal Postal Convention, bearing in mind the provisions of article 234 of the Treaty?

Henn & Darby, *supra* note 6, at 3799.

42. *Id.* at 3817. This finding is in response to question 1 above. *See supra* note 41 and accompanying text.

The lower court apparently held that a total ban could not be a "quantitative restriction," because an absolute prohibition is not measured by quantity. *Henn & Darby*, 1979 E.C.R. at 3806.

43. *Id.* at 3817. This finding responds to Question Two above. *See supra* note 41 and accompanying text.

44. *Henn & Darby*, 1979 E.C.R. at 3817. This finding responds to Question Four above. *See supra* note 41 and accompanying text.

45. *Henn & Darby*, 1979 E.C.R. at 3815.

46. *Id.*

47. Advocate General J.P. Warner wrote in *Henn & Darby* that in the case of a book that was prohibited by the Customs Consolidation Act, but legally sold in England, it would be difficult to determine whether the discrimination was "justified" under article 36. The Advocate General

Six years after *Henn & Darby*, the European Court of Justice had another opportunity to consider the trade laws of the United Kingdom. In *Conagate Ltd. v. Her Majesty's Customs and Excise*, the Court was asked whether an absolute prohibition of imported obscene material was permissible when there was only a partial restriction on the same goods in the domestic legislation.⁴⁸ This was a different question than that raised by *Henn & Darby*. In *Henn & Darby*, the books and magazines in question were clearly prohibited by domestic law, specifically the Obscene Publications Act. *Conagate*, however, involved the sale of materials that were not prohibited under domestic law.

In *Conagate*, the defendants' business imported inflatable life-size rubber dolls into England from Germany.⁴⁹ The dolls were seized and the defendants were arrested for a violation of the Customs Consolidation Act 1876.⁵⁰ Although items such as inflatable dolls are regulated to some extent in the United Kingdom, it is not illegal to manufacture and sell them,⁵¹ as the Obscene Publications Act does not cover dolls.⁵²

Applying the *Henn & Darby* test, the *Conagate* court held that where there is no prohibition of the articles within the Member State, there cannot be a prohibition on importation of those same articles.⁵³ The *Conagate* decision thus reaffirmed the *Henn & Darby* principles by looking to the purpose of the laws as a whole. Since the dolls were not prohibited or even seriously regulated when sold within the United Kingdom, the United Kingdom could not prohibit the importation of these types of dolls. Like *Henn & Darby*, however, *Conagate* failed to address the question surrounding the public good defense.

concluded that under his view of article 36, he doubted whether such discrimination could be "justified." *Id.*

48. Case 121/85, *Conagate Ltd. v. Her Majesty's Customs and Excise*, 1 C.M.L.R. 739, 751 (1986).

49. *Id.* at 750. Germany is a European Community Member State. EC Treaty, *supra* note 1, pmbl. The articles in question were dolls which were called "Love Love Dolls," "Miss World Specials," and "Rubber Ladies." There were also a number of articles called "Sexy Vacuum Flasks." *Conagate*, 1 C.M.L.R. at 741. The defendants argued that these dolls were for window displays of ladies' dresses and underwear. *Id.* The courts saw through this ruse with little difficulty, noting that the dolls had artificial pubic hair. *Id.*

50. *Id.* at 750.

51. *Id.* at 745-46. The laws that apply to the various parts of the United Kingdom are: (1) the Obscene Publications Act 1959, (2) the Post Office Act 1953, (3) the Isle of Man (Obscene Publications and Indecent Advertisements) Act 1907, and (4) the Civic Government (Scotland) Act 1982. *Conagate*, 1 C.M.L.R. at 746. In addition, local governments may regulate the licensing of sex shops. *Id.*

52. *Id.* at 744 (Advocate General's opinion).

53. The Court further held that it was irrelevant that no such dolls were currently manufactured in the United Kingdom, as long as there was no legal obstacle to their manufacture and marketing. *Id.* at 755.

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Recently, however, the public good defense issue resurfaced in the English courts in *R. v. Bow St. Metro. Stipendiary Magistrate, Ex parte Noncyp Ltd.*⁵⁴ In *Noncyp*, the question left unanswered by the *Henn & Darby* and *Conegate* decisions was put directly before the court. That is, the court was asked whether the two United Kingdom acts must provide identical defenses in order to comply with article 36 of the EC Treaty. In *Noncyp*, the imported articles were books that were seized under the Customs Consolidation Act.⁵⁵ The defendant contended that the “public good” defense from section 4 of the Obscene Publications Act must be an available defense to a defendant accused of importing obscene articles.⁵⁶ The Court of Justice had held in *Henn & Darby* that article 36 requires that imports may only be restricted when there is no lawful trade in the same item within the Member State. The defendant contended that to determine whether there is lawful trade in any specific item within the United Kingdom, the court must consider the merits of any possible affirmative defenses that could be raised.⁵⁷ This would require the court to make a preliminary finding as to whether an article is obscene under the domestic law, and then make a determination of whether the public good defense applies. The English Court of Appeals was not convinced by the defendant’s arguments.⁵⁸

Rather, the English court considered the European Court of Justice’s opinions in *Henn & Darby* and *Conegate* and concluded that article 36 did not require that the public good defense be made available under the Customs Consolidation Act.⁵⁹ In so doing, the *Noncyp* court interpreted *Henn & Darby* to stand for the proposition that the domestic legislation need only “have the effect in substance of prohibiting . . . the category of articles” that have been seized upon import.⁶⁰ Thus, the court held that notwithstanding the limited domestic exceptions, “obscene publications” were generally prohibited in the United Kingdom.⁶¹ The

54. 1990 Q.B. 123 (Eng. C.A.).

55. The articles were shipments of the following six books: (1) *Men in Erotic Art*, (2) *Men Loving Men*, (3) *Men Loving Themselves*, (4) *My Brother Myself*, (5) *Roman Conquest*, and (6) *Below the Belt*. *Id.* at 137.

56. *Id.* at 141.

57. *Noncyp*, 1 Q.B. at 126-27.

58. *Id.* at 133.

59. *Id.* at 143.

60. *Id.* at 143. The court was aware that there may be some instances in which an import seized under the Customs Consolidation Act would be legal to possess and distribute within the United Kingdom under the public good defense of the Obscene Publications Act. *Id.* at 143. The Court characterized such cases as “anomalies” that must be accepted. *Noncyp*, 1990 1 Q.B. at 143.

61. *Id.* at 142-43. There is disagreement about whether there are two operating definitions of “obscene,” or whether the definition of “obscene” in the Obscene Publications Act applies to the

use of the language "in substance" and "category" gave the court the flexibility needed to conclude that obscene publications were prohibited by both the domestic and trade laws. Consequently, the defendant's appeal was dismissed.⁶²

It is unfortunate that the *Noncyp* court chose not to refer this question to the European Court.⁶³ The facts of *Henn & Darby* and *Conegate* fit easily into the Court's test as expressed in *Henn & Darby*. In *Henn & Darby*, the goods were prohibited domestically and the public good defense was not raised due to the strong content of the magazines.⁶⁴ Thus, the test was easy to apply. In *Conegate* the goods were *not* prohibited domestically and the public good defense was not available because the goods were not covered by the Obscene Publications Act.⁶⁵ In contrast, the public good defense could arguably have been applicable in *Noncyp* if the books had been seized under the Obscene Publications Act. Perhaps the books could have been justified as having literary or artistic merit. Therefore, the questions raised by *Noncyp* are not as easily answered by the *Henn & Darby* test as were the questions raised by other cases such as *Conegate*, and consequently the Court of Appeals should have exercised its discretionary powers and referred the questions in *Noncyp* to the European Court of Justice.

More significantly, *Noncyp*'s legal question was one that the European Court had not addressed in its prior decisions. That is, the European Court never assessed whether the United Kingdom could prohibit a book from being imported when that same book could lawfully be manufactured and marketed within the United Kingdom, pursuant to a domestic exception. The *Noncyp* court understood the previous decisions of the European Court to allow such a result. This result, however, is arguably a form of arbitrary discrimination against the goods of another Member State and would therefore be proscribed by article 36. Accordingly, the European Court might not have reached the same conclusion as the English Court of Appeals.

Customs Consolidation Act also. *Id.*

62. *Id.*

63. Article 177 of the EC Treaty provides that:

Where any such question [of interpretation of the Treaty] is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

EC Treaty, *supra* note 1, art. 177.

64. *Henn & Darby*, 1979 E.C.R. at 3799.

65. *Conegate*, 1 C.M.L.R. at 744.

III. Requirements of Coextensivity Under Article 36

The Court of Justice has not clearly articulated a position on the question of what constitutes obscenity for purposes of the “public morality clause” of article 36. Consequently, in response to the controversies discussed above, courts in the United Kingdom now apply one definition of “obscene” to both domestic and trade legislation.⁶⁶ While the adoption of this approach is consistent with the Court of Justice’s decisions, it is not clear that this approach is required by those decisions.

In addition, the question remains as to whether the so-called “public good” defense, available under the United Kingdom’s domestic law, must also be applied to trade legislation. Although this question was directly raised in *Noncyp*, the case was not referred to the Court of Justice for consideration.⁶⁷

These partially unresolved issues — whether the same definition of “obscene” must be applied under both acts and whether the defenses available under one act must be carried over to the other — constitute a single concern. Despite the rather mandatory language of article 36 of the EC Treaty, it is not clear to what extent the domestic and trade legislation must be coextensive. This concern and the related issues are addressed below.

A. “Obscene” vs. “Indecent and Obscene”

In *Henn & Darby*, the European Court of Justice acknowledged that the definition of “obscene,” as used in the United Kingdom’s domestic legislation, is more narrow than the definition of “indecent or obscene,” as used in its trade legislation.⁶⁸ That is, the word “obscene,” as used in the Obscene Publications Act, describes materials which tend to “deprave and corrupt” those persons likely to be exposed to them.⁶⁹ At the same time, the “indecent or obscene” standard, as used in the Customs Consolidation Act, describes that which offends against recognized standards of propriety, with “‘indecent’ being at the lower end of the scale, and ‘obscene’ at the upper end.”⁷⁰

66. See *infra* notes 77-83 and accompanying text.

67. *Noncyp*, 1 Q.B. at 123 (importer of books seized under Customs Consolidation Act may not assert the public good defense as permitted under the Obscene Publications Act).

68. *Henn & Darby*, 1979 E.C.R. at 3823.

69. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1(1) (Eng.).

70. *Henn & Darby*, 1979 E.C.R. at 3811.

1. *A Dual Standard.*—The *Henn & Darby* court did not seem to be troubled by the dual standard, possibly because it seemed likely that the magazines at issue satisfied both standards.⁷¹ One of the questions the *Henn & Darby* decision does not explicitly answer is whether the court condones the dual standard or whether it implicitly requires the “obscene” standard to apply in all cases. The court merely held that prohibitions on importation are permissible so long as “the same goods” are prohibited domestically.⁷² Thus, the question remains as to whether materials that are merely “indecent” may be prohibited by the Customs Consolidation Act, when only materials that are “obscene” are prohibited by the Obscene Publications Act. The *Henn & Darby* court concluded that a prohibition on imports may be more strict than the domestic laws within the United Kingdom, provided that the trade laws do not arbitrarily discriminate against goods from other Member States, and thereby indirectly protect national products.⁷³ It is arguable, however, that a dual standard in and of itself constitutes arbitrary discrimination against the goods of another Member State.

Indeed, in the Court of Justice’s Advocate General’s opinions in *Henn & Darby* and *Conagate*, the stringency requirements for the trade laws are clearly stated. Advocate General J.P. Warner wrote that article 36 is to be interpreted strictly because it comes directly from the fundamental principle of free movement of goods within the Communities.⁷⁴ Furthermore, in *Conagate*, Advocate General Sir Gordon Slynn wrote, that “[t]o be effective everywhere [in the United Kingdom], . . . the ban on imports may, indeed must, be equal to the strictest test which is applied internally.”⁷⁵ The Advocate General’s opinions are not part of the Court’s decision, however.⁷⁶ Accordingly, these opinions do not represent the Court of Justice’s position on whether the dual standard is permissible under article 36.

71. See *id.* at 3831 (Advocate General’s opinion). As stated by Advocate General J.P. Warner: In the case . . . of [an] importation of articles of a kind so obscene and unmeritorious that they may not be published or distributed in any way in any part of the United Kingdom without a criminal offense being committed, it seems to me that the problem [of the possibility of the articles being legal domestically but prohibited from importation] does not arise at all.

Id.

72. *Id.* at 3817.

73. *Id.* at 3815. See EC Treaty, *supra* note 1, art. 36.

74. *Henn & Darby* 1979 E.C.R. at 3824.

75. *Conagate* 1 C.M.L.R. at 743 (opinion of Sir Gordon Slynn, Advocate General).

76. The duty of the Advocate General is to make impartial and independent submissions to the Court in order to assist the Court in interpreting the EC Treaty. EC Treaty, *supra* note 1, art. 166.

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2. *A Single Standard.*—The judiciary of each country must interpret the nation's laws as it sees fit.⁷⁷ Many of the English courts look to the House of Lords' decision in *Henn & Darby* to determine what standard is required under article 36. All of the Lords concurred with Lord Diplock.⁷⁸ Lord Diplock wrote that since the jury found that the magazines in question were obscene under the definition in the Obscene Publications Act, and also under the definition of obscenity in the Customs Consolidation Act, there was no arbitrary discrimination against goods from other Member States.⁷⁹ Some English courts read this opinion to mean that in every case involving seizure of obscene goods under the customs law, the definition of "obscene" from the Obscene Publications Act must be applied to ensure that the EC Treaty has not been violated.⁸⁰

After the European Court of Justice decided the questions referred to it in *Conegate*, the Queen's Bench Division held in its opinion that the single standard must be applied in all cases.⁸¹ In *Conegate*, the English Court stated that there is arbitrary discrimination when imports, prohibited by the Customs Consolidation Act, are not obscene under the Obscene Publications Act or other domestic legislation, and may therefore be manufactured and distributed within the United Kingdom.⁸² This approach ensures that the same standard is applied to both domestic and imported goods. The application of a uniform standard approach appears to be the safest interpretation of the *Henn & Darby* decision.

Under the single standard approach, the articles subject to seizure by the United Kingdom's trade law, such as prints, paintings, photographs, books, cards, lithographic or other engravings, are illegal only if they satisfy the "deprave and corrupt" standard as applied in the Obscene Publications Act. English courts consider this hybrid of the two laws to be the only way to comply with article 36 of the EC Treaty.⁸³

77. *Henn & Darby*, 1979 E.C.R. at 3827-28 (Advocate General's opinion). The relationship between the Courts of the Member States and the European Court of Justice is like the relationship between state courts and federal courts in the United States. The Member States have a high degree of discretion to draft and implement the laws that are deemed appropriate and necessary. Unless there is an EC Treaty violation, the European Court of Justice generally does not interfere with the legislation of any particular Member State.

78. *R. v. Henn, R. v. Darby*, 2 All E.R. at 194-99. The House of Lords applied the interpretation of the EC Treaty by the Court of Justice and dismissed *Henn and Darby's* appeals.

79. *Id.* at 198-99.

80. See *infra* note 83 and accompanying text.

81. *Conegate Ltd. v. Customs and Excise Comm'rs*, 1 Q.B. at 273.

82. *Conegate*, 1 Q.B. at 273-74.

83. *E.g.*, *R. v. Uxbridge Justices Ex parte Webb*, [1993] 1 Q.B. 392 (1992); *Ex parte Noncyp*, 1 Q.B. 123 (1990) (opinion by Glidewell L.J.). See also *Conegate Ltd. v. Customs and Excise*

B. *The Public Good Defense*

In addition to the issue of which definition of obscene to apply, another unanswered question is whether article 36 prohibits the ban of imported articles that may be lawfully manufactured and marketed in the United Kingdom by virtue of the "public good" defense of section 4 of the Obscene Publications Act. *Noncyp* holds that the public good defense does not apply to articles seized under the Customs Consolidation Act.⁸⁴ In fact, "it may be that what is forfeited under one Act may be protected by section 4 of the other."⁸⁵ In deciding this issue, the court relied primarily on *Henn & Darby*, but failed to consider the practical realities involved in the denial of the defense.⁸⁶ Note, however, that *Noncyp* is not a Court of Justice decision and therefore is not binding on all EC States.

In *Noncyp*, the defendant unsuccessfully argued that when a court inquires into whether there is a lawful trade in the same goods within the Member State, it must focus on the specific articles in question and thus must allow the public good defense, when appropriate, on a case by case basis.⁸⁷ The defendant further insisted that only in this way can a court determine whether there is a lawful trade in the goods in the Member State and be sure not to violate article 36.⁸⁸

The English Court of Appeals rejected this theory, however, instead choosing to inquire whether the "category" of articles was prohibited.⁸⁹ Because the category of articles in question was "obscene publications," which are generally prohibited in the United Kingdom, the court reasoned that there was no article 36 violation.⁹⁰

In adopting this approach to the issue, the English Court believed that it was important to provide customs officials with a uniform standard of what imports are illegal.⁹¹ In the court's opinion, the defendant's proposal in *Noncyp* would require the customs officials to make the complete analysis. The court decided that if each official had to first determine whether the article was obscene and then evaluate the public

Comm'rs, 1 Q.B. 254 (1987) (holding that articles that are not prohibited by the Obscene Publications Act or by other domestic legislation can not be prohibited by the Customs Consolidation Act).

84. *Noncyp*, 1 Q.B. at 143.

85. *Id.*

86. *Id.* at 139-41.

87. *Id.* at 141.

88. *Id.*

89. *Noncyp*, 1 Q.B. at 141.

90. *Id.*

91. *Id.* at 142-43.

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good of the article, the customs procedure would become excessively impractical and cumbersome.⁹² The court understood *Henn & Darby* and *Conegate* to prescribe “a general approach which was practical and readily understandable.”⁹³ With that interpretation in mind, the court held that a refusal to allow *Noncyp* to raise the public good defense did not violate article 36.

Unfortunately, the English Court’s rationale was flawed in at least one respect. The public good defense of section 4 of the Obscene Publications Act is available as an affirmative defense at trial. It is a question for the judiciary, and therefore police officers may seize goods without regard to the public good defense. Thus, if articles appear to be obscene, police should seize the articles. The public good defense, therefore, does not hinder the police officer’s actions to enforce the Obscene Publications Act, nor would it hinder the customs officer’s enforcement of the Customs Consolidation Act. The public good defense would be an issue to be addressed at trial. By treating the domestic and customs situations differently, the *Noncyp* court’s justification of its conclusion is unpersuasive.

IV. Standard of Review for Article 36 Cases

A. “Legislative Intent” Test

In *Henn & Darby* and *Conegate*, the Court of Justice chose to apply a “legislative intent” test.⁹⁴ With such a test, the Court considered whether the laws in question have the “purpose” of arbitrarily discriminating against the goods of other Member States.⁹⁵

Article 36 directs that quantitative restrictions on importation are only permissible if they can be “justified.”⁹⁶ In *Henn & Darby*, the United Kingdom argued that the Customs Consolidation Act’s ban on indecent or obscene imports was “justified” under the public morality

92. *Id.* The *Noncyp* court also relied on another aspect of *Henn & Darby*. In *Henn & Darby*, it was discussed that it is not unlawful merely to *possess* obscene articles in the United Kingdom, only to mail or publish them. *Henn & Darby*, 1979 E.C.R. at 3810. On the other hand, the trade law, the Customs Consolidation Act, makes it unlawful to possess obscene articles which have been imported. The defendant in that case alleged that this too was a violation of article 36.

The Court of Justice held that such a practice was permissible due to the nature of customs. A customs official has no way of knowing what will happen to the articles once he allows them into the country. Article 36 is therefore not offended if the customs laws are stricter in this respect. *Henn & Darby*, 1979 E.C.R. at 3815.

93. *Noncyp*, 1 Q.B. at 143.

94. *Henn & Darby*, 1979 E.C.R. at 3815-17.

95. *Id.* See also *supra* note 45 and accompanying text.

96. *E.g.* *Henn & Darby*, 1979 E.C.R. at 3813.

exception of article 36.⁹⁷ The Court, therefore, had to determine what was required to "justify" the law.

In its opinion, the *Henn & Darby* court focused on the purpose of the second sentence of article 36.⁹⁸ The purpose of the second sentence is to prevent arbitrary discrimination or protectionism from taking place under the guise of safety or morality.⁹⁹ Thus, a determination of when this occurs requires scrutiny of the actual intent of the legislature. The Court concluded that the legislature in the United Kingdom had the purpose to protect public morality.¹⁰⁰ Furthermore, the Court held that the fact that the customs laws were stricter than the domestic laws was not a measure "designed" to arbitrarily discriminate against foreign goods or to protect a national product.¹⁰¹ Here again, the implication is that to violate article 36, the lawmakers must have actually intended to unfairly discriminate or to protect a national product.

Some have criticized the "legislative intent" analysis of the Court of Justice.¹⁰² In particular, these critics recognize the difficulty of determining the intent of the legislature.¹⁰³ For example, it may often be difficult for a Member State to prove that the intent of its legislature was not to discriminate against the goods of another state, but to protect public morality. The Customs Consolidation Act was enacted in 1876, and many European laws are even older. It would often be futile for a court to embark on a factfinding mission to determine the legislative intent of legislation that is comparatively old.

Additionally, critics question whether proof of discriminatory impact alone establishes a legislative intent to discriminate.¹⁰⁴ If the laws necessarily discriminate, it would seem that the legislature should be presumed to have intended that result. Such criticism is the basis of the constructive intent test. Under the constructive intent test, the question is whether the differing effects of the laws is a sufficient basis for concluding that the legislature had the intent to arbitrarily discriminate.

97. *Henn & Darby*, 1979 E.C.R. at 3806 (Observations of the United Kingdom).

98. *Id.* at 3815. For the full text of article 36, see *supra* text accompanying note 2.

99. *Henn & Darby*, 1979 E.C.R. at 3815. For more on the relationship between the two sentences of article 36, see *Henn & Darby*, 1979 E.C.R. at 3826; J.H.H. Weiler, *Europornography — First Reference of the House of Lords to the European Court of Justice*, 44 MOD. L. REV. 91, 92 (1981).

100. *Henn & Darby*, 1979 E.C.R. at 3815.

101. *Id.*

102. Weiler, *supra* note 99, at 91.

103. *Id.* at 95.

104. *Id.*

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Finally, critics raise a possible contradiction in the *Henn & Darby* opinion. The Court wrote that a prohibition of certain imports is justified so long as there is no intentional abuse of the article 36 exception.¹⁰⁵ However, a restriction need only be justified when there is disparate treatment. If the imported goods are also prohibited domestically, there is no discrimination since the imports and domestic material are treated identically.

This inquiry into the legislative intent therefore only applies if there is no lawful trade in the goods within the Member State.¹⁰⁶ This condition undermines the intention test.¹⁰⁷ If there is a lawful domestic trade in the goods, the condition is not met and there is arbitrary discrimination regardless of what the legislature intended to accomplish.

The decision may be read in other ways, but this reading provides a particularly interesting approach. If the Court's focus on intent is misguided, perhaps Advocate General Warner's "reasonableness" test should become the standard.

B. "Reasonableness" Test

In the Advocate General's opinion, J.P. Warner expressly rejects the "legislative intent" test ultimately adopted by the Court:

Although the expression "a means of arbitrary discrimination" in the second sentence of Article 36 may seem at first sight to call for an enquiry into the intentions of those who enacted the measure under consideration . . . I cannot believe that the authors of Article 36 meant its application to depend on the outcome of such an enquiry, which would manifestly be impracticable, and indeed unrealistic, in most cases.¹⁰⁸

Instead, the Advocate General recommended a "reasonableness" test. In essence, such a test directs that the domestic and trade laws prohibit the same articles, and that the prohibition must be reasonable.¹⁰⁹ The reasonableness test is found in two earlier cases cited by the Advocate General.¹¹⁰ A prohibition on imports is reasonable if its effect is not

105. *Henn & Darby*, 1979 E.C.R. at 3817.

106. *Id.*

107. Weiler, *supra* note 99, at 95.

108. *Id.* at 3827.

109. *Henn & Darby* 1979 E.C.R. at 3833.

110. *Id.* at 3829-30. The cases cited were *Rewe-Zentralfinanz v. Landwirtschaftskammer*, 1 E.C.R. 843 (1975), and *De Peijper's case*, 1 E.C.R. 613 (1976). Both of these cases analyzed the requirements of article 36.

disproportionate to the legitimate purpose of the publication.¹¹¹ Warner explained that, in a case like *Henn & Darby*, reasonableness and proportionality are "the same concept" or that, at least, "proportionality is an aspect of reasonableness."¹¹²

While the Advocate General seems to conclude that the prohibition is justified in *Henn & Darby*, he suggests that the prohibition might not be justified in a case with facts like those in *Noncyp*.¹¹³ For example, if the purpose of laws of the United Kingdom is to prohibit the marketing of obscene articles to the public, the effect of the prohibition in *Noncyp* may be disproportionate to that purpose. That is, the seizure of an obscene book at customs would not achieve the purpose of the obscenity laws if the same book was legally available from domestic sources.

V. Conclusion

The decisions of the Court of Justice relating to the United Kingdom's prohibition of obscene imports have far-reaching effects. All of the EC Member States are bound by these decisions. In *Henn & Darby* and *Conegate*, the Court attempted to strike a balance between the right of the United Kingdom to place certain restrictions on trade and the rights of other Member States to have free access to the United Kingdom market.

Despite these decisions, the legal disputes over the interpretations of articles 30 and 36 are far from over. Indeed, while the European Court of Justice answered the questions referred to it by the House of Lords in *Henn & Darby*, it has not answered questions concerning the public good defense, as proffered in *Noncyp* or the "legislative intent test" used to interpret article 36 in *Henn & Darby*.

The Court has most likely set in motion years of litigation, as there is a need for further court explanations of these decisions. It is important that these future decisions clarify, rather than cloud the issue.

Chase G. McClister

111. *Henn & Darby*, 1979 E.C.R. at 3831.

112. *Id.* at 3830.

113. *Id.* at 3831. The prohibition would not be justified if it were shown that the books in *Noncyp* were for the public good and therefore were legal to produce and sell domestically.