

Seminar 3: Quantitative Restrictions (Articles 28 & 29 – ex-Arts 28 & 29); Cassis de Dijon; Mandatory Requirements

Reading: Barnard Ch 6

I The Treaty Provisions

Article 34 (ex-Art 28) – direct effect

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

NB Articles 34-36 have direct effect (ex-Arts 28-30)

II What is a Quantitative Restriction (QR)? (not defined)

Geddo, Case 2/73, [1973] ECR 865

“Any measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit”

Henn & Darby, Case 34/79, [1979] ECR 3795 (HL) – **Article 267** (ex-Art 234)

Bluhme, Case C-67/97 [1998] ECR I-8033 (import/export licences)

III What is a Measure Having Equivalent Effect to a QR?

a Directive 70/50, (1970) OJ (Sp ed), IL/13/29 p 17 (See Blackstone’s Legislation 9th ed) (distinct and indistinct applicable measures) – no longer applicable but...

- Article 2(1) only discriminatory measures
- Article 2(2) defines in more detail conditions which if imposed are discriminatory (eg an inspection of imported meat or a condition that butter be in square packaging)
- Article 2(3) non-exhaustive list of measures which are prohibited
- Article 3 covers measures governing the marketing of products eg shape, size, weight, composition, presentation “which are equally applicable to domestic and imported products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules” (ie disproportionate)

b 3 Broad Groups of Measures

- distinctly applicable rules (ie discriminate directly against imports)
- indistinctly applicable rules of a “dual burden” type
- indistinctly applicable rules of an “equal burden” type

c THE FIRST PHASE: Dassonville Formula (definition of a measure having equivalent effect)

Dassonville, Case 8/74, [1974] ECR 837

“All trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions” (intention irrelevant)

The Dassonville Formula, Case 8/74, [1974] ECR 837

Facts: Criminal proceedings in Belgium were brought against a trader who acquired a consignment of Scotch whisky in free circulation in France, and imported it into Belgium without being in possession of a certificate of origin from the UK customs authorities. This was in violation of the Belgian customs requirements, the UK at the time not being part of the customs union. Dassonville prepared its own certificate of origin and was prosecuted for forgery

d “All Trade Rules Enacted by Member States”

Articles 34-36 (ex-Arts 28-30) are concerned with state measures and include measures taken by a professional body which lays down the rules of ethics applicable; a company limited by guarantee charged with the task of organising a “buy national” campaign – no need for them to be binding

NB No de minimis rule even though strongly argued for by various Advocates General

Commission v Ireland, (Buy Irish) Case 249/81, [1982] ECR 4005

Rau Case 261/81 [1982] ECR 3961

Apple and Pear Development Council v Lewis, Case 222/82, [1983] ECR 4083

R v Royal Pharmaceutical Society, Case 266/87, [1989] ECR 1295

Commission v France Case C-265/95 [1997] ECR I-6959 (French farmers)

Schmidberger, Case C-112/00 [2003] ECR I-5659

Commission v Germany, Case C-325/00 [2002] ECR I-2039 (quality labels)

e Types of Measures (distinctly applicable measures caught by **Art 34**, (ex-28) but justified under **Art 36** (ex-Art 30))

- Import bans: **Commission v UK** (French Turkeys), Case 40/82, [1982] ECR 279; **Commission v UK** Case 124/81 (re UHT Milk); **Henn & Darby** (cited above)
- Buy national campaigns: **Commission v Ireland** (Buy Irish), Case 249/81, [1982] ECR 4005; cf **Apple & Pear Case**
- Inspections or checks – Case 35/76 **Simmenthal** [1976] ECR 1871; [1977] 2 CMLR 1
- Price regulation (maximum and minimum prices)
- Standards (technical specifications): **Commission v Ireland** (Dundalk Water Scheme), Case 45/87, [1988] ECR 4929
- Origin markings: **Commission v UK**, Case 207/83 [1985] ECR 1201

IV PHASE II: Cassis de Dijon, Case 120/78, [1979] ECR 649

- Principle of mutual recognition
- ‘Rule of reason’ principle (mandatory requirements)

Cassis de Dijon, Case 120/78, [1979] ECR 649 (indistinctly applicable)

Facts: German law prohibited the marketing of liqueurs with an alcoholic strength of less than 25°. This made it impossible for the plaintiff to import a consignment of Cassis de Dijon, a French liqueur with a strength of between 15 and 25°, into Germany. The liqueur therefore could not compete with the stronger German one. No restrictions on the production and marketing of the weaker liqueur existed in France.

Commission Communication on the consequences of Cassis de Dijon, [1980] OJ C256/2 (see Blackstone’s Legislation) [See also Gormley “Cassis de Dijon & the Communication from the Commission” (1981) 16 ELRev 454]

ECJ – no valid reason why provided a product is lawfully marketed in one Member State it should not be introduced into any other Member State – mutual recognition approach

V Mandatory Requirements

One exemption to the mutual recognition principle where the disparities result from national provisions which are recognised as being necessary in order to satisfy certain “mandatory requirements” (rule of reason)

Non-exhaustive list (contrast with Article 30 derogations)

- protection of public health
- effectiveness of fiscal supervision
- fairness of commercial transactions
- defence of the consumer

Additions

Environment protection: **Commission v Denmark**, Case 302/86, [1988] ECR 4607; [1989]

Cultural protection: **Cinetheque**, Joined Cases 60 & 61/84, [1985] ECR 2605

Fundamental rights: **Schmidberger** Case C-112/00 [2003] ECR I-5659

Improving working conditions: **Oebel**, Case 155/80, [1981] ECR 1993 (beyond the scope of **Art 34** (ex-Art 28))

NB Where the defence is based on the *Cassis* rule of reason the genuineness of the justification as well as the proportionality of the measure will be closely assessed by ECJ in the light of the existing knowledge. See eg **Commission v Germany** (Beer purity laws), Case 178/84, [1987] ECR 1227 (consumer protection - content control)

NB Member States free to apply higher standards for domestic goods marketed at home.