

Seminar 4: Post-Cassis Jurisprudence and Keck

Reading

- Barnard, Ch 7
- Bernard, “Sunday Trading: A Drama in Five Acts”, (1994), 57 MLR 449
- Chalmers, “Repackaging the Internal Market – The Ramifications of the Keck Judgment”, (1994) ELRev 385
- Moore, “Revisiting the Limits of Article 30 EEC”, (1994) ELRev 195
- *Weatherill “After Keck: Some thoughts on how to clarify the clarification” (1996) 33 CMLRev 885
- *Barnard, “Fitting the Remaining Pieces into the Goods and Persons Jigsaw” (2001) 26 ELRev 35
- *Koutrakos, “On Groceries, Alcohol & Olive Oil: more on Free Movement of Goods after *Keck* (2001) 26 ELRev 391

I Post-Cassis Case Law

See **Bernard’s** article above for an excellent account of what is now mainly of historical interest

Oebel, Case 155/80, [1981] ECR 1993 (outside scope of **Art 34** (ex-28))

Blesgen, Case 75/81, [1982] ECR 1211; [1983] 1 CMLR 431 (outside)

Quietlynn, Case C-23/89, [1990] ECR I-3059; [1990] 3 CMLR 55 (outside)

cf Buett, Case 382/87, [1989] ECR 1235 (within scope of **Art 34** (ex-28))

Oosthoek. Case 286/81, [1982] ECR 4575 (within scope)

II The Sunday Trading Saga (within scope of **Art 34** (ex-28) but?)

See Bernard’s article above.

Torfaen v B&Q plc, Case 145/88, [1989] ECR 765; [1990] 1 CMLR 337 (see esp AG Van Gerven) (within the scope)

Stoke on Trent and Norwich City v B&Q, Case C-169/91, [1993] 1 All ER 481 - the Proportionality principle (within the scope)

III **THIRD PHASE:** Retreat from the Lawfully Marketed Approach of Cassis

Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] ECR I-6097 (noted by **Roth** in (1994), CMLRev 845 and see also **Moore** listed above)

Keck & Mithouard Cases, Cases 367-268/91, [1993] ECR I-6097

Facts: Criminal proceedings in France (prohibited to re-sell at a loss). Strasbourg Tribunal de Premier Instance.

NB (1) No Community issue; (2) Justified.

Shopping Centre Managers

Distortion of competition as law not applicable to manufacturers of products nor to traders outside France who have their place of business in frontier areas

Article 23 - fairness of Community transactions

Article 28 not applicable – effect on interstate trade hypothetical

ECJ

- increasing tendency of traders to invoke Article 28 as a means of challenging any rules whose effect is to limit their commercial freedom
- upholds *Cassis* re regulations, laying down requirement to be met by goods (regulations re designation, form, size, weight)
= MHEE even if applied without discrimination unless justified by pub int object
- “contrary to what has previously been decided” “certain selling arrangements” shall no longer be regarded as hindering State trade within the meaning of *Dassonville*
- 3 exceptions to new rule which would make Article 28 apply:
 - a not legislation – purpose to regulate trade between Member States
 - b process not applicable to all affected traders within national territory
 - c process which in law or fact, do not affect the manufacturing of imports and of domestic products in the same manner

ECJ: “contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”

ie national laws restricting or prohibiting certain **selling arrangements** (ie those that govern where, when and by whom goods may be sold – opening hours, advertising rules, prevention of resale at a loss) do not infringe Article 28 provided that the laws are not aimed at imports from other Member States and provided that they have the same effect on the commercial freedom to market domestic products as on imports.

Thus equal burden arrangements appear to fall outside the scope of **Article 34** (ex-28) – no need to justify the proportionality principle: ie time & place where goods to be sold to consumers =selling arrangements

- (i) Packaging and labelling
Clinique Case, Case C-315/92, [1994] ECR I-317
Mars, Case C-470/93 [1995] ECR I-1923

- (ii) Advertising (not equal burden in fact?)
Hunermund, Case C-292/92, [1993] ECRI-6787 (see esp AG Tesouro)
Leclerc-Siplec, Case C-412/93, [1995] E.C.R. I-179 (esp AG Jacobs – critical of *Keck* ruling ie preferred “market access” approach)
 - (iii) Licensing & restriction on retail outlets
Commission v Greece (Baby Milk) Case C-391/92 [1995] ECR I-1621
 - (iv) Sales methods
Familapress Case C-368/95 [1997] ECR I-3689
 - (v) Shops and working hours
Punto Casa, Case C-69 & 258/93 [1994] ECR I-2355
- Is discrimination relevant? Should it be a ‘market access’ test?
De Agostine & TV-shop Joined Cases C-34-36/95 [1997] ECR I-3843
Heimdienst, Case C-254/98 [2000] ECR I-151
Gourmet Case C-405/98 [2001] ECR I-1795
Alfa Vita Vassilopoulos, Joined Cases C-158/04 & C-159/04 [2006] ECR I-8135
 - How to identify the boundary between a “selling arrangement” and a “product requirement”?
Morellato, Case C-416/00 [2003] ECR I-9343
Schwarz, Case C-366/04 [2005] ECR I-10139

Litigation Avoidance: Directive 98/34 re technical standards
Barnard pp127-135
CIA Case C-194/94 [1996] ECR I-2201
Unilever Case C-443/98 [2000] ECR I-7535

IV Quantitative Restrictions on Exports and Measures Having Equivalent Effect

Barnard, Ch 8

Article 35 (ex-Art 29)

“Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States”

Groenveld, Case 15/79, [1979] ECR 3409 (only applies to discriminatory measures)

Pigs Marketing Board Case 83/78 [1978] ECR 2347

Bouhelier Case 53/76 [1977] ECR 197

Delhaize Case C-47/90 [1992] ECR I-3669

Ravil Case C-469/00 [2003] ECR I-5053

Davies, “Can Selling Arrangements be Harmonised? (2005) ELRev 370