

Post-Cassis Case-Law

◆ Confusion?

Structure of today's Lecture



- Post-*Cassis* case law
- The *Keck & Mithouard* ruling
- Further developments

CJEU Rulings

- ◆ *Oebel* Case 155/80 [1981]
- ◆ *Blesgen* Case 75/81 [1982]
- ◆ *Oesthoek* Case 286/81 [1982]
- ◆ *Quietlynn* C-23/89 [1990]
- ◆ *Cf Buët* Case 382/87 [1989]

The Sunday trading saga

- ◆ *Torfaen v B&Q* Case 145/88 [1989]
- ◆ *Stoke on Trent & Norwich City v B&Q* C-169/91

Phase III

- ◆ CJEU retreats from lawfully marketed approach
- ◆ *Keck & Mithouard* Cases 367-68/91 [1993]

Cont'd (para 16 of *Keck's* ruling

'...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.'

The key elements

- ◆ Indistinctly applicable measures - distinction:
 - Rules which relates to the goods themselves (product requirements)
 - Rules relating to selling arrangements

- ◆ National rules relating to selling arrangements will be regarded to fall outside Article 34 TFEU **provided** the conditions in paragraph 16 are met:
 - They apply to all relevant traders within the MS and,
 - They affect in the same manner, in law and in fact, the marketing of domestic and foreign (EU) products

Criticism of *Keck*

- ◆ AG Jacobs in *Leclerc-Siplec*: Too much emphasis on factual and legal equality at the expense of market access
- ◆ Overly formalistic? Ambiguity regarding definition of selling arrangement
- ◆ Subsequent cases try to clarify approach laid down in *Keck*

Examples

- ◆ Packaging & labelling (*Clinique, Mars*)
- ◆ Advertising (*Hunermund, Keckerc-Siplec*)
- ◆ Licensing (*Commission v Greece*)
- ◆ Sales methods (*Familiapress*)
- ◆ Working hours (*Punta casa*)

Is discrimination relevant?

- ◆ *De Agostini & TV-shop* Joined cases C-34-36/95 [1997]
- ◆ *Heimdienst* C-254/98 [2000]
- ◆ *Gourmet* C-405/98 [2001]
- ◆ *Karner* C-71/02 [2004]
- ◆ *Alfa Vita - Vassilopoulos* C-158/04 & C-159/04 [2006]

Cases concerning *product use* – a market access test?

Commission v Italy ('trailers')

Mickelsson & Roos

Unfair Commercial Practices Directive (UCPD) 2005/29

- ◆ Maximum approach to harmonization
- ◆ Starting point: commercial practices by traders are lawful
- ◆ Sets out 3 rules as to when commercial practices are unfair
- ◆ MSs cannot go further and ban other practices

Art 2(d) of UCPD

- ◆ Business-to-consumer commercial practices (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers

Practices which are unfair

- ◆ Art 5(5): 31 specific commercial practices (exhaustive list in annex)
- ◆ Art 5(4): misleading (by action or omission) or aggressive
- ◆ Art 5(2): contravene the requirements of professional diligence and materially distort (or are likely to materially distort) the economic behaviour of the average consumer.

Implications of UCPD on the *Keck* case law

- ◆ *Keck*: national measures restricting/prohibiting certain selling arrangements are **presumptively lawful** under EU law
- ◆ *Outside scope of UCPD, Art 34 TFEU will continue to apply*
- ◆ *Within UCPD (and not covered by exhaustive list), are **presumptively unlawful** unless case-by-case assessment the practice is unfair.*

Impact of UCPD

- ◆ Restore pre-*Keck* position as laid down in cases such as *Oosthoek* and *Buet* (ie national rules on commercial practices which fall within scope of UCPD and therefore lawful)
- ◆ Barnard suggests that in litigation brought by the State, the trader is likely to prefer to rely on UCPD rather than Art 34 TFEU

Article 35 TFEU

- ◆ Prohibition, as between MS, of QRs and MEQRs on **EXPORTS**

Case law on export barriers

◆ *A different approach to Article 34 TFEU?*

Bouhelier (53/76) [1977]

Groenveld (15/79) [1979]

BUT

Lodewijk Gysbrechts (C-205/07) [2008]

A shift towards a similar approach to Art 34 FEU?

Next seminar

Expressed Treaty Derogations to the free Movement of Goods Rules ie Article 36 TFEU, particularly in the context of intellectual property rights