

Seminar 4: Post-Cassis Jurisprudence and Keck

Reading

- Barnard, Ch 5
- Bernard, “Sunday Trading: A Drama in Five Acts”, (1994), 57 MLR 449
- *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 Buet, 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

‘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

In *Keck* the ECJ carved out an area of national regulation in which it will not intervene and over which the Union does not have power to regulate. **However, it would seem clear from subsequent case law that the *Keck* approach is being constantly refined and revised.**

Some case law since *Keck* has followed the approach of the CJEU in that decision (for instance *Case C-292/92 Hünermund [1993] ECR I-6787*).

However, the *Keck* ruling has been criticised. For instance, Advocate General Jacobs in his Opinion in *Case C-412/93 Leclerc-Siplec [1995] ECR I-179* argued that the rigid distinctions introduced in the *Keck* case are inappropriate. He further argued that (re)introduction of a discrimination – same application ‘in law and in fact’ - in *Keck* was inappropriate since the central concern of the Treaty provisions on the free movement of goods should be to prevent unjustified obstacles to trade between Member States. For this reason, he argues, a *market-access* test would be more appropriate i.e. the key issue is whether the measure in question leads to a substantial restriction on access to state markets.

Indeed, the CJEU appears more recently to have placed more emphasis on para. 17 of the *Keck* judgment, emphasising market access, and in effect turning this into the operative part of the test. In other words, measures would fall within the Article 34 TFEU prohibition if, even though indistinctly applicable, they were liable to impede the access of imports more than the access of domestic products:

- *Cases C-34-6/95 KO v De Agostini* [1997] ECR I-3843
- *Case C-254/98 TK-Heimdienst Sass GmbH* [2000] ECR I-151
- *Case C-405/98 Gourmet* [2001] ECR I-1795
- *Joined Cases C-158/04 & C-159/04 Alfa Vita Vassilopoulos* [2006] ECR I-8135

Another problem with the Keck formula might lie in identifying the boundary between a ‘selling arrangement’ and a ‘product requirement’

- *Case C-416/00 Morellato* [2003] ECR I- 9343
- *Case C-366/04 Schwarz* [2006] ECR I-10139

In other cases the CJEU has used the argument of *remoteness* to justify non-interference with national measures. For instance in [DIP SpA \(cases C-10-2/94\)](#) the ECJ held that the national measure in question had a restrictive effect that was ‘too uncertain and too indirect’ for it to be regarded as hindering trade between Member States. On this point, also see *Case C-44/98 BASF* [[1999] ECR I-6269

It seems that only with the following three recent cases do we have any clarification of the situation post-Keck. These cases appear to favour a pure *market access* test over the discrimination approach advocated in Keck.

- Case C-265/06 Commission v Portugal* (tinted windows) [2008] ECR I-2245
- Case C-110/05 Commission v Italy (trailers)* [2009] ECR I-519
- Case C-142/05, Mickelsson & Roos* 2009] ECR I-4273

Each of these cases involved rules concerning the *use* of goods

Categorising the case-law

Packaging and labelling

Clinique Case, Case C-315/92, [1994] ECR I-317

Mars, Case C-470/93 [1995] ECR I-1923

Advertising (not equal burden in fact?)

Hunermund, Case C-292/92, [1993] ECR I-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)

Licensing & restriction on retail outlets

Commission v Greece (Baby Milk) Case C-391/92 [1995] ECR I-1621

Sales methods

Familapress Case C-368/95 [1997] ECR I-3689

Shops and working hours

Punto Casa, Case C-69 & 258/93 [1994] ECR I-2355

Questions

- 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

The Unfair Commercial Practices Directive 2005/29 (UCPD) OJ 2005 L149/22

IV Quantitative Restrictions on Exports and Measures Having Equivalent Effect

Article 35

“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)

Bouhelier Case 53/76 [1977] ECR 197

BUT now see

Case C-205/07 *Gysbrechts* – ECJ extended scope of Art 35 to encompass indistinctly applicable measures (although it is not clear yet whether the ECJ intends to adopt a pure market access test which does not require discrimination as it has with import restrictions).

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