Seminar 4: Post-Cassis Jurisprudence and Keck

Reading
- Barnard, Ch 5

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)
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)

PHASE 3: Retreat from the Lawfully Marketed Approach of Cassis
Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] ECRI-6097 (noted by Roth in (1994), CMLRev 845 and see also Moore listed above)

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<td><strong>Facts:</strong> Criminal proceedings in France (prohibited to re-sell at a loss). Strasbourg Tribunale 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</td>
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<td><strong>Article 34 not applicable – effect on interstate trade hypothetical</strong></td>
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<td><strong>CJEU</strong></td>
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- increasing tendency of traders to invoke Article 34 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 public interest object |
'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 34 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 – 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 but not abandoned altogether.

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 hindrance to market access.

- ‘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 34 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
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-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-368/95 Familiapress*
- *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 CJEU 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. However these cases are unlikely to constitute a significant shift in the CJEU’s approach to the scope of Article 34 TFEU in which access to markets is clearly impeded.

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 window film) [2008] ECR I-2245
*Case C-110/05 Commission v Italy (motor cycle trailers)* [2009] ECR I-519

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

Advertising (not equal burden in fact?)

- **Hunermund**, Case C-292/92, [1993] ECR I-6787 (see esp AG Tesauro)

Licensing & restriction on retail outlets

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

Sales methods

- **Familiapress** 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


### III 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