

## MILESTONES ON THE ROAD TO KECK

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*Summary: The article traces the roots of the ECJ's famous Dassonville formula back to similar concepts under competition law and questions its direct importation into Art 28 EC as done by the Court. From this starting point, the case law to Keck and beyond is analysed with a view to track the attempts to limit the scope of Art 28 and the role of the proportionality principle in this respect. The conclusion is that Keck did at least constitute the right approach, limiting the scope of (rather than adding another justification dimension to) Art 28, even though it still failed to answer the crucial question as to what constitutes a measure of equivalent effect to quantitative restrictions in a general manner. The partial success thus achieved has at least enabled the ECJ to leave the proportionality test of individual measures of the Member States to the proper venue - the referring courts of the Member States.*

### Introduction

The abundance of writing and case law on Article 28 (formerly 30) of the EC Treaty and, in particular, the crucial notion of measures of equivalent effect to quantitative restrictions is such that readers have not been provided with a footnote here. Rather, they are invited to consult any European law database of their choice, type in "Art. 28" (or "30", respectively) and then hit "ENTER". Given the predictable result of this small experiment, the reader may ask whether there is anything which has not yet been said or written on this subject any number of times, such as would merit another paper on it. Indeed, the road to *Keck* has been charted in almost every textbook and commentary on European Law one can think of. However, its origin and, in particular, the reasons for selecting this very path are less widely known. It all began with one original sin, followed by three decades of damage control, with the Court at times closely resembling Goethe's famous Sorcerer's Apprentice, trying to get rid of the spirits it had summoned up, but instead merely opening another thread of academic discourse every time it tried to strike them down. The apprentice, however, could still rely on his master: "Ah, he

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comes excited. / Sir, my need is sore. / Spirits that I've cited / My commands ignore.”<sup>1</sup>

### **The Tools at Hand: Article 28 and Directive 70/50**

When Article 28 of the EC Treaty still was Article 30 (i.e. in the original, pre-Amsterdam version) it read:

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

The stipulation inserted between the two commas (“without prejudice to the following provisions”), together with the transitional provisions of (the former) Articles 31 through 33 to which it referred, was removed by the 1997 Treaty of Amsterdam; yet the core of the provision remained unchanged. The first point to be made about Article 28 is that the Treaty uses specific terms without defining their meaning. As far as “quantitative restrictions” are concerned, the transitional provisions of (the former) Articles 31-33 had at least given clear hints that trade quotas between Member States were the main targets of the first part of Article 28. This view was quickly confirmed by the ECJ in *Riseria Luigi Geddo*,<sup>2</sup> where it held “quantitative restrictions” to mean “measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit”. However, there is likewise no definition of “measures of equivalent effect” to trade quotas, nor any hints comparable to those given in Articles 31-33 as to the meaning of the second part of Article 28. Once the Court had held that quantitative restrictions must *restrain* (and not merely *affect*) intra-community trade in order to qualify under Article 28, the term “equivalent” -meaning “of equal value” - should have been read as denoting measures whose effect is equally *detrimental* to the object of the liberalised trade in goods within the single market as that of trade quotas, without fixing the threshold inherent in the notion of “equivalence”.

Further clarification was needed, and an important step was taken by the Commission in adopting its Directive 70/50, which was based on the transitional legislative competence under (the former) Art. 33 para. 7, empowering the Commission to establish a procedure and timetable for

<sup>1</sup> Johann Wolfgang von Goethe's poem *Der Zauberlehrling* (*The Sorcerer's Apprentice*) was written in 1779. The crucial passage in its original version reads: „Ach, da kommt der Meister. / Herr, die Not ist gross! / Die ich rief, die Geister / werd' ich nun nicht los!“ (English translation by Edwin Zeydel (1955), <[http://www.fln.vcu.edu/goethe/zauber\\_e3.html](http://www.fln.vcu.edu/goethe/zauber_e3.html)> accessed 3 October 2006).

<sup>2</sup> Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECR 865.

obligatory elimination of measures with an effect equivalent to quotas. Being a transitional measure, this directive lost its binding force with the end of the transitional period; nevertheless, it demonstrates the interpretation of a crucial Treaty provision by an organ enjoying certain regulatory competences in the area in question. It thus provides important guidance for subsequent practice, as has been stressed by the Advocates General and the Court on several occasions.<sup>3</sup>

Art. 2 of Directive 70/50 defines the first group of measures to be abolished (because they come under the prohibition in Art. 28), namely, those which treat imports *differently* to domestic goods and:

“(...) hinder imports which could otherwise take place, including measures which make importation more difficult or more costly than the disposal of domestic production.”

In particular, Art. 2 covered measures which made imports subject to any condition “other than a formality”<sup>4</sup> which was to be met solely by imports, or which differed from those required of domestic products and were thus more difficult to satisfy, as well as measures favouring domestic products or granting them preferential status. It also provided a lengthy, though not exhaustive list of examples.<sup>5</sup> Thus the first dimension of the prohibition on measures having equivalent effect to quantitative restrictions is a ban on *discriminatory* measures specifically targeting imports and treating them differently in some way from similar domestic goods.

However, Directive 70/50 points to another dimension beyond this simple non-discrimination rule. According to the preamble, non-discriminatory measures applying to domestic goods and imported goods alike do not, at least as a general rule, have an effect equivalent to that of quantitative restrictions. Nevertheless, Article 3 reads as follows:

“This Directive also covers measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up, and which are equally applicable to domestic and imported products, where the restrictive effects of such measures on the free movement of goods exceed the effects intrinsic to trade rules (...).”

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<sup>3</sup> See Case 75/81 *Joseph Henri Thomas Blesgen v State of Belgium* [1982] ECR 1211; Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 (Sunday Trading); see also Advocate General Walter van Gerven in case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* [1992] ECR I-6457.

<sup>4</sup> As early as 1971, however, the Court departed from this approach and, in Joined Cases 51 & 54/71 *International Fruit Company v Produktschap voor Groenten en Fruit (No. 2)* [1971] ECR 1107, condemned even pure formality requirements as unlawful.

<sup>5</sup> Council Directive (EC) 70/50 [1970] OJ L13/29 art 2(3).

Thus, even non-discriminatory trade rules relating to the marketing of products, including *both* requirements to be met by the goods themselves (shape, size, weight, etc.) *and* those relating to the circumstances of sale (presentation, putting up) - a point to which we shall have to return later, may come under the Directive and thus, implicitly, under Art. 28 of the Treaty, should their negative effects be disproportionate. Thus it was Directive 70/50 - rather than the *Dassonville* or *Cassis de Dijon* judgments, as seems to be the standard view<sup>6</sup> - which first took Article 28 beyond the scope of a pure non-discrimination rule.

### **The Challenge: *Dassonville***

The facts of the 1974 *Dassonville* case<sup>7</sup> need not be repeated here. One must, however, bear in mind (as the Court made quite clear) that this case was concerned with measures discriminating against (parallel) importers,<sup>8</sup> who were able to produce the certificate of authenticity required by Belgian law only with great difficulty, or not at all. Advocate General Trabucchi, explicitly referring to Directive 70/50 in his opinion, was not prepared to accept the disputed certificate requirement because less restrictive means could have been available, and concluded that, in any event, the measure in question resulted in arbitrary discrimination - if not between goods, then at least between traders.<sup>9</sup> However, the Court did not adopt either idea, and simply ruled that:

“[a]ll 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 an effect equivalent to quantitative restrictions.”<sup>10</sup>

Thus the (in)famous *Dassonville* formula came into being. It was immediately criticised by several writers as being overly broad,<sup>11</sup> and there were doubts as to whether *any* trading rule could escape the breadth of this formula.<sup>12</sup> Indeed, the *Dassonville* formula not only followed Directive

<sup>6</sup> See E White, 'In search of the limits to Article 30 of the EEC Treaty' (1989) 26 CMLR 235; J Steiner, 'Drawing the line: Uses and abuses of Article 30 EEC' (1992) 29 CMLR 749; D Chalmers, 'Repackaging the Internal Market - The Ramifications of the Keck Judgment' (1994) 19 ELR 385, already criticised by this writer in 1995 (S Stadlmeier, 'Contrary to what has previously been decided: The search for the rule goes on' (1995/2) 1 LIEI 9).

<sup>7</sup> Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

<sup>8</sup> *Ibid* paras 7-9.

<sup>9</sup> *Ibid* 859-63.

<sup>10</sup> White (n 6) para 6.

<sup>11</sup> See eg D Chalmers, 'Free Movement of Goods within the European Community: An unhealthy addiction to Scotch whisky?' (1993) 42 ICLQ 269, and J Steiner (n 6) 751-752.

<sup>12</sup> White (n 6) 235.

70/50 beyond pure discrimination, but also blurred the notion of distinguishing between discriminatory measures, which are caught in any case, and equally applicable measures, which are caught only if they are disproportionate. No significance whatsoever seems to have been assigned to either the discrimination or the proportionality element (as discussed by the Advocate General), and this constitutes the real surprise of the *Dassonville* formula.

### **The Roots: “Trade between Member States”**

Instead of looking at discrimination or the proportionality of equally applicable measures, the Court seems to have borrowed the concept of hindrances to trade between Member States. This concept appears in Article 81 of the EC Treaty as one of the central provisions of the Community’s competition policy, and seems to have influenced the wording of the *Dassonville* formula to a considerable degree.

Article 81 prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices if these might *affect* trade between Member States, and if their object or effect is to prevent, restrict or distort competition within the common market. At first glance this may be misleading: the Treaty was made in several languages, each of them equally authentic,<sup>13</sup> although we find a considerable difference among them concerning the meaning of this crucial provision. The German version of the Treaty uses the term *beeinträchtigen*, which implies that trade must be *adversely* affected, whereas the English “to affect” does not necessarily imply a *negative* effect. Since an examination of the authentic text discloses such a difference in meaning, the objects and purposes of the Treaty must be taken into account when determining which meaning best reconciles the texts.<sup>14</sup>

The purpose of the “trade between Member States” requirement in Article 81 is merely to define the boundary between areas covered by Community law and national law, respectively. Only if intra-Community trade is affected does Community competition law apply to the given situation; anything below that threshold is a matter for the Member States’ competition law. This was established in the very early leading cases in competition law, *Société Technique Minière*<sup>15</sup> and *Consten and Grundig*.<sup>16</sup> Although Advocate General Karl Roemer strongly argued that “to affect”

<sup>13</sup> EC Treaty (Treaty of Rome, as amended) art 314.

<sup>14</sup> Vienna Convention on the Law of Treaties 1969 art 33(4).

<sup>15</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235.

<sup>16</sup> Cases 56 & 58/64 *Établissements Consten SARL and Grundig Verkaufs-GmbH v Commission* [1966] ECR 299, 341.

means - as in the Dutch, Italian and German versions of the Treaty - “to affect adversely”,<sup>17</sup> the Court originally adopted a very broad approach not expressly calling for a *negative* effect, and defined this element of Article 81 as follows:

“For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an *influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*”<sup>18</sup>

A mere fortnight after this judgment, the Court handed down its decision in *Consten and Grundig*. Again AG Roemer argued as mentioned above,<sup>19</sup> and this time the Court heard the message, declaring that the crucial issue was:

“(...) whether the agreement is capable of constituting a *threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.*”<sup>20</sup>

The resemblance between this “trade between Member States” formula and the wording of the *Dassonville* formula of eight years later can hardly be overlooked. Yet even in this refined (post-*Consten/Grundig*) “trade between Member States” formula of Art. 81, the scope is trade as such (and not trade patterns or volumes), and an *adverse* effect on such trade must be demonstrated. What can be gained from this for the purposes of Art. 28? White argued that both the addressees and purposes of Articles 28 and 81 were fundamentally different, and denied any systematic or teleological link between the two concepts that could be helpful under Art. 28, while still admitting that even the Court itself had given reason to question the validity of this distinction.<sup>21</sup> Wils contended that Art. 28 at least served a similar purpose, namely, policing the borderline between legitimate and illegitimate national trade regulations.<sup>22</sup> Advocate General Walter van Gerven chose a similar starting point in his opinion

<sup>17</sup> Opinion of AG Roemer in *Société Technique Minière* (n 15) 256.

<sup>18</sup> n 15, 249; emphasis added. Here the translation is correct: the German version of the judgment uses the term *beeinflussen*, which means *to influence*, and is as neutral as the English term *to affect*.

<sup>19</sup> Opinion of AG Roemer in *Consten and Grundig* (n 16) 360.

<sup>20</sup> n 16, 341 (emphasis added).

<sup>21</sup> White (n 6) 264-5, referring to Case 240/83 *Procureur de la République v Association de défense des brûleurs d’huiles usagées* [1985] ECR 531 (Waste Oils).

<sup>22</sup> W Wils, ‘The Search for the Rule in Article 30 EEC: Much ado about nothing?’ (1993) 18 ELR 475.

in the *Torfaen* case,<sup>23</sup> the first of the famous Sunday trading cases under Art. 28. He conceded that Articles 28 and 81 were addressed to different entities (Member States and undertakings, respectively) and, moreover, had different types of obstacles in mind (national legislation and cartels, respectively),<sup>24</sup> but nevertheless contended that they pursued the same fundamental purposes with regard to the general aims of the Treaty as laid down in Articles 2 and 3, i.e. establishing and maintaining the internal market. To that extent, he regarded the comparison as feasible, and went on to discuss the ECJ's case law on Art. 81 for the purpose of interpreting Art. 28, applying the market partitioning/penetration concept of Art. 81<sup>25</sup> to Art. 28. However, the Advocate General limited his discussion to two equally serious and harmful scenarios: on the one hand, a *per se* compartmentalisation ("screening off") of the internal market into national markets, and, on the other, the erecting of barriers which, given their entire legal and economic context, render market access more difficult and tend to reinforce such compartmentalisation.<sup>26</sup>

This limitation of the comparison to genuinely detrimental scenarios is most important. The contention is that an uncritical application of Article 81 concepts to Article 28 is contrary to both the wording and objectives of the Treaty. Under Article 81, the concept of (adversely) affecting trade between Member States is meant to be broader, because its function is merely to delimit the sphere of action of Community competition law; if fulfilled, this requirement makes Community competition law applicable, but does not yet decide as to the lawfulness of the agreement, decision or concerted practice in question. The decisive factor in any such conclusion is the second requirement under Article 81, namely, the prevention, distortion or restriction of competition. The objective of Article 28 is not only to delimit the Community sphere from the national

<sup>23</sup> Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, 3876-3877.

<sup>24</sup> It should be noted that this distinction was one of the key arguments in the debate following the *Angonese* judgment (Case C-281/98 *Angonese (Roman) v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139) against extending the effects of market freedoms to relationships between individuals. According to R Streinz and A Leible, 'Die unmittelbare Drittwirkung der Grundfreiheiten' ("The direct third party effect of market freedoms") (2000) 11 *EuZW* 459, the Treaty *explicitly* provides for such an extension whenever it intends to create such an effect. The fact that this was not the case under art 39 should be understood as a deliberate decision against it. For a different view, see this writer in 'Gemeinschaftliche Grenzen für die Privatautonomie? Zur Drittwirkung von Freiheiten des Binnenmarkts' ("Limits on private autonomy under Community law? On third party effects of market freedoms") (2000/01) 11 *JAP* 245.

<sup>25</sup> Established in leading cases on competition law such as *Consten and Grundig* (n 16), *Brasserie de Haecht I* (Case 23/67 *Brasserie de Haecht SA v Wilkin* [1967] ECR 407) and *Vereniging van Cementhandelaren* (Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977).

<sup>26</sup> n 23, 3877-3878.

sphere in regulating trade, but also to decide *uno actu* as to the lawfulness of the national measure.<sup>27</sup> The wording of Article 28 suggests that any adverse effects must *hinder* trade between Member States in a manner *equally severe* as those of *quotas*. In short, the comparison made by the Advocate General in *Torfaen*, which was limited to scenarios with an effect equivalent to *quotas*, is supported by the Treaty; the ECJ's merely importing this concept into Art. 28 in *Dassonville* is not.

Steiner has reminded us that the scope of the *Dassonville* formula ("directly or indirectly, actually or potentially") must be limited by the preceding verb "hindering", noting a tendency to blur the distinction between Art. 81, which is aimed at agreements that *affect* trade, and Art. 28, which is aimed at measures that *hinder* trade.<sup>28</sup> Unfortunately, Steiner's reasoning is based on the plain English wording of the Treaty, rather than on the interpretation given to it in the Court's case law, which makes this distinction look more clear-cut than it actually is. The distinction between "affect" and "hinder" is a matter of principle; the distinction between "affect adversely" and "hinder equally as severely as quotas" is only a matter of degree. Nevertheless, this distinction is the crucial issue in interpretation of Art. 28, and ought to have been the starting point for reducing the scope of the *Dassonville* formula in the Court's case law.

### **"Spirits that I've cited / My commands ignore": The Road from Cassis to Keck**

#### **"Mandatory Requirements"**

In *Cassis de Dijon*,<sup>29</sup> the Court had to deal with a non-discriminatory ban on the sale of medium-strength liquor in Germany. It held that, in the absence of Community legislation, it was for the Member States to regulate all matters relating to the production and marketing of the beverages in question, and went on to state as follows:

"Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."<sup>30</sup>

<sup>27</sup> Stadlmeier (n 6) 18.

<sup>28</sup> n 6, 754-8.

<sup>29</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*).

<sup>30</sup> n 29 para 8.



Certainly the all-embracing *Dassonville* formula, lacking any element of proportionality, would have covered any of these measures, whether they satisfied such mandatory requirements or not. Finally, the Court returned to the original concept of Directive 70/50, amending it so that not simply the “intrinsic effects” of trade rules, but rather only those necessary to satisfy certain mandatory requirements, could justify such rules under Art. 28, subject to a proportionality test.<sup>31</sup> In hindsight, however, the true significance of *Cassis de Dijon* lay in its impact on the development of the internal market and its powerful signal that each and every obstacle need not be levelled by secondary legislation and the harmonisation or approximation of laws. Even in the absence of such legislation, the remaining obstacles in the national rules had to be justified; otherwise, market freedoms would prevail.<sup>32</sup> If not for *Cassis*, eurosclerosis might well have stalled the internal market.

### **The Court's Proportionality Test**

In numerous follow-up judgments to *Cassis*, the Court elaborated this concept. The list of acceptable mandatory requirements in *Cassis* is demonstrative (“in particular”) rather than enumerative: working conditions,<sup>33</sup> cultural policy,<sup>34</sup> protection of the environment,<sup>35</sup> even maintaining a permanent economic infrastructure independent of seasonal tourism industries<sup>36</sup> have all been added to the list. Likewise, the Court elaborated a proportionality test, requiring an objective which is not only mandatory but also accepted by Community law<sup>37</sup> and a measure which is capable of achieving this objective and is, moreover, proportionate thereto; the Court usually (merely) reads this as a requirement that the national rule in question constitute the least restrictive measure capable of achieving the desired result.<sup>38</sup> The overall evaluation of proportional-

<sup>31</sup> In light of Directive 70/50, it seems ill-founded to accuse the Court of “judicial legislation” (see eg N Green and others, *The Legal Foundations of the Single European Market* (OUP, Oxford 1991) 65).

<sup>32</sup> Cf. the Commission’s reaction to the judgment, published in [1980] OJ C256/2 .

<sup>33</sup> Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR 1993.

<sup>34</sup> Cases 60 & 61/84 *Cinéthèque SA and others v Fédération nationale des cinémas français* [1985] ECR 2605.

<sup>35</sup> Case 240/83 “Waste Oils” (n 35); Case 302/86 *Commission v. Denmark* (n 35); Case C-2/90 *Commission v Belgium* [1994] ECR I-4431 (Walloon Wastes).

<sup>36</sup> Case C-302/97 *Konle v Austria* [1999] ECR I-3099, para 40.

<sup>37</sup> See Cases 302/86 *Commission v Denmark* [1988] ECR 4607 (Containers for Beer and Soft Drinks), para 6, and 240/83 *Procureur de la République v Association de défense des brûleurs d’huiles usagées* [1985] ECR 531 (Waste Oils), para 12.

<sup>38</sup> A textbook analysis of the proportionality test is given by Advocate General Walter van Gerven in his opinion in case C-169/91 *Stoke-on-Trent and Norwich City Council v B & Q* (n 3).

ity as such (*strict proportionality review*: "... is it worth it?"<sup>39</sup>) has, more often than not, been left to the Member State in question, which is understandable given the fact that the vast majority of cases under Art. 28 were brought before the Court as preliminary references under Art. 234. In this role, the Court is merely called upon to interpret provisions of Community law; drawing conclusions concerning national legal provisions is the job of the referring national court. It can even be shown that, in certain distinct groups of cases, such as those concerning restrictive foodstuff regulations, the Court's approach to the proportionality test was the same under preliminary reference procedures, in which any strict proportionality review must be reserved for the national court, and under infringement procedures based on very similar facts, where the Court could have performed - *but did not perform* - a full analysis of the national legal provisions, including qualification under a strict proportionality test.<sup>40</sup>

From a doctrinal point of view, one could debate whether these mandatory requirements are to be understood as "justifications" like those of Art. 30, meaning that national rules satisfying such requirements are caught by Art. 28, yet justified; or whether the Court intended to limit the range of Art. 28 by *exempting* such national rules. Unfortunately, the Court chose the middle ground. On the one hand, in the early days it regarded national rules satisfying mandatory requirements as not being caught by Art. 28,<sup>41</sup> while, on the other, it would only adopt this position after performing the same full-scale proportionality test as under Art. 30.<sup>42</sup> If a national rule must pass a full-scale proportionality test before it is cleared, the remaining difference between an exemption under the mandatory requirements test and a justification under the Art. 30 test becomes insignificant, and the corresponding debate is moot. Moreover, the Court gradually blurred the original distinction in Directive 70/50 between discriminatory measures and equally applicable measures, with the latter qualifying for justification as mandatory requirements only after passing a proportionality test, while mandatory requirements were even accepted with regard to discrimina-

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<sup>39</sup> This writer wishes to thank Don Regan for his stimulating comments ("Is it worth it?") at the 2006 Dubrovnik Jean Monnet seminar on advanced issues of European law (February 27-March 4).

<sup>40</sup> **Cf.** Case 178/84 *Commission v Germany* [1987] ECR 1227 (Purity Requirement) (infringement proceedings) and Cases 407/85 *Drei Glocken v USL* [1988] ECR 4233, and 90/86 *Zoni* [1988] ECR 4285 (*Italian Pasta cases*-preliminary reference proceedings); see also S Stadlmeier, 'Le Gourmet Européen' in Köck and others (editors), *Liber Amicorum Peter Fischer* (Vienna 2004) 529.

<sup>41</sup> **Cf.** the *Cinéthèque* judgment (n 34), which states in para 24 that art 28 "does not apply" to such national legislation.

<sup>42</sup> For a prototype of the Court's approach, again see Case 178/84 *Commission v Germany* [1987] ECR 1227 (Purity Requirement).

tory measures.<sup>43</sup> As the trigger cases were concerned with environmental protection, one could argue that this was merely a particular regime for a particular purpose; however, in light of all that has been said so far, it is difficult to avoid seeing a general trend in the Court's doctrine, one which goes far beyond the establishment of particular regimes in particular sectors. Initially, this doctrine did not include the "limited" approach later suggested by AG van Gerven in *Torfaen*, i.e. taking into account only the genuinely detrimental effects of national trade rules; rather, it combined a pure *Dassonville* approach with a uniform proportionality review that was limited to a *least restrictive means* test, treating the proportionality test thereby established as a general principle of Community law.<sup>44</sup>

In the opinion of this writer, the latter moment proved to be the worst. By rejecting any inherent threshold and dealing with all *Dassonville*-type measures, however "potential" and "indirect" their impact on intra-Community trade may have been, the Court invited a torrential flood of preliminary references covering all kinds of national trade regulations, including measures governing the marketing of products in the widest sense of the term (shape, packaging, sales promotion, advertising, etc.), which could arguably have had negative side effects on imports, or at least on the volume of imports. Until just before *Keck* there was nothing to encourage traders or courts in the Member States to consider a different approach. The most significant early case in this respect was *Oosthoek*,<sup>45</sup> in which a trader contested a national rule prohibiting free gifts in conjunction with the sale of books (encyclopaedias), arguing that a ban on this particularly effective promotional method had negative effects on the volume of his trade. The Court was ready to accept this argument, which relied merely on some hypothetical negative *effects* (rather than a hindrance equally as severe as a trade quota):

"Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported product.

"The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from

<sup>43</sup> Case 16/83 *Prantl (Karl)* [1984] ECR 1299 (Bocksbeutel Bottles); Case C-2/90 *Commission v Belgium* (n 35).

<sup>44</sup> See Case 122/78 *Buitoni SA v Fonds d'Orientation et de Regularisation des Marches Agricoles* [1979] ECR 677; Case 66/82 *Fromençais v FORMA* [1983] ECR 395; Case 181/84 *The Queen v. Intervention Board for Agricultural Produce, ex parte E.D. & F. Man (Sugar) Ltd.* [1985] ECR 2889; Case 137/85 *Maizena v Council* [1987] ECR 4587; Case C-365/92 *Henrik Schumacher v Bezirksregierung Hannover* [1993] ECR I-6071.

<sup>45</sup> Case 286/81 *Criminal Proceedings against Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575.

one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports (...) even if the legislation in question applies to domestic products and imported products without distinction.”<sup>46</sup>

*Oosthoek* was frequently looked to as a precedent, and even cited by the Court and its Advocates General, such as in *Buet*<sup>47</sup> (a ban on canvassing for educational materials in private dwellings) and *GB-INNO*<sup>48</sup> (a ban on quoting regular prices during special discount sales). Legal writers have tried to divide the measures involved in these and similar cases into several groups according to their nature, proposing several additional tests to be applied under Art. 28.<sup>49</sup> Yet what is most important to note is that the common feature of the measures involved in these cases is how, lacking a proper definition of the *hindrance* threshold in the *Dassonville* formula, they were all - explicitly or implicitly - regarded as having passed the *Dassonville* test; and this even though, at best, they *affected* the *volume* of trade, thus requiring a thorough analysis of their ability to satisfy mandatory requirements, the necessity of their doing so, and their proportionality in this respect, so as to clear them under Art. 28. Thus a full-scale “mandatory requirements and proportionality test” had to be performed by the Court in each individual case, with the prospect of its being confronted with “countless new mandatory requirements”.<sup>50</sup> Moreover, the Court was required to decide as to the reasonableness of national policy decisions in a number of cases which, arguably, it should not have even dealt with, to such an extent that White worried about Art. 28 becoming “a quasi-constitutional instrument which complainants and courts can use to question the justification and ‘proportionality’ of virtually all State measures regulating society”.<sup>51</sup> All of this because the Court had never addressed the crucial question: when does a national measure not merely *affect* trade in an indirect or potential or merely hypothetical manner, but *hinder* trade among Member States in a manner *as severe as quotas*?

The climax of this development was reached in the first Sunday trading case, *Torfaen*. In his opinion, Advocate General Walter van Gerven

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<sup>46</sup> n 45 para 15.

<sup>47</sup> Case 382/87 *R. Buet and Educational Business Services (EBS) SARL v Ministère Public* [1989] ECR 1235.

<sup>48</sup> Case C-362/88 *GB-INNO-BM v Confédération du commerce Luxembourgeois Asbl* [1990] ECR I-667.

<sup>49</sup> K Mortelmans, ‘Article 30 of the EEC Treaty and legislation relating to market circumstances: Time to consider a new definition?’ (1991) 28 CMLR 115; WH Roth, commenting on *Keck* in (1994) CMLR 845, 849-50; White (n 6) 248-56.

<sup>50</sup> Advocate General Walter van Gerven in his opinion in *Torfaen* (n 23) 3880.

<sup>51</sup> White (n 6) 239.

warned the Court of the consequences of this very development<sup>52</sup> and (at long last) urgently proposed a more restrictive approach to the *Dassonville* formula by adopting the “screening off national markets” concept from the case law on Art. 81, as discussed above. However, the Court decided the first Sunday trading case in line with its traditional approach, surprisingly referring to Directive 70/50 rather than applying the full proportionality test developed in the *Cassis de Dijon* follow-up cases. It accepted national rules governing hours of work, delivery and sale as a legitimate part of economic and social policy consistent with the objectives pursued by the Treaty,<sup>53</sup> referring to a mandatory requirement already familiar in principle from the *Oebel* case.<sup>54</sup> The next Sunday trading cases, *Conforama*<sup>55</sup> and *Marchandise*,<sup>56</sup> followed the same pattern. In his opinion in both cases, Advocate General van Gerven recognised that the Court had not followed him in *Torfaen*, and proceeded “on the assumption that the Court has opted in favour of the *Dassonville* rule once and for all”. He examined the facts according to the standard patterns of the mandatory requirements and proportionality test, concluding that the legislation in question was necessary, justified and proportionate and should be cleared under Art. 28.<sup>57</sup> Indeed, the Court once again accepted side effects on the volume of trade as falling under the *Dassonville* formula, and held that:

“[n]ational legislation which prohibits the employment of staff on Sundays (...) is not designed to control trade. Nonetheless, it may entail *restrictive effects* (...), may have negative repercussions on the *volume of sales* and hence on the *volume of imports*.”<sup>58</sup>

Only in *Stoke-on-Trent*,<sup>59</sup> the last Sunday trading case prior to *Keck*, did the tide begin to turn. Advocate General van Gerven once again delivered an opinion on the case, and found no reason to distinguish it from *Torfaen*, *Conforama* or *Marchandise*. Surprisingly, he succeeded in convincing the Court even though he had already given up on any further attempts to that end. The Court obviously believed that the scope of application given to the *Dassonville* formula had been too broad. Yet instead

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<sup>52</sup> n 50.

<sup>53</sup> n 23 paras 13 and 15.

<sup>54</sup> Case 155/80 *Summary Proceedings against Sergius Oebel* [1981] ECR 1993.

<sup>55</sup> Case C-312/89 *Union départementale des syndicats CGT de l’Aisne v SIDEF Conforama and others* [1991] ECR I-997.

<sup>56</sup> Case C-332/89 *Criminal Proceedings against André Marchandise and others* [1991] ECR I-1027.

<sup>57</sup> Opinion of Advocate General Walter van Gerven on *Conforama* and *Marchandise* (n 55) 1011.

<sup>58</sup> *Conforama* (n 55) para 8; *Marchandise* (n 56) para 9 (emphasis added).

<sup>59</sup> Case C-169/91 *Stoke-on-Trent and Norwich City Council v B & Q* [1992] ECR I-6635.

of immediately introducing a definition of the hindrance threshold, the Court dealt with the problem only at the next stage, under the proportionality test:

“Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods.

“In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are *direct, indirect or purely speculative*, and whether those effects do not impede the marketing of imported products more than the marketing of national products.”<sup>60</sup>

The additional turnover lost due to the closing of shops on Sundays not only affected trade in domestic and foreign goods alike, but was above all considered to be merely speculative, and so for *this* reason (and *not* for satisfying any mandatory requirement in a proportionate way) the prohibition under Art. 28 simply did not apply to national legislation prohibiting retailers to open their premises on Sunday. In this writer’s words, the result of the proportionality test was that its performance had been made redundant; it should not have been performed at all.<sup>61</sup> It was time for a change.

### **Keck and Its Follow-up Cases**

In the *Keck* and *Mithouard* cases,<sup>62</sup> the Court cleared the contested ban on resale at a loss as applying to any sales activities carried out within a national territory, regardless of the nationality of the traders or the origin of the goods. The Court finally set out to directly address the crucial hindrance threshold at the proper level, i.e. the applicability of Art. 28, rather than at the level of possible justification thereunder, as it had done before:

“Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in

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<sup>60</sup> n 59 para 15.

<sup>61</sup> Again see this writer (n 6).

<sup>62</sup> Joined cases C-267 & 268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097. For comments see D Chalmers, ‘Repackaging the Internal Market - The Ramifications of the *Keck* Judgment’ (1994) 19 ELR 385; S Moore, ‘Re-visiting the limits of Article 30 EEC’ (1994) 19 ELR 195; N Reich, ‘The “November Revolution” of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited’ (1994) 31 CMLR 459; WH Roth (1994) CMLR 845.

so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.”<sup>63</sup>

In view of traders’ increasing tendency to invoke Art. 28 as a means of challenging any rules limiting their commercial freedom (a tendency which, as we have seen, the Court itself had created and reinforced, just as Goethe’s Sorcerer’s Apprentice created a force which eventually threatened to flood the shop), the Court then announced point-blank that it would re-examine and clarify its case law, stating that:

“...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.

“Where those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article [28] of the Treaty.”<sup>64</sup>

### Comments on *Keck*

The newly-established doctrine was quickly confirmed by the Court in the first series of follow-up cases, which included *Hünermund*,<sup>65</sup> *Clinique*,<sup>66</sup> *Tankstation*<sup>67</sup> and *Punto Casa*.<sup>68</sup> However, neither *Keck* nor any of these early follow-up cases provide answers to some lingering ques-

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<sup>63</sup> *Keck* (n 62) para 13.

<sup>64</sup> *Keck* (n 62) paras 14-17.

<sup>65</sup> Case C-292/92 *Ruth Hünermund u.a. v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6878.

<sup>66</sup> Case C-315/92 *Verband Sozialer Wettbewerb e.V. v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* [1994] ECR I-317.

<sup>67</sup> Joined cases C-401 & 402/92 *Tankstation t’Heukske vof and J.B.E. Boermans* [1994] ECR I-2199.

<sup>68</sup> Joined cases C-69 & 258/93 *Punto Casa SpA v Sindaco del Comune di Capena* [1994] ECR I-2355.

tions. Is the *Dassonville* formula still valid? Has it been reshaped (minus certain non-discriminatory sales arrangements), or, as argued by some writers,<sup>69</sup> abandoned altogether? How is the category of “sales arrangements” to be properly defined? What does restricting the test to “certain” sales arrangements mean? This writer has suggested a few answers to these questions and voiced some concerns over the approach taken by the Court. These need not be repeated here;<sup>70</sup> a few comments on the most important issues will suffice.

The Court did not clearly identify which cases were to be considered as overruled. Looking at the wording of the judgment, and taking into account the development of the doctrine and case law outlined above, it seems that, at the very least, the trade volume approach from *Oosthoek* to *Conforama*, i.e. one specific application given to the *Dassonville* formula in subsequent case law, should be regarded as overruled, while the formula itself, with special reference to the inherent hindrance threshold, still stands.

This writer considers it practically redundant to recall that Art. 28 prohibits measures of equivalent *effect* - rather than of equivalent *nature* - to quantitative restrictions; hence the Court should have defined its *Keck* test with regard to the effects of measures, rather than their *nature*,<sup>71</sup> and should have used this approach to give a general definition of the hindrance threshold. Not only did the Court adopt the wrong approach altogether, it did so in a piecemeal, inconsistent manner, exempting *certain selling arrangements* yet defining neither what a selling arrangement is (and how to distinguish the spheres of production and marketing for such purposes) nor which (“certain”?) selling arrangements come under this exemption and which do not. This approach could not but fail to meet one of its express objectives, i.e. reducing the Court’s workload.

Numerous attempts have been made to address the specific “hindrance” threshold, the crucial issue behind Art. 28; AG van Gerven’s opinion in *Torfaen* was one of them. A few years earlier, AG Slynn in *Cinéthèque* had made another attempt. Focusing on imports, he suggested that a measure not specifically directed against imports, not discriminating against them, not making it any more difficult for an importer to sell his products than for a domestic producer, and not giving any protection to domestic producers would not *prima facie* come under Art. 28.<sup>72</sup> Steiner proposed a combined definition with regard to indistinctly appli-

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<sup>69</sup> D Chalmers (n 11) 269.

<sup>70</sup> n 61.

<sup>71</sup> n 70; see also the opinion of Advocate General Walter van Gerven in *Torfaen* (n 23) 3870.

<sup>72</sup> *Cinéthèque* (n 34) 2611.



cable measures: these either operated to the advantage of the domestic product by making imports more difficult, more burdensome, more costly or even impossible, or, even without conferring such an advantage, undermined the single market principle by precluding imports or restricting market opportunities.<sup>73</sup> More than ten years ago, this writer predicted that the search for the rule would go on,<sup>74</sup> and so far this has proved to be right. There is still unfinished business for the Court to do.

### **Afterthought: A New Approach?**

Despite its doctrinal shortcomings and the need for further clarification, *Keck* has had a sobering effect in that the tendency to subject every national trade regulation to scrutiny under the proportionality test has been halted: whatever falls under the *Keck* formula is no longer subject to the proportionality test. Moreover, the Court may have reconsidered its own past activity in this area, recalling its limited role under preliminary reference proceedings, as may be seen in more recent cases such as *Gourmet International Products*.<sup>75</sup> Faced, as several times before, with a comprehensive ban on advertising for a certain category of products, the Court held that *Keck* did not apply, since the national rule, although concerned with sales promotion activities, had a worse effect on imports than on domestic products:

“... [T]he Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.”<sup>76</sup>

With regard to the proportionality test, the Court took a textbook “preliminary reference” approach, refraining from performing a full-scale test and merely reminding the national court of the legal framework for such a test under Community law, thereby leaving the matter for the national court to resolve:

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<sup>73</sup> J Steiner (n 6) 754-5.

<sup>74</sup> n 61, 33.

<sup>75</sup> Case C-405/98 *Konsumentombudsmannen v. Gourmet International Products AB* [2001] ECR I-1795.

<sup>76</sup> *Gourmet* (n 75) para 21.

“Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.”<sup>77</sup>

Some of the messages have finally been heard in Luxembourg.

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<sup>77</sup> *Gourmet* (n 75) para 33.