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## Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?

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## Abstract

The provision which is the focus of this Article is article 34 of the Treaty on the Functioning of the European Union ("TFEU" or "Treaty") (formerly article 28 EC). This Article focuses on an analysis of two recent judgments on this important issue delivered by the European Court of Justice ("Court") in 2009, namely the *Trailers* decision and the *Mickelsson* decision. Before reaching these judgments, the Article discusses very briefly the relationship between the four freedoms (free movement of goods, persons, services, and capital) and then, as to the scope of article 34, reminds the reader of what is "the story so far." This story falls neatly into three parts, each beginning with a seminal judgment: *Dassonville*, *Cassie de Dijon*, and *Keck*. For good measure, this Article will also consider the principles governing justification under article 36 TFEU (article 30 EC).

# OF TRAILERS AND JET SKIS: IS THE CASE LAW ON ARTICLE 34 TFEU HURLTLING IN A NEW DIRECTION?

*Peter Oliver\**

## INTRODUCTION

From 1983 to 1986, I had the very good fortune to work as *référéndaire* (legal secretary or, in U.S. parlance, law clerk) to Gordon Slynn when he served as Advocate General (“AG”) at the European Court of Justice (“Court”). With hindsight, I have become aware that this period of my professional life was an even more formative experience than I realized at the time.

Gordon’s sound judicial good sense and foresight continue to be a major source of inspiration to me. In addition, among the many lessons which I hope to have learned from him was how to determine which points should, and which should not, be decided in a particular case. Although I have never acted in a judicial or quasi-judicial capacity, these lessons have served me in good stead, not least when appearing before the Court in cases in which the European Commission (“Commission”) is effectively acting as *amicus curiae*. I shall return to these points later.

Before I embark on my topic, it is as well to recall that the Treaty of Lisbon came into force on December 1, 2009.<sup>1</sup> This new treaty has not had a major effect on the area of law covered by this Article: it has simply renumbered the provisions in issue and effected some minor textual changes without in any way

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1. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1. A consolidated version of the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”), incorporating the Treaty of Lisbon, was published in 2010 O.J. C 83/13 [hereinafter TEU post-Lisbon], and 2010 O.J. C 83/47, respectively [hereinafter TFEU].

altering their substance.<sup>2</sup> However, it has brought an end to the European Community, which merged into the European Union (“EU”).<sup>3</sup> At the same time, the former Treaty Establishing the European Community (“EC Treaty”) has now become the Treaty on the Functioning of the European Union (“TFEU” or “Treaty”).

The provision which is the focus of this Article is article 34 TFEU (formerly article 28 EC). It reads: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”<sup>4</sup> The counterpart to this provision is article 35 TFEU (article 29 EC), which prohibits quantitative restrictions and measures of equivalent effect on exports.<sup>5</sup> Not every measure caught by articles 34 or 35 is necessarily unlawful: article 36 TFEU (article 30 EC) contains an exception to both provisions, since it permits Member States to maintain or introduce such measures if they are justified on various public interest grounds, including public health.<sup>6</sup> The substance of these provisions has remained unchanged since the Treaty of Rome establishing the European Economic Community first came into force at the start of 1958.<sup>7</sup>

The concept of quantitative restrictions on imports under article 34 TFEU is very narrow and raises no difficulties. As the Court held in *Geddo*, “the prohibition on quantitative restrictions

2. The consolidated version of the two Treaties prior to the accession of Bulgaria and Romania and to the Treaty of Lisbon was published in 2006 O.J. C 321 E/5. The consolidated version of the treaties as they stand now *supra* note 2, contains a table of equivalences between pre-Lisbon and post-Lisbon numberings. See 2010 O.J. C 83/361.

3. TEU post-Lisbon, *supra* note 1, art. 1, 2010 O.J. C 83, at 16.

4. TFEU, *supra* note 1, art. 34, 2010 O.J. C 83, at 61.

5. *Id.* art. 35, 2010 O.J. C 83, at 61. This provision will only be mentioned in passing here. Suffice it to say at this juncture that it has been consistently construed far more narrowly than article 34. See *Consorzio del Prosciutto di Parma v. Asda*, Case C-108/01, [2003] E.C.R. I-5121, ¶¶ 74–81; *Belgium v. Spain*, Case C-388/95, [2000] E.C.R. I-3123, ¶¶ 73–78; *Oebel*, Case 155/80, [1981] E.C.R. 1993, ¶¶ 15–16; *P.B. Groenveld BV v. Produktschap voor Vees en Vlees*, Case 15/79, [1979] E.C.R. 3409, ¶ 9; see also *FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION* ¶¶ 6.95FF, 7.113FF (Peter Oliver ed., Hart Publ'g, 5th ed. 2010); Alexandre Defossez, *L'article 29 TCE. Histoire d'une Divergence et d'une Possible Réconciliation* [Article 29 TCE: History of Conflict and a Possible Reconciliation], 45 *CAHIERS DE DROIT EUROPÉEN* 409 (2009) (Fr.).

6. TFEU, *supra* note 1, art. 36, 2010 O.J. C 83, at 61. It is always essential to proceed in two stages: only if a measure is found to fall within articles 34 or 35 TFEU is it necessary to consider whether it is justified under article 36.

7. Treaty Establishing the European Economic Community arts. 30–31, Mar. 25, 1957, 298 U.N.T.S. 11.

covers measures which amount to a total or partial restriction of . . . imports . . .”<sup>8</sup> In contrast, the concept of measures of equivalent effect has been the subject of major controversy since the very beginning.

This Article focuses on an analysis of two recent judgments on this important issue delivered by the Court in 2009, namely the *Trailers* decision<sup>9</sup> and the *Mickelsson* decision.<sup>10</sup> Before reaching these judgments, we must first discuss very briefly the relationship between the four freedoms, and then, as to the scope of article 34, remind the reader of what in the jargon of soap operas is known as “the story so far.” This story falls neatly into three parts, each beginning with a seminal judgment: *Dassonville*,<sup>11</sup> *Cassis de Dijon*,<sup>12</sup> and *Keck*.<sup>13</sup> For good measure, we shall also consider the principles governing justification under article 36.

### I. FOUR FREEDOMS: CAN THERE BE A UNITARY APPROACH?

Since the early 1990s, a vast body of literature has been published on the idea that a unitary approach should be followed in relation to all the four freedoms (free movement of goods, persons, services, and capital).<sup>14</sup> Manifestly, unnecessary divergences should not be allowed to develop between the

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8. *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865, ¶ 16.

9. *Commission v. Italy (Trailers)*, Case C-110/05 [2009] E.C.R. I-519.

10. *Åklagaren v. Mickelsson*, Case C-142/05 [2009] E.C.R. I-4273).

11. *Procureur du Roi v. Benoît (Dassonville)*, Case 8/74, [1974] E.C.R. 837.

12. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, [1979] E.C.R. 649.

13. *Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097.

14. See, e.g., SONJA FEIDEN, DIE BEDEUTUNG DER “KECK”—RECHTSPRECHUNG IM SYSTEM DER GRUNDFREIHEITEN [THE MEANING OF “KECK”—IN THE SYSTEM OF FUNDAMENTAL LAW] 121 (2003) (F.R.G.); JUKKA SNELL, GOODS AND SERVICES IN EC LAW: A STUDY OF THE RELATIONSHIP BETWEEN THE FREEDOMS (2002); Catherine Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw?*, 26 EUR. L. REV. 35 (2001); David O’Keeffe & Antonio Bavasso, *Four Freedoms, One Market and National Competence: In Search of a Dividing Line*, in 1 LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY, JUDICIAL REVIEW IN EUROPEAN UNION LAW 541 (David O’Keeffe ed., 2000); Peter Oliver, *Goods and Services: Two Freedoms Compared*, in 2 MÉLANGES EN L’HONNEUR DE MICHEL WÆLBROECK 1377 (Mariane Dony & Aline de Walsche eds., 1999); D. Martin, *Discriminations, Entraves et Raisons impérieuses dans le Traité CE: Trois Concepts en Quête D’Identité Ière Partie [Discrimination, Barriers and Compelling Reasons in the EC Treaty: Three Concepts in Search of Identity Part I]*, 34 CAHIERS DE DROIT EUROPÉEN 261 (1998) (Fr.).

principles governing the various freedoms: they form part of a coherent whole and serve the same end; namely, the creation of the single market.<sup>15</sup> At the same time, certain differences between the freedoms are inherent in life and in the treaty.

For a start, natural persons are not mere economic units and must be treated with dignity and proper regard for their families and feelings. Consequently, the individual's right to live and work in the country of his choice and not be separated from his immediate family cannot be treated on a par with purely economic transactions.<sup>16</sup> Besides, restrictions on imports of goods may take a very wide variety of forms: apart from those which take effect at the border, they may be restrictions on sale, "selling arrangements," use, possession, advertising and promotion, and so forth.<sup>17</sup> The range of restrictions on the other freedoms, especially the free movement of natural persons, is more limited. Consequently, the scope of article 34 has given rise to greater difficulty than that of the corresponding provisions relating to the other freedoms. Second, certain key differences between the freedoms are spelled out unequivocally in the Treaty.<sup>18</sup> Clearly,

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15. *See, e.g.*, *Staatssecretaris van Financiën v. Verkooijen*, Case C-35/98 [2000] E.C.R. I-4071 (a case on free movement of capital where the European Court of Justice ("Court") based its reasoning on the case law relating to other freedoms); *Futura Participations SA v. Administration des Contributions*, Case C-250/95, [1997] E.C.R. I-2471 (a case on establishment where the same occurred). The analogy between goods and services is particularly close; in *Canal Satélite Digital SL v. Administración General del Estado*, Case C-390/99, [2002] E.C.R. I-607, the Court even chose not to decide whether the measure in issue constituted a restriction on goods or services.

16. The Treaty of Maastricht played a key role in raising the status of the free movement of natural persons, in particular by the insertion into the Treaty Establishing the European Community ("EC Treaty") of a series of provisions on citizenship of the Union (now article 20 TFEU (formerly article 17 EC)). *See* Treaty on European Union art. G(C), Jul. 29. 1992, 1992 O.J. C 191/1, at 7. At the same time, it transformed the European Economic Community into the European Community, thereby underlining in the clearest possible terms that the organization was no longer purely economic in nature. *Id.* art. G(A), 1992 O.J. C 191, at 5.

17. In addition, restrictions on exports under article 35 may take the form of restrictions on production. *See* TFEU, *supra* note 1, art. 35, 2010 O.J. C 83, at 61.

18. For example, whereas nationality plays no part in the free movement of goods, only nationals of Member States are entitled to provide services pursuant to article 56 TFEU. *See* TFEU, *supra* note 1, art. 56, 2010 O.J. C 83, at 70. Also, unlike its counterparts in the other three freedoms, article 63 TFEU is not confined to transactions within the internal market but extends to capital transactions with third countries; this is subject to article 75 TFEU (formerly article 60 EC). *Id.* art. 63, 2010 O.J. C 83, at 71.

then, any suggestion that the four freedoms have merged into a single concept would be untenable.<sup>19</sup>

## II. THE STORY SO FAR

### A. Scope of Article 34 TFEU

#### 1. *Dassonville*

The judgment in *Dassonville* was the first ever delivered on article 34 TFEU (article 28 EC). In that ruling, the Court set out the following definition of measures of equivalent effect to quantitative restrictions on imports: “All 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 equivalent effect to quantitative restrictions.”<sup>20</sup> Hundreds of cases have been decided on this area of the law in the meantime, and in virtually every one this formula has been reproduced, albeit with certain variations;<sup>21</sup> the word “trading” is generally omitted today.

The striking feature of the *Dassonville* formula is its breadth.<sup>22</sup> In particular, it is not necessary to show that a measure actually restricts imports, but only that it potentially does so;<sup>23</sup> a measure which restricts imports only indirectly also falls within this definition. Consequently, it is inappropriate to consider

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19. Authority for this self-evident proposition may be found in the opinion of Advocate General Tizzano, *Commission v. United Kingdom*, Case 30/01 [2003] E.C.R. I-9481, ¶ 70. Moreover, there is evidence that the idea of a unitary approach to all four freedoms may hold less attraction for the Court than it might once have done. See Judge Rosas, *Dassonville and Cassis de Dijon*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 730* (Miguel Poaires Maduro & Loic Azoulai eds., 2010).

20. *Dassonville*, Case 8/74, [1974] E.C.R. 837, ¶ 5.

21. For instance, the Court has been known to speak of “a direct or indirect, real or potential hindrance to imports between Member States.” *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer*, Case 4/75 [1975] E.C.R. 843, ¶ 3. Quite exceptionally, the *Dassonville* formula does not appear in *Mickelsson. Compare Dassonville*, [1974] E.C.R. 837 with *Åklagaren v. Mickelsson*, Case C-142/05, [2009] E.C.R. I-4273.

22. Nevertheless, restrictions governed by other provisions of the treaty fall outside article 34. See *De Danske Bilimportører v. Skatteministeriet, Told-og Skattestyrelsen*, Case C-383/01, [2003] E.C.R. I-6065; *Iannelli v. Meroni*, Case 74/76, [1977] E.C.R. 557; *Fink-Frucht v. Hauptzollamt München*, Case 27/67, [1968] E.C.R. 223.

23. For an especially clear illustration of this principle, see *Commission v. France*, Case C-184/96, [1998] E.C.R. I-6197, ¶ 17.

statistical evidence as to the volume of imports of products subject to the national measure in question: even if imports have actually increased since the measure was introduced, they might have increased more in the absence of such a measure.<sup>24</sup> In other words, the Court considers the nature of the measure in question without regard to any economic analysis. However, the Court has been known to rely on clear evidence that the introduction of a measure has caused a dramatic reduction of imports.<sup>25</sup>

Another obvious characteristic of the *Dassonville* formula is that it refers exclusively to the effects of a measure, not its purpose. That is scarcely surprising; as Picod has pointed out, article 34 speaks of “measures of equivalent effect” to quantitative restrictions, not “measures of equivalent purpose” to quantitative restrictions!<sup>26</sup> The overwhelming thrust of the subsequent case law confirms this. Although the Court has occasionally referred to the purpose of a measure in this context,<sup>27</sup> it is doubtful if there is a single instance of the Court finding a measure to constitute a measure of equivalent effect on the basis of its purpose alone, without reference to its effects.

Within the confines of this Article, it is not possible to give anything approaching a full picture of the variety of measures that have been held to constitute measures of equivalent effect following the *Dassonville* formula. Suffice it to say that they include the following: import licenses,<sup>28</sup> import inspections,<sup>29</sup>

24. See *Commission v. Germany*, Case C-463/01, [2004] E.C.R. 11,705, ¶ 65; *Konsumentombudsmannen v. Gourmet Int'l Products AB*, Case C-405/98, [2001] E.C.R. I-1795, ¶ 22; *Commission v. Ireland*, Case 249/81, [1982] E.C.R. 4005, ¶¶ 22, 25.

25. *Commission v. Greece*, Case C-65/05, [2006] E.C.R. I-10,341, ¶ 30.

26. Frabrice Picod, *La Nouvelle Approche de la Cour de Justice en Matière d'Entraves aux Échanges* [*The New Approach of the Court of Justice in Matters of Barriers to Trade*], 34 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 169, 186–87 (1998) (Fr.).

27. See *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519; *Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, ¶¶ 12, 14; *Cinéthèque SA v. Fédération Nationale des Cinémas Français*, Joined Cases 60–61/84, [1985] E.C.R. 2605, ¶ 21. Moreover, the Court has defined measures of equivalent effect under article 35 as those which have the “object or effect” of restricting patterns of exports. See *supra* note 5.

28. See *Donckerwolcke v. Procureur de la République*, Case 41/76, [1976] E.C.R. 1921; *Int'l Fruit Co. v. Produktschap voor Groenten en Fruit*, Joined Cases 51–54/71, [1971] E.C.R. 1107.

29. See *Simmenthal SpA v. Ministero delle Finanze Italiano*, Case 35/76, [1976] E.C.R. 1871; *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer*, Case 4/75, [1975] E.C.R. 843.

marketing authorizations,<sup>30</sup> prohibitions on sale,<sup>31</sup> the unwarranted reservation to certain goods of generic names,<sup>32</sup> or indications of origin,<sup>33</sup> labeling requirements,<sup>34</sup> discrimination in the award of public contracts,<sup>35</sup> and certain price controls;<sup>36</sup> the list is almost endless. Where a measure is intended to restrict imports, that is no more than an indication that the measure has such an effect.<sup>37</sup>

Just how wide the scope of article 34 is can be seen from the ruling in the *Foie Gras* case.<sup>38</sup> In that case, the Commission alleged that France had infringed that provision by laying down standards for goods sold under the trade description “foie gras.”<sup>39</sup> The defendant argued that the infringement was purely hypothetical and theoretical, since this product was only produced in very small quantities in other Member States, those Member States had no specific requirements of their own, and products from those Member States generally complied with the French standards in any event.<sup>40</sup> The Court dismissed this

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30. See *Commission v. France*, Case C-122/03, [2003] E.C.R. I-15,093.

31. See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, [1979] E.C.R. 649; see also *Gilli & Andres*, Case 788/79, [1980] E.C.R. 2071.

32. See *Commission v. Federal Republic of Germany*, Case 178/84, [1987] E.C.R. 1227.

33. See *Commission v. France*, Case C-6/02, [2003] E.C.R. I-2389; *Pistre, Barthes, Milhau, & Oberti*, Joined Cases C-321–24/94, [1997] E.C.R. I-2343; *Prantl*, Case 16/83, [1984] E.C.R. 1299; *Commission v. Federal Republic of Germany*, Case 12/74, [1975] E.C.R. 181.

34. See *Verein gegen Unwesen im Handel und Gewerbe Koeln eV v. Mars GmbH*, Case C-470/93, [1995] E.C.R. I-1923; *Fietje*, Case 27/80, [1980] E.C.R. 3839.

35. See *Commission v. Netherlands*, Case C-359/93, [1995] E.C.R. I-157; *Commission v. Denmark*, Case C-243/89, [1993] E.C.R. I-3353; *Commission v. Ireland*, Case 45/87, [1988] E.C.R. 4929.

36. See *Roussel v. Netherlands*, Case 181/82, [1983] E.C.R. 3849; *Netherlands v. van Tiggele*, Case 82/77, [1978] E.C.R. 25; *SA G.B.-Inno-B.M. v. Ass'n des Détaillants en Tabac (ATAB)*, Case 13/77, [1977] E.C.R. 2115.

37. Opinion of Advocate General van Gerven, *Tankstation 't Heukske vof & J.B.E. Boermans*, Joined Cases C-401 & 402/92, [1994] E.C.R. I-2201, ¶ 22; see also *Picod*, *supra* note 26. In addition, the intention of the author of a measure may be evidence that it is not justified under article 36.

38. *Commission v. France (Foie Gras)*, Case C-184/96, [1998] E.C.R. I-6197; see also A. Mattera, *L'arrêt "Foie Gras" du 22 Octobre 1998: Porteur d'une Nouvelle Impulsion pour le Perfectionnement du Marché Unique Européen [The "Foie Gras" Ruling of October 22, 1998: Bearing a New Impetus for the Development of a Single European Market]*, 4 REVUE DU MARCHÉ UNIQUE EUROPEEN 113 (1998) (Fr.).

39. *Foie Gras*, [1998] E.C.R. I-6197, ¶¶ 8–9.

40. *Id.* ¶¶ 14–15.

argument in the following terms: “Article [34 TFEU] applies . . . not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State.”<sup>41</sup>

Equally, it is inherent in the *Dassonville* formula that some measures do not constitute even potential or indirect hindrances to imports and thus fall outside the *Dassonville* formula altogether. Thus, in a handful of cases—and only a handful—the Court has held that measures fell outside article 34 on the grounds that the possibility of their effecting imports was “too uncertain and indirect.”<sup>42</sup> In effect, this is a rule of remoteness. In some of these cases, the parties’ reliance on article 34 was merely fanciful. For instance, in *Peralta*,<sup>43</sup> perhaps the best known of this line of cases, the captain of a ship, accused of dumping harmful chemical substances at sea contrary to Italian legislation, argued that the legislation was in breach of article 34 since it restricted imports of those substances into Italy. Moreover, few would question the Court’s assessment in *DIP*<sup>44</sup> that urban planning laws restricting the opening of new shops in town centers have an impact on imports too uncertain and indirect to constitute measures of equivalent effect.<sup>45</sup> Whether such a measure has any impact on imports at all is dependent on a variety of imponderables: the same shops might open at other locations, which might even attract more custom; and, even if the shops had been authorized in the city center, they might simply

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41. *Id.* ¶ 17 (citation omitted).

42. *See* *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del porto de Genova Coop. arl*, Case C-266/96, [1998] E.C.R. I-3949, ¶ 31; *Esso Española SA v. Comunidad Autónoma de Canarias*, Case C-134/94, [1995] E.C.R. I-4223, ¶ 3; *DIP SpA v. Comune di Bassano del Grappa*, Joined Cases C-140–42/94, [1995] E.C.R. I-3257, ¶ 29; *Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl*, Case C-96/94, [1995] E.C.R. I-2883, ¶ 41; *Peralta*, Case C-379/92, [1994] E.C.R. I-3453, ¶ 24.

43. *Peralta*, [1994] E.C.R. I-3453.

44. *DIP*, [1995] E.C.R. I-3257.

45. The same principle has been applied to article 35 TFEU (article 29 EC). *See* *ED Srl v. Fenocchio*, Case C-412/97, [1999] E.C.R. I-3845, ¶ 11. This remoteness test has also been applied under article 45 TFEU (article 39 EC) on the free movement of workers and article 56 TFEU (article 49 EC) on services. *See* *Viacom Outdoor Srl v. Giotto Immobilier SARL*, Case C-134/03 [2005] E.C.R. I-1167, ¶ 38 (discussing article 56 TFEU); *Graf v. Filzmoser Maschinenbau GmbH*, Case C-190/98, [2000] E.C.R. I-493, ¶¶ 24–25 (discussing article 45 TFEU).

have drained business away from competitors without increasing the overall quantity of imports sold.

Nevertheless, this line of case law is not free from difficulty, in view of its inherently subjective nature: as AG Kokott put it in *Mickelsson*, the criteria of “uncertainty and indirectness” are “difficult to clarify and thus do not contribute to legal certainty.”<sup>46</sup> Since article 34 has to be applied by national courts, legal certainty is of paramount importance. This principle should therefore be reserved for very clear cases.

Another important development occurred in *van de Haar*, where it was held that article 34 is not subject to a de minimis rule.<sup>47</sup> The Court has steadfastly adhered to this fundamental tenet ever since.<sup>48</sup> A clear illustration of this principle can be seen in the charming case of *Bluhme*.<sup>49</sup> The defendant was charged with infringing a ban on keeping nectar-gathering bees other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) on the tiny Danish island of Læsø and certain neighboring islands.<sup>50</sup> The alleged purpose of this prohibition, which was imposed by the Danish Minister of Agriculture, was to protect this particular strain of bee from extinction on these islands.<sup>51</sup> One of the arguments advanced by Denmark was that the decree fell outside article 34 as being de minimis, since it covered only 0.3 percent of Danish territory.<sup>52</sup> Citing *Van de Haar*, AG Fennelly rejected that argument on the grounds that “the slight effect of the Decision, in volume terms, cannot, in itself, prevent the application of Article [34 TFEU] of the Treaty.”<sup>53</sup> The Court

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46. Opinion of Advocate General Kokott, *Åklagaren v. Mickelsson*, Case C-142/05, [2009] E.C.R. I-4273, ¶ 46.

47. *van de Haar & Kaveka de Meern BV*, Joined Cases 177–78/82, [1984] E.C.R. 1797, ¶¶ 13–14.

48. See *Radlberger Getränkegesellschaft mbH v. Land Baden-Württemberg*, Case C-309/02, [2004] E.C.R. I-11,763, ¶ 68 (regarding consumer goods in recoverable packaging); *Commission v. France*, Case C-166/03, [2004] E.C.R. I-6535, ¶ 15 (regarding precious metals); *Commission v. Italy*, Case 103/84, [1986] E.C.R. 1759, ¶ 18 (regarding subsidies for the purchase of national vehicles); *Commission v. France*, Case 269/83, [1985] E.C.R. 837, ¶ 10 (regarding periodicals).

49. *Bluhme*, Case C-67/97, [1998] E.C.R. I-8033.

50. *Id.* ¶¶ 2, 6–8.

51. *Id.* ¶ 25.

52. *Id.* ¶ 16; Opinion of Advocate General Fennelly, *Bluhme*, [1988] E.C.R. I-8033, ¶ 10.

53. Opinion of Advocate General Fennelly, *Bluhme*, [1988] E.C.R. I-8033, ¶ 18 (citing *van de Haar*, [1984] E.C.R. 1797).

ruled to the same effect.<sup>54</sup> A rare suggestion that the Court should abandon its opposition to a de minimis rule came from AG Jacobs in *Leclerc-Siplec v. TFI Publicité*.<sup>55</sup> However, he proposed that overtly discriminatory measures should not be subject to a de minimis test, which should therefore be reserved for indistinctly applicable measures (*i.e.*, measures which do not discriminate against imports on their face).<sup>56</sup>

In *Schmidberger v. Austria*, AG Jacobs suggested that the remoteness test in *Peralta* is in effect a de minimis rule in disguise.<sup>57</sup> As he pointed out, it would seem out of the question for the Court to find that article 34 could ever be engaged where a Member State caused a brief traffic delay on a road occasionally used for transport between Member States.<sup>58</sup> Plainly, it is indisputable that in that instance, the rule of remoteness would cover the same ground as a de minimis rule: either test would lead the Court to exclude the measure from the scope of article 34. Yet that is not always the case: a measure may constitute an actual and direct restriction on a very small proportion of imports, as is clearly illustrated by *Bluhme*. The rule of remoteness, in contrast, relates to the intensity of the impediment to imports.

In any case, the crucial question at the heart of the controversy surrounding article 34 did not come before the Court until five years after *Dassonville*. The question was this: What role does discrimination play? Article 34 speaks of restrictions, not discrimination.

## 2. *Cassis de Dijon*

This question came to the fore in *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, universally known as “*Cassis de Dijon*” after the French black currant-based drink that

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54. *Bluhme*, [1988] E.C.R. I-8033, ¶ 19–20. For another clear illustration, see *Commission v. France*, Case C-212/03, [2005] E.C.R. I-4213, ¶¶ 15–16.

55. Opinion of Advocate General Jacobs, *Société d’Importation Edouard Leclerc-Siplec v. TFI Publicité SA*, Case C-412/93, [1995] E.C.R. I-179, ¶¶ 42–43.

56. *Id.*

57. Opinion of Advocate General Jacobs, *Schmidberger v. Austria*, Case C-112/00, [2003] E.C.R. I-5659, ¶ 65; *see also Peralta*, Case C-379/92, [1994] E.C.R. I-3453.

58. Opinion of Advocate General Jacobs, *Schmidberger*, [2003] E.C.R. I-5659, ¶ 65.

was in issue.<sup>59</sup> The plaintiffs, who sought to import this drink from France into Germany, contested the validity of a provision of German law requiring spirits to have a minimum alcohol content.<sup>60</sup> *Cassis de Dijon*, which in France had a content of between fifteen percent and twenty percent, fell into the category of products required to have twenty-five percent alcohol under the German provision.<sup>61</sup> The German court referred a question for a preliminary ruling on the compatibility of such a measure with article 34 TFEU.<sup>62</sup> Never before had the Court had occasion to rule on an indistinctly applicable measure. In a seminal judgment, the Court held that such measures could fall under this provision.<sup>63</sup> To underline the importance of this ruling, the Commission took the unusual step of issuing a Communication, setting out the consequences which it would have.<sup>64</sup>

Before long, a raft of judgments confirming *Cassis de Dijon* was delivered. The long series of indistinctly applicable measures subjected to the scrutiny of the Court included: an Italian prohibition on selling vinegar unless it was based on wine;<sup>65</sup> a Belgian requirement that margarine be sold in cubic packaging so as to distinguish it from butter;<sup>66</sup> a ban on the sale of products as “beer” unless they were made exclusively with the raw materials traditionally permitted in Germany;<sup>67</sup> and a French prohibition on the sale of substitute milk powder.<sup>68</sup> Each of these measures was held to constitute a measure of equivalent effect contrary to article 34.<sup>69</sup>

During this period, a widely held view—perhaps even the prevailing view—was that the concept of measures of equivalent effect did not depend on whether the measure discriminated

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59. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, [1979] E.C.R. 649.

60. *Id.* ¶ 4.

61. *Id.* ¶ 3.

62. *Id.* ¶ 6.

63. *Id.* ¶ 15.

64. See Commission Communication, 1980 O.J. C 256/2 (concerning the consequences of the judgment given by the European Court of Justice on February 20, 1979 in *Cassis de Dijon*).

65. *Gilli & Andres*, Case 788/79, [1980] E.C.R. 2071.

66. *Rau Lebensmittelwerke v. De Smedt PVBA*, Case 261/81, [1982] E.C.R. 3961.

67. *Commission v. Federal Republic of Germany*, Case 178/84, [1988] E.C.R. 1227.

68. *Commission v. France*, Case 216/84, [1988] E.C.R. 793.

69. This involved a finding in each case that the measure was not justified under article 36. This provision will be considered below.

against imports, but only on whether it restricted them.<sup>70</sup> Discrimination, it was argued, only came into play in the following ways: first, a measure which discriminated against imports constituted per se an actual or potential, direct or indirect restriction on them; second, a discriminatory measure was far less likely to be justified under article 36 TFEU.

However, that view was by no means universal: Marengo mounted an attack on the view that non-discriminatory measures might be caught by article 34.<sup>71</sup> In his view, discrimination was the very essence of measures of equivalent effect, although he defined discrimination fairly widely to cover “indistinctly applicable” measures which required manufacturers of other Member States to institute a special production for exports to the offending state. By this means he sought to bring the *Cassis de Dijon* line of cases within his theory.<sup>72</sup>

Of the many cases on which I worked with Gordon, I particularly recall *Cinéthèque SA v. Fédération Nationale des Cinémas Français*,<sup>73</sup> a case decided five years after *Cassis de Dijon*. The proceedings concerned an indistinctly applicable prohibition on the sale or rental of video cassettes of any film within one year of that film being authorized for showing in cinemas.<sup>74</sup> At that stage, I was still imbued with the idea that the scope of article 34 must be defined as widely as possible. After much soul-searching, Gordon informed me that he could not advocate that approach in this case. Instead, in his opinion, he asserted:

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70. See LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 262–63 (1985). I myself plead guilty to the charge of espousing this view at the time. PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EEC ¶ 6.46 (2d ed. 1988). However, de jure or de facto discrimination was clearly the determining criterion in relation to price controls. See, e.g., *supra* note 35 and accompanying text.

71. Giuliano Marengo, *Pour une Interprétation Traditionnelle de la Notion de Mesure D'Effet équivalent à une Restriction Quantitative* [For a Traditional Interpretation of the Measure of Equivalent Effect Concept to a Quantitative Restriction], 20 CAHIERS DE DROIT EUROPÉEN 291 (1984) (Fr.) (analyzing case law in discrimination terms).

72. *Id.* For a much attenuated form of this theory, see Lucette Defalque, *Le Concept de Discrimination en Matière de Libre Circulation des Marchandises*, 23 CAHIERS DU DROIT EUROPÉEN 471 (1987) (Fr.); Michel Waelbroeck, *Mesures D'effet Equivalent, Discrimination Formelle et Matérielle dans la Jurisprudence de la Cour de Justice* [Measures of Equivalent Effect, Formal Discrimination and Material in the European Court of Justice], in 2 LIBER AMICORUM FREDERIC DUMON 1329 (1983) (Fr.).

73. *Cinéthèque SA v. Fédération Nationale des Cinémas Français*, Joined Cases 60–61/84, [1985] E.C.R. 2605.

74. *Id.* ¶ 2.

[W]here a national measure is not specifically directed at imports, does not discriminate against imports, does not make it any more difficult for an importer to sell his products than it is for a domestic producer, and gives no protection to domestic producers, then in my view, *prima facie*, the measure does not fall within Article [34 TFEU] even if it does in fact lead to a restriction or reduction of imports.<sup>75</sup>

The Court, however, found that the measure fell within article 34. It accepted that the measure did “not have the purpose of regulating trade patterns”<sup>76</sup> and its effect was “not to favour national production as against the production of other Member States, but to encourage cinematographic production as such.”<sup>77</sup> Yet it found that the measure still fell foul of article 34.<sup>78</sup> This finding was of crucial importance, although the Court then proceeded to find that the measure was justified.<sup>79</sup>

Time was to prove—and this was no surprise—that Gordon had had considerably more foresight than I, or the Court for that matter! Shortly afterwards, the Court was flooded with references for preliminary rulings on national measures which had only a tenuous connection with imports.

The matter came to a head with a spate of cases relating to national restrictions on Sunday trading. The first of these cases was *Torfaen v. B&Q*, which concerned the statute then-in force in England and Wales.<sup>80</sup> This indistinctly applicable measure was quite far removed from imports and manifestly not targeted at them in any way. At the same time, B&Q furnished strong evidence that, by opening its shops on Sundays, it was able to increase its sales substantially: if the shops were closed on Sundays, the loss of sales on that day was not compensated by sales during the rest of the week. Since imports accounted for a significant percentage of turnover, it followed that the contested legislation had the effect of reducing imports.<sup>81</sup>

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75. Opinion of Advocate General Slynn, *Cinéthèque*, [1985] E.C.R. 2605.

76. *Cinéthèque*, [1985] E.C.R. 2605, ¶ 21. As mentioned, *supra* note 27, this is a rare instance of the Court referring to a purpose of a measure in this context.

77. *Cinéthèque*, [1985] E.C.R. 2605, ¶ 21.

78. *Id.* ¶ 22.

79. *Id.* ¶ 23.

80. *Torfaen Borough Council v. B & Q plc*, Case 145/88, [1989] E.C.R. 3851.

81. *Id.* ¶ 17.

After a very thorough review of the case law, AG van Gerven reached the conclusion that a restriction on Sunday trading did not constitute a measure of equivalent effect within the meaning of article 34 at all, unless it discriminated against imports in some way or “screened off” the domestic market.<sup>82</sup> For the concept of “screening off,” which was of an economic rather than a legal nature, he drew on ideas developed in relation to what is now article 101 TFEU (formerly article 81 EC). He urged the Court to have regard to “the entire legal and economic context.”<sup>83</sup> This approach would have involved a major break with the case law going right back to its inception with *Dassonville*. Under the test in that case, statistical information is irrelevant, whereas the AG proposed, in effect, that such information should be required.

More seriously, his approach would, it is submitted, have failed to “provide the courts with a clear and decisive guideline on which to base their judgments,” since it would have required them to have regard to “the entire legal and economic context.”<sup>84</sup> In short, this approach is not consonant with the principle of legal certainty. Indeed, to say that a measure of equivalent effect to a quantitative restriction on imports is a measure which “screens off” the domestic market from imports is merely a tautologous statement, not a definition which clarifies the concept. The Court declined to follow the Advocate General. Instead, it ruled that in principle this measure fell under article 34, but in such ambiguous terms as to create the utmost legal uncertainty. A surge of further cases on Sunday trading restrictions followed.<sup>85</sup>

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82. Opinion of Advocate General van Gerven, *Torfaen*, [1989] E.C.R. 3851.

83. *Id.*

84. Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?*, 28 COMMON MKT. L. REV. 115, 127 (1991). More recently, an approach markedly similar to that of Advocate General van Gerven in *Torfaen* was propounded by Wilsher. Daniel Wilsher, *Does “Keck” Discrimination Make Sense? An Assessment of the Non-Discrimination Principle Within the Single Market*, 33 EUR. L. REV. 3, 3 (2008). This author takes the World Trade Organization (“WTO”) as his model without recognizing that, unlike article 34, the provisions of the WTO do not have to be applied by domestic courts.

85. *See, e.g.*, Council of the City of Stoke-on-Trent v. B & Q plc, Case C-169/91, [1992] E.C.R. I-6635; *Marchandise*, Case C-332/89, [1991] E.C.R. I-1027; *Union Départementale des Syndicats CGT de l’Aisne v. SIDEF Conforama*, Case C-312/89, [1991] E.C.R. I-997.

### 3. *Keck* and its Aftermath

Four years after *Torfaen*, in its seminal judgment in *Keck & Mithouard*, the Court expressed its impatience with this highly unsatisfactory situation:

In view of the increasing tendency of traders to invoke Article [34 TFEU] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.<sup>86</sup>

The Court then proceeded to revolutionize the law relating to article 34 TFEU by adopting an approach first propounded by my colleague Eric White in an article published in 1989.<sup>87</sup> The key passage of the judgment reads:

It is established by the case-law beginning with “*Cassis de Dijon*” that, in the absence of harmonization of legislation, obstacles to free movement of goods where they are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article [34 TFEU]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

By contrast, 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, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same

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86. *Keck & Mithouard*, Joined Cases C-267–68/91, [1993] E.C.R. I-6097, ¶ 14. The reference to measures “aimed at products from other Member States” is a rare reference to the purpose of a measure. *Id.* ¶ 12; *see also supra* note 27 and accompanying text.

87. Eric White, *In Search of the Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235 (1989). The Commission first advanced this theory in *Torfaen*, but in that case its proposal fell on deaf ears. *See Torfaen*, [1989] E.C.R. 3851, ¶ 6.

manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Provided that 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 [34 TFEU].<sup>88</sup>

In paragraph 17, the Court made it clear that “access to the market” is the test underlying the entire approach set out in that judgment; as Barnard has put it, “the need to secure market access pervades the judgment.”<sup>89</sup> This can scarcely come as a surprise: as already pointed out, by definition restrictions on imports constitute barriers to access to the market of the Member State in question. At the same time, the Court appears to acknowledge that, in view of its nebulous nature, “access to the market” is not a sufficient criterion in itself and needs to be fleshed out by more specific rules such as those in paragraphs 15 and 16.

In any case, the ruling in *Keck* unleashed a torrent of comment<sup>90</sup> which was overwhelmingly hostile, albeit for a wide

88. *Keck & Mithouard*, [1993] E.C.R. I-6097, ¶¶ 15–17.

89. CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU—THE FOUR FREEDOMS*, 155 (2d ed. 2007).

90. The following is merely a small selection of the literature: Thomas Ackermann, *Warenverkehrsfreiheit und “Verkaufsmodalitäten”* [*Free Movement of Goods and “Selling Arrangements”*], 40 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 189 (1994) (F.R.G.); Jürgen Basedow, *Keck on the Facts*, 54 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 225 (1994) (F.R.G.); Laurence W. Gormley, *Reasoning Renounced? The Remarkable Judgment in Keck and Mithouard*, 5 *EUR. BUS. L. REV.* 63 (1994); Santiago Martínez-Lage, *Revisión Jurisprudencial Sobre la Libre Circulación de Mercancías* [*Review of Cases on the Free Movement of Goods*], *GACETA JURIDICA DE LA C.E. Y DE LA COMPETENCIA*, Dec. 1993, at 1–3 (Spain); Alfonso Mattera, *De L’arrêt ‘Dassonville’ à L’arrêt ‘Keck’: L’obscur Clarté d’une Jurisprudence Riche en Principes Novateurs et en Contradictions* [*From the ‘Dassonville’ Case to the ‘Keck’ Case: The Obscure Clarity of Cases Rich in Principles and Contradictions*], *REVUE DU MARCHÉ UNIQUE EUROPÉEN* 117 (1994) (Fr.); S. Moore, *Re-visiting the Limits of Article 30 EEC*, 19 *EUR. L. REV.* 195 (1994); Kamiel Mortelmans, *Case Note*, 442 *SOCIAAL-ECONOMISCHE WETGEVING* 115, 115 (1994); Picod, *supra* note 26, at 169; Norbert Reich, *The “November Revolution” of the European Court of Justice: Keck, Meng and Audi Revisited*, 31 *COMMON MKT. L. REV.* 459 (1994); Jules Stuyck, *Case Note*, 35 *CAHIERS DU DROIT EUROPÉEN* 435 (1994) (Fr.); Mario Todino & Tilman Lüder, *La Jurisprudence Keck en Matière de Publicité: Vers un Marché Unique Inachevé?* [*The Keck Case on Advertising Material: Towards a Single Market Incomplete?*], 1 *REVUE DU MARCHÉ UNIQUE EUROPÉEN* 171 (1995) (Fr.); Richard Wainwright & Virginia Melgar, *Bilan de l’Article 30 Après Vingt ans de*

variety of reasons. This has persisted into the twenty-first century.<sup>91</sup> No doubt, this hostility is due in part to a defect from which the ruling has suffered since birth: its drafting leaves a good deal to be desired.<sup>92</sup> First, the concept of restrictions on selling arrangements, which the Court did not even attempt to define, was woefully unclear. Second, what was meant by “certain” selling arrangements? Were some restrictions on selling arrangements not governed by the principle set out in paragraph 16? Third, were the rules in paragraphs 15 and 16 mutually exclusive? Finally, what of the various residual measures which did not fall within either paragraph?

On the other hand, the category of measures covered by paragraph 15 of the judgment (generally referred to as “product-bound measures”) was reasonably certain from the outset, since the Court took the trouble to set out a non-exhaustive list. Moreover, it was clear that, as regards this class of restriction, the *Cassis de Dijon* approach lived on.

What is more, the subsequent case law clarified a number of the areas of doubt mentioned above. For instance, it soon became plain that the two categories of measure are mutually exclusive. Similarly, it became clear that the category of measures relating to selling arrangements referred to in paragraph 16 of the ruling in *Keck* covered the following: restrictions on when

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*Jurisprudence: de Dassonville à Keck et Mithouard* [Review of Article 30 After Twenty Years of Jurisprudence: From Dassonville to Keck and Mithouard], 381 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 533, 533 (1994) (Fr.); Stephen Weatherill, *After Keck Some Thoughts on How to Clarify the Clarification*, 33 COMMON MKT. L. REV. 885 (1996).

91. Claus D. Classen, *Die Grundfreiheiten im Spannungsfeld von Europäischer Marktfreiheit und Mitgliedstaatlichen Regelungskompetenzen* [The Fundamental Freedoms in Conflict with the European Free Market and the Member States' Regulatory Powers], 2004 EUROPA UND RECHT 416 (F.R.G.); Laurence W. Gormley, *Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods*, 31 FORDHAM INT'L L.J. 1637 (2008) [hereinafter Gormley, *Silver Threads*]; Laurence W. Gormley, *The Definition of Measures Having Equivalent Effect*, in CONTINUITY AND EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 189 (2007) [hereinafter Gormley, *The Definition of Measures*]; Franz Mayer, *Die Warenverkehrsfreiheit im Europarecht – eine Rekonstruktion* [The Free Movement of Goods in Europe – A Reconstruction], 38 EUROPA UND RECHT 793 (2003); Peter-Christian Müller-Graff, *Commentary on Article 28 EC*, in 1 VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 1045 (H. von der Groeben & Schwarze eds., 6th ed. 2003) (F.R.G.).

92. Even a member of the Court conceded this. See Judge Joliet, *La libre Circulation des Marchandises: L'arrêt Keck et Mithouard dans les Nouvelles Orientations de la Jurisprudence* [The Free Movement of Goods: The Keck and Mithouard Case on the New Direction in Jurisprudence], in JOURNAL DES TRIBUNAUX—DROIT EUROPÉEN 145 (1994) (Fr.).

goods may be sold;<sup>93</sup> restrictions on where or by whom goods may be sold;<sup>94</sup> price controls;<sup>95</sup> and advertising restrictions.<sup>96</sup> However, as explained below, the latter appear to be *sui generis*.

Measures which subject the marketing of products to the requirement to obtain a prior authorization are not selling arrangements. In *Canal Satélite Digital v. Spain*, it was held that this was due to “the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed.”<sup>97</sup> In any case, such schemes can lead to delays, and they confer discretion on the public authorities concerned and thus entail a risk of arbitrary action.

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93. See *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco*, Joined Cases C-418–21, 460–64/93, 9–15, 23–24, 332/94, [1996] E.C.R. I-2975; *Tankstation ‘t Heukske vof & J.B.E. Boermans*, Joined Cases C-401–02/92, [1994] E.C.R. I-2199; *Punto Casa SpA v. Sindaco del Comune di Capena*, Joined Cases C-69 & 258/93, [1994] E.C.R. I-2355.

94. See *Deutscher Apothekerverband eV v. 0800 DocMorris NV*, Case C-322/01 [2003] E.C.R. I-14,887; *Schutzverband Gegen Unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH*, Case C-254/98, [2000] E.C.R. I-151; *Commission v. Greece*, Case C-391/92, [1995] E.C.R. I-1621.

95. See *Fachverband der Buch-und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, Case C-531/07 [2009] E.C.R. I-3717, ¶ 36 (holding that “[n]ational provisions, which prohibit importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication, cannot be justified under Articles 30 EC and 151 EC or by overriding requirements in the public interest”); *Groupement National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA*, Case C-63/94, [1995] E.C.R. I-2467, ¶ 15 (holding that article 30 of the EEC Treaty does not apply where a member state prohibits any sale which produces a very low profit margin by legislation). These were already subject to a discrimination test prior to *Keck*. See *supra* note 70 and accompanying text.

96. See *Konsumentombudsmannen v. Gourmet Int’l Products AB*, Case C-405/98, [2001] E.C.R. I-1795, ¶ 22 (holding that the EC Treaty does not preclude a prohibition on the advertising of alcoholic beverages); *Konsumentenombudsmannen v. De Agostini (Svenska) Förlag AB*, Joined Cases C-34–36/95, [1997] E.C.R. I-3843, ¶ 47 (holding that “a Member State is not precluded from taking . . . measures against an advertiser in relation to television advertising, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States”); *Société d’Importation Edouard Leclerc-Siplec v. TF1 Publicité SA*, Case C-412/93, [1995] E.C.R. I-179, ¶ 48 (holding that the EC Treaty does not “preclude Member States from prohibiting, by statute or by regulation, the broadcasting of advertisements for the distribution sector by television broadcasters established on their territory”); *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787, ¶ 24 (holding that “[a]rticle 30 of the EEC Treaty is to be interpreted as not applying to a rule of professional conduct, laid down by the pharmacists’ professional body in a Member State, which prohibits pharmacists from advertising quasi-pharmaceutical products outside the pharmacy”).

97. *Canal Satélite Digital SL v. Administración General del Estado*, Case C-390/99, [2002] E.C.R. I-607, ¶ 30; see also *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, Case C-244/06, [2008] E.C.R. I-505, ¶ 31.

In *Alfa Vita*,<sup>98</sup> the Court was confronted with a different kind of measure. The case concerned so-called “bake-off” products, that is, bread which is first half-baked, then frozen and transported to the point of sale (typically a supermarket), where it is thawed and the baking is completed.<sup>99</sup> The contested Greek legislation required vendors of such goods, whether domestic or imported, to comply with all the standards imposed on traditional bakeries, including the obligation to have a flour store, an area for kneading equipment, and a solid-fuel store.<sup>100</sup> The Court held that such a measure clearly aimed to “specify the production conditions for bakery products, including ‘bake-off’ products” and did not “take the specific nature of these products into account and [entailed] extra costs, thereby making the marketing of those products more difficult.”<sup>101</sup> Thus, it could not be regarded as a measure relating to a selling arrangement.<sup>102</sup> At first sight, this outcome might seem surprising: the Pavlovian reaction is to think that, because this legislation took effect at the point of sale, it must relate to a selling arrangement. In reality, as the Court pointed out, it directly affected the method of production of the goods concerned. Quite apart from that, the measure effectively defeated the purpose of selling “bake-off” products at all, and it was therefore tantamount to a ban on sale of this type of bread.

When any doubt exists as to whether a measure is “product-bound” or relates to a selling arrangement, the Court tends to incline towards the former.<sup>103</sup> This has not been formulated as a

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98. *Alfa Vita Vassilopoulos AE v. Dimosio*, Joined Cases C-158–59/04, [2006] E.C.R. I-8135.

99. *Id.* ¶ 19.

100. *Id.*

101. *Id.* ¶¶ 18, 19.

102. *Id.* ¶ 19.

103. See *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, [1997] E.C.R. I-3689 (relating to a prohibition on the sale of periodicals containing games or competitions for prizes; again this could have been categorized as a restriction on the content of the periodicals (a product-bound measure) or as a restriction on promotion (a “selling arrangement”)); *Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Mars GmbH*, Case C-470/93, [1995] E.C.R. I-1923 (concerning a prohibition on the sale of ice cream bars with wrapping papers bearing the symbols “+10%.” Theoretically, two alternative options were open to the Court: it could treat such a measure either as a labeling requirement (a product-bound measure) or as an advertising restriction (a “selling arrangement”). In both cases, the Court found that the measures in issue were to be regarded as product-bound.

principle, but it certainly appears to be the Court's practice. Having said that, at the risk of stating the obvious, the mere fact that a national provision refers to a specified category of goods—as it necessarily must, unless it applies to all goods—does not prevent it from constituting a rule relating to a selling arrangement.

As just mentioned, one significant point left open by the judgment in *Keck* was the fate of measures that are not product-bound and do not relate to selling arrangements (“residual measures”). Some of these residual measures, such as import licenses or controls and acts of discrimination in the award of public supply contracts, are discriminatory by their very nature. Other residual measures, such as marketing authorizations and restrictions on use, may be indistinctly applicable. Successive judgments have shown that these residual measures fall under article 34, regardless of whether they are discriminatory or not.<sup>104</sup>

Consequently, it would seem that the two categories of measure recognized by the court today are not the same as those referred to in *Keck*. In that judgment, a distinction was made between (i) product-bound measures and (ii) selling arrangements. Now, in contrast, the Court would seem to have acknowledged the need to accommodate residual measures, so that the categories appear to have been redefined as follows: (i) selling arrangements and (ii) all other measures.<sup>105</sup>

Even if a measure is found to relate to selling arrangements, it only falls outside article 34 if it passes the two-fold test set out in paragraph 16 of the judgment in *Keck*: (1) it must “apply to all relevant traders operating within the national territory”,<sup>106</sup> and (2) it must “affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”<sup>107</sup>

The Court has never explained the meaning of the first of these conditions, and it is hard—or, perhaps, impossible—to find

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104. On marketing authorization schemes, see generally *Dynamic Medien*, [2008] E.C.R. I-505, and *Canal Satélite Digital*, [2002] E.C.R. I-607. As to restrictions on use, see *Kemikalieinspektionen v. Toolex Alpha AB*, Case 473/98, [2000] E.C.R. I-5681, ¶¶ 34–49.

105. See Niels Fenger, *Article 28 EC and Restrictions on Use of a Legally Marketed Product*, 13 EUR. L. REP. 326, 331 (2009).

106. *Keck & Mithouard*, Joined Cases C-267–68/91, [1993] E.C.R. I-6097, ¶ 16.

107. *Id.*

a single case which has turned on it. Such rare attempts as have been made to clarify it have all portrayed it as being directed at discriminatory measures.<sup>108</sup> Since that is the function of the second condition, one is driven to the conclusion that the first condition is redundant.

As to the second condition, the concept of discrimination in law raises no difficulty: discrimination is plain on the face of the measure. In contrast, discrimination “in fact” is less straightforward. In *Commission v. Greece* (processed milk for infants), the Court pointed out that the concept of de facto discrimination ought not to depend on data which may vary over time, since otherwise a measure could constantly oscillate between falling within and outside article 34.<sup>109</sup> A good illustration of the Court’s interpretation of the concept of de facto discrimination may be seen in *Deutscher Apothekerverband*.<sup>110</sup> In that case, an indistinctly applicable ban on marketing pharmaceuticals over the internet in Germany was held to discriminate against imports: while German pharmacies were able to sell their products in their dispensaries, the internet provided a “more significant way” for those established in other Member States to gain direct access to that market.<sup>111</sup> It is hard to see how the Court could have held otherwise. Having said that, the Court must take care not to define the concept of de facto discrimination too broadly, otherwise the distinction between measures relating to selling arrangements and other restrictions is at risk of breaking down altogether. In that case the entire approach in *Keck* would be in tatters.

Although advertising is a selling arrangement, legislation relating to this activity is treated as a special case. This harks back to the highly influential insight of AG Jacobs in *Leclerc-Siplec*<sup>112</sup> as to the central importance of advertising for market integration.

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108. See Opinion of Advocate General van Gerven, Tankstation ‘t Heukske vof & J.B.E. Boermans, Joined Cases C-401–02/92, [1994] E.C.R. I-2201, ¶ 21; see also Opinion of Advocate General van Gerven, Punto Casa SpA v. Sindaco del Comune di Capena, Case C-69/93, [1994] E.C.R. I-2355, ¶¶ 8–9; see also Müller-Graff, *supra* note 91, at 1049.

109. *Commission v. Greece*, Case C-391/92, [1995] E.C.R. I-1621, ¶ 17.

110. *Deutscher Apothekerverband eV v. 0800 DocMorris NV*, Case C-322/01, [2003] E.C.R. I-14,887.

111. *Id.* ¶ 74; see also *Commission v. Germany*, Case C-141/07, [2008] E.C.R. I-6935, ¶¶ 34–45.

112. *Société d’Importation Edouard Leclerc-Siplec v. TFI Publicité SA*, Case C-412/93, [1995] E.C.R. I-179.

Since in general each product is little known outside its own Member State, he regarded advertising as crucial if traders are to penetrate other markets. Thus “measures that prohibit or severely restrict advertising tend inevitably to protect domestic manufacturers and to disadvantage manufacturers located in other Member States.”<sup>113</sup> As a result, it would seem that total bans on advertising constitute measures of equivalent effect, as they are considered to discriminate against imports per se.<sup>114</sup>

By clarifying these various points over a period of several years, the Court has taken some of the steam out of those hostile comments voiced by authors such as Mattera, Reich, and Stuyck<sup>115</sup> based on the lack of clarity of the ruling in *Keck*.<sup>116</sup> However, others have focused on the inconsistencies in the Court’s application of the distinction between product-bound restrictions and those relating to selling arrangements. The most notable example is AG Maduro in *Alfa Vita*.<sup>117</sup> Within the confines of this Article it is not possible to do justice to all the criticism of *Keck* and its progeny. Suffice it to concentrate on the two most authoritative assaults on this case law: the opinion of AG Jacobs in *Leclerc-Siplec*, and the much more recent opinion of AG Maduro in *Alfa Vita*.

In *Leclerc-Siplec*, AG Jacobs gave two reasons for finding the reasoning in *Keck* to be unsatisfactory: it was inappropriate to make such rigid distinctions between different categories of measure, since “the severity of the restriction imposed by different rules is merely one of degree”; and in any event a test based solely on discrimination was inappropriate, although

113. Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. I-179, ¶ 21.

114. *Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB*, Joined Cases C-34–35/95, [1997] E.C.R. I-3843, ¶ 42; *Konsumentombudsmannen v. Gourmet Int’l Products AB*, Case C-405/98, [2001] E.C.R. I-1795, ¶ 21.

115. *See supra* note 90.

116. Gormley acknowledges this in *The Definition of Measures*, *supra* note 91, at 198. The same author, while still critical of *Keck*, now considers that, in the light of the subsequent case law, that judgment must be regarded as effecting a less radical change in the Court’s approach than initially appeared. Gormley, *Silver Threads*, *supra* note 91.

117. Opinion of Advocate General Maduro, *Alfa Vita Vassilopoulos AE v. Dimosio*, Joined Cases C-158–59/04, [2006] E.C.R. I-8135, ¶ 27 (referring to *Verein gegen Unwesen im Handel und Gewerbe Köln eV v. Mars Gmb*, Case C-470/93, [1995] E.C.R. I-1923); *see also* *Keck & Mithouard*, Joined Cases C-267–68/91, [1993] E.C.R. I-6097, ¶ 15 (stating that packaging requirements are to be product-based measures). All the commentators hostile to *Keck* mentioned in this Article have focused on such inconsistencies in the case law.

discriminatory measures would necessarily fall within article 34.<sup>118</sup> While there is much force in these criticisms, the fact remains that he was unable to propose a more satisfactory test. His suggestion was that in all cases the test should be whether the measure constituted a substantial barrier to market access. Apart from the fact that this would introduce a *de minimis* test into article 34, the “barrier to market access” criterion is inherently nebulous. Admittedly, unlike AG van Gerven in *Torfaen*, he did not propose to have regard to economic data. Instead, he suggested that a series of factors (e.g., whether the measure applied to all goods and, in the case of selling arrangements, whether other marketing arrangements were available) should be taken into account.<sup>119</sup> It is submitted that this would still have caused problems of legal uncertainty. On one view, the “barrier to market access” test is merely a restatement of the *Dassonville* formula, and the experience, particularly with the Sunday trading cases, has shown that that formula does not suffice by itself.

It is true, as AG Jacobs pointed out, that some non-discriminatory measures relating to selling arrangements could be highly restrictive of imports and should therefore not escape article 34. In his article, White had expressly acknowledged this point.<sup>120</sup> He gave the example of a measure permitting the sale of cigarettes only on Christmas day; in his view, such a measure must be assimilated to a prohibition on sale.<sup>121</sup> Accordingly, this problem can be satisfactorily addressed without there being any need to abandon *Keck*. In any case, this solution should be reserved for extreme cases, and it is doubtful whether the Court has ever encountered such a case.

Relying on the *Leclerc-Siplec* opinion, in *Alfa Vita* AG Maduro proposed that the principles of *Keck* be thoroughly recast, but without jettisoning the distinction between product-bound measures and selling arrangements.<sup>122</sup> One of his aims was to

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118. See Opinion of Advocate General Jacobs, *Leclerc-Siplec*, [1995] E.C.R. I-179, ¶ 38.

119. Cf. Opinion of Advocate General van Gerven, *Torfaen Borough Council v. B & Q plc*, Case 145/88 [1989] ECR 3851, ¶ 23.

120. See White, *supra* note 87, at 258.

121. See *id.* at 258–59.

122. Opinion of Advocate General Maduro, *Alfa Vita*, [2006] E.C.R. I-8135, ¶¶ 31, 35.

bring the jurisprudence on the free movement of goods in line with that of the other three freedoms.<sup>123</sup> This required, according to AG Maduro, that Member States take into consideration the effects of their measures on all citizens of the EU who seek to exercise one of the freedoms under the Treaty.<sup>124</sup> The task of the Court in this context is to ensure that Member States do not treat situations straddling the border between each other less favorably than situations confined to a single Member State.

He then suggested three main criteria. First, any discrimination based on nationality, direct or indirect, must be prohibited.<sup>125</sup> Second, additional costs as a consequence of discrepancies between the Member States' legislation would not necessarily amount to a hindrance to one of the freedoms.<sup>126</sup> They could be regarded as such only if they resulted from the Member State's failure to take into consideration the specific situation of imports, in particular the fact that they have to comply with the requirements of their Member State of origin. Product requirements will therefore always amount to hindrances. Rules relating to selling arrangements will fall within this category only if they fail to take the specific situation of imports into consideration. Third, there will be a measure having equivalent effect to a quantitative restriction if a national provision more severely restricts market access and marketing of products from other Member States.<sup>127</sup> The measure will be a hindrance to market access if it protects the position of the incumbents or if it renders intra-EU trade more onerous than trade on the national market.<sup>128</sup>

Despite the force of this opinion, it is open to criticism on two grounds. First, it arguably attached excessive importance to the idea of a unitary approach to the four freedoms. For the reasons set out in Part II of this Article, this idea has its limits. Consequently, it is submitted, the Court should not abandon principles which are appropriate for article 34 merely because they are not suited to the corresponding provisions relating to the other three freedoms. Second, while the opinion expressed

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123. *Id.* ¶¶ 32, 37.

124. *Id.* ¶ 40.

125. *Id.* ¶ 43.

126. *Id.* ¶ 44.

127. *Id.* ¶ 45.

128. *Id.* ¶¶ 43–45.

dissatisfaction with the case law as it stood, it failed to provide a clear test to replace it.

My own view continues to be that the core of *Keck* is sound: measures relating to selling arrangements—as defined by the Court in subsequent judgments—are less harmful to imports than other restrictions since they do not impose additional costs on traders.<sup>129</sup> By their very nature, restrictions such as Sunday trading legislation, a requirement that spectacles be sold by opticians, or a requirement that baby food be sold exclusively in pharmacies tend to be less harmful than product-bound measures or the residual measures discussed earlier. Having said that, there are inevitably borderline cases, and the case law has not always been consistent. Without any doubt, given that more than fifteen years have passed and several hundred judgments have been delivered since the ruling in *Keck*, the time has come to clarify and streamline the relevant principles.

#### 4. Article 34 Confers No General Freedom to Trade

Before turning to the two judgments which are the focus of this Article, it is as well to recall what article 34 TFEU is *not*. As AG Tesouro robustly pointed out in *Hünernmund*, article 34 does not provide for a general freedom to trade or the right to the unhindered pursuit of one's commercial activities, but is aimed at restrictions on imports.<sup>130</sup> Recalling this statement, AG Maduro asserted in *Alfa Vita*:

Community nationals cannot draw from [article 34 TFEU] an absolute right to economic or commercial freedom. Indeed, the Treaty provisions relating to the free movement of goods aim to guarantee the opening-up of national markets, offering producers and consumers the possibility of fully enjoying the benefits of a Community internal market,

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129. For other authors who consider criticism of the judgment in *Keck* to be exaggerated, see Stefan Enchelmaier, *The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck*, 22 Y.B. EUR. L. 249 (2003), and Robert Kovar, *Dassonville, Keck et les Autres: de la Mesure Avant Toute Chose [Dassonville, Keck, and the Others: Measure Before All Things]*, 42 REVUE TRIMESTRIELLE DE DROIT EUROPEAN 213 (2006) (Fr.).

130. Opinion of Advocate General Tesouro, *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787, ¶¶ 1, 25–26.

and not to encourage a general deregulation of national economies.

....

[T]he task of the Court is not to call into question as a matter of course Member States' economic policies. It is instead responsible for satisfying itself that those States do not adopt measures which, in actual fact, lead to *cross-border situations being treated less favourably than purely national situations*.<sup>131</sup>

In the same vein, in *Caixa Bank*, AG Tizzano rejected an argument relating to article 49 TFEU (formerly article 43 EC) on services, on the basis that it would be

tantamount to bending the Treaty to a purpose for which it was not intended: that is to say, not in order to create an internal market in which conditions are similar to those of a single market and where operators can move freely, but in order to establish a market without rules. Or rather, a market in which rules are prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest.<sup>132</sup>

These statements cannot be seriously contested. Amidst the uncertainties which currently beset this area of the law, this point is refreshingly free from controversy. Article 34 must on no account be confused with article 16 of the Charter of Fundamental Rights of the European Union, which provides: "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."<sup>133</sup>

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131. Opinion of Advocate General Maduro, *Alfa Vita*, Joined Cases C-158–59/04, [2006] E.C.R. I-8135 ¶¶ 37, 41.

132. *Caixa Bank France v. Ministère de l'Economie, del Finances et de l'Industrie*, Case C-442/02, [2004] E.C.R. I-8961, ¶ 63.

133. Charter of Fundamental Rights of the European Union art. 16, 2010 O.J. C 83/389, at 395 [hereinafter Charter of Fundamental Rights]. Article 6(1) TEU as amended by the Treaty of Lisbon renders the Charter binding with "the same value as the Treaties". See TEU post-Lisbon, *supra* note 1, art. 6(1), 2010 O.J. C 83, at 19; see also Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 661 (2008) (referring to the Constitutional Treaty that "proposed fully incorporating the Charter into the Union's primary law and conferring upon it binding legal status").

### B. *Justification Under Article 36*

Article 36 TFEU reads:

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.<sup>134</sup>

Since free movement of goods is an exception to a fundamental principle of the Treaty, and article 36 constitutes an exception to that principle, it is to be construed narrowly.<sup>135</sup> For the same reason, the party seeking to show that a measure falling within either article 34 TFEU or article 35 TFEU is justified bears the burden of proving that proposition.<sup>136</sup> To discharge this burden, it does not suffice for a party to show that a measure falls within one of the grounds of justification set out in article 36 TFEU. It must also demonstrate that no arbitrary discrimination or disguised discrimination on trade between Member States is involved. Most importantly of all, it must show that the measure is justified, that is, necessary and proportionate.

The principle of proportionality displays a Protean quality.<sup>137</sup> In its classic manifestation under article 36, a measure must be no more restrictive of imports or exports than is necessary to achieve its legitimate objective.<sup>138</sup> Yet the principle also takes

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134. TFEU, *supra* note 1, art. 36, 2010 O.J. C 83/1, at 61.

135. *See* Bauhuis v. Netherlands, Case 46/76, [1977] E.C.R. 5.

136. *Firma Denkavit Futtermittel GmbH v. Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, Case 251/78, [1979] E.C.R. 3369, ¶ 24. This ruling has been confirmed on countless occasions. *See, e.g.*, *Commission v. Portugal*, Case C-265/06, [2008] E.C.R. I-2245, ¶ 39 (concerning tinted windows); *Commission v. Belgium*, Case C-227/06, [2008] E.C.R. I-46, ¶¶ 62–63 (full text of case available only in French); *Commission v. Netherlands*, Case C-297/05, [2007] E.C.R. 7467, ¶ 76 (concerning vehicle identification); *Commission v. France*, Case C-24/00, [2004] E.C.R. I-1277, ¶ 53 (concerning nutrients).

137. *See generally* TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW*, 136–74 (2d ed. 2006).

138. *See* de Peijper, Case 104/75, [1976] E.C.R. 613, ¶¶ 16–18, *cited with approval in* *Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen*, Case 13/78, [1978] E.C.R. 1935, ¶

many other forms. Thus, if a measure contains an inconsistency, that will prevent it from being justified.<sup>139</sup> Furthermore, in *Hartlauer v. Wiener Landesregierung*, a case concerning establishment, the Court stated: “national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.”<sup>140</sup> Equally, in *Radlberger v. Land Baden-Württemberg*, legislation was held not to be consonant with the principle of proportionality on the grounds that traders were given insufficient time to adapt to it.<sup>141</sup> In *Mickelsson*, as we shall see, the principle of proportionality assumed yet another form.<sup>142</sup>

Since *Cassis de Dijon*, the Court has recognized a series of “mandatory requirements,” grounds of justification other than those expressly spelled out in article 36.<sup>143</sup> While the categories

30; *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, [1979] E.C.R. 649, ¶ 8; *Commission v. France*, Case C-212/03, [2005] E.C.R. I-4213, ¶ 43. Sometimes, the Court even identifies an alternative measure which would achieve the desired aim without affecting interstate trade to the same degree. For instance, a requirement that products be adequately labeled has often been held to constitute a suitable substitute for a sales ban or a ban on a particular designation. See *Cassis de Dijon*, [1979] E.C.R. 649, ¶ 13; see also *Guimont*, Case C-448/98, [2000] E.C.R. I-10,663, ¶¶ 31–34. For a more recent example, see *Commission v. Germany*, Case C-387/99, [2004] E.C.R. I-3751, ¶ 81 (concerning vitamins).

139. See *Corporación Dermoestética SA v. To Me Group Advertising Media*, Case C-500/06, [2008] E.C.R. I-5785, ¶ 39 (concerning the parallel provisions relating to establishment and services, respectively articles 54 TFEU (article 48 EC) and 62 TFEU (article 55 EC)).

140. *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung*, Case C-169/07, [2009] E.C.R. I-1721, ¶ 55; see also *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Case C-42/07, [2009] E.C.R. \_\_, ¶ 61, [2010] 1 C.M.L.R. 1 (relating to services).

141. *Radlberger Getränkegesellschaft mbH v. Land Baden-Württemberg*, Case C-309/02, [2004] E.C.R. I-11,763, ¶¶ 80–81; see also *Commission v. Austria*, Case C-320/03, [2005] E.C.R. I-9871, ¶ 90; *Commission v. Germany*, Case C-463/01, [2004] E.C.R. I-11,705, ¶¶ 79–80.

142. See discussion *infra* notes 239–40.

143. See, e.g., *Commission v. France*, Case C-84/00, [2001] E.C.R. I-4553, ¶ 20 (referencing “mandatory requirement of fairness of commercial transactions”). Occasionally, the Court uses other terms to designate mandatory requirements, such as “imperative requirements,” “overriding requirements of general public importance,” and “overriding requirement justifying a restriction on the free movement of goods.” *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519, ¶ 59 (referencing “imperative requirements”); *Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB*, Joined Cases, C-34–36/95, [1997] E.C.R. I-3843, ¶ 2 (discussing “overriding requirements of general public importance”); *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, [1997] E.C.R. I-3689, ¶

are not closed, the list of “mandatory requirements” recognized to date includes the prevention of tax evasion,<sup>144</sup> consumer protection,<sup>145</sup> the prevention of unfair competition,<sup>146</sup> the protection of the environment,<sup>147</sup> the improvement of working conditions,<sup>148</sup> the maintenance of press diversity,<sup>149</sup> and the protection of fundamental rights.<sup>150</sup> Although for many years the Court treated the “mandatory requirements” differently from the grounds of justification mentioned in article 36, today it appears to have tacitly reversed that position.<sup>151</sup>

### III. MICKELSSON AND TRAILERS

#### A. *The Facts*

*Commission v. Italy* (“*Trailers*”) concerned an indistinctly applicable prohibition in the Italian Highway Code on the towing of trailers by mopeds; this prohibition even applied to trailers specially designed to be towed by mopeds.<sup>152</sup> The Commission sought a ruling to the effect that this measure infringed article 34 TFEU. Owing to a quirk in the legislation, it applied only to mopeds registered in Italy, and those bearing number-plates from other countries were not subject to the ban. Although this

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18 (discussing an “overriding requirement justifying a restriction on the free movement of goods”).

144. See *Abbink*, Case 134/83, [1984] E.C.R. 4097; *Carciati*, Case 823/79, [1980] E.C.R. 2773.

145. See *De Groot en Slot Allium BV v Ministre de l'Économie, des Finances et de l'Industrie*, Case C-147/04, [2006] E.C.R. I-245; *Commission v. France*, Case C-166/03, [2004] E.C.R. I-6535; *Linhart & Biffl*, Case C-99/01, [2002] E.C.R. I-9375; *GB-INNO-BM v. Confédération du Commerce Luxembourgeois*, Case C-362/88, [1990] E.C.R. I-667.

146. See *Commission v. Germany*, Case C-51/94 [1995] E.C.R. I-3599; *BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV*, Case 6/81, [1982] E.C.R. 707.

147. See *Commission v. Austria*, Case C-320/03, [2003] E.C.R. I-7929; *PreussenElektra AG v. Schleswag AG*, Case C-379/98, [2001] E.C.R. I-2099; *Aher-Waggon v. Germany*, Case C-389/96, [1998] E.C.R. I-4473; *Commission v. Belgium*, Case C-2/90, [1992] E.C.R. I-4431; *Commission v. Denmark*, Case 302/86, [1988] E.C.R. 4607.

148. See *Oebel*, Case 155/80, [1981] E.C.R. 3147.

149. See *Familiapress*, [1997] E.C.R. I-3689.

150. See *Schmidberger v. Australia*, Case C-112/00, [2003] E.C.R. I-5659.

151. Peter Oliver & Stephen Enchelmaier, *Free Movement of Goods: Recent Developments in the Case Law*, 44 COMMON MKT. L. REV. 649, 689 (2007).

152. *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519, ¶¶ 1, 6–9.

anomaly was mentioned in passing,<sup>153</sup> it played no direct part in the proceedings.

The facts of *Mickelsson*<sup>154</sup> were that Sweden had enacted an indistinctly applicable ban on the use of “personal watercraft.” These devices, a form of motorized raft familiarly known as jet skis, were the subject of considerable controversy in Sweden, given that they are widely considered to be dangerous for wildlife and the environment.<sup>155</sup> The ban did not apply to generally navigable waterways or to other waters designated by local authorities according to criteria laid down in the statute.<sup>156</sup> The defendants in the main proceedings were prosecuted for infringing the prohibition.<sup>157</sup> The alleged offense occurred only a few weeks after the adoption of the contested legislation, when no local authority had yet approved any waters for the use of jet skis.<sup>158</sup> Consequently, at the material time they were subject to a total ban outside generally navigable waters. The Swedish court hearing the case made a reference for a preliminary ruling asking whether such legislation was compatible with article 34.<sup>159</sup>

For reasons which will soon become evident, it is necessary to consider these cases, which were initially referred to two different five-judge Chambers, together. They will be treated in chronological order, episode by episode.

#### B. *October 2006: The First AG’s Opinion in Trailers*

The first episode occurred in October 2006 with the delivery of AG Léger’s opinion in the *Trailers* case.<sup>160</sup> The case had been regarded as so unimportant that no hearing had been held.<sup>161</sup> In

153. Opinion of Advocate General Léger, *Trailers*, [2009] E.C.R. I-519, ¶ 58; Opinion of Advocate General Bot, *Trailers* [2009] E.C.R. I-519, ¶ 142.

154. Åklagaren v. Mickelsson, Case C-142/05, [2009] E.C.R. I-4273.

155. *Id.* ¶ 3.

156. *Id.* ¶¶ 10–13.

157. *Id.* ¶ 14.

158. *Id.* ¶ 25.

159. *Id.* ¶ 16–23. The reference also contained a question on Council Directive 94/25, 1994 O.J. L 164/15 (relating to recreational craft). The Court found that this directive did not preclude such national legislation. *Mickelsson*, [2009] E.C.R. I-4273, ¶¶ 16–23.

160. Opinion of Advocate General Léger, *Trailers*, Case C-110/05, [2009] E.C.R. I-519.

161. *Trailers*, [2009] E.C.R. I-519, ¶ 13.

a very brief opinion, the AG found against the defendant.<sup>162</sup> Moreover, he appeared to have no difficulty finding that this measure fell within the scope of article 34 TFEU, since he asserted that “it is undeniable that, by imposing a general and absolute prohibition on the towing of trailers by mopeds throughout Italian territory, the national rules at issue impede the free movement of goods and, in particular, that of trailers.”<sup>163</sup> He also rejected Italy’s contention that the contested rule was justified.<sup>164</sup>

### C. December 2006: AG Kokott’s Opinion in *Mickelsson*

In contrast, AG Kokott in her opinion in *Mickelsson* proposed a wholly novel approach to the treatment of restrictions on the use of goods under article 34 TFEU.<sup>165</sup>

Although such restrictions have long been recognized as being capable of constituting measures of equivalent effect, very few have come before the Court. It was always plain that measures governing the use of goods which discriminate on their face against imports are caught by article 34. As long ago as 1966—even before that provision had become fully applicable—the Commission issued Directive 66/683 requiring the Member States to abolish measures which partially or totally prohibit the use of an imported product, as they were contrary to what is now article 34.<sup>166</sup> Not surprisingly, the Commission assessment was endorsed by the Court some years later.<sup>167</sup> What is more, in *Kemikalieinspektionen v. Toolex Alpha*, an indistinctly applicable ban on the use of a certain chemical was held to fall foul of

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162. Opinion of Advocate General Léger, *Trailers*, [2009] E.C.R. I-519, ¶ 58

163. *Id.* ¶ 39.

164. *Id.* ¶¶ 62, 67.

165. Opinion of Advocate General Kokott, *Mickelsson*, [2009] E.C.R. I-4273.

166. Commission Directive Eliminating All Differences Between the Treatment of National Products, No. 66/683, 220 J.O. 3748 (1966) (full text unavailable in English). This directive was based on article 33(7) of the original Treaty of Rome, a provision that was repealed by the Treaty of Amsterdam. *See* Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 6(20), 1997 O.J. C 340/1, at 59.

167. *See* SA des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saône et du territoire de Belfort, Case 119/78, [1979] E.C.R. 97.

article 34.<sup>168</sup> All these authorities are unremarkable and provoked little commentary.

The AG set out to change all that. She saw a pressing need to address what she perceived as the problem posed by arrangements relating to use, which she defined as “rules governing how and where products may be used.”<sup>169</sup> She then referred to two restrictions on use which, she intimated, should not be caught by article 34: a prohibition on driving cross-country vehicles “off-road” in forests and speed limits on motorways.<sup>170</sup> She then admitted that such measures might be regarded as falling outside the scope of article 34 on the basis that their effects on imports were “too uncertain and too indirect” (the *Peralta* principle);<sup>171</sup> but “an argument against these criteria is that they are difficult to clarify and thus do not contribute to legal certainty.”<sup>172</sup>

Since she found the existing mechanisms unsatisfactory, she decided to construct a wholly novel theory. In her view, arrangements relating to use are comparable to selling arrangements “in terms of their nature and the intensity of their effects on trade in goods.”<sup>173</sup> She rested her analysis on two traits which, she believed, were common to both categories of measure: both affected the marketing of a product “only indirectly through their effects on the purchasing behaviour of consumers”;<sup>174</sup> and selling arrangements and use arrangements were not generally intended to “regulate trade in goods between Member States.”<sup>175</sup> In a similar vein, she maintained that “[t]he Swedish regulations are not product-related since they do not make use dependent . . . on personal watercraft meeting technical requirements . . . . The restriction on use does not therefore require any modifications to the personal watercraft themselves.”<sup>176</sup>

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168. See cases cited *supra* note 104; see also *Commission v. Netherlands*, Case C-249/07, [2008] E.C.R. I-174, ¶¶ 25–27; *Harpegnies*, Case C-400/96, [1998] E.C.R. I-5121, ¶ 30; *Brandma*, Case C-293/94, [1996] E.C.R. I-3159, ¶ 6.

169. Opinion of Advocate General Kokott, *Mickelsson*, [2009] E.C.R. I-4273, ¶ 44.

170. *Id.* ¶ 45.

171. See *supra* notes 42–43 and accompanying text.

172. Opinion of Advocate General Kokott, *Mickelsson*, [2009] E.C.R. I-4273, ¶ 46.

173. *Id.* ¶ 52.

174. *Id.* ¶ 53.

175. *Id.* ¶ 54.

176. *Id.* ¶ 57.

On the basis of this supposed analogy, she proposed the following test:

National legislation which lays down arrangements for use for products does not constitute a measure having equivalent effect within the meaning of Article [34 TFEU] so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related. However, prohibitions on use or national legislation which permit only a marginal use for a product, in so far as they (virtually) prevent access to the market for the product, constitute measures having equivalent effect which are prohibited under Article [34 TFEU], unless they are justified under Article [36 TFEU] or by an imperative requirement.<sup>177</sup>

She did not attempt to define the term “marginal use” or to give examples of measures which only permitted such use. In any case, a crucial step in her reasoning was the following assertion:

It is for the national court to decide whether national rules prevent access to the market. In the present case there are several reasons to suggest that the Swedish rules prevent access to the market for personal watercraft. The provisions of the Swedish regulations lay down a prohibition on the use of personal watercraft with the sole exception of use on general navigable waterways—at least for the period until the county administrative boards have designated other waters for the use of personal watercraft.<sup>178</sup>

Consequently, although she proposed to leave this question to the national court, she inclined to the view that the legislation in question constituted a total or near total prohibition on the use of these craft.<sup>179</sup> In addition, she left open the question as to whether this measure discriminated against imports in law or in fact (a question which would only arise if her intuition on the previous question turned out to be unfounded).<sup>180</sup>

As to justification, the measure might be justified on environmental grounds but, given that it laid down no deadline by which the local boards were to designate permitted waters, it

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177. *Id.* ¶ 87.

178. *Id.* ¶ 68.

179. *Id.* ¶¶ 67, 70.

180. *Id.* ¶¶ 63–64.

appeared to be incompatible with the principle of proportionality for want of legal certainty.

This opinion stands in stark contrast to that of AG Jacobs in *Leclerc-Siplec*: unlike the approach set out in that opinion it would cut down, not broaden, the scope of article 34 TFEU. Furthermore, whereas one of the objections voiced by the Advocate General in *Leclerc-Siplec* was that it made rigid distinctions between different categories of rules, the approach proposed by the Advocate General would have introduced a fresh distinction of this kind. While these points in themselves are obviously no cause for criticism, the opinion in *Mickelsson* is a source of serious concern.

The flaw in the Advocate General's reasoning, it is submitted, lies in her analogy between restrictions on use and selling arrangements—the premise on which her entire theory rested.<sup>181</sup> Restrictions on use differ markedly from selling arrangements in their intensity. Unless its impact on imports is so “uncertain and indirect” as to be caught by the *Peralta* principle, virtually any restriction on use can be expected to constitute a more serious hindrance on imports than a restriction on Sunday trading or a requirement that spectacles be sold by opticians or that baby food be sold exclusively in pharmacies. The fact that both categories of measure take effect after importation is beside the point, as we noticed earlier in relation to *Alfa Vita*.<sup>182</sup>

What is more, if the Advocate General's view were accepted with respect to restrictions on use, then logically the same approach would have to be extended to restrictions on possession. Three major categories of measure—those relating to selling arrangements, restrictions on use, and restrictions on possession—would then be subject to a discrimination test. Surely, this would unduly narrow the scope of article 34. In addition, more “rigid distinctions” (to coin the term used by AG Jacobs in *Leclerc-Siplec*) between different categories of measure would then be created than the Court had envisaged in *Keck*.

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181. *Contra* Thomas Horsley, *Case Note*, 46 COMMON MKT. L. REV. 2001 (2009); Eleanor Spaventa, *Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v. Italy and Mickelsson and Roos*, 34 EUR. L. REV. 914, 922–23 (2009). Both authors support this analogy.

182. *See supra* notes 98–102.

Few would quibble with AG Kokott's assertion that article 34 ought not cover minor restrictions on use, such as speed limits for cars.<sup>183</sup> Other restrictions of the same nature spring to mind, such as: a ban on commercial flights at night; a prohibition on using hand-held mobile phones while driving a motor vehicle; and bans on adolescents being served alcohol in restaurants or on using ultraviolet sun-beds. As mentioned earlier, she was surely right to point to the subjective and difficult nature of the *Peralta* principle.<sup>184</sup> Nevertheless, the fact remains that this principle is inherent in *Dassonville*, the *fons et origo* of the entire body of case law on the scope of article 34. Despite its shortcomings, *Peralta* is a necessary element in the Court's interpretation of that provision and it is here to stay. Consequently, if a minor restriction on use were ever to come before the Court—and none appears to have done so to date—then the proper course would surely be to find that its impact on imports is “too indirect and too remote” to be caught by article 34.<sup>185</sup> Indeed, as we shall see, that is the very solution that the Court appears to have adopted in *Mickelsson*.

More poignantly, there was no need to address this issue in *Mickelsson* at all. By the Advocate General's own admission, the measure at issue in that case was, if anything, at the opposite end of the spectrum from minor restrictions on use of the kind we have just mentioned. Indeed, she took the view that, in all probability, the Swedish legislation amounted to a total or near-total ban on personal watercraft. To cap it all, restrictions on use have never given rise to any particular difficulty.

Surely, in the light of all these circumstances, it was inappropriate to propose a radical upheaval of the principles governing this area of the law at this stage. As I mentioned at the outset, Gordon had a keen sense of which points should, and which should not, be decided in a particular case. I cannot imagine that he would have advised the Court to embark on such a radical course in this case.<sup>186</sup>

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183. Opinion of Advocate General Kokott, *Mickelsson*, Case C-142/05, [2009] E.C.R. I-4273, ¶¶ 43, 45–46, 49.

184. *See id.* ¶ 46; *see also supra* notes 42–43 and accompanying text.

185. *See id.*

186. For criticism of the Advocate General Kokott's Opinion in *Mickelsson*, see Luis González Vaqué, *La Ampliación de la Jurisprudencia “Keck y Mithouard” à las Modalidades de Uso: ¿Un Peligro Inmediato para el Mercado Interior?* [*The Enlargement of the “Keck & Mithouard” Case to*

D. *March and May 2007: the Trailers Case Re-Opened*

The opinion in *Mickelsson* prompted the Chamber hearing *Commission v. Italy* to refer the case to the Grand Chamber, which re-opened the oral phase of the proceedings. Anomalously, however, *Mickelsson* itself remained before a five-judge Chamber without the oral phase of the proceedings being reopened.

In *Trailers*, the Grand Chamber invited all the Member States to submit their observations on when restrictions on use fall under article 34 TFEU. Eight Member States intervened, and the hearing was held in May 2007.

E. *A Strange Interlude: Commission v. Portugal*

Bizarrely, another case relating to restrictions on use, *Commission v. Portugal*,<sup>187</sup> slipped through almost unnoticed at the very time when *Trailers* and *Mickelsson* were the focus of attention and controversy. This case concerned indistinctly applicable Portuguese legislation prohibiting the affixing of tinted film on car windows, ostensibly to prevent crime. This case did not appear to cause any difficulty for AG Trstenjak:

[T]here can be no doubt, in my opinion, that the contested prohibition . . . constitutes a measure having equivalent effect within the meaning of that definition. Even if such a prohibition is applicable without distinction and is thus not discriminatory in nature, it is essentially aimed towards and capable of hindering or even making impossible the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement.<sup>188</sup>

She went on to dismiss Portugal's argument as to justification and therefore found for the Commission.<sup>189</sup> The five-judge Chamber of the Court that was hearing the case (the Third Chamber) likewise upheld the Commission's claim that the measure was in breach of article 34 TFEU.<sup>190</sup> In particular, the Court observed that "potential customers, traders, or individuals

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*the Methods of Use: An Immediate Danger to the Internal Market?*, 11 *REVISTA ARANZADI* 5 (2008) (Spain).

187. *Commission v. Portugal*, Case C-265/06, [2008] E.C.R. I-2245.

188. Opinion of Advocate General Trstenjak, *Portugal*, [2008] E.C.R. I-2245, ¶ 38.

189. *Id.* ¶¶ 46–57.

190. *See Portugal*, [2008] E.C.R. I-2245, ¶ 48.

have practically no interest in buying [the products concerned] in the knowledge that affixing such film to the windscreen and windows alongside passenger seats in motor vehicles is prohibited.”<sup>191</sup>

Few would question this ruling. Indeed, it merely underlines the obvious fact that restrictions on use can fall foul of article 34, even if they are indistinctly applicable.

#### F. July 2008: The Second AG’s Opinion in Trailers

Following the hearing, AG Bot, as successor to AG Léger, delivered his opinion. He began by lending his support to the criticism of *Keck* voiced by AG Jacobs in *Leclerc-Siplec* and by AG Maduro in *Alfa Vita*, namely that *Keck* established inappropriate and artificial distinctions between different categories of measure.<sup>192</sup> Next, he expressed his concern that *Keck* had created a divergence between the free movement of goods and the other three fundamental freedoms enshrined in the Treaty (persons, services, and capital).<sup>193</sup>

Nevertheless, like AG Maduro, he considered it inappropriate to abandon *Keck*.<sup>194</sup> Equally, he explained in great detail why he could not support AG Kokott’s approach in *Mickelsson*. His reasons were essentially those set out above.<sup>195</sup> Indeed, in a particularly trenchant remark, he declared that he saw “no reason for departing from that analytical approach in favour of a solution which, ultimately, would to some extent render nugatory one of the key provisions of the Treaty.”<sup>196</sup>

He then sang the praises of the “access to market” test. One advantage of this test, he maintained, was that it would enable the Court to bring the principles governing the free movement of goods closer to those applicable to the free movement of persons, services, and capital.<sup>197</sup> He pointed out that this

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191. *Id.* ¶ 33.

192. Opinion of Advocate General Bot, *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519, ¶¶ 79–81.

193. *Id.* ¶ 82. In *Alpine Invs. BV v. Ministerie van Financiën*, the Court declined to transpose *Keck* to services; it has not transposed that ruling to the free movement of persons or the free movement of capital either. Case C-384/93, [1995] E.C.R. I-1141.

194. Opinion of Advocate General Bot, *Trailers* [2009] E.C.R. I-519, ¶ 84.

195. *Id.* ¶ 86.

196. *Id.* ¶ 102.

197. *Id.* ¶ 118.

principle underlies all the case law on the definition of measures of equivalent effect under article 34 TFEU.<sup>198</sup> In addition, he made it clear that the “access to market” test should not involve an appraisal of complex economic data.<sup>199</sup>

As to the contested provision of the Italian Highway Code, he found that, as a total ban on use, it gave rise to “a substantial, direct and immediate obstacle to intra-Community trade” and it thus fell squarely within article 34 TFEU.<sup>200</sup> Moreover, he gave short shrift to Italy’s defense that this provision was justified on road safety grounds: Italy had failed to furnish any precise evidence in support of its claim; the provision only applied to trailers towed by motorcycles registered in Italy; and finally, road safety could equally well have been ensured by other, less restrictive measures.<sup>201</sup> For all these reasons, he advised the Court to uphold the Commission’s action.

While the Advocate General’s findings in the instant case appear sound, it is submitted that, like AG Maduro in *Alfa Vita*, he attached excessive importance to the idea of a unitary approach to all four freedoms. Moreover, his espousal of the “access to the market” test is problematic, since he gave no indication of his conception of this nebulous term beyond his clear and most welcome rejection of a test entailing the appraisal of complex economic data. On one view, restrictions on “access to the market” are those which are “capable of hindering, directly or indirectly, actually or potentially”—so we are back to the *Dassonville* formula! Could this really be what AG Bot intended? Or did he mean a test such as that proposed by AG Jacobs in *Leclerc-Siplec*, but shorn of its *de minimis* element? If not, then what?<sup>202</sup>

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198. *Id.* ¶ 128.

199. *Id.* ¶ 116.

200. *Id.* ¶ 159.

201. *Id.* ¶¶ 169–70.

202. On the ambiguity of “access to market” as a test, see Horsley, *supra* note 181, at 2014, and Spaventa, *supra* note 181, at 923. However, the test continues to have many distinguished advocates. See, e.g., BARNARD, *supra* note 89, at 162–65; Catherine Barnard & Scott Deakin, *Market Access and Regulatory Competition*, in *THE LAW OF THE SINGLE EUROPEAN MARKET* 197 (Catherine Barnard & Joanne Scott eds., 2002); Peter Pecho, *Goodbye Keck? A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05*, 36 *LEGAL ISSUES OF ECON. INTEGRATION* 257 (2009); Luca Prete, *Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck*, 35 *LEGAL ISSUES OF ECON. INTEGRATION* 133 (2008); Gert Straetmans, *Market Access, The Outer Limits of Free Movement of Goods and the*

### G. February 2009: The Judgment in Trailers

#### 1. Principles Governing Article 34

In February 2009—just shy of four years after the action in the case had been lodged—the Grand Chamber delivered its judgment in *Trailers*.<sup>203</sup> Given the delay and the exceptional procedural steps taken by the Court, the ruling came as an anticlimax, not to say a disappointment.

The Court opened its judgment with a series of “preliminary observations.” This section of the judgment opens with a reiteration of the principles laid down in *Dassonville*, *Cassis de Dijon*, and *Keck*.<sup>204</sup> By this means, the Court implied that these principles are still good law. However, in paragraph 37 the Court then asserted:

Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], as are the measures referred to in paragraph 35 of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.<sup>205</sup>

Thus, despite confirming the three pillars of the previous case law (*Cassis de Dijon*, *Dassonville*, and *Keck*), the Court then appears to set out a fresh approach by spelling out three categories of measure of equivalent effect under article 34 TFEU, namely: (i) measures which discriminate against imports (measures “the object or effect of which is to treat products coming from other Member States less favourably”); (ii) rules that lay down requirements to be met by goods which have been “lawfully manufactured and marketed [in other Member States] . . . even if those rules apply to all products alike”; and (iii) “any other

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*Law?*, in VIEWS OF EUROPEAN LAW FROM THE MOUNTAIN: LIBER AMICORUM FOR PIET JAN SLOT 91 (Mielle Bulterman et al. eds., 2009);. But these authors do not necessarily share the same understanding of the concept.

203. *Trailers*, Case C-110/05, [2009] E.C.R. I-519.

204. *Id.* ¶¶ 33–36.

205. *Id.* ¶ 37.

measure which hinders access of products originating in other Member States.”<sup>206</sup>

The first category is scarcely novel, although the reference to the object of measures is unusual, but not unprecedented.<sup>207</sup> The second category covers measures of the type in issue in *Cassis de Dijon*, although it also covers discriminatory measures. The first two categories will overlap in some cases. The real novelty comes with the third category—which the Court has not troubled to define at all! Nor has the Court made it clear whether only residual measures that are neither product-bound nor related to selling arrangements can fall within the third category; but the better view is that this category is limited to those measures.<sup>208</sup> On one view, the Court is merely telling us that these residual measures are governed by the general *Dassonville* formula, not by the discrimination test applicable to measures relating to selling arrangements; but we knew that already.

What is more, while it is notable that the Court has referred to “access to the market,” there is no evidence that it now intends to apply a pure market access test (*i.e.*, a test involving a case-by-case assessment without reference to any rules relating to particular types of measure)—any more than the mention of market access in paragraph 17 of the ruling in *Keck* was to be understood in this way.<sup>209</sup> On the contrary, like AG Maduro in *Alfa Vita* and AG Bot in *Trailers*, the Court in this case appears to be keen to amend *Keck*, while retaining its essence—but without giving any indication as to how this is to be achieved.

As already mentioned, the ruling in *Keck* has been fairly criticized for its poor drafting. Yet, if anything, the language of the judgment in *Trailers* is even more shrouded in mystery and ambiguity.<sup>210</sup> At least in *Keck*, the Court had the commendable courage to state explicitly that it was reversing some of its

206. *Id.* ¶¶ 34–35, 37.

207. *See supra* note 27 and accompanying text. The phrase “object or effect” is drawn from the case law on article 35 TFEU. *See supra* note 5 and accompanying text.

208. *See* Fenger, *supra* note 105, at 333; Spaventa *supra* note 181, at 922.

209. *Keck & Mithouard*, Joined Cases C-267–68/91, [1993] E.C.R. I-6097, ¶ 17.

210. *See* Nicolas De Sadeleer, *L'Examen, au Regard de l'Article 28 CE, des Règles Régissant les Modalités d'Utilisation de Certains Produits*, 2009 *JOURNAL DU DROIT EUROPÉEN* 247, 249 (Fr.); Spaventa, *supra* note 181, at 922. Even Pecho acknowledges that “its concrete meaning is . . . still to be determined.” Pecho, *supra* note 202, at 271.

previous case law;<sup>211</sup> but the same cannot be said of the judgment in *Trailers*. Consequently, it is not even clear whether the Court is seeking to plot a new course: paragraph 37 can equally be read as a description of the existing case law, albeit an idiosyncratic one.<sup>212</sup> The latter view appears to be supported by the fact that, in the judgments delivered since its rulings in *Trailers*, the Court has continued to apply its earlier approach to article 34.<sup>213</sup> For this reason, it seems premature to conclude that this ruling has made any change at all in the pre-existing law.<sup>214</sup> More probably, it should be seen as a harbinger of possible changes to come.

## 2. Restrictions on Use

Turning to the case at hand, the Court began by stating that the Commission had not specified whether its action was confined to trailers specifically designed to be towed by motorcycles or whether it also covered other trailers. Since the Commission had failed to establish that the contested provision of the Italian Highway Code hindered “access to the market” for the latter category, the Court dismissed the action to that extent.<sup>215</sup> The rest of its judgment therefore relates exclusively to trailers specifically designed to be towed by motorcycles. The Court noted that, according to the evidence before it, such trailers could not effectively be put to any other use. Accordingly, it found:

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211. *Keck & Mithouard*, [1993] E.C.R. I-6097, ¶¶ 16–18.

212. *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519. ¶ 37.

213. Apart from *Mickelsson*, see, for example, *Budějovický Budvar, Národní Podnik v. Rudolf Ammersin GmbH*, Case C-478/07, [2009] E.C.R. \_\_, [2009] E.T.M.R. 1238; *Commission v. Spain*, Case C-88/07, [2009] E.C.R. I-1353; *Fachband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, Case C-531/07, [2009] E.C.R. I-3717.

214. Sibony and Defossez also consider that this passage of the *Trailers* judgment is not a reversal of the earlier case law, but merely a reformulation. Anne-Lise Sibony & Alexandre Defossez, *Chronique Marché Intérieur* [*Internal Market Chronicle*], 46 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 129, 143 (2010). On Spaventa’s view, this ruling clarifies “what, in many respects, was already evident from previous case law: the *Keck* distinction based on the type of rules is no longer relevant . . . [It seems] to realign the case law on goods with the case law on the free movement of persons, so that barriers to economic freedom, to the freedom to trade, might now well be caught by Art. [34 TFEU] . . .” Spaventa, *supra* note 181, at 928–29.” In any case, for the reasons set out in Part III.A.4 of this Article, it seems most unlikely that the Court intended to go so far as to turn article 34 into a provision conferring freedom to trade.

215. *Trailers*, [2009] E.C.R. I-519, ¶¶ 49–53.

[A] prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.

Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer. Thus, [the contested provision] prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation.<sup>216</sup>

With these clear words, the Court rejected the radical approach to restrictions on use propounded by the Advocate General in *Mickelsson*. This is most welcome.

### 3. Justification

Controversy also surrounds the ruling on whether the contested legislation was justified. The Court began this part of its judgment by noting Italy's claim that this measure was justified on the grounds of road safety.<sup>217</sup> As to whether the contested measure was necessary for this purpose, the Court stated:

Although it is possible, in the present case, to envisage that measures other than the prohibition laid down in . . . the Highway Code could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer . . . the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.<sup>218</sup>

Manifestly, this statement runs directly counter to the firmly established principle that the burden of proof is borne by the

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216. *Id.* ¶¶ 56–57 (citing *Commission v. Portugal*, Case C-265/06, [2008] E.C.R. I-2245, ¶ 33).

217. This has been recognized as a mandatory requirement. *See Commission v. Netherlands*, Case C-297/05, [2007] E.C.R. I-7467, ¶ 77; *Commission v. Portugal*, Case C-265/06, [2008] E.C.R. I-2245, ¶ 38. It would have been preferable to treat accident prevention as subsumed within the public health exception spelled out in article 36, but nothing turns on this—since it now appears that the mandatory requirements are assimilated into the grounds of justification laid down in that provision.

218. *Trailers*, [2009] E.C.R. I-519, ¶ 67.

party claiming that a measure is justified.<sup>219</sup> The Court's express admission that road safety could equally well have been assured by other, less restrictive measures makes this inconsistency all the more glaring. Moreover, there could be no room for any suggestion that this principle is relaxed in the field of accident prevention, given that human life is at stake: in a number of recent cases in this area, the Member State was held to have failed to discharge its burden of proof.<sup>220</sup> Indeed, in some of these cases the Court stated that "the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and *precise* evidence enabling its arguments to be substantiated."<sup>221</sup>

De Sadeleer maintains that the Court chose to relax its standard of review because the contested measure was a restriction on use.<sup>222</sup> However, there is no reason why this should be so. What is more, nothing in the judgment suggests this. On the contrary, the Court's clear statement that bans on use constitute measures of equivalent effect should be taken as an indication that restrictions on use do not warrant special treatment.

Admittedly, a difficulty arises where there is some reason to believe that a measure might be justified but the Member State fails to furnish appropriate evidence to support that proposition. This problem is more acute where human life is at stake. Is the Court to take a legalistic view and find against the Member State, simply because it has failed to defend itself adequately, even if lives might then be lost? Or is the Court to find for the Member State despite a lack of evidence to support its case? This dilemma is by no means new for the Court, since a very high proportion of cases concerning article 36 TFEU relate to public health, accident prevention, or both.

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219. *See supra* note 136 and accompanying text.

220. *See* Commission v. Belgium, Case C-227/06, [2008] E.C.R. I-46, ¶¶ 63–64 (full text of case available only in French); Commission v. Belgium, Case C-254/05, [2007] E.C.R. I-4269, ¶¶ 36–37; Commission v. Netherlands, Case C-297/05, [2007] E.C.R. I-7467, ¶¶ 78–79.

221. *Belgium*, Case C-227/06, [2008] E.C.R. I-46 ¶ 63 (full text of case available only in French); *Belgium*, Case C-254/05, [2007] E.C.R. I-4749, ¶ 36.

222. De Sadeleer, *supra* note 210, at 250.

As just indicated, hitherto the Court's solution to this dilemma has always been precisely the opposite of what it adopted in this case. Naturally, where the Member State makes out a reasonably convincing case on justification, then the burden shifts once again to the other party (in infringement proceedings this will be the Commission).<sup>223</sup> If the Member State fails to do that but the Court still entertains doubts about the Commission's case, the Court can pose detailed questions to the Member State asking it to provide precise evidence.

To conclude on this point, it is obviously true that legislation is by its very nature of general application and the legislator is in no position to provide for every conceivable situation in the minutest detail. Yet this problem is scarcely new, and can be accommodated perfectly well by the standard case law.<sup>224</sup>

## H. *Final Episode: The Judgment in Mickelsson*

### 1. Restrictions on Use

The final move came in June 2009 when the Second Chamber delivered its judgment in *Mickelsson*—more than four years after the reference for a preliminary ruling was made by the Swedish court and four months after the ruling in *Trailers*.<sup>225</sup>

First, the Court referred to the definitions of measures of equivalent effect set out in *Cassis de Dijon* and in paragraph 37 of the *Trailers* judgment.<sup>226</sup> Next, it repeated paragraphs 56 and 57 of the latter judgment (quoted above).<sup>227</sup> This led it to the key pronouncement in *Mickelsson*, which reads:

[W]here the national regulations for the designation of navigable waters and waterways have the effect of preventing

223. *See, e.g.*, *Commission v. France*, Case C-55/99, [2000] E.C.R. I-1149; *Commission v. Federal Republic of Germany*, Case 178/84, [1987] E.C.R. 1227.

224. In its subsequent judgment in *Commission v. France*, which was rendered on January 28, 2010, the Court rejected the defendant's argument that the contested prior authorization scheme was justified on public health grounds, saying that it was "systematic and untargeted." Case C-333/08, ¶ 103 (ECJ Jan. 28, 2010) (not yet reported). The case concerned the sensitive subject of substances akin to food additives. *Id.*

225. *Åklagaren v. Mickelsson*, Case C-142/05 [2009] E.C.R. I-4273; *Commission v. Italy (Trailers)*, Case C-110/05, [2009] E.C.R. I-519.

226. *Mickelsson*, [2009] E.C.R. I-4273, ¶ 24 (citing ; *Trailers*, [2009] E.C.R. I-519, ¶ 37; *Cassis de Dijon*, Case 120/78, [1973] E.C.R. 649, ¶¶ 6, 14–15).

227. *Id.* ¶¶ 26–27.

users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article [36 TFEU] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [30 TFEU].<sup>228</sup>

Consequently, restrictions on use are caught by article 34 TFEU if they fall within one of the following categories: (1) total bans on use (as in *Commission v. Portugal* and *Trailers*);<sup>229</sup> (2) measures which prevent goods from being used “for the specific and inherent purposes for which they were intended”; and (3) measures which “greatly restrict” the use of goods.<sup>230</sup>

The last two criteria are not notable for their precision,<sup>231</sup> but perhaps it could not be otherwise. Following the Advocate General’s opinion in *Mickelsson*,<sup>232</sup> the Court was left with little choice but to attempt to specify which categories of restrictions on use fall within article 34. By its very nature, this is no easy task.

On what basis do restrictions on use outside these three categories fall outside the scope of article 34? Although the Court did not spell this out, the answer can only be that the impact of such measures on imports is too “uncertain and indirect” for them to constitute measures of equivalent effect. In other words, the *Peralta* principle—ironically, the very principle that AG Kokott was at such pains to avoid—applies. As she pointed out, the drawback of the remoteness test in *Peralta* is that it contains an element of uncertainty and subjectivity;<sup>233</sup> but this test is an inescapable element in the rules governing the definition of measures of equivalent effect under article 34. In short, the Court decided the question on the basis of the pre-existing principles, although the Advocate General had firmly opposed doing so.

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228. *Id.* ¶ 28.

229. *See supra* notes 191–216 and accompanying text.

230. *Mickelsson*, [2009] E.C.R. I-4273, ¶ 28.

231. *See De Sadeleer*, *supra* note 210, at 248.

232. *Mickelsson*, [2009] E.C.R. I-4273, ¶ 28.

233. Opinion of Advocate General Kokott, *Mickelsson*, [2009] E.C.R. I-4273 ¶ 46.

## 2. Justification

The Court then proceeded to consider whether legislation of the kind in question could be justified for the protection of the environment and of human, animal, and plant life, as the Swedish government claimed.<sup>234</sup> For the most part, this final passage of the judgment was in line with the standard case law on article 36 TFEU. In particular, the Court recalled that, in references for preliminary rulings, it is not for the Court itself, but for the national courts, to decide the facts.<sup>235</sup> Also, the Court implied that there was no per se objection to imposing a blanket ban on the use of personal watercraft, subject to dispensations granted by the competent authorities.<sup>236</sup> However, this passage contains two statements which merit special mention. In particular, the Court held:

The fact that measures to implement those regulations had not been adopted at a time when those regulations had only just entered into force ought not necessarily to affect the proportionality of those regulations in so far as the competent authority may not have had the necessary time to prepare the measures in question, a matter which falls to be determined by the national court.<sup>237</sup>

This assertion is surprising. First, it is strongly arguable that the Swedish legislation should have allowed a sufficiently long transitional period to enable the authorities concerned to take the requisite decisions.<sup>238</sup> Second, there was no need to prosecute anyone for breach of this legislation until the necessary implementing measures were in place. Individuals should not have to suffer the consequences of measures adopted with undue haste or of the inaction of public authorities—especially not in criminal proceedings. As in *Trailers*, the Court clearly felt the need to relax the standard case law on article 36. Why?

The second noteworthy statement in this part of the judgment reads:

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234. *Michelsson*, [2009] E.C.R. I-4273, ¶ 30.

235. *Id.* ¶ 40.

236. *Id.* ¶ 36.

237. *Id.* ¶ 42.

238. See *Commission v. Austria*, Case C-320/03, [2005] E.C.R. I-9871, ¶ 90; *Radlberger Getränkegesellschaft mbH v. Land Baden-Württemberg*, Case C-309/02, [2004] E.C.R. I-11,763, ¶¶ 80–81; *Commission v. Germany*, Case C-463/01, [2004] E.C.R. I-11,705, ¶¶ 79–80.

Furthermore, if the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community law of the retroactive application of the most favourable criminal law and the most lenient penalty.<sup>239</sup>

This assertion is most welcome: the principle referred to in this passage (frequently known by its Latin name, *lex mitior*) is enshrined in article 49(1) of the Charter of Fundamental Rights.<sup>240</sup> It is interesting that it has now been incorporated into the principle of proportionality under article 36 TFEU.

#### V. SUGGESTED REFORM

Beyond any doubt, the time is ripe for the Court to streamline and clarify the definition of measures of equivalent effect under article 34 TFEU. It is submitted that the definition may be summarized in the following propositions:

(1) The underlying principle is that measures which restrict imports actually or potentially, directly or indirectly, are caught by this concept (*Dassonville*). This test involves an examination of the inherent characteristics of the measure and does not entail an economic or statistical analysis.

(2) A measure falls outside the scope of article 34 if its impact on imports is manifestly too “uncertain and indirect” (*Peralta*). This is part and parcel of the *Dassonville* formula, not a separate rule.

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239. *Mickelsson*, [2009] E.C.R. I-4273, ¶ 43 (citation omitted).

240. Charter of Fundamental Rights, *supra* note 133, art. 49(1), 2010 O.J. C 83, at 401 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence . . . when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.”)

(3) For all measures other than those relating to selling arrangements—whether or not they are “product-bound” measures, such as those listed in paragraph 15 of the judgment in *Keck*—no discrimination against imports need be shown. However, measures which do discriminate against imports automatically constitute measures of equivalent effect.

(4) Only rules relating to selling arrangements are subject to a test of de jure or de facto discrimination. Such rules include: restrictions on when goods may be sold; restrictions on where or by whom they may be sold; price controls; and advertising restrictions (but see point 5 below). The requirement that such rules “apply to all affected traders operating within the national territory” of the Member State concerned<sup>241</sup> has no place in this area of the law and should be expressly abandoned. The concept of de facto discrimination is to be interpreted broadly, but not all restrictions on imports fall within this concept. In any case, total bans on advertising are considered to be discriminatory per se.

(5) In case of doubt, a measure is not to be regarded as relating to selling arrangements so that the general rule in point 3 above applies.

No doubt, the reader would have preferred this summary to be far more succinct. Yet, the fact is that, given the enormous variety of measures which have come before the Court, this subject matter cannot be condensed into a single sound bite. Experience has shown that, while the Court took an inspired starting point with the *Dassonville* formula, much further elaboration was required.

In any case, the approach proposed here is simpler than it may appear at first sight: all measures other than those relating to selling arrangements are subject only to points 1 and 2; and, in any case, those two points are merely two sides of the same coin.

### CONCLUSION

Despite the widespread criticism of many of the judgments relating to articles 34 to 36 TFEU (especially *Keck*), the fact remains that this is a remarkable body of case law characterized

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241. *Keck & Mithouard*, Joined Cases C-267–68/91, [1993] E.C.R. I-6097, ¶ 16.

by a surprisingly high degree of legal certainty, given the large number of cases decided each year. Given that there have been several hundred judgments in this area of the law over the years, some inconsistencies are inevitable. Plainly, the time is ripe for the case law to be streamlined and clarified—a task which, by its very nature, must fall to the Grand Chamber. Unfortunately, with its Delphic pronouncement in *Trailers*, it failed to perform that task. Instead, it simply muddied the waters further.<sup>242</sup>

What is more, these cases are scarcely a model of case management, since they are beset by two glaring procedural anomalies: the decision to refer *Trailers* to the Grand Chamber while leaving *Mickelsson* before the Second Chamber; and the fact that *Commission v. Portugal* was decided by the Third Chamber after *Trailers* was re-opened.

The ambiguities in the *Trailers* judgment and the procedural anomalies just mentioned scarcely show the Court at its best. At all events, it is to be hoped that the Grand Chamber will take the earliest opportunity to bring clarity to its definition of measures of equivalent effect to quantitative restrictions on imports under article 34 TFEU. In the meantime, it is noticeable that, since its ruling in *Trailers*, the Court has applied its earlier approach to this issue.<sup>243</sup>

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242. Unfortunately, this judgment was matched by an equally inconclusive judgment of the Grand Chamber on the concept of measures of equivalent effect to quantitative restrictions on exports under article 35 TFEU. See *Gysbrechts & Santurel Inter BVBA*, Case C-205/07, [2008] E.C.R. I-9947, ¶ 40; see also Defossez, *supra* note 5; Stéphane Rodrigues, *Chronique de Jurisprudence Communautaire—Marché Intérieur—Marchandises, Services et Capitaux* [Chronicle of Community Cases—Internal Market—Goods, Services and Capital], 44 CAHIERS DE DROIT EUROPEEN 217, 230 (2009) (Fr.).

243. See, e.g., *Commission v. France*, Case C-333/08, ¶¶ 74–80 (ECJ Jan. 28, 2010) (not yet reported) (food processing supplements); *Budějovický Budvar, Národní Podnik v. Rudolf Ammersin GmbH*, Case C-478/07, [2009] E.C.R. \_\_, [2009] E.T.M.R. 1238; *Commission v. Spain*, Case C-88/07, [2009] E.C.R. I-1353, (products based on medicinal herbs); *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, Case C-531/07, [2009] E.C.R. I-3717 (imported books sold at a fixed price).