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Two Years After Keck

Laurence W. Gormley*

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Laurence W. Gormley

Abstract

This Essay begins by rejecting the reasoning of the joined cases *Keck & Mithouard*. After discussing what passes for reasoning in this case, this Essay examines the case law before and after *Keck* in order to attempt to draw some conclusions about the consequences of *Keck* for the earlier case law and about the application of Article 30 since *Keck*. In part through a comparison with recent case law on EC Treaty Article 59, the conclusion is that the case law on Article 30 has developed in an extremely unfortunate and unsystematic direction, but also that the unity of the internal market within the Community has at the end of the day not been unduly endangered.

ESSAYS

TWO YEARS AFTER KECK

Laurence W. Gormley*

INTRODUCTION

The title "Two Years After *Keck*" gives the impression of a celebration or remembrance of an important event, certainly an event where the consequences may fittingly be discussed in honor of Professor Due's distinguished tenure of office at the European Court of Justice ("Court of Justice" or "Court"). Norbert Reich has rightly written of a November revolution at the Court of Justice in Luxembourg.¹ As far as Article 30² is concerned, it is perhaps more appropriate to speak of: an evolution in approach, little new in the concrete result, a great deal of dissatisfaction about the absence of reasoning, and, more regrettably, another nail in the coffin of systematic reasoning and coherent analysis.

I. KECK & MITHOUARD

The facts in the Cases *Keck & Mithouard*³ ("*Keck*") are well

* Professor of European Law; Rijksuniversiteit Groningen; Visiting Professor of EC Law, University College London & Universität Bremen; Professor at the College of Europe; Barrister, Houthoff, Amsterdam & Rotterdam. This Essay is adapted from a paper presented to the Dutch Association for Competition Law in June 1995.

1. Norbert Reich, *The "November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited*, 31 COMMON MKT. L. REV. 495 (1994).

2. Treaty Establishing the European Community, Feb. 7, 1992, art. 30, [1992] 1 C.M.L.R. 573, 602 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITY (EC Off'l Pub. Off. 1987).

3. Bernard Keck and Daniel Mithouard, *Joined Cases C-267/91 and 2-268/91*, [1993] E.C.R. I-6097 [hereinafter *Keck*]; *see* Ackermann (1994) RIW 189; Berr (1994) JDInt. 491; Chalmers (1994) 19 ELRev. 385; Gormley (1994) 5 EBLR 63; Joliet (1994) JdT (Dr. Eur.) 145 & (1994) GRURInt. 979; Mattera (1994) RMUE 117; Mok (1994) TVVS 20; Mortelmans (1994) SEW 115 & 236; Odle (1994) IER 65; Petschke (1994) EuZW 107; W.-H. Roth, *Joined Cases C-267 and C-268/91, Bernard Keck and Daniel Mithouard; Case C-292/92, Ruth Hunermund et al. v. Landesapothekerkammer Baden-Württem-*

known. Keck and Mithouard were prosecuted for reselling Sati rouge coffee and Picon beer at a loss.⁴ It is perhaps less widely realized that there was no indication on the facts that these products had been imported from other Member States. The Court of Justice should, therefore, have sent these cases back to the French court, stating that there appeared to be no questions of Community law involved.⁵

But, laying this objection to one side, the reasoning in *Keck* is still unacceptable. The reasoning is not simply conspicuous by its absence, it is remarkable, it may be said with Biesheuvel, for its arrogance. After discussing what passes for reasoning in this case, this Essay examines the case law before and after *Keck* in order to attempt to draw some conclusions about the consequences of *Keck* for the earlier case law and about the application of Article 30 since *Keck*. In part through a comparison with recent case law on EC Treaty Article 59, the conclusion is that the case law on Article 30 has developed in an extremely unfortunate and unsystematic direction, but also that the unity of the internal market within the Community has at the end of the day not been unduly endangered.

The first point in *Keck*, other than the preliminary objection already mentioned, is that the Court does not derogate from its previous definition of the concept of a measure having equivalent effect to a quantitative restriction on imports. It confirms that the basic principle in *Dassonville*⁶ is still the point of departure.⁷ This principle is an object or effects doctrine, not

berg, with annotation by W.-H. Roth, 31 COMMON MKT. L. REV. 845 (1994); Schilling (1994) EuR 50, & Steindorff (1994) ZHR 149.

4. See, e.g., Products in an unaltered state at lower than their actual purchase price, contrary to Law No. 63-628 of July 2, 1963, art. 1 (as amended by Order 86-1243 of December 1, 1986, art. 32).

5. See, e.g., Gormley in (1994) 5 EBLR 63 at 66 and by Sack (1994) EWS 37 at 44, and acknowledged by Joliet in *inter alia* (1994) JDT (Dr. Eur.) 145 at 150. Joliet's rejoinder that the application of Article 30 had never been refused on that ground is, with great respect, unconvincing. The Court was (rightly) perfectly willing to refuse to invoke Article 52 in wholly domestic circumstances. See *Ministère public v. Gauchard*, Case 20/87, [1987] E.C.R. 4879, [1989] 2 C.M.L.R. 489. Further, the Court has always refused to rule on artificial disputes sent to it under Article 177, even though a few doubtful cases have slipped through over the years.

6. Procureur du Roi v. Dassonville et al, Case 8/74, [1974] E.C.R. 837, 852, [1974] 2 C.M.L.R. 436, 448.

7. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a mea-

merely a principle that looks to the intention behind a measure. Thus, the intention to hinder intra-Community trade is not a precondition to find a breach of Article 30.⁸ This point is simply demonstrated because had it ever been necessary to show that legislation intended to hinder trade between Member States, the Commission would never have been able to win the *Reinheitsgebot*⁹ case against Germany, as the legislation involved had existed in one form or other for centuries before the establishment of the Community. Intention is relevant in deciding whether a measure which at first sight is justified in fact forms a means of arbitrary discrimination or a disguised restriction on trade between Member States, and thus is unacceptable in Community law.¹⁰ This makes it immediately apparent just how irrelevant the observation by the Court in *Keck*, that the French measure was not designed to regulate trade between Member States, really is.¹¹ The Court admitted that the French legislation was capable of restricting the volume of sales and, thus, the volume of products sold by Member States, because it deprived traders of a particular method of sales promotion.¹²

What then followed appears to be incompatible with the

sure having equivalent effect to a quantitative restriction. *Keck*, [1994] E.C.R. I-6097, 6130.

8. See *Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs-GmbH*, Case 95/82, [1981] E.C.R. 1217, 1226 (intention to hinder intra-Community trade is sufficient to find breach of Articles 30 or 34 EC respecting discriminatory rules); *P.B. Groenveld BV v. Produktschap voor Vee en Vlees*, Case 15/79, [1979] E.C.R. 3409, [1981] 1 C.M.L.R. 207, 211; *Re: Imports of Poultry Meat: EC Commission v. United Kingdom*, Case 40/82, [1982] E.C.R. 2793, 2825-26, [1982] 3 C.M.L.R. 497, 535 (indicating intention to hinder intra-Community trade is sufficient to find breach of Articles 30 or 34 more generally).

9. *Re Purity Requirements for Beer: EC Commission v. Germany*, Case 178/84, [1987] E.C.R. 1227, [1988] 1 C.M.L.R. 780 (indicating that original provisions dated from old Bavarian brewing tradition given formal recognition in *Reinheitsgebot* adopted in Bavaria in 1516). See also *Re Beer Purity Standards: EC Commission v. Greece*, Case 176/84, [1987] E.C.R. 1193, [1988] 1 C.M.L.R. 813.

10. See, e.g., *Commission v. United Kingdom*, Case 40/82, [1982] E.C.R. 2793, 2826, [1982] 3 C.M.L.R. 497, 535.

11. See *Torfaen Borough Council v. B & Q PLC* (formerly *B & Q (Retail) Ltd.*), Case C-145/88, [1989] E.C.R. 3851, 3889, [1990] 1 C.M.L.R. 337, 343; *Quietlynn Ltd. et al. v. Southend Borough Council*, Case C-23/89, [1990] E.C.R. I-3059, 3081, [1990] 3 C.M.L.R. 55, 66; *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen et al.*, Case C-69/88, [1990] E.C.R. I-583, 597, [1991] 2 C.M.L.R. 677, 687; *Council of the City of Stoke-on-Trent et al. v. B & Q plc*, Case C-169/91, [1992] E.C.R. I-6635, 6657, [1993] 1 C.M.L.R. 426, 464 (showing same observation prior to *Keck*, often standing entirely alone from other reasoning).

12. *Keck*, [1993] E.C.R. at I-6130.

very clear approach in *Van de Haar*¹³ and *Prantl*,¹⁴ where the Court expressly rejected attempts to introduce a *de minimis* principle into Article 30. The Court posed the question whether the possibility of such a restriction was sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports. In an attempt to answer that question, the Court looked at the increasing tendency of traders to invoke Article 30 in order to challenge any rules whose effect was to limit their commercial freedom, even where such rules were not aimed at products from other Member States. This tendency was the basis for the decision by the Court to re-examine its case law and, allegedly, to clarify it.

For this purpose the Court referred to its judgment in *Cassis de Dijon*.¹⁵ The English text at this point in *Keck* is in fact slightly wider drawn than the French. The English text states that:

In "Cassis de Dijon" it was held that, in the absence of harmonisation of legislation, measures of equivalent effect prohibited by Article 30 *include* obstacles to the free movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging) to goods from other Member States where they are lawfully manufactured and marketed, 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.¹⁶

The French text states that:

Il y a lieu de constater que, conformément à la jurisprudence Cassis de Dijon, constituent des mesures d'effet équivalent, interdites par l'article 30, les obstacles à la libre circulation des marchandises . . . (further as in English).

The English "include" makes it clear that this description is illus-

13. *Van de Haar et al.*, Joined Cases 177/82 & 178/82, [1984] E.C.R. 1797, 1812-13.

14. Criminal proceedings against Prantl, Case 16/83, [1984] E.C.R. 1299, 1326, [1985] 2 C.M.L.R. 238. See *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*, Case C-126/91, [1993] E.C.R. I-2361, 2390.

15. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494 [hereinafter *Cassis de Dijon*].

16. *Keck*, [1993] E.C.R. at I-6131 (emphasis added).

trative and not restrictive, thus that such conditions are not the only measures which fell under Article 30. It has never seriously been argued, however, that the *Cassis* case law was an exhaustive statement of the ambit of Article 30.¹⁷

But the departure from earlier case law was to be clear and explicit. The Court observed that:

[C]ontrary to what had 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 within the meaning of the *Dassonville* judgment, provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.¹⁸

Provided that these conditions were satisfied, the Court concluded that the application of such rules to the sale of products from another Member State, which meeting the requirements laid down by that State, was not by nature such as to impede their access to the market or to impede access any more than it impeded the access of domestic products.¹⁹ Such rules thus fell outside the scope of Article 30, and so the answer to the national court was that Article 30 did not apply to national rules imposing a general prohibition on resale at a loss.²⁰

II. A CONFLUENCE OF PROBLEMS: TWO STREAMS MIXED TOGETHER

Although Mortelmans²¹ is of the opinion that this judgment is not a surprise, the reasoning, although not the result, is indeed very much a surprise. It seems that the Court has tried to bring together two separate streams of case law dealing with questions which, while related, are in fact distinct. These two

17. See, e.g., *Re Buy Irish Campaign: EC Commission v. Ireland*, Case 249/81, [1982] E.C.R. 4005, [1983] 2 C.M.L.R. 104; *Du Pont de Nemours Italiana SpA v. Unità sanitaria locale No 2 di Carrara*, Case 2188, [1990] E.C.R. I-889, [1990] 3 C.M.L.R. 25 (indicating policy of preference for national products incompatible with Article 30).

18. *Keck*, [1993] E.C.R. at I-6131.

19. *Id.*

20. *Id.*

21. Mortelmans (1994) SEW 115 at 120.

streams are on the one hand the "police powers" cases,²² and on the other hand the cases dealing with methods of sale that bear no relationship to the products themselves but deal with methods of sales promotion, such as advertising or inducements to purchase. Although it is true that the reason for the many challenges to legislation concerning shop closing on Sundays was to increase sales, such legislation is, in fact, to be seen as a measure dealing with the local regulation of socio-economic life.

Measures concerning planning also fall within this category. But the problems had already started here prior to *Keck*. Is a prohibition of advertisements on hoardings by the roadside incompatible with Article 30? Provided that there is no discrimination, the conclusion ought to have been that such a measure was not prohibited by Community Law,²³ yet the Court had found such a restriction was, in principle, incompatible with Article 30.²⁴ There was little doubt that Article 30 was becoming a touchstone for testing socio-economic questions and that the

22. See *Quietlynn*, [1990] E.C.R. I-3059, [1990] 3 C.M.L.R. 55 (discussing sex shop licensing). See *Blesgen v. Belgium*, Case 75/81, [1982] E.C.R. 1211, [1983] 1 C.M.L.R. 431 (same result achieved, albeit by controversial reasoning). See also, GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 55-56, 252-53 (1985); PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EEC 88, 157-59 (2d ed. 1988) (regarding sale of strong drink in cafes); Criminal Proceedings Against Sergius Oebel, Case 155/80 (Eur. Ct. J. 1993) (not yet reported). See also Gormley, *supra* note 5, at 64-65, 100-03, 252; OLIVER, *supra*, 88-89, 100-03 (regarding night work in bakeries and associated restrictions on transport and distribution). These judgments deviate significantly from the general line of pre-*Keck* reasoning but are explicable as concerning "police powers" measures. *Blesgen* was indeed a case where the integration merit was zero. The reasoning was based on the view that the Belgian *Loi Vandervelde* regulated local socio-economic life and there was no real link between intra-Community trade and the sale of strong drink in cafes. *Blesgen* should in fact have been decided on the basis of public policy (*in casu* maintenance of public order) under Article 36. The genuineness (or otherwise) of the alleged health justification advanced in *Blesgen* (protection of young people from the evils of strong drink) may be judged from the fact that a few years later the law was repealed and replaced by a licensing system (and much revenue was raised thereby). *Blesgen* can be seen as being based on a remoteness test. See Krantz, [1990] E.C.R. I-583, [1991] 2 C.M.L.R. 677; *CMC Motorradcenter GmbH v. Baskiciogullari*, Case C-93/92, [1993] E.C.R. I-5009, 5021, [1993]. See also *Direction générale des impôts et al. v. Forest et al.*, Case 148/75, [1986] E.C.R. 3449, [1988] 2 C.M.L.R. 577.

23. The message should not be prohibited by Community Law as a legitimate socio-economic policy choice. Even adherents to the wide scope of Article 30, such as the present author, would not have sought to challenge non-discriminatory restrictions on advertising hoardings. Article 30 does not deserve a reputation akin to that of patriotism (the last refuge of a scoundrel: Dr. Johnson). Laurence Gormley, *Recent Case Law on Articles 30-36 EEC: Some Hot Potatoes*, 27 COMMON MKT. L. REV. 825, 826 (1990).

24. See *Aragonesa de Publicidad Exterior SA et al. v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, Joined Cases C-1 & 176/90, [1991]

Court was being asked to rule frequently on how far Article 30 affected such measures.

III. THE SITUATION BEFORE KECK

Although there was considerable dissatisfaction about the reasoning in *Torfaen*,²⁵ which concerned shop closing on Sunday, it was already clear before *Keck* that the Court had accepted that such measures were caught by the concept of measures having equivalent effect, but were justified as legitimate socio-economic policy choices.²⁶ The Court of Justice had, therefore, already decided that such measures forming part of the general local regulation of socio-economic life would not be prohibited, provided that they did not discriminate against goods from other Member States and that they did not have a more far-reaching effect on trade between Member States than inherent in the legitimate nature of such measures. In other words, the measures were acceptable under Article 30 so long as they were not disproportionate and did not form a means of arbitrary discrimination or a disguised restriction on trade between Member States.²⁷

Thus, attacks on shop closing laws really made no sense any more: the result was already clear, although this did not in fact deter other cases being brought.²⁸ But in *Keck*, the Court departed from this line of reasoning. Instead of concluding that the measures were capable of hindering inter-state trade but

E.C.R. I-4151, 4183 (upholding legislation as being justified on health protection grounds under Article 36).

25. See, e.g., Gormley, *supra* note 23, at 141.

26. See *Union départementale des syndicats CGT de l'Aisne v. SIEF Conforama et al.*, Case C-312/89, [1991] E.C.R. I-997, 1025, [1993] 3 C.M.L.R. 746, 767; *The State of Belgium v. André Marchandise*, Case C-332/89, [1991] E.C.R. I-1027, 1041, [1993] 3 C.M.L.R. 746, 767; *Stoke-on-Trent*, [1992] E.C.R. I-6335, [1992] 1 C.M.L.R. 426, 464 (concluding that measures were justified). In *Torfaen*, the Court simply stated the relevant criteria against which the national court had to examine the measure and it left it to the national court to draw decide whether the laws were disproportionate or not. *Torfaen*, [1989] E.C.R. 3851, [1990] 1 C.M.L.R. 337.

27. The prohibition on disproportionate measures, arbitrary discrimination and disguised restrictions on trade is the criterion of the second sentence of Article 36. However, it applies also when evaluation takes place under the rule of reason. See *Procureur du Roi v. Dassonville et al.*, Case 8/74, [1974] E.C.R. 837, 852, [1974] 2 C.M.L.R. 436, 443 (applying rule of reason for first time); *Cassis de Dijon*, [1979] E.C.R. at 664, [1979] 3 C.M.L.R. at 494 (refining rule of reason).

28. See *Criminal proceedings against Tankstation 't Heuske vof and JBE Boermans*, Joined Cases C-401/92 & 402/92, [1994] E.C.R. I-2199; *Punto Casa SpA v. Sindaco del Comune di Capena et al.*, Joined Cases C-69/93 & 258/93, [1994] E.C.R. I-2355.

were justified in the interest of consumer protection, which would have been a perfectly sustainable approach, the Court removed any possibility of Community-level examination of the measure by concluding that the measure was not capable of hindering inter-state trade within the meaning of *Dassonville*. But *Keck* should not be compared with the “police powers” cases. It concerned a particular method of sales promotion, not through advertising as such, although no doubt the supermarket concerned did advertise its special offers, or even through longer opening hours. *Keck* really should be seen — and has been approached — in line with the cases dealing with consumer protection. The fact that the Court spoke of “selling arrangements” rather than “sales methods” made it clear that the Court did not intend to restrict its *dictum* to such methods: it extended to circumstances which themselves had nothing to do with the product or its presentation.

In a series of judgments prior to *Keck*, the Court had discussed various selling methods or practices.²⁹ In order to essay a conclusion as to whether previous judgments would now be decided or at least reasoned differently, it may be helpful to recall the approach taken in these cases. *Oosthoek*³⁰ concerned a prohibition on offering inducements to purchase gifts that were not usually used or consumed at the same time as the product being sold. The Court found that this was capable of hindering trade between Member States, but was justified in the interest of consumer protection. In *Buet*,³¹ the Court analyzed the general prohibition on doorstep selling, which *in casu* prevented house-to-house sales of language course material imported from other

29. Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV, Case 286/81, [1982] E.C.R. 4575, [1983] 3 C.M.L.R. 428; R. Buet and Educational Business Services (EBS) SARL v. Ministère Public, Case 382/87, [1989] E.C.R. 1235, [1993] 3 C.M.L.R. 659; GB-INNO-BM v. Confédération du Commerce luxembourgeois, Case C-362/88, [1990] E.C.R. I-667, [1991] 2 C.M.L.R. 801; The Republic (France) v. Jean-Marie Delatre, Case C-369/88, [1991] E.C.R. I-1487, [1993] 2 C.M.L.R. 445; SCP Boscher, Studer et Fromentin v. SA Briish Motors Wright et al., Case C-239/90, [1991] E.C.R. I-2023, [1994] 3 C.M.L.R. 410; Aragonesa de Publicidad Exterior SA e.a. v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, Joined Cases C-1/90 & 176/90, [1991] E.C.R. I-4151; Schutzverband gegen Unwesen in der Wirtschaft v. Yves Rocher GmbH, Case C-126/91, [1993] E.C.R. I-2361.

30. Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV, [1982] E.C.R. 4575, [1983] 3 C.M.L.R. 428.

31. R. Buet and Educational Business Services (EBS) SARL v. Ministère Public, [1989] E.C.R. 1235, [1993] 3 C.M.L.R. 659.

Member States. The Court found the prohibition to be an obstacle to imports, as it deprived the trader of the method of marketing whereby he realized almost all his sales, but one that was justified in the interest of consumer protection because it prevented the purchase on the doorstep of unsuitable or low-quality material which could compromise the consumer's chance of obtaining further training and thus consolidating his position on the labor market.

In *GB-INNO-BM*,³² the freedom of consumers was found to be compromised if they were deprived of access to advertising available in the Member State where the purchases were made. Thus, the prohibition on the distribution of leaflets advertising temporary price cuts was examined in the light of Articles 30-36 of the Treaty and the Court concluded that it was not justified on the ground of consumer protection.³³ This case did not examine roadside advertising hoardings, which could be thought of as falling under "police powers," or television advertising, which is examined under Article 59 relating to the freedom to provide and receive services. *GB-INNO-BM* can be seen, however, as the high-water mark of the freedom of information for the consumer and for the consumer's liberty to make up his or her own mind without being subject to undue pressure, a consideration that clearly played a part in the judgment on doorstep selling in *Buet*.³⁴

In *Delattre*,³⁵ the Court dealt with a pharmacist's monopoly on the sale of medicinal and certain other products. Here, the Court decided that the monopoly was capable, insofar as it restricted sales to certain channels, of affecting the sales possibilities of marketing imported products, and was thus a measure having equivalent effect within the meaning of Article 30. For pharmaceutical products, however, this monopoly was justified on the basis of Article 36.³⁶ For other products, the Court left it

32. *GB-INNO-BM*, [1990] E.C.R. I-667, [1991] 2 C.M.L.R. 801.

33. *GB-INNO-BM*, [1990] E.C.R. I-667 at 688-68.

34. *Buet*, [1989] E.C.R. at 1252-53.

35. Criminal proceedings against Jean-Marie Delattre, [1991] E.C.R. I-1487, [1993] 2 C.M.L.R. 445.

36. The justification for such products could, in general, be presumed. However, evidence could be produced that, in relation to certain pharmaceutical products whose use would not involve any serious danger to public health, the inclusion in the monopoly was manifestly disproportionate. This represents an important shifting of the burden of proof, as normally, it is for the body seeking to restrain importation to show that

to the national court to decide whether the monopoly was necessary for the protection of public health or consumers, and whether these aims could be attained by measures less restrictive of trade between Member States.³⁷

In *Boscher*,³⁸ the Court found that national legislation that imposed, on a seller or owner, the requirement of prior entry in the trade register at the place where an auction took place before he could sell second-hand goods *in casu* vehicles was an unjustified restriction on inter-state trade, as it obliged the owner either to sell through a trader operating at the place of sale or to refrain from selling the goods by public auction. In the Court's view this was a disproportionate requirement and could not be justified either on the ground of consumer protection or on the Article 36 ground of public policy: there existed less restrictive measures that the French authorities could have taken to protect these interests.³⁹

In *Aragonesa*,⁴⁰ the Court noted that it had already decided that legislation, which restricted or prohibited certain forms of advertising and certain means of sales promotion, although it did not directly affect trade, could be such as to restrict the volume of trade because it affected market opportunities. However, in that particular case, the State's interest in protecting the public health, was capable of justifying the restriction on advertising in certain places. There was, furthermore, no evidence that the legislation was a means, even an indirect means, of protecting certain local products. This case, like *Blesgen*,⁴¹ dealt with public policy (planning) considerations in conjunction with health protection arguments. In *Aragonesa*, the reasoning was based solely on the protection of public health as set out in Arti-

the restraint is justified. See, e.g., *Denkavit Futtermittel GmbH v. Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, Case 251/78, [1979] E.C.R. 3369, 3392, [1980] 3 C.M.L.R. 513, 536. See also Criminal proceedings against *Sandoz BV*, Case 174/82, [1983] E.C.R. at 2464-65 (regarding duty of co-operation).

37. *Delattre*, [1991] E.C.R. 1540-41, [1993] 2 C.M.L.R. at 485 (required reference to average, well-informed consumer). See *The Republic v. Jean Monteil and Daniel Samanni*, Case C-60/89, [1991] E.C.R. I-1547, 1570-72, [1992] 3 C.M.L.R. 442, 459; *Laboratoire de prothèses oculaires (LPO) v. Union nationale des syndicats d'opticiens de France (UNSOFF) et al.*, Case C-271/92, [1993] E.C.R. I-2898.

38. *Boscher*, [1991] E.C.R. I-2023, [1991] 3 C.M.L.R. at 410.

39. *Id.* at 2039-40, [1991] 3 C.M.L.R. at 426.

40. *Aragonesa*, [1991] E.C.R. at 4185-87.

41. *Blesgen*, [1982] E.C.R. 1211, [1983] 3 C.M.L.R. 431.

cle 36 (health and life of humans). The Court's reasoning was not based on the rule of reason,⁴² nor was it based on public policy considerations. Where the core of the justification lies in another Article 36 heading, this alternative justification is preferred to any attempt at justification on the grounds of public policy.

The final judgment on sales methods prior to *Keck* was *Yves Rocher*.⁴³ This case concerned the advertising of price reductions in publicity materials, a type of advertising that was considered to be attention-grabbing.⁴⁴ Consistent with its earlier judgments, the Court found that the prohibition on this form of advertising was capable of hindering inter-state trade. The Court then concluded that the prohibition was disproportionate and that it was, in fact, useful for consumers to be informed about price reductions.

It is evident from all these judgments that the Court was of the view that although the legislation concerned applied to domestic and imported products alike, the fact that a foreign undertaking had to adapt its sales publicity or other sales methods or was prevented from using them, was sufficient to conclude that inter-state trade was hindered. The Court then went on to examine the justifications advanced, to see if the interests involved were indeed justified and proportionate, so as to render the restriction on trade acceptable; it concluded that they were not.⁴⁵ This approach could indeed have perfectly well been followed in *Keck*.

IV. THE SITUATION POST-KECK

In *Keck*, as has been noted above, the Court clearly was of the view that it was increasingly being faced with attempts to use Article 30 to set aside differences in the manner in which consumers were being protected in the various Member States. In

42. *Cassis de Dijon*, [1979] E.C.R. at 662-63, [1979] 3 C.M.L.R. at 512. See GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 63-64 (1985). The Court had confused matters by including the expression "public health" in the examples of rule of reason justifications set out in *Cassis de Dijon*. *Cassis de Dijon*, [1979] E.C.R. at 649, [1979] 3 C.M.L.R. at 494.

43. *Yves Rocher*, [1993] E.C.R. at 2390.

44. In German, blickfangmässig; in French, publicité accrocheuse.

45. *Yves Rocher*, [1993] E.C.R. at 2390.

terms of what may be called the "spirit of Edinburgh,"⁴⁶ now that the emphasis has come to be placed on as little Community intervention as possible. It is understandable that the Court wished to create clarity on the ambit of Article 30, but the Court manifestly failed to do that in *Keck*. If the Court had wanted to follow the spirit of Edinburgh, it should have either found that there was no evidence of a Community point being involved or have stated that the national court could find that the measure was justified on grounds of consumer protection.

But, save a very few recent cases,⁴⁷ the Court has developed the tendency to indulge in an elaborate evaluation of the alleged justification, effectively leaving the national judge little to do other than mechanically apply the Court of Justice's evaluation. Effectively, the Court has become the victim of its own success: once it saw that *Torfaen* had not addressed the Sunday trading arguments, it tried to stem the flow of such cases in *Conforama*, *Marchandise*, and *Stoke-on-Trent*.⁴⁸ That meant taking a position on the matter, not simply giving the national court the elements of Community law on the basis of which it could make up its own mind. In the consumer protection cases, the Court had long been providing concrete rulings on whether or not a measure was justified. It may indeed be difficult to draw the line between too scant a ruling to be useful and too detailed a ruling which effectively does the national court's job for it. Nevertheless, it ill behoves the Court to blame traders for seeking rulings when it has so manifestly been prepared in the past to give concrete rulings on the traders' issues of concern.

In view of the term "selling arrangements" in *Keck*, it seems highly likely that the judgments in *Oosthoek* and *Buet* would today be differently decided; they concerned particular methods of selling, namely free gifts and doorstep selling. Judge Joliet saw no reason to draw a distinction between *Keck* on the one hand and *GB-INNO-BM* and *Yves Rocher* on the other.⁴⁹ Those latter

46. Edinburgh European Council, Conclusions of the Presidency, 25 E.C. BULL., no. 12, at 9 (1992).

47. *Torfaen*, [1989] E.C.R. at 3889, [1990] 1 C.M.L.R. at 337; *Delattre*, [1991] E.C.R. I-1487, [1993] 2 C.M.L.R. 445; *Monteil*, [1991] E.C.R. I-1547, [1992] 3 C.M.L.R. 425.

48. *Stoke-on-Trent*, [1992] E.C.R. I-6635, [1993] 1 C.M.L.R. 426.

49. (1994) GRURInt. 979, at 986; (1994) JdT (Dr. Eur.) 145, at 151. Similarly, Joliet saw no reason to distinguish between *Hünermund*, the Sunday trading cases and the professional monopoly cases.

judgments concerned certain advertising practices, but not in relation to what may easily be characterized as real "police powers" issues or issues relating to consumer protection at the point of sale (at home or on business premises).

Shortly after *Keck*, the Court handed down its judgment in *Hünernmund et al. v. Landesapothekerkammer Baden-Württemberg*,⁵⁰ where it decided, referring solely to *Keck*, that a professional rule laid down by an association of pharmacists that prohibited pharmacists from advertising para-pharmaceutical products outside their pharmacies, although they were allowed to sell such products, was not prohibited by Article 30.

In *Commission v. Greece*,⁵¹ the Court rejected a challenge to a Greek law requiring that infant formulae and follow-on formulae milk be sold only in pharmacies, except in municipalities where there was no pharmacy, in which cases the products could be sold in other shops. The Court thereby rejected the argument that since processed milk for infants was produced in Greece the measure in reality only affected imported products. It found the Greek rules non-discriminatory with respect to the origin of the product and that the applicability of Article 30 to such a measure could not depend on such a purely fortuitous factual circumstance that could change with time. If it were otherwise, the Court concluded, the illogical consequence would be that the same legislation would be prohibited under Article 30 in certain Member States but allowed in other Member States. Only if it were apparent that the legislation protected domestic products which were similar to or in competition with processed milk from other Member States would the result be different, and no evidence to this effect had been adduced.

This unconvincing judgment is wholly at odds with Advocate General Lenz's carefully reasoned Opinion,⁵² in which he noted that in accordance with the pre- and post-*Keck* case law the pharmacists' monopoly had to be viewed as a measure having equivalent effect. The consequence of applying *Keck* was that the Court did not even reach the question of whether the pharmacists' monopoly could be justified as a measure designed to

50. *Hünernmund et al. v. Landesapothekerkammer Baden-Württemberg*, Case 292/92, [1993] E.C.R. I-6787.

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

52. Opinion of Advocate General Lenz, *Commission v. Greece*, [1995] E.C.R. I-1621, 1630.

protect the health and life of humans, and, thus, a valid derogation under Article 36.

In its judgments in the *Delattre*⁵³ and *Monteil*⁵⁴ cases, the Court had stressed the need to evaluate the alleged reasonableness of monopoly positions for products which were not pharmaceutical products. What was sauce for the national judge was not sauce for the Court of Justice. It appears, therefore, that both *Delattre* and *Monteil* would, at the very least in respect of products other than pharmaceuticals, now be decided differently. Moreover, the Court's approach in *Commission v. Greece*⁵⁵ resurrects a preference for one channel of trade, something against which it had originally set its face in *Dassonville*, and effectively supports a monopoly that cannot be justified on public interest grounds (such as health protection).

After *Hünernmund*, it became clear that the advertising campaigns in *GB-INNO-BM* and *Yves Rocher* would now not be open to examination under Article 30.⁵⁶ In his Opinion in *Hünernmund*, Advocate General Tesauro invited the Court to state expressly which judgments had been "overruled" by *Keck*, but the Court declined to respond. Mr. Tesauro mentioned the Sunday trading cases, such as *Conforama* and *Stoke-on-Trent*. He also cited the judgments in: *Delattre*, *Monteil*, *Boscher*, *LPO*, and *Aragonesa*. Not until the judgment in *Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA et al.*⁵⁷ was it expressly stated that advertising campaigns, *in casu* televised advertising, were caught by the *Keck* doctrine as a particular form of sales promotion for a particular form of marketing products (distribution). An attempt to prohibit advertisements placed on the packaging of the products themselves was, however, subjected to Article 30 examination in *Verein gegen Unwesen in Handel und Gewerbe, Köln v. Mars GmbH*.⁵⁸ Advocate General Gulman, in his Opinion in *Lucien Orsheit*

53. *Delattre*, [1991] E.C.R. I-487, [1993] 2 C.M.L.R. 445.

54. *Monteil and Samanni*, [1991] E.C.R. I-1547, [1992] 3 C.M.L.R. 442.

55. *Commission v. Greece*, [1995] E.C.R. I-nyr.

56. See Opinion of Advocate General Jacobs, *Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA et al.*, Case C-412/93, [1995] E.C.R. I-179 at 193.

57. *Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA et al.*, Case C-412/93, [1995] E.C.R. I-179 at 193.

58. *Verein gegen Unwesen in Handel und Gewerbe, Köln v. Mars GmbH*, Case C-470/93, [1995] E.C.R. I-1923. This was scarcely surprising as it concerned a "+ 10%" marking on the packaging and the question of the manner in which that was presented. Such questions are caught fair and square by the *Keck* doctrine.

GmbH v. Eurim-Pharm Arzneimittel GmbH,⁵⁹ regarded the case law on selling arrangements prior to *Keck* as inapplicable as long as the conditions set out in *Keck* were met. However, the fact that certain principles from the pre-*Keck* case law are still cited by the Court well after *Keck* proves that those judgments are still not without some significance.⁶⁰

Yet, the Court has maintained its stance. In *Tankstation 't Heukske vof et al.*⁶¹ and *Punto Casa SpA v. Sindaco del Comune di Capena et al.*,⁶² the Court turned its back on the solution adopted in the earlier Sunday trading cases of *Conforama*, *Marchandise*, and *Stoke-on-Trent* where it had held that non-discriminatory shop closing laws were acceptable. *Keck* was applied. Advocate General Van Gerven observed that "all other⁶³ national measures applicable without distinction also fall in principle within the new *Keck* and *Mithouard* case-law, in so far as, unlike product requirements, they do not necessitate any adaptation of the intrinsic or extrinsic characteristics of the products imported."⁶⁴ Mr. Van Gerven did not express a concluded view on the question of whether the Court had in reality opted for a test of discrimination in fact in looking at measures applicable to domestic and imported products alike.⁶⁵ It was not possible, he felt, to exclude the possibility out of hand that some measures, albeit not discriminatory in that broad sense, might nevertheless be capable, on an overall view, of impeding, actually or potentially, directly or indirectly, trade between Member States in some other way.⁶⁶

59. See Opinion of Advocate General Gulman, *Lucien Orscheit GmbH v. Eurim-Pharm Arzneimittel GmbH*, Case 320/93, [1994] E.C.R. I-5243, 5248.

60. See *Verband Sozialer Wettbewerb e.V. v. Clinique Laboratoires SNC et al.*, Case C-315/92, [1994] E.C.R. I-317, 336 (citing *Buet's* principle of proportionality); *Ligur Carni Srl e.a. v. Unità sanitaria locale No XV di Genova et al.*, Joined Cases C-277/91, 318/91, and 319/91, [1993] E.C.R. I-6221, 6661 (citing *Aragonesa*, no escape from finding of discrimination because provision applied only to part of national territory).

61. *Tankstation 't Heukske vof et al.*, Joined Cases C-401/92 and C-402/92, [1994] E.C.R. I-2199.

62. *Punto Casa SpA v. Sindaco del Comune di Capena et al.*, Joined Cases C-69/93 and C-258/93, [1994] E.C.R. I-2355.

63. Opinion of Advocate General Van Gerven, *Tankstation 't Heukske vof et al.*, [1994] E.C.R. at I-2220. See, e.g., measures not satisfying the test in *Keck* and, if there are no other circumstances suggesting that the legislation, on an overall view, impedes intra-Community trade. *Id.*

64. *Tankstation 't Heukske vof et al.*, [1994] E.C.R. at I-2220.

65. *Id.* at 2218.

66. In which case the pre-*Keck* case law would apply and the effect of *Keck* would be to reverse the burden of proof. See also *Delattre*, [1991] E.C.R. I-1487, [1993] 2 C.M.L.R.

It appears from the judgment in *Ligur Carni Srl et al. v. Unità sanitaria locale No XV di Genova et al.*⁶⁷ that the Court may be inclined to agree, although this judgment may perhaps simply confirm the doctrine that Article 30 applies to measures irrespective of the origin of the product if the measures do indeed make importation of products from other Member States more difficult. Most recently, on August 11, 1995, the Court applied *Keck* to decide that a prohibition on resale at a very low profit margin fell outside the scope of Article 30.⁶⁸

V. DE MINIMIS NON CURAT LEX?

Despite the strong criticism levelled against the Court in the literature⁶⁹ and by Advocate General Jacobs in his Opinion in *TFI Publicité*, the Court appears, as yet, less than wholly inclined to review *Keck*. The application of the rule of reason approach would have offered the flexibility to maintain Community supervision to safeguard against abuse by Member States and safeguard against abuse of Community law by litigants. The reaction of Mattera and the present writer has concentrated on the paucity of reasoning in *Keck*, an approach which clearly did not endear Mattera to Joliet.⁷⁰ If the Court was determined to change its approach so comprehensively, particularly when a clear line of recent judgments was apparently being overruled, it should

445. Mr. Van Gerven invited the Court to state whether it was in fact reversing the burden of proof, but again, the Court was not pleased to respond. *Id.*

67. *Ligur Carni Srl et al. v. Unità sanitaria locale No XV di Genova et al.*, Joined Cases C-277, 318 & 319/91, [1993] E.C.R. I-6621, 6661. This case concerned, *inter alia*, a rule preventing the imposition by a municipality of a rule preventing an importer of fresh meat from making his own transportation and delivery arrangements within the area of that authority, unless he paid the local concessionaire a fee corresponding to its charges relating to handling, transportation and delivery in the local slaughterhouse.

68. *Grouperment National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA et al.*, Case 63/94, [1995] E.C.R. I-2467.

69. See generally Mattera (1994) RMUE 117; Gormley (1994) 5 EBLR 63; Sack; Steindorff (1994) ZHR 149, *supra* note 3. It is no coincidence that strongest criticism has come from those authors who had dealt with many of the Article 30 cases in the Commission. It has to be admitted, though, that many writers appear to welcome the *Keck* judgment. Such joy is, respectfully submitted, grossly premature.

70. Joliet's attack in (1994) JdT (Dr. Eur.) 145 & (1994) GRURInt. 979 is in part an attempt to whitewash Mattera's views: it is, with respect, perhaps less than wholly convincing. Joliet's arguments are discussed in detail in the present author's forthcoming book, *PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EC* (2nd. ed. 1997). The third edition of Oliver's *FREE MOVEMENT OF GOODS IN THE EC* is expected early in 1996 (Sweet & Maxwell, London). The text of this Essay was completed in November, 1995.

have based its decision on clear and justified grounds. The mere observation that traders had an increasing tendency to invoke Article 30 is no justification for what could be seen as a backdoor attempt to introduce a *de minimis* criterion into Article 30. Indeed, Advocate General Tesauro had warned the Court about the difficulties inherent in any such temptation.⁷¹ Yet, the analysis presented by Advocate General Jacobs in *TFI Publicité*⁷² as an alternative to that in *Keck* is a pure plea for a clear *de minimis* approach for equally applicable measures, although the learned Advocate General rightly declined to apply such an approach to discriminatory measures.

Even if Mr. Jacobs's submission concerning equally applicable measures is unacceptable (not least because the threshold would be more difficult to set than it would be to decide on alleged justifications), and even he is decidedly unclear on what would constitute a significant hindrance to inter-state trade, it is at least more intellectually honest than the Court's apology for reasoning in *Keck*. A significant hindrance of access to the market would, in Mr. Jacobs's view, serve as the criterion for equally applicable measures which did not relate to the specific characteristics of the product.⁷³ The purpose of the measures would, of course, play a part in the evaluation once that threshold were crossed. Advocate General Jacobs was entirely right to emphasize that if the Court wished to go down the *de minimis* route it would have to lay down clear criteria.⁷⁴ But what would those criteria be? If it were 5% of the relevant product and geographical market Article 30 analysis would turn into economic analysis, something the Court has always avoided. A *de minimis* criterion in Article 30 is unworkable and the Court should continue to avoid it.

When arguments were presented years ago that the British local authorities adopting the London conditions of fitness for hackney carriages (taxis) were merely small local incidents and

71. See *Hünernmund e.a. v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-I-6787, 6810-11.

72. See Opinion of Advocate General Jacobs, *Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA et al.*, Case C-412/93, [1995] E.C.R. I-179 at 194-95.

73. See W.-H. Roth, *Joined Cases C-267 and C-268/91, Bernard Keck and Daniel Mithouard; Case C-292/92, Ruth Hunernmund et al. v. Landesapothekerkammer Baden-Württemberg*, with annotation by W.-H. Roth, 31 *COMMON MKT. L. REV.* 845, 853 (1994).

74. See Opinion of Advocate General Jacobs, *Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité SA et al.*, Case C-412/93, [1995] E.C.R. I-179 at 196.

that if (which the United Kingdom Government did not accept) a restriction on trade resulted it was of minimal importance, some argued that such small matters should be left alone. Yet, within a few years an ever-increasing number of local authorities have adopted the conditions of fitness, spreading the London-style cabs, of which there are now a small number of models made by different British manufacturers, further throughout the land, rather like an infection. The moment that the Court accepts a *de minimis* argument in Article 30, the descent along a very slippery slope will have commenced, and as sure as night follows day it will lead to backdoor market fragmentation.

VI. GENERAL ACCESS TO THE MARKET?

It appears that the Court now places particular weight on access to the market, even though it appears that this is *really* relevant for access to the market of the importing Member State as a whole, and that the Court is (rightly) still not prepared to embark on any indications of *de minimis* criteria. Thus, in *Alpine Investments BV v. Minister van Financiën*,⁷⁵ the Court did not respond to the invitation by the British and Dutch Governments to apply *Keck* to a prohibition on cold-calling in the financial services sector so as to find that such a prohibition was not caught by Article 59 on the freedom to provide services. The Court opined that the application of the measures involved in *Keck* was not such as to prevent access by imported goods to the market of the Member State or to impede such access more than it impeded access by domestic products.⁷⁶ In *Alpine Investments*, the Court stated that the prohibition on cold-calling by the Member State in which the service provider was established "deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It therefore constitutes a restriction on the freedom to provide services."⁷⁷ The Court then turned to the evaluation of the justification of the prohibition and found that it was indeed justified and proportionate. *Keck* was not extended to Article 59. It is true that the Court did not expressly rule out such an extension,

75. *Alpine Investments BV v. Minister van Financiën*, Case C-384/93, [1995] E.C.R. I-1141.

76. *Alpine Investments*, [1995] E.C.R. at 1178.

77. *Id.* at 1176.

but the fact that the Court was at pains to draw an unconvincing distinction between the two cases shows that it was unwilling to accept the British and Dutch viewpoints at face value.

In *Her Majesty's Customs & Excise v. Schindler et al.*,⁷⁸ the Court refused to go down this path. If a prohibition on cold-calling and a prohibition on the supply of services in relation to lotteries (including the advertisement of such services) hinders market access for the purposes of Article 59, why is a prohibition on advertisements deemed no longer to form a hindrance to market access for the purposes of Article 30? Should not *GB-INNO-BM* and *Aragonesa*⁷⁹ be returned to the drawing board? It appears, however, regrettably, that this is unlikely to occur. While *Aragonesa* is not deprived of all significance, for example, in relation to the evaluation of a justification on health grounds and for the relationship between the rule of reason and Article 36, it seems unlikely that the Court will now investigate a prohibition on advertising in terms of Article 30, at least in the absence of a total ban. As far as *GB-INNO-BM* is concerned, it appears that such a prohibition on advertising would not be found to hinder market access as such: in these circumstances the result would clearly now be different.

Perhaps the explanation lies in the fact that measures dealing with selling methods (having no bearing on the product itself) concern the circumstances under which goods are sold,⁸⁰ although the actual sale of the product is not hindered or prevented. The effect of the prohibition on cold-calling and on the provision of lottery information services was that market access was completely blocked. In this light, the question becomes whether inter-state trade take place at all. If so, then equally applicable measures which do not affect the product and have no discriminatory or disguised restrictive effect on trade between Member States will escape the ambit of Article 30 after *Keck*. This might appear to be a return to the view expressed in *Oebel*,⁸¹ that if inter-state trade remains possible at the macro level (ware-

78. *Her Majesty's Customs & Excise v. Schindler et al.*, Case C-275/92, [1994] E.C.R. I-1039; see Gormley, *Pay Your Money and Take Your Chances*, 19 EUR. L. REV. 644 (1994).

79. *Aragonesa*, [1991] E.C.R. I-4131.

80. Thus, adopting (in relation to Article 30) the criteria proposed by Eric L. White, *In Search of the Limits to Article 30 EEC*, 26 COMMON MKT. L. REV. 235, 246 *et. seq.* (1989).

81. *Oebel*, [1981] E.C.R. at 2010.

houses and intermediaries), non-discriminatory prohibitions on transport for delivery to individual consumers and retail outlets only would not infringe Articles 30 or 34. But, an "emergency brake" is still necessary in order to prevent abuses, in the form of rank unreasonableness, or arbitrary discrimination, or a disguised restriction on trade between Member States.⁸²

CONCLUSION

The recent judgments in *Ligur Carni*⁸³ and *Verband Sozialer Wettbewerb e.V. v. Clinique Laboratories SNC et al.*⁸⁴ in the context of Community legislation in the fields concerned, make it clear that Article 30 still holds a central place as one of the fundamental principles of Community law. *Grosso modo* the integrity of the internal market has been safeguarded, although it is now clear that the Court will not entertain what it perceives to be attempts to use Article 30 as an escape mechanism for the avoidance of the application of national legislation, particularly where the integrationist merit is somewhat thin. Yet, the Court has in these cases given scant attention to the quality of its reasoning. It is at first sight tempting to think that it might have been better after all if the Court had been more willing to throw the ball back to the national court, as it did in *Torfaen*, albeit at the risk of national courts themselves being unable to form a unanimous view. But, the Court clearly felt that it had to make its view plain; indeed in relation to the later Sunday trading questions, elegantly so. Certainly, it is very difficult for the Court at the Community level to determine any sort of general test of national non-discriminatory socio-economic policy choices, and it is perhaps understandable that the case-by-case approach led to certain frustrations. But if the Court excludes the application of Article 30 by definition, there remains no possibility of looking behind the face of ostensibly innocent measures to discover whether a national measure really is manifestly disproportionate or a disguised restriction on trade between Member States. This creates an open season for all sorts of restrictions (like insisting that

82. The phrase, in relation to the second sentence of Art. 36, is from BRÄNDEL Die gemeinschaftsrechtliche Missbrauchstabstände bei der Ausübung nationale Schutzrechte (Art. 36 Satz 2 EWGV)(1980) GRURInt. 512.

83. *Ligur Carni*, [1993] E.C.R. I-6621.

84. *Verband Sozialer Wettbewerb e.V.*, [1994] E.C.R. I-317 (discussing sale of cosmetics under name "Clinique").

processed baby milk normally be sold only in pharmacies) which may create or strengthen local monopolies and now appear immune from Article 30 analysis.

The *Dassonville* basic principle, combined with the rule of reason, was certainly sufficient, if properly used, to permit both the Court of Justice to give guidance and the national courts to decide in Article 177 proceedings, or the Court of Justice itself to decide in Article 169 proceedings. But, the Court may have made life more difficult for itself by its increasing tendency to decide everything in fine detail, rather than to leave to the national courts the task clearly allocated to them by indicating, even clearly, what the requirements of Community law are and letting national judges decide on the basis of the criteria so established. *Dassonville* did not need to be nuanced; it needed to be properly applied by the Court of Justice. The reasoning in *Keck* has all the hallmarks of the definition of a camel,⁸⁵ and looks like the product of what might perhaps be called the narrowest of majorities.⁸⁶

85. A horse, drawn by a committee.

86. Clearly, as the Court only gives one judgment, and the deliberations are secret, knowledge of the voting will never be known outside the members of the Court itself, but the paucity of the reasoning in *Keck* surely gives rise to the suspicion that it was a hotly contested discussion, with minimal agreement.