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## Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods

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# Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods

Laurence W. Gormley

## **Abstract**

The European Community (“EC”) is 50 years old this year, albeit having undergone a change of name and, just to confuse everyone, the articles of the Treaty establishing the European Community (“EC Treaty”) underwent a change in numbering. If the Treaty of Lisbon comes into force, the European Community itself will disappear, being absorbed into the European Union (“EU”), and the present EC Treaty will become the Treaty on the Functioning of the European Union (“FEU”). It is thus appropriate that this issue of the *Fordham International Law Journal* be devoted to the Golden Anniversary of the European (Economic) Community, and yet this issue may serve as a state of the art assessment of Community law on the possible eve of the disappearance of the very body which is the subject of this celebration. However, the subject of this contribution, the present Articles 28-30 EC, will be renumbered, but otherwise remain intact, to become Articles 34-36 FEU.

## ARTICLES

# SILVER THREADS AMONG THE GOLD . . . 50 YEARS OF THE FREE MOVEMENT OF GOODS

*Laurence W. Gormley\**

### INTRODUCTION

The European Community ("EC") is 50 years old this year,<sup>1</sup> albeit having undergone a change of name and, just to confuse everyone, the articles of the Treaty establishing the European Community ("EC Treaty") underwent a change in numbering.<sup>2</sup>

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1. The European Economic Community ("EEC") was established by the Treaty establishing the European Economic Community ("EEC Treaty") (Mar. 25, 1957, 298 U.N.T.S. 11). The EEC Treaty was ratified by Italy on Nov. 23, 1957, by France on Nov. 25, 1957, and by the remaining original parties (Belgium, Germany, Luxembourg and The Netherlands) on Dec. 13, 1957. Under the terms of Art. 247 EEC Treaty, it entered into force on January 1, 1958.

2. Among the changes made under the Treaty of Amsterdam (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. C 340/1 (1997)), Arts. 30-36 of the EEC Treaty were shorn of their transitional provisions (Arts. 31-33, 34(2) & 35) and the old Art. 30 EEC became Art. 28 EC Treaty (see Consolidated Version of the Treaty Establishing the European Community art. 28, O.J. C 321 E/37, at 44 (2006), with the renaming of the European Economic Community as the European Community). The Treaty of Amsterdam also contained the following redrafting which does not affect the meaning. Art. 30 EEC reads: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, at 32 [hereinafter EEC Treaty]. Art. 28 EC reads "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." See Consolidated Version of the Treaty Establishing the European Community art. 28, O.J. C 321 E/37, at 52 (2006) [hereinafter EC Treaty]. Art. 34(1) EEC (EEC Treaty, Mar. 25, 1957, 298 U.N.T.S. 11, at 33), became (unchanged) Art. 29 EC: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States." See EC Treaty, *supra*, art. 29, O.J. C. 321 E/37, at 53. Art. 36 EEC (EEC Treaty, Mar. 25, 1957, 298 U.N.T.S. 11, at 55), became, apart from the reference to the revised article numbers, unchanged in

If the Treaty of Lisbon<sup>3</sup> comes into force, the European Community itself will disappear, being absorbed into the European Union ("EU"), and the present EC Treaty will become the Treaty on the Functioning of the European Union ("FEU").<sup>4</sup> It is thus appropriate that this issue of the *Fordham International Law Journal* be devoted to the Golden Anniversary of the European (Economic) Community, and yet this issue may serve as a state of the art assessment of Community law on the possible eve of the disappearance of the very body which is the subject of this celebration. However, the subject of this contribution, the present Articles 28-30 EC, will be renumbered, but otherwise remain intact, to become Articles 34-36 FEU.<sup>5</sup>

### I. *BEFORE DASSONVILLE*

The first judgment<sup>6</sup> in which the European Court of Justice ("ECJ") considered the elimination of quantitative restrictions and measures having equivalent effect related to a breach of the first paragraph of Article 31 of the Treaty Establishing the European Economic Community ("EEC Treaty"), which required Member States to refrain from introducing between themselves any new quantitative restrictions or measures having equivalent effect; the ECJ, however, made no attempt to define what was meant by that concept, but pointed out that Article 30 of the EC

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substance, Art. 30 EC: "The provisions of Articles 28 and 29 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." See EC Treaty, *supra*, art. 29, O.J. C. 321 E/37, at 53. The latest Consolidated version of the Treaty Establishing the European Community ("EC Treaty"), was published in 2006 but it does not take account of the accession of Bulgaria and Romania on January 1, 2007. As for the purposes of the analysis in this article, the renumbering is of no substantive consequence. The present numbers are used throughout this contribution, although in square brackets where a quotation in fact referred to the original numbering.

3. Draft Treaty of Lisbon (Reform Treaty), O.J. C 306/01 (2007), *corrigenda* O.J. C 111/56 (2008) *opened for signature* Dec. 13, 2007 (not yet ratified) [hereinafter Reform Treaty].

4. Reform Treaty, *supra* note 3, art. 2, O.J. C 306/01, at 42.

5. FEU is the appropriate abbreviation for the Treaty on the Functioning of the European Union (as the EC Treaty will become on the entry into force of the Treaty of Lisbon).

6. Commission v. Italy, Case 7/61, [1961] E.C.R 317.

Treaty "is directed to eventualities of a non-economic kind, which are not liable to prejudice the principles laid down by Articles [28]-[30] of the EC Treaty, as the last sentence of the article confirms."<sup>7</sup> Moreover, it held that EC Treaty Article 30 did not establish a generic protective clause additional to that provided by Article 226 EEC, and thus that Article 30 did not allow Member States to derogate by unilateral action from the procedure guarantees laid down by that provision.<sup>8</sup>

Although there were some considerable difficulties in relation to the free movement of goods, as far as the prohibition of customs duties and charges having equivalent effect in trade between Member States was concerned,<sup>9</sup> and not inconsiderable developments in relation to the prohibition of discriminatory taxation on imports and exports,<sup>10</sup> it was some years before the next major development occurred: in April 1968, the ECJ ruled in *Fink-Frucht GmbH v. Hauptzollamt München-Landbergerstraße*<sup>11</sup> that internal taxation which did not infringe the prohibition of

7. See *id.* at 329.

8. Art. 226 EEC Treaty (EEC Treaty, Mar. 25, 1957, 298 U.N.T.S. 11, at 144) was repealed in the tidying up by the Treaty of Amsterdam; it was otiose, referring to a procedure whereby the Commission could authorize the Member State to take protective measures to rectify difficulties during the transitional period. That period came to an end at midnight on December 31, 1969.

9. See, e.g., *Commission v. Luxembourg & Belgium*, Joined Cases 2 & 3/62, [1962] E.C.R. 445 (gingerbread); *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration*, Case 26/62, [1963] E.C.R. 1; *Commission v. Luxembourg & Belgium*, Joined Cases 90 & 91/63, [1964] E.C.R. 625 (milk products); *Sociaal Fonds voor de Diamantarbeiders v. S.A. Ch. Brachfeld & Sons*, Joined Cases 2 & 3/69, [1969] E.C.R. 211; *Eunomia di Porro E. C. v. Ministry of Education of Italy*, Case 18/71, [1971] E.C.R. 811; *S.p.A. Marimex v. Ministry of Finance of Italy*, Case 84/71, [1972] E.C.R. 89; *S.p.A. Marimex v. Italian Finance Administration*, Case 29/72, [1972] E.C.R. 1309; *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865; *Fratelli Variola S.p.A. v. Amministrazione Italiana delle Finanze*, Case 34/73, [1973] E.C.R. 981; *Rewe-Zentralfinanz eGmbH v. Direktor der Landwirtschaftskammer Westfalen-Lippe*, Case 39/73, [1973] E.C.R. 1039.

10. See, e.g., *Commission v. Italy*, Case 45/64, [1965] E.C.R. 857; *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis*, Case 57/65, [1966] E.C.R. 205; *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, Case 28/67, [1968] E.C.R. 143; *Firma Kurt A. Becher v. Hauptzollamt München-Landbergerstraße*, Case 13/67, [1968] E.C.R. 187; *Firma August Stier v. Hauptzollamt Hamburg-Ericus*, Case 31/67, [1968] E.C.R. 235; *Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau*, Case 34/67, [1968] E.C.R. 245; *Commission v. Italy*, Case 16/69, [1969] E.C.R. 377; *Commission v. Italy*, Case 28/69, [1970] E.C.R. 187; *Commission v. Belgium*, Case 77/69, [1970] E.C.R. 237.

11. See *Fink-Frucht GmbH v. Hauptzollamt München-Landbergerstraße*, Case 27/67, [1968] E.C.R. 223, 233.

discriminatory taxation on imports and exports could not come within the prohibition of quantitative restrictions and measures having equivalent effect, within the meaning of Article 28 of the EC Treaty, as those restrictions, which were intended to limit the quantities imported, in fact differed both in their purpose and the way in which they operate from measures of a fiscal nature. Moreover, the two sets of provisions laid down different periods of time and different procedures for the elimination of the restrictions to which they referred, and it would thus be difficult to concede that one on the same tax could be both a measure having equivalent to a quantitative restriction and internal taxation.<sup>12</sup> Further demarcation occurred in *Commission v. Italy*, the first "Art Treasures" case,<sup>13</sup> in which the ECJ found that the provisions of Article 30 EC could not be invoked to justify measures which constitute customs duties or charges having equivalent effect; the ECJ also observed that exceptions to the fundamental rule that all obstacles to the free movement of goods between Member States had to be eliminated, must be strictly construed. In any event, it continued, the fact that the provisions of Article 30 EC do not relate to customs duties and charges having equivalent effect was explained by the fact that such measures had the sole effect of rendering more onerous the exportation of art treasures, without ensuring the attainment of the relevant objective referred to in Article 30 EC (namely to protect artistic, historic, or archaeological heritage). In order to be able to avail themselves of that provision, the Member States had to observe the limitations which it imposed, both as regards the objective to be attained and, as regards the nature of the means used to attain it.<sup>14</sup> As the seeds of the necessity and proportionality tests of justifications for measures having equivalent effect, sowed (in the ECJ's subsequent view)<sup>15</sup> in the second sentence of Article 30

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12. *See id.* at 231.

13. *Commission v. Italy*, Case 7/68, [1968] E.C.R. 423.

14. *See id.* at 430-31.

15. *See, e.g., Regina v. Henn & Darby*, Case 34/79, [1979] E.C.R. 3795, 3815. It is submitted that even though it is clear that the second sentence of Art. 30 EC is designed to avoid abuse of the grounds of justification in the first sentence, the better view is that the necessity and proportionality of a measure are to be examined in the context of the alleged justification, and that a measure which is (ostensibly) justified may nevertheless fall foul of the second sentence of Art. 30 EC. Thus the second sentence is designed to prevent the dressing up of essentially protective measures in the sheep's clothing of justifications, whereas necessity and proportionality go to the question of whether a

EC began to germinate, the policy of interpreting the first sentence of Article 30 EC strictly had been convincingly launched. This led the ECJ in 1972 to reiterate that Article 30 of the EC Treaty could not be understood as authorizing measures of a different nature from those referred to in Articles 28 and 29; thus, while Article 30 EC did not prevent sanitary inspections, it did not thereby permit the imposition of charges levied on imported goods subjected to such inspections and intended to cover the costs incurred; such a charge was not intrinsically necessary to the exercise of the power laid down in Article 30 EC and was thus capable of constituting an additional barrier to intra-Community trade.<sup>16</sup>

The ECJ well demonstrated the ramifications of this approach in *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*<sup>17</sup> in which it drew a distinction between the exercise of rights recognized by legislation of the Member State with regard to industrial and commercial property, which the EC Treaty does not affect, and the exercise of those rights which could nevertheless fall within the prohibition of which the EC Treaty laid down; thus, although Article 30 EC permitted prohibitions or restrictions on free movement of products which were justified for the purpose of protecting industrial or commercial property rights, it only admitted derogations from that freedom to the extent to which they were justified for the purpose of safeguarding rights which constituted the specific subject-matter of such property. The ECJ held that the prohibition of marketing in a Member State of products, distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, would, by legitimizing the isolation of national markets, be repugnant to the essential purpose of the Treaty, which was to unite national markets into a single market; that purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring

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justification can be made out. See L.W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 210-20 (1985).

16. See *SpA Marimex v. Italian Finance Administration*, Case 29/72, [1972] E.C.R. 1309, 1318.

17. *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG.*, Case 78/70, [1971] E.C.R. 487.

about arbitrary discrimination or disguise restrictions on trade between Member States.<sup>18</sup> Here too, important factors in the future development of the case-law on the use of industrial and commercial property rights were launched: the importance of the unity of the market, the doctrine of exhaustion of rights, and the importance of consent to first marketing within the Community in that context. Later that year (1971) the ECJ held that the prohibitions of Articles 28 and 29 EC precluded, apart from the exceptions for which provision was made by Community law itself, those provisions which required, even purely as a formality, import or export licenses or any other similar procedure.<sup>19</sup>

Penultimately, in the context of a common organization of the market for rice,<sup>20</sup> the ECJ found in 1973 that "the prohibition of quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit."<sup>21</sup> It went on to find that measures having equivalent effect not only took the form of restraint described; whatever the description or technique employed, they could also consist of encumbrances having the same effect.<sup>22</sup>

Finally, there came the notorious judgment in *Van Zuylen Frères v. Hag AG* ("Hag I"),<sup>23</sup> which for many years cast a long shadow over Community industrial and commercial property law. In view of the emphasis noted above in *Deutsche Grammophon* on the unity of the market, and the need to ensure that private parties did not artificially resurrect barriers to intra-Community trade that the Member States had been obliged to abolish, the

18. *See id.* at 499-500.

19. *See Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, Joined Cases 51, 52, 53, 54/71, [1971] E.C.R. 1107, 1116.

20. Prior to the end of the transitional period (when Arts. 28-30 EC acquired direct effect), the Council used to copy the prohibitions of inter alia Arts. 28 & 29 EC Treaty into the integral text of the regulations on the common organization of the various agricultural markets. This ensured that the prohibitions were directly applicable, and had direct effect in the agricultural sphere even before they had direct effect in other areas. This explains why, in some of the Arts. 28-30 cases involving common organizations of the market, the European Court of Justice ("ECJ") actually ruled on the wording of the regulation, rather than on the identical wording of the EC Treaty itself.

21. *See Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865, 879.

22. *See id.*

23. *See generally Van Zuylen Frères v. Hag AG*, Case 192/73, [1974] E.C.R. 731 [hereinafter *Hag I*].



ECJ's approach in *Hag I* is understandable, but the common origin doctrine used by the ECJ (the trademarks involved were originally in one pair of hands, but through results of wartime sequestration and subsequent sale were no longer) manifestly failed to take account of the importance of the function of a trademark in the eyes of the consumer, as guaranteeing the authenticity of a product, and the risk of confusion in the consumer's mind of having two different companies marketing—by this time—very different versions of Café Hag decaffeinated coffee. The burial of this doctrine came only as late as 1990 in *SA CNL-SUCAL-NV v. HAG GF AG* ("*Hag II*"),<sup>24</sup> it being made plain that what was decisive was that the trademarks were identical or confusingly similar in respect of similar products, and that there were no legal or economic ties between the parties concerned. Where there are indeed such links, the principle of exhaustion still applies in respect of intra-Community trade, and an attempt to maintain exclusivity of distribution by use of separate trademarks may well involve an infringement of Community anti-trust law. Moreover, as third parties operating under licenses of right<sup>25</sup> and now, to the disappointment of consumers, others<sup>26</sup>

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24. See generally *SA CNL-SUCAL-NV v. HAG GF AG*, Case C-10/89, [1990] E.C.R. I-3711. The circumstances were dramatic: the ECJ had heard a powerful opinion (in connection with which, it is worth recalling the analysis by Jacobs (1975). See Francis Jacobs, *Industrial Property and the EEC Treaty: A Reply*, 24 INT'L. & COMP. L.Q. 643, 653, from Advocate General Jacobs, advocating a reversal of the approach in *SA CNL-SUCAL-NV v. HAG GF AG* [hereinafter *Hag II*]). Because of a series of takeovers in the beverage sector, the ownership of the trademarks had, since the reference to the ECJ, reverted into ownership within one group of companies, and the parties had no longer any interest in continuing the litigation. Accordingly, they made an appointment with the referring national court to ask for the reference to be withdrawn. Whether by coincidence or by fast footwork, the ECJ pronounced its judgment shortly before the parties were due to appear before the national court! Confirming that the common origin principle was abandoned not merely in the case of compulsory splitting of ownership, but also in the case of voluntary splitting, see generally *IHT Internationale Heiztechnik GmbH v. Ideal-Standard GmbH*, Case C-9/93, [1994] E.C.R. I-2789.

25. See *Pharmon BV v. Hoechst AG*, Case 19/84, [1985] E.C.R. I-2281, 2298.

26. See, e.g., *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, Case C-355/96, [1998] E.C.R. I-4799; *Sebago Inc. v. G-B Unic SA*, Case C-173/98, [1999] E.C.R. I-4103; *Zino Davidoff SA v. A & G Imports Ltd.*, Joined Cases C-414-416/99, [2001] E.C.R. I-8691. But see *Phytheron International SA v. Jean Bourdon SA*, Case C-352/95, [1997] E.C.R. 1729; *Van Doren & Q GmbH v. Lifestyle Sports & Sportwear Handelsgesellschaft MbH*, Case C-244/00, [2003] E.C.R. I-3051. These judgments (involving consideration of the First Trademark Directive, Council Directive No. 89/104, [1989] O. J. L 40/1, and in the later cases its interaction with Arts. 28-30 EC) build on the much earlier series of judgments in *EMI Records Ltd. v. CBS United Kingdom Ltd.*, Case 51/75, [1975] E.C.R. 811, decided on June 15, 1976.

have found out to their cost, the doctrine of consent to first marketing within the Community forms a key condition to the exhaustion doctrine.

Prior to the celebrated judgment in *Procureur du Roi v. Dassonville*,<sup>27</sup> the scene had been set with the development of various general principles: the non-availability of Article 30 EC to justify barriers to intra-Community trade on economic grounds, the strict interpretation of the first sentence of Article 30 of the EC Treaty, the importance of the unity of the market place, even in relation to the conduct of individuals, and the importance of consent to first marketing within the Community in relation to the use made of national industrial and commercial property rights. Of these principles, it is worth recalling that the applicability of Articles 28-30 EC to the conduct of individuals as such (as opposed to an individual acting in an official capacity, whose acts therefore are attributable to the State)<sup>28</sup> in relation to the use they make of industrial and commercial property rights is an anomaly, because in all other aspects, Articles 28-30 EC only apply to State measures.<sup>29</sup> This anomaly is really explicable on the basis that it is State measures which are being invoked, albeit by

27. *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837.

28. See generally *AGM-COS.MET Srl v. Suomen Valtio*, Case C-470/03, [2007] E.C.R. I-2749.

29. See *Criminal Proceedings Against Van de Haar*, Cases 177 & 178/82, [1984] E.C.R. 1797, ¶¶ 8-24; *VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, [1987] E.C.R. 3801, 3830; *Bayer AG et al. v. Süllhöfer*, Case 65/86, [1988] E.C.R. 5249, 5285; *Sapod Audic v. Eco-Emballages SA*, Case C-159/00, [2002] E.C.R. I-5031, 5085 (the ECJ referred to para. 5 of *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837 and to para. 36 of *Colim NV v. Bigg's Continent Noord NV*, Case C-33/97, [1999] E.C.R. I-3175, 3215, neither of which support the proposition advanced, "a contractual provision cannot be regarded as a barrier to trade for purposes of Article 28 EC since it was not imposed by a Member State but agreed between individuals." See *Colim NV v. Bigg's Continent Noord NV*, Case C-33/97, [1999] E.C.R. I-3175, ¶ 74. P. Oliver and S. Enchelmaier state that a Member State can only be liable for the acts of private parties in highly exceptional circumstances. See P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 *COMMON MKT. L. REV.* 649, 663 (2007). They rightly refer to the angry farmers judgment, *Commission v. France*, Case C-265/95, [1997] E.C.R. I-6959, and to the environmental protest judgment, *Schmidberger v. Austria*, Case C-112/00, [2003] E.C.R. I-5659, but, with respect, it is *not* the case that a Member State is liable for the act of private parties, the liability is for the failure to ensure that the free movement of goods is maintained and ensured—in other words, the failure to say anything about the acts of private parties. As to the notification and consultation obligations imposed by Community law in the case of disruptions to intra-Community trade, see Council Regulation No. 2679/98, O.J. L 337/8 (1998).

private individuals, to create barriers to the free movement of goods which the Member States have been obliged to remove.

## II. THE ACADEMIC DISPUTES

Despite the fact that in a number of later judgements the ECJ would make the, as far as Article 28 EC is concerned, irrelevant observation that a particular measure was not designed to hinder trade between Member States,<sup>30</sup> it has been clear from the very beginning of the attempts to define the notion of measures having equivalent effect, that it should be viewed as an effects doctrine rather than a concept which depended upon the nature or contents—or even purpose of the measure.<sup>31</sup> Indeed, the Commission rightly emphasized this very early on;<sup>32</sup> observing later that Article 28 EC, applied not merely to legal and administrative measures, but also to administrative practices.<sup>33</sup> Somewhat curiously though, the Commission took the view that measures, which were equally applicable to imports and national products would not, in most cases, fall within the ambit of Article 28 EC.<sup>34</sup> This initial approach excited a veritable flood of academic writing, which, like Ancient Gaul, can be divided into three: those who took the view that only discriminatory measures were caught by the notion of measures having equivalent effect,<sup>35</sup> those who took a wider view looking at obstacles to trade

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30. See, e.g., *H. Krantz GmbH v. Ontvanger der Directe Belastingen*, Case C-69/88, [1990] E.C.R. I-583,597; *Criminal Proceedings against Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, 6130.

31. The intention of a measure may be relevant in relation to Art. 30 EC justifications, in relation to the second sentence of that provision (but, it is respectfully submitted that it is not a necessary ingredient, in determining whether a measure forms a means of arbitrary discrimination, although it will usually form a substantial element in deciding whether the measure forms a disguised restriction on trade). See EC Treaty, *supra* note 2, art. 30, O.J. C 321 E/37, at 53.

32. See generally Reply to Written Question No. 118 by M. Deringer to the EEC Commission, 901 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES ("J.O.") 67 (1967); see also D. Ehle, *Maßnahmen mit gleicher Wirkung wie Mengemäßige Beschränkungen und ihre Abschaffung im Gemeinsamen Markt*, 125 AUBENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS ("AWD") 453, 455 (1967).

33. See generally Reply to Written Question No. 64 by M. Deringer to the EEC Commission, 169 J.O. 12 (1967).

34. See generally *id.*

35. See M. Seidel, *Der EWG-rechtliche Begriff der Massnahmen gleicher Wirkung wie eine mengemäßige Beschränkung*, (1967) 9 NEUE JURISTISCHER WOCHENSCHRIFT 2081, 2084, 2086 (1967); G. Meier, 6 AWD 219, 220; see generally D. EHLE & G. MEIER, EWG-WARENVERKEHR, (1971); M. GRAF, DER BEGRIFF MASSNAHMEN GLEICHER WIRKUNG WIE

between Member States,<sup>36</sup> and those who took a view broadly supportive of the Commission.<sup>37</sup> The wide divergences of views in the literature well demonstrated the difficulty of achieving a balance between the understandable desire of the Member States to continue to enforce the legislation on the one hand and integrationist demands of the Community on the other.<sup>38</sup> The narrow interpretation of Article 28 would have allowed the Member States to frustrate the achievement of the free movement of goods envisaged in the Treaty. And yet the wider view gave rise to fears that in important sectors the effective right of the Member States to legislate would be eroded. Although the use of the principle of proportionality by the Commission<sup>39</sup> and the observation by VerLoren van Themaat that many equally applicable obstacles would be likely to benefit from Article [30],<sup>40</sup> represented an attempt to find a balance between the demands of the Community and the claims of the Member States, it was not until the judgment of the ECJ in *Dassonville*<sup>41</sup> that the primacy of Community interests was firmly established in relation to Article 28.

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MENGENMÄSSIGE EINFUHRBESCHRÄNKUNGEN IN DEM EWG-VERTRAG (1972). Broadening the narrow approach somewhat, finding "material discrimination" (i.e., in fact if not in law) sufficient, E. Steindorff, *Dienstleistungsfreiheit und Ordre Public*, in *DIENSTLEISTUNGSFREIHEIT UND VERSICHERUNGSAUFSICHT IM GEMEINSAMEN MARKT* 79, 83 (Maurice Lagrange et al. eds., 1971).

36. See P. VerLoren van Themaat, *Bevat Artikel 30 van het EEG-Verdrag slechts een non-Discriminatiebeginsel ten aanzien van invoerbeperkingen?* SOCIAAL ECONOMISCHE WETGEVING ("SEW") 632 (1967); P. VerLoren van Themaat, *EEG-richtlijnen betreffende discriminerende aankooppolitiek, overheidsinstellingen, discriminerende prijsvoorschriften en andere maatregelen van gelijke werking als kwantitatieve invoerbeperkingen*, SEW 258 (1970) (criticizing the Commission's standpoint in Commission Directive No. 70/50, O. J. Eng. Spec. Ed. 1970, at 17); M. WAELBROECK, *LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE* 102-03 (J. Mégret et al. eds., 1970). See also, subsequently, A. W. Meij & J. A. Winter, *Measures Having Equivalent Effect*, 13 *COMMON MKT. L. REV.* 76 (1976).

37. See D. Ehle, *Maßnahmen mit gleicher Wirkung wie mengenmäßige Beschränkungen und ihre Abschaffung Im Gemeinsamen Markt*, 125 *AWD* 453, 455 (1967); see generally R-C Béraud, *Les Mesures d'Effet Equivalent au sens des Arts. 30 et suivants du Traité de Rome*, *REVUE TRIMESTRELLE DE DROIT EUROPÉEN* ("RTDE") 265 (1968); Dona-Viscardini, *Les Mesures d'Effet Equivalent à des Restrictions Quantitatives*, *REVUE DE MARCHÉ COMMUN* ("RMC") 224 (1973); P. Ulmer, *Zum Verbot mittlebarer Einfuhrbeschränkungen in EWG-Vertrag*, *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL* ("GRUR INT'L") 502 (1973) (also critical of the Commission's viewpoint); C-D Ehlermann, *Die Bedeutung des Artikels 36 EWGV für Freiheit des Warenverkehrs*, *EUROPARECHT* 1 (1973).

38. See L.W. GORMLEY, *supra* note 15, at 18.

39. See generally Commission Directive No. 70/50, O.J. L 13/29 (1969).

40. See Van Themaat, *supra* note 36, at 634.

41. See *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852.

## III. THE BASIC PRINCIPLE IN DASSONVILLE

The bouquet of a wee dram whiffed through the *salle des pas perdus* at the ECJ, enriched no doubt by the prospect of continuing parallel imports, with the handing down of the judgment in *Dassonville* in which the ECJ proclaimed that “[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”<sup>42</sup> This basic principle of the definition of measures having equivalent effect has remained, steadfast, ever since, although the reference to “trading rules” is sometimes omitted, or replaced by “national rules” or simply “rules,” and very occasionally by “commercial rules.”<sup>43</sup> It remains thus the standard definition of measures having equivalent effect to quantitative restrictions, cited regularly and relentlessly. The basic principle itself is very broad in its formulation, although its effects are tempered by the development, first in *Dassonville* itself<sup>44</sup> and more extensively in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”),<sup>45</sup> of the case-law based justifications for measures, which stand in addition to the exceptions provided for in the EC Treaty itself. The need for a broadly-formulated basic principle can be explained by a desire to limit as much as possible the room for maneuver by the Member States in an effort to create or maintain in force barriers to intra-Community trade, while the development of the case-law based justifications recognized on an equitable basis that there were certain legitimate interests or values, not thought of when the Treaty was drafted, which had to be accepted, pending them being covered by Community mea-

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42. See *id.* *Dassonville* concerned parallel imports of Scotch whisky (Johnnie Walker and Vat 69).

43. The reference to “commercial rules” is in *Commission v. Denmark*, Case C-192/01, [2003] E.C.R. I-9693, 9736. As to some examples of the ECJ’s varying approach, see L.W. Gormley, *The Definition of Measures Having Equivalent Effect*, in CONTINUITY AND CHANGE EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 189, 193 (Anthony Arnall et al. eds., 2008).

44. See *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852 (the basic principle is set out in para. 5 of the judgment, the first case-law based justifications at para. 6).

45. See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. 649, 662 [hereinafter *Cassis de Dijon*].

tures, as deserving protection.<sup>46</sup> In this context, the application of the principles of necessity and proportionality, and by analogy of the second sentence of Article 30 EC, served to ensure that these new justifications, just as the EC Treaty-based justifications, should not be misused. A balancing of interests in the round thus took place. The downside of a wide basic principle is the temptation, which lawyers and their clients could not resist, to probe the limits of the definition: did the ECJ really mean what it said, or even say what it meant?

#### IV. APPLYING THE PRINCIPLE FROM *DASSONVILLE* TO *KECK*

Some evident themes in the case-law were fairly easily developed, applying the basic principle in *Dassonville*, as a few examples demonstrate: the promotion of national products,<sup>47</sup> or favoring of national contractors over those in other Member States,<sup>48</sup> and "local grab" measures<sup>49</sup> were readily caught by the basic principle; insistence on repeating inspections already carried out in the exporting Member States<sup>50</sup> was painlessly found to be a barrier to intra-Community trade, import bans,<sup>51</sup> import license requirements,<sup>52</sup> and prior authorization requirements,<sup>53</sup> requirements that a representative be established in the Member

46. See L.W. Gormley, *supra* note 15, at 52-53.

47. See, e.g., *Commission v. Ireland*, Case 249/81, [1982] E.C.R. 4005; *Apple & Pear Development Council v. K. J. Lewis Ltd.*, Case 222/82, [1983] E.C.R. 4083; *Jongeneel Kaas BV v. Netherlands*, Case 237/82, [1984] E.C.R. 483; *Commission v. France*, Case 152/78, [1980] E.C.R. 2299.

48. See, e.g., *Commission v. Ireland*, Case 45/87, [1988] E.C.R. 4929; *Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale No. 2 di Carrara*, Case C-21/88, [1990] E.C.R. I-889.

49. See, e.g., *Commission v. Italy*, Case C-235/89, [1992] E.C.R. I-776; *Commission v. United Kingdom*, Case C-30/90, [1992] E.C.R. I-829.

50. See, e.g., *Officier van Justitie v. De Peijper*, Case 104/75, [1976] E.C.R. 613; *United Foods NV v. Belgium*, Case 132/80, [1981] E.C.R. 995; *Criminal Proceedings Against Frans-Nederlandse Maatschappij voor Biologische Producten BV*, Case 272/80, [1981] E.C.R. 3277.

51. See, e.g., *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865; *Commission v. France*, Case 232/78, [1979] E.C.R. 2729.

52. See, e.g., *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, Cases 51-54/71, [1971] E.C.R. 1107; *Commission v. United Kingdom*, Case 121/81, [1983] E.C.R. 203.

53. See, e.g., *Commission v. Italy*, Case C-249/92, [1994] E.C.R. I-4311.

State of importation,<sup>54</sup> requirements that goods be presented or put up in a certain way,<sup>55</sup> origin marking requirements,<sup>56</sup> confining names to domestic products only,<sup>57</sup> certain effects of price-regulatory measures,<sup>58</sup> and administrative practices,<sup>59</sup> all fell foul of the basic principle, without too much logical difficulty. It also became clear that Article 28 EC was not merely concerned with the prohibition of restriction on trade between Member States, but involved a positive obligation on Member States to accept products coming from each other. The foundations of the concept of mutual acceptance were laid in relation to the recognition of public sector tests and inspections,<sup>60</sup> but became more generally apparent in the celebrated judgment in *Cassis de Dijon*,<sup>61</sup> which came to public prominence through the Communication on the consequences of the *Cassis de Dijon* judgment issued by the Commission.<sup>62</sup> However, *Cassis de Dijon* contained two central errors: first, the ECJ spoke about goods "lawfully

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54. See, e.g., *Commission v. Belgium*, Case 155/82, [1983] E.C.R. 531; *Commission v. Federal Republic of Germany*, Case 247/81, [1984] E.C.R. 1111.

55. See, e.g., *Criminal Proceedings Against Fietje*, Case 27/80, [1980] E.C.R. 3839; *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, Case 261/81, [1982] E.C.R. 3961.

56. See, e.g., *Commission v. Ireland*, Case 113/80, [1981] E.C.R. 1625; *Commission v. United Kingdom*, Case 207/83, [1985] E.C.R. 1201.

57. See, e.g., *Commission v. Federal Republic of Germany*, Case 12/74, [1975] E.C.R. 181; *Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen*, Case 13/78, [1978] E.C.R. 1935; *Exporteur SA v. LOR SA*, Case C-3/91, [1992] E.C.R. I-5529.

58. Discriminatory price regulatory measures fall clearly within the ambit of Art. 28 EC; equally applicable price-regulatory measures will have prohibited effects when they have discriminatory effects against imported products. See, e.g., *Tasca*, Case 65/75, [1976] E.C.R. 291; *SA GB-INNO-BM v. Association des Détaillants en Tabac (ATAB)*, Case 13/77, [1977] E.C.R. 2115; *Openbaar Ministerie v. Van Tiggele*, Case 82/77, [1978] E.C.R. 25; *Commission v. Italy*, Case 78/82, [1983] E.C.R. 1955; *Association des Centres Distributeurs Édouard Leclerc v. Au Blé Vert Sàrl*, Case 229/83, [1985] E.C.R. 1.

59. See *Commission v. France*, Case 21/84, [1985] E.C.R. 1356, ¶ 13, in which the ECJ pointed out that an isolated act did not amount to an administrative practice, there had to be a certain degree of consistency and generality, although where there are very few market participants in a particular sector, an attitude adopted to one company may well be characterized as an administrative practice.

60. See, e.g., *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865; *Commission v. France*, Case 232/78, [1979] E.C.R. 2729.

61. See generally *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649.

62. See Communication from the Commission Concerning the Consequences of the Judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ("*Cassis de Dijon*") (1980) O.J. C 256/2, at 2; see also R. Barents, *New Developments in Measures Having Equivalent Effects*, 18 COMMON MKT. L. REV. 271, 296 (1981); see generally L.W. Gormley, *Cassis de Dijon and the Communication from the Commission*, 6 EUR. L. REV. 454 (1981).

produced and marketed” in another Member State, whereas it should have referred to goods lawfully produced or marketed in another Member State,<sup>63</sup> secondly, in the (illustrative) list of justifications for measures, the ECJ referred to the protection of public health.<sup>64</sup> This latter error was subsequently corrected by the ECJ,<sup>65</sup> although, surprisingly, the former never has been.

However, there started to emerge a series of cases of scant integrationist merit, which severely tested the ECJ’s willingness to apply the basic principle logically. In *Blesgen v. Belgium*,<sup>66</sup> which concerned liquor licensing, the ECJ dramatically failed to apply the basic principle, instead finding that liquor licensing in cafes had in reality nothing to do with imports of the spirits concerned. This case is the most interesting example of the ECJ kowtowing to pressures not to find the national measure concerned in principle prohibited; it thus rejected the logical approach, which would have been to have found that the Belgian measure was indeed capable of limiting the sales opportunities for (largely imported), spirits, but nevertheless justified on grounds of public policy (public order) or on the ground of being a legitimate measure in the interests of protection of the health of young people. Pressure of this sort is something to which regrettably, the ECJ is not quite as immune as it should be, although it is fair to say that examples of spinelessness are relatively few, but that does not diminish their notoriety.<sup>67</sup>

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63. This is because of the effect of Art. 23(2) EC (free movement benefits not only goods originating in the Community but also products coming from third countries which are in free circulation in Member States). See EC Treaty, *supra* note 2, art. 23(2), O.J. C 321 E/37, at 51. As to when products are in free circulation, see Art. 24 EC. See *id.*, art. 24, at 51.

64. This added absolutely nothing to “the protection of the life and health of humans, animals, and plants” mentioned in Art. 30 EC. See EC Treaty, *supra* note 2, art. 30, O.J. C 321 E/37, at 53.

65. See *Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generaliteit de Cataluña*, Cases C-1 & 176/90, [1991] E.C.R. I-4151, 4183-84.

66. See generally *Blesgen v. Belgium*, Case 75/81, [1982] E.C.R. 1211; see also *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen*, Case C-69/88, [1990] E.C.R. I-583.

67. Other notorious examples of highly dubious conclusions in the free movement of goods area include *Commission v. Belgium*, Case C-2/90, [1992] E.C.R. I-4431 (Walloon waste in which the ECJ having decided that waste fell to be treated like any other goods, went on to find that because of its special nature it was not a discriminatory measure; the Walloon measure was upheld on environmental protection grounds when it was manifestly discriminatory), and *Belgium v. Spain*, Case C-388/95, [2000] E.C.R. I-



*Blesgen* looked as if it might cast a long shadow, although those fears, like recent reports of Mark Twain's death, were greatly exaggerated. Nevertheless, lawyers continued to attack measures restricting the circumstances in which goods could be sold within Member States. Thus Sunday trading,<sup>68</sup> sex shop licensing,<sup>69</sup> and worker protection<sup>70</sup> provided fruitful ground for litigation. To a certain extent, the ECJ could have limited this by being clearer when first confronted with Sunday trading problems. Implicitly it acknowledged that restrictions on Sunday trading were indeed measures which fell within the *Dassonville* basic principle;<sup>71</sup> a reluctance to come to a concluded view on whether the measures were justified, however, meant that it was left up to the national courts to decide on the proportionality of the measures. The option of leaving the decision clearly in the hands of the national court is the route which the ECJ tends to follow when it is paying lip service to (sometimes exaggerated) national sensitivities. By the time the ECJ stated its own view on Sunday trading, namely that the non-discriminatory application of shop closing legislation appeared justified,<sup>72</sup> lawyers and litigants were no longer listening.<sup>73</sup>

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3123, which reversed the finding in *Éts Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA*, Case C-49/90, [1992] E.C.R. I-3669. Outside the free movement of goods see, e.g., *Groener v. Minister for Education*, Case C-379/89, [1989] E.C.R. 3967 and *The Society for the Protection of Unborn Children Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. I-4865.

68. See generally *Torfaen Borough Council v. B & Q PLC*, Case 145/88, [1989] E.C.R. 3851; *Union Départementale des Syndicats CGT de l'Aisne v. SIFEDEF Conforama*, Case C-312/89, [1991] E.C.R. I-997; *Criminal Proceedings Against Marchandise*, Case C-332/89, [1991] E.C.R. I-1027; *Council of the City of Stoke-on-Trent v. B & Q PLC*, Case C-169/91, [1992] E.C.R. I-6635; *Rochdale Borough Council v. Anders*, Case C-306/88, [1992] E.C.R. I-6457; *Reading Borough Council v. Payless DIY Ltd.*, Case C-304/90, [1992] E.C.R. I-6493.

69. See generally *Quietlynn v. Southend Borough Council*, Case C-23/89, [1990] E.C.R. I-3059; *Sheptonhurst Ltd. v. Newham Borough Council*, Case C-350/89, [1991] E.C.R. I-2387.

70. See generally *Summary Proceedings Against Oebel*, Case 155/80, [1981] E.C.R. 1993 (this pre-dated *Blesgen v. Belgium*, Case 75/81, [1982] E.C.R. 1211). Clear worker protection arguments were also advanced in *Union Départementale des Syndicats CGT de l'Aisne v. SIFEDEF Conforama*, Case C-312/89, [1991] E.C.R. I-997 and *Criminal Proceedings Against Marchandise*, Case C-332/89, [1991] E.C.R. I-1027.

71. See *Torfaen Borough Council v. B & Q PLC*, Case 145/88, [1989] E.C.R. 3851, ¶¶ 10-19.

72. See *Union Départementale des Syndicats CGT de l'Aisne v. SIFEDEF Conforama*, Case C-312/89, [1991] E.C.R. I-997, ¶¶ 7-14; *Criminal Proceedings against Marchandise*, Case C-332/89, [1991] E.C.R. I-1027, ¶¶ 8-14.

73. Hence the references in *Council of the City of Stoke-on-Trent v. B & Q PLC*,

The second front of attack on national legislation, which restricted the commercial freedom of market participants, took place in relation to selling techniques: matters such as the prohibition of the use of certain types of sales promotion campaigns,<sup>74</sup> the prohibition of doorstep selling,<sup>75</sup> and restrictions on comparative advertising,<sup>76</sup> were perceived as standing in the way of market penetration. In this series of cases, the conclusion did not always favor the importer, as the ECJ often felt that the measures, while undoubtedly capable of hindering trade between Member States, were justified.<sup>77</sup> But for lawyers and litigants, what mattered was that they had their day in court at Community level: the ECJ was almost saying "bring me your tired, your poor, your huddled masses yearning to breathe free."<sup>78</sup> Yet this was a Janus approach: with one face the ECJ started to send a message of simply not wanting to know about shop closing legislation, yet with the other it seemed to relish its role as the haven of justice and mercy for the weary and hard-done-by participant in intra-Community trade.

These cases were brought under the preliminary reference procedure, but the workload of the Commission's services, partly as a result of the Commission's Communication,<sup>79</sup> partly as a result of the effect of the drive for the Internal Market,<sup>80</sup> meant

Case C-169/91, [1992] E.C.R. I-6635; Rochdale Borough Council v. Anders, Case C-306/88, [1992] E.C.R. I-6457, and Reading Borough Council v. Payless DIY Ltd et al., Case C-304/90, [1992] E.C.R. I-6493.

74. See generally *Criminal Proceedings Against Oosthoek's Uitgeversmaatschappij BV*, Case 286/81, [1982] E.C.R. 4575.

75. See generally *Buet & Educational Business Services (EBS) SARL v. Ministère Public*, Case 382/87, [1989] E.C.R. 1235.

76. See generally *GB-INNO-BM v. Confédération du Commerce Luxembourgeois*, Case C-362/88, [1990] E.C.R. I-667; *Schutzverband Gegen Unwesen in der Wirtschaft v. Yves Rocher GmbH*, Case C-126/91, [1993] E.C.R. I-2361.

77. See, e.g., *Criminal Proceedings Against Oosthoek's Uitgeversmaatschappij BV*, Case 286/81, [1982] E.C.R. 4575; *Buet & Educational Business Services (EBS) SARL v. Ministère Public*, Case 382/87, [1989] E.C.R. 1235. As examples of unjustified measures, see *GB-INNO-BM v. Confédération du Commerce Luxembourgeois*, Case C-362/88, [1990] E.C.R. I-667; *Schutzverband Gegen Unwesen in der Wirtschaft v. Yves Rocher GmbH*, Case C-126/91, [1993] E.C.R. I-2361.

78. With Emma Lazarus.

79. See *Communication from the Commission Concerning the Consequences Of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ("Cas-sis de Dijon")* (1980) O.J. C 256/2, at 2.

80. See *Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985); see generally 1992: *ONE EUROPEAN MARKET?* (R. Bieber et al. eds. 1988); the

that the Commission's division specializing in Articles 28-30 infringements was in the 1980's becoming ever more like a free legal aid center for traders within the Community.<sup>81</sup> What the ECJ saw was merely the tip of the iceberg; fortunately most complaints were resolved by the Member State concerned being persuaded to climb down, and sometimes it transpired that the complaints were misconceived or unjustified. Discreditably, on occasions, some Member States were not above persuading their Commissioners' cabinets to engage in a little shoddy dealing to close files, although such deals invariably compromised the moral high ground of the cabinet with the internal market portfolio for future occasions. One thing was certain: some people wanted to press for reigning in the basic principle in *Dassonville* (or perhaps for reigning in an extremely successful division). Two members of the Commission's Legal Service, Marengo and White, sought in different ways to question the wide application of the basic principle. Marengo revived the old discrimination criterion arguments,<sup>82</sup> but his analysis was, with respect, not actually supported by the judgments he relied upon, as a close examination of the context of the statements concerned demonstrates.<sup>83</sup> In any event, a discrimination criterion for the scope of Article 28 EC would be disastrous.<sup>84</sup> White was more subtle: he suggested that Article 28 should not regulate by whom, when, how and where goods were sold, but should be confined to rules affecting the characteristics of products (matters such as their composition, presentation, size, shape, weight, denomination and labeling).<sup>85</sup> That analysis, although attracting much stimu-

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entire 1989 first issue of LEGAL ISSUES OF EUROPEAN INTEGRATION; P.P. CRAIG, THE EVOLUTION OF THE SINGLE MARKET; THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES (C. Barnard & J. Scott eds. 2002); L.W. Gormley, *The Internal Market: History and Evolution*, in REGULATING THE INTERNAL MARKET 14 (N. Nic. Shuibnhe ed. 2006).

81. Lifting its lamp beside the golden door!

82. See generally G. Marengo, *Pour une Interpretation Traditionnelle de la Notion de Mesure d'Effet Equivalent a une Restriction Quantitative*, CAHIERS DU DROIT EUROPÉEN 211 (1984); see also, more nuanced, L. Defalque, *Le Concept de Discrimination en Matière de Libre Circulation Des Marchandises*, CAHIERS DU DROIT EUROPÉEN 471 (1987).

83. See L.W. Gormley, *supra* note 15, at 263-64.

84. Indeed, it is only in relation to equally price-regulatory measures that the ECJ has required a discriminatory effect before finding that Art. 28 EC is infringed; a similar approach has been taken more generally to measures applicable without distinction as to the destination of a product in relation to Art. 29 EC.

85. See generally E.L. White, *In Search of Limits to Article 30 EEC Treaty*, 26 COMMON MKT. L. REV. 235 (1989).

lating academic discussion,<sup>86</sup> did not find favor with the ECJ, at least when first presented,<sup>87</sup> and represented a position from which the Commission would then withdraw.<sup>88</sup> As Mortelmans has observed,<sup>89</sup> the Commission's position in its submissions in *Criminal Proceedings Against Keck* was that in the light of the case-law, a prohibition of resale at a loss could constitute an obstacle to the importation of goods from other Member States, in so far as a trader wishing to use the marketing strategy to publicize and promote a product found himself obliged to renounce a method which he considered to be effective. Although possible justifications on the grounds of consumer protection and fair trading were considered by the Commission, it concluded that neither justification could be made out. The ECJ, however, having heard Advocate General Tesaro's Opinion in *Ruth Hünermund v. Landesapothekerkammer Baden-Württemberg* ("Hünermund"),<sup>90</sup> concluded otherwise, and the influence of White's views in the formulation of the judgment in *Keck*<sup>91</sup> should not be underestimated either.<sup>92</sup>

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86. See generally D. Chalmers, *Free Movement of Goods within the European Community: An Unhealthy Addiction to Scotch Whisky?*, 41 INT'L & COMP. L.Q. 269 (1993); L.W. Gormley, *Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods*, (1989) 9 YEARBOOK OF EUR. LAW ("YBEL") 197; L.W. Gormley, *Free Movement of Goods*, LEGAL ISSUES OF EUR. INTEGRATION, 1, 9 (1989); K. Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition*, 28 C.M.L. REV. 115 (1991); J. Steiner, *Drawing the Line: Uses and Abuses of Article 30 EEC*, 29 C.M.L. REV. 749 (1992); W. Wils, *The Search for the Rule in Article 30 EEC*, 18 EUR. L. REV. 475 (1993).

87. In *Torfaen Borough Council v. B & Q PLC*, Case 145/88, [1989] E.C.R. 3851, the ECJ did not follow the Commission's arguments.

88. In the oral proceedings in *Quietlynn* it abandoned the position it took in *Torfaen* (and thus the position it had taken in its written submissions in *Quietlynn*); the ECJ simply adopted a *Blesgen* (see *Blesgen v. Belgium*, Case 75/81, [1982] E.C.R. 1211) approach and applied a remoteness test. See *Quietlynn v. Southend Borough Council*, Case C-23/89, [1990] E.C.R. I-3059 [1990] E.C.R. I-3059, 3081. The same approach occurred in *Sheptonhurst Ltd. v. Newham Borough Council*, Case C-350/89, [1991] E.C.R. I-2387.

89. NED. TIJDSCHRIFT VOOR EUROPEES RECHT 247, 254 (2005).

90. *Hünermund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787.

91. See *Criminal Proceedings against Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, 6130.

92. As P. Oliver rightly observes. See P. OLIVER, *FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY* 123 (2003). Mortelmans observes that the Commission's agents in *Criminal Proceedings Against Keck & Mithouard* ("Keck") quickly sprung on board the ECJ's line. See generally K. Mortelmans, *Article 30 of the EEC Treaty and Legislation Related to Market Circumstances: Time to Consider a New Definition*, 28 COMMON MKT. L. REV. 115

*Keck* represented not so much a departure from *Dassonville*, which it expressly upheld, as a nuancing of its application in the case-law hitherto. Although reaction was heavily divided,<sup>93</sup> it was unanimous on at least one point: the ECJ had not clarified its case-law; that was confirmed by the reaction of litigants.<sup>94</sup> The

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(1991); see also R. Wainwright & V. Melgar, *Bilan de L'article 30 Apres Vingt Ans de Jurisprudence—de Dassonville à Keck et Mithouard*, RMC 533 (1994). Mortelmans followed V. Hatzopolous, LE PRINCIPE COMMUNAUTAIRE D'ÉQUIVALENCE DE RECONNAISSANCE MUTUELLE 252 (1999) in noting that Commission officials writing in their personal capacity did not always follow the same line (thus A. Mattera, *De L'arrêt Dassonville à L' Arrêt Keck: L'obscur Clarté D'une Jurisprudence Riche en Principes Novateurs et en Contradictions* 1 REV. MARCHÉ UNIQUE EUR. 117 (1994) and the present author (who was a Commission official from 1983-1990) in *Reasoning Renounced? The Remarkable Judgment in Keck and Mithouard*, 5 EUR. BUS. L. REV. 63 (1994) and *Two Years After Keck*, 19 FORDHAM INT'L L.J. 866 (1996) were merciless critics of the approach in *Keck*). But this is nothing new: there has always been room for discussion, and the views of individual members of the Commission's Legal Service were sometimes quite at odds with the views expressed by those who were lawyers in the policy directorates general. Debate is healthy and encourages improved analysis. Some of the more unorthodox arguments (such as, with respect, Marengo's, see G. Marengo, *Pour une Interpretation Traditionnelle de la Notion de Mesure d'Effet Equivalent a une Restriction Quantitative*, CAHIERS DU DROIT EUROPEEN 211 (1984)) have on occasions been picked up by some Member States to try to attack the Commission's arguments in infringement proceedings in particular, although with notable lack of success. In the latter type of proceedings the influence of the directorate general concerned is much greater: the Legal Service services the policymakers (and, as always, represents the Commission before the ECJ), whereas in preparing the Commission's position on Art. 234 EC references, the Legal Service has greater influence, even though the policymakers are consulted and involved.

93. The discussion of *Keck* has produced an enormous bibliography: as to examples of which, see the literature cited in P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 631-37 (L.W. Gormley ed., 3rd ed. 1998); P. OLIVER, *FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY* 123 (2003); P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 COMMON MKT. L. REV. 649, 674 (2007); and A. ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 427-38 (2d ed. 2006). See in particular, L.W. Gormley, *Reasoning Renounced? The Remarkable Judgment in Keck and Mithouard*, 5 EUR. BUS. L. REV. 63 (1994) and *Two Years After Keck*, 19 FORDHAM INT'L L.J. 866 (1996); R. Joliet, *The Free Circulation of Goods: the Keck and Mithouard Decision and the New Directions in the Case Law*, 1 COLUM. J. EUR. L. 436 (1995); M. Poiaras Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 EC Treaty*, 3 EUR. L.J. 55 (1998); A. Mattera, *De L'arrêt Dassonville à L'arrêt Keck: L'obscur clarté d'une Jurisprudence riche en Principes novateurs et en Contradictions*, Revue du Marché Unique Européen 117 (1994); F. Picod, *La Nouvelle Approche de la Cour de Justice en Matière d'Entraves aux Échanges*, RTDE 169 (1998); R. Wainwright & V. Melgar, *Bilan de L'article 30 Apres Vingt Ans de Jurisprudence—de Dassonville à Keck et Mithouard*, RMC 533 (1994); J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods, in THE EVOLUTION OF EU LAW*, 349, 349 (P. Craig & G. De Búrca eds. 1999), and S. Weatherill, *After Keck: Some Thoughts on How to Clarify the Clarification*, 33 COMMON MKT. L. REV. 885 (1996).

94. This was particularly demonstrated by the series of shop opening hours or Sun-

views on *Keck* are extremely well-known, so just a few brief comments will suffice, with the minimum of repetition. The ECJ's reasoning was terse and motivated solely by managerial concerns:

In view of the increasing tendency of traders to invoke Article 30 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>95</sup>

A textual change occurred between the judgment as handed down and the judgment as reported, at least as far as the English-language version was concerned. Thus originally, the following paragraph (15) read:

In *Cassis de Dijon* (Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649) 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 consequences of applying rules that lay down requirements to be met by 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 the application can be justified by a public interest objective taking precedence over the free movement of goods.

By the time of publication in the European Court Reports, that had become:

It is established by the case-law, beginning with '*Cassis de Dijon*' (Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649) that, in the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manu-

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day trading cases post-*Keck*. See generally *Criminal Proceedings Against Tankstation't Heuske Vof & Boermans*, Joined Cases C-401 & 402/92, [1994] E.C.R. I-2199; *Punto Casa v. Sindaco del Comune di Capena*, Joined Cases C-69 & 258/93, [1994] E.C.R. I-2355; *Semerano Mobil Srl v. Sindaco del Comune di Erbusco*, Cases C-418-424/93, [1996] E.C.R. I-2975.

95. See *Criminal Proceedings Against Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, ¶ 14.

factured and marketed, rules that laid 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 30. This is so even if those rules apply without distinction to all products unless the application can be justified by a public-interest objective taking precedence over the free movement of goods.<sup>96</sup>

The English text was now in line with the original French text.<sup>97</sup> The ECJ continued:

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 (Case 8/74 [1974] E.C.R. 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same 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 [28] of the Treaty.<sup>98</sup>

From the above, it is indeed clear that the basic principle in *Dassonville* was not being thrown overboard, but its application was being nuanced. The ECJ had clearly had enormous difficulties with *Keck*; this is evident from the fact that the case was initially

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96. Criminal Proceedings Against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, 6131. The author cited the original version in the following articles: *Reasoning Renounced? The Remarkable Judgment in Keck and Mithouard*, 5 EUR. BUS. L. REV. 63, 63 (1994) and *Two Years After Keck*, 19 FORDHAM INT'L L.J. 866, 869 (1996). But, as noted in L.W. Gormley, *The Definition of Measures Having Equivalent Effect*, in CONTINUITY AND CHANGE EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS 189, 196 (Anthony Arnall et al. eds. 2008), he was not the only writer who did so. In order that readers of this *Journal* not be misled, it seemed sensible to repeat the point made in that latter contribution here: *mea culpa!*

97. Thus meeting one of the author's points in both articles by Gormley, *supra* note 93.

98. Criminal Proceedings against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, 6132.

before the Second Chamber, but, after Advocate General van Gerven had delivered his Opinion,<sup>99</sup> it was assigned to the Full Court, which decided to reopen the oral procedure, and to put specific questions to the parties which had submitted observations.<sup>100</sup> A few weeks earlier, Advocate General Tesauro, in a case dealing with the rules of a professional body regulating pharmacists which prohibited the latter from advertising pharmaceutical products outside their pharmacies,<sup>101</sup> had called on the ECJ to change its mind and, for this to be useful, to do so clearly and explicitly.<sup>102</sup> He posed a strategic question: "Is Article [28] of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?"<sup>103</sup> To be sure he was really setting his sights on examining measures which were of general application, having an adverse effect on the demand for goods to which they applied, and therefore entailing a reduction in the volume of sales and ultimately, as a result of this on imports as well, even though the measures applied irrespective of the origin of the product; more specifically, he was looking at whether the resulting reduction in trade—remote, indirect and contingent, and in any case merely hypothetical—was sufficient to bring the measure within the ambit of Article 28 EC.<sup>104</sup> He summarized his conclusions in the following terms:

I am persuaded that the *Dassonville* test neither can nor should be so construed as to include in the definition of measures having equivalent effect even those national laws which, because they affect supply and/or demand and therefore, but on that account alone, the volume of sales, may bring about a reduction in the volume of imports, that is to say, where there exists no obstacle whatsoever to the movement within the Community of the products concerned and no connection whatsoever with the disparity between the laws in question.

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99. Mr. Van Gerven had little difficulty in concluding that the rules involved were in principle covered by Article 28 EC. See *Keck*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, 6112-13.

100. For the details, see *Keck*, [1993] E.C.R. I-6097, 6102.

101. See generally *Hünernund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787.

102. See *id.* at 6813.

103. See *id.* at 6800.

104. See *id.* at 6802-03.



I consider that the purpose of Article [28] is to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods; its purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade.<sup>105</sup>

A couple of brief points should be made about this view: Mr. Tesauro was the first to admit that he had changed his mind;<sup>106</sup> he was also honest enough to state which judgments he now felt should not be followed. He was also not thinking in terms of a *de minimis* approach, rather he was taking the line that the type of measures involved really had nothing to do with intra-Community trade, and that Article 28 EC should not be diverted from its proper purpose. The author had already warned against abuse:

[L]itigants should not simply see Article [28 EC] as a panacea to attack every local regulation of economic life willy-nilly. Disputes alleging interference with inter-state trade should always have a genuine inter-state element, otherwise Article [28] might fall into disrepute and national courts might become reluctant to refer genuine disputes to the Court of Justice. That would not be a happy result.<sup>107</sup>

Regrettably, litigants had not heeded that advice, and now paid the price, although the ECJ in *Keck* was not as straightforward as was Mr. Tesauro.<sup>108</sup> It is thus unsurprising that Advocates General as well as many learned writers were withering in their criticism of the reasoning in *Keck*; indeed, Oliver rightly noted that “the opprobrium which has been heaped on that ruling must be almost without precedent.”<sup>109</sup> The need for a genuine interstate

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105. See *id.* at 6814. Mr Tesauro also pointed out that it was revealing that the pharmacists in the instant case, in claiming the right to advertise the products concerned, did not in any way argue that the measure constituted an obstacle to imports, rather they complained that the measure put them at a disadvantage in comparison with other shops selling the same products.

106. See *id.* at 6813.

107. See L.W. Gormley, *Commentary on Torfaen Borough Council v. B & Q PLC*, 27 COMMON MKT. L. REV. 141, 150 (1990).

108. The court was unable or unwilling to reach specific agreement on what earlier judgments were being overruled and to what extent.

109. P. Oliver, *Some Further Reflections on the Scope of Articles 28-30*, 36 COMMON MKT. L. REV. 783, 793 (1999). Other celebrated victims of heaps of opprobrium include the judgment in *Van Zuylen Frères v. Hag AG*, Case 192/73, [1974] E.C.R. 731, and (certainly deserving of opprobrium) *Commission v. Belgium*, Case C-2/90, [1992] E.C.R. I-4431

element has come under pressure in recent years, however, as is discussed below. Unsurprisingly, the result<sup>110</sup> in *Hünernmund* follows the line in *Keck*.

The *Keck* interpretation of *Dassonville* does not attempt to cover all types of measures which can fall under the *Dassonville* basic principle; it merely sought to deal with what may be called the non-discriminatory regulation of socio-economic life to bring the use of *Dassonville* back to its intended ambit. The world of measures having equivalent effect is not restricted to classifications as either product-bound restrictions or selling arrangements; there may well be measures which are neither: this is particularly true in respect of measures which discriminate in law or in fact against imports. It is still good law that it is unnecessary to demonstrate discrimination to find a breach of Article 28 EC. In any event, it is clear that in para. 15 of the judgment in *Keck* the ECJ was not seeking to give an exhaustive list of measures having equivalent effect. The point that the ECJ's reasoning is wholly contradictory—first finding that the measure could have an effect on intra-Community trade and then concluding that this did not amount to a measure having equivalent effect—remains a major flaw in the judgment. But standing common sense on its head seemed to be in fashion.<sup>111</sup>

### V. THE MODERN CASE-LAW

The case-law since *Keck* has confirmed that the ECJ failed in its attempt at clarification of its case-law in that judgment. Nevertheless, soup is consumed less hot than it is served, and talk of a revolution<sup>112</sup> was perhaps premature, in respect of *Keck* at least; to describe it as an evolution would now seem more appropriate. This discussion of the modern case-law naturally focuses on how the *Keck* approach has worked out in practice, the question of a

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(Walloon waste). It is worth comparing that judgment with *Du Pont de Nemours Italiana SpA v. Unita' Sanitaria Locale No. 2 di Carrara*, Case C-21/88, [1990] E.C.R. I-889 which in legal terms is the parallel of Walloon Waste in another context; see also *supra* note 67 for are well-known examples of reasoning which, on its core elements, fails to convince.

110. The measure was found not to fall within the ambit of Art. 28 EC, see *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92 [1993] E.C.R. I-6787, 6823, on the same reasoning as that used in *Keck*.

111. As in *Commission v. Belgium*, Case C-2/90, [1992] E.C.R. I-4431.

112. N. Reich, *The "November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited*, 31 *COMMON MKT. L. REV.* 459 (1994).

*de minimis* approach, and the requirement of an interstate element.

### A. *Keck in Practice*

The concept of certain selling arrangements was left undefined in *Keck*, presumably because of a failure to be able to agree on a definition of selling arrangements. Subsequent judgments indicate that it embraces legislation restricting who may sell goods and/or where and/or when they may be sold,<sup>113</sup> advertising restrictions<sup>114</sup> (other than those which are related to the presentation or packaging of the product itself<sup>115</sup> or which act as a total barrier to market entry<sup>116</sup>), and, as far as concerns resale conditions, price control legislation,<sup>117</sup> but the situation regarding legislation controlling the conditions under which goods are sold may not be quite so clear cut.<sup>118</sup> The ECJ has rightly re-

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113. See generally *Commission v. Greece*, Case C-391/92, [1995] E.C.R. I-1621; *Criminal Proceedings Against Tankstation't Heuske Vof & Boermans*, Cases C-401 & 402/92, [1994] E.C.R. I-2199; *Punto Casa SpA v. Sindaco del Comune di Capena*, Cases C-69 & 258/93, [1994] E.C.R. I-2355; *Criminal Proceedings Against Banchoero*, Case C-387/93 [1995] E.C.R. I-4663; *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco*, Joined Cases C-418-424/93, [1996] E.C.R. I-2975. But see *Schutzverband gegen Unlauteren Wettbewerb v. TK Heimdienst Sass GmbH*, Case C-254/98, [2000] E.C.R. I-151.

114. See generally *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787; *Société d'importation Édouard Leclerc v. TFI Publicité SA*, Case C-412/93, [1995] E.C.R. I-179.

115. See generally *Verein gegen Unwesen in Handel und Gewerbe Köln e V v. Mars GmbH*, Case C-370/93, [1995] E.C.R. I-1923; *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, [1997] E.C.R. I-3689.

116. See generally *Konsumentenombudsmannen (KO) v. De Agostini (Svenska) Förlag AB*, Joined Cases C-34-36/95, [1997] E.C.R. I-3843, 3891-92; *Konsumentenombudsmannen (KO) v. Gourmet International Products AB (GIP)*, Case C-405/98, [2002] E.C.R. I-1795, 1823-24.

117. See generally *Criminal Proceedings against Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097; *Groupement National des Négociants en Pommes de Terre (Belgapom) v. ITM Belgium SA*, Case C-63/94, [1995] E.C.R. I-2467. The old cases on price controls are still good law because they rely on the discriminatory effect of the legislation (and if there is discrimination, even a classification of a measure as a selling arrangement will not let the measure escape the ambit of Art. 28 EC).

118. Contrast the analysis in *Morellato v. Comune di Padova*, Case C-416/00, [2003] E.C.R. I-9343, with that in *Alfa Vita Vassilopoulos AE v. Elliniko Dimosto*, Cases C-158 & 159/04, [2006] E.C.R. I-8135 and *Commission v. Greece*, Case C-82/05, [2006] E.C.R. I-93, relating to the marketing of "bake-off" products. The distinction between the analysis results from the effects of the measures concerned. In *Morellato*, the requirement for prior packaging of bread which had been pre-baked off the premises before being finally baked on the premises was in principle found to fall outside the scope of Art. 28 EC, unless it could be shown that in reality it constituted discrimination against im-

sisted the siren calls of the Member States to expand the scope of “selling arrangements” to apply the *Keck* reasoning outside the field of the free movement of goods.<sup>119</sup> Moreover, requirements which necessitate a change in the product or affect its packaging will clearly not constitute selling arrangements.<sup>120</sup> Such product-bound measures will be straightforwardly judged on the lines of *Dassonville* and *Cassis de Dijon*, but, as noted above, measures which fall foul of the basic principle in *Dassonville* and thus of Article 28 EC are not restricted to product-bound measures or selling arrangements which do not satisfy the *Keck* conditions.

If a measure has been classified as a selling arrangement as such, the logical next step is to examine whether the two conditions set by *Keck* which have to be met if the measure is to escape the ambit of the basic principle in *Dassonville* and thus of Article 28 EC. The first of these is that the measure must apply to all affected traders operating within the national territory. This has been the subject of relatively little discussion;<sup>121</sup> and on one oc-

ported products (which the ECJ left it up to the national court to decide, while noting that if the latter found that there was discrimination, no justification on grounds of the protection of the health and life of humans could be made out under Art. 30 EC). In the latter judgments the ECJ condemned Greek legislation which made the sale of “bake-off” products subject to the same requirements as those applicable to the full manufacturing and marketing procedure for traditional bread and bakery products. The suggestion by Advocate General Poaires Maduro in *Alfa Vita* that the *Keck* principles be somewhat adapted found no favor with the ECJ, and the weaknesses of his proposed analysis have been well demonstrated by P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 *COMMON MKT. L. REV.* 649, 676-77 (2007). See also, generally, S. Enchelmaier, *The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions* [2007] 26 *YBEL* 115-56 (published while this contribution was in proof).

119. See *Alpine Investments BV v. Minister van Financiën*, Case C-384/93, [1995] E.C.R. I-1141, 1177-78; *Union Royale Belge des Sociétés de Football Association v. Bosman*, Case C-415/93, [1995] E.C.R. I-4921, 5070-71. See also G. Tesaurò, *The Community's Internal Market in Light of the Recent Case-Law of the Court of Justice*, 15 *YBEL* 1, 7 (1995).

120. The ECJ has held that the need, resulting from the measures at issue, to alter the packaging or the labeling of imported products prevents those measures from concerning selling arrangements for the products within the meaning of the judgment in *Criminal Proceedings Against Keck & Mithouard*, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097. See *Colim NV v. Bigg's Continent Noord NV*, Case C-33/97, [1999] E.C.R. I-3175, ¶ 37; *Commission v. Spain*, Case C-12/00, [2003] E.C.R. I-459, ¶ 76; *Morellato*, Case C-416/00, [2003] E.C.R. I-9343, ¶ 29. It is worth noting that in *Morellato* it was precisely “bake-off” bread which had to be presented packaged, and such bread in pre-baked form was usually imported (in particular from France).

121. It is relatively easy to ascertain whether this condition is met, but it is not often examined. It was, however, expressly mentioned in *Konsumentenombudsman v. De Agostini (Svenska) Förlag AB*, Joined Cases C-34-36/95, [1997] E.C.R. I-3843, 3890 and in *Deutscher Apothekerwerbund eV v. 0800 Doc Morris NV*, Case C-222/01, [2003] E.C.R. I-

casation the argument that such a measure in fact operated to penalize small traders more heavily than larger firms got short shrift indeed.<sup>122</sup> It seems that the real aim of this first condition simply to ensure that there is no distinction (particularly on the basis of nationality or residence) as to the scope of those affected by the measure: it must be universally applicable to all market participants in the Member State concerned. The second condition, that the measures affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, has given rise to more interesting analysis. Despite a very unpromising start,<sup>123</sup> there has been some considerable movement in the ECJ's approach. Thus, for example, in *Schutzverband gegen Unlauteren Wettbewerb v. TK Heimdienst Sass GmbH* ("TK Heimdienst")<sup>124</sup> the ECJ looked at Austrian legislation preventing bakers, butchers, and grocers from making sales on rounds in a given administrative district unless they also carry on their trade at a permanent establishment situated in that district or in an adjacent municipality, where they also offer for sale the same goods as they do on their rounds. It had no difficulty concluding that this was a selling arrangement, and, implicitly that it applied to all market participants, it held that it did *not* affect in the same manner the marketing of domestic products and that of products from other Member States. Although local operators could meet this requirement of permanent establishment, those from other Member States would have to bear additional costs to comply with that requirement. While though the measure was equally applicable to domestic and foreign butchers, bakers and grocers, the ECJ noted that it was unnecessary for a measure to have the effect of favoring national products as a whole or of placing only imported products at a disadvantage and not national products for the measure to be found to have discriminatory or protective effects in relation to the free movement of goods. This is in line with the approach taken to local

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14887, 14985, and implicitly so in *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media GmbH*, Case C-6/98, [1999] E.C.R. I-7599, 7636; on other occasions the ECJ merely trots out the two *Keck* criteria without further specification.

122. See generally *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco*, Joined Cases C-418-424/93, [1996] E.C.R. I-2975.

123. See generally *Commission v. Greece*, Case C-391/92, [1995] E.C.R. I-1621 (dealing with measures restricting where processed milk for infants could be sold).

124. *Schutzverband Gegen Unlauteren Wettbewerb v. TK Heimdienst Sass GmbH*, Case C-254/98, [2000] E.C.R. I-151.

grab measures designed to advantage the supply of goods and services by firms established a particular region of a Member State.<sup>125</sup>

Taking this approach further, in *Deutscher Apothekerverbund eV v. 0800 Doc Morris NV* (“*Doc Morris*”),<sup>126</sup> having observed that “even if the measure is not intended to regulate trade in goods between the Member States, the determining factor is its effect, actual or potential on intra-community trade,”<sup>127</sup> the ECJ gave the following summary of the second *Keck* criterion:

In order to ascertain whether a particular measure affects in the same manner the marketing of both domestic products and those from other Member States, the scope of the restrictive measure concerned must be ascertained. Thus, the court has found that a prohibition on pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, which they were authorised to offer for sale, did not affect the ability of traders other than pharmacists to advertise those products (see *Hünernund*, paragraph 19). Similarly, the prohibition on broadcasting the advertising at issue in *Leclerc-Siplec* was not extensive, since it covered only one particular form of promotion (television advertising) of one particular method of marketing products (distribution) (see *Leclerc-Siplec*, paragraph 22).

By contrast, the Court has accepted the relevance of the argument that a prohibition on television advertising deprived a trader of the only effective form of promotion which would have enabled it to penetrate a national market (see *De Agostini and TV-Shop*, paragraph 43). Furthermore, the court has found that in the case of products such as alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, prohibiting all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public

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125. See, e.g., *Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale No. 2 di Carrara*, Case C-21/88, [1990] E.C.R. I-889. Similar thinking lies behind the judgment in *Criminal Proceedings Against Mutsch*, Case 137/84, [1985] E.C.R. 2681 and *Criminal Proceedings Against Bickel & Franz*, Case C-274/96, [1998] E.C.R. I-7637, in relation to persons (restricting the use of a language to those national citizens speaking the language concerned).

126. *Deutscher Apothekerverbund eV v. 0800 Doc Morris NV*, Case C-222/01, [2003] E.C.R. I-14887.

127. See *id.* at 14984; see also *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, Case C-244/06, ¶ 27 (ECJ Feb. 14, 2008) (not yet reported).

highway is liable to impede access to the market for products from other Member States more than it impedes access for domestic products, with which consumers are instantly more familiar (see Case C-405/98 *Gourmet International Products* [2001] E.C.R. I-1795, paragraphs 21 and 24).<sup>128</sup>

The ECJ found that it was undisputed that there was a requirement that certain medicines be sold only in pharmacies and that there was a prohibition on mail-order sales of medicines; while the latter prohibition could be regarded as merely the consequence of the first requirement, the emergence of the internet as a method of cross-border sales meant that the scope and effect of the prohibition had to be viewed broadly. The prohibition was found to be more of an obstacle to pharmacies outside Germany than to those in Germany; although there was little doubt that as a result of the prohibition, pharmacies in Germany could not use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they were still able to sell the products in their dispensaries. But for pharmacies not established in Germany, the internet offered a more significant way to gain direct access to the German market. Given that a prohibition which had a greater impact on pharmacies established outside German territory could impede access to the German market for products from other Member States more than it impedes access for domestic products, the ECJ concluded that the prohibition did not affect the sale of domestic medicines in the same way as it affected the sale of those coming from other Member States. The German rules kept foreign pharmacies out of the market, whereas although the domestic pharmacies had their marketing possibilities curtailed, the market was not wholly closed but channelled through national dispensaries.

It is always tempting for the ECJ to resolve the issues before it, but, as has been demonstrated in relation to the pre-*Keck* case-law, that can lead to yet more litigation. Thus it is notable that in some recent case-law, the ECJ has seemed rather reluctant in Article 234 EC references to take a view on whether the second condition in *Keck* is actually met, leaving the factual analysis to the referring court, although this really resulted from the scant

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128. *Deutscher Apothekerverbund e V v. 0800 Doc Morris NV*, Case C-222/01, [2003] E.C.R. I-14887, 14986.

information before it. Thus, in *Openbaar Ministerie v. Burmanjer*<sup>129</sup> dealing with itinerant sales, the ECJ found that it did not have sufficient information to reach a conclusion; in *A-Punkt Schmuckhandels GmbH v. Schmidt*,<sup>130</sup> it was unable to decide whether the prohibition on marketing in private houses would affect the sale of imported products more than that of domestic products.

A particularly disturbing development, which has clearly given rise to the need for a great deal of further reflection by the ECJ, is the approach advocated by Advocate General Kokott in *Åklagaren v. Mickelsson & Roos*.<sup>131</sup> This case concerned a prosecution for having driven personal watercraft on August 8, 2004 on waters on which the use of personal watercraft was not permitted,<sup>132</sup> the defendants relied inter alia on Articles 28 and 30 EC. The learned Advocate General proposed that the ECJ exclude arrangements for the use of goods from the scope of the basic principle in *Dassonville* and thus from Article 28 EC Treaty in the same way as it had excluded certain selling arrangements in *Keck* in response to the increasing tendency of traders to invoke Article 28 EC as a means of challenging any rules whose effect was to limit their commercial freedom even where such rules were not aimed at products from other Member States.<sup>133</sup> She noted that at present, in the context of arrangements for use, ultimately individuals could even invoke Article 28 EC as a means of challenging national rules whose effect is merely to limit their general freedom of action. She took the view that national legislation which laid down arrangements for use for products did not constitute a measure having equivalent effect within the meaning of Article 28 EC so long as it applied to all relevant traders operating within the national territory and so long as it affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and was not product-related. However, prohibitions on use or national legislation which permitted only a marginal

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129. *Openbaar Ministerie v. Burmanjer*, Case C-20/03, [2005] E.C.R. I-4133.

130. *A-Punkt Schmuckhandels GmbH v. Schmidt*, Case C-441/04, [2006] E.C.R. I-2093.

131. *Åklagaren v. Mickelsson & Roos*, Case C-142/05 (pending case).

132. Use was permitted on general navigable waterways and on other waters where permission had been granted. The ban on use was thus not total, but location-specific. *See id.*

133. *See Criminal Proceedings Against Keck & Mithouard*, Cases 267 & 268/91, [1993] E.C.R. I-6097, 6131, ¶ 14.



use for a product, in so far as they (virtually) prevented access to the market for the product, would, she concluded, constitute measures having equivalent effect which are prohibited under Article 28 EC, unless they were justified under Article 30 EC or by an imperative requirement.<sup>134</sup> In order to support her view, she mentioned two extreme examples: a prohibition on driving cross-country vehicles off-road in forests and speed limits on motorways. These, she felt, would constitute measures having an equivalent effect: it could be argued that they possibly deter people from purchasing a cross-country vehicle or a particularly fast car because they could not use them as they wish and the restriction on use thus constituted a potential hindrance for intra-Community trade.<sup>135</sup> With all due respect, not even the most fervent advocate of the wide application of the basic principle in *Dassonville* would argue that such examples were prohibited under Community law. Even if (and it is submitted that such non-discriminatory rules of use are so remote from intra-Community trade as to have nothing to do with it) it could be argued that they fell within the basic principle in *Dassonville*, justifications of public policy, safety and environmental protection would surely be so sufficiently evident that the case would be laughed out of court.

Her Opinion was delivered on December 14, 2006, and has clearly given the ECJ considerable difficulty. At the time of writing (February 2008) there was still no sign of the judgment being listed for handing down. Oliver and Enchelmaier have quite rightly drawn attention to the serious problems with the approach of the learned Advocate General, which is, with respect, fundamentally misconceived.<sup>136</sup> In the view of the author, the

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134. See Opinion of Advocate General Kokott, *Åklagaren v. Mickelsson & Roos*, Case C-142/05, ¶ 87 (pending case). She also concluded that national rules which also laid down a prohibition on using personal watercraft in waters in respect of which the county administrative boards had not yet taken any decision on whether protection of the environment requires a prohibition on use there were disproportionate and therefore not justified unless they included a reasonable deadline by which the county administrative boards had to have taken the relevant decisions.

135. See *id.* ¶ 45.

136. See P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 COMMON MKT. L. REV. 649, 678-79 (2007). The core of the criticisms is threefold: first, it is unclear what she means by "marginal use" of a product; secondly, distinction which she makes between the essence of product and its "technical requirements" is neither logical nor sound. Her observation that the contested restriction does not require modifications to be made the product distorts the issue: the prohibition could not be got round by

arguments in *Åklagaren v. Mickelsson & Roos* based on Article 28 EC should be dismissed as complete red herrings. They can be assimilated to the treatment of non-discriminatory shop closing legislation, post-*Keck*: the products may not be used in these places until such time as a specific decision has been taken as to whether their use in those places can be permitted.

The contrast between the approach of Advocate General Kokott in *Åklagaren v. Mickelsson & Roos* and that of Advocate General Léger in *Commission v. Italy*<sup>137</sup> is striking. He had no difficulty in finding that an equally applicable Italian rule prohibiting the towing of trailers by mopeds fell within the scope of Article 28 EC:

[I]t 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. Although that prohibition relates only to mopeds, it seems to me that the coupling of a trailer to a vehicle of that kind constitutes a normal and frequently used means of transport, particularly in rural areas. However, those rules, although not prohibiting imports of trailers and their marketing in Italy, have the effect of limiting their use throughout Italian territory. I am therefore of the opinion that such a prohibition is liable to limit opportunities for trade between the Italian Republic and the other Member States and to hamper imports and the marketing in Italy of trailers from those States, even though they are lawfully manufactured and marketed there. In those circumstances, it seems to me that the national rules at issue constitute a measure having an effect equivalent to a quantitative restriction, in principle prohibited by Article 28 EC.

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modification of the product. The suggestion that a total ban would be less damaging to intra-Community trade than the imposition of certain limitations (such as engine horsepower) is indeed novel. The third point they make is that adopting the learned Advocate General's view would reverse much of the case-law decided since *Cassis de Dijon*. A distinction between non-discriminatory (in law or in fact) restrictions on sale and restrictions on use is indeed nonsensical. What is the point of prohibiting restrictions on the sale of a product if it would be permissible to prohibit its use? Oliver and Enchelmaier argue that her approach would have to cover possession as well (prohibiting possession of a drink which failed to satisfy the minimum national requirements). See P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 *COMMON MKT. L. REV.* at 678-79.

137. *Commission v. Italy*, Case C-110/05 (pending case). The Opinion was handed down on October 5, 2006, but by Order of March 7, 2007 the oral procedure was reopened and the case referred to the Grand Chamber.

Mr. Léger went on to acknowledge that road safety—as an aspect of the health and life of humans—could be a legitimate ground for upholding the measures, but found that the Italian authorities had not produced any evidence to show how the ban contributed to road safety. While this case can be distinguished from *Åklagaren v. Mickelsson & Roos* (which involved a ban on use in places other than permitted places), it is submitted that the obvious road safety argument, even if not expressly motivated by the Italian government, is something which the ECJ should not ignore. Again, it is submitted, that the best approach would be to laugh it out, or to say that the safety issues are so manifestly obvious as not to need specific details to be acceptable.<sup>138</sup>

Safety issues and indeed the fight against crime have recently been considered further by Advocate General Trstenjak in *Commission v. Portugal*,<sup>139</sup> which dealt with a national rule prohibiting the attachment of colored foil to the windows of motor vehicles for the transport of persons or goods. Here the issue was more straightforwardly concerned with the product as such. The learned Advocate General had little difficulty in finding that this meant that colored foil, which was lawfully produced and/or marketed in other Member States, could not in effect be bought in Portugal; she went on to find the Portuguese justifications unconvincing. The Commission's argument was that Portuguese drivers would be deterred from buying the foil because it was illegal to apply it to their windscreens. In this product-based scenario, *Keck* arguments played of course no part.

There have been two other recent assaults on *Keck* which deserve attention; the views of the Advocates General being particularly interesting. In *Douwe Egberts NV v. Westrom Pharma NV*,<sup>140</sup> Advocate General Geelhoed drew attention to the difficulties in

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138. *See id.* Obviously, the Advocate General was right to point out that the party seeking to rely on a justification must make out its case—this follows from long-standing case-law—but some points are just so self-evident that judicial notice could be taken of them without more ado.

139. Opinion of 12 December, 2007. The ECJ held in *Commission v. Portugal*, Case C-263/06 (10 Apr. 2008) that there was indeed a restriction within the meaning of Art. 28 EC and that the one argument advanced in justification (the need to check compliance with the requirement that the driver and passengers wear seatbelts) was not made out: it was excessive and disproportionate.

140. *Douwe Egberts NV v. Westrom Pharma NV*, Case C-239/02, [2004] E.C.R. I-7007.

applying the *Keck* approach in relation to advertising.<sup>141</sup> He stressed the importance of advertising in assisting in the economic inter-penetration which the common market and the internal market sought to achieve.<sup>142</sup> He argued that if a certain form of advertising was indeed the only effective means of penetrating a certain market or if there were set patterns of consumption in the national market, prohibiting advertising would always seriously impede access to the market for products from other Member States. This was also, in his view, true of a prohibition of the advertising of new products which have been lawfully manufactured and marketed in other Member States.<sup>143</sup> He saw publicizing such products as essential if a market position were to be gained. The fact that such a prohibition was as much of an obstacle to the introduction into the market of similar new products manufactured and marketed in the Member State concerned did not alter this point. What was decisive, Mr. Geelhoed continued, was that the product from another Member State was prevented from gaining access to the market. In such a situation, compatibility with Articles 28 and 30 EC clearly had to be comprehensively examined. Because designating national rules as a selling arrangement results in those rules being taken outside the scope of Article 28 EC, and so beyond the reach of judicial control, he felt that the qualification of selling arrangements should be reserved for rules which govern the general conditions under which products are marketed, i.e. when, where and by whom, and which do not specifically concern commercialization as such. Thus rules dealing with matters such as times

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141. Contrast the ECJ's approach in *Hünernmund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787 and *Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA*, Case C-412/93 [1995] E.C.R. I-179 (limited scope advertising bans found to be selling arrangements meeting the *Keck* criteria) with that in *Konsumentenombudsman v. De Agostini (Svenska) Förlag AB*, Joined Cases C-34-36/95, [1997] E.C.R. I-3843 and *Konsumentenombudsmannen (KO) v. Gourmet International Products AB (GIP)*, Case C-405/98, [2002] E.C.R. I-1795 (prohibition of dissemination of advertising depriving foreign manufacturers of their only means of penetrating the Swedish market to reach their target groups, and impeding market access for foreign products more than access for domestic products with which potential consumers were likely to be more familiar).

142. In this point, he built on the observations of Advocate General Jacobs in *Leclerc-Siplec*, [1995] E.C.R. I-179, 186-87. The right of the consumer to information, and the importance of advertising therein was also the key to the judgment in *GB-INNO-BM v. Confédération du Commerce Luxembourgeois*, Case C-362/88, [1990] E.C.R. I-667.

143. Note that he kept to the *Cassis de Dijon* formulation of "lawfully produced and marketed." See *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, ¶ 3.

and locations at which products are marketed have an effect primarily on the volume of sales, but do not restrict access to the market for the products concerned. Mr. Geelhoed argued for a distinction between rules which include outright prohibitions, and rules which govern the terms *stricto sensu* of advertising messages. His examples of the latter were prohibitions of unsightly advertising, advertising in public buildings, and advertising certain products at certain events. Such rules did not provide for an outright and general prohibition of advertising in the marketing of products, but merely subjected it to conditions for well-defined reasons. In other words, they did not prevent access to the market or commercialization by other means and they did not seek to restrict access to the market and were further removed from marketing as such.<sup>144</sup> The ECJ found that the absolute prohibition of advertising the characteristics of the product was liable to impede access to the market by products from other Member States more than it impeded access by domestic products, and dismissed the proffered justifications.<sup>145</sup>

Finally, Advocate General Poiares Maduro's most interesting sally in *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio*<sup>146</sup> deserves some attention. *Alfa-Vita*, concerned conditions with which com-

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144. See *Douwe Egberts NV v. Westrom Pharma NV*, [2004] E.C.R. I-7007, 7032-33. These considerations lead him to conclude that an outright prohibition of references in advertising to slimming and to medical recommendations and attestations could not be regarded as a selling arrangement within the meaning of *Keck* and had to be comprehensively examined for compatibility with Articles 28 and 30 EC. Put differently, restrictions relating to the circumstances under which goods were sold, which did not have the effect of preventing market penetration as such would be legitimate, thus planning-type restrictions or social control restrictions (such as a prohibition of selling alcoholic beverages to persons below a certain age, or a prohibition of being in possession alcohol at football matches) would not fall within the ambit of Article 28 EC. Of course a wide application of the basic principle in *Dassonville* would not lead to a different result, even though the approach would be very different: either laugh a challenge out of court, on the ground that the rule was clearly irrelevant to intra-Community trade and an abuse of process, or, if really pushed, apply the public policy or public health justifications to uphold the measure.

145. See *id.* at 7059-60. Foodstuffs lawfully manufactured and marketed in other Member States in which, particularly concerning health, were not misleading were permitted under Community legislation and would be faced with restrictions on access to the Belgian market in view of the prohibition of references in advertising to slimming and medical recommendations, attestations, declarations, opinions or statements of approval (other than a statement that the product should not be consumed against medical advice). See *id.* at 7059.

146. *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio*, Joined Cases C-158 & 159/04, [2006] E.C.R. I-8135, ¶¶ 33, 36, 40-41.

pliance was required in order that "bake-off" products could be finally baked on premises (the full requirements made of traditional bakeries were applicable). Mr. Poiares Maduro was concerned about bringing the case-law on the free movement of goods into line with that of the other freedoms.<sup>147</sup> He felt that the Member States had to take into consideration the effects of their measures on citizens of the European Union as they sought to exercise the freedom of the Treaty. With the greatest respect, it has always been clear that the free movement of goods applies irrespective of the nationality of the consignor, consignee, or owner of the goods concerned,<sup>148</sup> although in *Dassonville* the ECJ did talk about the means of proof required having to be accessible to all Community nationals, that observation has not been repeated in subsequent case-law, and was not meant to restrict access to the right of free movement of goods; it is irrelevant.<sup>149</sup> Accordingly, it is submitted that the learned Advocate General's first main criterion as an answer to Advocate General Tesaurò's question in *Hünernmund*, that any discrimination based on nationality, direct or indirect had to be prohibited, cannot be confined to EU citizens in relation to the free movement of goods. Mr. Poiares Maduro then proposed that additional costs resulting from discrepancies between the legislation of the Member States would not as such amount to a hindrance to one of the freedoms; only if they resulted from the failure by the Member State concerned to take into consideration the specific situation of imports (in particular that they had to comply with requirements of their Member State of origin) would they be caught. On this view, product requirements would always be caught, but rules relating to selling arrangements would be caught only if they failed to take the specific situation of imports into consideration. With respect, this is somewhat unclear: if the Advocate General was saying that a mutual recognition clause is required, that would involve transposing the approach in *Commission v. France*<sup>150</sup> (dealing with *foie gras*) from the field of the requirement in which it is clearly appropriate into an area in which it has no logical place. The third main criterion that he

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147. *See id.*

148. *See generally* *Sociaal Fonds voor de Diamantarbeiders v. S.A. Ch. Brachfeld & Sons*, Cases 2 & 3/69, [1969] E.C.R. 211, 223.

149. *See* L.W. Gormley, *supra* note 15, at 22.

150. *Commission v. France*, Case C-184/96, [1998] E.C.R. I-6197.

proposed was that a measure would be caught if it restricted market access and the marketing of products from other Member States more severely; it would be a hindrance to market access if it protected the position of incumbents or if it rendered intra-Community trade more onerous than trade on the national market.<sup>151</sup> The ECJ declined to view the measures as selling arrangements, finding that the Greek rules intended to prescribe production conditions for bakery products (including “bake-off” products) and did not take the specific nature of those products into account; they also entailed extra costs and thus made the marketing of “bake-off” products more difficult.<sup>152</sup>

### B. *De Minimis*?

Turning now to the question whether *Keck* could be seen as entertaining a *de minimis* approach, it is now manifestly evident that this was not the ECJ’s intention. This is most apparent from the rejection of the plea for a *de minimis* approach made in an eloquent and elegant Opinion by Advocate General Jacobs which was highly critical of *Keck* in *Société d’importation Édouard Leclerc v. TFI Publicité SA* (“*Leclerc-Siplec*”).<sup>153</sup> With respect, the ECJ was right not to follow that path. Several reasons militate against accepting a *de minimis* rule in the free movement of goods. Most practically, at what level should the line be drawn? Should it be a percentage of GDP; a percentage of the value of the market (and what would be the relevant market?); the value of a daily penalty on the Commission’s guideline scales for penalizing Member States under Article 228 EC,<sup>154</sup> the value of a day’s imports? Advocate General Tesouro understandably felt that this would be a “very difficult, if not downright impossible” exercise.<sup>155</sup> The position of the free movement of goods as a fundamental freedom and foundation of the Community would indeed be jeopardized by the introduction of a *de minimis* rule, and the ECJ has (on this point at least) been consistent in re-

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151. *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio*, Joined Cases C-158 & 159/04, [2006] E.C.R. I-8135, ¶¶ 43-49.

152. *See id.* ¶¶ 18-19.

153. *Société d’importation Édouard Leclerc v. TFI Publicité SA*, Case C-412/93, [1995] E.C.R. I-179, 194-97.

154. *See* Commission Communication, SEC 1658 (2005) (Application of Article 228 to the EC Treaty).

155. *See* *Hünermund v. Landesapothekerkammer Baden-Württemberg*, Case C-292/92, [1993] E.C.R. I-6787, 6810-11.

jecting it.<sup>156</sup> Moreover, the Member States are under a particular duty by virtue of Article 10 EC to secure the free movement of goods,<sup>157</sup> this must surely militate against accepting chinks in the armor; indeed this point is also a valid criticism against the whole approach of treating selling arrangements as a special case outside the scope of Article 28 EC.

### C. *Intra-Community Trade*

A few words are now appropriate about the requirement of an effect on intra-Community trade. The ECJ found in *Dassonville* that direct or indirect, actual or potential hindrances of intra-Community trade were caught by Article 28 EC.<sup>158</sup> Only in so far as an equally-applicable measure hindered intra-Community trade, would it have prohibited effects; thus, for example, the German government was not obliged after the *Commission v. Federal Republic of Germany* ("*Reinheitsgebot*") judgment<sup>159</sup> to change the rules which applied to production of beer in Germany, although it was obliged to bring the text of the law into line with the requirements of Community law, thus to make it clear that beer lawfully produced or marketed in another Member State did not have to satisfy the recipe requirements for German beer in order to be sold as beer in Germany (mere compliance in practice is unacceptable).<sup>160</sup> As far as Community law is concerned, Member States are free to discriminate against their

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156. As to earlier authorities rejecting a *de minimis* argument, see Criminal Proceedings Against Prantl, Case 16/83, [1984] E.C.R. 1299, 1326; Criminal Proceedings Against Jan van de Haar & Kaveka de Meern BV, Cases 177/82 & 178/82, [1984] E.C.R. 1797, 1812-13; *Commission v. France*, Case 269/83, [1985] E.C.R. 837, 846; and *Commission v. Italy*, Case 103/84, [1986] E.C.R. 1759, 1773. See, e.g., *Radlberger Getränkegesellschaft mbH & Co KG, S Spitz KG v. Land Baden-Württemberg*, Case C-309/02, [2005] E.C.R. I-11763, ¶ 68. The ECJ has also recently confirmed in relation to a transport ban that the fact that there are alternative routes or other means of transport capable of allowing the goods in question to be transported does not negate the existence of an obstacle arising through a ban on the use of a particular route. See *Commission v. Austria*, Case C-320/03, [2005] E.C.R. I-9871, ¶ 67.

157. See *Commission v. France* [1997], Case C-265/95, E.C.R. I-6959, 6999; *Eugen Schmidberger Internationale Transporte und Planzüge v. Österreich*, Case C-112/00, [2003] E.C.R. I-5659, 5714-15.

158. See *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852.

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

160. This follows by virtue of the *Code du Travail Maritime* judgment, *Commission v. France*, Case 167/73, [1974] E.C.R. 359.



own traders if they wish;<sup>161</sup> thus the purpose of Article 28 EC Treaty "is to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported goods."<sup>162</sup> But if the facts of the dispute actually involve no inter-State element a certain tension can develop: on the one hand it can be argued that Community law on free movement has nothing to say about restrictions wholly internal to a Member State,<sup>163</sup> yet a rule which imposes a charge every time unworked marble crosses a municipal boundary will also have an effect on trade between Member States, insofar as the destination of a consignment is outside the territory of the Member State concerned and elsewhere in the EU.<sup>164</sup> So even though the EC Treaty is silent on barriers to trade within a Member State, the essence of the customs union, and the achievement of the unity of the common and internal market, even more so since the abolition of systematic customs controls in intra-Community trade since 1992, require the abolition within the customs territory of the Community of all barriers to the movement of goods within that territory, save for those justified under Community law.<sup>165</sup> Similarly, the fact that domestic products from elsewhere in a Member State are also affected by, say, a regional preference scheme, will not prevent the measure from being caught by the basic principle in *Dassonville*.<sup>166</sup> Even

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161. See *Driancourt v. Cognet*, Case 355/85, [1986] E.C.R. 3231, 3241-42; *Ministère Public v. Mathot*, Case 98/86, [1987] E.C.R. 809, 821.

162. See *Ministère Public v. Mathot*, Case 98/86, [1987] E.C.R. 809, 821.

163. See, e.g., *Procureur de la République v. Waterkeyn*, Cases 314-316/81, [1982] E.C.R. 4337, 4360; *Criminal Proceedings Against Oosthoek's Uitgeversmaatschappij BV*, Case 286/81, [1982] E.C.R. 4575, 4586; *Driancourt v. Cognet*, Case 355/85, [1986] E.C.R. 3231, 3241-42. In relation to persons, *The Queen v. Saunders*, Case 175/78, [1979] E.C.R. 1129, 1135, and in relation to services, *Procureur du Roi v. Debauwe*, Case 52/79, [1980] E.C.R. 833, 855. See also *Sodemare SA v. Regione Lombardia*, Case C-70/95, [1997] E.C.R. I-3395, 3435-36.

164. Thus in *Carbonati Apuani Srl v. Comune di Carrara*, Case C-72/03, [2004] E.C.R. I-8027, the ECJ found that such a measure constituted a charge having equivalent effect to a customs duty, in breach of Art. 23 EC. The ECJ continued the line of authority developed in *René Lancry SA v. Direction Générale des Douanes*, Cases C-363 & 407-411/93, [1994] E.C.R. I-3957, 3990-92.

165. This is the key to the reasoning behind *René Lancry SA v. Direction Générale des Douanes*, Cases C-363, 407-411/93, [1994] E.C.R. I-3957. The ECJ also thought that the drafters of the EC Treaty had assumed that there were no charges similar to customs duties within a Member State. Although the *octroi de mer* considered in *Lancry* had been in existence since 1946, it is quite possible that the drafters of the EC Treaty simply overlooked its existence.

166. See *Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale No. 2 di Car-*

though all the facts of a specific case before a national court confined to a single Member State, that does not necessarily mean that Article 28 EC is inapplicable;<sup>167</sup> the application of the national measure may also have effect on free movement of goods between Member States, particularly if the measure facilitates the marketing of domestic goods to the detriment of imported goods; in such circumstances, even if the application of the measure is restricted to domestic producers, the difference in treatment between the two categories of goods concerned hinders, at least potentially, intra-Community trade.<sup>168</sup> The fact that a measure in practice is not enforced against products coming from other Member States will not save it from qualification as an obstacle to trade between Member States.<sup>169</sup> Thus, the ECJ found that France was not entitled to reserve the description "mountain" to products manufactured on national territory and made from domestic raw materials.<sup>170</sup> Although Advocate General Jacobs pressed the ECJ to decline to give a ruling on the Article 28 EC aspect, on the ground that the factual inter-State element was absent,<sup>171</sup> the ECJ found little difficulty in pointing out the discriminatory effect of the French rules, but did not deal with the logical difficulty about the consequences of the application the discrimination finding in a purely domestic situation.<sup>172</sup> It is submitted that the ECJ was right to assert jurisdiction, and while it might have thought about the consequences, there is a powerful argument that these are solely a matter for the national court.<sup>173</sup> There may well be circumstances in which the national law of a Member State would not permit reverse discrimination:

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rara, Case C-21/88, [1990] E.C.R. I-889, 920; Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generalitat de Catalunya, Cases C-1 & 176/90, [1991] E.C.R. I-4151, 4186; Ligur Carni Srl v. Unità Sanitaria Locale no XV di Genova, Case C-277/91, [1993] E.C.R. I-6621 at 6661.

167. See *Criminal Proceedings Against Pistre*, Cases C-321-324/94, [1997] E.C.R. I-2343, 2374.

168. See *id.* at 2374-75.

169. See *id.* at 2375; *Commission v. France*, Case C-184/96, [1998] E.C.R. I-6197, 6224. This is also in line with the approach in *Commission v. France*, Case 167/73, [1974] E.C.R. 359.

170. See *Criminal Proceedings Against Pistre*, Cases C-321-324/94, [1997] E.C.R. I-2343, 2376.

171. See *id.* at 2355-59.

172. See the discussion referred to in P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 *COMMON MKT. L. REV.* 649, 657, *supra*, note 40.

173. In some ways the judgment in *Criminal Proceedings Against Pistre*, Cases C-321-324/94, [1997] E.C.R. I-2343, may be seen as answering the point that there was no

equality before the law would mean that if a measure could not be enforced against goods imported from another Member State, it could not be enforced in a wholly domestic situation. So in fact it would be the operation of national law which would give to purely domestic operators the benefit of a finding by the ECJ that a measure infringed Article 28 EC. That is the background against which the ECJ was willing to answer the questions posed in *Criminal Proceedings Against Guimont*,<sup>174</sup> even though the specific facts were entirely confined to France, namely the cheese concerned was manufactured in France and on sale there.<sup>175</sup> The result is, then, that reverse discrimination may result in some Member States but not in others, depending on whether they have an equality rule. This is scarcely equal treatment for all EU citizens, let alone all market participants; it may give rise to distortions of competition, but at least in the present state of Community law these are unavoidable, and there appears to be no generic requirement on the Member States to remedy this state of affairs.

#### D. Exports—An Old Peculiar?

The wording of Article 29 EC was (as the old Article 34 EEC Treaty substantively) and is now identical, *mutatis mutandis* to that of what is now Article 28 EC. As far as measures applicable solely to exports to other Member States are concerned, it is interpreted exactly as is Article 28 EC.<sup>176</sup> Infamously, the ECJ declined to apply the *Dassonville* basic principle without more ado in the context of Article 29 EC in relation to measures having equivalent effect to quantitative restrictions, which are applicable irrespective of the destination of the product.<sup>177</sup> This well demonstrates that hard cases make bad law: the ECJ was clearly

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evidence produced in *Keck* to demonstrate that the products in respect of which the charges were laid were imported products.

174. *Criminal Proceedings Against Guimont*, Case C-448/98, [2000] E.C.R. I-10663. The case concerned the requirement that Emmenthal cheese had to have a rind if it were to be sold under that name in France.

175. *See Douwe Egberts NV v. Westrom Pharma NV*, Case C-293/02, [2004] E.C.R. I-7037, 7060.

176. *See generally Procureur de la République de Besançon v. Bouhelier*, Case 53/76, [1977] E.C.R. I-197.

177. *See, e.g., PB Groenveld BV v. Produktschap voor Vee en Vlees*, Case 15/79, [1979] E.C.R. 3409; *Summary Proceedings Against Oebel*, Case 155/80, [1981] E.C.R. 1993.

swayed in *PB Groenveld BV v. Produktschap voor Vee en Vlees* ("*Groenveld*")<sup>178</sup> by the point that if the Dutch prohibition were to be condemned it was likely that exports of Dutch processed meat products (particularly to Anglo-Saxon countries) would suffer. The ECJ found that Article 29 EC:

[C]oncerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.<sup>179</sup>

One consolation is that this formula adopted in *Groenveld*, although contrary to Advocate General Capotorti's suggestion that the basic principle in *Dassonville* be applied, nevertheless was sufficiently wide to catch local grab measures.<sup>180</sup> Nevertheless, it is submitted that in *Groenveld* it would have been better to seek a justification on the ground of consumer protection (maintaining the reputation of Dutch processed meat products in the eyes of the consumer). The ECJ's sally into a different approach for exports than for imports as regards equally applicable measures is distinctly unfortunate to say the least, but it has maintained its stance consistently,<sup>181</sup> although in relation to equally applicable measures in agricultural sectors covered by common organization at the Community level, the ECJ seems to be concerned to preserve the unity of the agricultural market and applies the normal *Dassonville* approach *mutatis mutandis*.<sup>182</sup> It is respectfully submitted that revisitation and reconsideration of *Groenveld* is

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178. See *P B Groenveld BV v. Produktschap voor Vee en Vlees*, Case 15/79, [1979] E.C.R. 3409, ¶ 7.

179. See *id.*

180. See, e.g., *Commission v. France*, Case 173/83, [1985] E.C.R. 491. As *Belgium v. Spain* ("Rioja"), Case C-388/95, [2000] E.C.R. I-3123, which reversed the finding in *Éts Delhaize Frères et Compagnie Le Lion SA v. Promatvin SA*, Case C-49/90, [1992] E.C.R. I-3669, demonstrates, even local grab measures may be justified (although it has to be said that the justification for reversing *Delhaize* was thin indeed, which has the whiff of more political than legal motivation; in effect Spain was being rewarded for years of non-compliance with the result of *Delhaize*).

181. See, e.g., *Officier van Justitie v. Holdijk*, Joined Cases 141-143/81, [1982] E.C.R. 1299, 1313; *Duphar BV v. Netherlands*, Case 238/82, [1984] E.C.R. 523, 543; *Spain v. Council*, Case C-9/89, [1990] E.C.R. I-1383, 1411.

182. See, e.g., *Criminal Proceedings Against Vriend*, Case 94/79, [1980] E.C.R. 327;

long overdue. In this context, Roth<sup>183</sup> has suggested that there should be a new definition of measures having equivalent effect in Article 29 EC, to embrace all marketing restrictions as well as product-bound measures applying to exports, irrespective of whether they specifically aimed to discriminate against exports or had that effect: Member States would therefore be obliged to exempt goods intended for export from such restrictions, subject to this being justified, although measures which related to conditions in which goods are produced, such as labor law, environmental or planning rules would continue to be subject to a discrimination-based test. Following this approach, Oliver<sup>184</sup> has suggested that the language of the *Groenveld* test be reworded so as to cover any measure which has the object or effect of treating exports less favorably than goods intended for the domestic market. It is, however, submitted that the view that the basic principle in *Dassonville* should be applied without more ado has rather more to commend it.

## VI. THE JUSTIFICATIONS FOR MEASURES HAVING EQUIVALENT EFFECT

### A. General Observations

The principal grounds of justification for quantitative restrictions or measures having an effect are set out in the first sentence of Article 30 EC.<sup>185</sup> A number of general principles apply in respect of these grounds: measures which it has sought to justify must be both necessary and proportionate;<sup>186</sup> the inter-

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Germany v. Deutsches Milch-Kontor GmbH, Case C-426/92; see also P.J.G. Kapteyn & P. VerLoren van Themaat, *supra* note 93, at 649.

183. See W.H. ROTH, ZEITSCHRIFT FÜR HANDELSRECHT 78 (1995).

184. See P. Oliver, *Some Further Reflections on the Scope of Articles 28-30*, (1999) 36 COMMON MKT. L. REV. 783, 803; see also Enchelmaier, *supra* note 118.

185. As to the text of art. 30 EC, see EC Treaty, *supra* note 2, art. 30, O.J. C 321 E/37, at 55. The security safeguard clauses of Arts. 297 & 298 EC are left to one side in this discussion. See EC Treaty, *supra* note 2, art. 297-98, O.J. C 321 E/37, at 174-75.

186. See *Officier van Justitie v. De Peijper*, Case 104/75, [1976] E.C.R. 613, 636; *Commission v. United Kingdom*, Case 121/81, [1983] E.C.R. 203, 236; *Commission v. France*, Case 42/82, [1983] E.C.R. 1083, 1087; *Commission v. United Kingdom*, Case 261/85, [1988] E.C.R. 547, 574; see also *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, Case C-244/06, ¶ 27 (ECJ Feb. 14, 2008) (not yet reported). Logically, necessity and proportionality are separate: it may be necessary to protect health, but the means by which this is done may be disproportionate; quite frequently, however, the ECJ subsumes necessity and proportionality. In considering the proportionality of a measure, regard may be had to (the length of) any transitional period for compliance.

ests or values concerned are non-economic in nature, thus economic justifications will not be entertained;<sup>187</sup> the burden of proof that a measure is justified lies firmly on the party seeking to justify it;<sup>188</sup> it may be possible in exceptional circumstances to justify a difference in treatment of domestic and imported products, where the measures taken have the same aim, although this is highly exceptional.<sup>189</sup> The ECJ has consistently refused to add to the interests or values expressed in the first sentence of Article 30 EC Treaty.<sup>190</sup> The requirement expressed in the second sentence of Article 30 EC, that measures which it has sought to justify must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, is seen by the ECJ as being the source of the requirement that measures which Member States seek to justify must be proportionate,<sup>191</sup> but it is, with respect, more appropriately seen as an emergency brake, which is designed to ensure that measures, which appear ostensibly justified are not misused or distorted from the proper purpose.<sup>192</sup> Thus, even if a justification can be made out, it may fail because of the effect of the second sentence of Article 30 EC.

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*See* Commission v. Germany, Case C-463/01, [2004] E.C.R. I-11705, 11760-61; *see generally* Commission v. Austria, Case C-320/03, [2005] E.C.R. 9871; Radlberger Getränkegesellschaft mbH & Co. v. Land Baden-Württemberg, Case C-309/02, [2004] E.C.R. I-11763.

187. *See, e.g.*, Commission v. Italy, Case 7/61, [1961] E.C.R. 317, 329; Commission v. Ireland, 288/83, [1985] E.C.R. 1761, 1776; Decker v. Caisse de Maladie des Employés Privés, Case C-120/95, [1998] E.C.R. I-1831, 1884. If, though, a justification can genuinely be made out on a ground known to Community law, the fact there may result desirable economic effects for the Member State will not be fatal to the justification. *See* Campus Oil Ltd. v. Minister for Industry and Energy, Case 72/83, [1984] E.C.R. 2727, 2752 (keeping essential services of the Member State running, although ensuring the refinery's survival also meant that jobs were safeguarded, which may very well have been the real reason behind the measure in the first place, although the public security justification was advanced as the justification); The Queen v. Secretary of State for the Home Department, *ex parte* Evan Medical Ltd. et al. Case C-324/93, [1995] E.C.R. I-563, 608 (ensuring country has reliable supplies of essential medical purposes).

188. *See, e.g.*, Firma Denavit Futtermittel GmbH v. Minister für Ernährung, Case 251/78, [1979] E.C.R. 3369, 3392; Officier van Justitie v. Sandoz BV, Case 174/82, [1983] E.C.R. 2445, 2464-65.

189. *See* Rewe Zentralfinanz eGmbH v. Landwirtschaftskammer, Case 4/75, [1975] E.C.R. 843, 860.

190. *See* Commission v. Italy, Case 7/68, [1968] E.C.R. 423, 431; Bauhuis v. Netherlands, Case 46/76, [1977] E.C.R. 5, 15; Commission v. Ireland, Case 113/80, [1981] E.C.R. 1625, 1638.

191. *See, e.g.*, Criminal Proceedings Against Sandoz BV, Case 174/82, [1983] E.C.R. 2445, 2463; Regina v. Henn & Darby, Case 34/79, [1979] E.C.R. 3795, 3815.

192. *See* O.C. Brandel, *Die Gemeinschaftsrechtliche Missbrauchstabestände Bei Der*

Although the protection of fundamental rights does not feature in Article 30 EC, it is now clear that the ECJ will have regard to fundamental rights in interpreting that provision.<sup>193</sup>

### B. Article 30 EC

The heads of justification under Article 30 EC appear relatively straightforward, although they have given rise to a veritable wealth of case-law. Some of the most spectacular of these deserve mention here. Confirming continental views about the strange preoccupations of the British, the cases clearly based on the protection of public morality have come from the United Kingdom: after the clear upholding of the right of the United Kingdom to ban the importation of grossly obscene materials,<sup>194</sup> the ECJ found, unsurprisingly, that the United Kingdom was not entitled to ban the importation of blow-up dolls and sexy vacuum flasks when it did not prohibit their manufacture or sale within its territory.<sup>195</sup> Sometimes public morality is bound up with public policy, or expressed in wider public interest terms, such as the protection of the interests of children.<sup>196</sup> Public policy, the second ground, is not simply an excuse for whatever suits the government of the day, and it is not defined by national concepts of the term; the limits on its use by the national authorities are set by Community law, through the supervision by the ECJ, although it may clearly vary from place to place and from time to time.<sup>197</sup> It was feared for a time that public security was in dan-

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*Ausubung Nationale Schutzrechte*, GRUR INT'L 512 (1980); L.W. Gormley, *supra* note 15, at 217.

193. See, e.g., Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, [1997] E.C.R. I-3689, 3717; Schmidberger v. Austria, Case C-112/00, [2003] E.C.R. I-5659, 5718.

194. See generally Regina v. Henn & Darby, Case 34/79, [1979] E.C.R. 3795.

195. See Conegate Ltd. v. H.M. Customs & Excise, Case 121/85, [1986] E.C.R. 1007; see generally L.W. Gormley, *Cassis de Dijon and the Communication from the Commission*, 6 EUR. L. REV. 454 (1981).

196. See Dynamic Medien Vertriebs GmbH v. Avides Media AG, Case C-244/06, ¶ 36 (ECJ Feb. 14, 2008) (not yet reported). Sometimes public morality and public policy are advanced in the context of a health justification, rather than separately. See *The Queen v. Minister of Agriculture*, Case C-1/96, [1998] E.C.R. I-1251. In relation to the freedom to provide services, see *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, [2004] E.C.R. I-9609 and judgments cited there.

197. Thus it covers matters such as the protection of the integrity of coinage (see Regina v. Thompson, Case 7/78, [1987] E.C.R. 2247) and reasonable measures to prevent speculative transactions (see *Commission v. Italy*, Case 95/81, [1982] E.C.R. 2187)

ger of providing a gaping hole through which national measures could be pushed,<sup>198</sup> but it is now clear that the normal rules as to justification really do apply in that area too and that the Member States will not be allowed to get away with it.<sup>199</sup> The fifth ground, the protection of national treasures possessing artistic, historic, or archaeological value, has given rise to no case-law directly on point, although the heritage protection of works of art has now been the subject of Community level measures;<sup>200</sup> this may well indicate the development of a consciousness of the patrimony of the Community as a whole (as opposed to merely local patrimony), but in any event, the concept of artistic value resembles a distinctly moveable feast.<sup>201</sup>

Unsurprisingly, the vast majority of case-law has concerned the fourth ground, the protection of health and life of humans, animals or plants, and the final ground, the protection of industrial and commercial property. Taking these in turn, a number of points on health protection deserve emphasis. Member States and importers are obliged to cooperate: thus a Member State must use in relation to a parallel import authorization procedure for pharmaceuticals information which they already have in their possession;<sup>202</sup> although, as noted above, the burden of

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but the ECJ has refused to accept the argument that a measure is justified on public policy grounds simply because it is reinforced by penal sanctions (see *Criminal Proceedings Against Prantl*, Case 16/83, [1984] E.C.R. 1299, 1329). The dangers of promoting social unrest have not been accepted by the ECJ as a public policy justification. See *Commission v. France*, Case 52/95, [1995] E.C.R. I-4443, 4468; *Commission v. France*, Case C-265/95, [1997] E.C.R. I-6959, 7003. The concept is well summarized (in relation to persons, services, and capital) in *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, [2004] E.C.R. I-9609, 9651-52 and judgments cited there: public policy may only be relied upon if there is a genuine and sufficiently serious (present) threat to a fundamental interest of society.

198. See, e.g., *Campus Oil Ltd. v. The Minister for Industry and Energy*, Case 72/83, [1984] E.C.R. 2727; see also L.W. Gormley, *supra* note 15, 134-39. Public security covers both internal and external security. See *Criminal Proceeding Against Richardt*, Case C-367/89, [1991] E.C.R. I-4621, 4652; *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany*, Case C-70/94, [1995] E.C.R. I-3189 at 3227; *Criminal Proceedings Against Leifer*, Case C-83/94, [1995] E.C.R. I-3231, 3249.

199. See generally *Commission v. Greece*, Case C-347/88, [1990] E.C.R. I-4747; *Criminal Proceedings Against Richardt*, Case C-367/89, [1991] E.C.R. I-4621.

200. See Council Directive No. 93/7, O.J. L 74/74 (1993), amended by O.J. L 60/59 (1997), amended by O.J. L 187/43 (2001).

201. See L.W. Gormley (1985), *supra* note 15, 184-89; P. Oliver (2003), *supra* note 92, 285-87.

202. See generally *Officier van Justitie v. De Peijper*, Case 104/75, [1976] E.C.R. 613; *Eurim-Pharm GmbH v. Bundesgesundheitsamt*, Case C-207/91, [1993] E.C.R. I-3723



proof that a measure is justified lies firmly on the party seeking to justify it, importers must make available such information as they have in their possession.<sup>203</sup> After initial problems, the case-law on matters such as additives seems to have settled down, with the ECJ being less inclined to accept thin arguments from Member States.<sup>204</sup> It is also now clear that it will be difficult to justify trying to prevent people taking advantage as individuals of the single market throughout the EU.<sup>205</sup> Health protection arguments fall to be considered under Article 30 EC, not under other justifications known to Community law.<sup>206</sup>

The case-law on the protection of industrial and commercial property has developed apace since the early cases discussed above; much now operates within the framework of Community legislation,<sup>207</sup> but Oliver<sup>208</sup> has conveniently encapsulated much in the following general rule and exceptions: Member States

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(which, even though it dealt with a free trade agreement with what was at the time of the facts a third country, Austria, saw the ECJ using the concept of the useful effect of the agreement to apply the principle developed in *De Peijper* in that context as well).

203. See *Criminal Proceedings Against Sandoz BV*, Case 174/82, [1983] E.C.R. 2445, 2464-65.

204. The present state of the case-law is well illustrated by *Commission v. Federal Republic of Germany*, Case 178/84, [1987] E.C.R. 1227; *Commission v. Denmark*, Case C-192/01, [2003] E.C.R. 9693, and *Commission v. France*, Case C-24/00, [2004] E.C.R. 1277. That the precautionary principle is respected, however, is evident from cases such as *United Kingdom v. Commission*, Case 180/96, [1998] E.C.R. I-2265, 2298 (in relation to the Community's right to take protective measures during the BSE crisis). Increasingly, Community harmonization measures occupy the field, thus limiting the room for Member States' individual requirements; in the presence of total occupation of the field at Community level, the justification for unilateral national measures disappears; in the case of partial harmonization, the Member States must not only comply with, as appropriate, Community law on the free movement of goods, they must also, by virtue of Art. 10 EC, not endanger the proper functioning of the rules which have been harmonized at Community level. See, e.g., *Criminal Proceedings Against Van Bennekom*, Case 227/82, [1983] E.C.R. 3883, 3904; *National Farmers' Union v. Secrétariat Général du Gouvernement*, Case C-241/01, [2002] E.C.R. I-9079, 9126 (citing various earlier judgments); see also *HLH Warenvertriebs GmbH v. Germany*, Cases C-211/03, [2005] E.C.R. 5141, 5221-23.

205. See, e.g., *Schumacher v. Hauptzollamt Frankfurt-am-Main-Ost*, Case 215/87, [1989] E.C.R. 617; *Decker v. Caisse de Maladie des Employés Privés*, Case C-120/95, [1998] E.C.R. I-1831.

206. See, e.g., *Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generaliteit de Cataluña*, Cases C-1 & 176/90, [1991] E.C.R. I-4151, 4183-84 (overruling the inclusion of public health in the list of "mandatory requirements" in *Cassis de Dijon*).

207. See, e.g., Council Directive No. 89/304, O.J. L 30/1 (1989), amended by O. J. L 6/35 (1992).

208. P. Oliver (2003), *supra* note 92, at 332.

may legislate in the intellectual property field, unless it is the subject of Community harmonized legislation provided that they do not discriminate on ground of nationality or place of manufacture,<sup>209</sup> that they do not interrupt goods in transit unless the intellectual property rights were being used within their territory,<sup>210</sup> and, finally, that they must not allow the owner of a right to prevent the importation or sale of goods which have been lawfully obstructed on the market of another Member State by the owner of that right or with his consent.<sup>211</sup>

In regards to the second sentence of Article 30 EC, in addition to the general remarks as to its function made above, it is worth recalling that the number of occasions on which the ECJ has clearly used the second sentence of Article 30 EC to strike down national attempts to justify barriers to trade is actually small, although the cases have been spectacular.<sup>212</sup> The result is that there is no hiding place for arguments that are merely specious or disingenuous.

### C. *Case-Law-Based Justifications*

The basic principle in *Dassonville* was however also accompanied by a recognition that, pending action at the Community level to afford guarantees of certain interests or values, national measures taken in order to secure those guarantees or values would be acceptable subject to certain conditions. Thus, the ECJ admitted what is sometimes—and it is submitted with hindsight, perhaps rather misleadingly—called a rule of reason<sup>213</sup> (later

209. See, e.g., *Phil Collins v. Imtrat Handelsgesellschaft mbH*, Cases C-92 & 326/92, [1993] E.C.R. I-5145; *Commission v. Italy*, Case C-235/89, [1992] E.C.R. I-777; *Commission v. United Kingdom*, Case C-30/90, [1992] E.C.R. I-829.

210. See, e.g., *Commission v. France*, Case 23/99, [2000] E.C.R. I-7653.

211. This idea was launched in *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, Case 78/70, [1971] E.C.R. 487, as was noted above, see generally, P. Oliver (1993), *supra* note 92, 343-358; see also *supra* notes 26-27 and accompanying text. As to repackaging, see *Eurim-Pharm Arzneimittel GmbH v. Beiersdorf AG*, Cases C-71-73/94, [1996] E.C.R. I-3063. This approach has been taken into Community legislation in the field (see, e.g. First Trademark Directive, Council Directive No. 89/104, O.J. L 40/1 (1989); *Bristol-Myers Squibb v. Paranova A/S*, Joined Cases C-427, 429, 436/93, [1996] E.C.R. I-3457.

212. See generally *Commission v. United Kingdom*, Case 40/82, [1982] E.C.R. 2793; *Commission v. France*, Case 42/82, [1983] E.C.R. 1013.

213. See generally L.W. Gormley, *The Genesis of the Rule of Reason in the Free Movement of Goods*, in *RULE OF REASON-RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE* 21, 21-33 (A. Schrauwen ed. 2005).

designated mandatory requirements)<sup>214</sup> which tempered, albeit only on a provisional basis pending action at the Community level to cover them, the rigors of the principle of the free movement of goods.<sup>215</sup> This is despite the repeated insistence that the heads of justification of Article 30 EC cannot be expanded.<sup>216</sup> There has been much debate as to whether these case-law based interests are taken into account when assessing the applicability of Article 28 EC, or whether they should be regarded as in fact an extension of Article 30 EC.<sup>217</sup> It is respectfully submitted that neither view is correct.<sup>218</sup> It is often thought that the case-law-based justifications began in *Cassis de Dijon*, but this is incorrect, as the first heads of justification surfaced in *Dassonville* itself.<sup>219</sup> *Cassis de Dijon* is indeed of importance for the further elaboration of these heads,<sup>220</sup> although it is actually far more important for launching the significance of the mutual recognition concept in the free movement of goods. It is sometimes argued that the ECJ has no power simply to create new exceptions to the basic principles of the EC Treaty,<sup>221</sup> but this misunderstands the essentially equitable nature of the ECJ's approach.<sup>222</sup> Measures justified on the case-law-based exceptions do constitute measures caught by Article 28 EC, but are acceptable because of their pur-

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214. See *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, 662.

215. The provisional basis of the case-law based justifications is evident from the formulation in *Dassonville*, "in the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin." *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852.

216. See *supra* note 189.

217. In favour of the first of these approaches, V. Hatzopoulos, *Exigences Essentielles, Imperatives ou Imperieuses Une Theorie, des Theories ou Pas de Theorie du Tout*, RTDE 191 (1998); A. MATTERA, *LE MARCHÉ UNIQUE EUROPÉEN—SES RÈGLES, SON FONCTIONNEMENT* 274 (2d. ed., 1990). See, e.g., in favor of the second, C. Barnard, *Barnard, Fitting the Remaining Pieces into the Goods and Persons Jigsaw*, 26 EUR. L. REV. 35, 54 (2001); J.C. Masclat, *Les Articles 30, 36 et 100 du Traité CEE à la Lumière de l'Arrêt "Cassis de Dijon"*, RTDE 611, 611-634 (1980); W.H. ROTH, *WIRTSCHAFT IN RECHT UND PRAXIS* 979 (2000); Joseph H. H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in *THE EVOLUTION OF EU LAW* 349, 366 (Paul Craig & Gráinne de Búrca eds., 1999).

218. The case-law-based exceptions do not determine substantively what is or is not caught by Art. 28 EC, nor are they an extension of Art. 30 EC.

219. See *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852, ¶ 6.

220. *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, 662.

221. See, e.g., R. Barents, *New Developments in Measures Having Equivalent Effects*, 18 COMMON MKT. L. REV. 271, 285 (1981); C. Masclat, *Les Articles 30, 36 Et 100 du Traité CEE à la Lumière de l'Arrêt "Cassis de Dijon"*, RTDE 611, 625 (1980).

222. See L.W. Gormley, *supra* note 15, at 56.

pose and extent.<sup>223</sup> The case-law-based exceptions reflect the lacunae in protection that still exist in the present state of integration in the Community, and recognize the need, pending action at the Community level, to allow Member States to act to ensure that the interests or values concerned guarantee the general interest. Such measures must be applicable to domestic and imported products alike and must be necessary and proportionate to the interest or value concerned, and moreover, the second sentence of Article 30 EC applies by analogy.<sup>224</sup> Despite the aberration in relation to environmental protection,<sup>225</sup> it is submitted that the proposition that the case-law-based exceptions are only available for measures which are equally applicable irrespective of the origin of the goods (domestic or coming from other Member States) represents good law.<sup>226</sup> The class of case-law based interests or values which may justify barriers to intra-Community trade is not closed, but the following heads of justification are clearly permissible, subject to compliance with the requirements of necessity, proportionality, and the second sentence of Article 30 EC: consumer protection,<sup>227</sup> the prevention of unfair commercial transactions,<sup>228</sup> the effectiveness of fiscal supervision,<sup>229</sup> environmental protection,<sup>230</sup> the improvement of

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223. See *Commission v. Germany*, Case C-463/01, [2004] E.C.R. I-11705, 11759.

224. See *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852, ¶ 6.

225. See generally *Commission v. Belgium*, Case 2/90, [1992] E.C.R. I-4431.

226. See *Commission v. Ireland*, Case 113/80, [1981] E.C.R. 1625, 1639; R. Barants, *New Developments in Measures Having Equivalent Effect*, 18 *COMMON MKT. L. REV.* 271, 291 (1981); L.W. Gormley, *supra* note 15, at 57; see also L.W. GORMLEY, *RULE OF REASON—RETHINKING ANOTHER CLASSIC OF EUROPEAN LEGAL DOCTRINE* 21, 30-32 (A. Schrauwen ed. 2005) (the author agrees with P. Oliver (2003), *supra* note 92, 211 when he says that the ECJ has had recourse to some far-fetched—not to say—exotic devices to maintain this facade, although the author does not regard the distinction between Art. 30 EC exceptions and the case-law-based exceptions as a facade). The ECJ will look behind the face of ostensibly equally applicable measures, however, to see if they in reality disadvantage imports; in such circumstances, the justification will fail, see e.g., *Commission v. United Kingdom*, Case 207/85, [1985] E.C.R. 1201.

227. See, e.g., *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852; *Cassis de Dijon*, [1979] E.C.R. 649, 662; *Commission v. France*, Case 216/84, [1988] E.C.R. 793, 812-13.

228. See, e.g., *Procureur du Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852; *Cassis de Dijon*, Case 120/78 [1979] E.C.R. 649, 662; *Commission v. France*, Case 216/84, [1988] E.C.R. 793, 812-13.

229. See, e.g., *Cassis de Dijon*, Case 120/78 [1979] E.C.R. 649, 662.

230. See, e.g., *Commission v. Denmark*, Case 302/86, [1988] E.C.R. 4607; *Commission v. Belgium*, Case 2/90, [1992] E.C.R. I-4431. The conclusions in *Aher-Wagon v. Germany*, Case C-389/96, [1998] E.C.R. I-4473 and *PreussenElektra AG v. Schlesweg AG*,

working conditions,<sup>231</sup> and the plurality of the media.<sup>232</sup> To these, and this is in common with the justifications mentioned in the first sentence of Article 30 EC, must be added the overall importance of fundamental rights (whether in general or in terms of human dignity).<sup>233</sup> In view of the ECJ's case-law on Article 29 EC, discussed above, it would appear that there is no room for case-law based exceptions in relation to that provision.<sup>234</sup>

The finding that a measure is justified does *not* mean that such a measure ceases to be a measure having equivalent effect. The case-law based exceptions are clearly distinguishable from obstacles to trade which are deemed not to fall within the definition of measures having equivalent effect under the *Keck* approach.<sup>235</sup> There is, it is submitted, still a clear distinction between the EC Treaty-based justifications and those finding their basis solely in case-law under the "mandatory requirements"; to assimilate them<sup>236</sup> is, with the utmost possible respect, a fundamentally flawed approach.

## VII. FREE MOVEMENT OF GOODS IN LIGHT OF THE OTHER FREEDOMS OF THE TREATY

The question of the convergence or divergence of the fundamental freedoms of the treaty in the internal market has been

Case C-379/98, [2001] E.C.R. I-2099 are also remarkable, to say the least. Perhaps the honest answer, with as much respect as can be mustered, is that the ECJ is so scared of environmental arguments that it is prepared to stand logical analysis on its head!

231. *See, e.g.*, Summary Proceedings Against Oebel, Case 155/80, [1981] E.C.R. 1993; Union Départementale des Syndicats CGT de l'Aisne v. SIFE Conforama, Case C-312/89, [1991] E.C.R. I-997; Criminal Proceedings Against Marchandise, Case C-332/89, [1991] E.C.R. I-1027; Council of the City of Stoke-on-Trent v. B & Q PLC, Case C-169/91, [1992] E.C.R. I-6635; Rochdale Borough Council v. Anders, Case C-306/88, [1992] E.C.R. I-6457; Reading Borough Council v. Payless DIY Ltd., Case C-304/90, [1992] E.C.R. I-6493.

232. *See* Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, [1997] E.C.R. I-3689.

233. *See id.* at 3717; Schmidberger v. Austria, Case C-112/00, [2003] E.C.R. I-5659, 5718; Dynamic Medien Vertriebs GmbH v. Avides Media AG, Case C-244/06 (ECJ Feb. 14, 2008) (not yet reported).

234. This follows from the ECJ's approach in P B Groenveld BV v. Produktschap voor Vee en Vlees, Case 15/79, [1979] E.C.R. 3409.

235. *See* Criminal Proceedings Against Keck & Mithouard, Joined Cases C-267 & 268/91 [1993] E.C.R. I-6097, 6131.

236. *See* P. Oliver, *supra* note 92, at 216; Oliver, *supra* note 108, at 804 (he acknowledges that his view is not shared by the majority of writers); *see also* Gormley, *supra* note 213, at 25.

the subject of considerable discussion,<sup>237</sup> so that the present observations may be brief. On the one hand, a certain convergence can be seen in the development of case-law based justifications in relation to other freedoms,<sup>238</sup> but on the other hand, the ECJ has rejected calls to apply *Keck* outside the area of the free movement of goods,<sup>239</sup> or to introduce a nationality-based beneficiary criterion into Article 28 EC<sup>240</sup> and thus to promote a unified approach to the freedoms. The changed emphasis in the free movement of workers, the freedom of establishment, and the freedom to provide services away from merely discrimination-based concepts to become more potentially and even (indirectly) effect-oriented<sup>241</sup> demonstrate that the ECJ is willing to look to maintain the integrationist effects of intra-Community

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237. See generally P. Behrens, *Die Konvergenz der wirtschaftlichen Freiheiten im Europäischen Gemeinschaftsrecht*, 27 *EUROPARECHT* 145 (1992); J. SNELL, *GOODS AND SERVICES IN EC LAW* (2002); *SERVICES AND FREE MOVEMENT IN EU LAW* (M. Andenas & W.H. Roth eds., 2002), which contains a large number of valuable essays.

238. See, e.g., the conditions set out in *Kraus v. Land Baden-Württemberg*, Case 19/92, [1993] E.C.R. I-1663; *Alpine Investments BV v. Minister van Financiën*, Case C-384/93, [1995] E.C.R. I-1141; *Konsumentenombudsman v. De Agostini (Svenska) Förlag AB*, Cases C-34-36/95, [1997] E.C.R. I-3843 (public interest requirements; these too will be available only to equally applicable measures—save perhaps for environmental protection, although this is not clear); in any case, measures which discriminate will have to be justified on the basis of the EC Treaty itself (or a (temporary) derogation under an Act of Accession); see *Ciola v. Land Vorarlberg*, Case C-224/97, [1999] E.C.R. I-2517, 2536; P. Oliver & S. Enchelmaier, *Free Movement of Goods*, 44 *COMMON MKT. L. REV.* 649, 670 (2007) (regarding the principles governing justification of restrictions falling under Articles 28 and 49 EC as essentially the same). That is certainly true as regard the assessment of proportionality, and it seems that it ought to be true as regards case-law based justifications (public interest justifications). But only so far: Arts. 39(3) and 46 EC mention only public policy, public security, and public health (respectively for free movement of workers and freedom of establishment and, by virtue of Art. 55(1) EC, also freedom to provide services); Art. 58(1)(b) (capital and payments) mentions public policy and public security, but also infringements of tax law, the need for compliance with prudential supervision requirements, and statistical declaration information; these cover some of the case-law-based justifications in relation to the free movement of goods, but not all of them, nor do they embrace the whole scope of Art. 30 EC. Art. 58(3) EC parallels the requirements of the second sentence of Art. 30 EC.

239. See, e.g., *Alpine Investments BV v. Minister Van Financiën*, Case C-384/93, [1995] E.C.R. I-1141, 1177-78; *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, Case C-415/93, [1995] E.C.R. I-4921, 5070-71; see also G. Tesaurò, *supra* note 119, at 7.

240. See the rejection of the argument of Advocate General Poiares Maduro in *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio*, Cases C-158 & 159/04, [2006] E.C.R. I-8135.

241. See, e.g., *Union Royale Belge des Sociétés de Football Association v. Bosman*, Case C-415/93, [1995] E.C.R. I-4921, 5068-71. This tendency has become even greater since the introduction of Union Citizenship, see, e.g., *Grzelczyk v. Centre Public D'aide Sociale Ottignies-Louvain-La-Nueve*, Case C-184/99, [2001] E.C.R. I-6193.

market penetration, although the nuancing of earlier case-law in *Keck* can be seen as a warning against abuse. In practice, the ECJ's refusal to allow *Keck* to become a general escape clause has greatly mitigated the damage which was feared and even done when the judgment in *Keck* was handed down.

A few more specific comments on convergence may be useful. Certainly the internal market has come alive and offers its beneficiaries a single market place within which to engage in leisure, business, or other pursuits. But there are differences in how the freedoms of the internal market operate. First, certain freedoms are clearly nationality-based,<sup>242</sup> whereas the free movement of goods is not limited on ground of nationality, and sometimes freedoms are specifically extended to benefit third-country nationals.<sup>243</sup> Secondly, the coming of age of the freedom to provide services, both in economic terms and in terms of motoring economic interpenetration within the single market, might be taken to indicate that the free movement of goods is now less important, but it is respectfully submitted that that belief is somewhat premature. Thirdly, while it is true that the Constitution would have moved the place of goods in the definition of the internal market<sup>244</sup> that has not happened in the amendments which the Treaty of Lisbon would bring into force, as a result of which the present definition of Article 14(2) EC will seamlessly transform into Article 26(2) FEU, with no change in the order of the freedoms.

If the ECJ had not decided *Keck* as it did, but had applied its earlier case-law and found that the French rule could be justified on consumer protection grounds, a more unified approach to the freedoms would have been much more possible (subject to the nationality points). It is therefore submitted that while there

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242. Such as the free movement of (legal and natural) persons.

243. The benefit of free movement of persons is extended to, e.g., European Economic Area and Swiss nationals by specific enlargement of the scope of the secondary legislation concerned; the benefit of the free movement of capital extends to third countries, with very limited exceptions, by virtue of Art. 56 EC. See, further, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, Case C-452/04, [2006] E.C.R. I-9521: a Swiss company was not permitted to grant unauthorized loans in Germany, as the provisions of the freedom to provide services (including the EC Treaty and public interest justifications) took precedence over the provisions of the EC Treaty on capital and payments (Arts. 56-60 EC).

244. See Draft Treaty establishing a Constitution for Europe, Art. III-130(2), O.J. C 310/1, at 58 (2004). That Constitution was not ratified by all Member States and has now been superseded by the Treaty of Lisbon, *supra* note 3.

are indications of some osmosis, and the freedoms have in common that they all contribute to the integration inherent in the single market and act as motors of integration, they will not through case-law alone develop into a coherent whole.

### CONCLUSION

Of the issues discussed in this birthday present, what to do with *Keck* is probably potentially most ripe for development, particularly in view of the divergence in views expressed by various Advocates General noted above. But other issues need attention, such as revisiting Article 29 EC. The ECJ really has not reacted to pressure from some learned writers and Advocates General to develop a new general theory of the free movement of goods, or a unified theory for the four freedoms.<sup>245</sup> The present writer has serious doubts about whether such a development would be at all helpful: one-size-fits-all legal solutions tend not to work out in practice, and are often inelegant in conception and even worse in implementation. Hence, this contribution has resisted all temptations to advance some revolutionary approach. Instead, the submission really is that the ECJ should seriously consider renouncing *Keck*, and all its works, and all its pomps.<sup>246</sup> The last thing that it should do is extend the range of measures which it deems to fall outside the basic principle in *Dassonville* (albeit subject to conditions); thus the siren call of Advocate General Kokott discussed above should not be heeded. This is emphatically *not* to plead for a mechanical application of the basic principle in *Dassonville* in an unrestrained manner, rather it is to argue that the ECJ should not shy away from making assessments—always remaining within the limits of its jurisdiction—but guiding the national courts towards pragmatic and common-sense solutions. The astute use of the basic principle, combined with a sensible application of the case-law-based justifications as well as those envisaged by the EC Treaty does not have to lead to the ECJ being overworked or unmeritorious litigants being rewarded. It should lead to a harmonious application of the law,

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245. See, e.g., the various writings and Opinions as Advocate General, of Poirares Maduro. See *supra* note 239 and accompanying text.

246. These might be suitable baptismal vows for assessing the suitability of future members of the ECJ!



rather than its obfuscation by knee-jerk reactions to discourage litigants whom the ECJ has encouraged in the first place.

Birthdays, and other anniversaries are a time for reflection and also for looking forward. This plea for returning to the roots and letting *Dassonville* work without artificial constraints,<sup>247</sup> is perhaps a reflection of part of the song referred to in the title:

Love is always young and fair,  
What to us is silver hair?<sup>248</sup>

50 years on, it may truly be said of the free movement of goods that it has somewhat matured, but has not yet settled down. Even if, as was noted at the outset of this article, for the EC Treaty it looks as if “life is fading fast away,”<sup>249</sup> nobody should doubt that the free movement of goods within the European Union—just like the Commerce Clause in the U.S. Constitution—will in 50 years time still be as stimulating and probably as controversial a subject for discussion and development of the law as it has been in the last 50 years. Very many happy returns to what for the author is still a most lively and rewarding experience:

Since I kissed you mine alone, you have never older grown.<sup>250</sup>

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247. Such as saying that a measure which it is admitted may hinder trade between Member States does not amount to a prohibited measure within the *Dassonville* definition (as in *Keck*).

248. EBEN E. REXFORD, H.P. DANKS, *SILVER THREADS AMONG THE GOLD* (1872).

249. *See id.*

250. *See id.*