Fordham International Law Journal

Volume 33, *Issue* 6 2011 *Article* 1

Free Movement of Goods and Their Use – What Is the Use of It?

Laurence W. Gormley*

*

Free Movement of Goods and Their Use – What Is the Use of It?

Laurence W. Gormley

Abstract

Shortly before the disappearance of the European Community, the European Court of Justice ("ECJ") handed down three judgments on the free movement of goods relating to the use to which goods are put. They are remarkable because they put an end to a serious controversy about the scope of what is now article 34 of the Treaty on the Functioning of the European Union ("TFEU") (article 28 of the Treaty Establishing the European Community ("EC Treaty")), which saw a considerable divergence in approach between the Advocates General concerned in these cases. The judgments also surely herald an end to attempts to expand the ambit of the now notorious judgment in *Criminal Proceedings against Keck & Mithouard*. These cases and their wider implications for the future scope of article 34 TFEU (article 28 EC Treaty) are the subject of this Article. The Article first examines and contrasts the approach of the Advocates General in each case chronologically and then the judgments in the order handed down, before turning to draw conclusions for the state of the law relating to the future application of the judgment in *Keck*.

ARTICLES

FREE MOVEMENT OF GOODS AND THEIR USE—WHAT IS THE USE OF IT?

Laurence W. Gormley[*]

INTRODUCTION

Gordon Slynn, Lord Slynn of Hadley, was an outstanding Advocate General and then judge at the Court of Justice of the European Communities (as it then was),[1] more usually referred to (if inaccurately) as the European Court of Justice ("ECJ"), and was later a distinguished member of the Judicial Committee of the House of Lords. His passing has rightly been widely lamented in legal and other circles,[2] and it is with fond affection that I

* B.A. 1975, M.A. 1979, Oxford University; M.Sc. 1976 London University (LSE); Barrister, Middle Temple, 1978; LL.D. Utrecht University, 1985; Professor of European Law & Jean Monnet Professor, University of Groningen (The Netherlands), Jean Monnet Centre of Excellence; Professor at the College of Europe, Bruges (Belgium).

1. As a result of the changes made by the Treaty of Lisbon, which entered into force on December 1, 2009, the European Community has now disappeared, various of its provisions being incorporated into the Treaty on the Functioning of the European Union. *See generally* Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1, corrigenda 2008 O.J. C 111/56 & 2009 O.J. C 290/1 (entered into force Dec. 1, 2009) [hereinafter Reform Treaty]; Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. C 83/47 [hereinafter TFEU]. As to the consolidated versions of the Treaty on European Union [hereafter TEU], with the accompanying Protocols (some of which are protocols to the TEU and TFEU, and some also to the Treaty establishing the European Atomic Energy Community (consolidated version 2010 O.J. C84/12, corrigenda 2010 O.J. C 181/1)), Annexes, and Declarations attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 2010 O.J. C 83/13; *see also* Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321E/37 [hereinafter EC Treaty]. Since December 1, 2009, the Court of Justice of the European Communities is now known as the Court of Justice of the European Union ("ECJ"). Reform Treaty, *supra,* art. 1, 2009 O.J. C 306/01, at 16.

2. *See, e.g.*, Laurence Gormley, *Obituary: Gordon Slynn (1930-2009)*, 34 EUR. L. REV. 347, 347–48 (2009); Louis Blom-Coomper, *Obituary: Lord Slynn of Hadley: Liberal Law Lord, Judge and Advocate General of the European Court of Justice*, GUARDIAN (London), May 22, 2009, at 41; *Lord Slynn of Hadley: a Lord of Appeal in Ordinary,* TIMES (London), Apr. 9, 2009, at 67; *Obituary of Lord Slynn of Hadley Law: Lord and Staunch Europhile who Dissented from the Decision to Extradite General Pinochet*, DAILY TELEGRAPH (London), Apr. 8, 2009, at 37.

remember his various visits to Groningen, many hilarious meals together, and his wise counsel and encouragement. The dedication of this special issue of this Journal to him justly pays further tribute to a great lawyer, judge, and tireless worker in national, European, and international law circles for the rule of law, respect for human rights and dignity, and liberation from all forms of oppression and injustice.

TRIA JUNCTA IN UNO

Shortly before the disappearance of the European Community,[3] the ECJ handed down three judgments on the free movement of goods relating to the use to which goods are put. They are remarkable because they put an end to a serious controversy about the scope of what is now article 34 of the Treaty on the Functioning of the European Union ("TFEU") (article 28 of the Treaty Establishing the European Community ("EC Treaty")),[4] which saw a considerable divergence in approach between the advocates general concerned in these cases. They also surely herald an end to attempts to expand the ambit of the now notorious judgment in *Criminal Proceedings against Keck & Mithouard*.[5] These cases and their wider implications for the future scope of article 34 TFEU (article 28 EC) are the subject of this Article, but, before examining these cases, some scene-setting seems appropriate. Regular readers of this Journal will recall the present author's recent extensive

3. *See supra* note 1 and accompanying text. The last consolidated version of the Treaty Establishing the European Communities was published in 2006, see EC Treaty, *supra* note 1, 2006 O.J. C 321 E, but it did not take account of the accession of Bulgaria and Romania on January 1, 2007. *See* Treaty of Accession, 2005 O.J. L 157/11; Act of Accession, 2005 O.J. L 157/203.

4. *See* TFEU, *supra* note 1, art. 34, 2010 O.J. C 83, at 35; EC Treaty, *supra* note 1, art. 28, 2006 O.J. C 321 E, at 52.

5. Criminal Proceedings against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097. Various Member States have frequently attempted to argue that the approach in *Keck* to selling arrangements should be extended from what is now article 34 TFEU (article 28 EC) to the other freedoms. *See, e.g.*, Alpine Invs. BV v. Minister van Financiën, Case C-384/93, [1995] E.C.R. I-1141, ¶¶ 36–39; Union Royale Belge des Sociétés de Football Ass'n v. Bosman, Case C-415/93, [1995] E.C.R. I-4921, ¶¶ 102–03.

discussion on the free movement of goods,[6] so a brief exposition of classic areas of controversy will suffice.

Traditionally, academic debate on the free movement of goods—and on articles 34–36 TFEU (articles 28–30 EC) in particular—has centered on matters such as the scope of the term "measures having equivalent effect"; whether discrimination is necessary in order to find a prohibited effect; whether equally-applicable measures are caught by articles 34–36 TFEU (articles 28–30 EC); the requirement of an interstate element; the nature of the ECJ's approach in *Keck*; the nature of the case-law-based justifications for obstacles to the free movement of goods; whether the ECJ was correct to treat measures applicable without distinction as to the destination of the goods concerned as usually not caught by article 35 TFEU (article 29 EC); whether the case-law-based justifications and the justifications under article 36 TFEU (article 30 EC) should be assimilated; and the manner in which the ECJ approaches issues such as the proportionality of obstacles to trade between Member States which Member States argue are justified. Of these issues, three are directly involved in these cases on use, namely: scope, justification, and proportionality.

The ECJ clearly thought that it had settled the issue of the scope of the term "measures having equivalent effect" with the classic definition in the basic principle in *Dassonville*: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[7] That basic principle was tempered by the development of case-law-based justifications for

---

6. *See generally* Laurence W. Gormley, *Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods*, 31 FORDHAM INT'L L.J. 1637 (2008).

7. *See* Procureur du Roi v. Dassonville, Case 8/74, [1974] E.C.R. 837, ¶ 9. As was noted in my previous Article, the basic principle has remained steadfast, even though "the reference to 'trading rules' is sometimes omitted, or replaced by 'national rules' or simply 'rules[.]'" Gormley, *supra* note 6, at 1647. It is trite law that rules or other measures adopted by national, regional, or local authorities are caught, as are measures adopted by bodies for whose acts under European Union law the Member State concerned is responsible (including public bodies and public-owned/directed companies): the state is the state in all its manifestations, whether acting as market regulator or market participant.

such measures, in addition to the treaty-based justifications.[8] Rapidly it became apparent that lawyers were seeking to stretch the ambit of "measures having equivalent effect" into areas where the integrationist merit was thin, to say the least, or wholly non-existent.[9] The judgment in *Keck* was a misconceived, albeit perhaps understandable, judicial reaction to the feeling of being constantly pushed by lawyers eager to score every point possible. It represented a nuancing of the application hitherto of *Dassonville*, but not a departure from it. As is well known, the flood of cases continued unabated, and the ECJ has often been Houdini-like in its contortions in its findings on whether or not the *Keck* conditions for removing measures from the scope of the *Dassonville* basic principle are satisfied.[10]

The issue of whether or not to assimilate the case-law-based justifications is one on which the overwhelming majority of authors are agreed: this is not something which should happen.[11] There has been no pressure to add to the list of justifications contained in article 36 TFEU (article 30 EC). The initial confusion caused by the inclusion of the protection of public health in the examples of "mandatory requirements" (case-law-based justifications) in *Cassis de Dijon*[12] has now been cleared up[13]: the protection of public health falls under the protection of health and life of humans in article 36 TFEU (article 30 EC).[14] However, it can be argued that some safety matters which the ECJ now seems to treat as separate case-law-based justifications, i.e., road safety,[15] shipping safety,[16] and product safety,[17] could equally

---

8. For a summarization of this development, see Gormley, *supra* note 6, 1647, 1679–87.

9. *See id.* at 1648–60.

10. *See id.* at 1660–77.

11. *Contra* PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY 216 (2003) (accepting that the majority of writers do not share his view).

12. *See* Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (*Cassis de Dijon*), Case 120/78, [1979] E.C.R. 649, ¶ 8.

13. *See* Aragonesa de Publicidad Exterior SA v. Departmento de Sanidad y Seguridad Social de la Generaliteit de Cataluña, Joined Cases C-1 & 176/90, [1991] E.C.R. I-4151, ¶¶ 9–13.

14. *See* TFEU, *supra* note 1, art. 36, 2010 O.J. C 83, at 35; EC Treaty, *supra* note 1, art. 30, 2006 O.J. C 321 E, at 53.

15. A number of cases have dealt with roadworthiness tests. *See, e.g.*, Commission v. Netherlands, Case C-297/05, [2007] E.C.R. I-7467; Cura Anlagen GmBH v. Auto Service Leasing GmbH, Case C-451/99, [2002] E.C.R. I-3193; Sneller's Auto's BV v. Algemeen Directeur van de Dienst Wegenverkeer, Case C-314/98, [2000] E.C.R. I-8633; Criminal

well be brought under the protection of the health and life of humans, and thus, in relation to goods, under article 36 TFEU (article 30 EC).[18] The merit of a separate approach is that a clear distinction is drawn between more classic health and life issues and specific safety issues. This view only strengthens the argument that the case-law-based justifications and the treaty-based justifications, although they have certain characteristics in common, are and should remain distinct. As is well known, the ECJ has consistently refused to add to the list of treaty-based justifications.[19]

The proportionality of measures is a matter in which the ECJ can exercise a great deal of discretion; this has usually resulted in the conclusion that the national measures concerned are unjustified. Although the ECJ frequently seems to merge the question whether it is necessary to protect a given interest or value with the question whether the measures adopted for that purpose are proportionate, they logically remain separate issues, and there are plenty of examples of the ECJ mentioning them

---

Proceedings against Van Schaaik, Case C-55/93, [1994] E.C.R. I-4837; Schloh v. Auto contrôle technique SPRL, Case 50/85, [1986] E.C.R. 1855. More directly concerned with road safety requirements as such are two cases discussed in the present Article: Commission v. Portugal, Case C-265/06, [2008] E.C.R. I-2245; Commission v. Italy, Case C-110/05 [2009] E.C.R. I-519.

16. *See* Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova, Case C-18/93, [1994] E.C.R. I-1783, ¶¶ 16–36 (although this case deals with the freedom to provide services rather than the free movement of goods).

17. *See, e.g.*, A.G.M.-COS.MET Srl v. Suomen valtio and Tarmo Lehtinen, Case C-470/03, [2007] E.C.R. I-2749; Criminal Proceedings against Yonemoto, Case C-40/04, [2005] E.C.R. I-7755; Commission v. France, Case 188/84, [1986] E.C.R. 419.

18. In relation to the freedom to provide services, the most analogous provision is article 62 TFEU (article 55 EC) (which applies article 52(1) TFEU to the provision of services), which accepts measures for the protection of public health as a legitimate limit on the freedom to provide services. *See* TFEU, *supra* note 1, art. 62, 2010 O.J. C 83, at 71; EC Treaty, *supra* note 1, art. 55, 2006 O.J. C 321 E, at 63. For services, therefore, it indeed seems more appropriate to treat safety issues as case-law-based justifications. This may explain why the ECJ has decided to treat safety issues as case-law-based justifications in relation to the free movement of goods, even though the term "health and life of humans" in article 36 TFEU (article 30 EC) is broad enough to embrace safety issues. TFEU, *supra* note 1, art. 36, 2010 O.J. C 83, at 35; EC Treaty, *supra* note 1, art. 30, 2006 O.J. C 321 E, at 51.

19. For examples of the ECJ's rejection of treaty-based justifications such as the interests or values expressed in the first sentence of article 36 TFEU (article 30 EC), see Commission v. Ireland, Case 113/80, [1981] E.C.R. 1625, ¶ 5; Bauhuis v. Netherlands, Case 46/76, [1977] E.C.R. 5, ¶¶ 12–13; Commission v. Italy, Case 7/68, [1968] E.C.R. 423, 430.

separately.[20] The view which the ECJ has taken on proportionality, particularly in relation to the freedom of establishment and the freedom to provide services, has sometimes been controversial,[21] although the ECJ is also used to dealing with matters in which emotions run high in the area of the free movement of goods.[22]

All of these three aspects feature in the trio of spectacular cases on the use of goods,[23] which form the subject-matter of this

---

20. *See* LAURENCE GORMLEY, EU LAW OF FREE MOVEMENT OF GOODS AND CUSTOMS UNION 507 (2009); Gormley, *supra* note 6, at 1637, 1679–80.

21. *See, e.g.*, Int'l Transp. Worker's Fed'n v. Viking Line ABP, Case C-438/05, [2007] E.C.R. I-10,779 (dealing with the right of establishment and industrial action); Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Case C-341/05, [2007] E.C.R. I-1167 (dealing with the freedom to provide services and industrial action). As to barriers to the free movement of goods caused by unrest, see Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria, Case C-112/00, [2003] E.C.R. I-5659; Commission v. France, Case C-265/95, [1997] E.C.R. I-6959 (inadequate police response to angry farmers); *see also* the notification and consultation obligations imposed by Council Regulation on Free Movement of Goods, No. 2679/98, art. 5, 1998 O.J. L 337/8, at 9; *see generally* Giovanni Orlandini, *The Free Movement of Goods as a Possible "Community" Limitation on Industrial Conflict*, 6 EUR. L.J. 341 (2000).

22. *See, e.g.*, Belgium v. Spain, Case C-388/95, [2000] E.C.R. I-3123 (bottling requirements in region of origin for Rioja wine); The Queen v. Minister of Agric., Fisheries and Food, *ex parte* Compassion in World Farming Ltd., Case C-1/96, [1998] E.C.R. I-1251 (export of live veal calves); Commission v. Federal Republic of Germany, Case 178/4, [1987] E.C.R. 1227 (quality standards for beer); *see also* Criminal Proceedings against Zoni, Case 90/86, [1988] E.C.R. 4233, ¶ 28 (pasta made from durum wheat); Opinion of Advocate General Mancini, Glocken GmbH v. U.S.L. Centro-Sud, Case 407/85, [1988] E.C.R. 4233.

23. The ECJ had considered prohibitions of use in earlier judgments, but in specific contexts which did not require consideration of a general approach to restrictions on use. Thus, the Court of Justice upheld a general prohibition in Sweden on the industrial use of trichloroethylene because of the health and life of humans justification, noting that the Swedish system of individual exemptions was proportionate. Kemikalieinspektionen v. Toolex Alpha AB, Case C-473/98, [2000] E.C.R. I-5681, ¶ 49. The ECJ also examined an Austrian prohibition of lorries of more than seven-and-a-half tons, carrying certain goods, from being driven along certain motorway routes. Commission v. Austria, Case C-320/03, [2005] E.C.R. I-9871, ¶ 1. The court found that the prohibition of traffic, which forced transport undertakings to seek at very short notice viable alternative solutions for the transport of the goods concerned, was capable of limiting trading opportunities between northern Europe and the north of Italy; the alleged environmental justification (improvement of air quality) was rejected as being disproportionate:

> Without the need for the Court itself to give a ruling on the existence of alternative means, by rail or road, of transporting the goods covered by the contested regulation under economically acceptable conditions, or to determine whether other measures, combined or not, could have been adopted in order to attain the objective of reducing emissions of pollutants in

Article. It is convenient, because the chronology of the opinions and the judgments is so staggered, to examine and contrast first the approach of the Advocates General in each case chronologically and then the judgments in the order handed down, before turning to draw conclusions for the state of the law relating to the future application of the judgment in *Keck*.

I. *THREE CASES, FOUR ADVOCATES GENERAL*

The first of these cases to receive the attention of an Advocate General was *Commission v. Italy*,[24] which dealt with the

---

> the zone concerned, it suffices to say in this respect that, before adopting a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established.
>
> More particularly, given the declared objective of transferring transportation of the goods concerned from road to rail, those authorities were required to ensure that there was sufficient and appropriate rail capacity to allow such a transfer before deciding to implement a measure such as that laid down by the contested regulation.
>
> As the Advocate General has pointed out in paragraph 113 of his Opinion, it has not been conclusively established in this case that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes.
>
> Moreover, a transition period of only two months between the date on which the contested regulation was adopted and the date fixed by the Austrian authorities for implementation of the sectoral traffic ban was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances.

Id. ¶¶ 87–90 (citations omitted). The ECJ thus concentrated on the effect on the transportation of the goods rather than on the use of the lorries as such.

24. Opinion of Advocate General Léger, Commission v. Italy, Case C-110/05, [2006] E.C.R. 519. This opinion was delivered in unusual circumstances: as neither of the parties had requested an oral hearing (which is unusual in infringement proceedings), the case proceeded straight to the Advocate General's opinion. While the hearing in Åklagaren v. Mickelsson & Roos, Case C-142/05 [2009] E.C.R. I-4273, was held on July 13, 2006, Mr. Léger was the first Advocate General to pronounce in the series of cases under discussion. Having heard his opinion, the Third Chamber of the ECJ decided on November 9, 2006 to remit the case in Commission v. Italy to the Grand Chamber, which by order of March 7, 2007 (transcript available in French on the ECJ's website) reopened the oral procedure to enable it to hear observations presented by the parties and eight other Member States at a hearing on May 22, 2007. Advocate General Bot was invited to present an opinion to the Grand Chamber, which he duly did on July

prohibition in Italy of the towing of trailers by mopeds. Advocate General Léger had absolutely no difficulty in concluding that this rule—which was equally applicable to domestic and imported trailers registered in Italy alike—fell within the scope of what is now article 34 TFEU (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.[25]

Mr. Léger then turned to any possible justification. He acknowledged that road safety—as an aspect of public safety and the health and life of humans[26]—could be a legitimate ground

---

8, 2008. *See* Opinion of Advocate General Bot, Commission v. Italy, Case C-110/05, [2009] E.C.R. I-519.

25. Opinion of Advocate General Léger, Commission v. Italy, [2006] E.C.R. 519, ¶¶ 39–41.

26. Advocate General Léger was clearly meaning safety in the sense of public security (in various EU languages, the English words "safety" and "security" are largely covered by the same word), although the ECJ seems to regard public security as being something different. *Id.* The cases so far deal with matters such as safeguarding the institutions of a Member State, its essential public services and the survival of its inhabitants, internal and external security, and controls on the importation and exportation of goods such as firearms, explosives, and the like. *See* Frits Werner-Industrie-Ausrüstungen GmbH v. Germany, Case C-70/94, [1995] E.C.R. I-3189, ¶ 25; Criminal Proceedings against Leifer, Case C-83/94, [1995] E.C.R. I-3231, ¶ 26; Criminal Proceedings against Richardt & Les Accessores Scientifiques SNC, Case C-367/89, [1991] E.C.R. I-4621, ¶ 22; *see also* GORMLEY, *supra* note 20, at 463. *See generally* Commission v. Greece, Case C-347/88, [1990] E.C.R. I-4747; Campus Oil Ltd. v. Minister

for upholding the measures[27]: indeed, coupling a trailer to a moped could, in certain circumstances, constitute a danger to traffic insofar as such vehicles are slow and encroach significantly upon the carriageway. He could well imagine that vehicular traffic of that kind may be limited on certain roads, such as motorways and particularly dangerous roads. However, the Italian authorities had not produced any precise factor which demonstrated how the ban contributed to road safety; it was clear that the ban only applied to mopeds registered in Italy, and not to foreign-registered mopeds with trailers. It was also evident that the safety of drivers pursued by the rules at issue could be guaranteed by measures less restrictive of intra-Community trade, for example, by localized prohibitions, applicable to itineraries that are considered dangerous, such as Alpine crossings or particularly heavily used public highways.[28] Mr Léger went on to observe that Italy's stated intention to amend its rules to conform with Community law confirmed that analysis,[29] and that it was, in any event, incumbent upon the Italian authorities to consider carefully, before adopting a measure as radical as a general and absolute prohibition, whether it might be possible to resort to measures less restrictive of freedom of movement and to rule them out only if their unsuitability for attainment of the aim pursued was clearly established.[30]

Advocate General Léger's analysis follows a classical *Dassonville* approach, considering first that there is clearly a barrier to trade between Member States, and then proceeding to deal with the alleged justification.[31] As has already been noted, the case was subsequently referred to the Grand Chamber of the ECJ for further consideration after another opinion from Advocate General Bot,[32] but in order to follow the chronological

---

for Indus. and Energy, Case 72/83, [1984] E.C.R. 2727. In any event, it is clear that he envisaged road safety as falling within the fields covered by the first sentence of what is now article 36 TFEU (article 30 EC).

27. Opinion of Advocate General Léger, Commission v. Italy, [2006] E.C.R. 519, ¶¶ 43–46.

28. *See id.* ¶ 59.

29. *See id.*

30. *See id.* ¶ 60.

31. *See* Gormley, *supra* note 6, at 1657.

32. Opinion of Advocate General Bot, Commission v. Italy, [2009] E.C.R. I-519. The case was referred to the Grand Chamber in order to permit observations to be

order of the opinions given, it is appropriate to return to Mr. Bot's opinion presently below.

Chronologically the first of these cases actually to have an oral hearing, but second in terms of delivery of an opinion, is *Åklagaren v. Mickelsson & Roos*.[33] This concerned a prosecution in Sweden for having driven personal watercraft on August 8, 2004, on waters where the use of personal watercraft was not permitted;[34] the defendants relied on, inter alia, articles 28 and 30 EC (articles 34 and 36 TFEU). Advocate General Kokott proposed that the ECJ exclude arrangements for the use of goods from the scope of the basic principle in *Dassonville*,[35] and thus from article 28 EC (article 34 TFEU), in the same way as it had excluded certain selling arrangements in *Keck*[36] in response to the increasing tendency of traders to invoke article 28 EC (article 34 TFEU) to challenge any rule whose effect was to limit their commercial freedom, even where such rules were not aimed at products from other Member States.[37] She noted that at present, in the context of arrangements for use, ultimately individuals could even invoke article 28 EC (article 34 TFEU) to challenge national rules whose effect is merely to limit their general freedom of action.[38] She took the view that national legislation which laid down arrangements for the use of products did not constitute a measure having equivalent effect within the meaning of article 28 EC (article 34 TFEU) 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.[39] In order to

---

presented to the ECJ, as none had been presented initially; the Advocate General was then able to take account of the observations.

33. *See* Åklagaren v. Mickelsson & Roos, Case C-142/05 [2009] E.C.R. I-4273. Hearing was held July 13, 2006, but the opinion was delivered December 14, 2006 and the judgment was rendered June 4, 2009. *See id.*

34. *See id.* ¶¶ 14–15. Use was permitted on general navigable waterways and on other waters where permission had been granted. *See id.* ¶¶ 1–13. The ban on use was thus not total, but location-specific. *See id.*

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

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

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

38. *See id.* ¶ 48.

39. *See id.* ¶ 49.

support her view, she mentioned two extreme examples: a prohibition on driving cross-country vehicles off-road in forests, and speed limits on motorways.[40] These, she felt, would also constitute a measure having 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.[41] However, she concluded that prohibitions on use or national legislation that permitted only a marginal use for a product, insofar as they (virtually) prevented access to the market for the product, would constitute measures having equivalent effect which are prohibited under article 28 EC (article 34 TFEU), unless they were justified under article 30 EC (article 36 TFEU) or by an imperative public interest.[42]

With respect to the learned Advocate General, her examples of the (equally-applicable) prohibition of off-road driving and speed limits on motorways really are very old canards: they fail to meet the criteria for measures having equivalent effect because they are so remote from intra-Community trade as to have nothing to do with it in reality—the integrationist merit is thin beyond belief.[43] This is the case even though the concept of measures having equivalent effect to a quantitative restriction is undoubtedly an effects doctrine rather than an intent-based doctrine.[44] And even if it could be argued that they were caught under the basic principle in *Dassonville*, public policy, road safety, and environmental considerations would be such obvious

40. *See id.* ¶ 45.

41. *See id.*

42. *See id.* ¶ 87. She also concluded that national rules that laid down a prohibition on using personal watercraft in waters, in respect of which the county administrative boards had not yet decided whether environmental protection 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. *See id.*

43. The argument that the measures concerned had in reality nothing to do with intra-Community trade was spectacularly used by the ECJ in Blesgen v. Belgium, Case 75/81, [1982] E.C.R. 1211, and H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen, Case C-69/88, [1990] E.C.R. I-583.

44. *See, e.g.*, Deutscher Apothekerverbund eV v. 0800 Doc Morris NV, Case C-222/01, [2003] E.C.R. I-14,887, ¶ 67; Dynamic Medien Vertriebs GmbH v. Avides Media AG, Case C-244/06, [2008] E.C.R. I-505, ¶ 27.

justifications that the argument is simply not worth running. The learned Advocate General's observation that only marginal use for a product resulting from of a virtually total prohibition of market access would be enough to prevent the market access concept inherent in the second of the famous conditions in *Keck* for taking certain selling arrangements outside the scope of article 34 TFEU (article 28 EC) from being satisfied was at least a step in the right direction.[45] It would indeed be for the national court to ascertain whether this was the case.

The next Advocate General to pronounce was Ms. Trstenjak in *Commission v. Portugal* in an opinion that is a model of excellent analysis.[46] This case dealt with a national rule prohibiting the attachment of colored foil to the windows of motor vehicles for the transport of persons or goods.[47] 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 or marketed in other Member States, could not in effect be bought in Portugal: Portuguese drivers would be deterred from buying the foil because it was illegal to apply it to their windscreens; if it could not be used, there was an obstacle to it being imported and marketed.[48]

The Portuguese government had advanced two justifications: the need to combat crime and the requirements of road safety, since it made it easier to verify that the vehicle seats were correctly occupied and that safety belts were being used as

---

45. The first condition was that the state rules concerned apply to all relevant traders operating within the national territory; the second was that they affect in the same manner, in law and in fact, the marketing of domestic products and of products from other Member States. Provided that those conditions were fulfilled, the ECJ concluded that there would be no prevention of access to the market or impediment to access for foreign products any more that there was an impediment to access for domestic products. *See* Criminal Proceedings against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. 6097, ¶ 16. There are several cases that exemplify the ECJ's willingness to examine total state barriers to market access. *See, e.g.*, Douwe Egberts NV v. Westrom Pharma NV et al., Case C-239/02, [2004] E.C.R. I-7007, ¶¶ 48–59; Konsumentenombudsmannen v. Gourmet Int'l Products AB, Case C-405/98, [2002] E.C.R. I-1795, ¶¶ 13–34; Konsumentenombudsmannen v. De Agnostini (Swenska) Förlag AB, Joined Cases C-34–36/95, [1997] E.C.R. I-3843, ¶¶ 32–35.

46. Opinion of Advocate General Trstenjak, Commission v. Portugal, Case C-256/06 [2008], E.C.R. I-2245.

47. *See id.* ¶ 1.

48. *See id.* ¶ 24.

required by the law.[49] The prohibition was imposed in order to ensure that it was possible to inspect the interior of the motor vehicle from *outside*.[50] The aim was not to achieve reasonably clear visibility for the driver by preserving the light transmission of the window, but to allow the competent authorities to verify directly that road traffic legislation was being complied with simply by observing motor vehicles and their occupants.[51] Ms. Trstenjak found these arguments deeply unconvincing: no evidence had been adduced of a sufficiently serious present threat to a fundamental interest of society so as to constitute a threat to public policy in Portugal.[52] Regarding road safety, she found that facilitating the ease of checks was indeed an appropriate method of contributing to road safety, but concluded that the measure was disproportionate: there was a lack of evidence that the prohibition on the use of tinted film contributed to road safety—all the more so since the use of tinted glass was not prohibited![53] Moreover, it would have been possible for Portugal to have made provisions permitting the attachment of foil provided that the European minimum light transmission requirements were observed.[54] In this product-based scenario, *Keck* arguments, of course, played no part.

---

49. *See id.* ¶ 29.

50. *See id.* ¶ 47.

51. *See id.*

52. *See id.* ¶ 51.

53. *See id.* ¶¶ 54–57.

54. *See id.* ¶ 62. Member States could require, on the basis of Commission Directive No. 2001/92, that the minimum light transmission of glazing ahead of the B-pillar be seventy percent and on the windshield be seventy-five percent. 2001 O.J. L 291/24, at 25. The Advocate General observed that this would "ultimately amount to a restriction of the prohibition" under review so that "only the use of film which cannot guarantee the observance of the prescribed limit values because of insufficient light transmission may be prohibited." *See* Opinion of Advocate General Trstenjak, *Portugal*, [2008] E.C.R. I-2245, ¶ 63. In addition, the learned Advocate General observed that a further spatial restriction of the prohibition to glazing which actually allowed the police to monitor road traffic would be appropriate. She noted:

> This would extend both to the windscreen of a motor vehicle and to the glazing alongside the seats of the occupants of the vehicle, but not to the rear windscreen. Not only would this allow the police to check the occupants of vehicles through observation alone, but such a measure would also have no material effect on the free movement of goods, unlike the contested prohibition.

Id.

The final opinion to be considered is that of Advocate General Bot, presented when *Commission v. Italy* was transferred to the Grand Chamber of the ECJ.[55] When the oral procedure was re-opened, the Grand Chamber asked the parties and all the other Member States to give their views on:

> [T]he question of the extent to which and the conditions under which national provisions which govern not the characteristics of goods but their use, and which apply without distinction to domestic and imported goods, are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC.[56]

Apart from the parties, eight other Member States submitted observations on this question.[57] Mr. Bot came to the conclusion that national measures governing conditions for the use of goods should not be examined in the light of the criteria laid down by the Court in *Keck*; he felt that "such measures f[e]ll within the scope of Article 28 EC and may constitute measures having an effect equivalent to quantitative restrictions . . . if they hinder access to the market for the product concerned."[58] Mr. Bot gave several reasons for this view.

First, he submitted that such a course of action would result in the introduction of a new category of exemption from the application of article 28 EC (article 34 TFEU); this would be undesirable for a number of reasons.[59] He was unsure whether "the reasons which prompted the Court to exclude from the scope of Article 28 EC rules on selling arrangements for products also exist[ed] in the case of rules governing arrangements for use."[60] Drawing distinctions between different categories of rules was inappropriate—it was artificial and could be a source of confusion for the national courts. Furthermore, to "exclude from the scope of Article 28 EC national rules governing not only

---

55. Opinion of Advocate General Bot, Commission v. Italy, Case C-110/05, [2009] E.C.R. I-519.

56. *See id.* ¶ 6.

57. *See id.* (these countries were Cyprus, Czech Republic, Denmark, France, Germany, Greece, the Netherlands, and Sweden).

58. *Id.* ¶ 11.

59. *See id.* ¶ 88.

60. *Id.* ¶ 89. Mr. Bot noted that there had not been a large number of cases brought to the ECJ on the use of goods. *See id.*

selling arrangements for goods but also arrangements for their use was contrary to the Treaty's objectives, namely the creation of a single and integrated market."[61] In his view, "such a solution would undermine the useful effect of Article 28 EC, since it would once more make it possible for Member States to legislate in areas which, on the contrary, the legislature wished to "communitarize."[62] That was "not the course that European construction and the creation of a single European market should follow."[63] He opined further that "[a] product must be able to move, unhindered, within the common market, and national measures which, in whatever way, create an obstacle to intra-Community trade must be ones that the Member States can justify."[64]

Mr. Bot's second reason was that there was no interest in limiting the Court's review of measures which, in fact, may constitute a serious obstacle to intra-Community trade.[65] He regarded "[t]he judicial review carried out by the Court in accordance with the 'traditional analytical pattern' laid down in *Dassonville* and *Cassis de Dijon"* as "fully satisfactory" and saw no reason to depart from it.[66] "That analytical approach not only ma[de] it possible for the Court to monitor Member States' compliance with Treaty provisions," but it also allowed the Member States a certain leeway.[67] The classic approach of the wide basic principle accompanied by a strict interpretation of the treaty-based justifications and the use of the case-law-based justifications ensured that liberalization of trade did not affect the pursuit of other general interests.[68] At the same time this did not give a carte blanche to the Member States, as the alleged justifications on these public interest grounds had to pass through the tests of necessity and proportionality.[69] This analytical approach enabled the ECJ to ensure judicial review of

61. *Id.* ¶¶ 90–91.
62. *Id.* ¶ 91.
63. *Id.*
64. *Id.*
65. *See id.* ¶ 92.
66. *Id.* ¶ 93.
67. *Id.* ¶ 94.
68. *See id.* ¶¶ 95–96.
69. *See id.* ¶ 98.

all measures adopted by the Member States.[70] Such review was, Advocate General Bot submitted, "necessary to make certain that the Member States take account of the extent to which the rules adopted by them [were] liable to affect the free movement of goods and the enjoyment of freedoms of movement by operators in the market," as well as being "necessary to ensure that the national courts were not prompted to exclude too many measures from the prohibition" laid down by article 28 EC (article 34 TFEU).[71] It was right, therefore, to view the term "restriction" in broad terms. At the same time, he noted that judicial review had to remain limited, since the ECJ's role was "not systematically to challenge policing measures adopted by the Member States"; it was "the review of proportionality which enabled the Court to weigh the interests associated with attainment of the internal market against those relating to the legitimate interests of the Member States."[72] There was, he concluded, "no reason for departing from that analytical approach in favour of a solution which, ultimately, would to some extent render nugatory one of the key provisions of the Treaty."[73]

The third reason he advanced was that the *Keck & Mithouard* criteria "c[ould] not be extended either to rules prohibiting the use of a product or even to rules laying down arrangements for its use."[74] Insofar as the Italian rules prohibited the use of a product outright and thus rendered it entirely unusable, they constituted, by their nature, an impediment to the free movement of goods.[75] He noted that "[e]ven if those rules applied in the same way to domestic and imported products, they prevent the latter from gaining access to the market."[76] That was clearly a restriction, and an examination based on the relationship between articles 28 and 30 EC (articles 34 and 36

70. *See id.* ¶ 100. In making this point about the need to retain the jurisdiction to look at the national measures in the round (whereas when the *Keck* criteria are satisfied, the ECJ effectively ousts its jurisdiction with the result that the measures fall outside the scope of the prohibition in article 34 TFEU (article 28 EC)), the learned Advocate General silently followed the argument advanced in Laurence W. Gormley, *Two Years after* Keck, 19 FORDHAM INT'L L.J. 866, 881, 885 (1996).

71. Opinion of Advocate General Bot, *Italy*, [2009] E.C.R. I-519, ¶ 100.

72. *Id.* ¶ 101.

73. *Id.* ¶ 102.

74. *Id.* ¶ 103.

75. *See id.* ¶ 104.

76. *Id.*

TFEU) was appropriate.[77] This also applied, he submitted, "to measures which lay down the arrangements for a product's use."[78] He further noted:

> Even if those measures did not in principle seek to regulate trade in goods between Member States, they may nevertheless have effects on intra-Community trade by affecting access to the market for the product concerned. It is therefore, in my view, preferable to examine measures of that kind in the light of the Treaty rules rather than to remove them from the scope of the Treaty.[79]

In the light of these three reasons, he concluded that the *Keck* criteria were inappropriate and that the Italian rules should be examined on the basis of article 28 EC (article 34 TFEU) using a criterion that had been developed in the light of the aim pursued by article 28 EC and was "common to all restrictions on freedom of movement, namely the criterion of access to the market."[80] This would be "based on the effect of the measure on access to the market rather than on the object of the rules involved." The criterion would apply to "all types of rules, be they requirements relating to the characteristics of a product, selling arrangements or arrangements for use," and would be "based on the extent to which national rules hinder trade between Member States."[81] Thus, "a national measure would amount to a measure having an effect equivalent to a quantitative restriction, contrary to the Treaty, where it prevented, impeded or rendered more difficult access to the market for products from other Member States," regardless of the aim of the measure concerned.[82] On the basis of that criterion, "the Member States would only have to provide justification for measures that impeded intra-Community trade."[83] This, Mr. Bot argued, "would facilitate a more appropriate balance between requirements relating to the proper functioning of the common market and those relating to the requisite respect for the sovereign powers of the Member

77. *See id.*
78. *See id.* ¶ 105.
79. *Id.*
80. *Id.* ¶¶ 106–07.
81. *Id.* ¶¶ 109–10.
82. *Id.* ¶ 111.
83. *Id.* ¶ 112.

States."[84] A case-by-case approach should be taken by the ECJ, with a specific examination of "the extent of the obstacle to intra-Community trade caused by the measure limiting access to the market."[85]

On the basis of this approach, Mr. Bot then relatively quickly concluded that the Italian measure hindered access to the Italian market for trailers attached to a moped, motorcycle, tricycle or quadricycle.[86] The prohibition made it "practically impossible to penetrate the Italian market"; "the extent of the prohibition was such that it [left] no scope for anything other than purely marginal use of trailers."[87] They were rendered "entirely useless because they could not be used for the normal purpose for which they were intended," which was to increase the luggage-carrying capacity of a motorcycle.[88] Distributors were therefore dissuaded from importing them if they could not be sold or rented. The effect of the prohibition was thus to significantly reduce imports.[89] Given that the use of trailers was prohibited throughout Italian territory, there was "a substantial, direct and immediate obstacle to intra-Community trade."[90]

As to any possible justification, Mr. Bot was brief. The prohibition applied not to use in "specific localities or on particular itineraries, but appli[ed] throughout Italian territory, regardless of road infrastructure and traffic conditions."[91] No argument of proportionality had been advanced by the Italian government and, as Advocate General Léger had already observed, the prohibition concerned only motorcycles registered in Italy, so that "vehicles registered in other Member States were therefore authorised to tow a trailer on Italian roads."[92] Like Mr. Léger, Mr. Bot considered that "the driver safety sought by the Italian legislation could be achieved by means that restrict freedom of trade to a much lesser extent."[93] For example, it

84. *Id.*
85. *Id.* ¶ 113.
86. *See id.* ¶¶ 147–77.
87. *Id.* ¶¶ 157–58.
88. *See id.* ¶ 158.
89. *See id.*
90. *Id.* ¶ 159.
91. *Id.* ¶ 153.
92. *Id.* ¶ 169.
93. *Id.* ¶ 170.

would be appropriate, he submitted, "to define which itineraries in Italy [were] considered to be fraught with risks—such as mountain crossings, motorways or even particularly heavily used public highways—for the purpose of laying down sectoral prohibitions or limitations"; such an approach would "reduce the risks arising from the use of trailers and would certainly be less restrictive of trade."[94] Advocate General Bot furthermore noted that the Italian authorities were obliged to "examine closely, before adopting as radical a measure as a general and absolute prohibition, the possibility of resorting to measures less restrictive of freedom of movement and not to reject them unless it was clearly established that they were not consonant with the aim pursued"; such an examination had never been undertaken.[95]

This extensive discussion of Mr. Bot's approach is justified because of his clear faith in the market access approach, but it may be wondered quite what this adds to the basic principle in *Dassonville*,[96] other than a seemingly seductive name. On the facts, it may be that, for example, a government-sponsored campaign to promote national products has actually had no demonstrable impact or has actually backfired, but that has not prevented the ECJ from holding that there is still a barrier to trade.[97] Another disturbing aspect of Mr. Bot's approach is how easily a case-by-case examination of the extent of the obstacle to interstate trade can descend into the introduction of a *de minimis* rule, an approach which has rightly always been rejected by the ECJ whenever it has reared its ugly head.[98] While his observation

---

94. *Id.* ¶ 170.

95. *Id.* ¶ 171.

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

97. *See, e.g.*, Commission v. Ireland, Case 249/81, [1982] E.C.R. 4005, ¶ 25.

98. *See, e.g.*, Radlberger Getränkegesellschaft mbH & Co. v. Land Baden-Württemberg, Case C-309/02, [2004] E.C.R. I-11,763, ¶ 68; Commission v. Italy, Case 103/84, [1986] E.C.R. 1759, ¶ 18; Commission v. France, Case 269/83, [1985] E.C.R. 837, ¶¶ 10–11; Criminal Proceedings against Van der Haar, Joined Cases 177 & 178/82, [1984] E.C.R. 1797, ¶¶ 12–13; Criminal Proceedings against Prantl, Case 16/83, [1984] E.C.R. 1299, ¶¶ 20–21. Despite the invitation by Advocate General Jacobs, the ECJ has steadfastly held the line against a *de minimis* approach in article 34 TFEU (article 28 EC). *See* Opinion of Advocate General Jacobs, Société d'Importation Édouard Leclerc-Siplec v. TFI Publicité, Case C-412/93, [1995] E.C.R. I-179, ¶¶ 38–39, 43, 46. In *Hünermund v. Landesapothekerkammer Baden-Württemberg*, Advocate General Tesauro has stated that this would be a "very difficult, if not downright impossible" exercise. Opinion of Advocate General Tesauro, Hünermund v. Landesapothekerkammer Baden-Württemberg, Case

that the *Dassonville* and *Cassis de Dijon* approaches work well is indeed to be welcomed, it is submitted that the apparent charms of his approach are full of traps for the unwary.

The four Advocates General involved in these three cases produced very different approaches to the question of whether the rules relating to the use of goods fall within the scope of article 34 TFEU. Fortunately, the judgments mark a firm rejection of siren calls in favor of the importance of the unity of the internal market within the European Union.

II. *PARADISE REGAINED?*

The first of the cases under discussion to come to judgment was *Commission v. Portugal*,[99] a decision of the Third Chamber of the ECJ. In a model of orthodox application of the basic principle in *Dassonville*,[100] the ECJ noted that the Portuguese government admitted that the ban on tinted film restricted the marketing of those products in Portugal. The ECJ had no difficulty at all in concluding that potential customers, traders, or individuals had practically no interest in buying them, knowing that affixing such film to the windshield and windows alongside passenger seats in motor vehicles was prohibited.[101]

The only issue remaining was whether there was any justification for the measure. Unsurprisingly, in view of Ms. Trstenjak's clear opinion, the conclusion was that the measure was excessive and that the alleged justification was not established.[102] The only argument advanced by Portugal was that the ban enabled the "passenger compartment of motor vehicles to be immediately inspected by means of simple observation from outside the vehicle."[103] While the Third Chamber accepted that the ban appeared likely to facilitate this inspection and, thus, appropriate to attain the objectives of fighting crime and

---

C-292/92, [1993] E.C.R. I-6787, ¶ 21; *see* Giuseppe Tesauro, *The Community's Internal Market in the Light of the Recent Case-law of the Court of Justice*, 15 Y.B. EUR. L. 1, 7 (1995).

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

100. *Dassonville*, [1974] E.C.R. 837.

101. *See Portugal*, [2008] E.C.R. I-2245, ¶¶ 14–15. The only exception was in relation to the "goods compartment of goods vehicles and to non-wheeled vehicles." *Id.* ¶ 34.

102. *See id.* ¶ 47.

103. *Id.* ¶ 40.

ensuring road safety, it did not follow that it was necessary to attain those objectives or that there were no other less restrictive means of doing so. Visual inspection was "only one means among others . . . in order to fight crime and prevent offences relating to the obligation to wear seat belts."[104] The alleged necessity of the ban was only further undermined when Portugal admitted at the hearing that it allowed the marketing in its territory of motor vehicles fitted from the outset with tinted windows within the limits laid down by Council Directive 92/22.[105] Tinted windows, like tinted film, may prevent any external visual inspection of the interior of vehicles. The ECJ pointed out that "unless it was accepted that, as regards motor vehicles fitted at the outset with tinted windows," the Portuguese authorities had "abandoned their campaign to fight crime and their efforts to enforce road safety, it was clear that they must use other methods to identify criminals and persons who may be breaking the rules concerning the wearing of seat belts."[106] Furthermore, no evidence had been adduced to show "that the ban, in so far as it concerned all tinted film, [was] necessary to promote road safety and combat crime."[107] Given "that there was a wide range of tinted film, from transparent film to film which is almost opaque . . . at least some films, namely those with a sufficient degree of transparency, permit[ted] the desired visual inspection of the interior of motor vehicles."[108] For all these reasons, which closely follow the approach proposed by the learned Advocate General, the Third Chamber rightly concluded that the measure concerned was not justified.

Ten months later, the Grand Chamber handed down its judgment in the motorcycle trailers case, *Commission v Italy*.[109] The judgment follows an orthodox line, as could be anticipated in view of the submissions of Advocate General Bot, although without any opening up of a *de minimis* possibility. The approach

104. *Id.* ¶ 42.

105. Council Directive No. 92/22/EEC, On Safety Glazing and Glazing Materials on Motor Vehicles and Their Trailers, 1992 O.J. L 129/11, amended by Commission Directive No. 2001/92/EC, 2001 O.J. L 291/24.

106. *Portugal*, [2008] E.C.R. I-2245, ¶ 44.

107. *Id.* ¶ 45.

108. *Id.* ¶ 46.

109. Commission v. Italy, Case C-110/05 [2009] E.C.R. I-519.

is firmly grounded in *Dassonville*[110] and *Cassis de Dijon*.[111] The Grand Chamber noted that "[i]t is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets."[112]

The Grand Chamber cited in support of this paragraphs from three well-known judgments.[113] While there is nothing wrong about this proposition as such, and although it is clearly illustrative and not limitative, the paragraphs cited in support only support partially. The first of these, in *Sandoz*, reads:

> As regards the requirement of a market demand it must be emphasized that the sole fact of imposing such a condition constitutes in itself a measure having an equivalent effect to a quantitative restriction prohibited by Article 30 which cannot be covered by the exception in Article 36. The objective pursued by the principle of free movement of goods is precisely to ensure for products from the various Member States access to markets on which they were not previously represented.[114]

The second part of this quotation clearly supports the second part of the Grand Chamber's proposition set out above. The paragraphs relied upon from *Cassis de Dijon*,[115] however, were not carefully selected. Paragraph 6 of that judgment lends no support at all to the Grand Chamber's proposition; it merely states what assistance the national court was asking from the ECJ.[116] Paragraph 14 first states that the German rules did not "serve a purpose which [was] in the general interest and such as to take precedence over the free movement of goods";[117] it then

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

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

112. *Id.* ¶ 34.

113. *See id.* (citing Criminal Proceedings against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, ¶¶ 16–17; Criminal Proceedings against Sandoz BV, Case 174/82, [1983] E.C.R. 2445, ¶ 26; *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, ¶¶ 6, 14, 15).

114. *Sandoz*, [1983] E.C.R. 2445, ¶ 26. The article numbers referred to are now articles 34 and 36 TFEU respectively.

115. *Cassis de Dijon*, [1979] E.C.R. 649.

116. *Id.* ¶ 6.

117. *Id.* ¶ 14.

notes that the principal effect of the requirement of a minimum alcohol percentage was to exclude from the German market products of other Member States which had a lower alcohol content. It then draws the conclusion that there was an obstacle to trade, and finishes with the statement that:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules."[118]

As is well-known, this paragraph makes the famous mistake of using the term "lawfully produced and marketed" instead of "lawfully produced *or* marketed" that the scheme of free movement within the European Union requires.[119] The final paragraph adduced from *Cassis de Dijon*, paragraph 15, simply states the conclusion that where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned, the fixing of a minimum alcohol content constituted a measure having equivalent effect.[120] Thus, one of the three paragraphs cited is irrelevant, the third states the conclusion in the judgment, and the second lays the embryonic foundation of the principle of mutual recognition of goods.[121]

The last judgment cited in support of the proposition is *Keck* itself.[122] Paragraphs 16 and 17 of that judgment set out the celebrated two tests which the Court said, if met, would take

---

118. *Id.*

119. The present writer has pointed this out on many occasions. *See, e.g.*, Gormley, *supra* note 6, at 1649–50. The only explanation might be that the facts concerned goods lawfully produced and marketed in France, and that nobody thought about goods produced outside the (then) European Economic Community and lawfully marketed within a Member State, which then were exported into another Member State.

120. *Cassis de Dijon*, [1979] E.C.R. 649, ¶ 15.

121. *See* Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on February 20, 1979 in *Cassis de Dijon*, Case 120/78, 1980 O.J. C 256/2; *see also* René Barents, *New Developments in Measures Having Equivalent Effect*, 18 COMMON MKT. L. REV. 271, 296 (1981). *See generally* Laurence Gormley, Cassis de Dijon *and the Communication from the Commission*, 6 EUR. L. REV. 454 (1981).

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

certain rules governing selling arrangements outside the scope of article 30 EC (article 36 TFEU) and express the market access approach.[123]

Returning to the Grand Chamber's approach in *Commission v. Italy*, the Court repeated the conclusion from *Cassis de Dijon*:

> [I]n the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike."[124]

It then simply trotted out paragraphs 16 and 17 of *Keck* before concluding:

> Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.[125]

Clearly, there was no prospect of measures relating to the use of goods being taken outside the scope of article 34 TFEU (article 28 EC). Orthodoxy was maintained and the line was held.

---

123. *See id.* ¶¶ 16–17.

124. Commission v. Italy, Case C-110/05, [2009] E.C.R. I-519, ¶ 35 (citations omitted). Again the Grand Chamber referred in paragraph 35 to paragraphs 6, 14, and 15 of *Cassis de Dijon*. *See id.* ¶ 35. While this is a correct statement of the result of *Cassis de Dijon*, the wording as such does not occur in the judgment in *Cassis de Dijon*! The Grand Chamber also referred to Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, [1997] E.C.R. I-3689, ¶ 8, and to Deutscher Apothekerverbund eV v. 0800 Doc Morris, Case C-322/01, [2003] E.C.R. I-14,887, ¶ 67. *See Italy*, Case C-110/05, [2009] E.C.R. I-519, ¶ 35. These two paragraphs merely restate paragraph 15 of *Keck* with the addition in *Doc Morris* of the sentence, "Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential on intra-Community trade." *See Doc Morris*, [2003] E.C.R. I-14,887, ¶ 67.

125. *Italy*, Case C-110/05, [2009] E.C.R. I-519, ¶ 37. The measures referred to in paragraph 35 are those set out in the preceding quotation. *See supra* note 124.

The Grand Chamber then went on to look at whether there was indeed an obstacle to intra-Community trade.[126] It noted that the Commission had not drawn a distinction between trailers specially designed to be towed by motorcycles and those not so specifically designed.[127] In relation to the latter, it concluded that the Commission had failed to establish that the Italian prohibition hindered access to the Italian market for that type of trailer.[128] In respect of the trailers specially designed for towing by motorcycles, the Grand Chamber noted that the Commission had stated, without being contradicted by the Italian government, that "the possibilities for their use other than with motorcycles are very limited"; the Commission had argued that, "although it [was] not inconceivable that they could, in certain circumstances, be towed by other vehicles, in particular, by automobiles, such use was inappropriate and remained at least insignificant, if not hypothetical."[129] The Grand Chamber noted that "a prohibition on the use of a product in the territory of a Member State ha[d] a considerable influence on the behaviour of consumers, which, in its turn, affect[ed] the access of that product to the market of that Member State."[130] Thus, "[c]onsumers, knowing that they were not permitted to use their motorcycle with a trailer specially designed for it, ha[d] practically no interest in buying such a trailer"[131] The contested Italian measure thus "prevent[ed] a demand from existing in the market at issue for such trailers and therefore hinder[ed] their importation."[132]

Thus far, the judgment is coherent in its approach. Then logical reasoning disappears and the Grand Chamber defers to the Italian arguments wholesale, almost giving the appearance of a compromise; the rejection of the argument that rules on the use of goods should be taken outside the scope of what is now article 34 TFEU (article 28 EC) came at the price of the

126. *See id.* ¶ 33.
127. *See id.* ¶ 52.
128. *See id.*
129. *Id.* ¶ 55.
130. *Id.* ¶ 56.
131. *Id.* ¶ 57 (citations omitted). The Grand Chamber of the ECJ rightly cited in support of this proposition the judgment in *Commission v. Portugal*. *Id.*; *see also* Commission v. Portugal, Case C-256/06, [2008] E.C.R. I-2245, ¶ 35.
132. *Italy*, [2009] E.C.R. I-519, ¶ 57.

acceptance of the justification advanced by the Italian authorities.[133] As so often happens when the ECJ takes a stand on principle, the price is the acceptance of the measure in the instant case,[134] and it may well be that this was the price needed to get majority agreement on use. First, the Grand Chamber really should know better than to state:

> [T]he prohibition . . . , to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, unless it can be justified objectively.[135]

If a measure is justified, it does not cease to be a measure having equivalent effect; it is merely a measure which is accepted, having been reviewed for necessity and proportionality, because of the interest or value pursued. The trade-restricting effects do not disappear! This logical mistake is all too frequently made and really ought to stop.

The judgment then turned to deal with the road safety argument.[136] Italy claimed that "it introduced the measure because there were no type-approval rules, whether at the Community level or national level, to ensure that use of a motorcycle with a trailer was not dangerous."[137] In the absence of such a prohibition, the argument went, "circulation of a combination composed of a motorcycle and an unapproved trailer could be dangerous both for the driver of the vehicle and for other vehicles on the road, because the stability of the combination and its braking capacity would be affected."[138] The Grand Chamber of the ECJ had, understandably, no difficulty in finding that the prohibition in question was appropriate for the purpose of ensuring road safety. In the absence of fully

---

133. *See id.* ¶ 60.

134. Just one example illustrates the point. *See* Köbler v. Republik Österreich, Case C-224/01, [2003] E.C.R. I-10,239 (explicit acceptance of the principle of state liability for acts of the judiciary incompatible with Community law, but finding no liability in that case).

135. *Italy*, Case C-110/05, [2009] E.C.R. I-519, ¶ 58.

136. *See id.* ¶¶ 60–61.

137. *Id.* ¶ 63.

138. *Id.*

harmonized rules, it was for the Member States to make up their own minds about the level of road safety which they wished to ensure, while taking account of the requirement of the free movement of goods.[139] This meant that they had a margin of discretion: Member States could determine "the degree of protection which [they] wish[ed] to apply in regard to such safety and the way in which that degree of protection should be achieved."[140] Given that such "degree of protection might vary from one Member State to the other . . . the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate."[141]

Italy had submitted, without being contradicted by the Commission, that the combination of a motorcycle and a trailer is a danger to road safety.[142] Although the burden of proof was on the Member State invoking "an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued," that did not mean that the Member State could be required to "prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions."[143] While the Grand Chamber acknowledged, as Advocate General Bot had observed, that it was possible to envisage other approaches, which could guarantee a certain level of road safety for the "circulation of a combination composed of a motorcycle and a trailer," it felt that Member States could not be "denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which w[ould] be easily understood and applied

---

139. *See id.* ¶ 61. The Grand Chamber of the ECJ referred to Commission v. Italy, Case 50/83, [1984] E.C.R. 1633, ¶ 12, and, by analogy, Commission v. Germany, Case C-131/93, [1994] E.C.R. I-3303, ¶ 16.

140. *Italy*, [2009] E.C.R. I-519, ¶ 65.

141. *Id.* The Grand Chamber of the ECJ referred by analogy to Commission v. Germany, Case C-141/07, [2008] E.C.R. I-6935, ¶ 51; Commission v. France, Case C-262/02, [2004] E.C.R. I-6609, ¶ 37.

142. *See Italy*, [2009] E.C.R. I-519, ¶ 66.

143. *Id.* The Grand Chamber of the ECJ referred by analogy to Commission v. Netherlands, Case C-157/94, [1997] E.C.R. I-5699, ¶ 58.

by drivers and easily managed and supervised by the competent authorities."[144]

Quite simply, the Grand Chamber took a different view of the proportionality of the measure than Advocates General Léger and Bot did. However, the only real justification for a total prohibition, as opposed to a prohibition on certain roads or in certain places or situations, seems to be the convenience argument of ease of understanding, management, and supervision. The weakness of that argument is that it can be made of any extensive rule, including the Portuguese rule on tinted film in *Commission v. Portugal*,[145] although in that case the absurdity was obvious, given that tinted glass was not prohibited. The Commission does not seem (at least so it appears from the judgment) to have been willing to tackle this general argument head on. But the Grand Chamber also ignored the point that foreign-registered motorcycles were allowed to tow trailers in Italy. Why the road safety argument should weigh so heavily on Italian-registered motorcycles is not apparent, although EU law does permit a Member State to disadvantage its own goods[146] (subject to any national law argument about equal treatment before the law).[147] However, the proportionality of a measure is a matter on which opinions may well diverge, as in this case. As explained above, the Grand Chamber's approach has the serious whiff of compromise about it.[148]

Finally, the last nail in the coffin of the sirens seeking to remove restrictions on use from the ambit of measures having equivalent effect was firmly hammered in by the judgment of the Second Chamber of the ECJ in *Mickelsson & Roos*.[149] Here, the Second Chamber unsurprisingly in effect cut and pasted from the judgment of the Grand Chamber in *Commission v. Italy* in

144. *Italy*, [2009] E.C.R. I-519, ¶ 67. The Grand Chamber of the ECJ also observed that it could not be presumed that "road safety could be ensured at the same level as envisaged by the Italian Republic by a partial prohibition of the circulation of such a combination or by a road traffic authorisation issued subject to compliance with certain conditions." *Id.* ¶ 68.

145. Commission v. Portugal, Case C-256/06, [2008] E.C.R. I-2245.

146. Thus the German government could maintain the Reinheitsgebot (beer purity law) for beer brewed in Germany for consumption in Germany.

147. *See* Criminal Proceedings against Guimont, Case C-448/98, [2000] E.C.R. I-10,663.

148. *See supra* note 133 and accompanying text.

149. *See* Åklagaren v. Mickelsson & Roos, Case C-142/05 [2009] E.C.R. I-4273.

rejecting the approach of Advocate General Kokott in *Mickelsson & Roos*.[150] The difference in this case was that it was not a direct action but a reference under the then article 234 EC (article 267 TFEU).[151] Thus applying the touchstone to the facts was a matter for the national court:

> [W]here the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article 30 EC or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article 28 EC.[152]

This time the formula at the end is more promisingly formulated: justified measures are not described as not being measures having equivalent effect, but rather as not being measures having equivalent effect prohibited by article 28 EC (article 34 TFEU). The situation was clear; the rejection of Ms. Kokott's view implicit. All that remained was to consider the alleged justification.

The Swedish government had contended that the regulations involved prohibiting the use of jet skis were justified by the objective of environmental protection and the objectives referred to in article 30 EC (article 36 TFEU).[153] Sweden further argued that "[t]he restriction on the use of personal watercraft to particular waters ma[de] it possible, inter alia, to prevent unacceptable environmental disturbances"; "[t]he use of personal watercraft ha[d] negative consequences for fauna, in particular where such a craft [was] used for a lengthy period on a small area or driven at great speed"; "[t]he noise as a whole disturb[ed] people and animals and above all certain protected

150. *Id.* ¶ 28.

151. *See id.*; *see also* TFEU, *supra* note 1, art. 267, 2010 O.J. C 83, at 164; EC Treaty, *supra* note 1, art. 234, 2006 O.J. C 321 E, at 135–36.

152. *Mickleson & Roos*, [2009] E.C.R. I-4273, ¶ 28.

153. *See id.*

species of birds," and, moreover, "the easy transport of personal watercraft facilitated the spread of animal diseases."[154]

The Second Chamber acknowledged that the protection of the health and life of humans, animals, and plants under article 30 EC (article 36 TFEU) was distinct from the case-law-based justification on the ground of environmental protection, but decided to examine all these grounds together.[155] It had no difficulty in concluding that a restriction or prohibition on the use of personal watercraft was an appropriate means of ensuring environmental protection, but then turned to the question of proportionality.[156] Here too, as in *Commission v. Italy*,[157] the ECJ was influenced by what was practical and manageable. The Swedish government submitted that "the prohibition on the use of personal watercraft l[eft] users of those craft with not less than 300 general navigable waterways on the Swedish coast and on the large lakes, which constitute[ed] a very extensive area."[158] Moreover, it submitted, "the geographical position of those aquatic areas in Sweden preclude[d] measures of a scope" different from that of the provisions concerned.[159] The Second Chamber showed some, but not an unrestricted, understanding of this position, noting that although measures other than the regulation at issue "could guarantee a certain level of protection of the environment," Member States could not be "denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which [were] necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities."[160]

However, the Second Chamber paid careful attention to the proportionality argument. It noted that the Swedish regulations provided for "a general prohibition of the use of personal watercraft on waters other than general navigable waterways" unless the former has been designated for use by personal watercraft; the designating authority was empowered, but in a

154. *Id.* ¶ 30.
155. *See id.* ¶¶ 31–33.
156. *See id.* ¶¶ 30–32.
157. Commission v. Italy, Case C-110/05, [2009] E.C.R. I-519.
158. *Mickelsson & Roos,* [2009] E.C.R. I-4273, ¶ 35.
159. *Id.*
160. *Id.* ¶ 36.

number of circumstances obliged, to issue such rules.[161] As to the allegedly necessary nature of the measure in question, the wording of the national regulations themselves suggested that, on waters which had to be "designated by implementing measures, personal watercraft may be used without giving rise to risks or pollution deemed unacceptable for the environment."[162] The result was inevitable: "[A] general prohibition on using such goods on waters other than general navigable waterways constitute a measure going beyond what is necessary to achieve the aim of protection of the environment."[163] But where (1) there was a requirement imposed on the competent authorities to adopt implementing measures, (2) those authorities had "actually made use of the power conferred on them and designated the waters which satisfy the conditions provided for by the national regulations," and (3) those measures were "adopted within a reasonable period after the entry into force of those regulations,"[164] regulations prohibiting or restricting the use of personal watercraft could be justified by the aim of the protection of the environment.[165] It was for the national court to ascertain whether those conditions had been satisfied.[166]

Although the Second Chamber emphasized that the assessment of the facts was indeed a matter for the national court, it felt that, in a spirit of cooperation with national courts, it should provide the national court with all the guidance that it deemed necessary.[167] The Second Chamber noted that the national regulations had been in force only for about three weeks when the fines were issued to the defendants.[168] The Second Chamber went on to state:

> The fact that measures to implement those regulations had not been adopted at a time when those regulations had only just entered into force ought not necessarily to affect the proportionality of those regulations in so far as the

161. *Id.* ¶ 37.
162. *Id.* ¶ 38.
163. *Id.*
164. *Id.* ¶ 39.
165. *See id.* ¶ 40.
166. *See id.*
167. *See id.* ¶ 41.
168. *See id.* ¶ 42.

> competent authority may not have had the necessary time to prepare the measures in question. [169]

But that was a matter for the national court. Then the Second Chamber added an important proviso to ensure that the defendants would not be prejudiced compared to what their situation would have been had the appropriate implementing measures been adopted:

> [I]f the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community law of the retroactive application of the most favourable criminal law and the most lenient penalty.[170]

This judgment offers a very delicate balance of the interests involved. Inaction by the administration would clearly be fatal to the national measures, and the defendants should, if national measures had subsequently been adopted within a reasonable time concerning the waters on which the defendants had used their jet skis, be able to rely on that designation so as to escape any penalty which would otherwise be imposed. The Second Chamber of the ECJ was clearly taking account of the fact that the case was received by the ECJ on March 24, 2005 and judgment was finally given on June 4, 2009.[171]

These three judgments offer a very mixed picture, putting the emphasis firmly on market access while taking very interesting—and frankly not always terribly consistent—

---

169. *Id.*

170. *Id.* ¶ 43. The Second Chamber cited in support of this proposition the judgment in *Criminal Proceedings against Berlusconi*, in which it had found that the principle of the retrospective application of the more lenient penalty formed part of the constitutional traditions common to the Member States. *Id.* (citing Criminal Proceedings against Berlusconi, Joined Cases C-387, 391, 403/02, [2005] E.C.R. I-3565, ¶ 68).

171. *See generally Mickelsson & Roos*, [2009] E.C.R. I-4273.

approaches to the justifications advanced by the Member States concerned. In particular, the approach to road safety seems to depend on the length of the proverbial Lord Chancellor's foot! The care which the Second Chamber of the ECJ took over the proportionality question in *Mickelsson & Roos*[172] and the Third Chamber took in *Commission v. Portugal*[173] stands in shrill contrast to the frankly cavalier approach of the Grand Chamber in the face of the carefully considered approach on proportionality suggested by Advocates General Léger and Bot.

The ECJ in these judgments places great emphasis on the position of the consumer in relation to market access. Thus, in *Commission v. Portugal*, the Third Chamber noted that, because of a prohibition on affixing tinted film, potential customers, traders, or individuals had practically no interest in buying tinted film.[174] In *Commission v. Italy*, the Grand Chamber spoke of the prohibition having considerable influence on the behavior of consumers, which, in its turn, affected the access of the product to the Italian market, so that consumers, knowing that they were not permitted to use their motorcycle with a trailer specially designed for it, had practically no interest in buying such a trailer.[175] This formula was repeated in relation to personal watercraft in *Mickelsson & Roos* by the Second Chamber.[176] Clearly the point is that if use is prohibited there will be no purchasers. But this emphasis on the consumer is also perfectly appropriate in relation to selling arrangements, such as price-cutting campaigns, and even shop closing hours. If restriction of market access is to be the criterion on which measures are to be judged, which is the line taken in *Commission v. Italy* and effectively in *Mickelsson & Roos*, what is the place of certain selling arrangements, and why should the consumer's interest there weigh less heavily than in the use cases, and particularly than in *Commission v. Portugal*? What precisely is left of *Keck*? Is

172. *Id.*
173. Commission v. Portugal, Case C-265/06, [2008] E.C.R. I-2245.
174. *Id.* ¶ 33.
175. Commission v. Italy, Case C-110/05, [2009], E.C.R. I-519, ¶¶ 56–57.
176. *See Mickelsson & Roos*, [2009] E.C.R. I-4273, ¶¶ 26–27.

the ECJ trying, as Eleanor Spaventa has deliciously put it, to have its *Keck* and eat it, too?[177]

III. *YOU CAN'T ABDICATE AND EAT IT*[178]

The central problem with the ECJ's approach in these three judgments is that it is trying to situate a market access approach firmly in the line of *Dassonville* and *Cassis de Dijon*, while maintaining the exclusion of certain selling arrangements—still famously undefined—which satisfy the two *Keck* conditions. As observed above, the judgments cited in support of this approach only partly support it and in fact deal with very different situations indeed. *Sandoz* concerned a prosecution for selling food and beverages which contained unauthorized additives; the comments about access to markets on which the products concerned were not previously represented were made in the context of the requirement under Dutch legislation that the importer prove that the marketing of the product concerned met a market demand.[179] *Cassis de Dijon* concerned a national minimum alcohol content for fruit liqueurs.[180] Both *Sandoz* and *Cassis de Dijon* dealt with products from other Member States that were actually lawfully produced and marketed there, as do the three judgments discussed in this Article,[181] albeit that the latter all concern the use of a product rather than a straightforward prohibition on its sale. As the ECJ rightly saw, though, if the use of a product for the purpose for which it is manufactured is prohibited, the effect in practice is the same as a prohibition. Finally, *Keck* concerned a prohibition on resale at less than the purchase price, a classic selling technique designed to promote the goods concerned.[182] As suggested above, the consumer's

177. Eleanor Spaventa, *Leaving* Keck *Behind? The Free Movement of Goods After the Rulings in* Commission v. Italy *and* Mickelsson and Roos, 34 EUR. L. REV. 914, 921 (2009).

178. As Wallis Simpson is said to have remarked to Edward VIII. *See* JOHN JULIUS NORWICH, TRYING TO PLEASE 48 (2008).

179. Criminal Proceedings against Sandoz BV, Case 174/82, [1983] E.C.R. 2445, ¶¶ 2, 4, 25–27.

180. *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, ¶ 3.

181. In *Mickelsson & Roos*, there was no specific indication whether the jet skis used were actually imported or not.

182. Criminal Proceedings against Keck & Mithouard, Joined Cases C-267 & 268/91, [1993] E.C.R. I-6097, ¶ 2.

interest in having access to products under favorable conditions is in fact as much present in relation to price campaigns as it is in relation to being able to use a product.

In *Commission v. Italy*, the Grand Chamber of the ECJ sought to set out the principles of the free movement of goods: (1) the basic principle in *Dassonville*, (2) the concepts of non-discrimination, mutual recognition, and market access, and (3) the exemption from the concept of measures having equivalent effect for measures which satisfy the *Keck* criteria.[183] This caused the ECJ to conclude that the following are to be regarded as measures having equivalent effect to quantitative restrictions on imports:

(1) "measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably";[184]

(2) "obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods . . . even if those rules apply to all products alike"[185]; and

(3) "any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept."[186]

Given that the Grand Chamber expressly maintained the *Keck* treatment of certain selling arrangements, it is clear that it did not want to signal a retreat from its treatment of matters such as shop closing; [187] restrictions on advertising[188] (other than

183. Commission v. Italy, Case C-110/05, [2009], E.C.R. I-519, ¶¶ 33–36.

184. *Id.* ¶ 37.

185. *Id.* ¶ 35.

186. *Id.* ¶ 37. These headings are hereinafter referred to as heading (1), heading (2) and heading (3) respectively.

187. *See, e.g.*, Semeraro Casa Uno Srl v. Sindaco del Comune di Ebrusco, Joined Cases C-418–21, 460–62, 464/93, 9–11, 14–15, 23–24, 332/94, [1996] E.C.R. I-2975; Punto Casa SpA v. Sindaco del Commune di Capena, Joined Cases C-69 & 258/93, [1994] E.C.R. I-2355; s*ee also* GORMLEY, *supra* note 20, at 409–10.

188. *See, e.g.*, Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité SA, Case C-412/93, [1995] E.C.R. I-179; Hünermund v. Landesapothekerkammer Baden-Württemberg, Case C-292/92, [1993] E.C.R. I-6787. But as to advertising restrictions affecting the presentation or packaging of the product itself, see Douwe Egberts NV v. Westrom Pharma NV, Case C-239/02, [2004] E.C.R. I-7007; Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, [1997]

where the restriction closed off access completely);[189] itinerant sales;[190] and doorstep sales.[191] Thomas Horsley has argued that, by choosing not to follow the approach suggested by Advocate General Kokott and equating restrictions on use with selling arrangements, the ECJ has once again brought within the scope of article 34 TFEU (article 28 EC) a category of equally applicable measures without the need to demonstrate any discriminatory effect.[192] The better view, it is submitted, is that the Court actually chose to treat restrictions on use as being rules concerning the products, as opposed to being non-product-based rules. Horsley is correct to say that Member States will have to justify their preferences within the strict derogations framework,[193] but this is nothing more than what the Treaty on the Functioning of the European Union (and previously the EC Treaty) actually envisages, and is the logical consequence of a finding that the measure is a measure having equivalent effect.[194] The Grand Chamber failed to mention the problem of goods originating outside of the European Union but placed in free circulation within a Member State and lawfully marketed there, then exported into another Member State. However, as the facts were confined to products lawfully produced and marketed within the European Union, the wording is unsurprising.

Horsley submits that the measures set out in heading (3) above[195] are subject to the requirement that the effect on market access goes beyond a certain degree;[196] he also submits that after *Mickelsson & Roos,* for measures merely restricting (as opposed to

---

E.C.R. I-3689; Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH, Case C-470/93, [1995] E.C.R. I-1923.

189. *See, e.g.*, Konsumentenombudsmannen v. De Agostini (Svenska) Förlag AB, Joined Cases C-34-36/95, [1997] E.C.R. I-3843.

190. *See, e.g.*, Konsumentenombudsmannen v. Gourmet Int'l Products AB, Case C-405/98, [2001] E.C.R. I-1795; Criminal Proceedings against Burmanjer, Case C-20/03, [2005] E.C.R. I-4133.

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

192. Thomas Horsley, *Anyone for* Keck*?*, 46 COMMON MKT. L. REV. 2001, 2010–11 (2009).

193. *See id.* at 2012.

194. *See* TFEU, *supra* note 1, art. 36, 2010 O.J. C 83, at 35; EC Treaty, *supra* note 1, art. 28, 2006 O.J. C 321 E, at 52. This is supplemented by the ECJ's case-law-based justifications, as tested against the principles of necessity and proportionality.

195. *See supra* note 186 and accompanying text.

196. Horsley, *supra* note 192, at 2013.

prohibiting) use, the new market access test is subject to a requirement that the restriction impede market access to a sufficient degree.[197] He bases this argument on paragraph 26 of the latter judgment:

> [T]he restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State.[198]

In paragraph 28 the Second Chamber stated:

> [W]here the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question.[199]

It is respectfully submitted that it would be wholly contrary to the demands of a single market within the European Union to see a market access test subject to a certain degree of impediment. Not only has the ECJ constantly rejected attempts to plead *de minimis*,[200] but it would also make nonsense of the ECJ's approach in those cases where the territorial effect of a measure has been confined to a part of a Member State.[201] The degree of use restriction which would be caught was left unsaid, but it surely cannot have been the intention of the Second Chamber to reverse earlier case law and introduce a *de minimis* exception through the back door. Although the expression, "a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State[,]" is also found in paragraph 56 of *Commission v. Italy*, in paragraph 57 the Grand Chamber made it clear that the measure prevented a demand from existing in the market at issue for such

197. *See id.* at 2015.

198. Åklagaren v. Mickelsson & Roos, Case C-142/05, [2009] E.C.R. I-4273, ¶ 26.

199. *See id.* ¶ 28.

200. *See supra* note 42 and accompanying text.

201. *See, e.g.*, Criminal Proceedings against Bluhme, Case C-67/97, [1998] E.C.R. I-8033 (measures to protect a rare and endangered species on a small island in Denmark); Du Pont de Nemours Italiana SpA v. Unità Sanitaria Locale No. 2 di Carrara, Case C-21/88, [1990] E.C.R. I-889.

trailers and therefore hindered their importation.[202] Accordingly, on policy grounds, it is submitted that any impression that the ECJ will permit *de minimis* restrictions on use is ill-founded. The ECJ has shown that it is prepared to use the proportionality test robustly in *Commission v. Portugal* and *Mickelsson & Roos*, yet timidly in *Commission v. Italy*. But it is manifest that the application of principles to facts will involve a careful examination of the proportionality of the measure, particularly in the case of measures governing the use of products. In relation to heading (3) above, Spaventa rightly states that the Grand Chamber was unclear about the meaning of the phrase "any other measure." She identifies a possible narrow interpretation as any measure that is neither a selling arrangement meeting the *Keck* criteria nor a product requirement; she also identifies a wider interpretation as embracing any non-discriminatory measure, including selling arrangements, apart from product requirements, which are always regarded as hindering intra-European Union trade.[203] It is submitted that this simply means any measure not covered by headings (1) or (2) above.[204]

Spaventa has argued that the *Keck* distinction based on the type of rules is no longer relevant, and that what now matters is the effect of the rules on market access.[205] The ECJ itself does not appear to see it that way in its judgments. Although market access plays the central role in the argumentation, the intention of the ECJ is not to revise its view of the certain selling arrangements as expressed in *Keck*, nor to revise the conditions under which it declares article 34 TFEU inapplicable. On the other hand, the exceptional status of those measures which do satisfy the *Keck* criteria is more and more anomalous. Perhaps the truth is that the ECJ is not thinking in terms of grand theory, but is actually simply deciding, on a case-by-case basis, the reasonableness of national measures. The ECJ does not particularly have an eye to theoretical considerations, and it is worth recalling that judges are more concerned with sorting out disputes than forming a

202. Commission v. Italy, Case C-110/05, [2009] E.C.R. I-519, ¶¶ 56–57.

203. *See* Spaventa, *supra* note 177, at 921.

204. *See supra* notes 184–85 and accompanying text.

205. *See* Spaventa, *supra* note 177, at 928–29. The article by P. Wenneras & K. Boe Moen, *Selling Arrangements, Keeping* Keck, 35 EUR. L. REV. 387 (2010) was published well after this contribution was submitted; it has not been possible to take account of it at proof stage.

coherent doctrine, even though they try to be consistent as much as possible. If the approach in *Keck* was a reaction to management concerns about the ECJ being flooded out by litigants seeking to challenge any national rule which prevented them from trading quite as they wished, the cases on the use of goods discussed in this Article signal the end of the slippery slope approach of allowing any expansion of the type of measures which the ECJ will accept as not being caught by article 34 TFEU (article 28 EC).

One further point should be mentioned: the judgments in *Commission v. Italy* and *Mickelsson & Roos* were a very long time in gestation; the decision to re-open the oral procedure in *Commission v. Italy* and have it considered by the Grand Chamber brought an understandable delay, but clearly there must have been a robust discussion at the deliberations in these two cases. It seems, with respect, that pragmatism triumphed, and that recent reports of the death of *Keck* may, like those of Mark Twain's death, prove to be greatly exaggerated.[206]

CONCLUSION

All the above simply goes to show how much more sensible it would be for the ECJ simply to say that measures affecting the use of goods fall under the basic principle in *Dassonville*, and have to be justified now under article 36 TFEU or under the case-law-based justifications. Market access should not be seen as a criterion as such, but merely as an example of a measure which can hinder, directly or indirectly, actually or potentially, trade between Member States. The ECJ meant what it said in *Dassonville*, and it is time that people realized it! The time for a unified approach to the freedoms of the internal market has certainly come and that must involve a reassessment of *Keck*, but the *Dassonville* basic principle said it all in 1974; mutual recognition put the icing on the cake in *Cassis de Dijon*, and that is all that was necessary. Market access is a nice shorthand for *Dassonville*, but not a substitute for it.

Gordon Slynn was a pragmatic man; his analysis was always clear and to the point, but firmly founded on common sense,

206. *See* Fachverband der Buch und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH, Case C-531/07, [2009] E.C.R. 3717.

without being tied to dogma for the sake of fitting into doctrinal straightjackets. He well understood that while in the good continental tradition, the professors, not the judges, "hold the law," judges have to deal with the disputes before them in a manner which seeks to balance competing interests and leads to an effective and satisfactory solution. In a committee situation in which one judgment is produced, compromises in reasoning are inevitable if a majority is to be secured for a particular outcome: result orientation abounds, and concessions on a broad scope of a principle may have to be met by concessions on the assessment of proportionality. The solution in *Commission v. Portugal* and in *Mickelsson & Roos* is to be welcomed; the solution in *Commission v. Italy* is mystifying and cries out for harmonization. That the ECJ has not quite managed to please everyone with its reasoning on the scope of article 34 TFEU (article 28 EC), and its reasoning on proportionality in these cases on the use of goods may indeed be disappointing, but Gordon would not have found it unexpected. In heaven, *Dassonville* will be found, and surely a good claret or burgundy too; Gordon will be cellar master. May his memory live long!