Brīva preču aprite

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FREE MOVEMENT OF GOODS: QUANTITATIVE RESTRICTIONS

1 CENTRAL ISSUES

i. The discussion in the previous chapter focused on duties, taxes, and the like. This is, however, only part of the strategy for an integrated single market. The free movement of goods is dealt with in Articles 34–37 TFEU (ex Articles 28–31 EC). Article 34 is the central provision and states that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Article 35 contains similar provisions relating to exports, while Article 36 provides an exception for certain cases in which a state is allowed to place restrictions on the movement of goods.

ii. It is necessary to understand the way in which Articles 34–37 fit into the more general strategy concerning the free movement of goods. Articles 28–33 TFEU provide the foundations for a customs union by eliminating customs duties between Member States and by establishing a Common Customs Tariff. If matters rested there free movement would be only imperfectly attained, since Member States could still place quotas on the amount of goods that could be imported, and restrict the flow of goods by measures that have an equivalent effect to quotas. The object of Articles 34–37 is to prevent Member States from engaging in these strategies.

iii. The ECJ's interpretation of Articles 34–37 has been important in achieving single market integration. It has given a broad interpretation to the phrase 'measures having equivalent effect' to a quantitative restriction (MEQR), and has construed the idea of discrimination broadly to capture both direct and indirect discrimination.

iv. The ECJ also held that Article 34 could apply even where there was no discrimination. The famous *Cassis de Dijon* case[1] decided that Article 34 can bite, subject to certain exceptions, when the same rule applies to domestic goods and imports, where the rule inhibits the free flow of goods within the EU. Discrimination is therefore a sufficient, but not necessary, condition for the invocation of Article 34. There are, however, six central issues in this area.

v. First, the ECJ's jurisprudence led to difficult issues about where this branch of EU law 'stops'. The ECJ's decision that Article 34 is applicable to trade rules even where they do not discriminate led to difficulties about the outer boundaries of EU law.

[1] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

Secondly, there is a problem concerning the relationship between negative and positive integration. The ECJ's approach in *Cassis de Dijon* fostered 'negative integration': indistinctly applicable rules were unenforceable when they hindered cross-border trade unless they came within one of the exceptions. Integration was essentially negative, in the sense that the national rules were held not to apply. This can be contrasted with 'positive integration', which results from EU legislative measures, stipulating which rules should apply across the Union. There are, as will be seen, important consequences that flow from developing EU policy by these different strategies.

Thirdly, there is a tension between EU integration and national regulatory autonomy. Article 34 will normally render national regulatory measures inapplicable. It is therefore a tool for policing the borderline between legitimate and illegitimate national regulation, and the nature of that border may well be contestable.[2]

Fourthly, the choice between a 'discrimination approach' and 'a rule of recognition approach of the kind introduced by *Cassis*' is important for the following reason. The former approach vests control in the host state, normally the country into which the firm is trying to import. Provided that the host state does not discriminate its rules remain lawful. The '*Cassis* approach' reverses the onus: the host state must accept the regulatory provisions of the home state, subject to the exceptions discussed below.

Fifthly, this topic also exemplifies the interconnection between judicial and legislative initiatives for attaining the EU's objectives, a theme stressed throughout this book. One way of dealing with trade rules that differ between Member States is through legislative harmonization. The process of such harmonization was, however, slow, a difficulty exacerbated by the requirement of unanimity in the Council.[3] The ECJ's jurisprudence constituted an alternative means for ensuring the free flow of goods even in the absence of EU harmonizing legislation. The message was clear: attainment of this central part of EU policy was not to be held up indefinitely by the absence of harmonization legislation. The Court's approach to Article 34 was welcomed by the Commission, which decided that harmonization would be used for those rules that were still lawful under the *Cassis* formula, on the grounds that, for example, they were necessary to protect consumers or safeguard public health. The judicial approach, therefore, caused the Commission to reorient its own legislative programme.

Finally, the EU Courts have also maintained tight control over the application of Article 36, which is concerned with defences against a *prima facie* breach of Article 34. The ECJ has interpreted Article 36 strictly to ensure that discriminatory restrictions on the free movement of goods are not easily justified. There are, however, difficulties concerning the relationship between defences to discrimination and defences to indistinctly applicable rules.

2 DIRECTIVE 70/50 AND *DASSONVILLE*

Article 34 will catch quantitative restrictions and all measures that have an equivalent effect. It can apply to EU measures,[4] as well as those adopted by Member States. The notion of a quantitative restriction was defined broadly in the *Geddo* case[5] to mean 'measures which amount to a total or partial

[2] WPJ Wils, 'The Search for the Rule in Article 30 EEC: Much Ado About Nothing?' (1993) 18 ELRev 475, 478; M Maduro, *We the Court, the European Court of Justice and the European Economic Constitution* (Hart, 1998) 54–58.

[3] See Ch 17.

[4] Case C-114/96 *Criminal Proceedings against Kieffer and Thill* [1997] ECR I-3629.

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

restraint of, according to the circumstances, imports, exports or goods in transit'. MEQRs are more difficult to define. The Commission and the Court have taken a broad view of such measures.

Guidance on the Commission's view can be found in Directive 70/50. This Directive was only applicable during the Community's transitional period, but it continues to furnish some idea of the scope of MEQRs. The list of matters which can constitute an MEQR are specified in Article 2 and include:[6] minimum or maximum prices for imported products; less favourable prices for imported products; lowering the value of the imported product by reducing its intrinsic value or increasing its costs; payment conditions for imported products which differ from those for domestic products; conditions in respect of packaging, composition, identification, size, weight, etc, which apply only to imported goods or which are different and more difficult to satisfy than in the case of domestic goods; the giving of a preference to the purchase of domestic goods as opposed to imports, or otherwise hindering the purchase of imports; limiting publicity in respect of imported goods as compared with domestic products; prescribing stocking requirements which are different from and more difficult to satisfy than those which apply to domestic goods; and making it mandatory for importers of goods to have an agent in the territory of the importing state.

Article 2, therefore, lists a number of ways in which the importing state can discriminate against goods. It should be noted that, even as early as 1970, the Commission was thinking of the potential reach of Article 34 to indistinctly applicable rules, since Article 3 of the Directive, which will be considered below, regulates such rules to some degree.

The seminal early judicial decision on the interpretation of MEQRs is *Dassonville*.

Case 8/74 Procureur du Roi v Dassonville
[1974] ECR 837

[Note Lisbon Treaty renumbering: Art 36 EEC is now Art 36 TFEU]

Belgian law provided that goods bearing a designation of origin could only be imported if they were accompanied by a certificate from the government of the exporting country certifying their right to such a designation. Dassonville imported Scotch whisky into Belgium from France without being in possession of the certificate from the British authorities. The certificate would have been very difficult to obtain in respect of goods which were already in free circulation in a third country, as in this case. Dassonville was prosecuted in Belgium and argued by way of defence that the Belgian rule constituted an MEQR.

THE ECJ

5. 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.

6. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7. Even without having to examine whether such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

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[6] Dir 70/50, [1970] OJ L13/29, Art 2(3).

8. That may be the case with formalities, required by a Member State for the purpose of proving origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9. Consequently, the requirement by a Member State of a certificate of authenticity which is not easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure equivalent to a quantitative restriction as prohibited by the Treaty.

Two aspects of the ECJ's reasoning should be noted. First, it is clear from paragraph 5 that the crucial element in proving an MEQR is its effect: a discriminatory intent is not required. The ECJ takes a broad view of measures that hinder the free flow of goods, and the definition does not even require that the rules actually discriminate between domestic and imported goods. *Dassonville* thus sowed the seeds which bore fruit in *Cassis de Dijon*,[7] where the ECJ decided that Article 34 could apply to rules which were not discriminatory. Secondly, the ECJ indicates, in paragraph 6, that reasonable restraints may not be caught by Article 34. This is the origin of what became known as the 'rule of reason', the meaning of which will be examined below. We can now consider the application of Article 34 to cases involving discrimination, both direct and indirect.

3 DISCRIMINATORY BARRIERS TO TRADE

Article 34 can bite if the national rule favours domestic goods over imports, even if the case, on its facts, is confined to products and parties from one Member State.[8] Article 34 can also apply to a national measure preventing import from one to another part of a Member State.[9] There are numerous types of case involving direct or indirect discrimination between domestic and imported goods.

(A) IMPORT AND EXPORT RESTRICTIONS

The ECJ has always been particularly harsh on discriminatory import or export restrictions. Thus import or export licences are caught by Article 34.[10] So, too, are provisions which subject imported goods to requirements that are not imposed on domestic products. This is exemplified by *Commission v Italy*,[11] in which the ECJ held that procedures and data requirements for the registration of imported cars, making their registration longer, more complicated, and more costly than that of domestic vehicles, were prohibited by Article 34.[12] The same approach is apparent with respect to discriminatory export rules. Thus in *Bouhelier*[13] a French rule which imposed quality checks on watches for export but not on those intended for the domestic market, was in breach of Article 35.

[7] Case 120/78 *Rewe-Zentral AG* (n 1).

[8] Cases C-321-4/94 *Criminal Proceedings against Pistre* [1997] ECR I-2343; Case C-448/98 *Criminal Proceedings against Guimont* [2000] ECR I-10663.

[9] Case C-67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033.

[10] Cases 51-54/71 *International Fruit Company v Produktschap voor Groenten en Fruit (No 2)* [1971] ECR 1107; Case 68/76 *Commission v French Republic* [1977] ECR 515; Case C-54/05 *Commission v Finland* [2007] ECR I-2473.

[11] Case 154/85 [1987] ECR 2717.

[12] See also Case 4/75 *Rewe-Zentralfinanz v Landwirtschaftskammer* [1975] ECR 843.

[13] Case 53/76 *Procureur de la République Besançon v Bouhelier* [1977] ECR 197.

(B) PROMOTION OR FAVOURING OF DOMESTIC PRODUCTS

Article 34 prohibits action by a state that promotes or favours domestic products to the detriment of competing imports. This can occur in a number of different ways.

The most obvious is where a *state engages in a campaign to promote the purchase of domestic as opposed to imported goods.*

Case 249/81 Commission v Ireland
[1982] ECR 4005

[Note Lisbon Treaty renumbering: Arts 30, 92, 93, and 169 are now Arts 34, 107, 108, and 258 TFEU]

The Irish government sought to promote sales of Irish goods, the object being to achieve a switch of 3 per cent in consumer spending from imports to domestic products. It adopted a number of measures including: an information service indicating to consumers which products were made in Ireland and where they could be obtained (the Shoplink Service); exhibition facilities for Irish goods; the encouragement of the use of the 'Buy Irish' symbol for goods made in Ireland; and the organization of a publicity campaign by the Irish Goods Council in favour of Irish products, designed to encourage consumers to buy Irish products. The first two of these activities were subsequently abandoned by the Irish Government, but the latter two strategies continued to be employed. The Commission brought Article 169 proceedings, alleging that the campaign was an MEQR. Ireland argued that it had never adopted 'measures' for the purpose of Article 30, and that any financial aid given to the Irish Goods Council should be judged in the light of Articles 92 to 93, and not Article 30. The members of the Irish Goods Council were appointed by an Irish Government minister and its activities were funded in proportions of about six to one by the Irish Government and private industry respectively. The ECJ held that the Irish Government was responsible under the Treaty for the activities of the Council even though the campaign was run by a private company, and then continued as follows.

THE ECJ

21. The Irish government maintains that the prohibition against measures having an effect equivalent to quantitative restrictions in Article 30 is concerned only with 'measures', that is to say, binding provisions emanating from a public authority. However, no such provision has been adopted by the Irish government, which has confined itself to giving moral support and financial aid to the activities pursued by the Irish industries.

22. The Irish government goes on to emphasise that the campaign has had no restrictive effect on imports since the proportion of Irish goods to all goods sold on the Irish market fell from 49.2% in 1977 to 43.4% in 1980.

23. The first observation to be made is that the campaign cannot be likened to advertising by private or public undertakings . . . to encourage people to buy goods produced by those undertakings. Regardless of the means used to implement it, the campaign is a reflection of the Irish government's considered intention to substitute domestic products for imported products on the Irish market and thereby to check the flow of imports from other Member States.

25. Whilst it may be true that the two elements of the programme which have continued in effect, namely the advertising campaign and the use of the 'Guaranteed Irish' symbol, have not had any significant success in winning over the Irish market to domestic products, it is not possible to overlook the fact that, regardless of their efficacy, those two activities form part of a government programme

which is designed to achieve the substitution of domestic products for imported products and is liable to affect the volume of trade between Member States.

...

27. In the circumstances the two activities in question amount to the establishment of a national practice, introduced by the Irish government and prosecuted with its assistance, the potential effect of which on imports from other Member States is comparable to that resulting from government measures of a binding nature.

28. Such a practice cannot escape the prohibition laid down by Article 30 of the Treaty solely because it is not based on decisions which are binding upon undertakings. Even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty.

29. That is the case where, as in this instance, such a restrictive practice represents the implementation of a programme defined by the government which affects the national economy as a whole and which is intended to check the flow of trade between Member States by encouraging the purchase of domestic products, by means of an advertising campaign on a national scale and the organization of special procedures applicable solely to domestic products, and where those activities are attributable as a whole to the government and are pursued in an organized fashion throughout the national territory.

30. Ireland has therefore failed to fulfil its obligations under the Treaty by organizing a campaign to promote the sale and purchase of Irish goods within its territory.

The ECJ's reasoning exemplifies its general strategy under Article 34. It looks to substance, not form, rebutting the Irish argument that only formally binding measures are caught by the Article (paragraphs 21 and 28), and rejecting the argument that, as the campaign appeared to have failed, therefore EU law should be unconcerned with it (paragraph 25).[14]

A second type of case caught by Article 34 is where *a state has rules on the origin-marking of certain goods.*

Case 207/83 Commission v United Kingdom
[1985] ECR 1201

[Note: Treaty renumbering: Arts 30 and 169 are now Arts 34 and 258 TFEU]

The Commission brought an Article 169 action, arguing that United Kingdom legislation which required that certain goods should not be sold in retail markets unless they were marked with their country of origin was in breach of Article 30, as an MEQR. The United Kingdom argued that the legislation applied equally to imported and national products, and that this information was of importance to consumers since they regarded origin as an indication of the quality of the goods. The extract relates to the first of these arguments.

THE ECJ

17. [I]t has to be recognized that the purpose of indications of origin or origin-marking is to enable consumers to distinguish between domestic and imported products and that this enables them to

[14] The campaign may have had some impact, since the diminution in sales of Irish goods might have been greater had the campaign not existed. Not all measures which promote domestic goods will, however, be caught by the Treaty: Case 222/82 *Apple and Pear Development Council v KJ Lewis Ltd* [1983] ECR 4083.

assert any prejudices which they may have against foreign products. As the Court has had occasion to emphasise in various contexts, the Treaty, by establishing a common market... seeks to unite national markets in a single market having the characteristics of a domestic market. Within such a market, the origin-marking requirement not only makes the marketing in a Member State of goods produced in other Member States in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as the result of a division of labour between Member States.

18. It follows from those considerations that the United Kingdom provisions in question are liable to have the effect of increasing the production costs of imported goods and making it more difficult to sell them on the United Kingdom market.

Member State legislation which contains rules on origin-marking will normally be acceptable only if the origin implies a certain quality in the goods, that they were made from certain materials or by a particular form of manufacturing, or where the origin is indicative of a special place in the folklore or tradition of the region in question.[15]

The Court's clear intent to stamp firmly on national measures that favour domestic over imported products is equally apparent in a third type of case: *public procurement* cannot be structured so as to favour domestic producers.[16]

Case 45/87 Commission v Ireland
[1988] ECR 4929

[Note Lisbon Treaty renumbering: Arts 30 and 169 are now Arts 34 and 258 TFEU.]

Dundalk Council put out to tender a contract for water supply. One of the contract clauses (4.29) was that tenderers had to submit bids based on the use of certain pipes which complied with a particular Irish standard (IS 188: 1975). One of the bids was based on the use of a piping which had not been certified by the Irish authorities, but which complied with international standards. The Council refused to consider it for this reason. The Commission brought an Article 169 action claiming a breach of Article 30.

THE ECJ

19. [I]t must first be pointed out that the inclusion of such a clause (as 4.29) in an invitation to tender may cause economic operators who produce or utilize pipes equivalent to pipes certified with Irish standards to refrain from tendering.

20. It further appears... that only one undertaking has been certified by the IIRS[17] to IS 188: 1975 to apply the Irish Standard Mark to pipes of the type required for the purposes of the public works contract at issue. That undertaking is located in Ireland. Consequently, the inclusion of Clause 4.29 had the effect of restricting the supply of the pipes needed for the Dundalk scheme to Irish manufacturers alone.

21. The Irish government maintains that it is necessary to specify the standards to which materials must be manufactured, particularly in a case such as this where the pipes utilized must suit the existing

[15] Case 12/74 *Commission v Germany* [1975] ECR 181; Case 113/80 *Commission v Ireland* [1981] ECR 1625.
[16] Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No 2 Di Carrara* [1990] ECR I-889; Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy* [1984] ECR 2727; Case C-254/05 *Commission v Belgium* [2007] ECR I-4269.
[17] Institute for Industrial Research and Standards.

network. Compliance with another standard, even an international standard such as ISO 160 1980, would not suffice to eliminate technical difficulties.

22. That technical argument cannot be accepted. The Commission's complaint does not relate to compliance with technical requirements but to the refusal of the Irish authorities to verify whether those requirements are satisfied where the manufacturer of the materials has not been certified by the IIRS to IS 188. By incorporating in the notice in question the words 'or equivalent' after the reference to the Irish standard, as provided for by Directive 71/305 where it is applicable, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract to tenderers proposing to utilize Irish materials.

A fourth type of case is where *the discrimination in favour of domestic goods is evident in administrative practice*, as exemplified by *Commission v France*.[18] French law discriminated against imported postal franking machines. The law was changed, but a British company claimed that, notwithstanding this, the French authorities repeatedly refused to approve its machines. The ECJ held that general administrative discrimination against imports could be caught by Article 34. The discrimination could, for example, take the form of delay in replying to applications for approval, or refusing approval on the grounds of various alleged technical faults that were inaccurate.

(c) PRICE FIXING

A state cannot treat imported goods less favourably in law or fact than domestic products through price-fixing regulations.[19]

Case C-531/07 Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH [2009] ECR I-3717

Austrian law provided in effect that an importer of books could not fix a price below the retail price fixed or recommended by the publisher for the state of publication.

THE ECJ

21. In that regard, it should be noted that Paragraph 3(2) of the BPrBG, by prohibiting Austrian importers of German-language books from fixing a retail price below that fixed or recommended by the publisher for the State of publication, less any VAT comprised in it, provides for a less favourable treatment for imported books... since it prevents Austrian importers and foreign publishers from fixing minimum retail prices according to the conditions of the import market, whereas the Austrian publishers are free to fix themselves, for their goods, such minimum retail prices for the national market.

22. Consequently, such provisions are to be regarded as a measure having equivalent effect to an import restriction contrary to Article 28 EC, in so far as they create, for imported books, a distinct regulation which has the effect of treating products from other Member States less favourably...

[18] Case 21/84 *Commission v France* [1985] ECR 1356.

[19] Case 181/82 *Roussel Laboratoria BV v The State of The Netherlands* [1983] ECR 3849; Case 56/87 *Commission v Italy* [1988] ECR 2919; Case 82/77 *Openbaar Ministerie v Van Tiggele* [1978] ECR 25; Case 65/75 *Riccardo Tasca* [1976] ECR 291.

23 The German Government contended, at the hearing, that all the considerations concerning the restrictive effects of the Austrian provisions are unfounded because the importation into Austria of books from Germany covers in reality the majority of the Austrian market and that the Austrian market for German-language books cannot be considered independently from the German market. There is, in fact, a single market in which, as the difference in the retail price is minimal, there is no competition between the different editions of the same book sold in those two Member States.

24 These facts, which are, moreover, not contested, cannot be taken into consideration. Even assuming that the publishing houses of German-language books, in particular those established in Germany, are not disadvantaged by the Austrian provisions on the price of imported books, those provisions allow them to exercise control over the prices charged on the Austrian market and also to ensure that those prices are not lower than those charged in the State of publication, such considerations do not allow it to be ruled out that provisions such as those at issue in the main proceedings have the effect of restricting the ability of Austrian importers to compete, as the latter cannot act freely on their market unlike the Austrian publishers who are their direct competitors.

(D) MEASURES WHICH MAKE IMPORTS MORE DIFFICULT OR COSTLY

There are numerous ways in which a Member State can render it more difficult for importers to break into that market, as exemplified by the *Schloh* case.

Case 50/85 Schloh v Auto Contrôle Technique [1986] ECR 1855

[Note Lisbon Treaty renumbering: Arts 30 and 36 are now Arts 34 and 36 TFEU]

Schloh bought a car in Germany and obtained from a Ford dealer in Belgium a certificate of conformity with vehicle types in Belgium. Under Belgian law he was required to submit his car to two roadworthiness tests, for which fees were charged. He challenged the tests, arguing that they were an MEQR. The extract concerns the first roadworthiness test.

THE ECJ

12 Roadworthiness testing is a formality which makes the registration of imported vehicles more difficult and more onerous and consequently is in the nature of a measure having an effect equivalent to a quantitative restriction.

13 Nevertheless, Article 36 may justify such a formality on grounds of the protection of human life and health, provided that it is established, first, that the test at issue is necessary for the attainment of that objective and, secondly, that it does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

14 As far as the first condition is concerned, it must be acknowledged that roadworthiness testing required prior to the registration of an imported vehicle may . . . be regarded as necessary for the protection of human health and life where the vehicle in question has already been put on the road. In such cases roadworthiness testing performs a useful function inasmuch as it makes it possible to check that the vehicle has not been damaged and is in a good state of repair. However such testing cannot be

justified on those grounds where it relates to an imported vehicle carrying a certificate of conform... which has not been placed on the road before being registered in the importing Member State.

15. As far as the second condition is concerned, it must be stated that the roadworthiness test... imported vehicles cannot, however, be justified under the second sentence of Article 36 of the [T]... if it is established that such testing is not required in the case of vehicles of national origin presen... for registration in the same circumstances. If that were the case it would become apparent that ... measure in question was not in fact inspired by a concern for the protection of human health and ... but in reality constituted a means of arbitrary discrimination in trade between Member States. It is ... the national court to verify that such non-discriminatory treatment is in fact ensured.

The ECJ held that the Belgian rule was contrary to Article 34, save in relation to cars which ... already on the road, provided that in this type of case the rules were applied in a non-discrimin... fashion.

NATIONAL MEASURES VERSUS PRIVATE ACTION

It seems clear that Article 34 applies to measures taken by the state,[20] as opposed to those taken ... private parties.[21] Other Treaty provisions, notably Articles 101 and 102 TFEU, apply to action ... private parties that restricts competition and has an impact on inter-state trade.[22]

This means that the issue of what is a state entity has to be addressed. Thus in the *'Buy Irish'* ... we have already seen that the ECJ rejected the argument that the Irish Goods Council was a pr... body and therefore immune from Article 34. The Irish Government's involvement with fun... the organization and appointment of its members rendered it public for these purposes, ... in the *Apple and Pear Development Council* case[24] the existence of a statutory obligation on ... growers to pay certain levies to the Council sufficed to render the body public for these purp... Institutions concerned with trade regulation may come within the definition of the state for t... purposes even if they are nominally private, provided that they receive a measure of state suppor... 'underpinning'.[25]

Article 34 can also apply against the state even though private parties have taken the main ro... restricting the free movement of goods, as exemplified by *Commission v France*.[26] The Commi... brought an Article 258 TFEU action against the French Government for breach of what is now Art... 34 TFEU combined with Article 4(3) TEU, because the government had taken insufficient measure... prevent French farmers from disrupting imports of agricultural produce from other Member St... The ECJ held that it was incumbent on a government to take all necessary and appropriate meas... to ensure that free movement was respected in its territory, even where the obstacles were creat... private parties.[27]

[20] S Van den Bogaert, 'Horizontality: The Court Attacks?' in C Barnard and J Scott (eds), *The Law of the ... European Market, Unpacking the Premises* (Hart, 2002) ch 5.

[21] Case 311/85 *Vereniging van Vlaamse Reisebureau's v Sociale Dienst de Plaatselijke en Gewestelijke Overheidsd...* [1987] ECR 3821, [30]; Case C-159/00 *Sapod-Audic v Eco-Emballages SA* [2002] ECR I-5031, [74].

[22] Chs 26–27.

[23] Case 249/81 *Commission v Ireland* [1982] ECR 4005; Case C-325/00 *Commission v Germany* [2002] ECR I-...

[24] Case 222/82 (n 14).

[25] Cases 266 and 267/87 *R v The Pharmaceutical Society, ex p API* [1989] ECR 1295.

[26] Case C-265/95 [1997] ECR I-6959; Case C-112/00 *Schmidberger, Internationale Transporte und Plan... Austria* [2003] ECR I-5659, [57]–[59].

[27] See also Regulation 2679/98 of 7 December 1998 on the functioning of the internal market in relation ... free movement of goods among the Member States [1998] OJ L337/8, but for the weakness of this Reg see Report ... the Commission to the Council and European Parliament on the application of Regulation 2679/98, COM(200... final.

(F) SUMMARY

i. If a polity decides to embrace a single market, then discriminatory or protectionist measures will be at the top of the list of those to be caught, since they are directly opposed to the single market ideal.

ii. The court entrusted with policing such a regime must be mindful of the many different ways in which a state can seek to discriminate against imported goods.

iii. The ECJ has been aware of this, and has made sure that indirect as well as direct discrimination is caught by Article 34.

4. INDISTINCTLY APPLICABLE RULES: *CASSIS DE DIJON*

(A) FOUNDATIONS: *CASSIS DE DIJON*

The removal of discriminatory trade barriers is a necessary, but not sufficient, condition for single market integration. There are many rules that do not discriminate between goods dependent upon country of origin, but which nevertheless create barriers to trade between Member States.

The Commission appreciated this when framing Directive 70/50.[28] Article 2 was concerned with discriminatory measures. Article 3 provided that the Directive also covered measures governing the marketing of products which deal with shape, size, weight, composition, presentation, and identification, where the measures were equally applicable to domestic and imported products, and where the restrictive effect of such measures on the free movement of goods exceeded the effects intrinsic to such rules.

The possibility that Article 34 could be applied to indistinctly applicable rules was also apparent in *Dassonville*.[29] The definition of an MEQR in paragraph 5 did not require a measure to be discriminatory. The seeds that were sown in Directive 70/50 and *Dassonville* came to fruition in the seminal *Cassis de Dijon* case.

Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein
[1979] ECR 649

[Note Lisbon Treaty renumbering: Art 30 is now Art 34 TFEU]

The applicant intended to import the liqueur 'Cassis de Dijon' into Germany from France. The German authorities refused to allow the importation because the French drink was not of sufficient alcoholic strength to be marketed in Germany. Under German law such liqueurs had to have an alcohol content of 25 per cent, whereas the French drink had an alcohol content of between 15 and 20 per cent. The applicant argued that the German rule was an MEQR, since it prevented the French version of the drink from being lawfully marketed in Germany.

THE ECJ

'8. In the absence of common rules relating to the production and marketing of alcohol . . . it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

[28] Dir 70/50, [1970] OJ L13/29, Art 2(3).
[29] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

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

9. The Government of the Federal Republic of Germany ... put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.

10. As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.

12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in the field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principal effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

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 limits set by the national rules.

The significance of *Cassis de Dijon* can hardly be overstated, and it is therefore worth dwelling upon the result and the reasoning.

In terms of *result* the Court's ruling in *Cassis* affirmed and developed the *Dassonville* judgment. It *affirmed* paragraph 5 of *Dassonville*: what is now Article 34 could apply to national rules that did not discriminate against imported products, but which inhibited trade because they were different from the trade rules applicable in the country of origin. The fundamental assumption was that when goods had been lawfully marketed in one Member State, they should be admitted into any other state without restriction, unless the state of import could successfully invoke one of the mandatory requirements. The *Cassis* judgment encapsulated therefore a principle of *mutual recognition*, paragraph 14(4). The *Cassis* ruling also *built* upon paragraph 6 of *Dassonville*, in which the ECJ introduced the rule of reason: in the absence of harmonization, reasonable measures could be taken by a state to prevent unfair trade practices. Paragraph 8 of *Cassis* developed this idea. Four matters (fiscal supervision, etc) were listed that could prevent a trade rule which inhibited the free movement of goods from being caught by what is now Article 34. This list is not, as will be seen below, exhaustive. The mandatory requirements that constitute the rule of reason are taken into account within the fabric of Article 34, and are separate from what is now Article 36.

The *reasoning* in *Cassis* is as significant as the result. The core is to be found in paragraph 8 of the judgment. The ECJ began by affirming the right of the states to regulate all matters that had not yet been the subject of Community harmonization. Yet within half a dozen lines the whole balance shifted. State regulation of such areas must be accepted, together with any obstacles to trade which might follow from disparities in national laws, *but* only insofar as these trade rules could be justified by one of the mandatory requirements listed in paragraph 8. What began by an assertion of states' rights was transformed into a conclusion that required the state to justify the indistinctly applicable rules under the rule of reason.

The ECJ scrutinized closely assertions that the mandatory requirements applied. The German Government's claim in paragraph 10 was weak. The substance of the main claim in paragraph 12 was little better, and was countered in paragraph 13. The point of real substance raised by the German Government was to be found in paragraph 12(3), and it elicited no direct response from the Court. The effect of *Cassis* was deregulatory: it rendered inapplicable trade rules that prevented goods lawfully marketed in one state from being imported into another state. The result might be a common standard based on the country with the least demanding rules, what is often referred to as the 'regulatory race to the bottom'.[30] The implications of this will be considered below.[31]

(B) APPLICATION: THE POST-*CASSIS* JURISPRUDENCE

There were numerous cases applying *Cassis* to various trade rules.[32] In *Déserbais*[33] an importer of Edam cheese from Germany into France was prosecuted for unlawful use of a trade name. In Germany such cheese could be lawfully produced with a fat content of only 34.3 per cent, whereas in France the name Edam was restricted to cheese with a fat content of 40 per cent. The importer relied on Article 34 by way of defence to the criminal prosecution. The ECJ held, in accord with *Cassis*, that the French rule was incompatible with this Article, and could not be saved by the mandatory requirements.

[30] This will not always be so: see 688–689.

[31] See below, 688–689.

[32] Case 298/87 *Smanor* [1988] ECR 4489; Case 407/85 *Drei Glocken v USL Centro-Sud* [1988] ECR 4233; Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois Asbl* [1990] ECR I-667; Case C-30/99 *Commission v Ireland* [2001] ECR I-4619; Case C-123/00 *Criminal Proceedings against Bellamy and English Shop Wholesale SA* [2001] ECR I-2795; Case C-14/02 *ATRAL SA v Belgium* [2003] ECR I-4431; Case C-170/04 *Klas Rosengren v Riksåklagaren* [2007] ECR I-4071; Case C-265/06 *Commission v Portugal* [2008] ECR I-2245.

[33] Case 286/86 *Ministère Public v Déserbais* [1988] ECR 4907.

The same result was reached in *Gilli and Andres*[34] where importers of apple vinegar from Germany into Italy were prosecuted for fraud because they had sold vinegar in Italy which was not made from the fermentation of wine. The rule hampered Community trade and did not benefit from the mandatory requirements, since proper labelling could alert consumers to the nature of the product, thereby avoiding consumer confusion.

The same approach was apparent in *Rau*,[35] which was concerned with national rules on packaging rather than content. Belgian law required all margarine to be marketed in cube-shaped packages, irrespective of where it had been made, but it was clearly more difficult for non-Belgian manufacturers to comply without incurring cost increases. The ECJ held that Article 34 was applicable, and that the Belgian rule could not be justified on the basis of consumer protection, since any consumer confusion could be avoided by clear labelling.

INDISTINCTLY APPLICABLE RULES: ARTICLE 35

Article 35 prohibits quantitative restrictions and MEQRs in relation to exports in the same manner as does Article 34 in relation to imports. The ECJ has, however, held that there is a difference in the scope of the two provisions. Whereas Article 34 will apply to discriminatory provisions and also to indistinctly applicable measures, Article 35 will, it seems, apply only if there is discrimination.[36] An exporter faced with a national rule on, for example, quality standards for a product to be marketed in that state cannot use Article 35 to argue that such a rule renders it more difficult for that exporter to penetrate other markets. The rationale for making Article 34 applicable to measures which do not discriminate is that they impose a dual burden on the importer, which will have to satisfy the relevant rules in its own state and also the state of import. This will not normally be so in relation to Article 35.[37]

This was established in *Groenveld*.[38] Dutch legislation prohibited all manufacturers of meat products from having in stock or processing horsemeat. The purpose was to safeguard the export of meat products to countries that prohibited the marketing of horseflesh. It was impossible to detect the presence of horsemeat within other meat products, and therefore the ban was designed to prevent its use by preventing meat processors from having such horsemeat in stock at all. The sale of horsemeat was not actually forbidden in the Netherlands. Nonetheless the Court held that the Dutch rule did not infringe what is now Article 35. The Article was aimed at national measures which had as their specific object or effect the restriction of exports, so as to provide a particular advantage for national production at the expense of the trade of other Member States. This was not the case here, said the Court, since the prohibition applied to the production of goods of a certain kind without drawing a distinction depending on whether such goods were intended for the national market or for export.[39]

It has however been argued that Article 35 should be conceptualized in terms of market access and that it should be capable of applying to indistinctly applicable rules.[40] It is moreover clear from

[34] Case 788/79 *Italian State v Gilli and Andres* [1980] ECR 2071; Case C-17/93 *Openbaar Ministerie v Van der Veldt* [1994] ECR I-3537.

[35] Case 261/81 *Walter Rau Lebensmittelwerke v de Smedt Pvba* [1982] ECR 3961; Case C-317/92 *Commission v Germany* [1994] ECR I-2039; Case C-369/89 *Groupement des Producteurs, Importeurs et Agents Généraux d'Eaux Minérales Etrangères (Piagème) Asbl v Peeters Pvba* [1991] ECR I-2971.

[36] Case C-12/02 *Criminal Proceedings against Marco Grilli* [2003] ECR I-11585, [41]-[42].

[37] R Barents, 'New Developments in Measures Having Equivalent Effect' (1981) 18 CMLRev 271.

[38] Case 15/79 *PB Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3409; Case 237/82 *Jongeneel Kaas v The State (Netherlands) and Stichting Centraal Organ Zuivelcontrole* [1984] ECR 483; Case 98/86 *Ministère Public v Mathot* [1987] ECR 809; Case C-293/02 *Jersey Produce Marketing Organisation v States of Jersey* [2005] ECR I-9543; Case C-205/07 *Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947.

[39] Case 15/79 *Groenveld* (n 38) [7].

[40] Case C-205/07 *Lodewijk Gysbrechts* (n 38) [59]-[61], AG Trstenjak; M Szydło, 'Export Restrictions within the Structure of Free Movement of Goods: Reconsideration of an Old Paradigm' (2010) 47 CMLRev 753.

Gysbrechts that the ECJ is willing to find a breach of Article 35 even where the rule applies to all traders if it has a greater effect on exports than on domestic traders.[41] Belgian law prohibited a supplier in a distant selling contract from requiring that the consumer provide his payment card number, even though the supplier undertook not to use it to collect payment before expiry of the period in which the consumer could return the goods. The ECJ cited *Groenveld* for the proposition that Article 35 caught national measures which treated differently the domestic and export trade of a Member State so as to provide an advantage for the domestic market at the expense of trade of other Member States. It noted that the consequences of the prohibition in this case were generally more significant in cross-border sales made directly to consumers, because of the obstacles to bringing legal proceedings in another Member State against consumers who defaulted. The ECJ therefore concluded that even if the prohibition was applicable to all traders active in the national territory, its actual effect was nonetheless greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State and was therefore caught by Article 35. It held moreover that although consumer protection could constitute a justification, the challenged rule was disproportionate.

(D) INDISTINCTLY APPLICABLE RULES: THE LIMITS OF ARTICLE 34

Cassis signalled the ECJ's willingness to extend Article 34 to catch indistinctly applicable rules. The difficulty is that all rules that concern trade, directly or indirectly, could be said to affect the free movement of goods in various ways. Thus, as Weatherill and Beaumont note, it could be said that rules requiring the owner of a firearm to have a licence, or spending limits imposed on government departments, reduce the sales opportunities for imported products.[42] It would, as they say, seem absurd to bring such rules within Article 34, yet they could be caught by the *Dassonville* formula.[43]

A distinction can however be drawn, as Weatherill and Beaumont note,[44] between what may be termed dual-burden rules and equal-burden rules. *Cassis* is concerned with dual-burden rules. State A imposes rules on the content of goods. These are applied to goods imported from state B, even though such goods have already complied with the trade rules in state B. *Cassis* prevents state A from imposing its rules in such instances unless they can be saved by the mandatory requirements. Equal-burden rules are those applying to all goods, irrespective of origin, which regulate trade in some manner. They are not designed to be protectionist. These rules may have an impact on the overall volume of trade, but there will be no greater impact for imports than for domestic products.

A key issue is whether rules of this nature should be held to fall within Article 34, subject to a possible justification, or whether they should be deemed to be outside Article 34 altogether. The result may be the same, in that the rule may be held lawful. The choice is nonetheless important. If these rules are within Article 34 they are *prima facie* unlawful, and the burden is on those seeking to uphold the rule to show objective justification. Both strategies were evident in the ECJ's jurisprudence prior to *Keck*.[45]

In some cases the ECJ held that rules which did not relate to the *characteristics* of the goods and did not impose a dual burden on the importer, but concerned only the conditions on which all goods were sold, were outside Article 34. Thus in *Oebel*[46] the Court held that a rule which prohibited the delivery

[41] Case C-205/07 *Lodewijk Gysbrechts* (n 38); W-H Roth, Note (2010) 47 CMLRev 509.
[42] S Weatherill and P Beaumont, *EU Law* (Penguin, 3rd edn, 1999) 608.
[43] Case 8/74 [1974] ECR 837, [5].
[44] (N 42) 608–609.
[45] Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.
[46] Case 155/80 [1981] ECR 1993, [20].

of bakery products to consumers and retailers, but not wholesalers, at night was not caught, since it applied in the same way to all producers wherever they were established.[47]

In other cases the Court held, however, that Article 34 applied to rules that were not dissimilar to those in the preceding paragraph. Thus in *Cinéthèque*[48] the ECJ held that a French law banning the sale or hire of videos of films during the first year in which the film was released, the objective being to encourage people to go to the cinema and hence protect the profitability of cinematographic production, was caught by Article 34 even though it did not favour domestic production and did not seek to regulate trade. The ECJ held that the French law could however be justified, since it sought to encourage the creation of films irrespective of their origin.[49] The same approach to Article 34 is apparent in the *Sunday Trading* cases.

Case 145/88 Torfaen BC v B & Q plc
[1989] ECR 3851

B & Q was prosecuted for violation of the Sunday trading laws which prohibited retail shops from selling on Sundays, subject to exceptions for certain types of products. B & Q claimed that these laws constituted an MEQR within Article 30. The effect of the laws was to reduce total turnover by about 10 per cent, with a corresponding diminution of imports from other Member States. But imported goods were, in this respect, in no worse a position than domestic goods: the reduction in total turnover affected all goods equally.

THE ECJ

11. The first point which must be made is that national rules prohibiting retailers from opening their premises on Sunday apply to imported and domestic products alike. In principle, the marketing of products imported from other Member States is not therefore made more difficult than the marketing of domestic products.

12. Next, it must be recalled that in its judgment... in Joined Cases 60 and 61/84 (*Cinéthèque*) the Court held, with regard to a prohibition of the hiring of video-cassettes applicable to domestic and imported products alike, that such a prohibition was not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to Community trade thereby created did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law.

13. In those circumstances it is therefore necessary in a case such as this to consider first of all whether rules such as those at issue pursue an aim which is justified with regard to Community law. As far as this question is concerned the Court has already stated in its judgment... in Case 155/80 (*Oebel* [1981] ECR 1993) that national rules governing the hours of work, delivery and sale in the bread and confectionery industry constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty.

14. The same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for Member States. Furthermore such rules are not designed to govern the patterns of trade between Member States.

[47] See also Case 148/85 *Direction Générale des Impôts and Procureur de la République v Forest* [1986] ECR 3449, [11]; Case 75/81 *Belgian State v Blesgen* [1982] ECR 1211; Case C–23/89 *Quietlynn Ltd v Southend-on-Sea BC* [1990] ECR I–3059.

[48] Cases 60 and 61/84 *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605.

[49] The ECJ's approach can be contrasted with that taken by AG Slynn, who argued that the French law should fall outside Art 34, since it did not impose any additional requirement on importers: ibid 2611.

15. Secondly, it is necessary to ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view. As is indicated in Article 3 of Commission Directive 70/50 . . . the prohibition laid down in Article 30 covers national measures governing the marketing of products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.

16. The question whether the effects of specific national rules do in fact remain within that limit is a question to be determined by the national court.

17. The reply to the first question must therefore be that Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.

The approach in *Torfaen* was conceptually identical to that in *Cinéthèque*. The rule was *prima facie* caught by what is now Article 34, but it could escape prohibition if there was some objective justification and the effects of the rule were proportionate, the latter issue to be determined by national courts. Subsequent case law within the United Kingdom attested to the difficulty in applying the ECJ's test.[50] The ECJ sought to resolve these difficulties by making it clear that Sunday trading rules were proportionate.[51] The fundamental approach nonetheless remained the same: such rules were *prima facie* within Article 34. The post-*Torfaen* case law simply made things easier for national courts by providing guidance on proportionality.

The ECJ's case law provided academics with much material concerning the proper boundaries of Article 34. Some saw little wrong with the ECJ's approach in *Cinéthèque* and *Torfaen*. Others were less happy with the Court's approach.[52] White distinguished between the characteristics of the goods and selling arrangements, a theme picked up by the ECJ in *Keck*.

E White, 'In Search of the Limits to Article 30 of the EEC Treaty'[53]

'[A]s the judgment of the Court in *Cassis de Dijon* clearly shows, Member States are not entitled to require that imported products have the same characteristics as are required of, or are traditional in, domestic products unless this is strictly necessary for the protection of some legitimate interest. There is not, however, the same need to require the rules relating to the circumstances in which certain goods may be sold or used in the importing Member State to be overridden for this purpose as long as imported products enjoy equal access to the market of the importing Member State compared with national goods. In such a case the imported product is not deprived of any advantage it derives from the different legal and economic environment prevailing in the place of production. In fact, any reduction of total sales (and therefore imports) which may result from restrictions on the circumstances in which they may be sold does not arise from disparities between national rules but rather out of the existence of the rules in the importing Member State.

[50] *Stoke City Council v B & Q plc* [1990] 3 CMLR 31; *Wellingborough BC v Payless* [1990] 1 CMLR 773; *B & Q plc v Shrewsbury BC* [1990] 3 CMLR 535; *Payless v Peterborough CC* [1990] 2 CMLR 577; A Arnull, 'What Shall We Do On Sunday?' (1991) 16 ELRev 112.

[51] Case C-312/89 *Union Département des Syndicats CGT de l'Aisne v SIDEF Conforama* [1991] ECR I-997; Case C-332/89 *Ministère Public v Marchandise* [1991] ECR I-1027; Cases C-306/88, 304/90, and 169/91 *Stoke-on-Trent CC v B & Q plc* [1992] ECR I-6457, 6493, 6635; Cases C-418-421, 460-462, and 464/93, 9-11, 14-15, 23-24, and 332/94 *Semeraro Casa Uno Srl v Sindaco del Commune di Erbusco* [1996] ECR I-2975.

[52] J Steiner, 'Drawing the Line: Uses and Abuses of Art 30 EEC' (1992) 29 CMLRev 749.

[53] (1989) 26 CMLRev 235, 246-267, italics in the original. See also K Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition' (1991) 28 CMLRev 115, 130.

5 INDISTINCTLY AND DISTINCTLY APPLICABLE RULES: *KECK* AND SELLING ARRANGEMENTS

(A) *KECK*: SELLING ARRANGEMENTS

Cases C-267 and 268/91 **Criminal Proceedings against Keck and Mithouard** [1993] ECR I-6097

[Note Lisbon Treaty renumbering: Arts 30 and 177 are now Arts 34 and 267 TFEU]

Keck and Mithouard (K & M) were prosecuted in the French courts for selling goods at a price which was lower than their actual purchase price (resale at a loss), contrary to a French law of 1963 as amended in 1986. The law did not ban sales at a loss by the manufacturer. K & M claimed that the French law was contrary to Community law concerning free movement of goods.

THE ECJ

12. It is not the purpose of national legislation imposing a general prohibition on resale at a loss to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter.

15. In '*Cassis de Dijon*' . . . it was held that, in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 include obstacles to the free movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging) to goods from other Member States where they are lawfully manufactured and marketed, even if those rules apply without distinction to all products unless their application can be justified by a public interest objective taking precedence over the free movement of goods.

16. However, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment . . . provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States.

17. Where those conditions are fulfilled, the application of such rules to the sale of products from another Member State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18. Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

It is clear that the decision was based in part upon the distinction between dual-burden rules and equal-burden rules (paragraphs 15 to 17).

Cassis-type *rules relating to the goods themselves* were within Article 34 because they would have to be satisfied by the importer *in addition* to any such provisions existing within its own state (paragraph 15). Such rules were by their very nature[54] likely to impede access to the market for imported goods.

Rules concerning selling arrangements, by way of contrast, imposed an equal burden on all those seeking to market goods in a particular territory (paragraph 17). They did not impose extra costs on the importer,[55] their purpose was not to regulate trade (paragraph 12), and they did not prevent access to the market. They were therefore not within Article 34, *provided* that they affected in the same manner in law or fact domestic and imported goods (paragraph 16).

It is unclear precisely which earlier cases were being reassessed (paragraph 16), because the Court did not name specific cases. It appeared to encompass decisions such as *Torfaen* and probably *Cinéthèque*,[56] since the challenged rules concerned selling arrangements which affected importers no more than domestic producers and the effect was a reduction in the volume of sales.

The ECJ's desire to exclude selling arrangements from the ambit of Article 34 is apparent from later case law. In *Tankstation*[57] the Court held that national rules that provided for the compulsory closing of petrol stations were not caught by Article 34. The ECJ concluded that the rules related to selling arrangements that applied equally to all traders. In *Punto Casa*[58] and *Semeraro*[59] the Court reached the same conclusion in relation to Italian legislation on Sunday closing of retail outlets. The rule applied equally to domestic and imported products, and therefore was outside the scope of Article 34. The same theme is apparent in *Hunermund*,[60] where the ECJ held that a rule prohibiting pharmacists from advertising para-pharmaceutical products that they were allowed to sell was not caught by Article 34: the rule was not directed towards intra-Community trade, it did not preclude traders other than pharmacists from advertising such goods, and it applied evenly as between all traders. The ECJ also held that national provisions restricting the number of outlets for a given product, or imposing a licensing requirement, were outside Article 34. This was either because the rule related to selling arrangements or because the impact was too indirect and uncertain.[61]

(B) *KECK*: STATIC AND DYNAMIC SELLING ARRANGEMENTS

The ECJ's desire to limit Article 34 is readily understandable, but the distinction drawn in *Keck* between rules that go to the nature of the product itself and those which relate to the selling arrangements for that product is problematic. The problem resides in ambiguity about the meaning of the term 'selling arrangements'.

This could connote only what may be termed *static selling arrangements*: rules relating to the hours in which shops may be open, the length of time for which people may work, or the type of premises in which certain goods may be sold. *Non-static or dynamic selling arrangements* include the ways in

[54] Cases C-401 and 402/92 *Criminal Proceedings against Tankstation 't Heustke vof and JBE Boermans* [1994] ECR I-2199, 2220.

[55] Ibid.

[56] In Cases C-401 and 402/92 *Tankstation* (n 54) AG van Gerven felt that *Cinéthèque* would be decided differently now in the light of *Keck*.

[57] Ibid.

[58] Cases C-69 and 258/93 *Punto Casa SpA v Sindaco del Commune di Capena* [1994] ECR I-2355.

[59] Cases C-418/93 *Semeraro* (n 51).

[60] Case C-292/92 *R Hunermund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

[61] Case C-387/93 *Banchero* [1995] ECR I-4663; Case C-379/92 *Peralta* [1994] ECR I-3453; Cases C-140-142/94 *Dip Commune di Bassano del Grappa* [1995] ECR I-3257.

which a manufacturer chooses *to market this specific product*, through a certain form of advertising, free offers, and the like.

The objection to taking the latter out of Article 34 is that they may relate more closely to the definition of the product itself. Legislation that restricted certain forms of advertising or sales promotion might limit intra-EU trade, even if the rules were indistinctly applicable. It might force a producer to adopt sales promotion or advertising schemes which differed as between states or to discontinue an effective scheme.[62] Non-static selling arrangements can therefore form an integral aspect of the goods, in much the same way as do rules relating to composition, labelling, or presentation.

It is, however, clear from *Keck* that the Court regarded some such rules as selling arrangements, and hence as outside Article 34. Thus it admitted that a rule prohibiting sales at a loss deprived traders of a method of sales promotion, and hence reduced the volume of sales, and yet treated this rule as a selling arrangement that was outside Article 34. While in *Hunermund*[63] and *Leclerc-Siplec*[64] a limited ban on advertising was characterized as a method of sales promotion and held to be outside Article 34, and in *Schmidt*[65] a prohibition on doorstep sales of silver jewellery was held *prima facie* to fall outside Article 34.

(c) *KECK* AND SELLING ARRANGEMENTS: TWO QUALIFICATIONS

(i) *Rules Concerning Sales Characterized as Relating to the Product*

It is open to the ECJ to characterize rules which affect selling as part of the product itself,[66] and hence within the ambit of Article 34. This is exemplified by *Familiapress*.[67]

Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und Vertreibs GmbH v Heinrich Bauer Verlag
[1997] ECR I-3689

[Note Lisbon Treaty renumbering: Art 30 is now Art 34 TFEU]

Familiapress, an Austrian newspaper publisher, sought to restrain HBV, a German publisher, from publishing in Austria a magazine containing crossword puzzles for which the winning readers would receive prizes. Austrian legislation prohibited publishers from including such prize competitions in their papers. Austria argued that its legislation was not caught by Article 30, since the national law related to a method of sales promotion, and was therefore, according to *Keck*, outside Article 30.

[62] Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575. See also Case 382/87 *Buet v Ministère Public* [1989] ECR 1235; Cases C-34-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843.

[63] Case C-292/92 (n 60).

[64] Case 412/93 *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA* [1995] ECR I-179.

[65] Case C-441/04 *A-Punkt Schmuckhandels GmbH v Schmidt* [2006] ECR I-2093.

[66] If the national rule requires the alteration of packaging or labelling of the imported products this generally precludes it from being a selling arrangement within *Keck*: Case C-12/00 *Commission v Spain* [2003] ECR I-459, [76]; Case C-416/00 *Morellato v Commune di Padova* [2003] ECR I-9343, [29]-[30]. Compare Case C-159/00 *Sapud Audic* (n 21) [72]-[75].

[67] See also Case C-67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033, [21]; Cases C-158 and 159/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505, [24]-[32].

THE ECJ

11. The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck and Mithouard*.

12. Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the products concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 30 of the Treaty.

(b) *Differential Impact in Law or Fact*

The ruling in *Keck* is also subject to a second qualification: even if a national regulation is categorized as being about selling, it will still be caught by Article 34 if it has a differential impact, in law or fact, for domestic traders and importers.[68] This is made clear in paragraph 16 of *Keck* and is exemplified by the following cases.[69]

Cases C–34–36/95 Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB
[1997] ECR I–3843

[Note Lisbon Treaty renumbering: Arts 30 and 36 are now Arts 34 and 36 TFEU]

The case concerned a Swedish ban on television advertising directed at children under 12 and a ban on commercials for skincare products. It was argued that this was in breach of Article 30, and hence could not be applied in relation to advertising broadcast from another Member State. The ECJ, following *Leclerc-Siplec*, characterized the Swedish law as one concerning selling arrangements. It then continued as follows.

THE ECJ

40. In ... *Keck* ... at paragraph 16, the Court held that national measures restricting or prohibiting certain selling arrangements are not covered by Article 30 ... so long as they apply to all traders operating within the national territory and as long as they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States.

41. The first condition is clearly fulfilled in the cases before the national court.

42. As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

43. Although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it is to be noted that ... de Agostini stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.

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[68] The determination of this possible differential impact will often be left to the national court: see, eg, Case C–20/03 *Burmanjer* [2005] ECR I–4133; Case C–441/04 *Schmidt* (n 65).

[69] P Koutrakos, 'On Groceries, Alcohol and Olive Oil: More on Free Movement of Goods after *Keck*' (2001) 26 ELRev 391.

44. Consequently, an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising... is not covered by Article 30..., unless it can be shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.

45. In the latter case, it is for the national court to determine whether the ban is necessary to satisfy overriding requirements of general public importance or one of the aims listed in Article 36 of the Treaty, if it is proportionate to that purpose and if those aims or requirements could not have been attained or fulfilled by measures less restrictive of intra-Community trade.

Case C-405/98 **Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)** [2001] ECR I-1795

[Note Lisbon Treaty renumbering: Art 30 is now Art 34 TFEU]

The Swedish Consumer Ombudsman sought an injunction restraining GIP from placing advertisements for alcohol in magazines. Swedish law prohibited advertising of alcohol on radio and television, and prohibited advertising of spirits, wines, and strong beer in periodicals other than those distributed at the point of sale. The prohibition on advertising did not apply to periodicals aimed at traders such as restaurateurs. GIP published a magazine containing advertisements for alcohol. 90 per cent of the subscribers were traders, and 10 per cent were private individuals. GIP argued that the advertising ban was contrary to Article 30. It contended that the advertising ban had a greater effect on imported goods than on those produced in Sweden.

THE ECJ

18. It should be pointed out that, according to paragraph 17 of its judgment in *Keck and Mithouard*, if national provisions restricting or prohibiting selling arrangements are to avoid being caught by Article 30 of the Treaty, they must not be of such a kind as to prevent access to the market by products from another state or to impede access any more than they impede the access of domestic products.

19. The Court has also held, in paragraph 42 of... *De Agostini*... that it cannot be excluded that an outright prohibition, applying in one Member State, of a type of product which is lawfully sold there, might have a greater impact on products from other Member States.

20. It is apparent that a prohibition on advertising... not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

21. Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.

...

25. A prohibition on advertising such as that in issue... must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 30 of the Treaty.

In *de Agostini* and *Gourmet* the advertising ban was total. However the ECJ has also brought cases which impeded market access within Article 34. In *Franzen* Swedish law required a licence for those, including importers, engaged in the making of alcohol, or in wholesaling. This was held to infringe Article 34 since it imposed additional costs on importers and because most licences had been issued to Swedish traders.[70] In *Heimdienst* the ECJ showed that it was willing to consider the proviso to paragraph 16 of *Keck* in relation to a selling arrangement that impeded, rather than prevented, access to the market.[71]

Case C-254/98 Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH [2000] ECR I-151

The case concerned an Austrian rule relating to bakers, butchers, and grocers. They could make sales on rounds in a given administrative district only if they traded from a permanent establishment in that district or an adjacent municipality, where they offered for sale the same goods as they did on their rounds. The ECJ classified the rule as one relating to selling arrangements, since it specified the geographical areas in which such operators could sell their goods in this manner. The ECJ found that the legislation had a differential impact on domestic traders and others. Local economic operators would be more likely to have a permanent establishment in the administrative district or an adjacent municipality, whereas others would have to set up such an establishment, thereby incurring additional costs.

THE ECJ

29 It follows that the application to all operators trading in the national territory of national legislation such as that in point in the main proceedings in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products (see to this effect... *Alpine Investments*...).

6 INDISTINCTLY AND DISTINCTLY APPLICABLE RULES: PRODUCT USE

We shall summarize and assess the current state of the law below, but before we do so it is necessary to consider recent case law on product use. The distinction drawn between selling arrangements and product characteristics generated further questions as to how cases concerned with the 'use' of products should be regarded. This issue has arisen in two major cases.

Case C-110/05 Commission v Italy [2009] ECR I-519

Italy prohibited motorcycles, mopeds, etc from towing trailers, even those specifically designed for use with such vehicles. The Commission argued that this was in breach of what is now Article 34 TFEU.

[70] Case C-189/95 *Criminal Proceedings against Franzen* [1997] ECR I-5909.

[71] See also Case C-322/01 *Deutscher Apothekerverband v 0800 Doc Morris NV and Jacques Waterval* [2003] ECR I-14887, [68]-[75]; Case C-20/03 *Burmanjer* (n 68); Case C-141/07 *Commission v Germany* [2008] ECR I-6935, [37]-[38].

THE ECJ

33. It should be recalled that, according to settled case-law, all trading rules enacted by Mem... States which are capable of hindering, directly or indirectly, actually or potentially, intra-Commun... trade are to be considered as measures having an effect equivalent to quantitative restrictions and ... on that basis, prohibited by Article 28 EC (see, in particular, Dassonville , paragraph 5).

34. It is also apparent from settled case-law that Article 28 EC reflects the obligation to ... the principles of non-discrimination and of mutual recognition of products lawfully manufactured ... marketed in other Member States, as well as the principle of ensuring free access of Commun... products to national markets (see, to that effect, Case 174/82 Sandoz [1983] ECR 2445, paragraph ... Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649, paragraphs 6, 14 and 15, and Keck ... Mithouard , paragraphs 16 and 17).

35. Hence, in the absence of harmonisation of national legislation, obstacles to the free moven... of goods which are the consequence of applying, to goods coming from other Member States ... they are lawfully manufactured and marketed, rules that lay down requirements to be met by ... goods constitute measures of equivalent effect to quantitative restrictions even if those rules ... to all products alike (see, to that effect, ' Cassis de Dijon', paragraphs 6, 14 and 15, Case C-3... Familiapress [1997] ECR I-3689, paragraph 8; and Case C-322/01 Deutscher Apotheker... [2003] ECR I-4887, paragraph 67).

36. By contrast, the application to products from other Member States of national provisions re... ing or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actu... potentially, trade between Member States for the purposes of the case-law flowing from Dasson... on condition that those provisions apply to all relevant traders operating within the national ter... and that they affect in the same manner, in law and in fact, the marketing of domestic products a... those from other Member States. Provided that those conditions are fulfilled, the application of ... rules to the sale of products from another Member State meeting the requirements laid down by ... State is not by nature such as to prevent their access to the market or to impede access any more ... it impedes the access of domestic products (see Keck and Mithouard , paragraphs 16 and 17).

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

The ECJ held that the Italian rule fell within Article 34, but concluded that it could be justifi... grounds of public safety.[72] The Court returned to the issue in the following case.

... C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos
[2009] ECR I-4273

... Nice Treaty renumbering: Arts 28 and 30 are now Arts 34 and 36 TFEU]

The ECJ considered whether Article 28 should be interpreted as precluding national regulations ... prohibited the use of personal watercraft on waters other than designated waterways.

[72] Case C-110/05 [2009] ECR I-519, [69]; See also Case C-433/05 *Criminal proceedings against Lars San...* 15 Apr 2010.

THE ECJ

24. It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in 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, even if those rules apply to all products alike, must be regarded as 'measures having equivalent effect to quantitative restrictions on imports' for the purposes of Article 28 EC (see to that effect, Case 120/78 Rewe-Zentral (Cassis de Dijon) [1979] ECR 649,...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 (see Case C–110/05 Commission v Italy [2009] ECR I–0000, paragraph 37).

25. It is apparent from the file sent to the Court that, at the material time, no waters had been designated as open to navigation by personal watercraft, and thus the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European Communities maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden are, therefore, merely marginal.

26. Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the 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 (see to that effect, Commission v Italy , paragraph 56).

27. Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, Commission v Italy , paragraph 57).

28. In that regard, where 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.

The ECJ accepted, however, that the national rule could be justified for the protection of the environment, provided that certain conditions were met.[73]

7 THE CURRENT LAW: SUMMARY

The academic reaction to the recent case law on product use has been mixed, with commentators divided as to its impact on the previous law and as to the desirability of the tests used by the ECJ.[74] This

[73] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, [35]–[44].

[74] I Gormley, 'Silver Threads among the Gold...50 Years of the Free Movement of Goods' (2008) 31 Fordham ILJ 1307; G Davies, '"Process and Production Method"-based Trade Restrictions in the EU' (2007–8) 10 CYELS; L Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck' (2008) 35 LIEI 133; E Spaventa, 'Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos' (2009) 34 ELRev 914; P Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v Italy, C-110/05' (2009) 36 LIEI 257; C Barnard, 'Trailing a New Approach to Free Movement of Goods' (2009) 68 CLJ 288; C Barnard,

area is indeed complex. This section will therefore attempt to summarize the existing law, which will then be assessed in the section that follows.

It is clear from the formulation used by the ECJ in the two cases on product use that Article 34 covers three types of national rules: those that discriminate, those that impose product requirements, and those that hinder or inhibit market access.[75] National rules concerning sales are not regarded *per se* as inhibiting market access and are only caught insofar as they apply differentially in law or fact to the marketing of domestic products and those from other Member States.[76] It remains to be seen whether selling arrangements disappear as a separate category of case, and are determined merely in terms of market access. Even if this does occur, cases concerned with selling arrangements will remain a prominent type of case in which issues of market access are considered.

The differences of view between commentators as to the current state of the positive law are ultimately explicable according to how one regards the interrelationship between the three types of case covered by Article 34. There are two possible 'readings' of the current law.

The first view regards market access as the overarching principle. On this view discrimination and product requirements are simply the principal examples of national rules that inhibit market access without thereby precluding the possibility that there may be other cases that can have the same effect. The case law could be read in this manner.[77]

The second view sees market access merely as a residual category. On this view discrimination and product requirements are the primary categories of case that fall within Article 34, with market access simply being used as the criterion to capture other cases that do not fall within the first two. The case law could also be read in this manner.[78]

8 THE CURRENT LAW: ASSESSMENT

The two views as to the reading of the current law are reflected in contrasting normative assessments of what Article 34 ought to cover.

(A) MARKET ACCESS AS OVERARCHING PRINCIPLE

(1) ARGUMENTS

The view that market access is and should be the overarching principle that determines the reach of Article 34 can be seen in the reaction to the *Keck* decision, which was not generally favourable.[79] It was argued that *Keck* placed too much emphasis on factual and legal equality at the expense of market access. The approach in *Keck* was to deny that rules relating to selling arrangements came within

'Restricting Restrictions: Lessons for the EU from US' (2009) 68 CLJ 575; T Horsley, 'Anyone for Keck?' (2009) 46 CMLRev 2001; P Wenneras and K Boe Moen, 'Selling Arrangements, Keeping Keck' (2010) 35 ELRev 387; M Derlén and J Lindholm, 'Article 28 EC and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions' (2009–10) 16 CJEL 191; J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 CMLRev 437; A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) 35 ELRev 36.

[75] Case C-110/05 *Commission v Italy* (n 72) [34]; Case C-142/05 *Åklagaren* (n 73) [24].

[76] Case C-110/05 *Commission v Italy* (n 72) [36].

[77] Case C-142/05 *Åklagaren* (n 73) [24].

[78] Case C-110/05 *Commission v Italy* (n 72) [34], [37].

[79] N Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 CMLRev 459; D Chalmers, 'Repackaging the Internal Market—The Ramifications of the *Keck* Judgment' (1994) 19 ELRev 385; L Gormley, 'Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*' [1994] EBLRev 63; S Weatherill, 'After *Keck*: Some Thoughts on how to Clarify the Clarification' (1996) 33 CMLRev 885; Maduro (n 7) 83–87; C Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 ELRev 35.