

European Community Law

Topic 5: The Fundamental Freedoms (1): Goods

{Lecture 13 (of 21)}

Prohibition of Quantitative Restrictions and Measures Having Equivalent Effect

Aim:

To provide an overview of how the ECJ has developed the law on the free movement of goods in relation to the prohibition of quantitative restrictions and equivalent measures.

Learning Outcomes:

After carefully studying the following notes, and other prescribed readings for this lecture, you should be able to:

1. Discuss, in depth, the provisions of, and the principal case law decided under, Art.28 and the exceptions to the Art.28 principle as contained in the provisions of Art.30EC;
2. Discuss the development of the case law on the free movement of goods ‘*pre-Keck*’; and
3. Discuss in detail the decision in *Keck* and the subsequent developments of this decision.

Quantitative Restrictions and Equivalent Measures

Quantitative restrictions are those measures designed to prohibit or limit imports or exports of particular categories of goods by reference to their number, weight, value or other quantitative criteria. They have been described as ‘measures which amount to a total or partial restraint of... imports, or goods in transit.’ *Case 2/73, Geddo*.

As noted, *Art.28 EC* prohibits between Member States quantitative restrictions on imports and all *measures* having equivalent effect. The U.K. has twice been involved in cases restricting imports, thus infringing Art.28EC: in 1978 it was in relation to imports of Dutch potatoes, *Case 231/78*; and in 1982 it was in relation to a quota being applied to the importation of French UHT milk, *Case 124/81*.

The meaning of “measures” has, however, been extended beyond its application to Member States to include the activities of public and quasi-public bodies: *Case 267/87, R v. Pharmaceutical Society of Great Britain* – in which rules adopted by a professional body could constitute “measures” within the meaning of Art.28EC if they were capable of affecting trade between Member States – and *Case 249/81*, the “*Buy Irish*” campaign involving a private undertaking engaged in promoting Irish goods but being funded partly from government funds.

Whereas direct, protectionist measures are now rare, if not eliminated, measures having an effect *equivalent* to quantitative restrictions continue to be a source of controversy. The concept of measures having equivalent effect is provided for in **Arts.2 & 3 of Directive 70/50**. **Art.2** of **Directive 70/50** is said to include those measures which

make imports, or the disposal at any marketing stage of imported products, subject to a condition, other than a formality, which is required in respect of imported products only, or a condition differing from that required for domestic products and more difficult to satisfy.

Art.3 of the Directive applies to what have become known as ‘indistinctly applicable measures.’ It provides that:

This Directive also covers measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation [and other measures] and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.

The jurisprudence of the ECJ provides the authority for stating that this Article applies where:

- (a) the restrictive effects on the free movement of goods are out of proportion to their purpose; and
- (b) the same objective(s) can be achieved by other means which are less of a hindrance to trade.

In the alternative, these rules may be expressed as: national measures can be applied to exclude imports from the market providing: (a) there is a legitimate interest requiring protection and which is capable of justifying the exclusion; and (b) there is no other way of satisfying the legitimate interest by measures less restrictive to trade.

Two landmark cases decided by the ECJ have defined and developed ‘measures having an effect equivalent to quantitative restrictions,’ viz; Cases 8/74 and 120/78.

Case 8/74, Procureur du Roi v. Dassonville

Here, Monsieur Dassonville had imported Scotch whisky from France into Belgium. Belgian legislation required a certificate of origin for imported goods. However, French law did not require him to have such a certificate. Following Dassonville’s prosecution for not having the certificate and an [**Art.234**] reference for a preliminary ruling, the ECJ defined equivalent measures very broadly to include ‘*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.*’ Thus the Belgian legislation was capable of breaching Art.28 EEC.

It is important to note that the effect of Dassonville is that it is not necessary to demonstrate actual effect on trade between Member States; it will suffice if it can be shown that a measure is *capable* of having such an effect. This has been demonstrated by, *inter alia*, the *Buy Irish* case, and by giving further consideration to the meaning of ‘measures’ as provided for in the preamble to *Directive 70/50* where they are defined as ‘laws, regulations

administrative provisions, administrative practices, and all instruments issuing from a public authority including recommendations.’ As noted above, (see Art.3 of Directive 70/50) where such measures apply equally to national and imported products, i.e. where there is no element of discrimination, because the measures are applicable to imports and national products alike, the measures are said to be ‘*indistinctly applicable*.’ In contrast, discriminatory provisions that apply only to imported goods or are overtly protective of national goods are said to be ‘*distinctly applicable*.’ By contrast with competition law provisions, there is no *de minimis* rule applicable to the free movement of goods provisions. Aim, not effect, is the significant feature. Accordingly, the failure of the Buy Irish campaign did not prevent infringement of the free movement of goods provisions (Art.28).

That a provision is regarded as an *indistinctly applicable* measure does not mean that it cannot be a ‘measure equivalent to a quantitative restriction’. This was evidenced in *Case 120/78, Cassis de Dijon*, where the ECJ applied the Dassonville formula but qualified it by applying a ‘rule of reason’.

Case 120/78 ‘Cassis de Dijon.’

In this case, German law had required a minimum alcohol content of 25% for, inter alia, cassis, a blackcurrant-flavoured liqueur. Whereas German cassis complied with the minimum requirement, French cassis had an alcoholic content of 15-20%. Accordingly, it did not comply with the German law. The effect was that whilst the German law was indistinctly applicable, the French cassis was banned from the German market. German importers of French cassis contested the law and, following an [Art.234] reference for a preliminary ruling, the ECJ applied the ‘Dassonville formula’ but added what have come to be known as the two ‘Cassis principles.’ The first principle the ECJ advocated was that:

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 these provisions may be recognised as being necessary in order to satisfy the mandatory requirements relating *in particular* to the (1) effectiveness of fiscal supervision, (2) the protection of public health, (3) the fairness of commercial transactions and (4) the defence of the consumer.

Cassis de Dijon and Subsequent Developments

This first rule in Cassis de Dijon has become known as the ‘rule of reason.’ That is, the rule has provided a non-exhaustive list of measures derogating from the free movement of goods where the reason for the measures is the satisfaction of national mandatory requirements.

That the cases on mandatory requirements do not constitute an exhaustive list is evident from the ‘in particular’ qualification of the categories. Indeed, in *Case 302/86, Commission v. Denmark (Disposable Beer Containers)*, the ECJ added legal protection of the environment as being justifiable as a mandatory requirement, on the basis that protection of the environment is “one of the Community’s essential objectives.”

Whereas, prior to the *Cassis* decision, the general consensus was that all measures breaching the Dassonville formula would breach **Art.28**, unless excepted by Art.30 (see infra), in *Cassis* it was decided that **a rule of reason could apply to indistinctly applicable measures**. Furthermore, whereas prior to *Cassis* the emphasis had been on establishing whether the rule was discriminatory against imports, the focus in *Cassis* was on the protective effect of the measures under consideration. Accordingly, “discrimination ... although it may be sufficient, even conclusive, to bring a measure within Art.28, is not a necessary precondition for Article 28 to apply” per **Advocate General Slynn** in *Cinethique* (1985).

The second ‘Cassis’ principle is the principle of mutual recognition. This is a *presumption* that goods freely available in one Member State should be available in another Member State unless national rules can be justified on the basis of mandatory requirements. The ECJ stated that:

There is ... no valid reason why, provided [that goods] have been lawfully produced and marketed in one Member State, [they] should not be introduced into any other Member State.

Thus, the effect of this *Cassis* principle has its significance in the evident assistance it affords to market integration via the invocation of Art.28 EC.

Three significant cases illustrating the principles of the *Cassis* approach to indistinctly applicable measures are: *Case 261/81, Rau v. De Smedt* involving the marketing of margarine in cube-shaped containers; *Case 16/83, Prantl*, on the legal protection afforded to the unique shape of a wine bottle; and *Case 178/84*, the German Beer Purity case. The cases should be read in the context of the impact EC law has had on areas of legislation that, prima facie, are “within the realms of *exclusive* national competence” (per **Weatherill**, *Law and Integration in the European Union*. Oxford: Clarendon Press, 1995, p233).

Sunday Trading and the Invocation and Limits of Invoking Art.30 as a Defence

The Sunday Trading cases arose from the ability of claimants to challenge national provisions that appeared to restrict commerce even though they were ‘even handed’ in their application. The task for the ECJ was to determine the boundaries of Art.28 in the sense that clear guidance would distinguish between a national law that wasn’t affected by Art.28 and one that would have to be justified under EC law. **Weatherill**¹ has noted that this requirement arose because:

“The application of EC trade law is triggered by a finding that the national rule obstructs the process of market integration. The crossing of that threshold has long been ... remarkably easy [because] The *Dassonville* formula’s flexible reference to trading rules that ‘are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’ ensures a large haul of national measures. Once the required impact on trade is shown, it then falls to the regulating state to demonstrate that its rules are justified.”

¹ op cit., p264

In terms of the ‘Sunday trading cases,’ local authorities prosecuted B & Q for trading on Sundays. However, B & Q were one of the companies that contended that *s.47 Shops Act 1950* was a measure having an effect equivalent to a quantitative restriction (MEQR). They argued that being prevented from opening on a Sunday would mean that their trade would decline by 10% and this would include imported goods. In the first case, *Case 145/88, Torfaen Borough Council v. B & Q*, and following an Art.[234]EC reference, the ECJ ruled that Art.28 did 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.’ In essence, if a national law reflected its socio-cultural characteristics and its prohibitive nature was not disproportionate to its effects intrinsic to trade rules, then the law was unaffected by Art.28EC. “The problem was” said *Hanlon*², “that it was up to the National court to decide the issue of proportionality. Unfortunately, in the Sunday trading cases, different United Kingdom courts came to different conclusions.” Moreover, the ECJ “failed to provide a clear rationale as to how and why EC law did not provide a solution to the matter³.” Accordingly, “Shops were able to take advantage of the legal uncertainty to open on Sundays in many parts of the country⁴.”

The ECJ provided a far clearer judgment in the second B & Q case, however, *Case C-169/91, Stoke-on-Trent and Norwich City councils v. B & Q*, by stating that:

“Article [28] is to be interpreted as meaning that the prohibition which it lays down does not apply to national legislation prohibiting retailers from opening their premises on Sundays.”

The repealing of the Shops Act 1950 and the subsequent liberalising of Sunday trading via the enactment of the *Sunday Trading Act 1994* did nothing to clarify the boundaries of *Art.28EC*, however. It took other trading cases, *Cases C-267 & 268/91, Keck and Mithouard*, for the ECJ to declare that it was “necessary to re-examine and clarify its case law on this [trade law] matter.” It was necessary finally to determine the boundaries of *Art.28EC* given that so many traders were attempting to invoke *Art.28* to challenge national laws as being restrictive of trade even though those laws were not directed at products that were imported from other Member States.

The ECJ decided, in essence, that there was a clear difference between obstacles to the free movement of goods that arose from characteristics relating to those goods, such as composition, labelling and packaging, and certain selling arrangements relating to the sale of those goods. *The restrictive rules that apply to the characteristics of the goods remain governed by the Cassis principles*. By contrast, national laws restricting certain selling arrangements will not be regarded as hindering directly or indirectly, actually or potentially, trade between Member States trade providing they apply to all affected traders operating within the Member State concerned and provided that they “*affect in the same manner, in law and fact*, the marketing of domestic products and those from other Member States.”

² *Hanlon, J, European Community Law*. London: Sweet & Maxwell, 1998, p199

³ *Weatherill*, op cit., p265

⁴ *ibid.*; and see: *Rawlings, The Eurolaw Game: Some Deductions From a Saga* (1993) 20 Jo of L & Soc 309

A possible result of *Keck* is that cases such as *Cinethique* and *Torfaen* would now be outside the scope of **Art.28EC**: that is, the national rules have to be neither justified nor deemed proportionate to their objectives. Whilst this isn't clear from *Keck*, this implication and the influence of *Keck* can be seen in, *inter alia*: *Case C-292/92, Hunermund*; *Cases C-401 and 402/92, Tankstation*; and *Cases C-69 and 258/93, Punto Casa*. By contrast, *Case C-368/95, Familiapress*, provided authority for some selling arrangements being inseparable from the nature of the product and so coming within the ambit of Art.28EC.

In summary, then, it would appear that Art.28 may be invoked only to challenge national laws that:

- (a) *discriminate* against goods imported from another Member State; and
- (b) exert a *protectionist effect* in favour of the goods and/or produce of the importing Member State; but **NOT** to
- (c) those national laws that merely *restrict trade* providing the restrictive effect has a uniform impact on all goods irrespective of origin.

Exceptions to the Prohibitions on Quantitative Restrictions and Measures Having an Equivalent Effect.

(1) Art.30 EC

Art.30 EC contains four express purposes for which Member States may impose quantitative or qualitative restrictions. The Article states that:

The provisions of Articles 28 & 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (1) public morality, public policy or public security; the (2) the protection of health and life of humans, animals or plants; the (3) protection of national treasures possessing artistic, historic or archaeological value; or the (4) protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Thus, there are four express purposes for which Member States may impose quantitative or qualitative restrictions. In outline:

(i) ***The protection of public morality, public policy or public security***: in *Case 34/79, R v. Henn and Darby* the ECJ held that Member States were justified in imposing restrictions on imports of pornographic material from other States. Such restrictions are not permitted, however, if the materials or matter may legitimately be manufactured within the territory of the Member State imposing the restriction: *Case 121/85, Conegate Limited v. HM Customs & Excise*.

(ii) ***The protection of the health and life of humans, animals or plants***. Member States are allowed to introduce measures to protect public health, but these measures must not be unduly restrictive: *Case 215/87*. (See also: *Case 174/82, Sandoz*, relating to the refusal of the Dutch authorities to permit the sale of muesli bars which contained added vitamins, on

the basis that the vitamins were dangerous to public health). {NB: When France refused to import British beef following a Council decision partially lifting the ban that had been imposed by the Commission, the Commission succeeded in obtaining a declaration under an **Art.226** action that France was in breach of Community law: **Case C-1/00**, (2001) *The Times*, Dec. 19th }.

(iii) **Protection of artistic, historic or archaeological treasures**: such restrictions may only be justified when the work remains in the public domain. Once a treasure or work of art is placed on the market or is the subject of a private sale, the exception cannot be invoked.

(iv) **Protection of industrial or commercial property**: the obvious examples of such restrictions are the laws protecting copyright, patents, trademarks, designs and other intellectual or industrial property rights.

(See also (i) **Art. 134EC in Title IX: Common Commercial Policy**)

It should also be noted that the second sentence of **Art.30** qualifies the rule of reason, i.e. the measures must not constitute arbitrary discrimination or a disguised restriction on trade between Member States.

(ii) Exceptions derived from case law.

The principal exceptions (all four?) are those specified in the *Cassis de Dijon* case (see supra). Some commentators would contend that it is inaccurate to say that *Cassis* contains *exceptions* to Art.28: that it is more accurate to state that where *Cassis* applies it actually renders Art.28 *inapplicable*. (Does any recent case law clarify this assertion for you? What do you think?).

To what extent, if at all, do the provisions of Arts.23 or 90 overlap with Art.28?

It has already been noted that Arts.25 and 90 are mutually exclusive (see last lecture), so the focus of enquiry becomes: do the provisions either in Arts.23 *or* Art.90 overlap with Art.28?

Goods imported into a Member State may be subject to inspection for which a fee is charged. First, it is necessary to determine whether this is a fee for a service (which is permissible) or a customs duty or an internal tax which may or may not be discriminatory. But whatever it might be, as *Wyatt & Dashwood*⁵ note:

Since the respective fields of application of the Treaty's prohibition on obstacles to the free movement of goods are to be distinguished, obstacles which are of a fiscal nature or have equivalent effect and are covered by Articles 23 or 90 of the Treaty cannot fall within the prohibition of Article 28, on quantitative restrictions and

⁵ *Wyatt, D and Dashwood, A. European Community Law, 3/e.* London: Sweet & Maxwell, 1993, p201.

measures having equivalent effect.⁶ [However] an excessive tax impeding the free movement of goods which falls outside the scope of Article 90 because it lacks a domestically produced counterpart will fall to be governed by Articles 28-30 EC.

Finally, it should be remembered that not only are Arts. 28 and 29 directly effective, but that any national measures that breach the provisions may give rise to a claim for damages against that State: see **Case C-46/93** (*Brasserie du Pêcheur*, w.r.t. imports) and **Case C-5/94** (*R v. Ministry of Fisheries and Foods, ex p Hedley Lomas, Ireland*, w.r.t. exports).

References

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⁶Authority for this point is: Case 74/76: *Iannelli & Volpi v. Paolo Meroni* [1977] ECR 557 at para. 9