ARTICLES

Importing and exporting poor reasoning: worrying trends in relation to the case law on the free movement of goods

By Anthony Dawes[*]

A. Introduction

This article focuses on the European Court of Justice's [ECJ] recent case law on the free movement of goods in order to show how the boundaries of the prohibition laid out under Articles 28 to 30 EC are once again coming under strain. Such a development, it will be argued, can be observed both in terms of the modification of the scope of the prohibitions set out by Articles 28 and 29 EC and of their application to purely internal situations.

The following analysis will consider a number of different aspects. Firstly, it will address the apparent convergence of the scope of Article 28 EC with that of the other freedoms and highlight that such a convergence would negate ECJ's intention in *Keck*[1] to ensure the respect for the boundaries of Article 28 EC. Secondly, it will then consider the apparent convergence in the scope of both Articles 28 and 29 EC and ask whether the ECJ is preparing the ground for a unified interpretation of the notion of quantitative restriction. Thirdly, the recent extension of the scope of application of Article 29 EC in the *Jersey Potatoes*[2] will be examined and the risks of such an extension underlined. Finally, a few comments will be made on the current confusion surrounding how and when mandatory requirements can be used to justify restrictions on the free movements of goods both under Articles 28 and 29 EC.

---

[*] LLM in European Legal Studies from the College of Europe, Bruges. Email: athonydawes@yahoo.co.uk

[1] Joined Cases C-267 and 268/91, *Criminal proceedings against Keck and Mithouard*, [1993] ECR I-6097.

[2] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board*, [2005] ECR I-9543.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

B. Article 28 EC and the concept of restriction: convergence between the four freedoms?

Recent cases have showed signs of a movement towards a re-unified approach to the notion of what should constitute a restriction across all four fundamental freedoms. Since the mid 1990's, a divergence has existed between the Court's definition of a restriction to the free movement of goods, based on the concept of discrimination, and restrictions to the free movement of persons (workers and establishment) and services, which has gone beyond the concept of discrimination and is now based on the concept of market hindrance. In relation to goods, despite the subsequent refinements of *Keck*, most notably in *De Agostini*[3] and *Gourmet*[4], the definition of what constitutes a restriction remains squarely built around *Keck* concepts of discrimination. Certain non-discriminatory selling arrangements i.e. arrangements which apply to all relevant traders operating within the national territory and which affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, no longer constitute restrictions to the free movement of goods and therefore fall outside of the scope of Article 28 EC. By contrast, in relation to the free movement of persons (workers, establishment and services), in a series of judgments[5] handed down after *Keck*, the ECJ chose to move beyond the concept of discrimination in relation to these freedoms and adopt an approach clearly centred around obstacles to free movement and the idea of market access. Furthermore, this was done despite it having been argued that the discrimination rationale behind *Keck* should be transposed into each of the other three freedoms.[6] The Court expressly rejected such an analogy and stated that national rules which are liable to prohibit or otherwise impede the free movement of persons (workers and establishment) and services are considered as being incompatible with the scope of the prohibition set out in Articles 39, 43 and 49 EC.

However, it is open to question how far this distinction between what constitutes a restriction to, on the one hand, the free movement of goods and, on the other, the free movement of persons, is still maintainable. Firstly, the inadequacy of the *Keck* test as a tool for market integration has already regularly been highlighted. In his

---

[3] Joined Cases C-34 to 36/95, *Konsumentombudsmannen v De Agostini and TV-Shop*, [1997] ECR I-3843.

[4] Case 405/98, *Gourmet International Products*, [2001] ECR I-1795.

[5] Cases C-415/93 *Bosman* [1995] ECR I-4921 (workers); C-55/94 *Gebhard* [1995] ECR I-416 (establishment) and C-384/93 *Alpine Investments* [1995] ECR I-1141 (services).

[6] Paragraphs 102 and 103 of *Bosman*, paras 33 to 38 of *Alpine Investments*.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

seminal opinion in *Leclerc-Siplec*,[7] AG Jacobs underlined what he considered to be the inappropriateness of the *Keck* discrimination test as a tool for establishing a single market. In his eyes, the discrimination model merely acknowledged the existence of arbitrary restrictions to trade and sorts them into justifiable and unjustifiable categories of restrictions, based on the nature of the restriction (product requirement versus certain selling arrangements), instead of addressing the more fundamental issue of the substantial impact of the measure on access of the products to the market. *"The central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States (…) all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market."*[8] Interestingly, while the Court did not follow AG Jacobs and applied the conditions in a formal manner, it did however adopt AG's Jacobs' point of view in *Bosman* and in *Alpine Investments* in relation to the other freedoms and also showed signs of moving in the direction of market access in *De Agostini* and *Gourmet*.

A similar line of reasoning has also been espoused in the literature by authors such as Weatherill[9] and Barnard[10] who, drawing on AG Jacobs' Opinion in *Leclerc-Siplec* and the Court's case law under Articles 39 and 49 EC, have proposed that the Court should focus upon market access as the basis for the notion of restriction under Article 28 EC rather than just factual and legal equality. As Barnard has remarked, if *Keck* is removed from the context of the free movement of goods and analysed in terms of its purpose i.e. "the removal of matters which do not substantially affect inter-state trade from the purview of Article 28 EC then it is possible to see how *Keck*-like principles would apply equally to the free movement of persons."[11] Adopting this approach would also provide a more "sophisticated approach for analysing the goods and persons case law"[12] and ensure that the construction of the internal market is not imperiled "by focusing on factual and legal equality to the

[7] C-412/93 [1995] ECR I-179.

[8] Paragraph 41 of his Opinion.

[9] Stephen Weatherill, *After Keck: Some Thoughts on how to Clarify the Clarification*, 33 COMMON MARKET LAW REVIEW 885 (1996).

[10] Catherine Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw?* 26 EUROPEAN LAW REVIEW, 35 (2001).

[11] CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU (2004), at 239.

[12] Barnard (note 10), 52.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

exclusion of questions and of market access and obstruction to the construction of cross-border commercial strategies"[13]

Secondly, it has recently been suggested that a reunification of the approach to all four freedoms has indeed already taken place. This has been argued by both AGs Stix-Hackl in her Opinion in *Doc Morris*[14] and Maduro in his Opinions in *Marks and Spencer*[15] and *Cipola*[16]. In *Doc Morris,* AG Stix-Hackl argued that:

> "*the two - traditional - requirements of the Keck formula are, strictly speaking, only expressions of the general requirement that the measure should be not by nature such as to prevent ... access to the market or to impede access any more than it impedes the access of domestic products. This is therefore neither a derivative, nor a third requirement, but, as it were, the - overriding - general criterion.*"[17]

This approach therefore subsumes the two *Keck* conditions under the more general umbrella of market access and brings the case law on the free movement of goods into line with the ECJ's reasoning as regards free movement of persons. Similarly, in both *Marks and Spencer* and *Cipola*, AG Maduro focused on what he considered to be the underlying framework which runs through the case law for appraising all four freedoms. All four freedoms prohibit not only "*discrimination on grounds of nationality (…) but also discrimination imposing, in respect of the exercise of a transnational activity, additional costs or hindering access to the national market for service providers established in other Member States.*"[18]. In this regard, he contends that a similar framework now exists for appraising all four freedoms since "*in respect of the free movement of goods, in Deutscher Apothekerverband, the Court censured a national measure on the grounds that it was more of an obstacle to pharmacies outside Germany than to those within it, thereby depriving the former of a significant way of gaining access to the German market*."[19] Although the exactitude of the AG's assessment of the ECJ's

---

[13] Weatherill (note 9), 896-897.

[14] Case C-322/01 *Deutscher Apothekerverband*, [2003] ECR I-14887.

[15] Case C-446/03, [2005] ECR I-10837.

[16] Joined Cases C-94/04 and 202/04 *Cipolla* and *Marconi*, judgment of 5 December 2006, nyr.

[17] Paragraph 74 of her Opinion.

[18] Paragraphs 37 and 40 of his Opinion in *Marks and Spencer* and para 56 of his Opinion in *Cipola*.

[19] Paragraph 57 of his Opinion in *Cipola*.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

judgment in *Doc Morris* is open to doubt[20], the underlying message coming out of the AG's reasoning is not only that a unified framework for appraising all four freedoms is desirable but already exists.

It is submitted that while a reunification of the notion of restriction across all four freedoms is desirable, it will be necessary for the ECJ to carefully consider whether this does not run the risk of once again re-extending the boundaries of Article 28 EC too far. If the aim of *Keck* was to counter "*the increasing tendency of traders to invoke Article (28) 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*"[21], any substantial re-interpretation of the *Keck* test over and beyond the refinements of *Di Agostini* and *Gourmet* must ensure that it does not defeat *Keck's* underlying purpose. In this regard, it would therefore be helpful for the ECJ to explicitly address the suggestions made by its AGs in recent cases that the framework for assessing restrictions on free movement of goods is now the same as for the other freedoms. Failing this, significant ambiguity will persist in this area, with all its potential damaging consequences.

C. Scope of Articles 28 and 29 EC: identical wording, converging nterpretations?

Despite the identical wording of both Articles 28 and 29 EC and the common interpretation of the notion of what is a quantitative restriction[22], the Court of Justice has consistently interpreted the notion of "measures of equivalent effect to a quantitative restriction" under both Articles in a different manner.

Under the *Dassonville* formula, "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"[23] within the meaning of Article 28 EC. In *Cassis de Dijon*[24], this formula was extended to encompass national rules applying to both national and imported products measures and which are capable in law or in fact to hinder

[20] At paragraph 68 of the judgment, the ECJ bases its reasoning clearly on the two *Keck* principles, as later refined in *Di Agostini* and *Gourmet*.

[21] *Keck*, para 14.

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

[23] Case 8/74 *Procureur du Roi v. Dassonville*, [1974] ECR 837.

[24] Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] E.C.R. 649.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

inter-state trade between Member States. However, at the same time, the Court recognised that these 'indistinctly applicable measures'[25], contrary to those directly discriminatory measures that can only be justified under the limited grounds provided in Article 30 EC, may escape from the ambit of Article 28 EC if they satisfy the open-ended category of 'mandatory (or imperative) requirements' and are proportionate to the pursued aim. However, in response to repeated criticism[26] that its case law[27] was resulting in the extension of the boundaries of the free movement of goods to cases which had little to do with the existence of measures hindering trade between Member States but was rather being used in an attempt to avoid the application of national provisions which, in regulating a given activity, restricted the freedom to trade, the Court of Justice (in)famously ruled in *Keck* that it considered " it necessary to re-examine and clarify its case-law" on Article 28 EC. A distinction has since be drawn between rules relating to product requirements, which remain under Article 28 EC, and 'certain selling arrangements', which provided they apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, fall outside of the scope of Article 28 EC.[28] Subsequent developments of the precise meaning of *Keck* test have since taken place, most notably in *De Agostini* and *Gourmet* and whilst some further refinements of the *Keck* formula may be expected, it appears that the rationale of *Keck* is here to stay, at least for the foreseeable future.

By contrast, the traditional position under Article 29 EC has been that the prohibition on measures having equivalent effect is limited to directly discriminatory measures, without the Court ever explaining the reason for this different interpretation of the same notion. "Indeed, the Court has never articulated a justification for it".[29] Initially, in *Bouhelier*[30], it had seemed that the Court had

[25] This terminology is used with caution as there seems to be as much disagreement over the semantics of Article 28 as with its substance. For examples of diverging appellations, *see* Laurence Gormley, "*Two years after Keck*", 19 FORDHAM INT*L L. J., 866 (1996), and Niamh Nic Shuibhne, *The free movement of goods and Article 28 EC: an evolving framework*, 27 Eur. L. Rev, 408 (2002).

[26] Eric White: *In search of limits to Article 30 of the EEC.* 26 COMMON MARKET LAW REVIEW, 234 (1989); Kamiel Mortelmans, *Article 30 of the EEC Treaty and legislation relating to market circumstances: time to consider a new definition?* 28 COMMON MARKET LAW REVIEW, 115 (1991).

[27] *See* among others, cases 75/81, *Blesgen*, [1982] ECR 1211; 286/81, *Oosthoek*, [1982] ECR 4575; 382/87, *Buet,* [1989] ECR 1235; Case 145/88, *Torfaen v B&Q plc*, [1989] ECR 765; Case C-169/91, *Stoke on Trent and Norwich City v B&Q*, [1992] ECR I- 6635.

[28] Paragraph 16 of the judgment.

[29] Stefan Enchelmaier, *Case C-469/00, Ravil S.a.r.l. v. Bellon Import S.a.r.l. and Biraghi SpA; Case C-108/01, Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd. and Hygrade Foods Ltd* (2004) 41 CMLRev 825.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

chosen to transpose *Dassonville* to Article 29 EC when it stated that "apart from the exceptions for which provision is made by community law, the Treaty precludes the application to intra-community trade of a national provision (…) which constitutes a measure having effect equivalent to quantitative restrictions in so far as such certificates are capable of constituting a direct or indirect, actual or potential obstacle to intra-community trade". However, it was made clear in *Groenveld*[31] that Article 29 EC only "concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a member state and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other member states." This has subsequently been confirmed in numerous instances[32] and little pressure has come either from inside[33] or outside[34] of the Court for the reappraisal of this approach and the adoption of a unitary interpretation of both Articles 28 and 29 EC. The main thrust of the argument against such a unitary interpretation has been that while the wide scope of the prohibition under Article 28 EC is necessary to ensure the removal of inter-State frontiers so that goods, once regulated by one Member State, may move freely between Member States, such a wide prohibition under Article 29 EC would run the risk of products escaping regulation altogether as they would be neither regulated by the law of either the home or host Member State.[35]

Yet despite this apparent consensus, recent case law seems to indicate a movement beyond the traditional interpretation of Article 29 EC, suggesting the emergence of a common vocabulary in the Court's reasoning under both Articles 28 and 29 EC. In *Italo Fenocchio*[36], the Court employed a remoteness/de minimis test, similar to its

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

[31] Case 15/79, *P.B. Groenveld BV/Produktschap voor Vee en Vlees*, [1979] ECR 3409, para 7.

[32] Cases 155/80, *Oebel*, [1981] ECR 1993, C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune*, [2000] ECR I-3743, para 34.

[33] Whilst it is true that the Advocates General in *Delhaize*, *Alpine Investments* and *Bosman* argued for a reformulation of the *Groenveld* test, AG Capotorti in *Oebel* is the only figure to have pleaded for the adoption of a unified approach to Articles 28 and 29 EC.

[34] For a lone voice, see Wulf-Henning Roth, *Wettbewerb der Mitgliedstaaten oder Wettbewerb der Hersteller? – Plädoyer für eine Neubestimmung des Art.* 34 EGV, ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT [ZHR], 78 (1995).

[35] Luigi Daniele, "*Non-discriminatory restrictions to the free movement of persons*", 22 EUR. L. REV. 191, 199 (1997).

[36] C-412/97, *ED SRL/Italo Fenocchio*, [1999] ECR I-3845.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

reasoning in *Krantz*[37]/*Peralta*[38] under Article 28 EC. Certain measures will escape the ambit of Article 29 EC if "the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member States is too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States."[39] In *Schmidberger*[40] and *Commission v Austria*[41], the Court seems to have implicitly gone back on its *Groenveld* formula in ruling that "it has been established in the case-law since the judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, that Articles 28 EC and 29 EC, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade"[42] It was unclear whether the Court had consciously chosen to overrule *Groenveld* or whether this turn of phrase could have been dismissed as a mere slip of the tongue[43]. In any case, whilst there may be some merit in the use of similar approaches under both Articles 28 and 29 EC, this should not mean that flawed reasoning under Article 28 should be extended Article 29 EC simply for the sake of consistency. If "the result is over-extended prohibitions with insufficiently clear limits; an echo of the problem in goods before *Keck*,"[44] then convergence across the free movement of goods is not necessarily a positive.

Similarly, if the Court's underlying aim in *Schmidberger* and *Commission v Austria* is to develop an overarching formula which would be applicable to both Articles 28 and 29 EC, this must be done in a deliberate and coherent manner with due regard to prior case law and to the policy implications of such a choice. Whilst "a good case can be made for the proposition that the Court should – at least in some cases – go beyond a mere discrimination test and apply its strict scrutiny approach to non-

[37]Case C-69/88, *Krantz GmbH v& Co. v Ontranger der Directe Belastingen and Netherlands State*, [1990] ECR I-583.

[38] Case 379/92, [1994] ECR I 3453.

[39] Para 11 of the judgment in *Italo Fenocchio*.

[40] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria*, [2003] ECR I-5659, para 56.

[41] Case 320/03, *Commission v Austria*, [2005] ECR I-9871.

[42] *Commission v Austria* at para 67 (emphasis added).

[43] The *Schmidberger* case takes up the Court's earlier statement in case C-265/95 *Commission v France* [1997] ECR I-6959, paras 28 and 29. However, whilst the decision *Commission v France* only referred to Article 28 and not to Article 29 EC, by contrast to *Schmidberger* which added in the reference to Article 29 EC.

[44] Gareth Davies, *Can selling arrangements be harmonised?*, 30 Eur. L. Rev. 370, 382 (2005)

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

discriminatory regulations,"[45] the complete extension of *Dassonville* to Article 29 EC should be resisted as and the although the wording of Articles 28 and 29 EC are identical, their scope differ when viewed in terms of regulatory burdens. To be sure, the rationale behind Article 28 EC and the concept of mutual recognition is to prevent goods become subject to a dual regulatory burden i.e. that of both the home and host state. Products are only subject to the regulatory requirements of the goods' State of origin and the State of import can only impose its standards on the goods under certain conditions (absence of harmonisation, examination of the criteria of necessity and proportionality, prohibition of arbitrary discrimination or disguised restriction on trade). By contrast, national rules on exports normally only impose a single burden as they apply both to domestic and export goods. It is only where national rules have an extraterritorial effect i.e. where a State extends either the application of its marketing and distribution rules or its regulations concerning the composition of a product to exported goods that a risk of the existence of a dual regulatory burden arises. In these circumstances, it would be logical that a similar solution be reached under Article 29 EC as would be reached under the free movement of services.[46]

However, in all other cases, the extension of the scope of Article 29 EC runs the risk of creating a situation where goods are not subject to *any* regulatory burden at all. As has been highlighted by Snell and Andenas, any extension of the scope of Article 29 EC "would undermine the trademark function of national legislation. Consumers could no longer fully trust products from a country known for its high regulatory standards."[47] It follows that any extension of the scope of Article 29 EC to mirror that of Article 28 EC must be carefully thought through and that while such an option would have the benefit of consistency, it may bring with it serious challenges to the regulatory powers of Member States and extend the ambit of the free movement provisions beyond their natural boundaries, with the risk of creating a similar situation under Article 29 EC as existed pre-*Keck* under Article 28 EC.

---

[45] Wulf-Henning Roth and Peter Oliver, *The internal market and the four freedoms,* 41 Common Market Law Review, 407, 419 (2004)

[46] That is to say the extension of the reasoning in the *Alpine Investment* case to Article 29 EC.

[47] Jukka Snell and Mads Andenas, *How Far? The Internal Market and Restrictions on the Free Movement of Goods and Services: Part 2*, 3 Int'l & Comp. Corp. L. J. 361 (2000), at 376.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

D. Article 29 EC and its (mis)application to purely internal situations

The recent decision in *Jersey Potatoes* has also shown the ECJ willing to extend its controversial case law on the application of both Articles 23-25[48] and 28 EC[49] to purely internal situations to Article 29 EC[50]. The case concerned the Jersey Potato Export Marketing Scheme, which was set up in order to regulate the marketing of the Jersey Royal potato in the United Kingdom and compatibility with the Treaty provisions on the free movement of goods. While both AG Leger and the ECJ concluded that, in the light the special status of Jersey under Community law[51], Jersey and the United Kingdom should be considered as forming part of a single Member State, they disagreed as to the subsequent application of the Treaty provisions on free movement to such purely internal situations. In his Opinion, AG Leger came out strongly against such a possibility. He criticised the Court's previous judgments in *Lancry*, *Simitzi* and *Carbonati Apuani* which had extended the territorial prohibition of charges having an effect equivalent to an import or export customs duty under Articles 23 and 25 EC to goods on goods entering a region from another part of the same State and strongly urged against transposing such reasoning to Article 29 EC.

In defining the internal market in Article 14(2) EC as they did "the authors of the Single European Act did not intend to call in question the framework that had been clearly laid down by the EEC Treaty for application of the rules on the free movement of goods, persons, services and capital,"[52] and that "the expression 'area without internal frontiers' in Article 14(2) EC means nothing more than an area within which obstacles to trade, between Member States, are prohibited"[53]. Were

[48] Joined Cases C-363/93, C-407/93 to C-411/93 *Lancry and others* [1994] ECR I-3957; C-485/93 and C-486/93 *Simitzi* [1995] ECR I-2655, and C-72/03, *Carbonati Apuani,* [2004] ECR I-8027.

[49] Case C-321/94 *Criminal Proceedings against Pistre and Others* [1997] ECR I-2343 and C-448/98 *Guimont* [2000] ECR I-10663.

[50] On purely internal situations and reverse discrimination, see among others Enzo Cannizzaro, *Producing 'Reverse Discrimination' through the exercise of EC competences*, 17 YB EUR. L. 29(1997),; Miguel Poiares Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination" in, THE FUTURE OF EUROPEAN REMEDIES (Claire Kilpatrick, Tania Novitz and Paul Skidmore eds., 2000), at 117; Niamh Nic Shuibhne, *Free movement of persons and the wholly internal rule: Time to move on?* 39 COMMON MARKET LAW REVIEW, 731 (2002).

[51] *See* Article 299 EC and Article 1 of Protocol n° 3 on the Channel Islands and the Isle of Man annexed to the Act of Accession of the United Kingdom.

[52] Paragraph 129 of his Opinion.

[53] Paragraph 134 of his Opinion.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

the Court to have intended to reverse its traditional case law[54], which has consistently denied the application of Articles 28 and 29 EC to purely internal situations, such a reversal cannot be implied from such a general statement, taking into account the fundamental change this would have on the application of all the Treaty rules on free movement to purely internal measures.

The Court, unfortunately, chose not to follow the advice of the AG. Despite the purely internal nature of the actual dispute, as the effect of the Export Marketing Scheme is such as "to establish a difference in treatment between Jersey's domestic trade and its export trade to the United Kingdom in such a way as to provide a particular advantage for the island's production or its domestic market, in this case at the expense of the United Kingdom's trade,"[55] this is sufficient to trigger the application of Article 29 EC. The Court therefore seems to be extending the scope of the *Groenveld* formula to capture not only measures which "provide a particular advantage to domestic products against those of other Member States but also where such advantages at provided at the expense of those from another region of the same Member State. However, at the same time, the Court also bases the application of Article 29 EC in the present circumstances on the fact that the scheme "is also likely to be an obstacle to the export of those goods to other Member States" and that "such a pattern of re-exports to other Member States of Jersey Royal potatoes from Jersey is certainly conceivable."[56] Whilst this is not sufficient to negate the judgment's previous pronouncement on the applicability of Article 29 EC even where the requisite cross border element is lacking, the presence of these two different lines of justification can be seen as the reflection of internal divisions within the Court, with some judges preferring to rely on the traditional requirement of the presence of a cross border element whilst others advocating for the extension of Article 29 EC to purely internal situations.

Once again, such a move seems to have been undertaken in an implicit and undercover manner and is indicative of the Court's lack of sense of direction in its dealings with Article 29 EC. Although some commentators have attempted to justify this approach by the fact that as "*with the advancement of the establishment of the internal market, as evidenced by decreasing frequency of obstacles in the way of cross-border trade between Member States (…) the emphasis will be increasingly placed on the functioning of the internal market. Genuine market unity requires more than simply the*

[54]Cases 314–316/81, *Waterkeyn*, [1982] ECR 4337, 286/81 *Oosthoek's Uitgeversmaatschappij*, [1982] ECR 4585, and 355/85, *Cognet*, [1986] ECR 3231.

[55] Paragraph 76 of the judgment.

[56] Paragraphs 80 and 81 of the judgment.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

abolition of obstacles at borders,"[57] such a re-evaluation appears to be being made by the ECJ without any explicit recognition of its potential implications. If the ECJ is saying that it is now willing to the free movement provisions of the EC Treaty to a national measure whenever there is a mere possibility that such a measure may, at some point in the future, affect inter-state trade, this therefore begs the question of whether there will one day ever be any national measures which can escape the application of EC law[58] and harks back to the situation under Article 28 EC pre-*Keck*. Clarification of the implications of extending the scope of the free movement of goods provisions to purely internal situations is therefore required in order both to preserve the overall coherence of the free movement of goods and to ensure that the aims of the Treaty are being upheld.

E. Article 30 versus the mandatory requirements: still nothing new under the sun?

Finally, the question of the apparent implicit extension of the *Dassonville* formula to Article 29 EC can also be linked to the issue of the possible extension of the mandatory requirements doctrine as laid out in the *Cassis de Dijon* case to allow national measures restricting exports to escape from the prohibition laid out under Article 29 EC. The classic position has been that the mandatory requirements doctrine is of no application to Article 29 EC because on the one hand, Article 29 EC only prohibits distinctly applicable measures whereas the mandatory requirements can only be used to allow indistinctly applicable measures to escape the application of Article 28 EC.

However, there now appears to be a double movement pointing towards the acceptance of the use of the mandatory requirements to justify measures caught under Article 29 EC. On the one hand, as has already been argued, the Court seems to be moving towards a common definition of the notion of measure having an equivalent effect under both Articles 28 and 29 EC. If this is the case, and indistinctly applicable measures now fall within the scope of Article 29 EC, then the corollary of this will be that the mandatory requirements can be used to allow such indistinctly applicable measures to escape the prohibition laid out under Article 29 EC. On the other, this is also taking place through the gradual abolition of the fact that the mandatory requirements can only be used to justify indistinctly applicable

[57] Opinion of AG Geelhoed in Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and others*, [2002] ECR I-11453, para 148.

[58] *See* Biondi "*In and out of the Internal Market: Recent developments on the principle of free movement*", 19 YEL, (1999) 469, 485.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

measures and not distinctly applicable measures. However, this has not, as yet, been done expressly by the Court but rather by way of the Court classifying as 'indistinctly applicable", measures which were clearly directly discriminatory.[59] For example, in *Decker*[60] the Court was willing to consider whether a national measure that required prior authorisation to be obtained for the reimbursement of the purchase of glasses outside of Luxemburg could be justified under the mandatory requirement of the preservation of the financial balance of the social security system. Similarly, in *PreussenElektra*[61], the Court assessed whether German legislation requiring regional electricity distribution undertakings to purchase at fixed minimum prices electricity produced from renewable energy sources within their area of supply could be justified on the basis of the mandatory requirement of the protection of the environment. For all these reasons, it has therefore been advocated that "the Court is now moving away from its traditional categorisation of the mandatory requirements towards acceptance that they should be treated in the same way as the grounds of justification expressly set out in Article 30.[62]

However, not only is the manner in which the ECJ has been undertaking such acceptance artificial[63], but also it once again fails to address the underlying theoretical difficulties of such a project. While it is tempting to consider this gradual evolution as a practical case-by-case response to the expansion of the EC's activities into new areas[64], it is important to remember the different scope of application of both the mandatory requirements and the exceptions provided under Article 30 EC[65]. "The question whether or not a measure applies without distinction to domestic and imported products is from a logical point of view a preliminary and neutral one. Its only function under the Court's case-law is to determine which

---

[59] *See* cases 274/87 *Commission v Germany* [1989] ECR 229, C-2/90 *Commission v Belgium (Walloon Waste)* ECR I-4431 and C-389/96 *Aher-Waggon* v *Germany* [1998] ECR I-4473.

[60] C-120/95 *Decker v Caisse de maladie des employés privés*, [1998] ECR I-1831.

[61] C-379/98 *PreussenElektra v Schleswag*, [2001] ECR I-2099.

[62] PETER OLİVER & MALCOM JARVİS, FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY: UNDER ARTICLES 28 TO 30 OF THE EC TREATY, 144 (2003)

[63] Peter Oliver, *Some Further Reflections on the Scope of Articles 28–30 (ex 30–36) EC'*, 36 COMMON MARKET LAW REVIEW, 783 (1999), and the Opinions of AG Jacobs in Cases C-203/96 *Chemische Afvalstoffen Dusseldorp v Minister van Milieubeeher* [1998] ECR I-4075 and C-379/98 *PreussenElektra v Schleswag*, [2001] ECR I-2099.

[64] Alina Tryfonidou, "*Comment on Case C-293/02, Jersey Potatoes,* (2006) 43 CMLRev, pp. 1727, 1741.

[65] For supporters of this approach, *see* Alfonso Mattera, *Le marché unique européen – Ses règles, son fonctionnement (*1990), 274, Vassilis Hatzopoulos, *Exigences essentielles, impératives ou impérieuses: une théoire, des theories, ou pas de théorie du tout?* Revue Trimestrielle de Droit Européen 191, (1998)

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

grounds of justification are available."[66] Article 30 EC only applies once a measure has been classified as a quantitative restriction or measure having equivalent effect and serves as a justification for otherwise prohibited measures that the question of the justification of the measure under Article 30 arises. It is only once a measure has been deemed to fall under the prohibitions laid down in Articles 28 and 29 EC. By contrast, the Court applies mandatory requirements when assessing whether a measure constitutes a measure having equivalent effect for the purpose of Article 28 EC and whether they can allow a measure to escape from the application of Article 28 EC. Mandatory requirements do therefore serve as a justification for a measure that is contrary to Article 28 EC but rather allow such a measure to escape altogether the scope of Article 28 EC.

All this is not to say that the mandatory requirements should not be allowed to justify distinctly applicable measures, nor that the *Cassis* case law should not be extended to export measures. In this respect, the author fully supports the statement of AG Jacobs in *PreussenElektra* that "in view of the fundamental importance for the analysis of Article 30 of the Treaty of the question whether directly discriminatory measures can be justified by imperative requirements, the Court should (…) clarify its position in order to provide the necessary legal certainty."[67] However, if such a step is to be undertaken, not only must the Court show "the courage to disown its earlier approach"[68] but it must also be aware of the potential impacts of any such re-evaluation.

F. Conclusion

The case–law across the free movement of goods is currently suffering from several areas of ambiguity, due to the ECJ's failure in to expressly confront the potential implications of its recent judgments. Firstly, the apparent convergence of the scope of Article 28 EC with that of the other freedoms is taking place without any indication of the potential dangers for the respect for the boundaries of Article 28 EC. Similarly, as regards Article 29 EC, recent judgments suggest that the ECJ is moving away from its previous restrictive interpretation of Article 29 EC and applying it to both indistinctly applicable measures and to purely internal situations, without any consideration of the wider impact of these movements.

[66] Opinion of AG Jacobs in *PreussenElektra*, para 225.

[67] Opinion of AG Jacobs in *PreussenElektra*, para 229.

[68] OLIVER & JARVIS (note 62), 220.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press

Finally, the situation as regards mandatory requirements continues to remain unclear and there is a real need for the ECJ to end this situation as soon as possible.

For all these reasons, the author therefore finds it necessary to refer back to the recommendation of AG Tesauro in *Hunermund* who pointed out "the need to achieve clarity by means of criteria that are as precise and unambiguous as possible and, even more importantly, of a conscious and explicit basic choice regarding the need for (or expediency of?) review."[69] Such a statement still holds true today and it is hoped the ECJ heeds these words of warning in the near future, at the risk or otherwise there is the risk of such worrying trends in relation to its case law on the free movement of goods continuing to develop.

[69] AG Tesauro in Case C-293/92 *Ruth Hünermund a.o. v Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787, at para 25.

https://doi.org/10.1017/S2071832200005927 Published online by Cambridge University Press