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Contents

Summary

Article 28 is one of the key Treaty Articles concerning the integration of national markets. But finding the right way to apply Article 28 is far from being easy, as history shows.

The ECJ has not been consistent in its case law on Article 28 EC. The main problem in its approach in the application of Article 28 has been the wideness of the *Dassonville*-formula, which by its wording catches smallest restrictions, and when such a rule is considered to catch indistinctly applicable measures, as was decided in *Cassis de Dijon*, the limits of the outer boundaries of Article 28 almost disappear, because almost every rule which regulates trade in the Member States can in fact be said to affect intra-Community trade in some way. This approach by the ECJ therefore led to problems in setting limits to the outer boundaries of the Article 28, as became obvious in *Cinéthéque* and later the Sunday trading cases.

Before its ruling in *Cinéthéque* the ECJ seemed to make a distinction between equal burden and dual burden rules when applying Article 28 EC to limit its scope, and although that approach is primarily based on the question if there has been any discrimination, and not on the effect of the rule as in *Dassonville*, this approach at least made the application of Article 28 easier. But in *Cinéthéque* the ECJ decided to use a different approach, and applied Article 28 to an equal burden rule, and based this opinion on the presumption that the application of the system there might create barriers to intra-Community trade. In *Cinéthéque* the restriction was a complete ban on sale for a certain time, and maybe the ECJ felt that for that reason it was difficult to let the rule fall outside the scope of Article 28. But nevertheless this judgment clearly got the attention of traders and defence lawyers throughout Europe. This judgment meant that non-discriminating rules with little and uncertain potential effects on intra-Community trade could be tried before the ECJ.

As an answer to criticism on this wide approach to apply Article 28 the ECJ gave the ruling in *Keck*, and there a new rule-based approach to Article 28 was presented. According to it certain selling arrangements would fall outside the scope of Article 28, if they fulfilled the conditions laid down in the judgment. But as has been pointed out by many, and perhaps most clearly by Advocate General Jacobs, this approach, to make a distinction between categories of rules, letting one category fall inside the scope of Article 28 but the other one outside its scope is not just. The presumption in *Keck* that "selling arrangements" are "not by nature such as to prevent…access to the market" is very questionable to say the least. It is right that restrictions on circumstances in which certain or all goods might be marketed do normally not obviously interfere with the free movement of goods but nevertheless it is clearly wrong to say that such a legislation never has effects on trade between Member States. Although its

effects are probably most often insignificant it can in some circumstances have some effects.

In my opinion *Keck* was not a good judgment. It was for example very unclear regarding the scope of the important phrase "selling arrangements". And in later cases the ECJ decided to interpret this phrase in a wide way, for example to advertising. In my opinion the ECJ should have applied *Keck* in a narrow way, making distinction between static and non-static selling arrangements, by not applying *Keck* to the ways which include how a manufacturer chooses to market his specific product. Then it could for example have avoided the difficulties it later experienced in applying *Keck* to advertising. *Keck* is an exception from the main rule in Article 28, and that should mean that it should be confined narrowly.

Keck was intended to limit the scope of Article 28 which many commentators considered too unclear. It was clearly intended to open a way out of the scope of Article 28 for rules which only had uncertain and indirect effects on intra-Community trade. It was in other words intended to keep farfetched claims from falling within the scope of Article 28. But this could have been done with a different approach.

The main problem in the application of Article 28 has been that the ECJ has constantly refused to apply a *de minimis* rule to limit its scope. But on the other hand the ECJ has, in cases such as *Peralta* and *DIP SpA*, stated that when the effects of a measure are too "uncertain and indirect" the measure should fall outside the scope of Article 28. In my opinion the ECJ could use this approach more frequently. It makes a lot more sense to let a rule fall outside the scope of Article 28 because of the fact that its effects are uncertain and indirect than basing the judgment on the fact that the rule falls inside the scope of a certain category of rules. By reaching the conclusion in *Keck* the ECJ went in my opinion too far from the essence of Article 28, *Dassonville* and *Cassis*. It is a fact that the effects of selling arrangements in the field of free movement of goods are generally uncertain and indirect and therefore they could in most cases fall outside the scope of Article 28, as the rules in *Peralta* and *DIP SpA*. It can even be said that there are certain similarities between the approaches in *Peralta* and *DIP SpA* on one hand and *Keck* on the other. In *Peralta* and *DIP SpA* the ECJ concluded that the rules fell outside the scope of Article 28 because their effect were "too uncertain and indirect", and the presumption in *Keck* that national rules which restrict certain selling arrangements do not hinder trade within the meaning of the *Dassonville*-formula is in fact based on a similar approach. The difference is that according to *Keck*, rules falling within a certain category of rules are presumed to have such indirect and uncertain effects.

It has not yet been made clear by the ECJ if *Keck* should be applied to other fields than free movement of goods. In my opinion it should not. Although *Keck* was not the right approach to limit the outer boundaries of Article

28, it is true that the selling arrangements which were precluded from the application of Article 28 do not affect intra-Community trade in most circumstances. So the distinction made in *Keck* between rules regarding selling arrangements and other rules does make some sense in the field of goods. But the nature of the other fields is on the other hand different so even if a similar distinction can be made between rules in this field it would be wrong to let a category of rules fall outside the relevant Treaty Articles without further justifications. In the other fields this distinction can therefore not be made between categories of rules.

Regarding how the ECJ has limited the scope of Articles 39 and 49 EC it is interesting to take a look at on what grounds the ECJ reached its conclusion in *Graf*. There it completely ignored *Keck* and stated that the effects of rules in question were too uncertain and indirect for the rules to be caught by Article 39. And I believe that the ECJ could use this kind of approach on more occasions, not only in those two fields, but also within the free movement of goods.

Preface

Deciding a topic for my masters thesis was not an easy task. But at the time when a decision had to be taken, I was attending the very interesting case-based course that my supervisor, Peter Gjörtler, gave on the four freedoms. In that course the case of *Keck and Mithouard* caught my attention, and after a discussion with Mr. Gjörtler I decided to write my thesis about this judgment and its effects.

I would like to thank Mr. Gjörtler for his support during the time I was working on the thesis, and especially for always being so positive. I would also like to thank my children, Gunnar and Kolbrún, for understanding that they could not play computer-games while I was writing the thesis. Last, but certainly not least, I would like to thank my wife Anna for all her support.

Abbreviations

CMLRev	Common Market Law Review
EC	European Community(+Treaty if after an article)
ECJ	European Court of Justice
ECR	European Court Reports
ELJ	European Law Journal
ELRev	European Law Review
EU	European Union
UK	United Kingdom of Great Britain and N-Ireland

1 Introduction

> …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 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 those from other Member States.
>
> Paragraph 16 of *Keck and Mithouard*.[1]

Deciding the outer boundaries of Article 28 EC has proven to be a difficult task for the ECJ. In *Dassonville* and *Cassis de Dijon* the ECJ provided a very wide approach to the Article, and that led to problems in later cases and criticism by commentators. In the famous *Keck* judgment the ECJ, as an answer to the criticism, went back on its earlier rulings and introduced a new approach. According to it restrictions on certain selling arrangements were to fall outside the scope of Article 28 altogether if they fulfilled the conditions laid down in the judgment.

But *Keck* has also been criticised, and has been considered by many as a bad clarification if not altogether wrong, and commentators are in fact still recommending different approaches on how to decide the outer boundaries of Article 28 EC. Most commentators agree on that there have to be certain limits on its outer scope, because of how wide the *Dassonville*- formula is, but there is far from being an agreement on the grounds which the limits should be decided upon.

The aim of this thesis is to try to find out if the approach which the ECJ chose in *Keck* to limit the scope of Article 28 was the right one, or if some other approach had better served the purpose of the judgment. I will discuss how the ECJ chose to develop the approach introduced in *Keck*, and analyse the cases which have provided a clarification of how *Keck* should be applied. I will also discuss if the approach taken in *Keck* should be applied to other fields than free movement of goods and analyse cases where that has been taken into consideration.

To do this I will begin by giving a short overview on rules regarding the free movement of goods and the problem at hand in deciding the outer boundaries of Article 28. Then I will go through the development of case law of the ECJ regarding Article 28 from *Dassonville* until *Keck* was decided. Then there will be a chapter about the judgment in *Keck* itself, which will be followed

[1] Joined cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1991] ECR I-6097.

by a chapter on the case law after *Keck* was decided, where the ECJ developed this new approach. Then I will discuss four different approaches for deciding the outer limits of Article 28, that is, the solution before *Keck*, the solution in *Keck* itself, the solution to look primarily at if a measure causes a hindrance to market access and finally the question if a *de minimis* rule should be introduced in cases regarding Article 28. I will then discuss if *Keck* should be applied to other fields than the free movement of goods, and finally there will be a conclusion.

This paper is based on a literature study, legislative material and on the case law of the European Court of Justice.

2 A short overview on rules regarding the Free movement of goods

In Article 14(2)EC it is stated that;

> the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provosions of this Treaty.

These four fundamental freedoms of movement[2] are of course all very important, but the free movement of goods has been considered to be the most important one, and in fact the corner stone of the Community, because the access to a Community-wide market has been a primary reason for membership by many Member States.

In Title one of part three of the EC Treaty the rules regarding the free movement of goods are laid down. They are supposed to ensure the removal of duties, quotas and quantative restrictions on the movement of goods within the Community. The purpose of these rules is to ensure that competition between goods coming from different Member States is not prevented or distorted by governent provisions which limit the amount of such goods which can be imported (quotas) or increase their price(tariffs).

The free movement of goods can be distorted in many ways, and those possible distortions are dealt with in different Articles of the Treaty. The most obvious form of protection by a Member State is when it attempts to erect custom duties or charges having equivalent effect, trying to make foreign goods more expensive then domestic ones. This is dealt with in Articles 23 – 25 EC which are of central importance to the establisment of a custom Union.[3] Other provisions which relate closely to the rules regarding custom duties are the provisions on discriminatory taxes. The central provision in that area is Article 90.[4] Its purpose is to prevent the obectives of Articles 23 – 25 being achieved by discriminatory taxation. Articles 23 – 25 would in fact be of a little help if

[2] According to some commentators, for example Kapteyn and Themaat (page 576), the freedoms are five, with freedom of payment as the fifth freedom.

[3] In Article 23(1) the basic rule is stated:"The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common custom tariff in their relation with third countries."

[4] In Article 90 it is stated that: " No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Member States could prejudice foreign goods when inside its territory by discriminatory taxation.

Although the rules on duties, charges and taxes, which are laid down in the Treaty are very important, they would not have been sufficient to guarantee free movement of goods within the common market.[5] Each Member State then could have created other barriers to trade of a non-pecuniary nature, which are also capable of hindering free flow of goods between Member States. That is why Articles 28 EC has proven to be so important in the development of the internal market. That is not least because of the ECJ´s jurisprudence under the Articles which has made a huge contribution to free movement of goods within the Community.

Under Article 30 EC certain prohibitions or restrictions on imports, exports or goods in transit are allowed. They have to be justified on grounds of reasons stated in the Article.[6]

[5] For an overview of those rules see for example Craig and de Búrca, p. 548 – 579 and Steiner and Woods, p. 139 –150.

[6] These reasons are: public moralty, public policy or public security, the protection of health and life of humans, animals or palnts, the protection of national treasures possessing artistic, historic or archaelogical value or the protection of industrial and commercial property. According tto Article 30 this prohibitions or restrictions shall on the other hand not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

3 The search for the right test for Article 28 EC

Article 28 EC provides that;

> quantative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 28 is one of the key Treaty Articles concerning the integration of national markets. Through integration the Community is in fact trying to limit the influence of national governments on production and consumption activities in the Community. This stems from both economic and political concerns.

But finding the right way to apply Article 28 is far from being easy, as history shows. It has been pointed out that the borderline between legitimate and illegitimate national regulations under Article 28 should reflect the balance between the desire for integration on one hand, and the desire for government intervention on the other. Therefore national measures should be struck down under Article 28 which are more harmful than beneficial, that is, their obstructive effect on integration of national markets would overweight their valued regulatory contribution. The test is therefore always essentially a balancing test and depends on whether anti-integrationist effect of the national measures is considered to outweight its valued regulatory effect or not.[7]

Different tests has been used by the ECJ over time, and other types of tests have been suggested by commentators. And it is in fact far from being easy to find find out how the test should be, as will become obvious later in this paper.

It has been pointed out that when one compares different possible tests, two elements should be considered, that is error costs and administrative costs.[8] An unclear test on the limits of the scope on Article 28 can lead to errors, for example by wrong judgments or that national measures which would be struck down under a full test on Article 28 are not challenged because of how unclear the rules are. Error costs are the costs which can be attached to those errors. Administrative costs on the other hand include the operational costs of the courts and also the costs of the parties concerned, and the fact is that a full test can be extremely expansive.

The best test is of course a test which minimises both the sum of error costs and administrative cost. The trick is therefore to find a test which is as full as possible, and therefore minimises error costs, without being to expansive for the courts and the parties.

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[7] Wils, page 478-9.
[8] Wils, page 480.

As has been mentioned the ECJ has not been consistent in the difficult task of deciding on the outer boundaries of Article 28. The wording of the Aricle is very open so the way the ECJ chose to interpretet it was very important, not least for the integration process in the Community. And the ECJ went in fact very far in letting national restictions to trade fall inside the scope of Article 28.

In the next chapter an overview will be given on how the ECJ used different approaches in its cases on Article 28 before it gave its decision in *Keck*.

4 The development of case-law on Article 28 EC.

The ECJ has been far from being consistent in its case law on Article 28 EC. In *Dassonville* and *Cassis* it provided a very wide formula in its judgments of what should be regarded as measures having effects equal to quantative restrictions under Article 28. That on the other hand led to problems in setting limits to the outer boundaries of the Article, which later led to the ECJ´s decision in *Keck and Mithouard,* which was intended to limit the scope of the Article.

4.1 The basic rules.

According to Article 28 EC ”quantative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”.

The first question which arises when one reads Article 28 is what can be considered to be ”quantative restictions”. That came into consideration in the *Geddo* case in 1973, and was defined very broadly there.[9]

When it had been defined what ”quantative restrictions” were, according to Article 28, the next question which arose was of course what could be regarded to be ”measures having equivalent effect” to quantative restrictions. The Commission provided guidance to the Member States to the meaning and scope of the term by passing Directive 70/50, and in Article 2(3) of the Directive the Commission provided a non-exhaustive list of measures capable of having effect equivalent to quantative restrictions. The Directive is not applicable anymore but still it continues to give a general idea of the scope of the term “measures having equivalent effect” in Article 28.[10]

[9] Case 2/73, *Geddo v. Ente Nazionale Risi* [1973] ECR 865. It was stated there that it meant ”measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit”

[10] The measure there include: minimum or maximum prices specified for imported products, less favourable prices for importes products, lowering the value of the imported product by reducing its intrinsic value or increasing its cost, payment conditions for imported productswchich differ from those for domestic products, conditions in respect of packaging, composition, identification, size, wight, etc. which only apply to imported goods or which are different and more difficult to satisfy than in the case of domestic goods, the giving of 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 requirement 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 imoprting State.

But it was in the famous *Dassonville*-case that the ECJ finally laid down its wide interpretation of what constituted "measures having equivalent effect" to quantative restriction under Article 28.[11]

4.1.1 Dassonville

In *Dasonville* the ECJ provided its famous *Dassonville*-formula. According to it "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having effect equivalent to quantative restrictions."[12]

The *Dassonville*-case regarded Belgian law that provided that goods bearing a destination of origin could only be imported to Belgium if accompanied by certificate from the exporting country where it was confirmed that it allowed such a designation. When Dassonville imported Scotch whisky into Belgium from France without such a certificate he was prosecuted. He argued that the Belgian law should fall under the prohibition in Article 28 EC.

After providing its so called *Dassonville*-formula the ECJ stated that measures taken by Member States to prevent unfair practices should be reasonable and the means of proof required should not act as a hindrance to trade between Member States. It concluded that the requirement of a certificate in this case constituted a measure having equivalent effect to a quantative restriction under Article 28 EC.

According to the *Dassonville*-formula, the important element in proving the existance of measures equivalent to quantative restrictions is the effect of the restriction. It does not require discriminatory intent. The *Dassonville*-formula is also very broad. The rules only have to be capable of hindering trade indirectly and potentially to fall under the formula. As should have been expected this wideness of the formula created problems in later cases.[13]

One problem after this judgment was the question if the *Dassonville*-formula could only be applied to discriminatory rules, as the rules in the case itself, or if it would also apply to rules which were non-discriminatory, but had discriminatory effect indirectly. There are in fact many rules which do not seem to discriminate between goods dependent upon origin, but nevertheless create a real barrier to the entry of products into Member States. The possability to apply Article 28 to such indistintly applicable rules was opened in *Dassonville,* and this question was finally answered in the famous *Cassis de Dijon,* where the ECJ laid also down the "rule of reason" on how such rules, although inside the scope of Article 28, could be justified and excepted from the Article without using the exceptions in Article 30 EC.

[11] Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837.
[12] Para. 5 of the judgment.
[13] See chapter 4.2.

4.1.2 Cassis de Dijon

Cassis de Dijon[14] is an extremely important case in the history of the ECJ, and has even by some be considered to be the most important one. There the ECJ came to the conclusion that Article 28 not only caught measures which were directly discriminating, but also indistinctly applicable rules, which applied both to national and foreign goods.

The case conserned West German rules which governed the marketing of alcohol beverages. According to the rules the minimum alcohol strenght of various categories of alcohol products was fixed at 25% of alcohol per litre. The applicant in the case had intended to import the liqeur ”Cassis de Dijon” into Germany from France, but was refused by the German authorities on grounds of those rules, because the liqueur only had alcohol content between 15 and 20 per cent. The applicant argued that the rules constituted measures having equivalent effect to quantative restrictions, but the German government cited human health and consumer protection in defence of its legislation.

The rule in this case was not directly discriminating, since it applied to both national and foreign goods. Therefore the question was if the *Dassonville*-formula would apply to those restrictions, which were indistinctly applicable.

The ECJ came to the conclusion that it did. It stated that although obstacles to movement within the Community had to be accepted in certain exceptional circumstances the main rule was that they could not be accepted.[15] The only exceptions from the main rule would be if the rules were necessary in order to satisfy mandatory requirements relating in particular to certain aspects which the ECJ laid down in the judgment.[16] The list provided there was not exhaustive.[17]

As was said here above this case was extremely important for the European Community. According to it, it was not really necessary in all circumstances to harmonize rules with legislative measures. According to the ECJ, rules which affected importation of foreign goods or made it difficult could be caught by Article 28 EC and were therefore illegal, if not justified on grounds of mandatory requirements. Those mandatory requirement, which in fact constitute

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[14] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein,* [1979] ECR 649, [1979].

[15] Para 8 of the judgment. The ECJ actually states this rule ”backwards”. It stated 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 those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fariness of commercial transaction and the defence of the consumer.”

[16] In *Cassis* the rule of reason was not in terms confined to indistinctly applicable measures. But shortly after *Cassis* in *Gilli* (case 788/79) the court stated that this principle should only apply where national rules apply without discrimination.

[17] The ECJ has later provided for many more mandatory requirements in its judgments such as the enviroment, pluralism of the press and fostering certain form of art.

the rule of reason, are considered within the application of Article 28, seperatly from any analises based on the exceptions in Article 30.[18]

Another impotant part of the judgment is paragraph 14(4) where the ECJ stated that once good have been lawfully marketed in one Member State, they should be admitted into any other Member State without restrictions, unless the State of import could successfully envoke one of the mandatory requirements. This has been called the principle of mutual recognision. Member States must respect the trading rules of other Member States and may not seek to impose their own rules on goods which have already been markeded in another Member State.

The ECJ´s decision in *Cassis* to widen the scope of Article 28 should not have come as a big surprise. The wording of Article 28 is extremely open, and the door to the conclusion reached in *Cassis* was in fact opened in *Dassonville*. But on the other hand one should have expected that this approach could create problems regarding the outer boundaries of Article 28. By extending the scope of the Article to all indistinctly applicable measures which affected intra-Community trade one should have expected that there could be a problem to decide the limits of the Article, because the fact is that it can be said that all rules which concern trade, directly or indirectly, can affect the free movement of goods. So this approach of course opened up the opportunity for traders, which were unhappy with legislation which somehow regulated trade, to try to get the legislation declared void because it violated Article 28.

And that was exactly what happened. Traders began to try to use Article 28 in various circumstances and the ECJ began experiencing difficulties in where to set the outer boundaries of the Article.

4.2 The basic rules become unclear.

4.2.1 Cinéthéque.

The *Cassis* doctrine was applied in many cases, and in the beginning it did not seem to create any problems.[19] But later some questions began to arise regarding the outer limits of where Article 28 could be applied. The ECJ began to show a tendency to apply the *Dassonville*- formula "mechanically" and to require measures which could affect the volume of import, but with no potential to really hinder import to be justified under the rule of reason. As was mentioned above the fact is of course that all rules which regulate trade can be

[18] See further discussion in chapter 7.1.

[19] Examples of the many cases where the Cassis doctrine was applied are Case 407/85, *Drei Glocken v. USL Centro-Sud* [1988] ECR 4233 and case C-362/88 *GB-INNO-BM v. Confédaration du Commerce Luxembourgeois Asbl* [1990] ECR I-667.

said to affect the free movement of goods. Therefore the important question was where and how the limits of the outer boundaries of Article 28 should be set.

One way of making a difference was to make a distinction between dual-burden and equal-burden rules.[20] Dual burden rules are rules which apply to imported goods which have already fulfilled similar rules in the home State. An example of such rules are the rules which the ECJ took into consideration in *Cassis de Dijon*. Equal burden rules on the other hand apply to all goods, are not designed to be protectionist, and do not have greater impact on the sale of foreign goods, even though they can effect the overall volume of trade. It is therefore a test primarily based on the question if there has been any discrimination.[21]

So the question was if equal burden rules should be considered to fall outside the scope of Article 28. And that approach seemed in fact to be applied in many cases by the ECJ, for example in *Oebel* and *Blesgen.* [22]

Oebel[23] regarded a rule which prohibited the delivery of bakery products to consumers and retailers at night. This is a clear equal burden rule, since it affects both national and foreign goods in the same manner. In this case the ECJ came to the conclusion that this rule was not caught by Article 28 EC.

In *Blesgen*[24] the ECJ took under consideration national rules which restricted the sale of drinks above certain strenght in all places open to the public for consumption. This was also a clear equal burden rule. The ECJ came to a similar conclusion as in *Oebel*. The ECJ concentraded on that the restrictions in question made no distinction between the nature or origin of the spirits. The legislation had therefore, according to the ECJ, no connection with the importation of the products and was therefore not of such nature as to hinder trade between Member States. The ECJ concluded therefore that the legislation in question would not fall under the prohibition in question.

At this point the ruled seemed to be clear. Article 28 was not to be understood as to cover equal burden rules, only dual burden rules, because equal burden rules did not have effects on the importation of goods.

But the problem was that the ECJ was not consistent in deciding that equal burden rules were not caught by Article 28 EC, and in *Cinéthéque*[25] the ECJ reached a different conclusion.

The case regarded French rules, which applied equally to domestic and imported videos, which banned the sale and hiring of videos of films during

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[20] Craig and de Búrca, page 611, citing Weatherill and Beaumont.

[21] The test which the ECJ introduced later in *Keck* is also based primarily on the question if there has been any discrimination. But it should be pointed out that according to the *Dassonville*-formula the main concern are the *effects* of the rule in question but not if it is a discriminatory hindrance to trade.

[22] Other cases where the ECJ reached a similar conclusion are for example Case 148/85 *Direction Génerale des Impots and Procureur de la République v. Forest* [1986] ECR 3449 and Case C-23/89 *Quietlynn Ltd. v. Southend-on Sea BC* [1990] ECR I-3059.

[23] Case 155/80, [1981] ECR 1983.

[24] Case 75/81, *Belgian State v. Blesgen* [1982] ECR 1211.

[25] Cases 60 and 61/84, *Cinéthéque SA v. Fédération Nationale des Cinémas Francais* [1985] ECR 2605.

the first year after the film was released. These rules were clearly equal-burden rules, but nevertheless the ECJ concluded that they were caught by Article 28. The ECJ came on the other hand to the conclusion that these rules were nevertheless legal since they were justified by a mandatory requirement under Article 28.

The Advocate General had reached a different conclusion, based on the fact that those rules were in fact equal-burden rules, and therefore the rules should not be considered to be caught by Article 28 at all. His opinion was therefore in line with *Oebel* and *Blesgen.*

When this case is considered it has to be born in mind that according to the rules in question there was a complete ban on sales over a considerable period of time of goods which were in free circulation in some parts of the Common market. Because of that it was probably difficult for the ECJ to conclude that these rules would not fall *prima facie* inside the prohibition in Article 28, although they affected both foreign and national goods in the same manner. But even if it can be said that the judgment made sense when this was considered, it had the effect of opening up the limits of Article 28 regarding equal-burden rules and make its application unclear, and that created problems which later became obvious in the Sunday Trading cases.

Even though the distinction between equal and dual burden rules is in fact a test based on discrimination, and is therefore not the right approach when the *Dassonville*-formula is considered, this is in my opinion the case where the ECJ really went wrong, and in fact created itself the confusion about the outer limits of Article 28. With this approach the ECJ opened up the limits of Article 28 by applying it to rules which had equal effects on imported and domestic goods. This ruling therefore had the effect of making it easier for traders to try rather farfetched cases before the ECJ, because after it the limits of Article 28 were very open.

This was therefore in my opinion not a good judgment by the ECJ. With it the ECJ opened up all gates to Article 28, and its effects should have been forseen. The difficulties in applying *Dassonville* and *Cassis* to small, unclear and indirect potential restrictions without any test based on discrimination should have been obvious. The difficulties in the cases which followed made it clear that to limit the scope of Article 28, either a some kind of a *de minimis* rule, or a test based on discrimination on import, was needed.[26]

4.2.2 The Sunday trading-cases.

As was mentioned above the ECJ started to experience difficulties in deciding on the outer boundaries of Article 28 after its decision in *Cinéthéque*.

[26] The possability of introducing a some kind of a *de minimis* rule in the aplication of Article 28 will be discussed in chapters 7.4. and 9.

And it was in the Sunday trading cases that it became very clear how problematic it could be to use the approach in *Cinéthéque* in some cases.

In the late 80´s several cases came before the ECJ regarding British rules which prohibited shops to sell on Sundays. The rules applied of course equally to foreign and domestic goods. The ECJ was therefore granted a good opportunity to make it clear that the judgment in *Cinéthéque* had been as it was because of the exceptional circumstances there, and to return to the approach which it had applied regarding equal-burden rules in *Oebel* and *Blesgen* for example, and say that the effects of these restrictions simply were too uncertain and indirect to fall under Article 28. But the ECJ did not do so. On the contrary it used the same approach as in *Cinéthéque* and ruled that those restrictions were *prima facie* inside Article 28, although it ruled that they could be justified under yet another mandatory requirement.[27]

An example of the Sunday trading cases is *Torfaen*.[28] It regarded a shop which was prosecuted for violating the Sunday trading law. The owner of the shop claimed that the law constituted a measure equivalent to quantative restriction. The law reduced total turnover by about 10%, which was the same regarding national and foreign goods, so the fact was that foreign goods were not in any worse position than national goods. The ECJ cited its judgment in *Cinéthéque* and reached a similar conclusion as there. But more interestingly it also cited *Oebel*, and said that, as had been decided there, national rules governing the hours of work, delivery and sale in the bread and confectionery industry constituted a legitimate part of economic and social policy, which were consistent with the objectives of public interest pursued by the Treaty. It then continued to say that the same had to apply in this case, although the ECJ said on the other hand the rules fell *prima facie* under Article 28.[29]

The reason for that the ECJ made a distinction between *Oebel* and *Torfaen* was clearly that it thought that the rules in the latter one in fact had some effects on intra-Community trade which were clear enough for the rules in question to be caught by the *Dassonville*-formula. So this made it clear that the ECJ did not intend to make any distinction based on the type of the rules in question, and if they created any discrimination, but to look primarily at the effects of the rules on intra-Community trade. In other words, it did not intend to let an equal burden rule fall outside the scope of Article 28 simply because it was that kind of a rule. So instead of going back to draw the line between dual-burden and equal-burden rules, and presume that the effects of equal burden rules were too unclear and indirect to fall under the *Dassonville*-formula, as it seemed to have done in *Oebel* and several other cases, the ECJ decided to follow the line in *Cinéthéque*.

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[27] The mandatory requirement which the ECJ recognized there was to ensure that working hours were arranged to accord with ”national or regional socio-cultural character-istics”.
[28] Case 145/88, *Torfaen BC v. B & Q plc*, [1989] ECR 3851.
[29] Para 13 and 14 of the judgment.

One big problem which followed this approach was that it was left to the national courts to decide if the rules were proportionate or not, that is if they were not excessive in relation to the objective sought to be achieved. The problem was that the national courts reached different conclusions on this issue. While some found the Sunday trading law compatible with Article 28, others did not. That caused of course a huge legal uncertainty in this field.

At this point it was argued by many that there was no balance in the Court´s test on Article 28, and the Article had in fact almost no limits under this approach. All restrictions were considered to fall under the Article *prima facie* and the parties had to find some good reason, in the form of mandatory requirements, to get them outside the scope of the Article. There was no simple rule which allowed national measures to fall outside Article 28 without going through the rather heavy process of *Dassonville* and *Cassis.*

One of the commentators which gave his opinion on how to decide on the outer boundaries of Article 28 was E. White.[30] His idea of solution was to make a distinction between rules regarding the charasteristics of the goods on one hand and rules regarding the circumstances which goods might be sold on the other.

And later it became clear that the ECJ had its doubts about this approach. That came clear with the judgment in *Keck and Mithouard* [31], where the ECJ introduced yet another approach to this problem. That approach was in line with the one that E. White had recommended.

[30] In his article *In Search of the Limits to Article 30 of the EEC Treaty* (1989) 26 CMLRev, 235.
[31] Cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1991] ECR I-6097.

5 Keck and Mithouard

The case of *Keck and Mithouard* regarded two men by the names Keck and Mithouard, managers of supermarkets at Mundolsheim and Geispolsheim, which were prosecuted in France for selling 1.264 bottles of "Picon" beer and 544 kilograms of "Sati Rouge" coffee at prices below those which they had purchased them. Resale at loss was prohibited under French law, but the law in question did on the other hand not ban sale at loss by manufacturers. Keck and Mithouard argued that the law was contrary to Community law concerning free movement of goods, persons services and capital and the principles of free competition within the Community.

The case was referred to the ECJ in June 1991 by the Tribunal de Grande Instance, Strasbourg. The national court referred two questions to the ECJ:

> Is the prohibition in France of resale at loss under Article 32 of Order 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition: (a) firstly, because it makes only resale at loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price; (b) secondly, in that it distorts competition, especially in frontier zones between the various traders on the basis of their nationality and place of establishment?

As can be seen the questions were not exactly clear and precise but the ECJ took them under consideration anyhow.

It was clear that even if the purpose of the prohibition was to ensure fairness of commercial transaction it was evident that it could impede imports in two particular ways, firstly by prohibiting resale at loss which is one of the techniques used when launching new products onto the market and secondly because an importer might be in competition with French manufacturers who can sell directly on the market.[32]

The Advocate General in this case, Mr Van Gerven, had given an opinion in the first Sunday trading case. There he had proposed that the ECJ should adopt a more reserved approach towards national rules which were not intended to regulate intra-Community trade, by declaring Article 28 only applicable to rules of this type if they had the effect of screening or partitioning the market. The ECJ did not follow his opinion in that case, so he assumed that in this case the Court would adhere to the broad *Dassonville*-formula. Then he stated that he thought that the ECJ owed a duty to the national courts to make this quite

[32] Moore, page 196.

clear to avoid confusion. He took under consideration the latest Sunday Trading case, *Stoke-on-Trent and Norwich City Council v. B & Q,,* where the ECJ had stated that when it was being decided if a measure should fall *prima facie* within the scope of Article 28, and had a proportionate effect on intra-Community trade, it had to be assessed according to whether that effect was direct, indirect or purely speculative, suggesting that even a measure which had only a speculative effect on trade might fall within the prohibition. Mr. Van Gerven made the conclusion that the ECJ had thereby chosen not to restrict the scope of Article 28, but instead it would regulate its application by using the doctrine of mandatory requirements and proportionality.

He applied this approach to the legislation in *Keck* but discovered a complication. Where the prohibition on resale extended to circumstances which did not invoke a need for consumer protection it could not been said that that it pursued an object justified with respect to Community law. There the concept of proportionality did therefore not become relevant. He concluded therefore that the rules were caught by Article 28 whatever the assessments of proportionality were. But nevertheless Mr. Van Gerven concluded that in this case the measure would not fall inside the scope of Article 28. In his conclusion he said that in the context of the reference for a preliminary ruling, the ECJ should give the national court all the information which it needs in order to decide the case before it, but that information only. It would therefore be sufficient to tell the national court that a statutory prohibition of resale at a loss was not incompatible with Article 28 since the events at issue occurred at the retail level, a level in respect of which a recognized ground of justification might be invoked for the rules in question and that at that level there was no more than a purely hypothetical effect on trade between Member States and certainly no more than an hypothetical hindering of trade flows.

The ECJ decided not to follow the Advocate General opinion in this case and introduced instead a whole new approach.

The ECJ began by citing the *Dassonville*-formula. Then it stated that the purpose of this legislation was not to regulate trade in goods between Member States. The ECJ said that although such a legislation might restrict the volume of sales, and hence the sale of products from other Member States, it was still a question if such a possibility was sufficient to characterize this legislation as a measure having equivalent effect to a quantitative restriction on imports.

Then the ECJ made a rather strange comment on why it felt necessary to change its approach to such cases. It said that because of increasing tendency of traders to invoke Article 28 EC to challenge rules whose effect was to limit their commercial freedom even where such rules were not aimed at products from other Member states it found it necessary to re-examine and clarify its case law on this matter.[33]

[33] With this comment it seemed like the ECJ was blaming over-ambitious traders for creating the problems in applying Article 28. The fact was of course that the ECJ had itself created

The ECJ then cited *Cassis de Dijon* and added that the prohibitions which should be considered to be caught by the principle laid down there were requirements such as form, size, weight, composition, presentation, labelling and packaging. Then the ECJ stated the essence of the judgment:

> By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty. 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.

With its judgment in *Keck* the ECJ was clearly trying to create clearer limits to Article 28 to make its application easier. But the method used to make this distinction was questionable and has provided a huge amount of academic literature.

The method the ECJ provided in this judgment was to make a distinction between rules which relate to the goods themselves in the terms of composition, packaging, presentation which would still fall within the scope of Article 28, and rules relating to selling arrangements which were thought to be outside the scope of Article 28, even though they might affect the total volume of goods sold, if the conditions provided for in the judgment were met.

It was true that before this judgment was given there was clearly a problem how and if Article 28 EC applied to some circumstances, but the solution which was provided in it was in fact not altogether clear either. Its purpose was probably to empower national courts to dismiss farfetched attempts by traders to use Article 28 in cases which were clogging up the Community legal system with affairs which should be purely local. But the risk was on the other hand that the approach was to formal which could lead to strange rulings in some circumstances. The fact was that even if it could be said that the ECJ had clarified the scope of Article 28 EC to some extent it also raised questions on its own. Another problem was that the ECJ did not identify the case law which was not applicable after this judgment.

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the problem with inconsistency in its judgments, and by opening up the limits of Article 28 without any safety-net to exclude farfetched claims.

A special problem was that the notion of "selling arrangements" was not clear as became apparent in later cases.[34] It has also been pointed out that when the ECJ decided to treat rules affecting "selling arrangements" as a special category it wrongly induced focus on the form of a measure instead of its effect, contrary the essence of *Dassonville*.[35] Perhaps the ECJ did that because it was a shorthand way of expressing the idea that some kinds of market interventions do not hinder market access. But it could have done that without drawing the line between categories of rules. The assumption that the rules in question, and other selling arrangements which would fall outside the scope of Article 28 under this new rule, were not by nature such as to prevent their access to the market or to impede access any more than they impeded the access of domestic products was also unclear if not altogether wrong.[36]

This ruling was in part based on the distinction between dual burden rules and equal burden rules. It can in fact be said that rules concerning selling arrangements only impose an equal burden on those seeking to market goods and they are said not to impose extra cost on the importer.[37] But why did the ECJ not draw the line just there instead of basing this approach on what category of rules were questioned? Probably the ECJ believed that this approach made the point clearer and served better its intentions to keep traders from bringing farfetched cases before the Court. The ECJ might also have thought that even though the "certain selling arrangements" referred to in *Keck* fell outside the scope of Article 28, some other equal burden rules could have enough effects on intra-Community trade to be considered under Article 28.

After the ECJ had provided *Keck*, questions arose on what the limits of *Keck* itself were. The fact was that in the beginning it was difficult to estimate the real effect of the judgment in *Keck*. It was for example not clear what earlier cases *Keck* overruled, although it was obvious that it at least overruled the Sunday trading cases, and the unclearness of the notion "selling arrangement" was also a problem.[38]

But what is clear is that in *Keck* the ECJ did in fact shift the burden of proof. If a restriction would fall under "selling arrangements" under the judgment it would be assumed that it was not a hindrance caught by Article 28. And in *Keck* itself it led to that the legislation in question was considered to fall outside the scope of Article 28 EC.

In my opinion *Keck* was not a good judgment by the ECJ. It had in the latest Sunday trading cases given its opinion on how such cases should be

[34] It was difficult to see how far the ECJ would strech the scope of this concept. It later became clear that the ECJ understood this concept in a wide way, streching its scope to marketing rules such as rules about advertising. See chapters 6.5. – 6.8.
[35] Wheatherill, page 896.
[36] This assumtion will be taken under consideration in chapter 7.3.
[37] Craig and de Búrca, page 618.
[38] See chapter 6 where post-Keck cases are discussed.

decided, and the difficulties which came apparent in those cases could have passed without further actions by the ECJ. It also seems strange to make a distinction between categories of rules, and to presume that one category should fall outside the scope of Article 28 while the other should fall inside its scope without looking primarily at the effect of the rules in question. This went in fact against the *Dassonville*-formula where the emphasis is on the effects of the measures in question but not on the question if a measure is discriminating or not. Another thing is that the ECJ left many questions about the scope of *Keck* itself unanswered, such as about the notion of "selling arrangements" and that was bound to create problems in applying this new approach.

As was said here above the approach which was used *Keck and Mithouard* was unclear and it was clearly very important how the ECJ would decide to apply this new approach. In later cases the ECJ developed and clarified its scope, and to understand better the test which the ECJ provided in *Keck*, and to see its effects, it is therefore necessary to look at how this test has been applied by the ECJ in later cases.

6 Post-Keck cases

After the ECJ provided the *Keck* judgment, the test in it has been used and clarified in many cases.

6.1 Commission v. Greece.

In the case *Commission v. Greece*[39], which was one of the first decided after *Keck*, the effect of *Keck* was obvious. The case regarded Greek legislation which reserved the sale of processed milk for infants in principle exclusively to pharmacies. The Commission took the view that those rules constituted a measure having equivalent effect to a quantative restriction on imports, and exceeded what was necessary to achieve the aims of protecting the health of infants and promoting breast feeding.

The Greek Government did not agree and claimed that exclusive sale of pharmacies of milk for infants did not affect importation of that product from other Member States and did therefore not constitute a measure having effect within the meaning of Article 28. It also claimed that the legislation could be justified under Article 30, since it was necessary and appropriate in order to protect the health and life of infants during the critical first five months of life.

The case was brought to the ECJ where the Commission stated that the legislation in question was caught by Article 28 since the prohibition was likely to hinder, albeit indirectly, intra-Community trade in the product concerned. According to the Commission the legislation did not constitute a mere restriction of certain selling arrangements within the meaning of *Keck* but also entailed a restrictive effect on trade by making the importation of the product more difficult. If the product could be sold in large stores their price would drop, which would lead to increased demand, which would then lead to more importation of the product.

The Greek Government did of course not agree. It pointed out that this measure had not led to a fall in the consumption of infant milk nor an increased price of the product.

The ECJ began by citing *Dassonville.* Then it stated that the legislation in question was not designed to regulate trade between Member States. The Court then cited *Keck* and stated that the legislation which had been called into question in the case fulfilled the conditions in *Keck*, and therefore fell outside the scope of Article 28.

The fact that processed milk for infants was not produced in Greece was invoked by the Commission. But that did not matter according to the ECJ. It stated that the application of Article 28 could not depend on such a purely fortuitous factual circumstances which might easily change over time. According

[39] Case C-391/92, *Commission v. Greece* [1995] ECR I-1621.

to the ECJ that could have the strange consequence that the same legislation would fall under Article 28 in certain Member States but fall outside it in others. This could only be different if it was clear that the legislation in question in fact protected domestic products which were similar to processed milk from other Member States.

So the legislation at issue was considered to fall under *Keck* and thereby fell outside the prohibition in Article 28.

The opposite to this approach was to be found in Advocate General Lenz opinion. According to him Article 28 went beyond a mere prohibition of discrimination and he believed that its aim continued to be to prohibit such measures in order to establish and maintain an internal market. According to him the determinative factor should therefore be if there was a hindrance to the market of imported goods. He was therefore in favour of a test based on market access.[40]

As was mentioned here above this case demonstrated clearly the effects of the judgment in *Keck*. The first concern of the ECJ was to find out if the rules in question regulated selling arrangements, and when that appeared to be the case the case was in fact solved. Then *Keck* was applied and the rule was found to fall outside the scope of Article 28. This case showed therefore clearly the difficulties which traders would meet in such cases after *Keck*.

6.2 Tankstation

In *Tankstation*[41] which was also one of the first decided after *Keck*, the ECJ demonstrated clearly the way it intended to deal with cases regarding selling arrangements under *Keck*. The main issue there was if national rules which provide for the compulsory closing of shops would fall inside the *Keck* rule and therefore outside of the scope of Article 28. The case was therefore in fact very similar to the Sunday trading cases.

In this case Dutch law regarding the maximum number of opening hours and periods of compulsory closing came into consideration. There were certain derogations from those rules, and one of those which benefited from them were petrol stations, but with strict conditions. Under the rules petrol stations situated at the side of motorways outside built-up areas and shops associated with those could be open day and night, but outside lawful opening hours only certain articles linked to journeys, such as petrol and smoking accessories, were to be sold there. Other articles were to be kept in locked cupboards outside lawful opening hours, and lawful opening hours were to be indicated at each public entry to the shops. A similar derogation was provided for all other petrol

[40] See discussion on this approach in chapter 7.3.
[41] Joined cases C-401/1992 and C-402/1992, *Tankstation ´t Heustke vof J. B. E. Boermans* [1994] ECR I-2199, 2220.

stations on the conditions that outside normal opening hours tobacco and smoking accessories were to be sold only by means of vending machines.

Two shops, forming part of the petrol stations of t´Heukske and Mr. Boermans were open to the public without the prescribed legal notice indicating opening hours on every entrance to those shops, and furthermore, number of articles not linked to road travel were offered for sale and had not been placed in lockable cupboards. As that was not enough, in one of the two shops it was also found that tobacco products were not sold by vending machines.

The owners of the two shops were convicted at lower court and appealed the judgment. In the appeal proceedings they claimed that the national legislation in question was contrary to Community law. The case was therefore referred to the ECJ for a preliminary ruling.

The ECJ cited *Dassonville* and *Keck* and said that the conditions laid down in *Keck* were fulfilled in this case. The rules in question related to the times and places at which the goods in question might be sold to consumers and applied to all relevant traders without distinguishing between the origin of the products in question and did not affect the marketing of products from other Member States in a manner different from how they affected domestic products. The ECJ found therefore that Article 28 did not apply to those rules.

The national court had also asked the ECJ whether Article 82 in conjunction with Article 3(g) and Article 10 precluded such rules which distinguishes between different categories of traders in connection with national provisions concerning the grant of licences for petrol stations. The ECJ found that this was not the case. Although the ECJ had held in several cases that Articles 81 and 82 in conjunction with Article 10 required the Member States not to introduce or maintain in force measures which might render the competition rules for undertakings ineffective, that, according to the ECJ, did not apply in this case. That was only the case if Member States were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 or to reinforce their effects, or to deprive its own rules of the character of state legislation by delegating to private traders reasonability for taking decisions affecting the economic sphere.

As was mentioned above this case demonstrated clearly how the ECJ intended to deal with cases regarding selling arrangements. The approach was very formal and strict, leaving little room for arguments by the trader. If the rule regarded selling arrangement *Keck* was applied, and the rule fell almost automatically outside the scope of Article 28.

6.3 Semeraro casa

In *Semeraro Casa*[42] an interesting point was brought up. The case, which was similar to the Sunday trading cases, regarded Italian legislation on the closure of retail outlets on Sundays. The plaintiff operated large shopping centres which were frequently open on Sundays and public holidays, and he charged the Italian legislation as being contrary to Article 28.

The interesting point brought up in the case was that large stores sell a greater quantity of products imported from other Member States than that sold by small and medium-sized businesses, and a huge amount of their sales are on weekends. Therefore the applicants argued that the legislation in fact had different impact on the marketing of domestic and imported goods.

The ECJ did not agree. It said that there were no evidence that the aim of the rules at issue was to regulate trade in goods between Member States or that, viewed as a whole, they could lead to unequal treatment between national products and imported products as regards access to the market. Then it stated that in this connection it had to be reiterated that national rules whose effect is to limit the marketing of a product generally, and consequently its importation, cannot on that ground alone be regarded as limiting access to the market for those imported products to a greater extent than for similar national products. It then cited *Keck* and said that the fact that national legislation might restrict the volume of sales generally, and hence the volume of sales of products from other Member States, was not sufficient to characterize such legislation as a measure having an effect equivalent to a quantitative restriction.

The ECJ therefore came to the same conclusion as in *Keck* without really going into this argument because, accordong to the ECJ, no evidence had been provided for it.

This case shows well the effects of the *Keck* judgment on the burden of proof in such cases. The rule regarded selling arrangements and therefore fell under *Keck*. So when the trader was not able to provide concrete evidence on that the rule in fact had effect on intra-Community trade the ECJ did not take this into consideration and applied *Keck* automatically. The rule was therefore considered to fall outside the scope of Article 28.

6.4 Vereinigte Familiapress

In the case *Vereinigte Familiapress*[43] the question where to set limits to the phrase "selling arrangements" in *Keck* came into consideration.

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[42] Joined cases C418-421, 460-462 & 464/93, 9-11, 14-15, 23-24 & 332/94, *Semeraro Casa Uno Srl v. Sindaco del Communae di Erbusco [1996] ECR I-2975*.

[43] Case C-368/95, *Vereinigte Familiapress Zeitungverlags-und Vertreibs GmbH v. Heinrich Bauer Verlag* [1997] 3 CMLR 1329.

The case regarded Austrian legislation which prohibited the sale of periodicals containing games or competitions for prizes.

An Austrian newspaper publisher brought proceedings against a newspaper publisher established in Germany, for an order that he should cease to sell in Austria publications where readers were offered the chance to take part in games for prizes in breach of the Austrian law. Since there is no such rule in German law, the national court took the view that this rule potentially affected intra-Community trade, and referred the case to the ECJ for a preliminary ruling.

The ECJ began by citing *Dassonville, Cassis* and *Keck*. The Austrian Government had claimed that the prohibition should fall outside Article 28, since the possibility of offering readers of a periodical the change to take part in prize competitions was merely a method of promoting sales and therefore a selling arrangement within the meaning of *Keck*. The ECJ came on the other hand to the conclusion that even though the legislation in question was directed against a method of sales promotion it was in fact about the actual content of the product in this case, because the competitions formed in fact an integral part of the magazine in which they appear. The ECJ found therefore that the national legislation in question as it was applied on the fact in this case, did not fall within the term selling arrangements in *Keck*. The Court said moreover that since the legislation required traders established in other Member States to alter the contents of their periodicals, the prohibition in fact impaired access to the market of the Member State of importation. It therefore hindered the free movement of goods. In principle it therefore constituted a measure having equivalent effect to a quantative restriction within the meaning of Article 28.

The ECJ came on the other hand to the conclusion that the legislation in question provided that the prohibition was proportionate to the maintenance of press diversity and the objective could not be achieved by less restrictive means. It was then left to the national court to decide if the prohibition was proportionate.

This case demonstrated clearly the distinction which was made in *Keck*, between rules regarding the characteristics of the good and selling arrangements. In this case the rule clearly regarded the contents of the good itself and therefore it fell outside the scope of *Keck*. So in this case the ECJ showed how even *Keck* had its limits.

6.5 Hünermund

The cases where the ECJ has applied *Keck* to rules regarding advertising are very interesting and show well how far the ECJ has stretched the scope of the term ”selling arrangement” which was presented in *Keck*.

As Advocate General Jacobs stated in his opinion in *Leclerc-Siplec* the role of advertising is fundamental in a developed market economy, based on free competition, and plays a particularly important role when new

products are launched.[44] One would therefore have imagined that restrictions to advertising would fall outside the *Keck*-exception from Article 28, and could only be excepted from the Article if it could be justified by reference to mandatory requirements. But that has not proven to be the case. This was first taken into consideration by the ECJ in *Hünermund.*[45]

The case regarded rules which were of professional conduct and were laid down by the body responsible for regulating the activities of pharmacists in Baden-Wuerttemberg. Under the rules in question pharmacists were allowed to place advertisements in newspapers and magazines under strict conditions, and were not allowed to advertise at all in cinemas, in radio or on television. The purpose of those rules was to prevent excessive competition between pharmacists. Mr. Hünermund and 12 other pharmacists were unhappy with those rules and wished to advertise para pharmaceutical products which they were authorised to sell in their pharmacies. They therefore sought a declaration from the competent administrative court that those rules were invalid, particularly since they were contrary to Article 28 EC. The case was referred to the ECJ for a preliminary ruling.

The ECJ took the view that these rules fell under *Keck* and therefore outside the scope of Article 28. It stated that the rules applied without distinction as to the origin of the products in question to all pharmacists regulated by the Professional Association and did therefore not affect the marketing of goods from other Member States differently from that of domestic goods.

This was the first time that the ECJ stated that advertising was covered by the phrase "national provisions restricting or prohibiting certain selling arrangements" in *Keck*. According to Advocate General Jacobs, in his opinion in *Leclerc-Siplec,* the ECJ might have been influenced by the relatively insignificant nature of the restriction in this particular case. But in fact the harm had been done. The conclusion of the case was that rules restricting freedom to advertise could fall under the *Keck*-exception from Article 28, and therefore outside the scope of Article 28 without further justification. Advertising was, according to the ECJ, one of the "certain selling arrangements" in *Keck*.

In my opinion this was a bad ruling by the ECJ. The approach presented by the ECJ in *Keck* was unclear and not easy to apply and therefore it was very important that the ECJ would apply *Keck* in a sensible way from the beginning.

One of the important aspects of post *Keck*-cases was how the ECJ was going to define the phrase "certain selling arrangements" in *Keck*. In my opinion it should have been defined in a narrow way since the fact is that if a rule regards selling arrangements it is considered to fall outside the main rule in Article

[44] Opinion delivered on 24 November 1994. [1995] ECR I-179.
[45] Case C-292/92, *Hünermund v. Landesapothekerkammer Baden-Württemburg,* [1993] ECR I-6787.

28. One way of drawing the line was to make a difference between static and non-static selling arrangements.[46] Static selling arrangements are rules relating to the hours at which shops can be open, the length of time that people may work, or where certain goods can be sold, but non-static selling arrangements are on the other hand the ways which include how a manufacturer chooses to market this specific product, for example through certain form of advertising, free offers and the like. It seems like that could have been a good place to draw the line, and state that selling arrangements of the latter kind would not fall under *Keck*, because that they may relate much more closely to the very definition of the product itself.

If the ECJ would have made this distinction it would have led to that advertising would have fallen outside the scope of *Keck* and would always have to be considered under *Dassonville* and *Cassis*. And in my opinion that would have been the right approach. Advertising is extremely important when new goods are introduced to the market, and all restrictions to it should in my opinion therefore always fall *prima facie* under Article 28. But of course such restrictions could in some circumstances be justified by a mandatory requirement under *Cassis*.

But as can be seen here above the ECJ did not agree with this and applied *Keck* to advertising.

Another case where this was taken into consideration was *Leclerc-Siplec*.[47]

6.6 Leclerc-Siplec

Leclerc-Siplec distributed petrol and other fuels at service stations in France. Those service stations were integrated into supermarkets operated under the name E. Leclerc. Leclerc-Siplec tried to get two television companies to advertise the petrol stations on television but was refused on ground of French legislation that prevented the distribution sector to advertise on television. The same provision also prohibited the advertising on television of alcoholic beverages with an alcohol content exceeding 1,2 degrees, literary publications, the cinema and the press. The main purpose of the prohibition was to protect France's regional daily press by forcing those sectors to advertise there rather than on television.

Leclerc-Siplec started proceedings against the two television companies and the case was referred to the ECJ.

As mentioned here above it was Advocate General Jacobs who gave an opinion in this case. He had serious doubts about if it was right to include

[46] Craig and de Búrca, page 621.
[47] Case C-412/93, *Sociéte d´Importation Edouard Leclerc-Siplec v. TFI Publicité & M6 Publicéte* [1995] ECR I-179.

advertising in the phrase "certain selling arrangements" in *Keck*. He said that advertising played a particularly important part in the launching of new products, because it was by means of them that consumers could be persuaded to abandon their existing brand and buy different manufacturer's goods. Without advertising consumers would therefore tend to continue to buy goods which they were familiar with and it would then be much easier for established manufacturers to retain their market share. According to Mr. Jacobs the ECJ should therefore be extremely vigilant when it appraised the compatibility with Community law of restrictions on advertising. He also pointed out that even if freedom to advertise would be recognised as an essential corollary to the fundamental freedoms created by the Treaty that would not mean that the Member State would be prevented from regulating and restricting advertising. They could both use Article 30 exceptions and the case law on "mandatory requirements" to restrict advertising in a reasonable manner.

But Mr. Jacobs recognised that on the grounds of *Hünermund* it was very likely that the ECJ would decide that the legislation in question would fall under *Keck*. Therefore he applied the test laid down in *Keck* and concluded that if that approach was used the prohibition would fall outside Article 28. He recommended on the other hand a new approach in the case in question, which in fact led to the same conclusion.[48]

The ECJ yet again applied *Keck* without changes in this case. It said that the prohibition in question concerned selling arrangements since it prohibited a particular form of promotion (televised advertising) of a particular method of marketing products (distribution). It also stated that those provisions affected the marketing of products from other Member States and that of domestic products in the same manner. The ECJ concluded therefore that the rules in question were not within the scope of Article 28.

So in this case the ECJ came again to the conclusion that *Keck* should be applied to advertising. But the opinion by Advocate General Jacobs in this case is very interesting and it is difficult not to agree with him about how the importance of advertising should mean that it should in all cases be looked at under *Dassonville* and *Cassis*.

And in later cases the ECJ began to experience some difficulties in applying *Keck* to advertising. Examples of this are *De-Agostini and TV-Shop*[49] and *Gourmet International Productions.*[50]

[48] See chapter 7.4.
[49] Joined cases C-34-36/95, *Konsumentobudsmannen v De Agostoni (Svenska) Förlag AB* and *Konsumentombudsmannen v TV-Shop i Sverige AB*.
[50] Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products*.

6.7 De Agostini and TV-shop

The joined cases *De Agostini* and *TV-shop,* regarded Swedish law which allowed the Swedish Marknadsdomstol to prohibit a trader who, in the marketing of goods, services or other commodities, engaged in advertising or any other activity which, by being contrary to good commercial practice or was otherwise unfair towards consumers or other traders, from continuing so to act, or from engage in other similar activity. That provision also applied to television broadcasts which might be received in any country bound by the Agreement on the European Economic Area. The Marknadsdomstol, was authorized in particular, to order a trader to provide in his advertising information which the Marknadsdomstol considers relevant for the consumer. It was also provided in Swedish law that an advertisement broadcast during a commercial break on television might not be designed to attract the attention of children under 12 years of age.

Regarding the application of Article 28, the ECJ cited *Leclerc-Siplec* and said that there the Court had held that legislation which prohibits television advertising in a particular sector concerned selling arrangements for products belonging to that sector in that it prohibits a particular form of promotion of a particular method of marketing products. Then the Court cited *Keck* and stated that the conditions provided for there were clearly fulfilled by its first condition, that is, the prohibition regarded all traders operating within the national territory. But regarding the second condition in *Keck* the ECJ came to an interesting conclusion when it stated that it could not be excluded that an outright ban of a type of promotion for a product which was lawfully sold there might have a greater impact on products from other Member States.

The ECJ said therefore that although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it had to be noted that De Agostini had 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. But then the ECJ stated that an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, was not covered by Article 28 of the Treaty, unless it was shown that the ban did not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.

The difficult question in this case was clearly if the prohibition in question operated equally in fact. And althoug it was left to the national court to decide the ECJ stated that in some circumstances the only practible way to break into a new market would be through such advertising.

Although the ECJ confirmed that adverising falls in principle under *Keck* and therefore out of the scope of Article 28 it recognised that in many circumstanses it would not fulfill the condition of in fact affecting in the same way

the marketing of national products and of products from other Member States. So the ECJ clearly recognised in this case the importance of advertising, which Advocate General Jacobs had stated in *Leclerc-Siplec*, and it seems likely that restrictions on advertising will not often fall outside the scope of Article 28, but rather that they have to be justified under the *Cassis* doctrine or Article 30.

Another case which supports this opinion is another Swedish case, *Gourmet International Products.*[51]

6.8 Gourmet International Products

This case regarded Swedish legislation which laid down several restrictions on advertising spirits, wines and strong beers.

Gourmet International Products (GIP) published a magazine entitled "Gourmet". One issue of the magazine contained three pages of advertisements for alcohol beverages. Because of this the Consumer Ombudsman applied a case to the Stockholm's Tingsrätt. The national court referred the case to the ECJ for a preliminary ruling.

GIP contended that an outright prohibition such as that at issue in the main proceedings did not satisfy the criteria in *Keck*, since it was liable to have a greater effect on imported goods than on those produced in the Member State concerned. The Commission supported this view.

The Advocat General in this case was Mr. Jacobs. He yet again made clear that in his opinion advertising were always caught by the *Dassonville*-formula, but admitted that the ECJ had in fact reached the conclusion that advertising restrictions could fall within the category of rules on selling arrangemets under *Keck*. But then Mr. Jacobs went on to point out that one of the condition in *Keck* was that the rules had to be non-discriminating both in law and in fact. According to him the rules in this case, although non-discriminatory in law, had discriminatory effect in fact.

He pointed out that according to statistics provided by GIP Swedish products dominated the domestic market in strong beer and also that consumers tended to favour national beverages, so that without advertising, products from other Member States were at a disadvantage. He also pointed out that the Swedish Government´s representative agreed at the hearing that there was a widespread preference for locally-produced beer.

Then the Advocate General stated that, even if it might be argued that these were matters of fact and therefore for the national court to decide, it seemed to him inherent in any rule which prevented producers from advertising directly to the public that it would disproportionately affect imported products. Therefore it would in his opinion always "prevent their access to the market or ...

[51] Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products*.

impede access ... more than it impedes the access of domestic products." Yet again a clear point made by Mr. Jacobs.

The ECJ cited its judgment in *De Agostini and TV-Shop* and stated again that it could not be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which was lawfully sold there might have a greater impact on products from other Member States.

It said that it was apparent that a prohibition on advertising such as that at issue in the case not only prohibited a form of marketing a product but in reality prohibited producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

Then the ECJ stated that even without it being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which would be for the national court to do, the Court was 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 advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway was liable to impede access to the market by products from other Member States more than it impeded access by domestic products, with which consumers were instantly more familiar.

The ECJ concluded therefore that a prohibition on advertising such as that at issue in the main proceedings had to 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 28 of the Treaty.

Here the ECJ went a step further than in *De-Agostini and TV-Shop* and stated that the prohibition in the case at issue was caught by Article 28. And it seems like the reasoning in this case could be applied to many products. And although it is only stated that this approach should be taken when outright bans are at issue it is difficult to see that a different approach would apply where restrictions are considerable. And if the a line is drawn when restrictions are less, is that not really a kind of *de minimis* rule?[52] The problem is of course where to draw the line, and that problem is usually left to the national courts.

6.9 DIP SpA

As has been mentioned above the ECJ has constantly refused to limit the scope of Article 28 by applying a *de minimis* rule to it. It has on the other hand sometimes reached the conclusion that the effects of some rules are so uncertain and indirect that the rules in question should be considered to fall outside the scope of Article 28. And although this approach is not based on a

[52] This question will be discussed in chapter 7.4.

genuine *de minimis* rule, it can be used for the same purposes, to keep farfetched claims from falling within the scope of Article 28. And the question is if such an approach could been used instead of the approach in *Keck*.

One of the cases where the ECJ reached such a conclusion was *DIP SpA.*[53] The case regarded Italian legislation which permitted the opening of new shops in particular areas only on receipt of a licence, which were to be issued by municipal authorities on the recommendation of local committee.

The ECJ did not apply *Keck*, maybe because it did not consider that the legislation in question clearly fell under the term selling arrangements. Instead it looked at the possible effect of the legislation and came to the conclusion that its restrictive effect was too uncertain and indirect to be regarded as hindering trade between Member States.

According to this judgment, even after *Keck*, measures can still fall outside the scope of Article 28, without being inside *Keck*, if the restrictive effects of them are too indirect and uncertain to be held to be in breach of Article 28. This means that alongside the application of *Dassonville*, *Cassis* and *Keck* it seems to be a certain kind of "remoteness approach" to farfetched claims. And if there is in fact such an approach which can bring farfetched claims outside the scope of Article 28 without using *Keck*, is there then any need for *Keck?* Should that approach not rather be developed, cleared and applied to such circumstances?[54]

[53] Case 140-2/94 *DIP SpA v Comune di Bassano del Grappa* [1995] ECR I-3257.
[54] These questions are taken into consideration in chapters 7.4. and 9.

7 Different solutions on how to decide the outer boundaries of Article 28 EC

Both before and after the ruling in *Keck and Mithouard* there have been many different views on how to decide on the proper boundaries of Article 28 EC, and the judgment in *Keck* was in fact an answer by the ECJ to criticisms of its earlier case law and suggestions for its reform.

Four different solutions to this problem will now be considered, the solution of applying only *Dassonville* and *Cassis*, the solution provided in *Keck*, the solution of looking primarily at if a measure hinder access to the market and finally the solution of applying a some kind of a *de minimis* rule to limit the scope of Article 28.

7.1 The pre-Keck solution.

For many years the ECJ only applied *Dassonville* and *Cassis* to decide if indistinctly measures brought by Member States were to be considered as being caught by Article 28.

Under the *Cassis*-test, indistinctly applicable measures, though within the *Dassonville* formula, will not breach Article 28 if they are necessary to satisfy mandatory requirements. This came to be known as "the rule of reason". Also established in *Cassis* was the principle of "mutual recognition", that is that there was no valid reason why goods which had been put on the market lawfully in one Member State should not be introduced into the market of other Member States.

The rule of reason was based on the earlier hint given in *Dassonville* that in the absence of Community measures on an issue trade rules could be accepted in certain circumstances. What it did was that it went further, made it clear that *Dassonville* could be applied to indistinctly applicable measures, and introduced how such rules could be excepted from Article 28.

One interesting point in the *Cassis*-test is that the ECJ took the view that the mandatory requirements should be considered within Article 28, but not Article 30 where derogations from the Article are provided for. This solution has been criticised by some commentators which say that it would both be simpler and more logical to treat the mandatory requirements as additions to the justifications in Article 30.[55] One rationale which can be given for keeping the mandatory requirements inside Article 28 is that the *Cassis* exceptions may only be used on rules which are not discriminatory. In other words, only indistinctly applicable measures can take advantage of the mandatory requirements. Another

[55] For example Oliver, page 804 – 805.

reason is that the *Cassis* rule inhibits matters such as the protection of consumers and the fairness of commercial transactions, which are not mentioned within Article 30. It is therefore very difficult to say that these justification could be covered by Article 30. The list in Article 30 is exhaustive, but under the rule of reason the ECJ has been able to add more justification which are reasonable.

But why are more justifications for restrictions on trade allowed under Article 28, and the rule of reason, than under Article 30? As mentioned here above Article 30 allows discriminatory rules to be justified while the mandatory requirements only can be used in respect of indistinctly applicable rules. Discriminatory rules strike at the heart of the Community and are therefore viewed with a much more suspicion than indistinctly applicable measures. The list in Article 30 is therefore exhaustive.

It is clear that the ECJ´s conclusion in *Cassis* to apply Article 28 to indistinctly applicable measures was not at all obvious. And if it is to be applied to such measures it is clear that the door to bring in justifications for such measures have to be open. Exceptions have to be allowed in a rather broad way and the list has to be open because it is obviously not possible to foresee all circumstances where the rule of reason should be applied. And the ECJ has introduced many mandatory requirements in its judgments. Those are for example consumer protection[56], fairness of commercial transactions[57], public health[58] and environmental protection[59].

The rationale for the mandatory requirements has been considered to be that many rules which regulate trade in some way are also capable of restricting trade, but some of them may on the other hand serve objectively justifiable purposes and it would therefore be inappropriate to render all such rules illegal *per se*.[60]

But the application of the "rule of reason" was not without problems. This was not at least because of the Court's tendency to apply the *Dassonville*-formula mechanically, requiring measures which might affect the volume of overall trade, but with little potential to hinder import to be justified by the rule of reason. The fact is that the term "indistinctly applicable" is not only capable of applying to rules which are non-discriminatory on their face in law, but discriminatory in effect, but also rules which are in fact both non-discriminatory in law and effect. It would have been possible to draw the line between dual- and equal-burden rules, but as was discussed above the ECJ chose not to do so, as became clear in *Cinéthéque*.[61] The approach taken by the ECJ was therefore

[56] Case 178/84, *Commission v. Germany* [1987] ECR 1227.
[57] Case 286/81 *Oosthoek´s Uitgeversmaatschppij BV* [1982] ECR 4575.
[58] Case 178/84, *Commission v. Germany* [1987] ECR 1227.
[59] Case 302/86, *Commission v. Denmark* [1988] ECR 4607.
[60] Craig and de Búrca, page 628.
[61] The approach which was introduced later in *Keck* was in fact based more or less on this distinction. It seems clear that it would have been better for the ECJ to draw the line there instead of the solution which it introduced later in *Keck*.

very wide. Smallest restrictions, which had in fact very little and in fact only indirect and potential affect on trade, were held to fall under the *Dassonville* formula and could only be justified by mandatory requirements or Article 30.[62]

This very wide approach by the ECJ led defence lawyers to try to use "Euro-defence" with exploitation of Article 28 in increasing manner. This led the ECJ to create more and more kind of mandatory requirements which could justify the legislations in question. Because of this the ECJ got increasing criticism for its approach, and different commentators suggested different approaches. Many of them regreted the disappearance of any simple general rule which would allow for national measures to withstand challenge under Article 28, without going through the *Dassonville*-formula and the *Cassis* test.[63] The criticism was mainly based on two things; a desire to limit the number of cases to be judged under Article 28, and a need to increase predictability of the application of Article 28.

But it was far from being easy to make the right choice. It was recognised that a full test, which would take all relevant factors into account, would have the disadvantage of being difficult to apply, which would lead to high administrative costs on the courts and the parties involved. A simplified test would on the other hand more possibly lead to errors, since it would not take into account all relevant factors.[64]

But was this approach really so bad? It is true that the rule of reason was not very clear. Article 28 was almost without limits but some rules could be excepted from its scope if they could be justified by mandatory requirements. But was it not enough that the ECJ made its position on this issue clear as in the latest Sunday trading cases? In my opinion that could have been enough. Alongside this approach the ECJ then could have developed further the approach used in *Peralta* and *DIP SpA* to keep farfetched claims from falling within the scope of Article 28.[65] That could have been a workable approach to this problem. And it is interesting that although the ECJ got heavy criticism for its approach, its final decisions in the cases in question were not disputed.

But as was mentioned above the ECJ was criticised heavily for its approach in the Sunday trading cases. E. White was one of the commentators which gave his opinion on this issue and his idea of solution was to make a distinction between rules regarding the charasteristics of the goods on one hand and rules regarding the circumstances which goods might be sold on the other.[66]

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[62] A good example of this are the Sunday trading cases.
[63] Wils, page 489.
[64] Wils, page 486.
[65] See chapters 7.4 and 9 for a futher discussion on this point
[66] In his article *In Search of the Limits to Article 30 of the EEC Treaty* (1989) 26 CMLRev, 235.

The criticism clearly got the attention of the ECJ. But which test was the right one? The ECJ´s solution on the problem was introduced in the *Keck* judgment.

7.2 The Keck solution

In *Keck* the ECJ presented a new approach to limit the scope of Article 28. It was based on a distinction between rules which lay down requirements to be met and rules relating to "selling arrangements". According to the ECJ such rules were not as to hinder, directly or indirectly actually or potentially, trade between Member States within the meaning of the *Dassonville*-formula.

It can be said that in judgments following *Keck* four categories of measures have been considered to be covered by the concept "selling arrangement".[67] Those categories are; restrictions on when goods may be sold[68], restrictions on where or by whom goods may be sold[69], advertising restrictions[70] and price controls[71]. And although the ECJ talked about "certain selling arrangements" in its ruling it seems by looking at post-*Keck* cases that if a measure is considered a selling arrangement it is presumed to be caught by *Keck*.

In *Keck* the ECJ established the presumption that national measures governing "selling arrangements" would fall outside the scope of Article 28. With this presumption the burden of proof was shifted to the trader that was claiming breach of Article 28, and he had to prove that the "selling arrangement" at issue actually governed product characteristics or requirements, and therefore constituting *prima facie* a breach of Article 28, which could only be excepted from its effect by mandatory requirements under *Cassis* or the provisions in Article 30.

One important question which arises when *Keck* is considered is the notion of "selling arrangements". It was clear from the beginning that it would be difficult to draw the line between rules which relate to nature of the product one hand, and selling arrangements of that product on the other. As was mentioned before the ECJ could have drawn the line between static and non-static selling arrangements and decided not to apply *Keck* in cases which only regarded rules on the ways which include how a manufacturer chooses to market his specific product, for example through certain form of advertising, free offers and the like.

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[67] Oliver, page 794.
[68] Case C-69/93, *Punto Casa v. Capena* [1994] ECR I-2355.
[69] Case C-319/92, *Commission v. Greece* [1995] ECR I-1691.
[70] *Hünermund* and *Leclerc-Siplec*.
[71] Case C-63/94, *Belgapom v. ITM Belgium* [1995] ECR I-2467.

But the ECJ chose not to make this distinction. That became obvious in its later rulings regarding advertising in *Hünermund, Leclerc-Siplec, De Agostini and TV- Shop* and *Gourmet International Products*[72].

As I mentioned before I think that it would have been reasonable for the ECJ to let such non-static selling arrangements fall outside the scope of *Keck*. *Keck* is an exception from the main rule in Article 28, and to apply *Keck* as widely as the ECJ has done is therefore in my opinion questionable. But although *Keck* has been applied to widely the ECJ has nevertheless made its limits clear in some cases. It has sometimes taken the view of characterising certain rules which affect selling as a part of the nature of the product itself, and therefore falling within the scope of Article 28. An example of this is the judgment in *Vereinigte Familiapress.*[73]

But is it right to make a distinction between those different categories of rules as the ECJ did in *Keck*? Advocate General Jacobs took this question into consideration in his opinion in *Leclerc-Siplec*. There he stated that in his opinion it was inappropriate to make such a rigid distinction between different categories of rules, and to apply different tests depending on the category to which particular rules belong. According to him the severity imposed by different rules is merely one of degree. He also pointed out that *Keck* introduced a test based on discrimination, but the creation of the single market on the other hand required the abolition of all substantial barriers, and not just the abolition of discriminatory measures.[74]

Another issue is if *Keck* made any real changes. It has in fact been pointed out that it is questionable whether the exclusion of "selling arrangements" from the scope of Article 28 in *Keck* in fact represents a change, or whether it just accomplished a rhetorical shift. The question is if it only offered the appearance of a rule-based approach, and simply pushed the unpredictable balancing of interests from one formula to another, that is, from *Dassonville* and *Cassis* to *Keck*.[75] And if was so did this make any difference? And can it really be said that this has in fact clarified anything?

It is not at all easy to answer those questions. But many commentators seem nevertheless to agree that *Keck* did in fact clarify the situation.[76] Prior to *Keck* the scope of Article 28 seemed much to wide as became clear in the Sunday Trading cases. Many approaches had been tried, so

[72] See chapters 6.5. – 6.8.
[73] See chapter 6.4.
[74] Advocate General Jacobs was therefore obviously also against restricting the application of *Keck* to dual burden cases, since the distinction between dual and equal burden rules is also based on a discriminatory-test.
[75] Freidbacher, page 232.
[76] Kapteyn P.J.G. & P. Verloren van Themaat (p. 631-637) are on the other hand against this view.

although *Keck* was imperfect it seemed better than former approaches.[77] But it has also been pointed out that the impact and importance of *Keck* should not be overstated, although such a rule-based approach is better for legal certainty than the former approach.[78]

In my opinion the approach which was introduced in *Keck* to limit the outer boundaries of Article 28 was not a good one. The method to make a distinction between categories of rules instead of looking primarily on the effects of the rule went against the *Dassonville*-formula where the emphasis is on the effects of the measures in question but not on the question if a measure is discriminating or not. Another thing is that the ECJ left many questions about the scope of *Keck* itself unanswered, such as about the notion of "selling arrangements". And when the ECJ started to apply *Keck* it applied it in my opinion to widely.[79] A narrower approach would have been more appropriate since *Keck* was an exception from the main rule in Article 28 and *Dassonville*.

7.3 Market access

Keck has been criticised for placing too much emphasis on factual and legal equality instead of looking at market access, and it has been argued that trading rules might in fact, although formally equal under *Keck*, operate so as to inhibit market access.

Here above it was mentioned that the ECJ´s assumption in *Keck* that "selling arrangements" were not "by nature such as to prevent…access to the market" is very questionable if not entirely wrong. It was in fact pointed out by Advocate General Jacobs in his opinion in *Leclerc-Siplec*, that although it was right that restrictions on circumstances in which certain or all goods might be marketed did not normally obviously interfere with the free movement of goods, as the legislation in *Cassis* did for example, it would nevertheless be wrong to say that such a legislation never had any effect on trade between Member States.[80] It could have some although insignificant effect.

This test which is laid down in *Keck* is therefore in fact not based on the question if the measures which are considered impede access of goods into the market. The only thing that is stated there is that under the *Keck*-test such rules are considered not to impede the market access without really looking into if that is a fact. It is a rule based test with certain assumptions which are not necessarily correct when looked at closely. And it is a strong argument which Weatherill has brought up, that by treating rules affecting "selling arrangements" as a special category the ECJ wrongly focuses on the form of measure instead of its effect on trade.[81] And that is in fact contrary to the very essence of *Dassonville*.

[77] Oliver, page 799.
[78] Jarvis, cited in Kapteyn and van Themaat, page 636.
[79] See for example discussion on the cases regarding adverising in chapters 6.5. – 6.8.
[80] Para. 26 of the opinion.
[81] Weatherill, page 896.

If a measure controls selling arrangements that only hints that the rules does not prevent market access. So the approach which the ECJ chose to take in *Keck* was perhaps only a shorthand way for it to express its idea that some market interventions do not hinder market access.

Tests for determining access to the market can be formal or substantive, and the ECJ has not been entirely consistent of which approaches to use. According to formal access test it is enough that goods are allowed into the market, but under substantive market access test practical difficulties experienced after entering the market are also considered.[82]

The ECJ has taken different approaches to the question if a measure is hindering market access in different cases, and other approaches have been considered by its Advocate Generals.

One way of deciding if a measure is in breach of the Treaty is to say that any national regulation which impedes market access in any way is contrary to the Treaty. In his opinion in *Leclerc-Siplec* Advocate General Jacobs came to the conclusion that a test of discrimination was in fact inappropriate. An obstacle to interstate trade could not, according to Mr. Jacobs, cease to exist simply because an identical obstacle affected domestic trade.[83] The ECJ did not follow Mr. Jacobs opinion in this case, but in the *Bosman*[84] and *Alpine Investments*[85] cases regarding the free movement of services and the free movement of workers it seems to have used a similar approach.[86]

In *Bosman* the ECJ stated for example that although the rules in question did not differ between domestic and foreign workers they still directly affected players´ access to the employment market in other Member States and were therefore capable of hindering the free movement of workers. In *Alpine Investments* the ECJ stated also that even though the rules in question were non-discriminatory they directly affected access to the markets in services in the other Member States and could therefore be hindering intra-Community trade in services.[87]

Another approach to decide if a hindrance to market access falls inside or outside the scope of Article 28 is to assume that where there has been indirect or direct discrimination there has been a hindrance of market access which has to be justified. This is in fact the approach which was used in most cases decided before *Keck*. Measures which fall inside the *Dassonville* formula fall inside the scope of Article 28, and can only be justified by mandatory requirements or Article 30. So the presumption is that the national measure constitutes a barrier to market access.

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[82] Barnard and Deakin, page15.

[83] The Advocate General is therefore obviously against both the approch in *Keck* and an approach based on distinction between equal and dual burden rules, which are both based on a discrimination-test

[84] Case C-415/93 *Bosman v ASBL* [1995] ECR I-4921.

[85] Case C-384/93 *Alpine Investments v Minister van Financien* [1995] ECR I-1141.

[86] Bernard and Deakin, page 16.

[87] See futher discussion on those two cases in chapter 8.

A third approach which the ECJ has taken has been demonstrated in some cases regarding discriminatory selling arrangements, where it has presumed that there is no hindrance to market access unless discrimination can been shown.[88] An example of this is *De-Agostini and TV-Shop,* where the ECJ said that it could not be excluded that an outright ban applying in one Member State of a type of promotion for a product which was lawfully sold there might have greater impact on products from other Member States. A similar approach was taken in *Gourmet International Products* where the ECJ went step further and stated that the ban in question was liable to impede access of foreign products more than domestic ones, which consumers were more familiar with. But the approach in these cases was nevertheless that in the case of rules regarding selling arrangements the first presumption was that there was no hindrance of access to the market and the legislation could stand, but this presumption could be rebutted by producing statistical or other kind of evidence. So the presumption which could be drawn from this judgment is that in the case of measures having equal burden in law and in fact, and which do not hinder market access the measures fall outside the scope of Article 28, while other non-discriminatory measures and discriminatory measures fall within the scope of the Article.

The ECJ has in some cases also applied a very weak form of market access test. One example of this is the ruling in *Keck*, where the Court stated that non-discriminatory restrictions on "certain selling arrangements" would fall outside the scope of Article 28 if the conditions laid down in the judgment were fulfilled. Regarding market access the ECJ stated that such measures "were not by nature as to prevent their access to the market or to impede access any more than it impedes access of domestic products". As has been said here above this presumption does not survive close scrutiny, even though the Court has applied it in later cases. It is a very formal test. Selling arrangements are singled out as a special category although some selling arrangements, such as a total ban on selling certain goods or simply just a prohibition to advertise certain goods, clearly impedes access to the market.

The ECJ could embrace a test based primarily on market access, but it would cause some problems. It is a difficult test to apply for the ECJ, and even more difficult for national courts, and would probably cause huge administrative costs. It is therefore not likely that the ECJ will start using an approach based primarily on market access to decide if measures fall under Article 28 or not.

7.4 De minimis rule

The problem regarding deciding on the outer limits of Article 28 EC can be traced to the fact that a *de minimis* rule is not used in the application

[88] Bernard and Deakin, page 20.

of Article 28, and the ECJ has in fact consistently refused to introduce a *de minimis* rule into cases regarding the four freedoms. An example of a case where the question arose was the *Bluhme* case[89]. There a man was charged for infringing a ban on keeping other kind of bees than was allowed to keep on the tiny Danish island Læsö. The purpose of the ban was to protect a particular type of bee from extinction on these islands. It was argued that because of the limited geographical scope this ban should not fall within Article 28. The ECJ did not bother to comment on this *de minimis* point, and ruled that the measure fell under Article 28. [90]

But the fact is that zero tolerance to restrictions of any kind was not considered to be a good choice. That was the practice before *Keck* and was regarded widely as a failure. Therefore many commentators believe that a legal fiction of some kind is necessary to avoid the pre-Keck situation.

A very interesting theory on this point was laid down by Advocate General Jacobs in *Leclerc-Siplec*[91]. One point which he raised in his well formed opinion was that a *de minimis* rule should be considered in cases regarding the outer limits of Article 28.[92] He stated that if the *Keck* rule was to be applied to the rules in question it would become clear that they in fact applied to all affected traders operating within the national territory and affected in the same manner in law and in fact the marketing of domestic and foreign goods. So if the Keck-rule was to be applied the rules would fall outside the scope of Article 28.

Although Jacobs did in fact agree with the conclusion he stated in his opinion that he thought that the Courts reasoning was unsatisfactory for two reasons. Firstly he stated that he thought it was inappropriate to make a rigid distinction between different categories of rules and apply different tests to rules according to those categories, because the severity of restrictions imposed by different rules should merely be one of degree. He pointed out that this was especially clear in the field of advertising. While the type of restrictions which were at issue in *Hünermund* might have little impact on trade between Member States that would clearly not be the case when a total ban on advertising a particular product would be the issue.

Secondly Mr. Jacobs pointed out that the approach to exclude measures which affected in the same manner, in law and in fact, the marketing of domestic and foreign goods, from the scope of Article 28, amounted to a discriminatory test in relation to selling arrangements. He thought that it was inappropriate since the central concern of the Treaty provisions on the free movement of goods was to prevent unjustified obstacles of trade between

[89] Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033.
[90] Another clear and early example of this was in case 177/82, *van de Haar* [1984) ECR 1797.
[91] The facts of the case are laid down in chapter 6.6.
[92] Steiner & Woods (page 166-168) agree with Mr. Jacobs on this point. According to them an approach focusing of whether a measure impedes access to a national market, subject to a *de minimis* rule would be a more workable rule than *Keck*. In their opinion it can be argued that the market is now sufficiently established for the ECJ to permit rules which only have minimal effects on import.

Member States. According to Mr. Jacobs this was a strange approach since an obstacle to intra-Community trade could not cease to exist simply because an identical obstacle affected domestic trade. He said that he had difficulties in accepting that Member States might arbitrarily restrict marketing of goods from other Member States if they only imposed similar restrictions on domestic goods. According to him the application of a discriminatory test would lead to the fragmentation of the Community market.

According to Mr. Jacobs there was one guiding principle which seemed to provide the appropriate test. That principle was that all undertakings which engaged in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there was a valid reason for denying them this full access. This principles was according to Jacobs to be found in all the cases regarding Article 28. Then Mr Jacobs went on and stated that if all undertakings should in fact have unfettered access to the whole of the Community market the appropriate test would be to find out whether there was a substantial restriction of that access. And, as he stated, that would in fact amount to introducing a *de minimis* rule in Article 28.

Mr. Jacobs stated also that even though the ECJ had rejected a *de minimis* test in cases regarding the free movement of goods, for example in *van de Haar,* it had really done so purely in the abstract.

But in this case the ECJ rejected this decision by Mr. Jacobs and applied the *Keck*-rule in the case.

But the Court has in some cases given decisions which can be considered to be based on a kind of a *de minimis* rule. Examples of this are *Peralta*[93] and *DIP SpA*[94] where the ECJ stated that the measure in question fell outside Article 28, since they were indistinctly applicable and the possibility of that they would have any effects import was too "uncertain and indirect".[95]

But what does the ECJ really mean with this? Is it saying that the measure in question does not impose restrictions within the *Dassonville* formula or are they saying that this test of remoteness is a separate principle on rules which qualify the *Dassonville* formula but fall outside Article 28 because their effect on intra-Community trade are "uncertain and indirect"? The latter would certainly have to considered to be a kind of a *de minimis* rule.

It has also been pointed out that *Keck* itself could be considered to be based on a certain kind of a *de minimis* rule. There the ECJ stated that non-discriminatory measures relating to "selling arrangements" were not "by nature such as to prevent…access to the market." It has been pointed out that this is a legal fiction and in fact a *de minimis* rule, since it involves that there will be certain

[93] Case 379/92 [1994] ECR I 3453.
[94] See chapter 6.9.
[95] Another example of this is case within the free movement of sevicres, Case 266/96, *Corsica Ferries SA v. Gruppo Antichi Ormeggiatory del porto di Genova,* para 31.

tolerance of measures which in fact restrict imports in some way.[96] The difference is though that the approach by the ECJ in *Keck* is rule-based, and not as a genuine *de minimis*-rule, based on complex economic data, and also that the approach in *Keck* would rarely lead to that restrictions would be tolerated which might have harsh effects on group of traders just because the group was small.

On the other hand there are some arguments that go against that a *de minimis* rule should be applied within the field of free movements of goods. It has for example been argued that if the four freedoms are to be taken seriously as fundamental principles of Community law, there is no room for a *de minimis* rule.[97] A small trader would for example not be comforted much by knowing that a rule affecting his access to the market was not illegal because it in fact affected so few.

Another argument against a *de minimis* rule in the field of free movement of goods is that there would probably be considerable practical problems in applying such a rule.[98] And it has also been pointed out that the legal uncertainty introduced by such a rule could in fact make it harder for national courts to apply Article 28.

In my opinion it is almost impossible to apply Article 28 without a some kind of a *de minimis* rule, or at least an approach which brings farfetched claims outside the scope of Article 28. And the ECJ has in some cases, such as *Peralta* and *DIP SpA*, used an approach which limits the scope of Article 28 to rules which do not have only "uncertain and indirect" effect on intra-Community trade. And this approach could in my opinion be developed and used on more occasions where claims are very farfetched and the effects of the rules clearly are both uncertain and indirect. And it can be difficult to draw the line between such an approach and a genuine *de minimis* rule.

Of course it would be clearer to introduce a formal *de minimis* rule in the application of Article 28, but as was stated here above the ECJ has constantly refused to apply a *de minimis* rule in the fields of free movement of goods. Instead it has chosen to apply *Keck* to limit the scope of Article 28. It is therefore not likely that it will do that in the future. The *Keck* approach seems to be here to stay.

[96] Oliver, page 798.
[97] Oliver, page 790.
[98] Oliver, page 792

8 The Keck rule in other free movement fields

The development of case law in other free movement fields has been similar to the development of case law in the field of free movement of goods, to a large extent. The derogations to them in the legislation is similar, and alongside them the ECJ has provided a justificatory test similar to the *Cassis*-test for workers, services and establishment alike.[99]

As has been discussed here above the ECJ introduced a new approach in *Keck*, providing that not all non-discriminatory measures had to be justified under the *Cassis*-test. But what about the other fields of free movements? Does *Keck* apply there?

8.1 Keck and the free movement of services

8.1.1 Alpine Investments

In *Alpine Investment*[100] which regarded the free movement of services the ECJ took into consideration if *Keck* should be applied. The case regarded a firm with the same name which was established in the Netherlands. The firm provided financial services and specialized in commodities futures trading and acted as an "introducing broker". It received orders from clients relating to transactions in the market and passed them on for execution to brokers dealing with those markets.

After the firm had been in the market for a while the Minister of Finance in the Netherlands started to receive complaints from several investors which complained about the selling technique which the firm used, called "cold calling". That technique consisted of contacting individuals by telephone without their prior written consent. After receiving those complaints the Minister decided to impose a general ban on the use of cold calling with the aim to protect consumers and to save the good reputation of Dutch financial services.

Alpine Investment contested this measure and claimed that it was contrary to Article 49 since it reduced the firms capacity of getting in contact with potential consumers established in other Member States. When its administrative claim was rejected the firm appealed to national court which referred questions to the ECJ. Two parties, UK and Greek, submitted written observations in addition to the parties. The main argument put forward by the Dutch and UK governments was that the *Keck* case-law should be transposed to the field of services.

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[99] See for example case 33/74, *Van Binsenberg v Bestuur van de Bedrifsvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[100] Case C-384/93 *Alpine Investment* [1995] ECR I-1141.

Advocate General Jacobs, which has been cited repeatedly in this thesis, gave opinion in this case. He began by looking at Community legislation which could be relevant to cold calling and came to the conclusion that Community legislation neither prohibited it nor prevented Member States from prohibiting it. He then looked at if there was a cross-border element in this case, and came to the conclusion that it was since the provider and the recipient of the services were established in different Member States.

Regarding the fact that the one which made the restrictions was in fact the home country of the firm the Advocate General stated that it did not matter if the rules were made by the importing or exporting state, if they substantially impeded the exercise of the freedom to provide services and adversely affected the establishment and functioning of the internal market. He therefore held that the contested measure fell within the scope of the Treaty.

Regarding the question if the measure qualified as a restriction within the terms of Article 49 EC, Mr. Jacobs introduced a functional criterion, similar to the one he had introduced in *Leclerc-Siplec*.[101] He stated that this should be determined by a reference to a functional criterion, that is, if the measure substantially impeded the ability of persons established in the territory to provide intra-Community trade. As was discussed earlier in this paper, Mr. Jacobs proposed a *de minimis* test in *Leclerc-Siplec* as an alternative to *Keck*. There the ECJ chose not to follow his opinion.

On the facts of the case the Advocate General found that Article 49 had been infringed. He on the other hand came to the conclusion that the restrictions could be justified by protection of consumers and the safeguard of the reputation of the Netherlands securities market. He also found that the restrictions were proportionate to the aim pursued.

The Advocate General therefore concluded that Article 49 was not applicable to the prohibition in question.

The ECJ reached the same conclusion as the Advocate General.

As was mentioned above the Dutch and the UK governments put forward the argument that *Keck* should be applied in this case, since the measure in question concerned selling modalities, applied without discrimination and did not have as its object or effect to favour the national market for services over other Member States´ markets. The two governments held therefore that the prohibition should fall outside the scope of Article 49.

The ECJ took this under consideration, but did not agree with the two governments on this point. But commentators have reached different conclusions about how to understand its conclusion on this point.

On this point the ECJ began by stating that the prohibition in question was not analogous to the legislation concerning selling arrangements

[101] The facts of the case are laid down in chapter 6.6. and a discussion on this approach suggested by Mr. Jacobs is in chapter 7.4.

which were held to fall outside the scope of Article 28 in *Keck*.[102] It then described the judgment in *Keck* and why it had been decided as it was, that is because provisions as the one in question there were not as to prevent access to the market of the Member State of importation or to impede access more than it impeded access by domestic products. Then the ECJ went on to state that the prohibition in the case at issue was imposed by the Member State in which the provider of services was established and effected not only offers made by him to addressees who were established in that State or moved there in order to receive services but also offers made to potential recipients in another Member State. Therefore the ECJ held that it did directly affect access to the market in services in other Member States and was therefore capable of hindering intra-Community trade in services.

One possible interpretation on this case, which has been suggested by Friedbacher[103], is that *Keck* was decided as it was because the ECJ saw it as lacking any cross-border effect. Therefore ECJ made a distinction when reaching its decision in *Alpine Investments* on the grounds that in that case the measures directly affected access to the market.[104]

In his article on *Alpine Investment*[105], Hatzopoulos took into consideration another three different interpretations of the judgment on this issue.

The first possible interpretation is that the ECJ in fact only distinguished *Keck* from the facts in this case. The Member State in question not only required compliance with the rules on marketing in its own territory but also in the territory of other Member States. So the Netherlands were in fact exporting their restrictions on the manner in which services were to be provided. Maybe the ECJ only ruled that this practice could not fall within *Keck*.

Another possible interpretation of this judgment is to say that the ECJ was trying to limit the scope of *Keck*, and it said in fact that although the conditions from *Keck* were fulfilled a measure could non the less constitute a restriction on the freedom to provide services.[106] This seems to point out that even when the *Keck* conditions are satisfied a measure might be considered to be a restriction under Article 49.

The third possible interpretation is to say that the ECJ in fact ignored *Keck* in this case. It ruled there immediately that the measure in question did not constitute a restriction under Article 49, and then, almost incidentally distinguished *Keck* as a final argument brought by the Netherlands and UK. So if it had not been for the two parties the ECJ had probably forgotten all about *Keck* when considering this case.

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[102] Para 36 of the judgment.
[103] See Friedbacher, page 231.
[104] Para 38 of the judgment.
[105] Hatzopoulos, V., *Case C-384/93, Alpine Investment BV v. Minister von Financiën, Judgment of 10 May 1995, nyr*, CMLRev 32: 1427, 1995.
[106] Para. 35 of the judgment.

But in another article, Hatzopoulos puts forward one more and very interesting possible explanation.[107] According to it the distinction between selling arrangements and other measures in *Keck* is inappropriate for ensuring the free provision of services. According to the author this is so because services are by essence immaterial and therefore the nature and quality of a service does not rely on its characteristics or ingredients, but on the other hand depends on the conditions under which it is delivered. He therefore points out that in most cases the "selling arrangement" of a service really is a part of the service itself and can therefore not be treated separately. An example of this was in *Alpine Investments* itself, where the "cold calling" was closely linked to the service. It was enough that the recipients of the "cold calling " accepted the offer to create the service relationship. He therefore believes that the distinction introduced in *Keck* between selling arrangements and other measures may only be operational in the field of free movement of goods.

This is a very interesting point, which I have to agree with. It is true that even if a similar distinction as was made in *Keck* can also be made in the field of services, the "selling arrangements" in that field are linked much more closely to the services than the "selling arrangements" in the field of goods to the goods themselves. Rules regarding how, when and where the service can be provided regard the service provider himself and often an important part of the service itself. And as was mentioned here above the rules regarding the promotion of a service affect more directly its access to the market than such rules in the field of goods. There is therefore an important distinction which can be made there.

But on the other hand the ECJ´s position on this issue is not yet clear, and I believe that the importance of *Alpine Investments* regarding the position of *Keck* in the field of services should not be overstated. The case is limited by its facts. It is exceptional that the Member States in question was in fact exporting its legislation on selling techniques outside its own territory. But it is interesting that the ECJ did not use this opportunity to clarify if *Keck* can apply in the field of free movement of services. It is also interesting that the ECJ put the hindrance to access to the market forward as the most important issue, as was discussed here above.[108]

So I think that before one comes to a conclusion regarding if and then how *Keck* applies in the field of services, more cases on the issue have to be decided by the ECJ. In my opinion *Keck* should not apply there, for the reasons stated above, but the ECJ´s position is not clear yet. But in my opinion it is likely that the ECJ will make this distinction.

[107] Hatzopolous, *Recent development of the case law of the ECJ in the field of services,* page 67 – 68.
[108] See chapter 7.3.

8.2 Keck and the free movement of workers

8.2.1 Bosman

Bosman[109] regarded the transfer system that national and transnational football associations had developed. According to the system a football club which wanted to engage a player which had finished his contract with another club had to pay a sum of money to the latter club. The amounts in question were substantial.

In this case a Belgian player, Bosman, which had been employed by a Belgian club, was hindered from securing employment for a French club by these rules. This case came to the ECJ for a preliminary ruling.

What was special in this case was that the rules in question applied equally to players moving from one club to another within a Member States as to players moving between Member States, and the nationality of the player did not matter.

The football associations relied on *Keck* to justify this system but the ECJ did not agree with them. Instead it reached similar decision as in *Alpine Investment* and stated that those rules still directly affected players access to the employment market in other Member States and were therefore capable of impeding freedom of movement for workers. Therefore these rules could not, according to the ECJ, been considered to fall outside the scope of Article 39.

The judgment in this case was very similar to the one in *Alpine Investments* and most of the things said about the ECJ´s conclusion in that case applies to *Bosman* to. And the ECJ in fact cited *Alpine Investment* when reaching the conclusion in *Bosman*.

What was specially interesting in *Bosman* was that the ECJ ignored a test based on if the rules applied unequally in law or in fact, depending on the origin or the destination of the player. Instead it used a market access-test and stated that because the rules directly affected the players´ access to the employment market in other Member States they were capable of impeding the freedom of movement for workers.[110]

In *Graf* the ECJ got the opportunity to define the scope of the *Bosman* ruling.

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[109] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995] ECR I-4921.

[110] This is different from the approach in *Keck* where the importance of securing direct market access was not the primary concern although the term was mentioned there. According to it it was assumed that when ruled fulfilled its criteria they were not as to prevent access to the market. But as has been mentioned this assumption does not survive close scrutiny becasue rules which regard ”certain selling arrangements” can in some circumstances prevent market access.

8.2.2 Graf

Graf [111] regarded the question if Article 39 EC would preclude national legislation which denies entitlement to compensation on termination of employment in the case of a worker who terminates his contract of employment himself in order to take up employment with a new employer established in that Member State or in another Member State, but grants it in the case of a worker whose contract ends without the termination being at his own initiative or attributable to him.

The plaintiff, Mr. Graf, was a German national, employed in Austria. He left his job to take another one in Germany and sought to get payments of two months salary, but was refused on the grounds that he had left his job voluntarily before the end of the contract. Mr. Graf took this argument to national court and argued that the limitation to the right to compensation prinsipally affected migrant workers who voluntarily gave up their existing employment in order to move to another Member State, and thereby gave rise to an indirect discrimination.

The national court found that this rule did not discriminate on grounds of nationality and did not impose any impediment on the movement of persons across borders which was more severe than a restriction on internal mobility. The court found that the loss of compensation was not enough to count as a perceptible non-discriminatory restriction on mobility. The court then found that it was not comparible with the transfer fee in *Bosman* which was fixed at so high level that no employer would pay it. It would rather be a factor in the overall assessment of the balance of financial advantage of changing employment.

On appeal the plaintiff argued that the ECJ had not required in *Bosman* that restrictions were perceptible to be caught by Article 39. The case was referred to the ECJ for a preliminary ruling.

The Advocate General in this case was Mr. Fennelly. He took into special consideration if the more developed case-law in the field of free movement of goods, including the *Keck* judgment, could give a useful guidance in this case. He recognised that analogies between the two fields would rarely be perfect, mainly because of the rigid and formalistic distinctions in *Keck* between product rules and certain selling arrangements. But according to the Advocate General this distinction was less important than the motivation which led to the adoption of it, which according to him was to identify circumstances in which different types of rules have the same undesired effect, that is, to affect access to the market. He said, after going through the problem with the wide case law before *Keck*, that it had been reasonable for the ECJ to respond by developing presumptions in the light of its knowledge of market behaviour, regarding the likely effects of different types of regulation on the achievement of the ultimate goal of Article 28. But then the Advocate General went on to state that such

[111] Case C-190/98, *Volker Graf v Filzmoser Maschinenbau Gmbh*.

presumption should not be conclusive. According to him the validity of such presumption had to be tested against the underlying criterion of market access in concrete cases, rather than automatically being taken as being sufficient in itself to dispose the case. So the Advocate General obviously did not agree with the ECJ´s presumption in *Keck* that national provisions regarding selling arrangements would not affect importers access to the market. But, according to him, it was not necessary in this case to examine the reliability of this presumption. Then the Advocate General cited *De Agostini*, Advocate General Jacobs suggestion in *Leclerc-Siplec* and specially *Alpine Investment*, where the ECJ held that *Keck* could not be applied, because the restriction in question directly affected access to the market in services.

The Advocate General took into special consideration the general test which had been laid down in *Bosman*. According to it all provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement constituted an obstacle to that freedom, even if they applied without regard to the nationality of the workers concerned. The question was really where the limits of this test laid. The Advocate General concluded that access in this case was not affected by the small size of the money involved. It was, in his view too tenuous, remote and uncertain to constitute a restriction on free movement. His opinion was therefore in line with the cases in the field of free movements of goods, where it is unclear if the ECJ is in fact using a certain kind of a *de minimis* rule.[112]

The ECJ agreed with the Advocate General and stated in its judgment that the events leading to compensation were to uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers.[113]

The opinion by Advocate General Fennelly in this case is very interesting. It is very similar to Hatzopolous´s idea[114] about how the distinction which was made in *Keck* can not been applied in other fields than free movement of goods. And it is obvious that the Advocate General is also in favor of market access test to limit the scope of Article 28.

[112] Such as *Peralta* and *DIP Spa.* See chapters 7.4. and 9.

[113] This is similar to the ”remoteness approach” of the ECJ in *Peralta, DIP SpA* and case C-69/88 *Krantz* which all regarded Article 28. In this case the ECJ in fact cited *Kranz*, where it was stated that ”.. the possibility that nationals of other Member States would hesitate to sell goods on instalment terms to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Netherlands tax debts is too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member State”. This ”rule of remoteness” is discussed further in chapters 7.4. and 9.

[114] See chapter 8.1.

8.2.3 Lehtonen

Lehtonen[115] was decided shortly after *Graf*, in april 2000. Although it regarded transfer rules for basketball players in Belgium it was quite different from *Bosman*. The *Bosman* case concerned the transfer fees which a club had to pay if it wished to engage a player from another club after the player's contract with that club had expired, and also the rules on foreigners under which football clubs could play only a limited number of foreign professionals, but this case concerned provisions which imposed time-limits on transfers of players between clubs if the player concerned was to play for the new club during the current season.

The opinion was put forward that the application of Article 39 on the free movement of workers should be restricted in accordance with the *Keck* judgment. A distinction should therefore be drawn between rules for the exercise of a profession and restrictions on access, and Article 39 should only apply to restrictions on access.

Advocate General Alber gave his opinion in this case, and took into consideration if there should be an application by analogy of *Keck*. According to him there was no reason in this case to do that, as the ECJ had in fact concluded in *Bosman*.

Then the Advocate General made an interesting comment on if there should be such an application in Article 39. He stated that, independently of the case in question, there was no reason to introduce such a restriction of the scope of Article 39 of the EC Treaty. The ECJ had limited the wide scope of Article 28 in *Keck and Mithouard*, by excluding rules on selling arrangements from its scope. According to him selling arrangements were characterised by the fact that they do not necessarily affect those who import or export a product, but only the subsequent sale to the final consumer and a foreign producer does therefore not have to alter his product according to the sales market he has in mind. Selling arrangements thus as a rule affected trade in goods only very indirectly. If trade in goods between Member States was nevertheless affected to a greater degree than internal trade within the Member State, then the formulation used in *Keck* would no longer apply, as the very wording of the judgment showed. Then the Advocate General stated that product-related requirements would always come under free movement of goods, and rules on the exercise of a profession were much closer to product-related rules than to rules on selling arrangements. Rules on exercise had to be complied with directly by a citizen of the Union who wished to assert the fundamental freedom under Article 48 of the EC Treaty. He had to take account of new rules of exercise and acquire corresponding qualifications, possibly after every cross-frontier change of employment.

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[115] Case C-176/96, *Jyri Lehtonen and Asbl Castors Canada Dry Namur-Braine v Asbl Fédération Royale Belge des Sociétés de Basket-ball and Asbl Basket Liga - Ligue Basket Belgium.*

The Advocate General recognized that the freedom of movement for workers had a wide definition, comparable to the *Dassonville* formula. But according to him it was already restricted by the fact that freedom of movement may be relied on only in a cross-border situation, and that starting point for reliance on freedom of movement already had in fact a similar restrictive effect to that under *Keck and Mithouard* for selling arrangements.

This is a very interesting point by the Advocate General, and in line with Advocate General Fennellys opinion in *Graf* and the opinion which Hatzopoulos has presented. It is true that there is a huge difference between those two fields, and that there is probably not a similar need for a *Keck* rule in the field of workers as in the field of goods.

But in this case the ECJ reached a similar decision as in *Bosman* regarding the question if there was an obstacle to the freedom of workers, and cited that judgment. It therefore reached the decision that the restriction was caught by Article 39 EC. The ECJ did on the other hand not mention *Keck* in its judgment.

8.3 Conclusion on the application of Keck to other fields than free movement of goods

As can be seen here above the ECJ has still not made its position clear on the question if *Keck* should be applied to rules regarding other fields than the free movement of goods, and it is interesting how it seems to have avoided to give clear rulings on this question.

In my opinion the application of *Keck* should be limited to the field of free movement of goods and I agree with Hatzopoulos, Advocate General Fennelly and Advocate General Alber on that issue. The distinction made in *Keck* between rules regarding selling arrangements and other rules does after all make some sense in the field of goods, but the nature of the other fields is different so even if a similar distinction can be made between rules in this field it would be wrong to let a category of rules fall outside the relevant Treaty articles without further justifications.

9 Conclusion

One thing that is clear about the application of Article 28, is that it is extremely difficult to find a rule to limit its outer boundaries in a simple and a clear way. The main problem in its application is the wideness of the *Dassonville*-formula which by its wording catches smallest restrictions, and when such a rule is considered to catch indirectly applicable measures, as was decided in *Cassis,* the limits of the outer boundaries of Article 28 almost disappear, because almost every rule which regulates trade can in fact be said to affect intra-Community trade in some way. It would be possible to solve the problem by applying some kind of a *de minimis* rule to limit the scope of the Article, as has been done in the application of Articles 81 and 82 of the Treaty, but the ECJ has consistently refused to apply such a rule in this field. On the other hand the ECJ has sometimes said that because the effects of the restriction in question were too "uncertain and indirect" the rules should fall outside the scope of Article 28. And although this approach is not a genuine *de minimis* rule, it can be used for the same purpose as such a rule, that is to get farfetched claims about rules with unclear, uncertain and indirect effects on intra-Community trade outside the scope of Article 28.

After its ruling in *Cassis* the ECJ seemed to draw the line between equal and dual burden rules, and although that approach is primarily based on the question if there has been any discrimination, and not on the effects of the rule as in *Dassonville,* this approach at least made the application of Article 28 easier. But in *Cinéthéque* the ECJ decided to use a different approach, and applied Article 28 to an equal burden rule, and based this opinion on the presumption that the application of the system there might create barriers to intra-Community trade. In this case the restriction was a complete ban on sale for a certain time, and maybe the ECJ felt that for that reason it was difficult to let the rule fall outside the scope of Article 28. But nevertheless this judgment clearly got the attention of traders and defence lawyers throughout Europe. This judgment meant that rules with little and uncertain potential effect on intra-Community trade could be tried before the ECJ.

This had the effects that a huge amount of cases of this kind were tried before the ECJ. In those cases the ECJ expressed its opinion that the rules in question there could be justified under *Cassis* but the problem was that the proportionality-test was left to national courts, which reached different conclusions on this issue. This therefore caused a huge legal uncertainty in this field. Because of this the ECJ provided clearer guidance to the national courts on this issue in later cases, so maybe this period in the cases before the ECJ could have passed without further actions by the ECJ.

But the ECJ obviously did not think so and was probably affected by the discussion which took place in academic literature on the scope of Article 28. And the ECJ´s new approach to limit the scope of Article 28 was presented in *Keck*.

Keck presented a rule-based approach to Article 28. According to it certain selling arrangements would fall outside the scope of Article 28, unless it was proven that they were discriminatory. But as was pointed out by many, and perhaps most clearly by Advocate General Jacobs, this approach, to make a distinction between categories of rules, letting one category fall inside the scope of Article 28 but the other one outside its scope was not just. The presumption in *Keck* that "selling arrangements" were not "by nature such as to prevent…access to the market" was also very questionable to say the least. It was right that restrictions on circumstances in which certain or all goods might be marketed did not normally obviously interfere with the free movement of goods, but nevertheless it was clearly wrong to say that such a legislation had never effect on trade between Member States. Although its effect would probably always be insignificant it could in some circumstances have some effect.

The reason for the ECJ´s judgment in *Keck* was clearly to open a way out of the scope of Article 28 for rules which only had uncertain and indirect effects on intra-Community trade. It was intended to keep farfetched claims from falling within the scope of Article 28. But this could have been done with a different approach.

As was mentioned here above the main problem in the application of Article 28 has been that the ECJ has constantly refused to apply a *de minimis* rule to it to limit its scope. But on the other hand the ECJ has, in cases such as *Peralta* and *DIP SpA*, stated that where the effects of a measure is too "uncertain and indirect" the measure should fall outside the scope of Article 28.

In my opinion the ECJ could use this approach more frequently. It makes a lot more sense to let a rule fall outside the scope of Article 28 because of the fact that its effects are uncertain and indirect than basing the judgment on the fact that the rule falls inside the scope of a certain category of rules which have such indirect and uncertain effects. By reaching the conclusion in *Keck* the ECJ went in my opinion to far from the essence of Article 28, *Dassonville* and *Cassis*. It is a fact that the effects of selling arrangements in the field of free movement of goods are generally uncertain and indirect and therefore they could in most cases fall outside the scope of Article 28, as the rules in *Peralta* and *DIP SpA*, without applying *Keck*.

So in my opinion *Keck* was not a good judgment. And it was also very unclear, for example regarding the scope of the phrase "selling arrangements". It was therefore very important how the ECJ decided to apply this new approach. In my opinion the ECJ should have applied *Keck* in a narrow way, making a distinction between static and non-static selling arrangements. Then it would for example have avoided the difficulties in applying *Keck* to advertising. *Keck* is an exception from the main rule in Article 28, and that should mean that it should be confined narrowly.

It has not yet been made clear by the ECJ if *Keck* should be applied to other fields than free movement of goods.

In my opinion it should not. Although *Keck* was not the right approach to limit the outer boundaries of Article 28, it is true that the selling arrangements which were precluded by the application of Article 28 do not affect intra-Community trade in most circumstances. In the other fields this distinction can not be made between categories of rules. And although the ECJ has not yet concluded on this issue I believe that it will not apply *Keck* to other fields then free movement of goods.

Regarding how the ECJ has chosen to limit the scope of Articles 39 and 49 EC it is interesting to take a look at on what grounds it reached its conclusion in *Graf*. There it completely ignored *Keck* and stated that the effects of rules in question were too uncertain and indirect for the rules to be caught by Article 39. And as was stated here above I believe that the ECJ could use this kind of approach on more occasions, not only in those two fields, but also within the free movement of goods.

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