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THE LIMIT OF ARTICLE 28 EC
- the ten year development of Keck and Mithouard

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CONTENTS

SUMMARY *i*

INTRODUCTION 1
The objective of the paper 2

BACKGROUND 4
Measures of equivalent affect to quantitative restrictions 4
Dassonville and Cassis de Dijon 6
Hindrance on trade 8
The outer limits of article 28 – utter confusion 11
The Sunday trading cases 13
Conclusion – the problem 14
The measure escapes article 28? 16
The measure does *prima facie* fall within article 28? 16
Early suggestions for a solution 18

THEN CAME KECK… 19
A closer look at the Keck formula 20
An unclear clarification 21

UNCLEAR ISSUES IN KECK 23
The principle of subsidiarity and article 28 23
What are selling arrangements 25
When goods may be sold 26
Where and by whom goods may be sold 26
Advertising restrictions 27
The form of advertising 27
Advertising and the freedom to provide services 29
Price control 30
Conclusion – selling arrangements 30
Affecting the internal market 31
An alternative approach 32
Only hindrance on a big scale counts? – the *de minimis* test 33
The market access approach in the area of free movement of workers and services 34

RECENT CASES 37
De Augostini and TV-Shop 37
The Directive 38
Article 28 39
The ruling of the national court 40
TK-Heimdienst 41
Gourmet 43
The ruling of the national court 44

RE-EXAMINING THE COURTS CASE LAW 46
Applying Keck 47
Equality in fact 48

Cases over ruled 49

REMAINING AREAS OF UNCERTAINTY 54

CONCLUSION 57

Bibliography *60*
Articles *60*
Table of cases *60*

SUMMARY

The Treaty provisions regulating the free movement of goods are articles 28 to 31 EEC (former articles 30 to 36). Article 28 prohibits Member States from discriminating, that is, favouring or in any other way putting its domestic products at an advantage against imported products unless the Member State can find just cause under article 30 (former article 36) for its practices. For a national measure to fall within the scope of article 28 it must be a measure equivalent to quantitative restrictions (MEQR). The basic principle considering MEQR was laid down by the Court in the case *Dassonville*[1]. There the Court stated that *"All trading rules enacted by Member States Which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."*[2] However, the early case law had given the article a too wide range of application. Nearly every national measure that in any way affected products from other Member States could be caught by article 28. The article was described as a loose tiger[3]. This was a situation that became somewhat frustrating for the Member States and for the Court, which got more and more complaints from traders whenever a national measure restricted their commercial freedom. A debate arose on the issue whether some national measures actually had nothing to do with trade between Member States and the free movement of goods. Such measures could be rules regulating how, where and by whom products may be sold. These rules could have a potential indirect hindrance in the sense that the rules could restrict the volume of sales. However, the rules did not restrict the marketing of imported products more than it restricted domestic. The main question was whether these rules constituted a hindrance on trade between Member States only permissible if justified under the mandatory requirements, or if these types of rules entirely fell outside the scope of art 28. Should the Court apply the Dassonville formula literally and let it catch all national measures even remotely capable of restricting trade, or should some measures simply escape the formula completely?

It was in the case *Keck and Mitouard*[4] where the Court presented the so called Keck formula or the Keck test, which changed the structure of the principle of free movement of goods and

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[1] Case 8/74, Procureur du Roi v. Dasonville, [1974] ECR 837

[2] Dassonville, Para 5

[3] Maria-Pia Midenbäck, "*The European Court of Justice and the interpretation of article 30 EC – The taming of the tiger*", JT 1994/95 p 972

[4] Joined cases C-267/97 and C-268/91, Keck and Mithouard, [1993] ECR I-6097

the scope of article 28. The Court presented a general principle which could help the national courts to determine whether a national measure hindered trade or not. The test or formula established in Keck is to be used to ascertain whether a national measure directly, indirectly, actually or potentially hinders trade within the meaning of the Dassonville ruling. The Keck formula divides national measures into two types of rules. One set of rules does, by its nature hinder trade, whereas the other does not, provided it fulfils two conditions. The first types of national measures are the so-called product-bound measures. Product-bound measures are rules, which impose additional requirements on the product as such despite the requirements imposed by the country of origin. These types of rules are found to restrict trade and thus fall within article 28. The second type of rules are called selling arrangements. Selling arrangements are rules regulating when, where and by whom goods may be sold, advertising restrictions and price controls. These sets of rules are perceived by their nature not to impede the market access of imports more than they prevented the market access of domestic products, provided they 1; apply to all relevant traders operating within the national territory and 2; apply equally in law and in fact to domestic and imported products. Such rules do subsequently fall outside the scope of article 28.

Still, many reacted to the Courts reasoning or what they saw as lack of reasoning in the Keck ruling[5]. Some found the judgement too formalistic and somewhat arrogant because of the lack of explanations to the new vocabulary, such as selling arrangements. The concept of selling arrangements was unclear at the time and it is only through subsequent case law that the notion of the term selling arrangements has become clear. The Court also stated in the ruling that it was more or less tired of traders who time after time challenged national rules because it restricted their commercial freedom and because of this, the Court found it necessary to re-evaluate its case law. The ruling in Keck was a trend breaker in the Court's previous somewhat inconsistent case law. However, the Court failed to mention which cases that no longer constituted good law. Even if the Courts intention was to give article 28 a clear-cut application, some things remained unclear. Some also found the Keck formula incorrect to use as a general principle because it did not accentuate the true objective of article 28. For example it was pointed out that the categorisation of national rules reflects only on the form of the rules, missing the effect they have on trade between Member States. This was contrary

[5] Weatherill, *"After Keck: Some thoughts on how to clarify the clarification"* [1996] C.M.L Rev. 33. 885; Opinion of Advocate.General. Jacobs Case 412/93 Leclerc-Siplec, ECR [1995] 179, Weatherill, *"After Keck: Some thoughts on how to clarify the clarification"* [1996] C.M.L Rev. 33. 885; Opinion of Advocate.General. Jacobs Case 412/93 Leclerc-Siplec, ECR [1995] 179

to the ruling in Dassonville where the effect of the national measure was the important issue and not the form the rule had. Critics thought that the key issue should not be whether the national measure is a selling arrangement or if it applies equally to all traders in law and in fact, but whether the measure "*…exerts a substantial restriction on the access to the national market*"[6].

Many of the questions that arose in relation to the ruling in Keck have over the ten year period that has passed since the case was decided been answered through the Courts case law and application of the Keck formula. The concept of selling arrangements has been defined, and with the understanding of that, one can conclude, more or less, which cases that have through Keck been overruled. The Court has in recent cases emphasised the importance of the imported product's possibility to access the market of the importing Member State. This shows that the Court recognises the importance of a market access approach. The Court states that when a national rule could be described as an outright ban one should bare in mind that such a measure could have a greater impact on imported products than on domestic[7]. The Court implies with this statement that a market access approach does indeed exist in the Keck formula, even if it is not a primary issue.

Still, some issues remain unanswered. The most important one is how the discrimination in fact of imported goods is to be determined when the Court is reluctant to use economic data. Some progress has been made even in this area. The Court has in its recent case law implied that it is possible for it to consider economic data, however, this statement is not clear enough. This issue is the Keck formulas downfall. The assessment of equality in fact is the big problem when applying the formula, which in its other aspects is a fairly easy test, in terms of application. On the other hand, considering the alternative approaches suggested, the Keck formula is as a general principle the best way to determine the limit to article 28.

[6] Wheatherill, "*After Keck: Some thoughts on how to clarify the clarification*" [1996] C.M.L Rev. 33 p 890
[7] Joined cases C-34/95, -35/94 and –36/94, Konsumentombudsmannen (KO) v. De Augostini and TV.Shop, [1997] ECR I-3843

INTRODUCTION

The free movement of goods constitutes one of the four fundamental freedoms, on which the realisation of a European common market is perceived to be characterised by[1]. The free movement of goods, persons, services and capital are the means to create one European internal/common market and thus the foundation of a European Union[2]. Member States may not, with its internal rules, in any way hinder the formation of a common market and thereby the creation of a European Union. Restrictions on the free movement of goods, persons, services or capital are strictly forbidden, unless the Member State has a reason, which must be justified under Community law.

The Treaty provisions regulating the free movement of goods are articles 28 to 31 EEC (former articles 30 to 36) [3]. Article 28 has been the subject of much interpretation by the Court over the years, and there is a rich case law concerning the matter. The early case law had given the article a too wide range of application. Nearly every national measure that in any way affected products from other Member States could be caught by article 28. The article had become a loose tiger[4]. There was a need to find the bounds, a limit to article 28. A general principle was required to determine when national measures where out of reach of article 28, in other words the tiger had to be tamed[5].

In November of 1993, the European Court of Justice[6] took a revolutionary step in the area of free movement of goods. It presented a general principle which was going to help the national courts to determine when one of their national measures did *not* restrict the free movement of goods. It was in the case *Keck and Mitouard*[7], where the Court presented the so-called Keck formula or the Keck test, which changed the structure of the principle of free movement of goods and the scope of article 28.

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[1] Articles 2 and 3 (1) a) and c) EEC.
[2] The creation of a European Monitary Union is perceived to be a step in order to create an “ever closer union”, Article 1-2 TEU.
[3] I will in the following use the new numbering of the articles.
[4] Maria-Pia Midenbäck, ”*The European Court of Justice and the interpretation of article 30 EC – The taming of the tiger*”, JT 1994/95 p 972
[5] Maria-Pia Midenbäck p 981
[6] I will in the following refer to the European Court of Justice as the Court.
[7] Joined cases C-267/97 and C-268/91, Keck and Mithouard, [1993] ECR I-6097

The objective of the paper

This is a thesis, written for the graduation from the law program at the University of Lund. The purpose of the paper is to present the development of the so-called Keck formula. The thesis presents a general view of the Keck and Mithouard case and what has happened during the ten years that has passed since the case was decided, and much has happened since then. The analysis is based on a case law, literature and article study. At my disposal, when analysing the facts of a case I have the actual rulings, the opinions of the Advocate Generals and the reports from the hearings as a source of information. However, one must bear in mind that there may be other factors which are not accounted for in the studied material. This could make it hard to, with absolute certainty, conclude that a national measure does for example not restrict trade.

Because Keck was such a revolutionary case, it has been heavily debated, not only because it was ground-breaking in a legal sense but also because it was found to be too formalistic, leaving little room for unpredictable situations and therefore not satisfactory as a general principle[8]. Subsequently, there is much written about the ruling[9]. What is noteworthy is the fact that there is also much written about the need for the Court to take a stand, like it did in Keck, prior to the judgement[10].

Many questions remained unanswered after Keck, despite the Courts attempt to clarify the scope of article 28. As I will show, there were many unclear issues in Keck when the case was decided, some, where more vital than others for the understanding of the ruling as such. I will also show that most of the uncertainties have been solved on a case-by-case application of the Keck formula during this ten-year period. Keck and the outer boundaries of article 28 have become clear over time, but there are still some question marks and "what ifs". Some are of

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[8] Weatherill, *"After Keck: Some thoughts on how to clarify the clarification"* [1996] C.M.L Rev. 33. 885; Opinion of Advocate.General. Jacobs Case 412/93 Leclerc-Siplec, ECR [1995] 179

[9] Bernitz, *"Nationell lagstiftning som handelshinder inom europarätten – ett steg tillbaka?"* JT 1993/94. 805; Chalmers, *"Repackaging the Internal Market – The Ramifications of the Keck Judgement"* [1994] E.L. Rev. 19. 385; Gromley, *"Reasoning Renounced? The Remarkable Judgement in Keck and Mithouard"* [1994] Euro. Bus. L. Rev. 63; Midenbäck, *"The European Court of Justice and the Interpretation of Article 30 EC – The Taming of the Tiger"* JT. 1994/95. 972; Reich, *"The "November Revolution" of the European Court of Justice: Keck, Meng and Audi revisited"* [1994] C.M.L. Rev. 31. 459;Weatherill, *"After Keck: Some thoughts on how to clarify the clarification"* [1996] C.M.L Rev. 33. 885

[10] Mortelmans, *"Article 30 of the EEC Treaty and Legislation relating to Market Circumstances: Time to Consider a New Definition?"* C.M.L. Rev. [1991] 28. 115; Steiner, *"Drawing the Line: Uses and Abuses of Article 30 EEC"* [1992] C.M.L. Rev. 29. 749; White, *"In Search of the Limits to Article 30 of the EEC Treaty"*

the opinion that the Keck formula is too narrow, leaving no room to solve the "what ifs" should they appear[11]. Followers of this opinion have given their contribution to how they think the Keck case should have been solved. The alternative approach has also been said to better accentuate the objective of article 28. The question is whether the Keck formula itself provides a good enough base to solve these, as of yet unclear issues, should they occur, or whether the Court has "painted itself into a corner", forcing it to deter from the Keck formula in order to stay in conformity with the principles of the free movement of goods.

[1989] C.M.L. Rev. 28. 115; Wils, *"The Search for the Rule in Article 30 EEC: Much ado about nothing?"* [1993] E.L. Rev. 18. 475

[11] Weatherill, *"After Keck: Some thoughts on how to clarify the clarification"* [1996] C.M.L Rev. 33. 885

BACKGROUND

It is often said that in order to understand the present one must understand history. That is a maxim that applies in most situations, so even in this. To be able to better appreciate the legal status, boundaries and application of article 28, one must know the path the Court has taken in order to give article 28 the ambit it has today. Since this paper primarily deals with the limits of the article, it is the Courts interpretation of the boundaries to the principle of free movement of goods that will be examined. Nonetheless, it is also important to understand the whole picture to be able to appreciate the details of it. However I have decided to leave out the discussion concerning quantitative restrictions and its definition contra measures of equivalent effect to quantitative restrictions[12]. Since Keck deals with national measures identified as being measures equivalent to quantitative restrictions I will concentrate on these types of rules.

Measures of equivalent effect to quantitative restrictions

Article 28 states:

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

Article 28 prohibits Member States from discriminating, that is favouring or in any other way putting its domestic products at an advantage against imported products, unless the Member State can find just cause under article 30 for its practices. Article 30 allows Member States to apply rules prohibited under article 28 provided they are justified on the grounds of public morality[13], public policy[14], public security[15], protection of health and life of humans, animals

[12] For more reading on the matter see; Craig and De Burca, pp 580, Kapteyn and van Thermaat, pp 623
[13] Case 34/79, R v. Henn and Darby [1979] ECR 3795; a ban on the import of pornography was found justified. The Member States are free to decide the sense of public morality as long as the same policy applies to domestic products.
[14] Case 231/83, Cullet v. Centre Leclerc [1985] ECR 305; a French legislation imposed minimum retail prices for fuel. The French government argued that without the pricing rules there would be civilian disturbance, the argument was rejected. The term public policy is fairly broad. Because of this the Court has used a careful and strict interpretation of the phrase. A public policy justification must be made on its own terms and not be used as a means to advance separate grounds for defence. This is why there are relatively few cases on the matter. See also Craig and De Burca pp 597
[15] Case 72/83, Campus Oil Ltd v. Minister for Industry and Energy [1984] ECR 2727; An Irish law requiring importers of petrol into Ireland to buy 35% of their requirements from a state owned refinery at prices fixed by the Irish government. The argument was that Ireland had to for public security reasons maintain an independent

or plants[16], protection of national treasures possessing artistic historic or archaeological value, or protection of industrial and commercial property[17], and as long as the measures do not arbitrarily discriminate or are a disguised restriction on trade. Since article 30 is a derogation from the main rule, it is interpreted narrowly and only the grounds mentioned in the article are considered as justified under Community law. The list is exhaustive.

National measures can be divided into two types of rules. The first types of rules are the so-called distinctly applicable measures. These provisions apply only to domestic *or* imported products, and create a direct discrimination, *de jure*. Distinctly applicable measures are by their very nature most likely to hinder imports[18] and may only, as stated above, be justified under article 30. Second types of rules are the so-called indistinctly applicable measures. These rules applies to domestic *and* imported products alike and do not discriminate as such between goods as to origin. However, these types of rules may create a real barrier to trade *de facto*. Indistinctly applicable measures, at a first glance, makes no distinction between domestic and imported products, but these types of rules may nevertheless be challenged and caught under article 28. It has not always been clear that indistinctly applicable measures may be an obstacle to the realisation of the internal market. This is a notion that has more or less grown from the Court's case law[19].

For a national measure to fall within the scope of article 28 it must be equivalent to quantitative restrictions (MEQR). The initial definition of MEQR, given by the Commission, referred in short to legislative rules and administrative provisions and practices that formed a barrier to importation or exportation and practices, which render the importation or exportation more expensive or difficult[20]. Measures that applied without distinction to imports and domestic products, indistinctly applicable, did not as a rule fall within the definition of MEQR. With the ending of the transitional period the Commission delivered a more refined view in a set of directives in a Christmas package in December 1969. Provisions and administrative practices, which restricted imports or exports, which particularly affected

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refining capacity of its own. The argument was rejected and the measure was found incompatible with art 28. Joined cases C-388/00 and C-429/00, Radiosistemi Srl v. Prefetto di Genova, ruling of 20 June 2002.

[16] Case 174/82, Officier van Justitie v. Sandoz BV [1983] ECR 2445; The Court accepted, in the absense of harmonisation, a Dutch law prohibiting the selling of muesli bars which contained added vitamins on the grounds of public health. Case C-67/97, Bluhme, "Laesö brown bee", [1998] ECR I-8033

[17] Case C-325/00, Commission v. Germany, ruling of 5 November 2002

[18] Steiner, p751

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

[20] Craig and de Burca pp 580

imports or exports fell within article 28, whereas measures which applied equally to domestic and imported products still did not. However, the Commission exemplified in Directive 70/50[21] a number of situations where equally applicable measures could constitute MEQR. Even if the Directive was only formally applicable during the transitional period, it may still give some ideas of the scope of MEQR.

Dassonville and Cassis de Dijon

The basic principle considering MEQR was laid down by the Court in the case *Dassonville*[22]. A Belgian court sought a preliminary ruling under article 234 to the question whether, a national provision requiring imported products (in this case Scottish whiskey) bearing a designation of origin, be accompanied by a certificate of the government of the producing country, was compatible with article 28. The Court stated:

"All trading rules enacted by Member States Which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[23]

With the ruling in Dassonville the Court chose not to entirely follow the Commissions view in regards to indistinctly applicable measures. Instead, the Court found that even indistinctly applicable measures could be caught by article 28 if they where capable of restricting imports. Dassonville also gave article 28 a very wide scope of application. According to the so called Dassonville formula it is the effect of the measure that is important and not the form. What the Court seeks to establish is whether a measure is *capable* of hindering imports and not if it actually does. The result of this approach is that every national measure that even has a remote potential effect on trade will be caught by the Dassaonville formula and found contrary to article 28. The focus on the restrictive effect of national rules enabled the Court to use article 28 as a means to strike down protectionist rules, and thereby securing the objective of the Treaty, i.e. the creation of an internal market through market integration[24].

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[21] Directive 50/70 OJ L 13/29
[22] Case 8/74, Procureur du Roi v. Dasonville, [1974] ECR 837
[23] Dassonville, Para 5
[24] Wheatherill and Beaumont, p 432

It is fairly problem free to apply the Dassonville formula on distinctly applicable rules since being directly discriminatory their potential for hindering imports is clear. Problems arise when the formula encounters measures that are indistinctly applicable[25]. Since the Dasonville formula is so broad and also covers indistinctly applicable measures, some rules that could be necessary, desirable and quite legitimate for a number of reasons could not be justified because of the narrow list in article 30. Thus, the rule was caught under article 28 and incompatible with Community law. This created a number of problems for Member States trying, with the help of various trading rules, to protect for example consumers, competition and other interests not included in article 30[26]. Even if the Court, already in Dassonvile, to some extent, lay the foundation to a rule of reason[27], and thus a limit to the scope of the Dassonville formula, the precise nature of the Dassonville rule of reason was unclear.

Subsequently, in *Cassis de Dijon*[28], the Court did introduce a more elaborated rule of reason. In Cassis, a provision of German rules relating to the marketing of alcoholic beverages fixing a minimum alcohol strength, denied the marketing of the French fruit liqueur, Cassis de Dijon, in Germany, because it had an alcohol content less then 25%. The Court stated:

"Obstacles to movement in 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 fairness of commercial transactions and the defence of the consumer."[29]

What the Court did with the ruling in Cassis was to extend the grounds for justification beyond article 30. However, the German governments defence that the restriction ought to be justified under public health and consumer protection was rejected and the measure was found to contradict article 28, in particular as regards to consumer protection, since the Court found that the restriction in question was too severe and that proper labelling requirements would have been sufficient to meet the objective.

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[25] Steiner, p 752
[26] see note 25
[27] Dassonville para 6, Craig and de Burca p 585
[28] Case 120/78 Rewe-Zentral AG, [1979] ECR 649
[29] Cassis para 8

According to Oliver, the ruling in Cassis does constitute a major landmark in the Court's case law but it is not a revolutionary judgement[30]. The judgement merely brought together the various indications pointing to the direction taken in Cassis in the Court's earlier cases[31]. The ruling did not just lay down prohibitions on trade between Member States, it also introduced the principle of mutual recognition of goods[32]. The rationale of the principle is that once goods have lawfully been marketed in one Member State, those goods should be admitted to any other Member State without restriction, unless the State can successfully invoke one of the mandatory requirements.

The Cassis rule of reason does only apply to indistinctly applicable measures[33] and the list of mandatory requirements are only examples and therefore not exhaustive[34]. This means that the distinctly applicable measures only may be justified under article 30, whereas indistinctly applicable measures have both the mandatory requirements and article 30 as grounds for justification. Cassis was an excellent solution to the problems that came with Dassonville and it has been applied in numerous of cases following Cassis. But problems remained.

Hindrance on trade

Cassis gives that, where a measure, although indistinctly applicable, has an effect that is to the advantage of the domestic product, for example when a national measure require additional conditions in respect of quality or content or presentation or documentation which are different from those imposed on the domestic manufacture[35], these types of rules fall within article 28, because they often impose an additional cost to the manufactures in other Member States and renders the marketing of the imported products more difficult or more expensive. This kind of national measures obviously requires justification, either under article 30 or the mandatory requirements. Weatherill and Beaumont call these types of measures dual-burden rules[36] because they impose a dual burden of technical rules. First the manufacturer has to meet the requirements in the state where he is established and produces his products, and

[30] Oliver, 1996, pp 93
[31] see note 31
[32] see note 31
[33] Case 113/80, Commission v. Ireland, [1981] ECR 1625; Case C-2/90, Commission v. Belgium, [1992] ECR I-4431
[34] Craig and De Burca pp 630; see also Wheatherill and Beaumont pp514
[35] Case 178/84, Comm v. Germany, [1987] ECR 1227; Case 407/85, 3 Glocken v. USL Centro-Sud, [1988] ECR 4233
[36] Wheatherill and Beaumont pp 532

second he has to satisfy the rules in the importing state. One example of these types of measures can be found in the *Walter Rau*[37] case, where a Belgian legislation required a special shape of packaging (cube-shaped blocks) of margarine sold by retail. Since the margarine manufactured in Germany had the shape of a truncated cone and did not meet these requirements it could not be marketed in Belgium. The Belgian government, not giving much credit to the intellect of the Belgian customer, argued that the law was needed for consumer protection in order to prevent confusion between butter and margarine. The argument was rejected. The law was found to hinder free movement of goods since the objective, consumer protection, could just as easily be met by less restrictive requirements such as labelling.

The dual-burden rules described above have after Keck, become known as product bound rules[38]. This is because dual-burden rules are technical rules imposed on the product as such hence the name product-bound. They create a hindrance on trade not because of discrimination but because of discrepancies in the legal systems of the Member States. Dassonville and Cassis in particular makes it possible to use article 28 to challenge national technical rules that hinder the free movement of goods. Thus Cassis guarantees, in principle, the free movement of goods and by eliminating the technical rules that isolates national markets, the objective of an internal market can be realised[39]. The rule of mutual recognition forces national markets to open up to cross-border competition and this in turn increases the consumer choice[40].

Some measures, on the other hand, are not designed to regulate patterns of trade between Member States. These types of rules do not isolate a national market from the common market, they are merely an application internal to the Member State[41]. Nevertheless, these measures can be caught under article 28 even if the hindrance they have on trade is remote, and even if the impact they have on imports is no greater than the restriction on domestic goods. The very broad range of the Dassonville formula could sometimes lead to somewhat absurd results[42]. The measures impose an, according to Weatherill and Beaumot, equal-

[37] Case 261/81 Walter Rau, [1982] ECR 3961
[38] Oliver, 1999, p 794
[39] Wheatherill and Beaumont p 519
[40] Chalmers, pp 392
[41] Wheatherill and Beaumont p 533
[42] *"Consider building regulations that restrict the erection of shops where imported goods might be sold; rules requiring the owner of a firearm, which might be imported, to hold a licence; or spending limits imposed on a government department that reduces its capacity to purchase imported goods. All these rules have the potential*

burden[43]. Since these types of rules do not really impede trade between Member States, they merely have an effect on the over all volume of trade, they should not fall within the scope of article 28 because they do not impose a threat to the creation of the internal market. But the Dassonville formula prohibits all trading rules, which are capable of hindering trade, and therefore also rules that may affect the volume of trade, irrespective of the fact that the effect was the same on domestic products. For example, the national measure challenged in the case *Oebel*[44], regulated night work in, and delivery from German bakeries. More detailed, the law prohibited work to be carried out in ordinary and fine baker's wares at night, and also the transport of ordinary and fine baker's wares for delivery to consumers or retail at night. The question was whether such a rule could, in regard to export and import of bakeries, be regarded as a hindrance on trade. The German law imposed an equal burden on bakeries. It did not say that imported baker's wares must look a certain way or consist of certain ingredients, imported goods did not have to adjust to certain technical requirements imposed by the importing state. It was therefore not more expensive or difficult for a trader from another Member State to market his goods on the German market than it was for a German manufacturer.

There was a need for the Court to establish an outer limit to art 28. The article covered too much and its application had gone beyond its objective. In the words of Wheatherill and Beaumont; *"Regulatory uniformity is not necessary to realise the common market, free trade is on the other hand a necessity"*[45].

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to reduce sales opportunities for imported products.", Wheatherill and Beaumont p 532; See also Craig, de Burca p 611

[43] Wheatherill and Beaumont p 533

[44] Case 155/80, Oebel, [1981] ECR 1993

[45] Wheatherill and Beaumont p 533

The outer limits of article 28 – utter confusion

The main question, before Keck, was whether the so called equal- burden rules constituted a hindrance on trade between Member States, only permissible if justified under the mandatory requirements, or if these types of rules entirely fell outside the scope of art 28. The focus was more on the legal approach towards equal-burden rules, not so much the effect they had on trade. What I mean by this is that the dispute was whether a literal application of the Dassonville formula was appropriate to use in relation to the so called equal-burden rules or whether it was possible to acknowledge that the potential, indirect hindrance that equal-burden rules could have did not pose any threat to the objective of article 28. Should the Court apply the Dassonville formula literally and let it catch all national measures even remotely capable of restricting trade, or should some measures simply escape the formula completely? It is hard to find consistency in the Courts opinion regarding this issue. Advocate General Tesauro gives in his opinion to *Hünermund*[46], (a case decided after Keck, while the opinion was given before Keck), an outline of the pre-Keck cases trying to systematise them[47]. He categorises the rulings into three types of cases.

The first group consists of cases where the Court held that the indistinctly applicable measure in question did in fact not have any connection with imports and was thus not of the nature to impede trade. In other words the rule did not even come within the scope of article 28. That was the conclusion of the Court in Oebel where German rules prohibiting delivery of bakery products to consumers and retailers, was found to fall outside the range of article 28. The same verdict was found in *Blesgen*[48], where a Belgian law prohibiting sale and consumption of alcoholic beverages exceeding 22% in all places open to the public was not covered by article 28. Also in cases like *Forest*[49] and *Quietlynn*[50] did the Court find that the measures in question did not fall within the ambit of article 28.

[46] Case C-292/92, Ruth Hünermund and others v. Landsesapothekerkammer Baden-Württenberg, [1993] ECR 6787

[47] Advocateb General Tesauro says that it is no secret that the Courts case-law is “certainly not amenable to systematic interpretation...”

[48] Case 75/81, Blesgen, [1982] ECR 1211

[49] Case C- 148/85, Forest SA, [1986] ECR 3449; A French system of wheat-milling quotas restricted to the manufacture of wheat for domestic and human consumption, the prohibition was found not to violate art 28.

[50] Case C-23/89, Quietlynn Limited and Brian James v. Southend Borough Council; [1990] ECR I-3059; The contested measure was a UK legislation prohibiting the sale of sex articles through unlicensed sex establishments, the prohibition was found not to contradict art 28.

A second group consists of cases where the Court applies a reasoning where the national measure is found to not directly affect trade, nevertheless it is found capable of hindering imports leading to a reduction of the volume of imports. In these cases, the Court uses a classic "Cassis examination" where the national measure had to be justified under the mandatory requirements as well as be proportionate for the objective in question, in order for article 28 not to come into play. Examples of cases are *Oosthoek*[51], where a Dutch law restricting offerings of gifts for sales promotion purposes was found to fall within article 28, but justified under consumer protection and prevention of normal competition. Likewise, in *Cinéthèque*[52], where a French law prohibiting simultaneous exploitation of films in cinemas and in video cassette form was found to be permissible, despite the fact that the measure was a MEQR within the meaning of article 28, because the objective of the measure was found to be justified under Community law whose interest was to encourage cinematographic production. Another case is *GB-INNO-BM*[53]; GB-INNO-BM, a Belgian supermarket operating in Belgium near the Luxembourg border had distributed advertising leaflets in both Belgium and Germany. The advertising in the leaflets was contrary to Luxembourg law on the grounds of consumer protection, whereas it was legal in Belgium. The Court stated, as it did in Oosthoek, that legislation which restricts or prohibits certain forms of advertising and means of sales promotion may be such as to restrict the volume of sales because it affects marketing opportunities and this is contrary to article 28. The Luxembourg government argued that the objective behind the prohibition was consumer protection and therefore justified under the mandatory requirements. The argument was rejected by the Court on the grounds that there already existed a Community consumer protection policy on this issue; providing the consumer with information[54]. A national prohibition denying the consumer access to certain kinds of information could therefore not be justified, since it would be contrary to Community policy.

There is a third group according to Advocate General Tesauro. This group consists of cases where article 28 is found to be applicable in principle to all measures. However the Court uses a proportionality test in order to assess the national rules compatibility with Community law.

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[51] Case 286/81, Oosthoek's, [1982] ECR 4575
[52] Joined Cases 60 and 61/84, Cinéthèque, [1985] ECR 2605
[53] Case C-362/88, GB-INNO-BM v. Confédération du commerce luxembourgeois, [1990] ECR I-667
[54] GB-INNO-BM para 14 referes to "The preliminary program adopted by the Council (OJ 1975, C 92, p 1) providing for the implementation of a consumer protection and information policy" and a Resolution of 19 May 1981 (OJ 1981, C 133, p 1) "The second program of the European Economic Community for a consumer protection and information policy."

A two fold condition is used also here in order to establish the legality of the rules in relation to article 28. One, the objective must be legitimate under Community law, and two, the effect of the rule must not exceed what is necessary in order to attain that objective. This approach has been used in a series of cases dealing with Sunday trading. These cases created utter confusion for the national courts in regards to the application and outer limit of article 28. The Sunday trading cases came to be the culmination of the critique of the Courts rulings regarding article 28 and a need for clarification in the case law was clearly needed[55].

The Sunday trading cases

It all started with the *Torfaen*[56] case. The challenged measure was section 47 of the UK Shops Act 1950 concerning the closing of shops on Sundays, with some exceptions. The prohibition on Sunday trading had actually reduced the plaintiff's total sale, and 10% of the goods sold came from other Member States. It was undisputed that the rules applied to domestic and imported products alike. The Court established that the rules in question constituted a legitimate part of economic and social policy and that *"their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics"*[57]. In other words the measures were justified under Community law, seen as mandatory requirements, as long as they did not "*exceed the effects intrinsic to the rules of that kind"*[58], the effects of the rule had to be proportionate. Whether the Shops Act 1950 was proportionate or not was for the national courts to decide.

It was the rule of proportionality that created problems for the national courts. The difficulty lied in accessing whether or not the rule in question was excessive in relation to the objective sought to achieve. When attempting to apply the Court's ruling the national courts reached different conclusions about the purpose of the Shops Act and its proportionality[59]. The Court subsequently gave two additional rulings concerning Sunday trading. In *Conforama*[60] and *Marchandise*[61] the disputed national measure was a legislation prohibiting the employment of

[55] Arnull, p 115
[56] Case C-145/88, Torfaen Borough Council v. B & Q plc; [1989] ECR 3851
[57] Torfaen para 14
[58] Torfaen para 17
[59] Wheatherill and Beaumont p 534
[60] C-312/89, Union départementale des syndicats CGT de l'Aisne v. SIDEF Conforama, Société Arts et Meubles and Société Jima; [1991] ECR I-997
[61] C-332/89, Criminal proceedings against André Marchandise, jean-Marie Chapuis and SA Trafitex; [1991] ECR I-1027

workers on Sundays. The Court took the same approach in these cases as it did in Torfaen but added that the restrictive effects on trade that may be the result from such rules "*do not seem disproportionate*"[62]. The Court did not explain why it had itself performed the proportionality test, an issue which, explained in Torfaen, was a matter of fact and a task for the national court to solve. These judgements did cause some confusion which is why the House of Lords asked, in *Stoke-on-Trent*[63], whether the Court's decision in Conforama and Marchandise meant that article 28 did not apply to such rules as those at issue in Torfaen. If not the Court was asked on what criteria and by reference to what the national court should determine whether such rules exceeded their restrictive effects on intra-Community trade. The answer the Court gave was that it considered that it had all the necessary information in Conforama and Marchandise to rule on the issue of proportionality and that it was obliged to do so "*In order to enable national courts to assess their compatibility with Community law in a uniform manner*"[64]. In other words the Court had actually attempted to help the national courts, but managed to create even a bigger mess. The Court acknowledged that assessments on proportionality could not vary according to the findings of facts. But instead of announcing a new formula, which had been easier for the national courts to apply, the Court decided to examine the proportionality itself, all in the name of conformity[65]. In that respect, the Court explained that the basis for determining the proportionality of a rule should be whether the restrictive effects the rule had was direct, indirect or purely speculative and whether those effects did not impede the marketing of imports more than the marketing of domestic products[66]. And with that the Court determined that article 28 did not apply to national legislation prohibiting shops from opening on Sundays.

Conclusion – the problem

The final outcome of all the pre-Keck cases dealing with so-called equal-burden rules was ultimately the same. None of the so-called equal-burden measures were in the end caught by article 28 for different reasons. It is the way the Court came to the conclusion as to *why* the measures where compatible with Community law that is different. The Court's inconsistency did create legal uncertainty. On the one hand a measure was found to have nothing to do with

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[62] Conforama para 11, Marchandise para 13
[63] C-169/91, Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q plc; [1992] ECR I-6635
[64] Stoke-on-Trent para 14
[65] Maria-Pia Midenbäck p 978
[66] Stoke-on-Trent para 15

trade between Member States at all, and on the other it may be an obstacle to imports and must be justified under article 30 or the mandatory requirements.

Personally I can only identify two types of approaches used by the Court in the pre-Keck cases. One is where the national measures has nothing to do with trade between Member States, and therefore falls outside the scope of article 28, as in Oebel, Blesgen and Quietlynn. The second is where the Court uses, in my view, a Cassis application where the national measure is found to fall within article 28, *prima facie*, and where an examination of justification and proportionality, such as the one in Cassis, must be made. Unlike AG Tesauro, I find his second and third group of cases being one and the same. The approach used by the Court in the Sunday trading cases coincides in my opinion with the reasoning that all national measures do *prima facie* fall within the ambit of article 28. The Court uses a different terminology in the Sunday trading cases compared to Oosthoek, Cinéthèque and Buet but the tests are the same. Both are a two-fold examination where the first condition consists of examining the legality or whether the objective sought by the national measure is justified under Community law that is the mandatory requirements or article 30. The second condition is in the Sunday trading cases described as a necessity test, meaning that the effect must not "*exceed what was necessary in order to ensure the attainment of the objective in view*"[67]. In Oosthoek, Cinéthèque and Buet the Court states that the measure must be proportionate to the objectives it seeks to achieve. In my opinion, this is the same thing. In the Sunday trading cases as well as in Oosthoek, Cinéthèque and Buet, the Court finds the national measure to *prima facie* fall within the ambit of article 28 and only permissible if justified under the mandatory requirements and necessary and proportionate to the objectives pursued. So, why measures such as those in Blesgen, Oebel and Quietlynn where found to fall outside the scope of article 28, whereas measures such as those in Oosthoek, Cinéthèque, Buet and the Sunday trading cases where caught by the article, is really the key issue. There seems to be no real explanation to the different reasoning, however, I refuse to believe that the Court did not have a line of thought when the cases where decided. That line of thought might explain the different approaches to the cases dealing with the essentially same, in relation to form and effect, type of national rules and why some national measures were found to hinder trade while others did not.

[67] Torfaen para 15, Conforama para 10, Merchandise para 11

The measure escapes article 28?

There are two common denominators for the cases where the Court found the measure to escape article 28. As stated by Advocate General Tesauro in his opinion in the case Hünermund, one is how the Court perceives the intention of the measure[68]. For example, the Court states in Blesgen that the measure in question did not have any connection with the importation of, in this case strong spirits, and because of this it was not of such nature as to impede trade between Member States[69]. Similarly the Court found in Quietlynn that the contested national measure had in fact no connection with intra-Community trade and therefore not intended to regulate trade between Member States[70]. The reason why the measures in Blesgen and Quietlynn where found not to interfere with the free movement of goods is also the second common denominator for theses cases. In Oebel the Court found that provided the prohibition only affected individual consumers and retail outlets and not warehouses or intermediaries, trade within the Community remained possible at all times and thus, the measure did not restrict trade[71]. Also in Quietlynn it was stated that as long as licensed sex establishments and other channels could market the products, there was no hindrance on trade[72]. In other words the national market was not sealed off because of the measure. The trader's commercial freedom was restricted but the restraint on the trader did not jeopardise intra-Community trade as a whole. This reasoning is identical to the market access approach described below[73]. The closer the rule comes to an outright ban the more isolated the national market becomes. This will be described more in detail below.

The measure does *prima facie* fall within article 28?

This group of cases does also have two main arguments in common for why they may be perceived to hinder trade between Member States. In Oosthoek it was stated that the measure, although it did not hinder trade directly, could *restrict the volume of sales* and hence the volume of imports[74]. The same was established in Torfaen where the evidence of a reduction in the volume of sales was the reason why the national court asked the Court for a preliminary

[68] Case C-292/92, R. Hünermund v. Landesapothekerkammer Baden-Württemberg, [1993] ECR I-6787 para 10ff
[69] Blesgen para 9
[70] Quietlynn para 11
[71] Oebel para 20
[72] Quietlynn para 9
[73] see pages 31 to 34
[74] Oosthoek para 15

ruling[75]. A second argument stated by the Court was that the differences in the Member States rules could force the trader to adopt a different promotion or advertising scheme which meant that he had to abandon a marketing scheme that may be the most effective or the one he renders almost all his sales[76]. This could inevitably be very costly and make it more difficult for the trader to market his products in other Member States. This line of reasoning is, in many respects, similar to the principle of mutual recognition established in Cassis. Advocate General Van Gerven does in his opinion to the Torfaen case, bring up the mutual recognition approach and states that it does not only relate to the composition, size, shape weight etc of the product but that it also relates to permissible sales methods[77]. But why were the national measures in these cases found to *prima facie* affect trade? The severity of the measures could, also in this group of cases, be a reason why the contested rules where found to hinder trade. The rule in Oosthoek was essentially an outright ban as it was in Cinèthéque, although the ban was limited for a period of time. Likewise where the national measures in Buet and *Aragonesa*[78] prohibitions constituting and outright ban.

The difference that I find in these two groups of cases are that the first group escapes article 28 because the national market is not isolated and the free movement of goods from other Member States is kept open through other types of marketing channels. The national measures in the second group tend to, not completely, screen off the national market because of the severity of the national rule. The effect of the national restrictions in the second group have also proved a reduction in the overall sales, this evidence had to be taken seriously and serve as an indicator that the free movement of goods might be threatened. However this line of thought is not completely consistent.

[75] Torfaen para 7
[76] Case 286/81, Oosthoek, [1982] ECR 4575
[77] Opinion of Mr Advocate General Van Gerven, Torfaen para 15
[78] Joined cases C- 1/90 and 176/90, Aragonesa, [1990] ECR I-4151; This case will be accounted for more in detail below.

Early suggestions for a solution

The definition of measures equivalent to quantitative restrictions given by the Court's case law had been over extended[79]. Article 28 did not only apply to measures that impeded trade between Member States but it also applied to rules that only affected the volume of sales of all goods to an equal extent. These types of rules regulated in a general and neutral manner the circumstances in which goods may be sold[80]. The so-called equal-burden rules did not affect the internal market in an undesirable way, as far as the Treaty is concerned. But because of the wide range of the Dassonville formula, Member States had to defend internal marketing rules that from the Treaty objective point of view, was not harming the goals of the Community. White argued in his search of the limit to article 28[81] that the Dassonville formula could not be taken literally. He came to the conclusion that the Court only used the formula when it suited its purposes[82]. Maybe this is the explanation to the different reasoning in the rulings of Court. White meant that article 28 already had an outer limit it was just not defined. He proposed a new definition to measures equivalent to quantitative restrictions in relation to indistinctly applicable measures. Article 28 was to cover measures that affected the characteristics of a product and thus imposed a dual-burden on imports, whereas the circumstances in which products may be sold fell outside the definition[83]. This approach would limit the ambit of the Dassonville formula but would still be in line with it, and the Cassis ruling.

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[79] Wheatherill and Beaumont p 535
[80] White p 259
[81] White p 235
[82] White p 279
[83] White p 280

THEN CAME KECK...

The Court's unsuccessful try to clarify its case law in Stoke-on-Trent did not leave the national courts satisfied. On the contrary the Court's application of the proportionality test in Conforama and Marchandise where challenged by some commentators as being *ultra vires*[84]. Eventually the Court recognised the need for a final decision on the limits of article 28. In the judgement Keck and Mithouard the Court took the step that many had been waiting for.

The Tribunal de Grande Instance of Strasbourg referred to the Court for a preliminary ruling concerning the compatibility with a French legislation prohibiting resale at a loss. That question was raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard who where prosecuted for selling products at a loss, contrary to French law. Initially this case is similar to some of the other cases dealing with a national measures compatibility with article 28. It starts out by stating, "*…general prohibitions on resale at a loss is not designed to regulate trade between Member States*"[85]. Even here, as stated in many previous cases, the Court states that the rule in question may "*…restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion*"[86]. But it is in paragraph 14 the judgement takes a different turn. Instead of looking for a possible justification under the mandatory requirements, the Court announces that it wishes, *"In view of the increasing tendency of traders to invoke article 30 [28] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter*" [87]. The Court asks whether the effect the measure has, reduction of volume, is sufficient to characterise the legislation as a measure having equivalent effect to quantitative restrictions. A reference to Cassis is made; here the Court emphasises, or rather clarifies, what type of indistinctly applicable measures are to be considered as a MEQR. Rules that lay down requirements relating to designation, form, size, weight, composition, presentation, labelling and packaging, the so called product bound rules, are not compatible with article 28 even if they are indistinctly applicable. However, other rules restricting or

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[84] Maria-Pia Midenbäck p 979
[85] Keck para 12
[86] Keck para 13
[87] Keck para 14

prohibiting "*certain selling arrangements*"[88] are not such as to hinder directly or indirectly, actually or potentially intra-Community trade provided that those rules *"…apply to all relevant traders operating within the national territory and so long as the affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States"*[89]. The Court found that as long as those conditions are fulfilled the application of rules relating to selling arrangements did not by nature impede the market access of imports more than it prevented the market access of domestic products. Such rules did subsequently fall outside the scope of article 28.

A closer look at the Keck formula

The test or formula established in Keck is to be used to ascertain whether a national measure directly, indirectly, actually or potentially hinders trade within the meaning of the Dassonville ruling. What is the rational behind the Keck formula and what does it actually mean? Let's repeat;

As stated above, the Court singles out one type of rules referred to as certain selling arrangements as a group of measures which are not such as to restrict trade between Member States provided that two conditions are fulfilled. 1. The measure has to apply to all relevant traders operating within the national territory and 2. The affect of the measure has to be equal, in law and in fact. In paragraph 17 the Court states that if those two conditions are fulfilled, a restriction on selling arrangements …"*is not by nature such as to prevent their access to the market or to impede access <u>any more</u> than it impedes the access of domestic products*"[90]. This essentially means that selling arrangements that fulfil the two conditions do restrict trade between Member States, insofar as they may restrict the volume of sales and hence the volume of imports[91]. However, the restriction does also affect domestic products. In other words a restriction does exist, but, in the eyes of the Court, it is not a hindrance within the meaning of Dassonville. Bare in mind, that just because the Court has decided that a restriction on selling arrangements escapes article 28, does not mean that the effect the measure might have is not even remotely capable of hindering trade, in the strictest sense of the word. A restriction may very well be there, even if it only is indirect and potential,

[88] Keck para 16
[89] see note 38
[90] Keck para 17
[91] Keck para 13

however, it does not interfere with intra-Community trade. The conclusion is that the Keck formula allows a certain degree of restriction (if one uses the term restriction in its strictest sense) provided that it affects imports and domestic products in the same manner.

One gets the impression that the Court with the ruling in Keck contradicts the Dassonville formula. A literary application of Dassonville may give that notion. However, the very wide scope of Dassonville had to be restricted some how. It is important not to forget the aim behind the ruling and a literary application may sometimes disrupt the initial objective. One could say that Keck brought Dassonville back to its initial path and that the two rulings in that sense must be read together.

An unclear clarification

Since this case created the long needed formula for national measures not hindering trade, it has been heavily debated. I have not yet come across a scholar objecting to the actual results of Keck. But many have comments concerning how the judgement is drafted, calling it "reasoning renounced"[92] and found that the ruling had a "disturbingly formalist tone" [93]. In my view the comments following Keck had much to do with the fact that the judgement tended to raise more questions than it answered.

So much is clear that the Court separated indistinctly applicable measures into two categories. One type that restricted trade between Member States and thus not legal under article 28 and one type of measures, called selling arrangements, that did not have the objective to restrict trade. In paragraph 12 the Court establishes the objective that restrictions on selling arrangements have, and the effect they have on intra-Community trade. This terminology has been used before by the Court prior to Keck[94]. What the Court says in this paragraph, according to Advocate General van Gerven, is that the purpose of the measure is an indication of how it in fact works[95]. So, when the purpose of an indistinctly applicable measure is to regulate trade between Member States, it in fact does just that[96]. Does this mean that the objective of the measure also is a determining factor whether it constitutes a measure of

[92] Gromley pp 63
[93] Weatherill p 887
[94] For example; Blesgen para 9, Cinéthèque para 21, Quietlynn para 11
[95] Joined cases C-401/92 and C-402/92, Tankstation't Heukske vof and J.B.E. Boermans, [1994] ECR I-2199, para 22.
[96] The same has been said in, Cinéthèque para 21.

equivalent effect to quantitative restrictions? Could this mean that when a selling arrangement that by the ruling in Keck falls outside the scope of article 28 has a purpose to restrict trade it can be caught by article 28?

It is also implied in the judgement that all types of indistinctly applicable measures fall within either one or the other of the two categories, and that the two are mutually exclusive. Paragraph 16 refers to *certain* selling arrangements leaving the reader to believe that some selling arrangements could indeed fall within the scope of article 28. The concept of selling arrangements was unclear at the time and many of the commentators thought that the Court ought to have defined it in the judgement[97], but as will be shown, the questionmarks concerning this issue have been answered through subsequent case law.

It is stated in paragraph 14 that the Court wishes to re-examine and clarify its previous case law on this matter. But at the time it was unclear which cases no longer constituted good law since the Court failed to mention which cases it wished to re-examine. This question has also more or less, been resolved with the clarification of the concept of selling arrangements.

The greatest question, which has not as of yet been resolved, is the issue of the concept of discrimination in fact. In paragraph 16 the Court lists the requirements provided for a selling arrangement to fall outside the scope of article 28. One of them is that the measure has to affect all traders in the same manner in law and in fact irrespective of origin. Oliver referes to this issue as the Achille’s heel Keck. The big question is how to assess the impact in fact when the Court rejects economic data.

Had the bounds of article 28 now been set?

[97] Oliver, 1996, p 106

UNCLEAR ISSUES IN KECK

As stated above many reacted to the Court's reasoning or lack of reasoning in the Keck case. Even if the Court's intention was to clarify previous case law some things remained unclear. The Court had failed to explain why, besides the comment concerning increasing tendency of traders to invoke art 28, a practice introduced into the law by the Court itself[98], it found it necessary to re-evaluate its previous case law. Likewise, it did not explain why it could draw the conclusion that the measures restricting selling arrangements did not create a sufficient impact on trade. Neither did it explain the term selling arrangements, nor did it name, at least some, of those previous cases now overruled. Some questions were critical of the way the ruling affected the policies of the internal market, the core of the Community. The reason for the Court's restraint concerning these issues is hard to pinpoint. Since the Court must speak in one voice the less elaborated explanations could stem from the difficulty for the judges to unite behind the reasoning, but the restraint could also be one of a more diplomatic nature[99].

The principle of subsidiarity and article 28

The Court had, prior to Keck received an increasing number of criticism from the Member States, not happy by the fact that numerous of their national measures had been found equivalent to quantitative restrictions, even if the effect the measures had on trade between Member States was marginal. Did the Court, which setting precedent otherwise is characterised by judicial activism take a step back and fall for the Member State's pressure?[100] Maybe the self-restraint was in line with the increased importance of the principle of subsidiarity, which was introduced with the Maastricht Treaty article 5 (former article 3 (b)) which came into force during the same time as the decision in Keck was taken. Bernitz points out that the ruling is in line with the fact that the principle puts the Community under an obligation to give reasons that justifies interference in Member States legislation. This may also have been a reason for the Court to rule in the way they did[101].

The principle of subsidiarity deals essentially with the competence of powers. The question to be solved is weather it is better for an action to be taken by the Community or by the Member

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[98] Weatherill p 887
[99] Bernitz p 804
[100] Bernitz p 805
[101] see note 100

States. The principle stems from the idea that matters should be dealt with at the level closest to those who are to be affected by a decision or legal act. However, this idea often collides with the very essence of the Community, the realisation of a general approach that is uniform throughout the Community[102]. The principle of subsidiarity means, in short, that "*The Community shall take action, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community*" (art 5 EEC). The principle of subsidiarity only applies in areas, which do not fall within the exclusive competence of the Community[103]. The principle is to be considered each time the Community is to take action outside its exclusive competence. What this means in reality, is that legislation may be presented through directives or maybe in the form of guidelines and codes of conduct rather than regulations [104]. The Court has not as of yet overturned a Community action on the grounds that it does not comply with the principle of subsidiarity[105].

Josephine Puebla-Simth is of the opinion that the Court "beyond any doubt" was influenced by the introduction of the principle of subsidiarity[106]. She means that already in the rulings post-Keck, did the Court show increasing recognition of regional autonomy within the internal market. The ruling in Keck was a definitive step, where the Court refrained from giving unnecessary instructions into the laws of the Member States, which did not affect intra-Community trade. The Court was reluctant to evaluate non-discriminatory, national measures concerning local trading between Member States. The ruling in Keck and the judgements following Keck confirm the right of Member States to exercise regulatory powers provided they do not discriminate. In other words the Community will not interfere in situations where the Member States have a better opportunity to realise the objectives sought, as long as the objectives are not contrary to the Community objectives. This is why, according to Puebla-Smith, national measures relating to selling arrangements, which do not have as an objective to regulate trade between Member States, falls outside the application of the Treaty.

[102] Craig and de Burca p 128
[103] What areas actually include in the exclusive competence of the Community is a debated issue, with different approaches. Craig and de Burca pp 124,
[104] Craig and de Burca p 128
[105] Craig and de Burca p 129
[106] Puebla-Smith p 56

What are selling arrangements

The Court did, by stating that the term selling arrangements did not include obstacles resulting from requirements concerning the characteristics of imports, leave the term selling arrangements open, and it's meaning had to be resolved on a case by case application[107]. The concept of selling arrangements constitutes a major part of the ruling, and understanding the meaning of it was imperative in order to understand the barriers of article 28.

As the Court stated it wanted to put an end to the tendency of traders to use article 28 as a means to challenge national rules that in fact only limited their commercial freedom. The way of doing this was to introduce some legal certainty into the law of free movement of goods[108]. This was to be done by dividing the national measures relating to imports into two categories. One relating to the characteristics of the product: such as form, size, weight, composition etc, the so-called product-bound measures[109]. The second group were the so-called selling arrangements. In Hünermund Advocate General Tesauro referred to selling arrangements as rules regulating how one may sell a product and where, when and who is permitted to sell a good, a definition very much like the one given by White[110]. The product-bound measures where to continue to be considered as equivalent to quantitative restrictions even if they were applied without distinction to domestic products and imports, and only justified under the mandatory requirements. Selling arrangements were to fall outside the scope of article 28 provided they applied equally to all relevant traders and did not discriminate either in law or in fact. The difference between these two types of rules was the fact that selling arrangements were not by nature such as to prevent access to the market of the Member State concerned, while product-bound measures did.

It has become clear, through case law following Keck, what measures actually constitute selling arrangements. Selling arrangements has now been held to cover the following categories of measures:

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[107] Maria-Pia Midenbäck p 980
[108] Maria-Pia Midenbäck p 291
[109] Oliver, 1999, p 793, and Keck para 15
[110] see page 18

- restrictions on when goods may be sold[111].
- restrictions on where or by whom goods may be sold[112].
- advertising restrictions[113]
- price controls[114].

When goods may be sold

In *Punto Casa*[115] the Court ruled that an Italian legislation on the closure of shops on Sundays and public holidays constituted a selling arrangement. Since the measure fulfilled the two conditions set out in Keck, it was found to be compatible with Community law. Also in *Tankstation*[116], the Court found a Dutch provision relating to the closing of petrol shops and restrictions relating to certain types of articles that may be sold outside lawful opening hours, constituting selling arrangements and compatible with Community law.

Where and by whom goods may be sold

In *Commission v. Greece* (*Processed milk*)[117], a Greek law required that processed milk for infants may only be sold by pharmacies. The Court found that the law applied equally to all relevant traders and that it affected them in the same manner in law and in fact. Thus the rule only limited the commercial freedom of the traders and constituted a selling arrangement. The fact that Greece itself did not produce processed milk for infant did not undermine the Court's findings. The rationale behind this was that the applicability of article 28 cannot depend on fortuitous factual circumstances that may vary over time. If it did, article 28 would sometimes be applicable and sometimes not. If Greece had a production of similar products for infants, which were in competition with the processed milk the situation, would be different. If Greece had its own production of similar products that where not caught by the prohibition the Greek rule would most certainly have been found to protect its own products. The national measure would not have been able to fulfil the condition of equality in fact.

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[111] Joined cases C-69/93 and C-258/93, Punto Casa, [1994] ECR I-2355; Joined cases C-401/92 and C-402/92, Tankstation, [1994] ECR I-2199
[112] Case C-391/92, Commission v. Greece (processed milk), [1995] ECR I-1621
[113] Case C-292/92, Hünermund; [1993] ECR I-6787; Case C-412/93, Leclerc-Siplec, [1995] ECR I-179
[114] Case C-63/94, Belgapom, [1995] ECR 2467
[115] see note 108
[116] see note 108

Advertising restrictions

Hünermund[118] was the first case, following Keck, where the Court got the opportunity to apply the new established formula giving the outer boundaries to article 28 and the free movement of goods. The ruling in Hünermund, announced only a couple of weeks after Keck, established that a German rule in a code of professional conduct, prohibiting pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, constituted selling arrangements. The Court referred to Keck and the conditions that had to be fulfilled for the measure to fall outside the scope of article 28. In this case the conditions where satisfied and the application of the contested rule was found compatible with Community law. Also in *Leclerc-Siplec*[119], the Court establishes that a French rule that excluded the distribution section from televised advertising constituted a selling arrangement.

The form of advertising

It has been shown, through the Court's case law, that the form of advertising is a significant factor in determining whether the Cassis or the Keck rules applies[120]. Following Leclerc-Siplec, the Court delivered it's ruling in *Mars*[121]. The dispute concerned a German law on unfair competition. Under the law in question proceedings could be brought in order to restrain unfair competitive practises and use of misleading information. Proceedings had been brought against Mars GmbH because its ice-cream bars had been increased in quantity and they were presented, during a publicity campaign covering the whole of Europe, in wrappers marked +10%. Mars marketing campaign was contested on the grounds that it mislead consumers to believe that the 10% increase was granted without any price increase and also the visual presentation of the 10% marking was contested. The 10% increase of the bar was indicated by a coloured part on the wrapping, which occupied considerably more than 10% of the total area of the wrapping. The rule of mutual recognition was applied. The Court held that the German rules in this case related to the presentation, labelling and packaging of goods that lawfully had been manufactured and marketed in another Member State. As established in Cassis, such rules are caught under article 28 and can only be justified under the mandatory

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[117] see note 109
[118] see note 108
[119] see note 110
[120] Greaves p 310
[121] Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Koln eV v. Mars GmbH, [1995] ECR I-1923

requirements. No justification could be found in this case, and the rules were subsequently restricting trade between Member States and contrary to Community law.

Another case, which illustrates the importance of the form of the advertising, is *Familiapress*[122]. A newspaper publisher established in Germany sold his papers, containing an offer to readers to take part in games for prizes, in Austria. The Austrian law on unfair competition contained a prohibition against inviting readers to take part in prize competitions or draws. The Austrian government, defending it's laws, argued that the contested measure fell outside the scope of article 28 since it only regulated a means of promoting the sale of the newspaper. It therefore constituted a selling arrangement, not contrary to Community law within the meaning of Keck. The Court was of another opinion, finding that the measure in this case affected the newspaper as such. The games did, according to the Court, form an integral part of the newspaper, making the restriction imposed by the Austrian law a product-bound measure and not a selling arrangement. Its compatibility with Community law had to be determined under the Cassis rule and justification sought under the mandatory requirements. The Court did find the rules justified under the maintenance of press diversity[123]. It was, however, for the national court to determine the proportionality of the rule.

These two cases show that where the form of advertising is intrinsic to the good, and the advertising restriction therefore directly affects the good as such, Keck is no longer applicable. According to Greaves the Court did not distinguish between intrinsic and extrinsic advertising before the ruling in Keck[124]. After Keck, extrinsic advertising constitutes a selling arrangement falling outside the scope of article 28, while intrinsic advertising relates to the product as such and restricting trade between Member States if not justified under the mandatory requirements. The ruling in Familiapress has not been free from criticism. The purpose of the prize competitions were to boost sales, and the fact that it happened to affect the content of the product concerned, rendered article 28 applicable. The national rule that in fact was designed to regulate selling arrangements, how goods may be sold or advertising restrictions, which is legal under Community law, fell within the scope of ariclet 28 because the sales promotion was an intrinsic part of the good.

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[122] Case C- 368/95, Vereinigete Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag, ECR [1997] I-3689

[123] The ruling added another type of mandatory requirements to the non-exhaustive list.

Another case illustrating how article 28 comes into play as soon as the product as such is affected by the national measure is *Clinique*[125]. A German trade association tried on the basis of German rules on unfair competition and consumer protection to prevent the marketing in Germany of cosmetics under the name 'Clinique". The reason was that consumers might be mislead in believing that the products had medicinal qualities. The Court found that the use of the word Clinique alone was not enough to make the word so misleading as to justify a prohibition of it's use especially not since the product was presented as cosmetics and not sold in pharmacies. The national measure was therefore not compatible with art 28 since the rule was found to be product-bound and contrary to the Cassis rule of recognition. Oliver is of the opinion that "*...the idea that the name under which a product is sold constitutes one of its inherent characteristics is by no means unassailable: there is a fine line between restrictions on the use of allegedly misleading names and restrictions on advertising and promotion*"[126].

Advertising and the freedom to provide services

Advertising is a method of promotion and marketing. By that definition it clearly fits under the Court's definition of selling arrangements. Rules concerning advertising regulates traders' methods of sales promotion, such rules may limit the commercial freedom of a trader but not necessarily hinder trade between Member States. The crux with advertising is that it is a service. The restrictions on that service are however, not primarily governed by the provisions on the freedom to provide services, articles 49 and 55[127]. Article 49 requires a direct cross-border element in the advertising service itself for the article to be applicable. When a direct cross-border element is non-existent, the only applicable Community rules on a national restriction on advertising are rules regulating the free movement of goods. Since the objective of the rules regulating the free movement of goods and services is the same, access to an integrated European market, there is a large degree of correspondence between the two sets of rules[128]. However, there is a difference in the approach of the Court in determining the compatibility of a national measure restricting advertising with Community law, depending on which set of rules that the Court applies[129]. When article 28 is applicable, the advertising

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[124] Greaves pp 310
[125] Case C-315/92, Verband Sozialer Wettbewerv eV v. Clinique Laboratoires SNC, [1994] ECR I-317
[126] Oliver, 1996, p 102
[127] Greaves p 305
[128] Greaves p 306
[129] Greaves p 306

restriction, as stated above, is classified as a selling arrangement, and falling outside the scope of the article. When article 49 applies, the Court has, on the other hand, classified the advertising restriction as an obstacle to the access of the goods or services to the national market. Does this difference in classification mean anything? Scholars who disagree with the Court's way of reasoning in Keck, refer to the way the issue has been handled in the field of free movement of services advocating that the same reasoning should be used when dealing with goods. Therefore I find it more appropriate to come back to this question in whole, when I present the alternative approach suggested mainly by Advocate General Jacobs[130].

Price control

The very case that sets the boundaries for art 28 concerned price controls. The disputed national measure in Keck prohibited resale at a loss, and a similar national restriction was under the Court's scrutiny in *Belgapom*. The national measure at issue in Belgapom was a Belgian rule prohibiting resale at a loss. As in Keck the Court found the rule belonging to the group of measures not intended to govern trade between Member States, inasmuch as it deprived traders of a method of sales promotion, in other words selling arrangements.

Conclusion – selling arrangements

According to Oliver it was the Court's way of applying the Keck judgement that has enabled it to clarify it so effectively[131]. Despite criticism, the Court has followed a strict application of the Keck formula with no discrepancies. What has also become clear through the post-Keck cases is that "certain selling arrangements" actually means all selling arrangements. If there should be any doubt as to whether a measure is product-bound or a selling arrangement the Court has in its case law chosen towards the product-bound[132]. Even if the concept of selling arrangements has become clearer through subsequent case law, some remain critical of the Court's categorisation of rules[133]. Weatherill is of the opinion that the Court's way of differentiating rules into special categories wrongly induce focus on the form of the measure instead of its effect on trade. This is contrary to the very essence of Dassonville, where the

[130] see page 32
[131] Oliver, 1999, p 794
[132] See note 131
[133] Weatherill p 896

effect of a national measure is key issue[134]. Weatherill means that the fact that a measure controls selling arrangements only gives a clue, and not a definitive answer, that the rules do not prevent market access, but merely affects the commercial freedom of the trader. Wheaterill finds that the Courts choice of treating rules affecting selling arrangements as a special category "*...was at best a shorthand way of expressing the idea that some market interventions do not hinder market access*"[135]. AG Jacobs and Weatherill have found that this idea is not conclusive, and have therefore introduced an alternative approach to the ruling in Keck, which will be presented below.

Affecting the internal market

Some have expressed worries concerning the impact the Keck formula has, as a general principle, on the principle of free movement of goods and ultimately the effect it has on the development of the internal market[136]. Both Wheatherill and Chalmers are of the opinion that the Court has missed the objective of article 28 and thus the principle of free movement of goods. The aim of article 28 is to create an internal market, and should thus be used as a means to reach this goal. While the Court has stared itself blind on discrimination it had overlooked the fact that article 28 goes beyond discrimination. Chalmers states that while Cassis opened up the internal market with its rule of recognition, Keck disrupts a homogeneous internal market, and in the end the individual freedom to trade[137]. There is a clash between the internal market policy and the narrow Keck formula of equality in law and in fact[138]. Those who have found that the principle of free movement of goods, through Keck, and the policy of the internal market to contradict one another have tried to re-evaluate or refine the Keck formula. The key issue in the alternative approach is not whether the national measure is a selling arrangement or if it applies equally to all traders in law and in fact, but whether the measure "*...exerts a substantial restriction on the access to the national market*"[139]. Advocate General Jacobs presented in his opinion to Leclerc-Siplec an alternative approach on how to set the outer bounds to article 28[140].

[134] Weatherill p 896
[135] Weatherill p 896
[136] Chalmers pp 390, Wheatherill pp 886
[137] Chalmers pp 392
[138] Wheatherill pp 885
[139] Wheatherill p 890
[140] Case C-412/93, Leclerc-Siplec v. TF1 Publicité SA, [1995] ECR I-179

An alternative approach

Advocate General Jacobs does not disagree with the actual outcome of the ruling in Keck. What he objects to is the way the Court reached its conclusion on why some measures do not restrict trade between Member States. Advocate General Jacobs finds the Court's approach in Keck unsatisfactory for two reasons[141]. One is the categorisation of rules into measures affecting selling arrangements and rules that are product-bound. The main objection is the assumption that one set of rules restricts trade while the other does not. This is, according to Jacobs, incorrect. He means that '*The severity of the restriction imposed by different rules is merely one of degree*"[142]. In other words, the rules deemed not to restrict trade, measures restricting selling arrangements, could do just that, depending on how severe the restriction is in fact. The categorisation reflects only on the form of the rules, missing the effect they have on trade between Member States. Suppose that a national measure only permits that certain products may be sold in certain shops in that Member State and only during certain days of the year. That type of restriction is almost as severe as an outright ban on importation and marketing. Jacobs emphasises that the effect that national measures has on trade is particularly well illustrated when the rules restrict advertising and advertising has an important role in building the internal market[143]. He says that a total ban on advertising can never fall outside the scope of article 28 even with its classification as a restriction on selling arrangements. What Jacobs proposes as a remedy for this "misconception" is a general test applicable to all rules. The test should be formulated in the light of the objective of article 28.

The second reason why Jacobs finds the Keck formula unsatisfactory is that the criteria in Keck focuses on a discrimination test. One of the requirements for a measure to fall outside the scope of article 28 is that it affects in the same manner in law and in fact. Discrimination is prohibited in article 28 but the article goes beyond discrimination, its central concern is to prevent unjustified obstacle to trade[144]. Jacobs makes a valid point when he states that an obstacle is not less unjustified if it applies equally to all traders[145]. He finds the discrimination criterion irrelevant. What he means is that a discrimination test in this context leads to the fragmentation of the internal market, because traders must adapt to restrictions on selling

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[141] Case C-412/93, Leclerc-Siplec v. TF1 Publicité SA, [1995] ECR I-179 para 38
[142] see note 141
[143] see note 141 paras 20-21
[144] see note 141 para 39
[145] see note 141 para 39

arrangements depending on which State they decide to market their products in[146]. Jacobs means that restrictions should not be tested against local conditions but against the entire Community market. The restriction should be tested against traders' availability to access a market within the Community. This means that all traders should have unfettered access to the whole of the Community market unless there is a valid reason for them not to have access. According to this test, article 28 does come into play where there is a substantial restriction on the market access. In order for this alternative test not to get out of proportion, it needs a *de minimis* test, otherwise even the smallest restriction on market access would fall within the ambit of article 28, and the outer bonds of the article and the prevention of excessive interference in the Member States regulatory powers would be non existent.

Only hindrance on a big scale counts? – the de minimis test

The *de minimis* test would only be necessary when indistinctly applicable measures are challenged. Distinctly applicable measures are *per se* prohibited and a *de minimis* test is therefor inappropriate. Because even the smallest effect a distinctly applicable measure has on trade is prohibited, unless it can be justified under article 30. The restriction an indistinctly applicable measure could have on trade must be substantial for it to fall within the scope of article 28. When assessing the restriction, the nature of the measure must be considered. In this respect, Jacobs finds the categorisation made in Keck not to be entirely useless since it indicates the degree of the restriction[147]. It cannot, on the other hand, be used to state that measures restricting selling arrangements cannot hinder trade between Member States[148]. Product-bound measures have, because of the very nature of the rule, a substantial impact on the market access whilst the impact restrictions on selling arrangements has, depends on a number of factors. Conditions such as whether the measure applies to certain goods, most goods or all goods, or if other selling arrangements remain available and whether the effect of the measure is direct, indirect, remote or speculative and too uncertain[149].

Why the Court did not suggest Advocate General Jacobs test could depend on the fact that the Court finds *de minimis* tests deterrent in the area of free movement of goods[150]. The Court has most of the times rejected suggestion on *de minimis* tests in its case law. For example, it did

[146] see note 141 para 40
[147] see note 141 para 45
[148] see note 147
[149] see note 147

so in *Pranlt*[151] where the Court stated that it is not necessary that the national measure should have an appreciable effect on intra-Community trade for it to fall within the scope of article 28. However, a national measure has been found not to fall within article 28 on the grounds that its effect on intra-Community trade was too uncertain and indirect to conclude that it constituted a hindrance[152]. Still the prevailing opinion of the Court seems to be that an application of a *de minimis* rule is not appropriate in the principle of free movement of goods[153]. This standpoint is logical since a hindrance on trade is not less of a hindrance just because it does affect the free movement of goods on a bigger scale[154]. A *de minimis* test would also mean the evaluation of complex economic data. The Keck formula is "rule-based"[155] and is in that respect easier for the national courts to apply. A *de minimis* test could also lead to the exclusion of many measures from the scope of article 28, since the initial "sorting" is made by the national courts. Jacobs acknowledges this and points out the need for a carefully defined *de minimis* test in order for it to work[156]. However, he himself has no suggestions.

The Market access approach in the area of free movement of services and workers

Wheatherill is another commentator who has refined the Keck formula. His re-formulation of the ruling is based on Advocate General Jacobs approach. What Wheatherill does is to compare the Courts reasoning in the areas of free movement of services and workers, where a market access approach has been used. In *Alpine Investments*, a case dealing with the free movement of services, a Dutch law restricting companies from calling potential customers, offering them financial services, without their prior consent was challenged. Alpine Investments, a company established in the Netherlands, dealing with financial service, used this practise known as cold calling. Alpine Investments, was affected by the rules, even if they were calling customers in Belgium, France and the United Kingdom where there were no

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[150] see note 141 para 42
[151] Case 19/83, Pranlt, [1984] ECR 1299
[152] Case C-69/88, H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Netherland State, [1990] ECR 583
[153] Case C-126/91 Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH. [1993] ECR I-2361,
[154] This could be compared to Jacobs's own remark that the fact that a measure is not less of a hindrance just because it affects all traders. See also Oliver p 799.
[155] Oliver, 1999, p 799
[156] see note 150

similar rules. The Court rejected the arguments presented by the Governments of the Netherlands and the United Kingdom, stating that the measure only affected the way in which the service was offered and thus constituted a selling arrangement. The Court found that the circumstances in Keck were not the same as those in the case at issue. The Dutch prohibition did not only affect potential customers in the Netherlands but it also affected customers in other Member States. Therefor the restriction did "*...directly affect(s) access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services*"[157]. Whereas in Keck it was only expected that the national measure be of such a nature not to prevent access by products from other Member States to the market of the Member State of importation or to impede such access more than it impedes access by domestic products[158]. The national measure in Alpine investments did prevent access by services from other Member States (Netherlands) to the market of the Member State of importation (Belgium, France and the United Kingdom). So, the Dutch rule did constitute a restriction on freedom to provide service, on the other hand, the Court found the rule to be justified by public interest reasons, maintaining the good reputation of the financial sector of the Netherlands.

The case dealing with free movement of workers, *Bosman*[159], concerned a football player's transfer from one football club in Belgium to another in France. The transfer rules, which applied equally to all football players and regardless of whether they were transferring form one Member State to another or just between different clubs within the same Member States, were regarded to restrict the freedom of movement of players. The rules were found to prevent or deter players from leaving the clubs, which they belonged to, even after the expiry of their contracts of employment. The argument that the rules would restrict selling arrangements, and fulfilling the requirements in Keck were rejected. The Court did not really assess whether the rules applied equally in law and in fact, it just established that the rules did "*...directly affect players access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers*"[160]. This was why the rules in Bosman where not comparable with the rules on selling arrangements in Keck. The findings in this context are the same as those made in Alpine Investments.

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[157] Alpine Investments para 38
[158] Keck para 17
[159] Case C- 415/93, ASBL v. Jean-Marc Bosman, [1995] ECR I-4921
[160] Bosman para 103

The key issue, when assessing the national measures compatibility with Community law in both Alpine Investments and Bosman, was securing a direct access to the market of the Member State concerned. The objective of securing a direct market access was not according to Wheaterill, relevant on the facts of Keck[161]. So, on its facts Keck was, according to Wheatherill, correctly decided, but as a general principle it was insufficient because it gives an assumption that is simply not correct[162]. The assumption that once the conditions in the Keck formula are fulfilled, measures restricting selling arrangements are not capable of hindering trade are not, according to Weatherill, accurate. He proposes a re-fined test stating;

"*Measures introduced by authorities in a Member State which apply equally in law and in fact to all goods or services without reference to origin and which impose no direct or substantial hindrance to the access of imported goods or services to the market of that Member State escape the scope of application of Articles 30 (28) and 59*[163]."

The reason why the market access approach became "secondary" in Keck, and in the cases following Keck, is because the facts did not present a clear-cut cross border element. The issue concerning market access becomes clearer in cases such as Alpine Investment and Bossman because of the apparent cross border element. I believe that the Court has shown in recent cases[164] that the significance of goods ability to access the market of the importing sate is very much a part of the Keck formula. The assumption in Keck is fulfilled provided that the measure does not restrict the market access of the imported good[165].

The objective, to create an outer boundary for article 28, the need for national rules that do not create a threat to the creation of an internal market to fall within the ambit of article 28, is according to Weatherill fulfilled with this refined test. Still his test is not problem free. What constitutes direct and substantial hindrance to market access, and how will it be assessed?

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[161] Wheatherill p 893
[162] Wheatherill p 894
[163] Wheatherill p 896
[164] Joined Cases C- 34/95 to C-36/95, De Augostini and TV-Shop, [1997] ECR I-3843, Case C-405/98. Konsumentombudsmannen v. Gourmet International Products AB; [2001] ECR I-1795, Case C-254/98, Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH, [2000] ECR I-151
[165] De Augostinin and TV-Shop para , Gourmet para

RECENT CASES

In this section I will present three quite recent cases dealing with national restrictions on selling arrangements. The Court does emphasise the importance of the imported products possibility to access the market of the importing Member State. The very clear statement that market access plays an important part in the assessment of a national measure alleged discrimination in fact shows that, in contrast to what Advocate General Jacobs and Wheatherill says, the Keck formula does involve a market access criteria. This was maybe not too clear when Keck was decided. However, the Court shows with these cases that a market access approach does indeed exist in the Keck formula, it is not a primary focus, nevertheless it is there.

These cases do also bring up the issue of the possibility of a national measure to escape article 28 despite the fact that it is so severe that it almost constitutes an outright ban. The Court states that when a national rule could be described as an outright ban one should bare in mind that such a measure could have a greater impact on imported products than on domestic. With this, the Court shows that yet another issue, which the critics blamed, the Court to have missed has at least been brought to the surface. Still, the Court is cautious in its statements and the questions surrounding this issue are ones, which the Court wants to solve on a case-by-case application.

De Augostini and TV-Shop[166]

The joined cases of De Augostini and TV-Shop, deals with Swedish rules on television advertising. In the case against De Augostini, a Swedish company belonging to the Italian group Istituto Geografico De Augostini, had the Swedish Consumer Ombudsman (KO) apply for an injunction to restrain the company from advertising in the television channels TV3 and TV4, a magazine for children. The grounds for the injunction was that the advertising in question was contrary to the Swedish broadcasting law, prohibiting advertising designed to attract the attention of children younger than 12 years.

The two other cases concerned the Swedish subsidiary of the company TV-Shop Europe that broadcasted on TV3 and on Homeshopping Channel. KO applied for an order restraining TV-

[166] Joined Cases C- 34/95 to C-36/95, De Augostini and TV-Shop, [1997] ECR I-3843

Shop from marketing skin-care products and detergent in two infomercials on the grounds that it was misleading. Similar to all the cases was that the advertising shown on TV3 was retransmitted to Sweden by satellite form the United Kingdom, whilst the advertising in TV4 and on Homeshopping Channel was broadcasted from Sweden.

The Swedish Marknadsdomstol (Court of Commerce) asked whether the so called Broadcasting Directive[167], article 28 or article 49 precluded a Member State from taking action against television advertisements which an advertiser had broadcasted from another Member State. The Marknadsdomstol also asked whether the above mentioned provisions prevented a Member State from applying a law prohibiting advertisements directed at children.

The Directive

The objective of the Directive is to abolish obstacles between the Member States concerning broadcasting activities and distribution of television programs. The aim is to harmonise the national rules concerning television broadcasting. The Court established that the Directive did not preclude the application of national rules within the general aim of consumer protection as long as those rules were held within the objectives of the Directive[168]. The national rules may not involve a secondary control of television broadcasts in addition to the control, which the broadcasting Member State has to carry out. The Directive allows Member States taking measures against an advertiser who is broadcasting from another Member State, provided that those measures do not prevent the retransmission as such[169]. In regards to the advertising restriction in relation to children, the Court stated, that since provisions concerning protection of minors in relation to televised program in general and televised advertising in particular, already were included in the Directive (articles 11-16), the Swedish rules were found to add a secondary control of broadcasting from another Member State, and thus incompatible with the Directive[170].

[167] Directive 89/552/EEC of 3 october 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; OJ 1989 L 298 p 23
[168] De Augostini and TV-Shop para 34
[169] De Augostinin and TV-Shop para 38
[170] De Augostinin and TV-Shop paras 55-62

Article 28

The lawfulness of the measures taken for the consumer protection against misleading advertising or against an advertiser in relation to televised advertising broadcasted from another Member State had to be considered under the Treaty provisions. The Court applied article 28 to the pure domestic situation, whereas the situation where the television broadcaster established in one Member State broadcast for an advertiser established in another Member State constitutes a service within the meaning of article 49.

Applying article 28, the Court established that the measure in question constituted selling arrangements since it prohibits a particular form of promotion of a particular form of marketing[171]. It then proceeded with applying the Keck formula assessing whether the law applied equally to all traders and affected them in the same manner in law and in fact. The equality in law was undisputedly fulfilled. As to the equality in fact, however, the Court found that it "*...cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States*"[172]. Despite the statement that the question regarding the effects of the national rule in fact, should be determined by the national court, the Court wanted to make clear that the television advertising was the only effective form of promotion for De Augostini to "*...penetrate the Swedish market since it had no other advertising methods for reaching children and their parents*"[173]. Maybe this statement can be seen as the Court's way of leading the national court to the conclusion that the advertising restriction screens off the national market and thus discriminates in fact, without assessing the equality in fact itself. On the other hand, the Court has not hesitated in the past to consider that question provided it found to have enough factual basis to make a correct decision[174].

If the national court should come to the conclusion that the advertising restriction does not affect in the same manner in fact, it had to determine whether the rule may be justified under

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[171]De Augostinin and TV-Shop para 39.
[172] De Augostini and TV-Shop para 42
[173] De Augostini and TV-Shop para 43
[174] For example cases like ; Joined cases C-69 and C-258/93, Punto Casa, [1994] ECR I-2355;
Joined cases C-401/92 and C-402/92, Tankstation't Heukske vof and J. B. E. Boermans, [1994] ECR I-2199; Case C-391/92, Commission v. Hellenic Republic (Processed milk), [1995] ECR

the mandatory requirements and whether it is proportionate. Noteworthy is the terminology the Court uses in regards to the possibility of justification. The wording is one normally associated with article 49[175]. Instead of referring to the mandatory requirements the Court speaks of "overriding requirements"[176], which is essentially the same thing as mandatory requirements but used in the area of free movement of services.

In regards to the advertising as a service and the application of article 49, the Court merely stated that the national measure could indeed restrict the freedom to provide services. The national court had to determine whether the measure could be necessary to meet overriding requirements and whether they are proportionate for the aim pursued.

In the operative part of the judgement the Court states that the national court should consider whether the *"...provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States, are necessary for meeting overriding requirements of general public importance or one of the aims laid down in art 36 [30] of the EC Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade"*[177]. This formulation may give the impression that the Court has mixed up the Keck and Cassis formula into one big test[178]. However, I am quite convinced that the Court does not mean that the national courts are required to consider not only whether the second condition of the Keck formula is fulfilled but also, in addition, asses whether the requirements of the Cassis formula are satisfied. When analysing a case as a part of a continuation of many cases and as a part of a logical system, I think that the Court means that the Keck formula should be considered first, and should the rule not apply equally in fact, then an application of the Cassis test is in order. This reasoning is also consistent with the reasoning made in the judgement[179].

The ruling of the national court[180]

The Marknadsdomstol came to the conclusion that the advertising restriction concerning advertising directed to children did affect the marketing of domestic and imported products

[175] Greaves p 316
[176] De Augostini and TV-Shop para 45
[177] De Augostini and TV-Shop operative part para 2
[178] Greaves p 318
[179] De Augostini and TV-Shop paras 43-46
[180] MD 1998:17 De Augostini (Svenska) Förlag AB and MD 2000:4 TV-Shop i Sverige AB

equally in fact. The basis for this was that the arguments presented by De Augostini and also the Court that the restriction made it harder for De Augostini to penetrate the Swedish market had nothing to do with the product as such or its origin. The Marknadsdomstol was of the opinion that it had more to do with De Augostinins position as a new operator on the Swedish market, compared to other domestic as well as foreign more established operators. The Marknadsdomstol admitted that the restriction could render it more difficult for new companies to access the Swedish market. However, nothing indicated that the advertising restriction imposed any appreciable differences, in the possibility of marketing the product, between Swedish companies and companies from other Member States.

Because the Directive precluded Member States from applying advertising restrictions, in relation to advertising directed to children, which were broadcasted form another Member State, the Swedish advertising rules on this issue were not applicable on the advertising which was broadcasted from, in this case, the United Kingdom. The result of this gave the somewhat bizarre situation; that advertising directed to children which was broadcasted from Sweden was found contrary to Swedish law and thus prohibited, whereas the advertising broadcasted from the United Kingdom was permitted because the British, less restrictive rules applied in this case.

In the case concerning the company TV-Shop, the Marknadsdomstol used the general legislation on protection of consumers against misleading advertising to prohibit what it found objectionable in relation to Swedish law.

TK-Heimdienst[181]

In January 2000 the Court gave a preliminary ruling concerning a prohibition in the Austrian Code of Business and Industry. This law permitted butchers, bakers and grocers to offer sales on rounds from door to door. But thise rounds could only be done in the district where the trader had his permanent establishment or in a municipality adjacent thereto. TK-Heidienst argued that the prohibition was not purely a marketing rule since it reserved sale of goods on rounds exclusively to sellers established locally, and also that it did not apply equally to all traders. The Court stated that the measure in question constitutes selling arrangements since it

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

regulates where goods may be sold. However, the rule was found not to "*affect in the same manner the marketing of domestic products and that of products from other Member States*"[182]. The rationale behind this conclusion was that traders who are established in other Member States have to set up another permanent establishment in that district or in an adjacent municipality to be able to sell his products. The result of this was that goods from other Member States had to bare additional costs in order to access the market of the importing state, whilst local traders already had met the requirements of a permanent establishment. The Court found that the Austrian rule "*impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products*"[183]. The Court makes a reference to Alpine Investments as to the effects of hindrance to market access.

Does the ruling in TK-Heimdienst mean that the Court has taken impression from the ruling in Alpine Investments and wishes to implement the same reasoning in the area of free movement of goods? Or is maybe the market access approach to be seen as an addition to the existing criteria in the Keck formula? I think that it is both. The cross border element is clearer in this case. The facts in TK-Heimdienst are more comparable to the facts in Alpine Investments then they are to the facts of Keck.

The Court rejected the Austrian governments argument that the effects of the rule were of a nature too random and indirect to be regarded as a hindrance. So, once again the idea of a *de minimis* test was rejected. The Austrian government did not either succeed in convincing the Court that the measure should be legitimate on the grounds of protection of the Austrian local businesses, which otherwise would be jeopardised in a country as topologically varied as Austria. The Court could not allow protection of aims of a purely economic nature.

[182] TK-Heimdienst para 25
[183] TK-Heimdienst para 29

Gourmet[184]

In 2001 the Court decided yet another case dealing with advertising restrictions. Once again it was the strict Swedish advertising rules that were under scrutiny. This time the issue concerned the legislation on advertising of alcoholic beverages. The question was whether the Swedish advertising restrictions on alcohol were contrary to article 28. These issues had been raised when the Consumer Ombudsman had made an application for an injunction restraining the magazine Gourmet from placing advertisements for alcoholic beverages in their magazine. Sweden has a very restrictive policy on alcohol advertisement. Alcohol advertising in radio or television is, as a principle, prohibited. Advertising may not be used to market spirits, wines or strong beer in periodicals with the exception of publications distributed solely at the point of sale of such beverages or in press aimed essentially at traders, in other words manufacturers and restaurateurs. Gourmet had, in an edition intended for subscribers only, three pages of advertisement for alcoholic beverages. This edition was not sold in the shops.

The Consumer Ombudsman argued that the Swedish rule constituted a restriction on selling arrangements, and therefore not caught by article 28. The Court found, as it did in De Augostini and TV-Shop that it cannot be excluded that an outright prohibition might have a greater impact on products from other Member States[185]. The Court stated with some caution, since it did not want to perform the task of the national court, that an analysis of the facts characteristic to the Swedish situation could conclude that domestic products in fact, because of the advertising restriction, had an advantage in relation to imported products. The rationale for finding the advertising restriction to favour domestic products was that the rule made it harder for imported products to access the Swedish market. The Court stated that according to paragraph 17 in Keck, a national provision must, in order to be classified as a selling arrangement escaping article 28 "…*not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more that they impede the access of domestic products*"[186]. A reference to De Augostini and TV-Shop is made, where it was established that a restriction that is too severe cannot escape the ambit of article 28, since such a prohibition may have a greater impact on imported products. In other words the rule constitutes an obstacle to trade between Member States because the effect of the rule in question could make the "…*marketing of products form other Member States more heavily*

[184] Case C-405/98. Konsumentombudsmannen v. Gourmet International Products AB; [2001] ECR I-1795
[185] Gourmet para 19
[186] Gourmet para 18

than the marketing of domestic products"[187]. The Court then proceeded in assessing the possibilities for the rule to be justified under the mandatory requirements. Protection of public health, which was the Swedish governments defence was accepted. However the rule as a whole may only be permissible if it also is proportionate to the objective to be achieved. The Court did not want to assess the proportionality of the restriction.

The ruling of the national court[188]

The national court in this case the Swedish Marknadsdomstol, had to, as instructed by the Court, consider whether the national advertising ban of alcoholic beverages was necessary and proportionate in order to protect public health. The principle of proportionality requires a balance between the means to reach an objective and the end result. The Markandsdomstol had to weigh contradicting interests against each other in this case the protection of public health and the free movement of trade.

The Markandsdomstol accounted for the national policy on alcohol and the different means that the Swedish state used in order to realise that policy. Some of the means in the Swedish alcohol policy are high taxes on alcoholic beverages, a state monopoly in the retail trade, age limits for serving and buying of alcohol, restrictions on opening hours on establishments that serve alcohol, restrictions on the private importation of alcohol and education and information on the risks connected to misuse of alcohol, directed especially to youths. The very far-reaching advertising restriction is also a means in the Swedish alcohol policy. The goal is to reduce the alcohol consumption and trough that limit negative effects of alcohol i.e. alcoholism. This is all good and well in the eyes of the Marknadsdomstol. The question remains whether these means are fitted to the purpose of protecting the public health, and whether there is any connection between the total consumption of alcohol and the advertising of alcohol in magazines, such as the one at issue. The Marknadsdomstol refers to the Court's findings in Aragonesa, where the Court said that the advertising of alcoholic beverages in magazines may have some connection to the overall consumption of alcohol. This fact can support the restriction on advertising as a suitable means to the objective. However, the Marknadsdomstol still have to asses whether the advertising restriction is necessary or if the same goal can be reached in a less restrictive way. In the end the Marknadsdomstol came to the conclusion that the advertising restriction plays a minor role in the overall alcohol policy.

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[187] Gourmet para 25

The state monopoly on sales of alcohol is found to be the strongest control mechanism and the national court does therefor question the proportionality and necessity of the advertising restriction. In conclusion the Marknadsdomstol finds that the advertising restriction in its present form, designed as an absolute ban, is not very effective and therefor not compatible with Community law and article 28. The advertising restriction is found to be too far-reaching. The question of how an advertising restriction compatible with Community law should look like is an issue that the Marknadsdomstol passes over to the legislators. One thing is certain that Sweden with its entry in the European Union has to review its very restrictive alcohol policy in order to conform to the Union and the principle of the free movement of goods.

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[188] MD 2003:5 Gourmet International Products Aktiebolag

RE-EXAMINING THE COURTS CASE LAW

The fact that the contested measure does constitute a selling arrangement does not mean that it automatically, if one applies the Keck formula, would escape article 28. The measure must still pass the two requirements of the Keck test; that is, the rule must apply to all traders and it must affect them equally in law and in fact. This is why it is too easy to dismiss the pre-Keck cases as irrelevant just by concluding that the national measure is a selling arrangement and thus through Keck no longer constitutes good law. It is also important to acknowledge the difference between a measure that is justified and a measure that completely escapes article 28. The measure that has been justified does hinder trade, however that hindrance has been accepted because the rule is needed to protect some mandatory requirement. When the Court rules that a national measure is justified it does not mean that the restriction "goes away", it means that the hindrance that the rule constitutes is limited and controlled by the Court so that it does not exceed what is necessary to meet the objectives of the measure and that it is proportionate[189]. I stated above that the Keck formula actually tolerates hindrance[190], although it is an indirect, potential and sometimes very remote hindrance, if one uses the term hindrance in its strictest sense, a mechanical application of the Dassonville formula. However since the Court has decided that the hindrance that a national restriction on selling arrangements might have on intra-Community trade is not of such nature as to prevent the market access on imported products more than it does on domestic, as long as the two requirements are fulfilled, it is not to be seen as a hindrance[191]. So, the difference between a national rule that has been justified and a measure that completely escapes article 28 is that the justified measure hinders trade whereas the measure that fell outside the scope of article 28 does not. When analysing the pre-Keck cases the difference just described may be useful to bear in mind. The point of departure, when analysing which cases that might be overruled, is that, the cases where the court found the measure to escape article 28 would most likely pass the Keck-test whereas the cases where the national measure was found justified are more uncertain. This is because where the Court found a national measure justified could mean that that measure, despite being a selling arrangement, does hinder trade to such a degree that it would not pass the Keck-test.

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[189] Case C-145/88, Torfaen; Case C-368/95, Familiapress,
[190] see page 20
[191] Keck para 17

Applying Keck

What happens when one applies the Keck formula. First of all, the form of the measure must be determined, since it has become quite clear what constitutes a selling arrangement, that task is not too hard. Selling arrangements are measures regulating when, where or by whom goods may be sold, advertising restrictions and price controls. Applying this, one gets the result presented in the chart below. The first column shows what constitutes a selling arrangement. The second column shows the cases verifying the concept of selling arrangements. Finally, the pre-Keck cases are presented in the third column, in the order in which the national measures in the various cases fit the description of a restriction on selling arrangements.

Selling arrangements	**Cases post-Keck**	**Cases pre-Keck**
When	Punto Casa Tankstation	Blesgen Oebel Cinétheque The Sunday trading cases
Where or by whom	Commission v. Greece	Quietlynn
Advertising restrictions how goods may be sold, sales promotions	Hünermund Siplec ostini and TV-Shop Gourmet	SARPP Agragonesa Buet - Oosthoek -
Price controls	Keck Belgapom	

After determining that the national measure constitutes a selling arrangement one must assess whether the two requirements of the Keck formula are fulfilled. Does the measure apply to all the relevant traders in the area, and does it apply equally in law and in fact. There is nothing in the pre-Keck cases, which I have analysed, that indicates that the national rules in question do not apply to all traders and are not equal in law. The national measures are all indistinctly

applicable, that is they affect all traders irrespective of origin. The hard part is assessing whether there is any discrimination in fact.

Equality in fact

It is often a range of factual circumstances that determine whether or not a national measure do discriminate in fact, and it is seldom one factual circumstance alone that is conclusive for the case. It is rather all the various factual conditions put together that establish whether or not a domestic product is in fact being favoured or given an advantage because of the contested national measure[192]. In most cases the Court simply states that the national measure applies to all traders irrespective of origin and that it does not affect the marketing of products from other Member States more than it affects the marketing of domestic products[193]. This is done without explaining why and how, and sometimes, as it is supposed to be, it is left to the national court to determine the equality in law and in fact. Nevertheless, the Court states in De Augostini and TV-Shop that the national court should in its assessment take into consideration that the contested television advertising was the only effective form of promotion enabling De Augostini to penetrate the Swedish market[194]. The Court found in TK-Heimdienst that the national measure imposed additional costs on traders from other Member States and thus gave an advantage to domestic traders[195]. In Gourmet the Court stated that traditional social practices and habits in relation to the consumption of alcoholic beverages should be considered in the assessment of the equality in fact[196]. The Court also agreed with the Commissions statement that the domestic producers had an easier access to means of advertising for principally cultural reasons[197]. The statistical fact from the Swedish government showing an increase in the consumption of mostly imported alcoholic beverages was dismissed[198]. These cases give some clue on what factual circumstances that may be taken into account.

The possible effect in the overall volume of sales could be a contributing but not a conclusive fact when the Keck formula is applied. The Court stated in Keck that the fact that the national rule may restrict the volume of sales is not sufficient to characterise the measure as a

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[192] See the Courts reasoning in Gourmet
[193] See note 160
[194] De Augostini and TV-Shop para 42
[195] TK-Hiemdienst para 26
[196] Gourmet para 21
[197] Gourmet para 24

MEQR[199]. An increase in the volume of sales, even if it is shown that there is an increase in sales of imported goods, has not been accepted as an argument that the contested national measure does not hinder trade. The Courts reply when presented with statistics that show an increase in imports is that the increase might have been even higher without the restriction[200]. An effect in the volume of sales, positive or negative, is not on its own proof of a measure being discriminatory or favouring of domestic products. It could at most, if anything, be a contributing circumstance to the fact of discrimination.

One of the main critique, besides the formalism of the ruling, was that the Keck-formula left out the issue concerning the isolation of national markets and the fact that a measure could be equal in law and in fact but still screen off a national market from traders from other Member States. The issue concerning this matter has been discussed above, and I maintain that the Court actually does consider the market access approach, however, the fact that they, do has not been that clear. I also believe that the difficulty for a product from another Member State to penetrate a domestic market plays a very important role in whether or not there is equality in fact[201].

Cases overruled?

Oebel was one of the first cases where the Court found the national measure to fall outside the ambit of article 28. The contested national rules concerned night work in bakeries and delivery and transport of baker's wares. The Court concluded then that the trade between Member States was kept open because the prohibition was confined to transport to individual consumers and warehouses[202]. The free movement of goods was not made more difficult for imported products than it was for domestic products. The Courts findings are satisfactory to me and show that the outcome is still valid. If a similar case would come before the court today it would come to the same end conclusion, however, the argumentation would differ since the Keck formula would be applicable.

Blesgen concerns a national restriction that may be perceived as an absolute ban. All alcoholic beverages exceeding 22% are prohibited from stocking and consumption in places open to the

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[198] Gourmet para 22
[199] Keck para Hünermund para
[200] Gourmet
[201] see the reasoning in De Augostini and TV-Shop, Gourmet, TK-Heimdienst.

public. The Court found that since the prohibition only concerned sale of strong spirits for consumption at places open to the public, that such a measure was not of such nature as to restrict trade. Nothing in neither the judgement nor the opinion from the Advocate General or the Report form the hearing, indicates that the marketing is made easier for domestic products. Because of this it is most likely that the rule would pass the Keck test. The appellant points out that the Belgian law protects the Belgian brewing industry, which is safe, due to lack of competition from foreign spirits in the share of the market in alcohol in general. Also the United Kingdom forwarded this point stating that Belgium was a major producer of beer but not an important producer of spirits. The fact that Belgium itself does not produce spirits is not relevant in assessing the equality in fact[203]. One could argue that beer is a product in competition with spirits and therefore belonging to the same market, alcoholic beverages[204]. However, since the actual selling of strong spirits was allowed (it was only the selling for consumption at the place) that made the marketing of imported as well as domestic products possible. The market access for strong spirits was kept opened; it was possible to market the products through other channels. It was not really the closed situation as in for example Gourmet.

In Quietlynn the Court did find the measure to fall outside the scope of article 28. The national rule demanded a licence in order to be able to sell sex articles applied to businesses where the sale of sex articles was the principal object of business. This meant that non-licensed businesses could sell sex articles as long as it was done on a secondary basis in addition to newspapers and magazines. Nothing indicates that, because of the rule, it would be harder to market imported sex articles. The fact that non-licensed businesses may, to a limited extent, sell sex articles add to the fact that the marketing of domestic products is not made easier than for imported. If Quietlynn was decided today the national measure would pass the Keck test and escape article 28.

Buet and Oosthoek concerns a form of advertising, really how goods may be sold, that is sales promotion schemes. The rules in these cases do constitute an outright ban on a particular sales promotion and were found to *prima facie* fall within the scope of article 28. Applying Keck in Oosthoek is fairly easy. Oosthoek is prohibited from marketing his products in combination

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[202] Oebel para 20
[203] Commission v. Hellenic Republic (processed milk)
[204] see the reasoning in Gourmet

with the offer of a free gift. His ability to penetrate the market is not really hindered; it is only one marketing strategy that is prohibited. Consequently, there are many other ways of marketing the product open to Oosthoek. And most importantly the imported product is not placed at a disadvantage in relation to domestic products. The same rationale goes for the application of Keck on Buet. The sales promotion scheme prohibited is canvassing at the home. There are other marketing channels that the trader may use. The fact that it is an effective sales promotion and that almost all his profits comes from this way of marketing the could however be a determining factor in the assessment. The question is whether this way of marketing the product is the only way to penetrate the national market[205]. Still, all circumstances indicate that both the measures in Oosthoek and Buet would, if the Keck formula applied, fall outside the scope of article 28. If the cases would fail the Keck test, they would most certainly be justified under consumer protection.

The contested national measure in Cinéthéque constitutes an outright ban of sale or hiring of videocassettes of films, which are simultaneously being shown on cinema, the ban is only in force for a period from 6 to 18 months. Nevertheless it is an outright ban applying, for that period of time, in one Member State and that may have a greater impact on products from other Member States that are lawfully sold and marketed in that Member State[206]. The ban was only on private showing and it does not apply on video showings in public. Neither does the ban prohibit the production or importation of video recordings during the months in question; the restriction only affects sale and hiring. However, the Court decided at the time that the measure did hinder trade between the Member States but the restriction was justified under the mandatory requirements. All the circumstances presented above indicates that French traders or producers of video cassettes do not have it easier to access the French market once the period of time is up than traders form other Member States. This finding shows that if the case was decided today, the national measure would fall outside the scope of article 28.

The case Aragonesa concerns and outright prohibition on advertising of alcoholic beverages with an alcoholic strength of more than 23%. The prohibition was a rule that applied in the district of Catalonia, it was therefore a measure that did not apply in the whole of Spain. It was also an established fact that that the majority of Catalan alcoholic beverages had an

[205] De Augostinin and TV-Shop
[206] Gourmet para 19

alcohol content less then 23%. Aragonesa argued that the advertising restriction protected locally produced products from competition. The fact that the measure only applied in one part of the national territory does not mean that it cannot constitute a hindrance on trade, likewise the national measure does not have to favour national products as a whole. The fact that Catalan did not produce much strong spirits is as we have learned before irrelevant[207]. The Court found that the measure in principle fell within article 28 and constituted a MEQR, nevertheless, it could be justified under article 30 on the grounds of the protection of public health. Applying Keck, and particularly the second criteria, the Courts reasoning in Gourmet comes to mind. The Court stated in Gourmet that the consumption of alcoholic beverages is linked to cultural and traditional social practices, local habits and customs[208]. An outright ban on advertising may therefore impede access to the market by products from other Member States more than domestic. However, the Catalan prohibition was not as severe as the Swedish advertising restriction. Advertising was allowed on public transports, cinemas and points of sale and production centres. This means that some channels for advertising were opened in contrast to the Swedish rules. These additional channels could be the determining factor for not sealing off the market and therefore allowing the measure to pass the Keck test and escape article 28, which it most likely would.

The Sunday trading cases deal with essentially the same issues as Punto Casa and Tankstation from a legal and factual point of view. The Court concluded that the volume of sales had decreased and that was an indication that the trade between the Member States was affected. We now know that an effect in the volume of sales is not enough to constitute hindrance. Since the Courts findings in Punto Casa and Tankstation were clear, that a rule such as the ones at issue did not hinder trade, I conclude that the Sunday trading cases must be overruled. National measures such as the ones in the Sunday trading cases would today completely escape article 28.

The conclusion of this chapter is that most cases are overruled in the sense that the reasoning in the judgements no longer constitutes good law. The fact that the end result, that the national rule would be allowed whether it escaped article 28 or whether it was justified, would be the same is essentially irrelevant. The legal certainty lies in knowing why and how the Court came to the final conclusion. There is one case that is somewhat different from the ones I

[207] see note 26
[208] Gourmet para 21

have presented above. It is different in the sense that it is not overruled. The reason for this is because Community policy was involved. The case is GB-INNO-BM. The key issue in GB-INNO-BM is whether a national measure that restricts hindrance may be justified despite the fact that it may contradict Community policy. The articles regulating the free movement of goods are to be used when there is no Community harmonisation on the issue. As soon as there is a Community policy regulating how the Community views the question, the Member States may not through national rules contradict that policy. That was what happened in GB-INNO-BM and that is why the national measure in that case did not escape article 28 and could not be justified. This case does still constitute good law .

REMAINING AREAS OF UNCERTAINTY

In an article written by Peter Oliver in the CML Rev of 1999[209], he lists three areas, concerning the ruling in Keck, that remain to be clarified. The first one concerns certain types of measures that cannot be regarded as neither product-bound nor selling arrangements. Import controls and discrimination in the award of public contracts or the obligation on traders to compile statistics on imports are some of the measures that do not fit in either categorisation. What is unclear in this aspect is to what extent discrimination has to be shown in order for article 28 to come into play? As Oliver himself states; this is not a major difficulty but a matter, which remains to be clarified[210]. A case dealing with such a measure described above is *Kieffer*[211]. The Luxembourg government had implemented Council Regulation (EEC) No 3330/91 on the statistics relating to the trading of goods between Member States. The objective of the regulation was to promote the completion of the internal market by keeping statistics of all goods moving form one Member State to another, in relation to the trading of goods. The regulation provided an obligation on natural and legal persons who were involved in the trading of goods to provide statistical information to the system set up through the regulation. The economic operators had to, in order for the obligation to apply, import or export. Fines were imposed on those parties who failed to comply with the obligation. The defendants who where managers of a garage in Luxembourg where charged with infringing the obligation to submit information. The defendants argued that the regulation imposed additional costs on them since, in order to comply they had to either take on staff or have the obligations carried out by third parties. They also claimed that the obligation would indirectly affect their efforts to export in excess of the annual threshold that triggers the requirement to submit statistics. This in all would encourage the sale of the goods on the national market. The national court chose in the light of the above mentioned to ask the Court if the Regulation might constitute a measure prohibited by article 28 and weather the measure could constitute a restraint, which was unjustified and disproportionate. The Court acknowledged that the obligation could have restrictive effects with regard to the free movement of goods[212]. However, that restriction had to be accepted since the aim of the Regulation was to promote the completion of the internal market, an aim that clearly is justified. The Court also concluded that various exemptions in the Regulation and the fact that

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[209] see note
[210] Oliver, 1999, p 795
[211] Case C-114/96 Kieffer, [1997] ECR I-3629
[212] Community regulations must also comply with the principle of free movement of goods.

the Community institutions had made available, free of charge, modern data-processing tools and software did not “appear” to make the obligation disproportionate.

Even if this case deals with Community law and not national law, it does nevertheless demonstrate that the assessment of whether a national measure that is neither a product-bound nor a selling arrangement, is not too problematic. The Court used in Kieffer an assessment very similar if not identical to a Cassis application. The Court determines that the measure may hinder trade, however that hindrance may be justified and the level of hindrance is not disproportionate. To use a Cassis assessment in such cases seems to be the right way to go, since the Keck formula is used to exclude measure that have a potential effect of hindering trade.

As a second point, Oliver shows concern regarding selling arrangements that are so severe that they virtually amount to an outright ban on sales despite the absence of discrimination. The question is when a non-discriminatory prohibition becomes so severe that it in fact hinders trade between Member States? This is not completely clear, however, the Court has implied in *inter alia* De Augostini and TV-Shop and in Gourmet that an outright ban may have a greater impact on imported products than it has on domestic goods. The result of this, as I interpret the reasoning of the Court, is that the circumstances that the severity of the measure causes, contributes to the situation where the national rule does not have the same effect on domestic products as it has on imported, and thus constitutes a MEQR. This means that a situation where a national measure on selling arrangements is so strict that it constitutes an outright ban cannot exist without some degree of discrimination in fact.

As a third point Oliver presents what he calls the Achilles’ heel of Keck[213]. This matter concerns how the concept of discrimination applicable to selling arrangements, discrimination in fact, is to be defined and ascertained. The problem is that the Court in a number of cases has rejected the use of economic data in order to assess discrimination in fact. The Court stated for example in Comm v. Greece (processed milk), that ‘*The applicability of article 30 [28] of the Treaty to a national measure for the general regulation of commerce, which concerns all the products concerned without distinction according to their origin, cannot depend on such a purely fortuitous factual circumstance, which may moreover, change with*

[213] Oliver, 1999, p 795

the passage of time"[214]. However when the Court in De Augostini and TV-Shop found that an outright ban may fall within the scope of article 28 if it could be shown that that the restriction had a greater impact on products from other Member States. Oliver interprets this statement as an acceptance of economic data. The same statement was given in Gourmet. The Swedish Consumer Ombudsman presented, in Gourmet, statistics concerning the relative increase in Sweden in the consumption of mainly imported alcoholic beverages as an argument that the advertising restriction had not affected imports. The Court seem to have taken the statistics into consideration even if they were rejected on the bases that "*...it cannot be precluded that, in the absence of the legislation* [...] *the change indicated would have been greater..*[215]." and that the statistics only considered some alcoholic beverages and ignored others, in particular beer. The problem with economic data is that they tend to vary depending on who puts them together. This circumstance combined with the fact that is hard to isolate the effects of a national measure in the data may make the results somewhat unreliable to use as evidence.

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[214] Case C-391/92, Commission v. Hellenic Republic; [1995] ECR p

[215] Gourmet para 22

CONCLUSION

I have shown in this paper that nearly all questions that arose in connection with the ruling in Keck have now been answered through a case-by-case application of the Keck formula. There was a need to set the proper bounds to article 28, and the point in time when the Keck formula was delivered coincides with the introduction of the principle of subsidiarity where the Member States rights to execute regulatory powers was acknowledged. The ruling in Keck acknowledged that right by recognising the Member States need to regulate certain trading conditions without being accused of restricting the free movement of goods.

The concept of selling arrangements has become clear and we now know that selling arrangements constitute when, where and by whom goods may be sold, advertising restrictions and price controls. There are some discrepancies in the area of advertising restrictions, since a national measure regulating advertising may also affect the free movement of services. A more clear cut market access approach is used in the area of free movement of services and no considerations as to the form of the national rule or whether it applies equally in fact are taken in these cases. On the other had it seems as if the Court is slowly recognising the market access approach also in the free movement of goods[216]. The Court has in recent cases emphasised the importance of imported products possibility to penetrate the market of the Member State of importation[217]. With this reasoning the Court has somewhat moved towards the alternative approach introduced by mainly Advocate General Jacobs and Wheatherill. The consideration for the possibility of imported products to access the market is taken without the need for a *de minimis* rule, which was needed in order for the presented alternative approaches to work, which in the area of free movement of goods would be inappropriate. The simplicity of the Keck formula as a general principle remains when a *de minimis* rule is kept out, and with the categorisation of national measures into selling arrangements or product-bound measures, the national courts do not have to consider what constitutes a direct and substantial hindrance to market access. On the other hand, Keck does also have its disadvantages; the definition of discrimination in fact. The hard part is to prove discrimination when the court is reluctant to use economic data.

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[216] De Augostini and TV-Shop, TK-Hiemdienst and Gourmet
[217] see note 169

On the other hand, recent cases show that the assessment of discrimination in fact to some extent involves statistics and at least the consideration of economic data[218]. Still, the Court has not as of yet accepted any economic data presented in the various cases.

The ambition to realise a common market does sometimes deliver strange results[219]. Wheatherill and Beaumot did, notwithstanding, state that regulatory uniformity was not a necessity but the principle of free movement of goods was. This has created a situation where a trader is faced with different conditions depending on where he for example chooses to broadcast his advertising[220]. I understand that the European Union is not about making all Member States alike, in regards to rules and regulations, the different cultures and political goals are recognised and acknowledged[221], nevertheless it seems quite easy to circumvent the rules in one Member State if another Member State has less restrictive rule. This shows how much the Union actually affects every Member State and how Member States affect each other. If one sees it from a competition point of view, maybe this influence is healthy and creates good marketing grounds for companies and ultimately good conditions for us consumers.

I have also shown that the pre-Keck cases, which I have presented in this paper to some extent no longer, constitute good law. The cases where divided into two groups. One where the Court found the national measure to *prima facie* fall within the scope of article 28, and another where the national rule was deemed not to contradict the principle of free movement of goods. The cases in the first group are, with the application of the Keck formula, completely overruled. If the Court was faced with the cases today it would find the national measure to escape article 28. In that sense the outcome different, the measure is not even found to contradict Community law. The other sets of cases are on the other hand closer to a Keck reasoning. The national rules were found to fall outside the scope of article 28 because they had nothing to do with trade between the Member States. This reasoning is similar to the one in Keck even if the approach of coming to that conclusion would have been different today. The one case, which may still constitute good law, does not really touch the key issue of the Keck formula. GB-INNO-BM does really concern the supremacy Community law and policy has over national rules. The grounds for justification are not valid when the

[218] TV-Shop and Gourmet
[219] see note 42
[220] De Augostini and TV-Shop
[221] provided they do not contradict Community law and policy.

Community has decided to harmonise on a specific issue. The reason for this is that the Community legislators have in their decision making already considered the grounds for justification and would include exceptions for those circumstances where problems could arise.

As a final point; the Keck formula has so far worked as a general principle. It shows in a clear-cut way the limit to article 28. It is relatively easy to apply without loosing the objective of the formula. Yes, the formula is not full proof and has it's weaknesses, but on the other hand I find it to be the best solution if one compares with some of the other suggestions that have been made. In the words of Oliver; "…*the case for Keck is not that it is perfect, but that every other approach which has been tried or suggested to date has greater shortcomings*."

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