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In Search of the Limits of Article 30 of the EEC Treaty Revisited

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I. Introduction

'In Search of the Limits of Article 30 of the EEC Treaty', published in the *Common Market Law Review* in 1986, was a response to the expansive interpretation given by the Court of Justice to the concept of 'quantitative restrictions and all measures having equivalent effect' in what is now Article 34 of the Treaty on the Functioning of the European Union (TFEU). The Court had reformulated this concept in *Dassonville* to cover 'all trading rules enacted by Member States that are capable of hindering, directly or indirectly, actually and potentially, intracommunity trade'. This had culminated in the *Sunday Trading* cases, where the Court held that restrictions on the opening hours of shops were measures of equivalent effect that needed to be justified in order to be consistent with the Treaty. After an extensive review of the case law, 'In Search of the Limits' concluded notably that:

- The Dassonville formula could not be taken literally. Requiring all economic regulation to be justified and proportionate leads, as Miguel Poiares Maduro put it later in 1998 in his book *We the Court*, to a 'process of Europeanisation of regulation in the Common Market through the judicial process'.
- In relation to indistinctly applicable measures, what is now Article 34 TFEU only applies to barriers to trade that arise out of the application of rules relating to the *characteristics* of products (thus preventing the product from benefiting in the Member State of importation of the advantages arising from the different legal and economic environment prevailing in the Member State of exportation) and not therefore to rules that regulate the *circumstances* of sale in the Member State of importation.
- The same limitation of the scope of Article 34 TFEU must also apply to non-discriminatory restrictions on the use of products (so that, to take one example, the *Reinheitsgebot* may be applied to prevent the use of cereals other than barley in the production of beer in Germany even though it cannot be

applied to prevent the sale of beers legally produced and marketed in other Member States).

- Regulations on the sale and use of goods that effectively prevent all sale or use of a product do fall under Article 34 TFEU as they are more properly considered quantitative restrictions (the quantity being zero) rather than measures of equivalent effect.
- Article 34 TFEU applies only to goods legally produced and marketed in a Member State and not to third-country goods in free circulation.
- In this article, the author of 'In Search of the Limits' reviews his original conclusions in the light of some subsequent developments over the last 30 years.

II. The Case Law Since 'In Search of the Limits'

The following rather selective review of the cases is designed to illustrate the evolution on the case law over the period.

A. Case C-145/88 *Torfaen* (Sunday Trading)[1]

The first case, or rather series of cases, that needs to be mentioned arose out of a concerted attempt by large UK retailers, especially do-it-yourself stores, to challenge the restrictions on Sunday trading that then applied in the UK. These retailers argued that the restriction on Sunday trading reduced their sales, including of products imported from other Member States and thus fell within the Dassonville formula of trading rules that are capable of hindering, directly or indirectly, actually and potentially, intra-Community trade.

These cases were the inspiration for 'In Search of the Limits' and the European Commission defended in its observations to the Court a position along the lines of that set out in that article.

The Court however, in a rather short judgment, stuck to its predominant case law of the time and held that the 'obstacle to Community trade' within the meaning of the Dassonville formula was not compatible with what is now Article 34 TFEU unless it 'did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law'.[2]

The Court went on to hold that the objective ('to ensure that working and non-working hours are so arranged as to accord with national or regional sociocultural characteristics') could be justified[3] but left it to the national court to

[1] Case 145/88 *Torfaen Borough Council v B&Q plc* EU:C:1989:593.
[2] Para 12 of the judgment.
[3] Para 14 of the judgment.

decide[4] whether the restrictive effect of the measure 'exceeds the effects intrinsic to trade rules',[5] that is, to consider whether it was proportionate.

B. Case C-292/92 *Hünermund*[6]

It was not until 1993 that the Court started to read the Dassonville formula in a less all-encompassing way.

Hünermund concerned an advertising restriction imposed on pharmacists. The referring court assumed that this constituted a measure of equivalent effect and asked whether it was justified.

Advocate General Tesauro made a careful review of the case law and the literature and examined the different effects of the various divergences in trading rules. He came to the conclusion that 'measures, whose subject is the *manner* in which trading activity is carried on, are in principle to be regarded as falling outside the scope of Article 30'.[7] This, he explained, was because such rules were 'not liable to make access to the market less profitable for the operators concerned and thus, indirectly, to make access more difficult for the products in question'.[8] He therefore called upon the Court to change its case law – 'and, for this to be useful, to do so clearly and explicitly'.[9]

The Court agreed but did so by relying on its judgment rendered during the period between the publication of the Advocate General's Opinion and the judgment in in *Hünermund.* It is to this key judgment which we now turn.

C. Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*[10]

It is in its famous judgment in *Keck* that the Court definitively broke with its previous case law. In doing so, it declined to follow the reasoning suggested in the two Advocate General opinions delivered in the case but adopted instead the reasoning that Advocate General Tesauro had developed a month earlier in *Hünemund*.

Messrs Keck and Mithouard were being prosecuted for selling merchandise at a loss in contravention of French law. The referring court invoked a range of Treaty

[4] Para 16 of the judgment.
[5] Para 15 of the judgment.
[6] Case 292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* EU:C:1993:932.
[7] Para 25 of the opinion.
[8] Para 25 of the opinion.
[9] Para 26 of the opinion.
[10] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* EU:C:1993:905.

provisions but the Court quickly cut the range of issues to those relating to the free movement of goods.

The Court recognised that rules such as those at issue could reduce imports[11] but announced that

> [i]n view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.[12]

After reaffirming its judgment in *Cassis de Dijon* on barriers to trade arising out of differences in national legislation relating to product characteristics, the Court adds that

> contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain *selling arrangements* is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of [*Dassonville*], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[13]

The Court goes on to explain why this is so in the following terms:

> [T]he application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their *access to the market* or to impede access any more than it impedes the access of domestic products.[14]

The distinction between product characteristics and selling arrangements and the explanation that the latter do not restrict access to the market while the former do are exactly those suggested by Advocate General Tesauro in his opinion in *Hünermund* a month before and in *In Search of the Limits* several years earlier.

D. *Commission v Greece* (Infant Formula Milk)

In case C-391/92 *Commission v Greece*,[15] the Court held that a requirement that infant formula milk could only be sold in pharmacies did not come within the scope of Article 34 TFEU because it was a selling arrangement of the kind described in *Keck*.[16]

[11] Para 13 of the judgment.
[12] Para 14 of the judgment.
[13] Para 16 of the judgment (emphasis added).
[14] Para 17 of the judgment (emphasis added).
[15] Case C-391/92 *Commission v Greece* EU:C:1995:199.
[16] Para 13 of the judgment.

The Commission had tried to distinguish *Keck* by arguing that Greece did not manufacture infant formula milk.[17] The Court held that

> the applicability of Article 30 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 the passage of time. If it did, this would have the illogical consequence that the same legislation would fall under Article 30 in certain Member States but fall outside the scope of that provision in other Member States.
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> The situation would be different only if it was apparent that the legislation at issue protected domestic products which were similar to processed milk for infants from other Member States or which were in competition with milk of that type.[18]

E. Selected Subsequent 'Unfair Competition' Cases

In *De Agostini*,[19] the Court held that advertising was a selling arrangement within the meaning of the Keck principle but that the outright ban in Sweden of television advertising aimed at children under 12 could come within the scope of [Article 34 TFEU] 'unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States'.[20]

The requirement of non-discrimination or neutrality is also present in *Keck* and one can wonder about the instruction to the national court to require the defender of the legality of the rule to prove this neutrality. It is by now well established that if the European Commission were to bring infringement proceedings against the Member State in question, it would be required to prove all elements of its case (as, for example, in the case of *Commission v Greece* discussed above).[21]

In Case C-254/98 *TK Heimdienst*,[22] the Court held that the requirement for Austrian butchers, bakers and grocers wishing to sell their wares door-to-door to have a permanent establishment in the same or a neighbouring administrative district to be a measure of equivalent effect to a quantitative restriction despite recognising it as a selling arrangement. The rationale of the Court is that such a measure lacks neutrality[23] since, even if an establishment in a neighbouring district of a neighbouring Member State might be sufficient, traders from elsewhere in the EU would not be able to provide their goods door-to-door in Austria[24] and also

[17] Para 7 of the judgment.
[18] Paras 17 and 18 of the judgment.
[19] Case C-34/95 *De Agostini* EU:C:1997:344.
[20] Para 44 of the judgment.
[21] See para 19 of the judgment in *Commission v Greece*.
[22] Case C-254/98 *TK Heimdienst* EU:C:2000:12.
[23] Para 25 of the judgment.
[24] Para 28 of the judgment.

that the measure does not allow traders from other Member States to provide their goods door-to-door in central areas of Austria.[25]

F. Use Restrictions

The application of the Keck formula in the case law was considered by many to be giving rise to unpredictability.[26] It was however cases concerning use restrictions that gave the opportunity for a clarification of the guiding principle.

The first, that we will discuss is *Mickelsson and Roos*,[27] a reference for a preliminary ruling concerning restrictions on where jet skis (referred to as 'personal watercraft' in the judgment) could be used on inland waterways in Sweden. It was argued in that case that these restrictions created an obstacle to the marketing of such products in Sweden.

The case took an extraordinary length of time to decide, evidencing perhaps an intensive debate. Advocate General Kokott had delivered an opinion[28] in December 2006 in which she observed that 'arrangements for use and selling arrangements … are comparable in terms of the nature and the intensity of their effects on trade in goods'[29] and 'it therefore appears logical to extend the Court's Keck case-law to arrangements for use and thus to exclude such arrangements from the scope of Article 28 EC'.[30]

The Advocate General was however conscious that restrictions on use could amount to a virtual general prohibition if use was restricted to such an extent that little use was possible. In such a case, access to the market would be prevented and Article 34 TFEU would apply.[31] That was however a matter for the national judge to assess in light of the facts.

It is not clear, however, whether the Court accepted the Advocate General's 'logical' conclusion that an approach similar to that in *Keck* should apply. Although the Court refers to a hindering of access to the market,[32] it goes on to approach the question from the point of view of justification holding that the measures would be compatible if regulations were adopted that allowed use of such craft 'within a reasonable period'.[33]

[25] Para 30 of the judgment.

[26] Unpredictability is arguably an inevitable by-product of evolving case law. A large part of the criticism was more motivated by a desire to return to the pre-*Keck days* when all national trading rules needed to be justified under Art 34 TFEU.

[27] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* EU:C:2009:336, judgment of 4 June 2009.

[28] Opinion of 14 December 2006, EU:C:2006:782.

[29] Para 52 of the opinion.

[30] Para 55 of the opinion

[31] Para 67 of the opinion.

[32] Para 28 of the judgment.

[33] Para 44 of the judgment.

The Court paid more attention to the problem in its judgment in *Italian Trailers*,[34] whose gestation overlapped that in *Mickelsson and Roos*. That case concerned the prohibition contained in the Italian Highway Code on motorcycles towing trailers. The Commission argued in an infringement proceeding that this constituted a measure of equivalent effect to a quantitative restriction since it created an obstacle to the marketing of such products in Italy.

The case was originally assigned to a chamber but then, after a first Advocate General's opinion, was referred to the Grand Chamber and all Member States were specifically requested to provide observations on whether the principles underlying the *Keck* judgment should also apply to use restrictions. This led to a second Advocate General's opinion.

Although this has not been widely noted, the Court effectively held in this case that non-discriminatory (in law and effect) use restrictions do not come within the scope of Article 34 TFEU, since it dismissed the action insofar as concerned trailers not specially designed for motorcycles.[35] It limited the case therefore to trailers specially designed for motorcycles, for which the prohibition in the Italian Highway Code was tantamount to an absolute prohibition of the product.

What *Italian Trailers* highlights is a change of emphasis from the classification of a measure (as relating to product characteristics, selling arrangements or use restrictions) to its effects (restricting access to the market).[36] A consideration of whether particular measures restrict access to the market was present in *Hünemund* and *Keck* and also in 'In Search of the Limits' but served more as a means of arriving at the conclusion on selling arrangements than as a test in itself.

Some have asked whether *Italian Trailers* means 'Good-Bye Keck?'[37] The answer is clearly 'no', not only because *Italian Trailers* did not concern selling arrangements but also because the Court continues to apply the test in *Keck* in its case law.

G. Hallmarking (*Commission v Czech Republic*)[38]

A judgment relevant to the last of the conclusions from 'In Search of the Limits' noted above arose recently from an infringement proceeding concerning the Czech Republic. The Commission claimed in that proceeding that a refusal of the Czech assay office to recognise hallmarks on precious metals from affixed by a third-country branch of the assay office of a Member State was a measure of equivalent effect to a quantitative restriction.

[34] Case C-110/05 *Commission v Italy* EU:C:2009:66.
[35] Para 53 of the judgment.
[36] See esp paras 56 and 58 of the judgment.
[37] P Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v Italy, C-110/05' (2009) 36 *Legal Issues of European Integration* 257.
[38] Case C-525/14 *Commission v Czech Republic* EU:C:2016:714.

The Court took the opportunity to clarify the significance for third-country goods of the condition that a product must be lawfully *manufactured and marketed* in another Member State in order for the prohibition of measures of equivalent effect to quantitative restrictions *between Member States* to apply to it.

It recalled that, in accordance with Article 28(2) TFEU, Article 34 TFEU applied to goods originating in third countries which are in free circulation in any of the Member States (that, is once all import formalities are complied with and all customs duties paid). In other words, they are assimilated to goods manufactured in the EU.[39] However, marketing is a stage subsequent to manufacture and lawful import does not mean that a product can be placed on the market.[40]

It would appear to follow from this that the benefit of Article 34 does not automatically extend to third-country goods. It is only market access from one Member State to another that is protected. The conclusion would also seem to follow from the definition of the internal market in Article 26(2) TFEU as an area without *internal* frontiers.

The actual outcome of the infringement proceeding was that the Czech rules infringed Article 34 TFEU but this was only as a result of the scope of the proceeding being limited to goods legally marketed in another Member State to the exclusion of those coming directly from third countries.[41]

It has been argued that the mutual recognition principle resulting from Article 34 TFEU cannot be reserved for the goods of Member States and must be applied to the goods of all other World Trade Organization (WTO) Member States since otherwise there would be a breach of the most favoured nation (MFN) principle in Article I of the General Agreement on Tariffs and Trade (GATT) by the Member States as well as various provisions of the WTO Agreement relating to technical regulations. This raises difficult issues that have not yet been explored in WTO jurisprudence.[42]

The usual defence is that the EU is a customs union and as such is covered by the exception for customs union and free trade agreements in Article XXIV GATT 1994. In *Turkey–Textiles*[43] the WTO Appellate Body adopted a rather restrictive approach to Article XXIV and in particular held that it only provided a defence for measures that were 'necessary' for the creation of the customs union. The EU may find itself arguing that the limitation of Article 34 TFEU to trade 'between Member States' and the consequent limitation of its benefit to goods originating in other Member States and third-country goods legally imported and marketed in other Member States was 'necessary' for the formation of the EU. As noted in 'In Search of the Limits', Article XXIV:8(a) GATT 1994 only requires the removal

[39] Para 37 of the judgment
[40] Para 38 of the judgment.
[41] Para 40 of the judgment.
[42] L Bartels, 'The Legality of the EC Mutual Recognition Clause under WTO Law' (2005) 8 *Journal of International Economic Law* 691.
[43] WTO case DS34, Turkey – Restrictions on Imports of Textile and Clothing Products.

of restrictive regulation of commerce on substantially all the trade in products *originating* in the customs union.

There is however an additional argument that the EU could deploy. The EU is a member of the WTO in its own right, as are its Member States. Although there is no declaration of competence, there needs to be a division of WTO rights and obligations between the EU and its Member States since otherwise this will give rise to overlapping and potentially conflicting rights and obligations. EU competence is such a variable concept capable of many variations that it can hardly serve this purpose. The better approach is, it is submitted, to consider the EU responsible at the WTO for all measures that arise from EU law and that the Member States are responsible for those measures that do not arise from EU law. Since the mutual recognition principle (and indeed more generally the free movement of goods resulting from Article 34 TFEU) is a creature of EU law, it is the EU and not its Member States that have the obligation to respect the MFN principle in this regard. Thus the EU has to accord the benefit of mutual recognition to all WTO Members if and to the extent that it (the EU) accords this treatment to another third country (and is not excused from doing so by Article XXIV GATT 1994).

III. Conclusion

Over the last 30 years there have been many judgments and even more debate about the limits to Article 34 TFEU.[44] Although all cases are fact specific and the case law relating to a vague yet fundamental treaty provision will inevitably have many conflicting strands, it is submitted that some more clarity has been achieved.

First, Article 34 TFEU is not a provision that generally limits economic regulation by the Member States by requiring all such measures to have a justification recognised as valid in EU law and to be neutral and proportionate. Attempts to challenge non-protectionist measures that do not create an obstacle to the realisation of an internal market will fail.

Second, the better test of whether a measure comes within the scope of Article 34 TFEU relates to the effects of the measure as limiting market access rather than the categorisation of the measure as relating to product characteristics, selling arrangements or even use restrictions. The categorisation of the measure as relating to product characteristics or to selling or use arrangements remains however a good guide as to whether it comes within the scope of Article 34 TFEU.

Third, although this is likely to be even more contested than the previous points, the market access facilitated by Article 34 TFEU does not apply automatically and in the same way to third-country goods. They must first be not only legally imported but also legally placed on the market of a Member State before

[44] No attempt is made in this short chapter to discuss all the case law and learned articles on the subject. It is truly vast.

they can benefit from the principles established for goods legally produced and marketed in a Member State. Only then does the market integration logic of the Treaty apply to require their assimilation to goods produced and marketed in the Member States for the purposes of Article 34 TFEU.

However, as Judge Rosas put it in his article commenting on *Italian Trailers* 'Life after *Dassonville* and *Cassis*: Evolution but No Revolution': '[t]hose who have hoped that the ECJ has already said everything that can be said on [Article 34 TFEU] will be disappointed'.[45]

[45] A Rosas, 'Life after *Dassonville* and *Cassis*: Evolution but No Revolution' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010).