

Law essays - certain selling arrangements



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Certain Selling Arrangements

*" The introduction of 'certain selling arrangements' has imposed an unnecessary straitjacket on the development of the Keck principle. Not only is the Keck formula too narrow; paradoxically, it is also too broad in that it catches 'dynamic' measures (such as restrictions on advertising) and therefore takes them outside the scope of Article 28 even though they do affect inter-state trade."(C. Barnard, *The Substantive Law of the EU. The Four Freedoms (OUP 2d ed.)* at 149). Discuss*

Article 28 (ex 30) EC provides that: " Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". Although this may initially seem simple, it has caused substantial difficulties when it comes to measures having equivalent effect when the rules are indistinctly applicable (ie. they apply equally to domestic and non domestic goods).

As will be seen, the confusion around dealing with these measures was intended by the ECJ to be halted by the judgment in *Keck* . This essay will critically evaluate the decision in *Keck* in order to consider whether it has indeed served this purpose.

A definition of measures having equivalent effect to quantitative restrictions was introduced by the ECJ in 1974 in the case of *Procureur du Roi v Dassonville* :

" 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.”

Although this definition proved helpful to the Court, its application tended not to distinguish between indirectly and directly applicable measures. It was also very broad, leaving many regulations open to examination by the Court. This in turn led to large amounts of litigation for the Court to deal with.

In *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”) a narrower approach was adopted. The case concerned the legality of a German law which prescribed a minimum alcohol level of 25% for certain spirits, including cassis. German cassis was above the 25% level, but French cassis was not. Therefore, although the German law was indistinctly applicable, the result of the measure was to preclude the French cassis from the German market.

The ECJ applied the *Dassonville* formula but went on to state that:

“ Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted insofar 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.”

The case therefore introduced the concept of the ‘rule of reason’ to applications of Article 28 in the context of indistinctly applicable measures.

In the *Cassis de Dijon* case itself it was held that the measure had been enacted in the interests of public health and fairness to commercial transactions, but that it was not a necessary means to achieve these objectives and was therefore in breach of Article 28.

The cases concerned the legality of a French law prohibiting the resale of goods in an unaltered state at prices lower than their purchase price. Keck and Mithouard were prosecuted for breach of this law but claimed that the rule was incompatible with EC law. The ECJ considered Article 28 and applied the *Dassonville* formula. It was stated that the legislation could have the effect of restricting the volume of sales of imported goods as it deprived traders of an important method of sales promotion. The Court then went on to state that: Although the *Cassis de Dijon* case placed a limit on the very broad approach of the *Dassonville* formula, it was not without its problems. The application of the 'rule of reason' was difficult for domestic courts. The 'Sunday Trading' cases demonstrated this when a challenge was made to the legality under Article 28 of national rules limiting Sunday trading. In some cases it was held by the national courts that the rules were justified, in others that they were disproportionate. As a result of this uncertain approach, a change in the way the ECJ dealt with this problem was clearly necessary. This change came in the form of *Keck and Mithouard* which "marks an important turning-point in the Court's jurisprudence on Article 28".

" In 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.”

The Court then considered the *Cassis de Dijon* case and the extent to which the application of rules which limited free movement of goods could be justified as in the public interest:

“ However, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment ... provided that these provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States.”

It was therefore held that Article 28 did not apply to ‘ selling arrangements’ and therefore the French law had not been in breach of the EC law.

The decision in *Keck* has been said to be ‘ lacking in principle’, yet it has also been praised for its ‘ tendency to cut back on unnecessary intrusions into the laws of the Member States in cases where access to the relevant national market is not at stake’. Perhaps the most controversial aspect of the decision is the distinction drawn between rules that are to do with the product itself, and rules which relate to the selling arrangements in place for that product. Indeed, it has proved difficult to determine exactly what is meant by ‘ selling arrangements’.

In *Hunermund* pharmacists were prohibited from advertising, outside their premises, products which they were authorised to sell. It was held that this was a method of sales-promotion and was therefore outside the scope of Article 28. Moreover, in *Banchero* defendants to a smuggling charge invoked Article 28 in relation to Italian rules reserving the retail sale of tobacco to authorised distributors. The authorised distributors could only gain such status where the national body which held a monopoly over tobacco production in the country granted it. It was held that the system did not impede access to the national market, was a selling arrangement, and was therefore compatible with Article 28.

In contrast, measures constituting requirements to be met, such as a Dutch law prohibiting dealings in gold and silver products not bearing certain hallmarks (*Houtwipper*) and German laws requiring the labelling of the contents of certain foods additional to those specified under EC law (*Commission v Germany*) are within the scope of Article 28 as they relate to the goods themselves, rather than merely the selling of the goods.

The difficulties in lack of workable definition of a ' selling arrangement ' are seen particularly starkly when considering the Courts' approach to the advertising of goods. In *Leclerc-Siplec* the ECJ held that legislation which prohibits television advertising in a particular sector amounted to a selling arrangement.

Therefore, even a complete ban on advertising of certain products will not come within the scope of Article 28 if the ban applies to domestically produced and imported products equally in law and in fact, as the Court held

when considering a ban on television advertising directed at children under 12 in *Komsummentombudsmannen v De Agostini*. This means that the free movement of goods can be seriously hampered and the main provision designed to prevent this will have no effect whatsoever. In this sense, the approach offered by *Keck* is too broad.

However, advertising and other measures intended to increase sales have not always been held to be 'selling arrangements'. In *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag Austria* had prohibited periodicals from featuring prize draws or competitions. The ECJ formed the view that publishers would use such competitions with the hope of increasing circulation.

However, the rule was held not to be a selling arrangement as it concerned the content of the magazine, equating to a requirement to be met. Article 28 applied and the Austrian rule was in breach of it. Although the measure was justifiable under the *Cassis de Dijon* formula, the provisions of *Keck* were too narrow to include this scenario. This approach therefore does not solve the problem created by the *Cassis de Dijon* case of uncertainty in application.

Furthermore, in *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* Austrian legislation provided that bakers, butchers and grocers may offer goods for sale on rounds in a given administrative district only if they also traded from a permanent establishment in that district or an adjacent municipality, where they offered the same goods for sale as they did on their rounds.

It was that this amounted to a 'selling arrangement' but one which did have a differential impact on domestic traders and others. This approach therefore entails an analysis of market access, which was a factor in the pre- *Keck* jurisdiction, but which was supposedly outside of the *Keck* approach.

The academic reaction to *Keck* at the time of the decision was in the main critical and it was argued that *Keck* placed too much emphasis on factual and legal equality at the expense of market access. It was suggested that denying that selling arrangements came within Article 28 as long as they did not discriminate in law or in fact ignored the importance of market access as trading rules could be formally equal yet still operate so as to inhibit market access.

Academics have therefore argued for an approach based on market access, with a main advocate being Weatherill. He has suggested that the correct approach should be to focus on market access rather than just factual and legal equality. To this end he has proposed a modified test:

" Measures introduced by authorities in a Member State which apply equally in law and in fact to all goods and services without reference to origin and which impose no direct or substantial hindrance to the market of that Member State escape the prohibition of Articles 30 and 59 [as were]."

This opinion was not confined to academics, and was raised judicially by Advocate General Jacobs in *Leclerc-Siplec*. Jacobs AG felt that advertising could play an important role in breaking down barriers to inter-state trade and was therefore dissatisfied that it should be outside Article 28. He suggested a modification to involve a test of 'substantial' hindrance, so that

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if a substantial restriction on access to the market was acting then it should be caught by Article 28. However, this suggestion was not applied by the ECJ.

Further judicial consideration has come from Advocate General Maduro in *Alfa Vita* where he stated that while *Keck* was intended to clarify the ambit of Article 28, it had 'proved to be a source of uncertainty for economic operators'. He went suggested a three point solution: prohibition of all discriminatory provisions, whether direct or indirect; the requirement that any supplementary costs on cross-border activity be justified and; that any measure which impedes to a greater extent the access to the market and the putting into circulation of products from other Member States should be considered to be an MEQR.

From the analysis above it may be concluded that although the Court in *Keck* attempted to resolve the problems of both the broad approach of *Dassonville* and the difficult to apply *Cassis de Dijon*, the result has been far from simplistic. Indeed, it is still unclear as to exactly what factors the court will consider when examining the legality of provisions in relation to Article 28. What is clear though, is that the Court is again willing to reconsider the approach and there may yet be a further attempt to restructure the approach to this area of free movement.

Bibliography

Barnard, C. (2001), "Fitting the Remaining Pieces into the Goods and Persons Jigsaw?", 26 ELRev 35

Connor, T. (2005), "Accentuating the Positive: The 'Selling Arrangement', The First Decade, and Beyond", *International and Comparative Law Quarterly*, 54, 1, 127

Craig, P. & De Búrca, G. (2008), *EU Law: Text, Cases and Materials*, 4th Edition, Oxford University Press

Enchelmaier, S. (2004), "Four Freedoms, How Many Principles?", *Oxford Journal of Legal Studies*, 24, 155

Chalmers, D. (1994), "Repackaging the Internal Market - The Ramifications of the *Keck* Judgment", 19 *ELRev* 385

Fairhurst, J. (2007), *Law of the European Union*, 6th Edition, Pearson Longman

Gormley, L. (1994), "Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*" *EBLRev* 63

Reich, N. (1994), "The November Revolution: *Keck*, *Meng*, *Audi* Revisited", 31 *CML Rev* 459

Roth, W. H. (1994), "Casenote on *Keck* and *Hunermund*", 31 *CML Rev* 845

Steiner, J., Woods, L., & Twigg-Flesner, C., (2006), *EU Law*, 9th Edition, Oxford University Press, pg 374.

Weatherill, S., (1996), "After *Keck*: Some Thoughts on how to Clarify the Clarification", 33 *CML Rev*, 885