19

Free movement of goods

19.1 Introduction

The rules relating to the abolition of measures having equivalent effect to quantitative restrictions have been central to the development of the single market. The abolition of customs duties and charges of equivalent effect and prohibition on discriminatory taxation would not have been sufficient to guarantee the free movement of goods within the common market. In addition to pecuniary restrictions, there are other barriers to trade of a non-pecuniary nature, usually in the form of administrative rules and practices, protectionist and otherwise, equally capable of hindering the free flow of goods from state to state. Articles 28–9 (ex 30–4) EC are designed to eliminate these barriers.

The significance of these rules is based on the breadth of the circumstances in which they can come into play. The prohibition on measures having equivalent effect do not apply just to rules that apply at the border, or which intend to discriminate against imports (or exports). They apply in a much wider ranger of circumstances, catching national rules that may have been enacted for legitimate, non-trade-related reasons, such as worker protection, consumer protection, or protection of the environment, and which apply to domestic goods as well as to imports or exports. Given the interplay between trade objectives and other policy aims, the central question is, 'Where does the proper scope of Article 28 end?' As we shall see below, this question has given rise to a considerable amount of case law and academic criticism. The issue is important as the scope of Articles 28–9 may limit the powers of each of the Member States to regulate matters that are not just trade-related. As a result, there is a tension between integration, driven by the Union institutions, and national regulatory competence.

Running parallel to this issue is another concern: that of the de-regulatory effect of the treaty freedoms. The effect of using Articles 28–9 is to strike down national legislation, thereby removing the rules regulating trade. This is sometimes called negative harmonisation. The difficulty is that a national rule may have been enacted for good reason. The European Court of Justice (ECJ) is therefore left with the task of balancing trade concerns with other concerns, as permitted by the treaty derogation (Article 30, discussed in Chapter 20) and through the rule of reason (see 19.6.2.1). Given that the ECJ may not be the best body to assess such questions, it is sometimes suggested that the use of positive harmonisation, which involves the political institutions in the determination of agreed standards (see Chapter 17) is a better approach.

A further obstacle to the free movement of goods may be caused by the existence of what is referred to in the EC Treaty as a 'State monopoly of a commercial

character'. Such monopolies exist where a Member State has restricted the right to sell particular goods to one body. State monopolies are clearly capable of obstructing the free movement of goods as their position in a particular market enables such monopolies to control the flow of goods in and out of the Member State, as well as the conditions under which trade in such goods takes place. Although a separate provision, Article 31 (ex 37), deals with state monopolies, it is dealt with here because of the broad similarity of the potential effect on trade. When considering Article 31 and state monopolies, the relationship between this provision and competition provisions, notably state aid (see Chapter 31) as well as Article 86 EC, should also be borne in mind. All these provisions seek to deal with state behaviour which has the effect of distorting, or reinforcing the distortion of, competition.

This chapter starts by looking at the elements common to the articles. Then, after considering the meaning of quantitative restriction, the chapter focuses on the development of the jurisprudence relating to measures having equivalent effect to quantitative restrictions. As we shall see, the case law has not been entirely consistent and the state of the law is still not completely clear. We will look at the jurisprudence as falling broadly into three phases: the early years; the expansion of Article 28 following the case of *Cassis de Dijon* and the consequent problems; and finally *Keck* and the question of whether the ECJ is now following a consistent policy. The chapter concludes with a consideration of Articles 29 (exports) and 31.

19.2 Outline of provisions

19.2.1 Quantitative restrictions

As will be apparent, Articles 28–9 EC cover a much wider range of measures than Articles 23 (ex 9) and 25 (ex 12) (post Lisbon, 28 and 30 TFEU), but unlike these latter articles provision is made for derogation under Article 30 (ex 36).

The principal provisions are:

(a) Article 28 (ex 30), which prohibits quantitative restrictions, and all measures having equivalent effect, on *imports*
(b) Article 29 (ex 34), which contains a similar prohibition on *exports*.

The prohibition is twofold, embracing:

(a) quantitative restrictions
(b) measures of equivalent effect to quantitative restrictions (MEQR).

Original Articles 31–3, which provided for the gradual abolition of import restrictions during the transitional period, were deleted by the Treaty of Amsterdam (ToA). Should the Lisbon Treaty come into force, Articles 28–9 EC shall be renumbered Articles 34–5 of the Treaty on the Functioning of the European Union (TFEU) respectively, but they otherwise remain substantively the same.

Article 30 (ex 36) provides that the prohibitions in Articles 28 and 30 will not apply to restrictions on imports and exports which are *justified* on a number of

specified grounds (see Chapter 20). Should Lisbon come into force, Article 30 EC will be renumbered Article 36 TFEU, which may be slightly confusing given its number in the original Treaty of Rome was Article 36 EEC.

Even where a particular activity falls within other provisions of the treaty, such as the 'services' provisions, it may still fall foul of Article 28 (*Commission v Ireland (Re Dundalk Water Supply)* (case 45/87), requirement that pipes required under a contract for the supply of services must comply with Irish specifications held in breach of Article 28 (ex 30)). The relationship between the four freedoms, together with the definition of 'goods', is discussed further in Chapter 15.

19.2.2 State monopolies

Article 31(1) (ex 37) EC states that 'Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'.

Lisbon does not alter the substance of this provision; should Lisbon come into force it will be renumbered Article 37 TFEU, thus returning it, too, to its original number under the 1957 version of the EC Treaty. Member States must also refrain from introducing any new measure which is contrary to Article 31(1) or which restricts the scope of Articles 25, 28, or 29 EC (Article 31(2)). This does not mean that no new monopolies may be created, but rather that if such monopolies are formed, they must be compatible with the provisions on the free movement of goods.

There is no specific provision derogating from Article 31; Article 30 cannot be used in this context.

There is special emphasis, in respect of state monopolies designed to make it easier to dispose of agricultural products, on safeguarding the employment and standard of living of the agricultural producers (Article 31(3)).

19.3 Whose actions are caught?

To engage the articles, the actions challenged must be capable of being traced back by the categories of persons covered by the relevant article. These articles are addressed to, and relate to, measures taken by Member States but, despite their wording, there are three ways in which to the meaning of 'Member States' has been expanded.

19.3.1 Application to the institutions

First, the institutions are bound by the terms of the treaty generally, including these provisions. Union institutions may derogate from the provisions of Articles 28–9 where they are expressly authorised to do so by other provisions of the treaty, for example in implementing the common agricultural policy (Articles 33–8 (ex 39–46, post Lisbon, Articles 39–44 TFEU) EC) (*Rewe Zentrale AG v Direktor der Landwirtschaftskammer Rheinland* (case 37/83)).

19.3.2 Public bodies

Secondly, 'measures taken by Member States' have been interpreted in the widest sense. They include the actions of all forms of government, whether central, regional, or local and extend to the activities of any public body, legislative, executive, or judicial, or even semi-public body, such as a quango, exercising powers derived from public law (eg, *Apple & Pear Development Council v KJ Lewis Ltd* (case 222/82)). In *R v Royal Pharmaceutical Society of Great Britain* (cases 266 and 267/87) the ECJ held that measures adopted by professional bodies, such as the Royal Pharmaceutical Society, on which national legislation has conferred regulatory or disciplinary powers were 'measures taken by Member States' subject to what is now Article 28. In determining whether the actions of a body fall within the scope of Article 28, the ECJ will consider the body's functions, statutory basis, management, and funding; its legal form will not be determinative. In the *Quality Labels* case (*Commission v Germany* (case C–325/00)), the fact that a body which awarded quality labels to German products was established as a private limited company did not take its actions outside Article 28, despite the fact that the German government could not directly influence its actions. The ECJ noted that the company was financed by a public body itself financed by compulsory contributions, its functions were determined, albeit broadly, by statute and it was subject to the supervision of the public body from which it derived its funding. More recently, the ECJ has held that, in principle, the opinions of a public official (expressed via interviews with the media) were sufficient to implicate the state provided the persons to whom the statements were addressed could reasonably suppose that the statements were given by the official with the authority of his office (*AGM-COS MET Srl v Finland* (case C–470/03)). This issue would be one for the national court to assess on the facts in a given case.

19.3.3 Horizontal direct effect

One question is whether these provisions have horizontal direct effect, a question that gained importance with the ECJ's ruling in *Angonese* (case C–281/98), see Chapter 21). Given the nature of Article 31, it is unlikely that this is a question that has much relevance for this provision. Although there had been some debate on the whether Articles 28–9 had horizontal effect, it seems that these provisions are limited to the actions of public bodies, however broadly seen (see, eg, *Sapod-Audic* (case C–159/00)). In principle then, these articles do not have horizontal direct effect.

This does not mean that the actions of individuals are completely beyond the reach of these articles. It now seems that the actions of individuals can be challenged indirectly by imposing positive obligations upon Member States. The starting point is *Commission v France* (*Angry Farmers*) (case C–265/95). The problem here did not concern actions by the French state but rather its failure to take action to prevent private individuals from impeding the cross-border flow of goods. According to the Commission, the French government should have taken action to stop the blockade of imported agricultural produce and demonstrations in which property was damaged. The ECJ agreed, stressing the fundamental nature of Article 28 and then referring to Article 10 (ex 5; post Lisbon,

Article 4(3) TEU), which puts Member States under an obligation 'to take all necessary and appropriate measures' to ensure that Union fundamental freedoms are respected in their territory. This ruling makes it clear that Member States' obligations extend to positive measures as well as refraining from taking action incompatible with the EC Treaty. The precise extent of this obligation remains uncertain, although *Schmidberger* (case C–112/00) (discussed below) provides further guidance. In the *Angry Farmers* case, the ECJ emphasised the duration and severity of the incidents in France and the passivity of the French authorities in this case. Note also that a Member State is only obliged to take 'necessary and proportionate' measures. Member States thus still retain some discretion in determining, for example, their policing policy, and would certainly not be obliged to quell every public demonstration. The question then is when does the Member State's obligation arise?

After the *Angry Farmers* case, a regulation, the so-called 'rapid intervention mechanism', was enacted to deal with obstacles to trade which originate in the action or inaction of the Member States (Regulation 2679/98 ([1998] OJ L337/8)). In defining 'inaction' the regulation tracks the wording of the *Angry Farmers* case. The regulation gives the Commission the power to intervene in such circumstances, providing the Commission with the possibility of taking a Member State before the ECJ should obstacles covered by the regulation continue in existence. The regulation defines in Article 1 the notion of an 'obstacle' requiring action. It lists three cumulative requirements:

(a) the serious disruption of the free movement of goods
(b) serious loss to individuals affected
(c) the necessity of immediate state action.

This definition would seem to take one-off actions outside the scope of the regulation. Such an approach would seem in line with the *Angry Farmers* case, which emphasised the severity and duration of the French farmers' action. In the more recent *Schmidberger* case (case C–112/00), the Advocate-General suggested that a one-day motorway blockade held in accordance with the relevant Member State's laws should trigger the application of Articles 28–9 where relevant, a view the Court followed. In the ECJ's reasoning, the severity of the disruption would be relevant for justification for failure to act rather than the application of Article 28–9 in the first place. Seemingly, there is now a divergence between the treaty jurisprudence and specific secondary legislation. In a report commissioned by the European Commission in 2007 on the functioning of the rapid intervention mechanism, the problems arising from the lack of clarity as to the regulation's scope were noted. The question of the extent of Member States' obligations to take measures becomes ever more important in the light of the possibility of a claim for damages under the doctrine of state liability in respect of public authorities' liability for omissions (see Chapter 9), an issue that was raised but not decided in *Schmidberger* (case C–112/00). In addition to the problems relating to scope, and the practical problems of reacting to obstacles notified at short notice, the report highlighted some other weaknesses, in particular the lack of a financial penalty under the regulation where Member States do not comply, together with an absence of a monitoring mechanism of state compliance.

19.4 Types of act caught by Articles 28–9

We need also to consider whether the types of act challenged fall within the terms of the relevant articles. Articles 28–9 refer to measures, a term which clearly includes national legislative acts. The ECJ will assess national legislation as it has been interpreted by national practice. According to the ECJ's case law, 'measure' for the purpose of Article 28 is wider than legislation. It includes administrative acts, as the *Franking Machine* case (case 21/84) shows. There, although a discriminatory law had been repealed, the administrative practice had not changed, the authorities showing a 'systematically unfavourable' attitude towards the approval of imported products. A measure does not need to be a binding act to fall within the prohibition as can be seen in the preamble to the Commission's Directive 70/50, and confirmed by the ECJ in *Commission v Ireland* ('Buy Irish' campaign) (case 249/81). In this case certain activities of the Irish Goods Council, a government-sponsored body charged with promoting Irish goods by, inter alia, advertising, principally on the basis of their Irish origin, were held to be in breach of the then Article 30 (now 28). Even though no binding measures were involved, the Board's actions were capable of influencing the behaviour of traders and thereby frustrating the aims of the Community. This approach was reasserted more recently in *AGM-COS MET* (case C–470/03), where the views of an official were held to fall within Article 28 EC, provided that they appear to be official position taken by the state and not the personal opinions of the individual. As we have already seen from the *Angry Farmers* case, omissions can also constitute 'measures'.

19.5 Prohibition on quantitative restrictions

Quantitative restrictions were interpreted in *Riseria Luigi Geddo v Ente Nazionale Risi* (case 2/73) as any measures which amount to a total or partial restraint on imports, exports or goods in transit. They would clearly include a ban, as was found to be the case in *Commission v Italy (Re Ban on Pork Imports)* (case 7/61) and *R v Henn* (case 34/79) (ban on import of pornographic materials). They would also include a quota system, as in *Salgoil SpA v Italian Ministry for Foreign Trade* (case 13/68). The *Ditlev Bluhme* case (case C–67/97) confirms that a ban on imports operates as a quantitative restriction even if the prohibition extends to part only of a Member State's territory. This case concerned the Danish prohibition on the import onto the island of Læsø of live domestic bees or reproductive material for them, the aim of which was to protect the Læsø brown bee. This, the ECJ held, was a quantitative restriction although it applied only to a small part of Denmark.

A covert quota system might operate by means of an import (or export) licence requirement. A licensing system might in itself amount to a quantitative restriction, or, alternatively, a measure of equivalent effect to a quantitative restriction. It was held in *International Fruit Co NV v Produktschap voor Groenten en Fruit* (cases 51–4/71) that even if the granting of a licence were a pure formality, the requirement of such a licence to import would amount to a breach of Article 28. In that case it was deemed to be a measure of equivalent effect to a quantitative restriction.

Although Articles 28–9 identify two types of prohibited behaviour, quantitative restrictions and MEQR, it seems as though the case law no longer maintains a firm and consistent distinction between the two, many cases which could be viewed as a quantitative measure now being considered as MEQR.

19.6 Prohibition on measures having equivalent effect to quantitative restrictions

The concept of MEQR is altogether wider in scope than that of quantitative restrictions. Perhaps to the surprise of Member States, it has been interpreted very generously by both the Commission and the ECJ, to include not merely overtly protective measures or measures applicable only to imports or exports ('distinctly applicable' measures), but measures applicable to imports (or exports) and domestic goods alike ('indistinctly applicable' measures), often introduced (seemingly) for the most worthy purpose. The precise scope of Article 28 has therefore been the subject of much discussion, and central to the debate is the question of whether Article 28 is about discrimination, whether direct (distinctly applicable measures) or indirect (indistinctly applicable measures), or instead about ensuring that individual national markets are opened up to goods from other Member States. It is questionable the degree to which the ECJ has developed a consistent policy. There are three key cases: *Dassonville* (case 8/74), *Cassis de Dijon*, and *Keck*, which may serve as landmarks as we navigate the development of the Article 28 jurisprudence. While the main elements of the jurisprudence are clear, there are a number of grey areas near the boundaries.

19.6.1 *Dassonville* and the early years

It was generally accepted in the early years of the EC, that Article 28 caught measures that discriminated against imports, that is were directly discriminatory by treating imports differently. The question was whether Article 28 could also catch indirectly discriminatory measures, which appeared on the face to treat imports and domestic products alike, but which in effect discriminated against imports. The Commission, in Directive 70/50 (which is no longer of legal effect), suggested that both direct and indirect discrimination should be caught. It was not until 1974 that the ECJ, in the case of *Procureur du Roi v Dassonville* (case 8/74), introduced its own definition of measures having equivalent effect to quantitative restrictions. *Dassonville* concerned Belgian rules which required imported goods bearing certain designations of origin to have a certificate of authenticity from the authorities in the country of origin. Criminal proceedings were instituted against traders who acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities. The ECJ determined that such a measure, which focused on imported goods, would fall within Article 28, arguing thus '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'.

This definition, now known as the '*Dassonville* formula', has since been applied consistently, almost verbatim, by the ECJ in subsequent cases. It is a broad, effects-based test. As became apparent, it is not necessary to show an actual hindrance to trade between Member States as long as the measure is capable of such effects. Unlike the competition provisions of Articles 81–2 (ex 85–6; post Lisbon, Articles 101–2 TFEU), which require an 'appreciable effect' on trade and competition between Member States, the ECJ has in the past held that Article 28 is not subject to a *de minimis* rule (*van de Haar* (case 177/82)).

19.6.1.1 *Internal situations*

Although *Dassonville*, as we shall see, is a broad test, there are some limitations. A measure which is not capable of hindering trade between Member States, which merely affects the flow of trade *within* a Member State, will not breach Article 28 (ex 30). In *Oebel* (case 155/80) a Belgian law banning the production and delivery to consumers and retail outlets of bakery products during the night hours, designed to protect workers in small and medium-sized bakeries, was held not to breach Article 28 because, although delivery of imported products through some outlets was precluded, 'trade within the Community remained possible at all times' (see also *Blesgen* (case 75/81)). In *Quietlynn Ltd v Southend Borough Council* (case C–23/89) a licensing requirement for the sale of sex appliances by sex shops was held not to breach Article 28, since the goods in question, which included imported goods, 'could be marketed through other channels'.

The case law of the Court has not been consistent on this point. In *Torfaen Borough Council v B & Q plc* (case 145/88) the Court found that a ban on Sunday trading in England and Wales under the Shops Act 1950, the effect of which was to restrict the volume of imports to the shops trading in breach of the rules, was prima facie contrary to Article 28, even though alternative outlets for the sale of these goods existed during the working week (see also *Conforma* (case C–312/89) and *Marchandise* (case C–332/89)). Following a change in the Court's approach, these latter cases involving Sunday trading would be decided on a different basis today (see *Keck* (cases C–267 and 268/91) and subsequent cases to be discussed below). The ECJ discussed the question of whether a national measure had an effect on inter-state trade in *Pistre* (joined cases C–321–4/94) which concerned a French rule limiting the marketing of products with the designation of 'montagne' to those originating in certain areas in France. The ECJ held that this rule had a Community dimension. In the ECJ's view, it did not matter that all the relevant facts arose in France; it was sufficient that the rule could affect inter-state trade. It would seem clear from this case, and other similar cases, that the question of internal situation is very closely linked to the question of whether there is hindrance to inter-state trade (see also 19.6.5). This connection can be seen from the ECJ's more recent restatement of the position in *Karner* (case C–71/02):

> That principle has been upheld by the Court not only in cases where the national rule in question gave rise to direct discrimination against goods imported from other Member States (*Pistre and ors*, paragraph 44), but also in situations where the national rule applied without distinction to national and imported products and was thus likely to constitute a potential impediment to intra-Community trade covered by Article 28 EC (see, to that effect, case C–448/98, *Guimont*, paras 21 and 22). [Para 20.]

19.6.1.2 *Reverse discrimination*

A measure falling within the *Dassonville* formula but which operates solely to the disadvantage of domestic production will not fall foul of Union law. The ban in *Oebel* on the production of bakery products during the night, which prevented Belgian bakers from benefiting from the early morning trade in adjacent Member States, was found not to breach what are currently Articles 12 (post Lisbon, Article 18 TEU), 28, and 29 EC. The Court held that it was not contrary to the principle of non-discrimination on grounds of nationality for states to apply national rules where other states apply less strict rules to similar products. The ECJ took the same view of a Dutch regulation concerning the permitted ingredients of cheese, which was only applicable to cheese produced in Holland (*Jongeneel Kaas BV v Netherlands* (case 237/82), see also approach to interpretation of Article 29 EC) and of a French law requiring French retailers to adhere to a minimum selling price for books, provided it was not applied to books which, having been exported, were reimported into France *(Association des Centres Distributeurs Edouard Leclerc v 'Au Blé Vert' Sàrl* (case 229/83)).

In this respect, as in other areas (eg, free movement of workers), the Court is prepared to accept a measure of reverse discrimination. While Member States must be compelled, in the interests of the single market, not to discriminate against, or in any way prejudice, imports, it seems that they may be safely left to act themselves in order to protect their own interests. There is now a consistent line of authority from the ECJ to this effect.

19.6.1.3 *Early application of Dassonville*

In the cases of *Tasca* (case 65/75) and *van Tiggele* (case 82/77) the *Dassonville* test was applied in the context of a domestic law imposing maximum and minimum selling prices, respectively. The laws were indistinctly applicable, that is they applied to both domestic and imported goods. In both cases the issue of Article 28 arose in criminal proceedings against the defendants for breach of these laws. Tasca was accused in Italy of selling sugar above the permitted national maximum price; van Tiggele in Holland of selling gin below the national minimum price. Both pleaded that the measures were in breach of EC law. Applying the *Dassonville* test the ECJ found that both measures were capable of breaching Article 28. Regarding the maximum price, the Court held a maximum price does not in itself constitute a measure equivalent in effect to a quantitative restriction. It becomes so when fixed at a level such that the sale of imported products becomes, if not impossible, more difficult. The maximum price in *Tasca* could have that effect, in that importers of more highly priced goods might have to cut their profit margins or even be forced to sell at a loss. In *van Tiggele* the minimum price also acted as a hindrance to imports, since it would prevent the (possibly) lower price of imported goods from being reflected in the retail selling price. The Court suggested, however, that a prohibition on selling below cost price, or a minimum profit margin, would be acceptable, since it would have no adverse effect on trade between Member States (principle applied in *Commission v Italy (Re Fixing of Trading Margins)* (case 78/82)).

In applying the *Dassonville* formula in these three cases, the Court did not distinguish between distinctly (or directly discriminatory) and indistinctly applicable (or indirectly discriminatory) measures. The breadth of the formula, especially when applied 'mechanically', looking to the *effect* of the measure on inter-state

trade rather than to the question of *hindrance*, despite the fact that a hindrance seems to be required by the terms of the *Dassonville* formula, bore harshly on Member States, particularly where the measure was indistinctly applicable and might be justified as in the public interest.

19.6.2 Indistinctly applicable measures: *Cassis de Dijon*

Perhaps taking heed of criticisms arising from its application of the *Dassonville* formula in these last three cases discussed above, the Court took a decisive step in the case of *'Cassis de Dijon' (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (case 120/78)) and paved the way for a distinction between distinctly and indistinctly applicable measures. The question before the ECJ in *Cassis* concerned the legality under EC law of a German law laying down a minimum alcohol level of 25 per cent for certain spirits, which included cassis, a blackcurrant-flavoured liqueur. German cassis complied with this minimum, but French cassis, with an alcohol content of 15–20 per cent, did not. Thus although the German regulation was indistinctly applicable, the result of the measure was effectively to ban French cassis from the German market. A number of German importers contested the measure, and the German court referred a number of questions to the ECJ.

19.6.2.1 *Rule of reason*

The ECJ applied the *Dassonville* formula, thus confirming should there have been any doubt, that Article 28 could apply to measures which, on their face, appeared to apply both to domestic products and imports. Crucially, it developed a suggestion in its earlier *Dassonville* judgment that state measures falling within the formula might be acceptable where the restrictions on inter-state trade were 'reasonable', stating 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.

This principle ('the first *Cassis* principle'), that certain measures, though within the *Dassonville* formula, will not breach Article 28 if they are necessary to satisfy 'mandatory requirements' (now often referred to as matters of overriding public interest), has come to be known as the 'rule of reason', a concept borrowed from American anti-trust law, which also occasionally appears in the context of EU competition law (see Chapter 29).

Prior to *Cassis*, it was assumed that any measure falling within the *Dassonville* formula would breach Article 28 and could be justified only on the grounds provided by Article 30. Since *Cassis*, at least where indistinctly applicable measures are concerned, courts may apply a rule of reason to Article 28. If the measure is necessary in order to protect 'mandatory requirements', it will not breach Article 28 at all. Distinctly applicable measures on the other hand will normally breach Article 28, but may be justified under Article 30. This distinction is significant, since the mandatory

requirements permitted under *Cassis* are wider than the grounds provided under Article 30, and, unlike Article 30, are non-exhaustive. The ECJ refuses to contemplate a justification based on purely economic grounds (see, eg, *Duphar BV v Netherlands* (case 238/82) and, more recently, *Decker* (case C–120/95)).

Box 19.1 Examples of matters of Overriding Public Interest

Oebel (case 155/80)—working conditions
Cinéthèque SA (cases 60 and 61/84)—culture
Commission v *Denmark (Re disposable Beer Cans)* (case 302/86) environment
Torfaen Borough Council v *B & Q plc* (case 145/88)—socio-cultural characteristics
Vereinigte Familiapress case (case C–368/95)—diversity of the press
Dynamic Medien (C–44/06)—protection of young people

It should be noted that the rule of reason as laid down in *Cassis* was not in terms confined to indistinctly applicable measures. Shortly after *Cassis*, in *Gilli* (Italian cider-vinegar case) (case 788/79), the Court suggested (para 14) that the principle applied only where national rules apply *without discrimination* to both domestic and imported products, a distinction that it has reiterated (*Aragonesa de Publicidad Exterior and Publivía Cases* (cases C–1/90 and C–176/90), para 13). The distinction between indistinctly and distinctly applicable measures therefore assumes a significance in terms of the justifications on which Member States may rely when national measures have been found to constitute MEQR. Problematically, the ECJ has not consistently insisted on this distinction, and, has also been inconsistent as to where the boundary between distinctly and indistinctly applicable measures lie (*Commission v Belgium (Walloon Waste)* (case C–2/90); *Aher-Waggon v Germany* (case C–389/96); *Commission v Austria (prohibition of heavy lorries)* (case C–320/03), all concerning environmental justifications). In many cases concerning indistinctly applicable measures, the ECJ has not considered the issue and, perhaps because the line between the two is not always clear, has dealt the question of justification of indistinctly applicable measures not on *Cassis* principles but under Article 30 (see *Sandoz BV* (case 174/82); more recently, *Commission v Germany (hospital pharmacy supply)* (case C–141/07)). There appear to be two possible reasons for this approach: in some cases the Court is merely responding to questions submitted by national courts under Article 234 (ex 177; post Lisbon, 267 TFEU); in others, where the ‘mandatory requirement’ falls under one of the specific heads of derogation provided by Article 30, the Court may prefer to rely on the express provisions of that article (see, eg, *Commission v Germany (re German sausages)* (case 274/87) (health justification) and *Ditlev Bluhme* (case C–67/97) (protection of biodiversity and the environment/health and life of animals)).

19.6.2.2 *Proportionality*

In applying the rule of reason to the facts in *Cassis* the Court found that the German law was in breach of Article 28. Although the measure fell within the categories suggested, being allegedly enacted in the interests of public health (to prevent increased consumption resulting from lowering the alcoholic content of cassis) and

the fairness of commercial transactions (to avoid giving the weak imported cassis an unfair advantage over its stronger, hence more expensive, German rival), the measure was not *necessary* to achieve these ends. Other means, such as labelling, which would have been less of a hindrance to trade, could have been used to achieve the same ends. Thus the word 'necessary' has been interpreted to mean no more than is necessary—ie, subject to the principle of proportionality. This is the case, even if the public objective aimed at is the protection of fundamental human rights although it is an open question as to whether the ECJ uses, or should use, exactly the same test in this regard (*Dynamic Medien* (C–244/06) (protection of young people/rights of the child)). In this, there are parallels to the approach taken by the ECJ with respect to the heads of derogation in Article 30 (see 20.3 and 20.4.2).

Although, where a domestic measure is challenged before a national court it is for the national court to apply the proportionality principle, the ECJ has often, in interpreting Union law at the request of national courts, offered guidance as to the specific application of that principle. In doing so it has applied the principle rigorously, excluding all measures that go beyond what is strictly necessary to achieve the desired end. In *Walter Rau Lebensmittelwerke v De Smedt PVBA* (case 261/81) a Belgian law requiring margarine to be packed in cube-shaped boxes, allegedly introduced in the interests of consumers, to enable them to distinguish margarine from butter, was held to be in breach of Article 28. The same objective could have been achieved by other means, such as labelling, which would be less of a hindrance to trade. Similar arguments have been used successfully to challenge national rules, allegedly in the interest of public health and consumer protection, concerning the permitted ingredients of pasta (*Drei Glöcken* (case 407/85)) and sausages (*Commission v Germany* (case 274/87)). In *Schutzverband gegen Unwesen in der Wirtschaft v Rocher* (case C–126/91) a German law prohibiting 'eye-catching' price comparisons in advertisements, designed to prevent consumers from being misled, was held to be disproportionate on the grounds that such advertisements were forbidden *whether they misled the public or not*. It was implied that a ban on *misleading* price comparisons would have been acceptable. Falling on the other side of the line is the case of *Dynamic Medien* (C–244/06). There, the ECJ held that rules which prohibit the mail-order sale of image storage media which have not been examined and classified by the competent national authority for the purposes of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed, would be proportionate, unless the procedure for examination, classification and labelling is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts. Nonetheless, while the rule of reason has, in principle, an unlimited list of possible justifications for national measures, proportionality has operated to limit when a national rule will be found to be justified, even under the rule of reason.

The requirement that national measures be proportionate is significant in the context of Article 30 also (see Chapter 20).

19.6.2.3 *Mutual recognition and the home country principle*

The Court established a second important principle in *Cassis*. It suggested that there was no valid reason why 'provided that [goods] have been lawfully produced and marketed in one of the Member States, [they] should not be introduced into any other Member State' (para 14).

Thus, national provisions making a product which was lawfully manufactured and marketed in another Member State subject to additional controls, save in the case of exceptions provided for or allowed by Union law, will constitute a MEQR. Is this principle, known as the principle of 'mutual recognition', not in conflict with the rule of reason? It is submitted that it is not. It merely gives rise to a presumption that goods which have been lawfully marketed in another state will comply with the 'mandatory requirements' of the importing state. This can be rebutted by evidence that further measures are *necessary* to protect the interest concerned. Given the requirement of proportionality, that presumption will be hard to rebut; the burden of proving that a measure is necessary is a heavy one, particularly when, although justifiable in principle, it clearly operates as a hindrance to intra-Community trade. Note that mutual recognition is now a central plank of the Union approach to the internal market and directives have been enacted to ensure that when Member States enact measures to protect a matter of public interest, those measures are notified to the Commission and reviewed to ensure that the measure is necessary and that mutual recognition is insufficient to protect the public interest at issue; it is this system which has given rise to the incidental direct effect cases (see 5.2.5.8). A similar notification approach is found with respect to designations of origin (see below).

19.6.2.4 *Impact of Cassis on rules of origin and quality*

The extent to which Member States are now limited, in the interests of the single market, in their ability to introduce indistinctly applicable and seemingly justifiable measures is illustrated by the case of *Commission v UK (origin marking of retail goods)* (case 207/83). Here the Commission claimed that a British regulation requiring certain goods (eg, clothing, textiles) sold retail to indicate their country of origin was in breach of Article 28. The British government argued that the measure was justified on *Cassis* principles in the interest of consumers, who regarded the origin of goods as an indication of their quality. The Court refused to accept this argument. It held that the regulation merely enabled consumers to assert their prejudices, thereby slowing down the economic interpenetration of the Union. The quality of goods could as well be indicated on the goods themselves or their packaging, and the protection of consumers sufficiently guaranteed by rules which enabled the use of false indications of origin to be prohibited. Whilst manufacturers remained free to indicate their own national origin it was not necessary to compel them to do so. The regulation was in breach of Article 28.

This judgment, initially surprising, demonstrates the Commission's and the Court's overriding concern to promote market integration by striking down national rules which tend to compartmentalise the market, particularly along national lines. In a single market, based on free competition, products must be allowed to compete on their merits, not on the basis of national origin. (See also *Apple & Pear Development Council v Lewis* (case 222/82); *Commission v Ireland (re 'Buy Irish' campaign)* (case 249/81) and Chapter 29 on competition law.) There has, however, more recently been some softening of the rules in respect of local or regional designations of origin of goods.

In *Exportur SA v LOR SA et Confiserie du Tech* (case C–3/91) the Court held that rules protecting indications of provenance and designations of origin laid down

by a bilateral Convention between Member States were permissible under Union law provided that the protected designations had not acquired a generic connotation in their country of origin. The institutions have now established a register (Regulation 510/2006 (OJ [2006] L 93/12), replacing Regulation 2081/92 dealing with food products for human consumption; a separate system exists for wines and spirits) providing for the protection of designations of origin and geographic indications for in excess of 300 named products, such as Stilton cheese and Hereford beef. This regulation protects registered designations of origin against all use, including 'evocations'. An evocation is a designation so evocative of the protected designation that, when a consumer is confronted with the product, the image that is triggered in the consumer's mind is that of the product the designation of which is protected. Thus, a soft cheese manufactured in Germany and called 'Cambozola' is an evocation of 'Gorgonzola' (*Conzorzio per la Tutela del Formaggio Gorgonzola v Käserei Champignon Hormeister GmbH & Co KG, Eduard Bracharz GmbH* (case C–87/97)). There are limitations to the protection granted. For example, since Cambozola had been made and registered as a trademark long before the introduction of the regulation, the ECJ also held that notwithstanding the prima facie prohibition of the use of the evocation, the trade mark 'Cambozola' could still be used were its initial registration to have been made in good faith and its continued use not likely to deceive the public. Union law will not, however, allow Member States to protect generic names, such as Cheddar cheese, which are not tied to a particular geographical area.

19.6.2.5 *Over-extension of Article 28*

Although the rule of reason has allowed states some latitude to enact or maintain indistinctly applicable measures that are capable of hindering trade between Member States to protect important national interests, while ensuring that such measures are subject to judicial control as to their proportionality, the rule has not been without its problems. These arose from a tendency to a lax, 'mechanical' application of the *Dassonville* formula, requiring measures which might affect the volume of imports overall, but with little potential to *hinder* imports, to be justified under the rule of reason. Certainly the idea of discrimination, or even indirect discrimination, seems to disappear in this body of cases where rules which equally affect domestic products were held to fall within Article 28 and following which Article 28 began to look like a 'right to trade' without any connection with the creation of the single market (for a similar trend with regard to the right to regulate at Union level, see the scope of Article 95 EC discussed in Chapter 16).

Defence lawyers in Member States were quick to exploit the 'Eurodefence' of Article 28 to charges involving a wide range of regulatory offences. Examples of such defences include challenges to Dutch laws restricting the use of free gifts for promotional purposes (*Oosthoek's Uitgeversmaatschappij BV* (case 286/81)); to French laws prohibiting the door-to-door selling of educational materials (*Buet v Ministère Public* (case 382/87)); to English laws requiring the licensing of sex shops for the sale of sexual appliances (*Quietlynn Ltd v Southend Borough Council* (case C–23/89)); to laws prohibiting 'eye-catching' price comparisons as in *Rocher* (case C–126/91); and a number of cases such as *Torfaen Borough Council v B&Q plc* (case 145/88) pleading

the illegality under Article 28 of national rules limiting Sunday trading. In all of these cases the legality of these measures under EC law was ultimately upheld, sometimes (eg, *Quietlynn*), on the grounds that Article 28 was not applicable at all, more often following the application of the rule of reason. Given the result, the cases might be thought unproblematic but there are difficulties relating to the approach of the ECJ in determining the connection with Article 28. Including a rule within the scope of Article 28 means that, in principle, the rule is unlawful and the burden of justification falls upon the state, not an easy task given the ECJ's approach to proportionality. Further, not only was Article 28's scope very widely drawn, but the case law has not been consistent here as to whether Article 28 applied in the first place or whether the national rule would be justified by a rule of reason. Moreover, as the Sunday-trading cases demonstrate, national courts face great difficulties in applying a rule of reason, particularly when there exist a number of possible justifications for the measure challenged and its harmful effect on trade between *Member States* (as opposed to between particular undertakings) is minimal. In these circumstances a national judge may be reluctant to entertain a challenge to domestic legislation, duly enacted by the national legislature, based on its lack of proportionality (see, eg, Hoffmann J in *Stoke-on-Trent City Council v B&Q plc* [1991] Ch 48).

These problems surfaced in the Sunday trading cases. In *Torfaen Borough Council v B&Q plc*, the ECJ had held that the rules in question, which prohibited large multiple shops such as the defendant's from opening on Sunday, might be justified to ensure that working hours be arranged to accord with 'national or regional socio-cultural characteristics', and directed the referring magistrates' court to examine the rules in the light of their proportionality. Unfortunately the precise grounds of justification permitted to protect such socio-cultural characteristics were not spelt out; nor was any guidance offered on the question of proportionality. Different British courts in different cases came to different conclusions. Courts which concluded that the socio-cultural purpose of the rules was to protect workers who did not want to work on Sunday not surprisingly concluded that the rules were disproportionate (eg, *B&Q Ltd v Shrewsbury & Atcham Borough Council* [1990] 3 CMLR 535); those which saw the rules as designed to 'preserve the traditional character of the British Sunday' legitimately concluded otherwise: the rules were not more than was necessary to achieve that end (eg, *Wellingborough Borough Council v Payless DIY Ltd* [1990] 1 CMLR 773). Despite a clear ruling from the Court in two cases subsequent to *Torfaen Borough Council v B&Q plc* (*Conforama* (case C–312/89) and *Marchandise* (case C–332/89)) that similar rules would be permissible under the rule of reason, the question of the legality of the English Sunday trading rules was only decided conclusively when the ECJ, following a reference from the House of Lords in *Stoke-on-Trent City Council v B&Q plc* (case C–169/91), applying the rule of reason in *Cassis*, found that the rules were justified and not disproportionate.

Whether as a result of these problems and the uncertainty surrounding the scope of Article 28 in the case of non-discriminatory national rules with a minimal impact (in terms of hindrance) on intra-Community trade, resulting in some exploitation of Union rules, or of a new post-Maastricht commitment to the principle of subsidiarity, the Court, in *Keck and Mithouard* (cases C–267 and 268/91), signalled an important change of direction.

19.6.3 *Keck* and *Mithouard*

19.6.3.1 *Possible approaches to Article 28*

The approach to Article 28 drew a significant amount of academic comment, most of it critical. A range of suggestions were put forward to correct the perceived defects. One suggestion was that the ECJ should return to the wording of *Dassonville* and look for a hindrance to interstate trade to trigger the application of Article 28. This is similar to the approach taken with regard to competition rules (see Chapter 29). Another was to draw a distinction between dual-burden and equal-burden rules. The former category places an additional burden on imports, and can therefore be seen as being akin to indirectly discriminatory rules. The rules in *Cassis* could be seen as falling in this category. Equal burden rules are rules which do not have a greater impact on imports though they may have an impact on trade. The Sunday trading rules could be an example of an equal-burden rule. The suggestion is that the boundary of Article 28 properly falls between the two categories. Another suggestion, focuses on the distinction between rules which relate to the characteristics of the goods, as in *Cassis*, and rules which relate to the conditions of sale, such as the *Sunday Trading* cases. A further distinction may be made as regards this latter category between conditions of sale which apply generally, such as opening hours (sometimes called static conditions of sale) and those which relate to the marketing of the product itself, for example a ban on advertising a particular product (sometimes called dynamic conditions of sale).

19.6.3.2 *Keck:* The judgment

These cases concerned the legality under EC law of a French law prohibiting the resale of goods in an unaltered state at prices lower than their actual purchase price, in the interests of fair trading, to prevent 'predatory pricing' (see Chapter 29). Keck and Mithouard, who had been prosecuted for breach of this law, claimed that it was incompatible with EC law. Although Article 28 was not expressly invoked, the reference being made for interpretation of Articles 3 and 12, the Court, to provide the French court with a 'useful' reply, focused on Article 28, which was clearly the relevant article. It cited the *Dassonville* test. It pointed out that legislation such as the French law in question:

> may restrict the volume of sales, and hence the volume of sales of products from other Member States, insofar as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterise the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

It went on to suggest:

> in view of the increasing tendency of traders to invoke Article 30 [now 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 of other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter.

Citing the rule of reason from *Cassis de Dijon* it drew a distinction between rules which lay down 'requirements to be met' by goods, such as those relating to designation, size, weight, composition, presentation, labelling and packaging, and rules

relating to 'selling arrangements'. Rules governing 'requirements to be met' falling within the *Dassonville* formula remained subject to the rule of reason in *Cassis*. However, 'contrary to what [had] 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 those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
>
> Where these conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 [now 28] of the Treaty.

Keck thus seemed to suggest that where a selling arrangement was in issue, the *Dassonville* test would not be satisfied. The impact of such rules was likely to be too indirect or insignificant to constitute a MEQR. In this, traces of similarity with the approach of the Commission towards indistinctly applicable measures in Directive 70/50 can be seen. There the Commission accepted indistinctly applicable measures might have some impact on trade provided 'the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules' (Article 3). We can also see similarities with the distinction between characteristics of the goods and their conditions of sale. *Keck* did not seem to distinguish between static and dynamic rules. In *Keck*, however, the ECJ emphasised that the selling arrangement must apply equally in law and in fact, and it is this proviso that was to prove to be significant in determining the direction of post-*Keck* case law. For the time being, the new approach to Article 28 was affirmed in a number of cases.

Box 19.2 Examples of the application of *Keck:* Selling arrangements

Hünermund (case C–292/92)—prohibition on pharmacists advertising, outside pharmacy premises, pharmaceutical products which they are authorised to sell.
Commission v *Greece* (case C–391/92)—requirement for processed milk for infants to be sold only in pharmacies.
Belgapom (case C–63/94)—rules prohibiting sales yielding very low profit margins.
Banchero (case C–387/93)—rules reserving the retail sale of tobacco to authorised distributors.

By contrast with these cases involving 'selling arrangements', measures constituting 'requirements to be met', such as a Dutch law prohibiting dealings in gold and silver products not bearing a Dutch, Belgian, or Luxembourg hallmark (*Houtwipper* (case C–293/93)) and German rules requiring the labelling of the contents of certain foods additional to that which was required under Union law

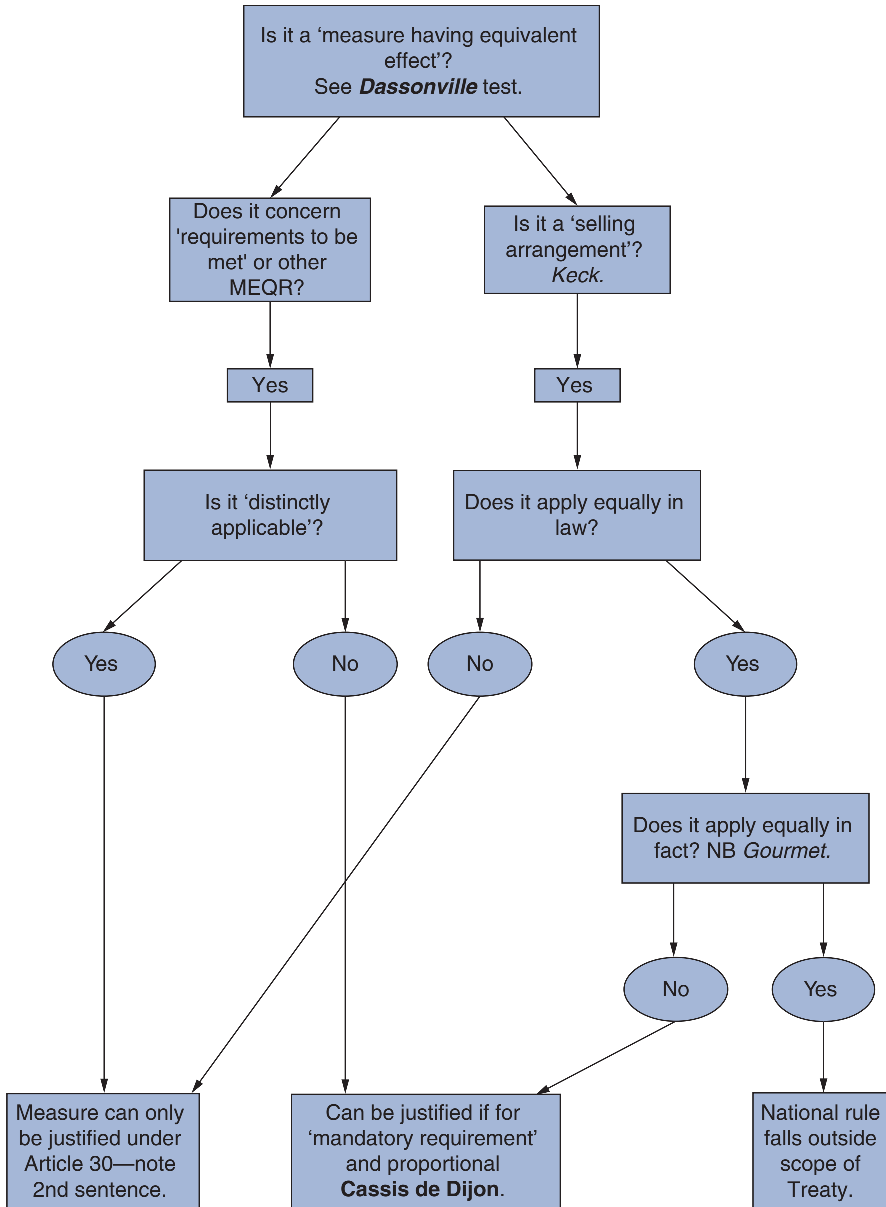

Fig 19.1 Approach to MEQR under Article 28

(*Commission v Germany* (case C–51/94) were examined, as *Keck* suggested, under the rule of reason and found not to be justified. Thus the approach to determining whether there is an MEQR can be rendered in diagrammatic form as seen in Fig 19.1.

19.6.4 Weaknesses of the *Keck* approach

Keck can be viewed as a return to an approach based on discrimination. The move towards a more 'formalistic' approach towards Article 28 initiated in *Keck* has been

both criticised as 'lacking in principle' and acclaimed 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' (see the articles by Reich and Roth respectively, listed in the further reading). Roth argues, persuasively, that the focus of Article 28 should be on access to the (national) market, its purpose to promote interstate trade in goods, not to ensure commercial freedom as such. It is arguable that the more recent post-*Keck* cases see the ECJ responding to some of these criticisms and, at least, considering questions such as the impact of a measure on access to the market. Perhaps a more appropriate way to view *Keck* is to consider, as the Advocate-General in *Volker Graf* (case C–190/98) suggested, the view that selling arrangements are harmless in internal market terms as a rebuttable presumption rather than as a rule. Even now, more than a decade after the decision, the jury seems still to be out on *Keck*.

There are two main areas of difficulty, together with a third issue which has not received much attention:

1. where the boundary between a selling arrangement and a requirement to be met lies, with the ancillary questions of whether the ECJ has taken a consistent approach and whether the boundary lies in the right place
2. the scope of the 'discrimination proviso' and whether a broad interpretation undermines the value of the *Keck* 'exception'
3. whether there are only two categories of trading rule: selling arrangements and product requirements.

19.6.4.1 *Meaning of 'selling arrangement'*

There is no doubt that the 'formalistic' approach introduced in *Keck* creates uncertainty. The ambit of the phrase 'certain selling arrangements' is unclear and ultimately remains a Union concept the scope of which is controlled by the ECJ. We can see from the cases above that some aspects of marketing (eg, advertising claims on packaging) (*Mars: Verein gegen Unwesen In Handel und Gewerbe Köln eV v Mars GmbH* (case C–470/93); and *Clinique: Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estee Lauder Cosmetics GmbH* (case C–315/92)) can fall within the notion of a product requirement as can the incorporation in a product of material for the purpose of increasing sales. One example of this occurred in *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* (case C–368/95), which concerned the Austrian prohibition on prize draws or competitions in periodicals. Although the ECJ accepted that publishers would include such games in publications with the hope of increasing circulation, this was not enough to bring the rule within *Keck*: the prohibition concerned the content of a magazine and therefore was a requirement to be met. Since it was an indistinctly applicable measure, it could, however, be justified under the *Cassis* rule of reason. The common theme in these cases is that the rules in question impose a dual burden on the manufacturer or importer; product requirements seem implicitly to involve de facto discrimination through the imposition of extra costs.

The ECJ summed the position up in *Morellato* (case C–416/00), that 'the need to alter packaging or the labelling of imported products prevents such requirements from constituting selling arrangements' (para 29). This case concerned the requirement to package bread made from partially baked dough, but finished off on-site,

before sale, such packaging to contain certain information. Here the ECJ held that the prior-packaging requirement did not mean it was necessary to alter the product. The rules therefore concerned selling arrangements and would be acceptable provided they applied equally in law and in fact (see 19.6.4.2). The approach in this case does hint at difficulties with the boundary between a product requirement and a rule relating to selling arrangements. What would the classification of a rule be, for example, if certain information was required but not included on the label, but national law would be satisfied by additional packaging? The question of a packaging requirement arose in *Schwarz* (case C–366/04). Austrian law required chewing gum to be packaged if it was to be dispensed via certain types of vending machine, whereas other Member States, specifically Germany, did not impose this requirement. Those manufacturers of gum established in a state where there was no such requirement would therefore have to go to the extra expense of packaging the gum to distribute in Austria. Without considering the question of a selling arrangement, the ECJ assumed that Article 28 was triggered and went on to assess and accept the question of justification under Article 30. This suggests that the ECJ thought that the rule could not benefit from the selling arrangement 'exception'. This implication is supported by the reasoning of the Advocate-General in *Schwarz*, who adopted the same test as the ECJ had in *Morellato*. Applying it in *Schwarz* however, the requirement was found to be a product requirement (para 29) even though the national laws did not require the alteration of the packaging (the boundary suggested by *Morellato*) but the *addition* of packaging. There is clearly a fine line to be drawn here and perhaps one distinction between *Morellato* and *Schwarz* is that the obligation in *Schwarz* could fall on the producer rather than the retailer. Whereas retailers can be seen as supplying goods from multiple origins in one place, manufacturers deal with one product, but subject to potentially many regimes. The problem in *Schwarz* again seems to be the concern about a dual burden.

One particular problem area in this context is that of advertising. One might argue that it falls within the ambit of 'selling arrangement' rather than 'requirements to be met'; indeed in *Leclerc-Siplec* (case C–412/93) the ECJ held that legislation which prohibits television advertising in a particular sector concerns selling arrangements for the products in that particular sector. Therefore, as the ECJ suggested in *Komsummentombudsmannen v De Agostini* (joined cases C–34–6/95), even an outright ban on the advertising of certain products—here toys—will not fall within the then Article 30 (now 28 EC) provided always that such measures apply to domestically produced and imported products equally in law and in fact. Sales promotions forming part of the packaging, as the *Mars* case illustrates, will conversely constitute a product requirement. The boundary between the two situations—sales promotion/advertising constituting a 'selling arrangement' on the one hand and product characteristics (including packaging) on the other—will not always be easy to identify. With the development of new television services, such as television shopping and 'infomercials', it will become increasingly difficult to identify where broadcasting (a service) ends and selling arrangements start. There is another risk here: that if a measure is found to constitute a selling arrangement, and therefore non-problematic in terms of Article 28, the ECJ may nonetheless return for a second 'bite of the cherry' and find there is a barrier to trade under Article 49 as far as advertising services are concerned.

Some commentators suggested that a clearer distinction than that between product requirements and selling arrangements can be found in the distinction between rules aimed at static and dynamic selling arrangements (see 19.6.3.1 above). The ECJ has not adopted such an approach, however, as can be seen from cases such as *Hünermund*, *Infant Milk*, *Banchero* and *TK Heimdienst* (Case C–254/98). Much more recently, the ECJ in *Schmidt* (Case C–441/04) held that a prohibition on the doorstep sale of silver jewellery was a selling arrangement and compatible with Article 28. In the *Hospital Pharmaceutical Supply case* (*Commission v Germany* (Case C–141/07)) rules imposed on pharmacists supplying products to hospitals were selling arrangements, albeit rules which might not operate equally. From this list, it seems rules relating to place of sale of particular products, as well as limitations as to who can sell them, should be seen as selling arrangements.

Contrast *Banchero*, concerning limitation on who could sell tobacco, with *Rosengren* (Case C–170/04, decision of the Grand Chamber). *Rosengren* concerned the Swedish alcohol monopoly and the consequent restriction on private individuals importing alcohol directly from overseas suppliers. Whilst the alcohol monopoly might seem to be a restriction on who can sell the product, the ECJ categorised it as a MEQR.

Another difficult case to fit in this framework is *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* (cases C–158–9/04 and C–82/05) which concerned town planning rules imposing construction restrictions with regard to bakeries and the machinery that they must have and which affected shops baking, partially pre-baked bread supplied to those shops in frozen form. This, the ECJ considered to be a product requirement, although the rules related to the place such bread was sold and not the bread itself. The reason given for the decision is that the rules affect the process of production of the product; other cases concerning planning or licensing rules have not had an impact on such a process. We can suggest that this approach is in line with the concern noted in relation to *Morellato* and *Schwarz* about where in the production process the impact of the rule is felt: the earlier in the production process, the more likely it is to affect the nature of the product. Whether this is convincing or not, is another question. Here, it is arguable that the rules should not have been considered to be a product requirement as they had no direct link with the content of the product itself; and the dual burden justification normally found with regard to product requirements is not easily found here. Further, the boundary between production and retail becomes blurred in this context. Although the Advocate-General notes that the effect of the rules is that only bakeries can sell 'bake-off' bread, it is still hard to distinguish a limitation such as this one and a rule which limits the sale of infant-formula milk to pharmacies; the rules here do not require the nature of the product itself to be changed. In this context, *Alfa Vita* could be seen as evidence of a contraction of the selling arrangement 'exception' found in *Keck*. Interestingly, the Advocate-General in *Alfa Vita* notes the difficulties in this area, and while retaining support for the *Keck* approach, makes a plea for greater clarity in this area; he suggested that the key factor is whether there is discrimination against the exercise of free movement, but the ECJ did not address the point.

19.6.4.2 *Non-discrimination in* Keck

It is not clear the extent to which the *Keck* assumption that selling arrangements should fall outside Article 28 is undercut by the requirement that any such selling arrangements should apply equally in law and, crucially, in fact. This point was

raised in *De Agostini* (joined cases C–34–6/95). There, the prohibition applied to all adverts, whether they related to imported products or not. It therefore operated equally in law. The difficult question of whether it operated equally in fact was left by the ECJ to the national court, although the ECJ did note that in some circumstances the only practicable way to break into a new market will be through such advertising. Implicitly, this suggests that it would be difficult for such a rule to apply equally in practice. The ECJ has left the question of assessment of whether there is equal application in fact to the national courts (see, eg, *Burmanjer and ors* (Case C–20/03)).

The ECJ itself undertook the assessment of the equal operation of the selling arrangement in law and in fact in *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (case C–254/98). Under Austrian legislation bakers, butchers, and grocers may offer goods for sale on rounds from door to door, provided such sales are made by traders who have a permanent establishment in that district or in a municipality adjacent to it and the sales relate to the type of goods sold at that establishment. This rule became the subject of proceedings and the question as to whether the rule was compatible with Article 28 was referred. The ECJ found that the rules constituted a selling arrangement; it then went on to consider whether the rules applied equally in law and in fact. The fact that traders established in one part of Austria would also be affected in respect of home delivery services in other areas of Austria does not change this assessment. What was important is that 'the national legislation 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'. Whereas the application of equality in law seems to be based on the notion of discrimination, the approach to equality in fact seems to bring us back to questions about access to the market, characteristic of pre-*Keck* jurisprudence.

The problem of the equal application of selling arrangements arose again in the context of Swedish rules limiting the advertising of alcoholic beverages to publications directed to point of sale and the trade press. In *Gourmet International Products* (case C–405/98), a publisher challenged these rules on the basis that they were contrary to Articles 28 and 49 EC. In its judgment, the ECJ restated the test in *Keck*, and following *TK-Heimdienst* closely, reiterated a test based on access to the market (para 18).

It then noted that *De Agostini* accepted the possibility that a prohibition might have a greater impact on imports than on domestic products. The Court concluded:

> Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar. [Para 21.]

The ECJ in this case seems to give the national court very little scope but to follow the ECJ's view that the national rules here do not apply equally in fact. The consequence is that the rule will fall to be assessed under the rule of reason and Article 28,

as it would have been pre-*Keck*. It should be noted that the ECJ is not stating that all advertising will necessarily fall within Article 28; it clearly seeks to limit the impact of its judgment by linking the type of product to 'traditional social practices'. Nonetheless, both *Gourmet International Products* and *TK Heimdienst* suggest that the selling-arrangement/product-requirement distinction proposed in *Keck* will not always answer the question of whether a measure falls outside the scope of Article 28 or not. The problem, as the ECJ seems to be recognising, is that even selling arrangements may have an impact on trade.

The current problem is what degree of impact, actual or potential, is required before a selling arrangement does not operate equally in fact—note that *Keck* seemed to imply that a trading rule might have an inherently restrictive effect. In *Deutscher Apothekerverband eV v 0800 DocMorris* (case C–322/01), the ECJ noted in respect of a prohibition on the mail order sale of medicinal products that, despite the fact that it limited the ability of German pharmacies to gain access to the entire German market:

> [a] prohibition which has greater impact on pharmacies established outside the German territory could impede access to the market for products from other Member States more than it impedes access for domestic products. [Para 74.]

On this basis, the selling arrangement did not apply equally in fact and therefore triggered an analysis under Article 28. The wording the ECJ uses in this case is broad. Although very similar to the test used in *TK-Heimdienst* and *Gourmet*, it seems not to require an actual impact, but suggests that a potential effect would suffice. The ECJ has repeated its broad approach in *Hospital Pharmaceutical Supply case* (*Commission v Germany* (Case C–141/07)). There it held:

> For a national measure to be characterised as discriminatory or protective within the meaning of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products. [Para 39.]

This approach seems to suggest that the test for the equal application of selling arrangements is the same as the test used to identify an MEQR in the first place. If this is the case, it renders the Keck 'exception' nothing but a detour to come to the same place as an assessment of all rules would have done prior to *Keck*. It is hard to square this approach—or, indeed, that in *TK-Heimdienst* and *Gourmet*—with that in the *Greek Pharmacies* case (*Commission v Greece* (case C–391/92)), handed down shortly after *Keck*. The boundary of Article 28 seems to have moved, becoming more broadly drawn again.

Despite this line of cases, there still seems some uncertainty as to where the actual boundary of discrimination does now lie. *Karner* concerned the Austrian prohibition on misleading advertising in relation to the sale of goods via auction. In this case, the auction catalogue, including the (misleading) statement that the goods in issue were from an insolvent estate, was advertised on the Internet. By contrast to *de Agostini*, in the Court's opinion, the national provision in this case did not constitute a total prohibition on all forms of advertising.

Consequently, although the Court accepted that the prohibition could affect the total number of sales, it did not affect the marketing of products originating from other Member States more than it affects the marketing of products from the host Member State (para 42) (see also *Dynamic Medien Vertriebs GmbH v Avides Media AG* (Case C–244/06)). Crucially, the ECJ pointed to lack of evidence from those seeking to benefit from Article 28 as to the impact of the national rule. This approach, which implicitly requires an actual impact, does not seem entirely on all fours with the approach in *DocMorris*. It may well be that the different rules did have a differential impact on the facts, justifying a difference in treatment. Nonetheless, any unifying principles on which these judgments are based remain unclear.

19.6.4.3 *Other categories of trading rule*

As we noted earlier, *Dassonville* was very broad and covered many areas of law. *Keck* identifies two subcategories: product requirements and selling arrangements and tells us how to treat them. The question is, are all rules found within these two categories, or are there others? Part of the difficulties with *Alfa Vita* seems to be the underlying assumption that the measure must fall into one or other of the categories. Presumably, there is scope for viewing rules as satisfying the *Dassonville* test without having to ascribe them either to a category of product requirement or selling arrangement. We might then question whether all rules falling in this third category are equally inimical to trade. This question could arise in relation to rules relating to the use of a product. If the use of a product is prohibited, we can see that such a rule would deter consumers from buying such products with a potential impact on trade. Equally, a rule limiting the circumstances in which a product can be use (eg, a push bike not being allowed on a motorway) would have little impact on trade. It has been suggested, by the Advocate-General in *Åklagaren v Mickelsson and Roos* (case C–142/05), that such rules should be treated as analogous to selling arrangements and that the crucial factor would be whether they applied equally in law and in fact. This case has not yet been decided, so it remains to be seen what approach the ECJ will take. The issue of a ban on the use of a product, that of tinted film for car windows, has more recently come before the ECJ (*Commission v Portugal* (tinted window film) (case C–265/06)). In that case, the ECJ concluded that the rules were MEQR, and proceeded to determine if they were justified; neither it nor the Advocate-General considered the issue of whether such rules should be treated akin to selling arrangements. This omission is perhaps not surprising: a total ban on a product's use has a direct impact on its marketing and sales.

19.6.5 Alternative solutions

Over the years other tests have been suggested. A test of 'substantial' hindrance was suggested by Advocate-General Jacobs in *Leclerc-Siplec* (case C–412/93), although the Court chose to apply *Keck*. An approach which considers the impact of a measure, however, seems to have been favoured by the ECJ in a number of cases. We have seen that in cases such as *TK-Heimdienst* and *Gourmet International Products*,

the ECJ has focused on the importers' ease of access to the markets of other Member States, rather than on the issue of whether a rule is a selling arrangement or not. In *DocMorris*, we also find references to ease of access to the market in the context of assessing whether the selling arrangement applies equally in fact. Indeed, in *Gourmet International Products*, the phrasing of the judgment is not in terms of discrimination but of access to the market. On one analysis, these rulings might not be too far from the *Keck* approach, in that *Keck* can be seen as distinguishing between measures which impact directly on the producer/importer and those which have an impact on consumers and thus only an indirect impact on the free movement rights.

On the other side of the coin the ECJ has also emphasised that the impact of national rules must not be too remote from interstate trade. In *BASF AG v Präsident des Deutschen Patentamts* (case C–44/98), BASF tried to challenge a German law which, as permitted by the European Patent Convention, required patents that were granted by the European Patent Office in respect of Germany to be translated, at the patent proprietor's cost, into German. BASF argued that because of high translation costs, patent proprietors would be forced into choosing the countries in which to have patent protection as they would not be able to afford the translation costs for the entire Union. This, in turn, would affect patent proprietors' decisions about the Member States in which the patented product would be marketed, thus partitioning the internal market, contrary to Article 28. In *ED Srl v Fenocchio* (case C–412/97), ED argued that Italian rules which precluded the obtaining of summary judgments against debtors who resided outside Italy would dissuade those resident in Italy from contracting with those who resided elsewhere, as debt recovery would be more difficult in respect of non-Italian residents. On this basis, it was argued that the rule should be regarded as incompatible with Article 29 as it would discourage exports. In both cases the ECJ gave these convoluted arguments short shrift, holding in both instances that the effect on Union law was too uncertain and indirect to constitute a measure having equivalent effect. A similar approach has also been used in the context of freedom of establishment (see Chapter 22). These cases are unlikely to constitute a significant shift in the ECJ's approach to the scope of Article 28 in which access to markets is clearly impeded. (Contrast *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (case C–254/98) in which the Austrian government unsuccessfully tried to argue that the impact of the legislation there would be too uncertain.)

The ECJ's approach in *BASF* and *ED Srl* was similar to that in the earlier case of *DIP SpA* (cases C–140–2/94), although with a different result. *DIP SpA* concerned a challenge to an Italian law permitting the opening of new shops in particular areas only on receipt of a licence, to be issued by municipal authorities on the recommendation of a local committee. The committee, which represented a variety of interest groups, made its recommendations according to specific criteria. Perhaps because the rule did not fall clearly within the category of either 'requirements to be met' or 'selling arrangements' the Court did not apply the *Keck* formulae. Instead it looked at the effect of the measure, and found its restrictive effect 'too uncertain and too indirect' for the obligation which it imposed to be regarded as hindering trade between Member States. It was thus compatible with Article 28.

19.7 Prohibition, as between Member States, of quantitative restrictions on exports and of all measures having equivalent effect (Article 29)

All the principles relating to imports under Article 28 will also apply to exports under Article 29, including, as seems to have been accepted by the English courts in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Limited* ([1996] QB 197 (QBD), [1997] 3 WLR 132 (CA), [1999] 1 CMLR 1320), the possibility of Member States being under positive obligations by virtue of Article 29 in conjunction with Article 10, with one important exception.

It seemed that there was a difference in approach between the scope of Articles 28–9 and that measures which are *indistinctly applicable* would not breach Article 29 merely because they are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. The *Dassonville* test does not apply, but rather a test set down in *PB Groenveld BV* (case 15/79). Here, a national law prohibiting the large-scale manufacture of horsemeat sausages and limiting the sale of such sausages by small specialist butchers to consumers only, designed to safeguard exports of such products to countries which prohibit the sale of horseflesh, was found, applying the above test, not to breach Article 29, although, as Advocate-General Capotorti pointed out, it presented an almost insuperable obstacle to exports. The ECJ held that to breach Article 29 such measures must have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question, at the expense of the production or of the trade of other Member States. Thus there is a double test: not only must there be a measure but it must benefit the domestic market. In other words, they must be overtly or covertly protectionist. The Court's judgment represented a clear departure from the opinion of the Advocate-General. He had approached the matter along the lines of Article 28; he applied the *Dassonville* test, and *Cassis*, and found that the measure was not justified since other, less restrictive measures, such as labelling, could have been used to achieve the same ends.

In *Oebel* (case 155/80) the restriction on night working and delivery hours for bakery products, although undoubtedly a barrier to exports, since it precluded Belgian bakers from selling bread in adjacent Member States in time for breakfast, was found, following *PB Groenveld BV*, not to breach Article 29.

On the other hand measures which are *distinctly applicable* and which discriminate against exports *will* normally breach Article 29. In *Bouhelier* (case 53/76) the requirement in France of an export licence, following a quality inspection, for watches destined for export was held to breach Article 29 since the same inspection and licences were not required for watches sold on the domestic market.

The principles of both *PB Groenveld BV* and *Bouhelier* were applied in *Jongeneel Kaas BV* (case 237/82). Here Dutch rules, indistinctly applicable, regulating the quality and content of cheese produced in The Netherlands were found not to breach Article 29, even though domestic producers were thereby at a competitive disadvantage vis-à-vis producers from other states not bound by the same standard of quality, since they did not fall within the *PB Groenveld BV* criteria, whereas a distinctly applicable rule requiring inspection documents for exports alone was,

following *Bouhelier*, in breach of Article 29. This approach has been reiterated more recently, for example in *Ravil* (case C–469/00).

The Court's tolerance towards indistinctly applicable, non-protective restrictions on exports introduced in *PB Groenveld BV* is in line with the Court's attitude, noted above, towards reverse discrimination. Clearly where there is no danger of protectionism the Court can afford to take a more lenient view. Restrictions on imports, on the other hand, will always raise a suspicion of protectionism. Nonetheless, it seems that there has been a move away from the 'double' test, even if *Groenveld* is the ECJ's starting point for cases concerning exports. This can be seen in the Grand Chamber decision in *Lodewijk Gysbrechts* (case C–205/07). The case concerned a Belgian rule, which prohibited vendors from asking for customers' credit card details before the expiry of a cooling off period, even if the vendor undertook not to take payment prior to the end of that period. The ECJ accepted that this could constitute a measure having equivalent effect to a quantitative restriction on exports as it deprives traders of an efficient tool with which to guard against the risk of non-payment. The ECJ noted a discriminatory effect as such a rule would fall particularly on those who sold direct consumers in other member states where transactions were of a small pecuniary value. Thus even if the prohibition on asking for credit-card numbers applies to all, it has a greater impact on exports. The ECJ then concluded that there was a prohibited MEQR within the scope of Article 29, without considering whether there had been an advantage to the domestic market. It is hard to spot such an advantage in the facts of this case, suggesting that Article 29 is now being interpreted more broadly.

Since only protective or discriminatory measures were thought to breach Article 29, it was usually also thought that a rule of reason will not be applied and justification can only be sought under Article 30. The beginnings of a change in approach can be seen in *Schmidberger* (case C–112/00), where the ECJ discussed the justification for a 'measure' within Article 29 in conjunction with that for a MEQR within Article 28. This suggests that similar principles should be used in assessing derogations from Article 28 and 29. The ECJ did not, however, address the point directly. In *Lodewijk Gysbrechts*, however, it stated unequivocably that:

> [a] national measure contrary to Article 29 EC may be justified on one of the grounds stated in Article 30 EC, and by overriding requirements of public interest, provided that the measure is proportionate to the legitimate objective pursued. [Para 45.]

Article 29 now seems to be being interpreted much more in parallel with Article 28, though there is still not equivalent of the *Keck* approach here.

19.8 State monopolies

19.8.1 Meaning of 'monopoly'

The bodies subject to Article 31 are those through which 'a Member State, in law or in fact, either directly or indirectly, supervises, determines or appreciably influences imports or exports between Member States' (Article 31(1), para 2).

To qualify as a monopoly it is not necessary to exert total control of the market in particular goods. It is sufficient if the bodies concerned have as their object transactions regarding a commercial product which could be traded between Member States, if they play an *effective* part in such trade (*Costa v ENEL* (case 6/64)).

It seems that state monopolies must be used for the pursuit of a public-interest aim; therefore, the object of Article 31 EC is to reconcile the desire of a Member State to do so with the need to maintain the common market (*Harry Franzen* (case C–189/95)). It is not clear whether monopolies which do not pursue a public-interest aim are compatible with the provisions on the free movement of goods, although it is arguable that state restrictions on granting a monopoly to a body could be characterised as 'selling arrangements' under *Keck* and *Mithouard* (contrast the approach in the *Infant Milk case* and *DocMorris*).

A state monopoly within the scope of Article 31 may also exist where an exclusive right to export or import particular goods is given to one body (*Manghera* (case C–59/75)). However, Article 31 does not apply where retailers in a Member State need to be authorised to sell a product, such as tobacco (*Banchero* (case C–387/93)). This is subject to the proviso that the state does not interfere with the *supply* of the goods to be sold and leaves the retailers free to choose the source of the product.

19.8.2 Prohibition on discrimination on grounds of nationality

Article 31 prohibits discrimination on the grounds of nationality in the operation of the state monopoly. The aim of Article 31 is not to abolish monopolies per se, but rather to ensure that they do not operate in a discriminatory manner. The overriding objective is to ensure that obstructions to the free movement of goods and distortions of competition within the Union as a result of such a monopoly are kept to a minimum. In *SA des Grandes Distilleries Peureux* (case 119/78), rules regarding the French monopoly for the distillation of raw materials were held to be discriminatory and contrary to Article 31(1) EC because they prohibited the use of raw materials imported from another Member State. In contrast, in *Harry Franzen* (case C–189/95), Swedish provisions on the existence and operation of the monopoly retailer of alcoholic beverages were found to be compatible with Article 31. The existence of this monopoly was not of concern, provided that it was set up in such a way that it was not more difficult for suppliers from other Member States to sell alcohol in Sweden.

More recently another Swedish monopoly, one concerning the retail sale of medicinal preparations, has been successfully challenged (*Hanner* (case C–438/02)). The Court reiterated its position that Article 31 does not require the abolition of state monopolies; it controls the way they operate. In this instance, the contract establishing the monopoly did not provide for either a purchasing plan or a system of calls for tender which would provide an opportunity for producers of products that are not selected by the monopoly to find out why and, possibly, to challenge the decision. Here, the state monopoly had absolutely free choice as to the products it would stock. The ECJ held that the agreement did not therefore ensure that discrimination was ruled out. On this basis the state monopoly's system for selecting the products to stock is liable to place products from other Member States at a disadvantage. It was therefore, in principle, contrary to Union law.

19.9 Relationship with other treaty provisions

19.9.1 Article 28

Article 31 is part of Title I, Chapter 2 of the EC Treaty on prohibitions of quantitative restrictions between Member States. It is as noted complementary to Articles 28–9 EC. However, in contrast to Articles 28–9, Article 31 does not benefit from the equivalent of the Article 30 derogation (see Chapter 20), and it may therefore be important to identify whether a particular provision is subject to the free movement provisions or the state monopoly provision.

It has been held that Article 31 only applies to activities that are intrinsically connected with the specific business of the monopoly (*SA des Grandes Distilleries Peureux* (case 119/78)). However, related activities may be subject to Article 28 EC. In *Franzen*, it was argued that the Swedish alcohol monopoly was contrary to both Articles 28 and 31. The ECJ drew a distinction between those provisions which related to the existence and operation of the monopoly itself, which would be subject to Article 31, and provisions which were separable from the operation of the monopoly but which had a bearing on it. The latter would be subject to assessment under Article 28 EC. The provisions at issue in *Franzen* concerned both the monopoly itself and the requirement for importers of alcohol to hold a licence. The monopoly itself was not contrary to Article 31, but the requirement of an import licence fell foul of Article 28 and could not be justified under Article 30.

19.9.2 Other provisions

Article 31 only applies to state monopolies in the provision of goods. It does not apply to services. However, if a state monopoly exists in the provision of services, and operates in a discriminatory manner, then it may be caught by the general prohibition against discrimination on grounds of nationality in Article 12 (ex 6) EC. It may also be subject to the provisions on the free movement of services (Articles 49–55 EC (ex 59–66)), or Article 82 (ex 86) EC (post Lisbon, 56–62 and 102 TFEU), which prohibits the abuse of a dominant position. To the extent that there is a comparable provision regarding services, this is Article 86(2) (post Lisbon, 106 TFEU), which deals with the provision of services of general economic interest (see also Chapter 28).

19.10 Conclusions

This chapter illustrates the importance of the jurisprudence defining the scope of the prohibition on measures having an equivalent effect to quantitative restriction. The key question is the relationship between free movement and national regulatory competence. This question is affected by the scope of the derogation principles (Chapter 20) and by positive harmonisation measures (Chapter 16). In addition to these provisions, there is also Article 31. Although there is very little jurisprudence on Article 31, it nevertheless fulfils an important function in ensuring that the free movement of goods in the common market is not restricted any more than is justifiable.

As far as this chapter is concerned, the central problem relates to how to determine the scope of Article 28. The ECJ's case law has not always been consistent and it seems that during the development of the Community different approaches have been taken ranging from tests based on discrimination, access to the market and the more formalistic approach under *Keck*. Behind all of these runs the underlying questions of how much regulation of trade (and trade-related matters) is desirable and who gets to choose the form of that regulation. With the single market, if not actually completed, being in a more developed phase than when *Dassonville*, *Cassis de Dijon*, and even *Keck*, were handed down, one remaining question is whether the internal market should tolerate more regulation and greater divergence or less.

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