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KECK CONSIDERED: A NEW DOCTRINAL MODEL FOR THE FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION

INTRODUCTION

Keck and Mithouard,[1] which was decided by the European Court of Justice[2] (hereinafter the Court) on November 24, 1993, has stirred great controversy. It has reshaped the judicial architecture of Article 30[3] of the Treaty establishing the European Economic Community (hereinafter Article 30). Article 30 is the comprehensive charter that guarantees the free movement of goods within the European Union.

The case establishes a new standard that can be applied to assess the autonomy of Community law[4] as it relates to Member State competence. *Keck*[5] appears at first glance as a step backward from the legal protections afforded intra-Community trade because it limits the application of the fiercely pro-integrative rule in the *Branntwein* case (hereinafter *Cassis de Dijon*),[6] which reinvigorated Article 30 and gave it startling new breadth. The decision in *Keck*[7] is not free of ambiguity, but it

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[1] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[2] The European Court of Justice was created in 1951 by the Treaty of Paris which established the European Coal and Steel Community, a predecessor of the European Economic Community. The Court, which sits in Luxembourg, has fifteen Justices, one from each Member State. Justices are appointed for six-year terms by the Member States, and are eligible for re-appointment. The Court's function is prescribed in Articles 164-188 of the Treaty Establishing the European Economic Community, as amended by the Treaty on European Union. The procedures and methods of the Court are based on the French civil law method.

[3] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 30, 298 U.N.T.S. 3 (1958) [hereinafter EEC TREATY]; *See also* EC LEGISLATION (Nigel G. Foster ed., 4th ed., Blackstone Press 1993).

[4] *Keck & Mithouard*, Joined Cases 267 & 268/91.

[5] *Id.*

[6] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 649.

[7] *Id.*

advances the development of Community law in three significant respects.

First, it rationalizes conflicting case law dealing with rules concerning socially and culturally determined market circumstances cases, particularly those encompassing the sale of products.[8] These conflicting cases, through erratic and unpredictable application by National courts, can lead to a jurisprudence more at to "a Europe of bits and pieces"[9] than to a vital federal structure. The Court's judgment acknowledges that the inconsistent judgments referred to the Court from various national courts do not assist in building a coherent body of law. Second, the *Keck*[10] decision seems to alleviate the difficulty of determining whether the rising number of Article 177[11] (hereinafter Article 177) challenges are capable of hindering intra-Community trade.[12] Third, and most important, the Court's ruling in *Keck*[13] preserves and advances the Court's central function as guarantor of a vital Community legal order by providing for a more coherent development of the law, which in turn enhances the international solidarity of the Union.

I. *KECK*[14] AND THE CHALLENGE TO ARTICLE 30

The Court in *Keck*[15] was asked to consider, in an Article 177 reference from the French Criminal Court,[16] whether French interdiction of resale at a loss is compatible with the principle of the free movement of goods articulated in Article

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[8] *Id.* ¶ 14.

[9] *See* Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17 (1993).

[10] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[11] EEC TREATY, *supra* note 3, art. 177.

[12] *Keck & Mithouard*, Joined Cases 267 & 268/91.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The specific French Criminal Court being referred to is the Tribunal de grande instance de Strasbourg. The French Criminal Court in Strasbourg referred this case to the European Court of Justice under Article 177. The accused supermarket managers, Keck and Mithouard, were charged with violating Article 32 of a French Ordinance No. 86/1243 dated December 1, 1986, which prohibited resale at a loss. The French court asked the European Court of Justice to advise it on whether or not the French interdiction of resale at a loss was compatible with Community law.

30. The French court, in its Article 177 reference, gave scant analysis of the extent to which the French law restricts, "directly or indirectly, actually or potentially, intra-Community trade"[17] as mandated in the test established by the Court in the case of *Procureur du Roi v. Dassonville*.[18] The reference indicated that the ordinance that the two accused supermarket managers, Keck and Mithouard, were charged with violating was one which prohibited resale at a loss, but exempted the manufacturer, "who remained free to sell on the market . . . at a price lower than cost."[19] The reference also stipulated that French shopping centers located near country borders may suffer from foreign competitors who were not bound by the prohibition.[20] In response to the reference, the Court reiterated its *Dassonville*[21] formula. The Court also limited its *Cassis de Dijon*[22] rule that any diversity between national laws is capable of running afoul of Article 30, even in the absence of discrimination against imported products.

In *Keck*,[23] a French ordinance is interpreted concerning the market circumstances of product sales, which has the potential of depriving traders of a type of sales promotion. "But the question remains," the Court said, "whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports."[24] The Court rejected this interpretation of the French law and considered it necessary to re-examine and clarify its case law, "in view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States."[25]

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[17] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

[18] *Id.*

[19] Joined Cases 267 & 268/91 ¶ 4(a), Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[20] *Id.* ¶ 4(b).

[21] *Dassonville*, 1974 E.C.R. at 837.

[22] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 649.

[23] *Keck & Mithouard*, Joined Cases 267 & 268/91.

[24] *Id.* ¶ 13.

[25] *Keck & Mithouard*, Joined Cases 267 & 268/91 ¶ 14.

II. TOWARD A COMMON MARKET: THE SCOPE AND LIMITS OF ARTICLE 30

Article 30's guarantee of the free movement of goods,[26] conceived as a broad anti-protectionist charter, is perhaps the chief mechanism employed by the Treaty to advance the economic and social cohesion and solidarity among the Member States.[27] Article 30 is also the structural and doctrinal model for the other "four freedoms" provided for in the Treaty:[28] the free movement of persons, services, capital, and payments. This establishes Article 30 as the central jurisprudential impulse for European interdependence. The brevity of Article 30 belies its vigor. It simply states, "quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."[29]

The heart of the jurisprudence of Article 30 is the creation of a common market among the Member States. The significance of this objective is acutely apparent from the prominent position it occupies at the very beginning of the Treaty in Article 3,[30] which describes the tasks of the treaty. Of the twenty different Community activities described in Article 3,[31] the first three enumerated tasks aim at one objective, the creation of a common market.[32] The first activity specified in Article 3[33] is the elimination of customs duties, quantitative restrictions and measures having equivalent effect; the creation of a common commercial policy is the second, and creation of an internal market is the third.[34]

A common market, according to Kapteyn and Van Themaat, is one in which

> [e]very participant in the Community is free to invest, produce, work, buy and sell, to supply or obtain services under conditions

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[26] EEC TREATY, *supra* note 3, art. 6.
[27] EEC TREATY, *supra* note 3, art. 6.
[28] EEC TREATY, *supra* note 3, art. 3(c) & (g).
[29] EEC TREATY, *supra* note 3.
[30] EEC TREATY, *supra* note 3, art. 3.
[31] EEC TREATY, *supra* note 3, art. 3.
[32] EEC TREATY, *supra* note 3, art. 3.
[33] EEC TREATY, *supra* note 3, art. 3.
[34] EEC TREATY, *supra* note 3, art. 3.

> of competition which have not been artifically distorted where ever economic conditions are most favorable.[35]

The Court affirmed this interpretation of Article 30 as the vehicle for achieving this dynamic objective. In *Commission v. United Kingdom*,[36] the Court stated that

> [t]he Treaty, by establishing a common market and progressively approximating the economic policies of the [M]ember [S]tates, seeks to unite national markets in a single market having the characteristics of a domestic market.[37]

Therefore, a common market as envisioned by the Treaty and as interpreted by the Court means a broad scope for the right to free movement. This ensures that the resources of the Community may be employed in the most economically efficient manner. The pursuit of a truly barrier-free internal market within the federal structure of the European Union[38] is propelled by the vision of the Italian economist Paolo Cecchini.[39] Cecchini's analysis of the benefits of a barrier-free internal market explains the zeal with which the Court interprets, applies and enforces Article 30. Cecchini concluded that the Union's gross domestic product would increase by seven percent[40] in the absence of all barriers to trade, creating five-million new jobs.[41]

Dassonville[42] is an example of how bold judicial legislation by the Court has transformed a spartan legal principle into a

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[35] P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 78 (2d ed. 1989).

[36] Case 207/83, Comm'n of the Eur. Communities v. U.K. & N. Ir., 1985 E.C.R. 1201.

[37] *Id.* ¶ 17.

[38] The European Union, which represents a broadening and deepening of the European Community, was formally created by the Maastricht Treaty on European Union, commonly called the TEU. The final TEU draft was approved by the Maastricht European Council, signed on February 7, 1992, and became effective on January 1, 1993. The provisions of the TEU, which amend the Treaty Establishing the European Community, concern two general spheres, political union and economic and monetary union. New provisions of the TEU strengthen the rights that attach to European citizenship. The TEU is seen as a decisive step in the direction of the political integration of Europe and the creation of a federal state.

[39] PAOLO CECCHINI, THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET 2 (1988).

[40] *Id.* at 102.

[41] *Id.*

[42] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 125.

vital, flexible doctrine wide application. The sweeping *Dassonville*[43] formula, which considers the effect of national measures that are capable of hindering trade is anchored to the principle of market unity.[44]

The *Dassonville*[45] test applies its broad power by cutting down a wide range of hindrances to the free movement of goods[46] in two ways. First, the second element of the Article 30 definition, "measures having equivalent effect to quantitative restrictions"[47] (hereinafter MEQRs),[48] vastly amplifies the scope of the formula. The preamble to Directive 70/50 EEC[49] defines MEQRs as, "laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority including recommendations."[50] The Court held that a Member State violates Article 30 when it provides a legal remedy with which to challenge the marketing of an imported product that infringes a patent when it does not give similar relief against an offending domestic product.[51]

The Irish Minister for Industry's "Buy Irish campaign"[52] to promote the sale of Irish goods by designating Irish products with a special 'Guaranteed Irish' symbol to indicate the local

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[43] *Id.*

[44] *Id.* ¶ 4.

[45] *Dassonville*, 1974 E.C.R. at 837.

[46] The Treaty employs an expansive concept of "goods." *See* LAW OF THE EUROPEAN COMMUNITIES 100 (Lord Hailsham of St. Marylebone & David Vaughan eds., 1986); Lord Hailsham notes that:

> "The Court of Justice has considered that "goods" are products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions. Thus the concept of "goods" extends even to waste matter, and no goods or products fall outside the scope of articles 30 to 36 of the treaty, no matter how important they may be to the needs of a member state."

[47] EEC TREATY, *supra* note 3.

[48] MEQRs are 'measures having equivalent effect' in Article 30 of the Treaty.

[49] 1970 O.J. SPEC. ED. (L 13/29) 17.

[50] *Id.*

[51] Case 434/85, Allen & Hanburys Ltd. v. Generics (U.K.) Ltd., 1988 E.C.R. 1245.

[52] The "Buy Irish Campaign" in Case 249/81, Comm'n v. Ir., 1982 E.C.R. 4005; is described in the submission of the Agent for the European Commission to the Court and in the Opinion of the Advocate General. The lack of success of the campaign was noted by the Court at ¶ 25 in its ruling: " . . . the advertising campaign and the use of the 'Guaranteed Irish' symbol, have not had any significant success in winning over the Irish products. . . ."

origin of the goods was held by the Court[53] to contravene Article 30 because it was designed to substitute domestic goods for imported ones, even though the campaign was conducted by a non-governmental authority, the Irish Goods Council[54] (albeit with public funds) and despite the fact that the campaign was a failure.[55] The efficacy of the campaign did not matter, only that the campaign was designed to affect intra-Community trade by encouraging consumer prejudice in favor of domestic goods.

In addition, the *Irish Souvenirs*[56] case is significant because it expresses the Court's fidelity to the concept of *effet utile*.[57] This concept is a well-established notion that the essential aim of Community law can be attained through a dynamic interpretation that broadens the compass of the Treaty.

The Court endorsed the broadest possible view of Article 30's scope by rejecting the Irish Government's argument that Article 30 only referred to binding measures emanating from a public authority.[58] It was sufficient for the Court that the Irish government assisted in and encouraged a national practice that had the potential effect of a binding national restriction on foreign products.

In *Commission v. United Kingdom*,[59] the Court applied the anti-discrimination principle at the heart of the *Irish Souvenirs* case[60] in a more elusive fashion. The Court examined a British law that required certain types of products to have a "clear and

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[53] *Ir.*, 1982 E.C.R. at 4005.

[54] Created on August 25, 1978, the Irish Goods Council was established to promote the sale of Irish goods by uniting various industries to a common goal.

[55] *Ir.*, 1982 E.C.R. at 4005 ¶ 25.

[56] *Id.* at 4005.

[57] The Court has developed principles for interpretation which are aimed at discovering both the objective meaning of particular provisions within the context of the entire document, as well as the subjective intent of the drafters of the Treaty. *Effet utile* is the general principle of 'effectiveness,' the concept that Member States may not adopt measures that abridge or destroy the effectiveness of Community rules. Since Article 30 is aimed at establishing the broadest possible conditions for the free movement of goods within the Community, the principle of *effet utile* commands that preference must be given to an interpretation of Community law that affords the widest possible scope of Article 30. In addition, adherence to this principle also means that exceptions to Article 30 must be narrowly construed.

[58] *Ir.*, 1982 E.C.R. at 4005.

[59] Case 207/83, Comm'n v. U.K. & N. Ir., 1985 E.C.R. 1201.

[60] *Ir.*, 1982 E.C.R. at 4005.

legible"[61] mark of their national origin. The regulation was indistinctly applicable, affecting imported and domestic products alike. However, the Court found that the measure was non-discriminatory in form only, because it permitted the British consumer to exercise prejudice against foreign goods.[62] The Court's reasoning relies on the debatable inference that British consumers would prefer German toasters over similar domestic products.[63] The challenged regulation could not withstand Article 30 scrutiny because it had "the effect of slowing down economic interpenetration in the Community."[64]

The concept of MEQRs is not limited to national legislation, the administrative regulation of official government agencies, or the semi-official efforts of publicly subsidized but ostensibly private authorities. The legal status of a quasi-official entity does not determine whether it is bound by the obligations of Article 30. Rather, the Court's decisions express that the nature of the functions and powers exercised are what determines whether the entities are bound by Article 30.

The holdings of private organizations, such as professional societies, will not avoid Article 30 scrutiny if the entity in question exercises special powers that may affect trade between Member States. In *The Queen v. Royal Pharmaceutical Society*,[65] the Court observed that national legislation conferred a special power that constituted an MEQR capable of affecting trade within the meaning of Article 30.[66] The aforementioned legislation named the Royal Pharmaceutical Society[67] as the mandatory registrar in order to issue prescriptions under the National Health Service.[68]

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[61] *U.K.*, 1985 E.C.R. at 1201 ¶ 3.

[62] *U.K.*, 1985 E.C.R. at 1201 ¶ 17.

[63] *U.K.*, 1985 E.C.R. at 1201 ¶ 19.

[64] *U.K.*, 1985 E.C.R. at 1201 ¶ 17.

[65] Case 266 & 267/87, Queen v. Royal Pharmaceutical Soc'y of Gr. Brit., 1989 E.C.R. 1295.

[66] *Id.* ¶ 5.

[67] The Royal Pharmaceutical Society of Great Britain is the sole professional body in which pharmacists must enroll in order to issue the prescriptions being discussed in this article.

[68] The National Health Service is the publicly financed national authority that manages the delivery of general health care to citizens of the United Kingdom.

The second basis for the far reaching scope of the *Dassonville*[69] formula is the low threshold required before an impact on interstate trade may be found.[70] The Court affirmed in *Van de Haar*[71] that the mere capability to actually or potentially, directly or indirectly hinder interstate trade is sufficient to transgress Article 30.[72]

Thus, in *Commission v. Germany*,[73] the Court held that the Biersteuergesetz[74] partitioned the market in violation of the Treaty because foreign brewers could not market a fermented product made from any cereal other than barley under the designation of "Bier." Beer not produced according to the Reinheitsgebot[75] could be sold in Germany, but not with the coveted "Bier." The Biersteuergesetz[76] did not overtly discriminate against foreign-produced beer, nor did it refer to foreign brewers. It simply stipulated manufacturing criteria that indirectly excluded foreign brewers from the German market by heightening the preference for domestic goods.[77]

The broad *Dassonville*[78] formula, which is concerned with all the trading rules[79] of Member States,[80] is tempered by a vaguely defined rule of reason: in the absence of Community rules in the relevant field, Member State measures that restrain unfair practices may be consistent with Community law if reasonable.[81] By avoiding any discussion of the exact nature

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[69] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

[70] *Id.* ¶ 5.

[71] Case 177 & 178/82, Officer Van Justitie v. Jan Van de Haar & K. Aveka de Meern B.V., 1984 E.C.R. 1797.

[72] *Id.* ¶ 14.

[73] Case 178/84, Comm'n v. F.R.G., 1987 E.C.R. 1227.

[74] The German beer purity law based on the original Reinheitsgebot, which was first adopted in Bavaria in 1516 to control the use of additives in brewing.

[75] *F.R.G.*, 1987 E.C.R. at 1227.

[76] *Id.*

[77] *Id.*

[78] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

[79] *Id.* ¶ 5.

[80] The Member States are Belgium, the Netherlands, Luxembourg, France, Germany, Italy, the United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria, Finland and Sweden.

[81] *Dassonville*, 1974 E.C.R. at 837 ¶ 6.

of this rule of reason,[82] the Court refrains from granting any unnecessary impetus to the residual national competence that it nevertheless acknowledges in *Dassonville*.[83] The lack of parameters in *Dassonville*[84] on the rule of reason[85] provides an explanation for the troubling lack of consistency in the Court's treatment of national measures regarding market circumstances and gives a logical force to the Court's attempt in *Keck*[86] to locate the outer borders of Article 30.[87]

In *Cassis de Dijon*,[88] the Court crafted another exception to *Dassonville*.[89] The exception states that Member States which have regulatory independence are subject to the requirements of Community law:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provi-

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[82] *See* Lord Hailsham, *supra* note 46, at 119. Lord Hailsham describes the rule of reason as:

> [A] good example of the approach of the Court of Justice in filling gaps in the structure of the EEC Treaty, pending the adoption of Community measures in the field. . . . It has recognized that, in the absence of legislative guarantees at the Community level, certain interests or values which are in the general interest may justify the refusal by a member state to permit goods from another member state to be imported or sold within its territory. . . . Measures which it is sought to justify under the rule of reason must be applicable to domestic and imported products alike, although equal applicability on their face will not be conclusive. Further, such measures must be proportionate and necessary to satisfy the needs of the interest which it is sought to protect.

With regard to the rule of reason and the ambit of Article 30, Lord Hailsham notes that:

> There is some debate as to whether the rule of reason operates so as to cut down the substantive scope of Article 30 itself or so as to accept the national measures, notwithstanding the terms of Article 30, pending appropriate guarantees adopted at Community level for the interests or values concerned. This latter approach is the better view, although the court has not always been clear on this point and sometimes has given credence to the former view.

[83] *Dassonville*, 1974 E.C.R. at 837.

[84] *Id.*

[85] *Supra* note 82.

[86] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[87] *Id.* ¶ 17.

[88] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 649.

[89] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

> sions may be recognized 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.[90]

Cassis de Dijon[91] establishes that Article 30 applies to indistinct measures which are equally applicable to domestic and imported goods. However, justified State rules will be permitted if they conform to a non-exclusive list of mandatory requirements.[92] The Member State[93] bears the burden of justifying a rule that exerts a market-partitioning effect as necessary to satisfy certain legitimate national interests.

Commentators, such as Gormley,[94] believe that by following *Cassis de Dijon*,[95] the jurisprudential basis of Article 30 will be firmly entrenched. The *Dassonville*[96] test will intercept state measures capable of hindering the free movement of goods, and the *Cassis*[97] principle will provide States with a narrow, judicially supervised discretion to protect vital national concerns.[98]

III. Article 30 And The Market Circumstances: Case Law In Chaos

The issue in *Keck*[99] involved a French ordinance that affected the market circumstances in which the accused supermarket managers sold their products. It neither targeted foreign competitors, nor compelled certain technical specifications for foreign-made goods sold at the supermarket. Furthermore, the safety, labeling or ingredients of such products were not affected by the French ordinance.[100] Rather, the legislation

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[90] *Bundesmonopolverwaltung Für Branntwein*, 1979 E.C.R. at 649 ¶ 8.

[91] *Bundesmonoploverwaltung Für Branntwein*, 1979 E.C.R. at 649.

[92] *Id.* ¶ 2.

[93] *Supra* note 80.

[94] *See* Laurence W. Gormley, *Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods*, 9 Y.E.L. 197 (1989).

[95] *Bundesmonopolverwaltung Für Branntwein*, 1979 E.C.R. at 649.

[96] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

[97] *Bundesmonopolverwaltung Für Branntwein*, 1979 E.C.R. at 649.

[98] *See* J. Steiner, *Drawing The Line: Uses and Abuses of Article 30 EEC*, 29 Common Mkt. L. Rev. 749, 753 (1992).

[99] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[100] *Id.*

was aimed at market behavior. By specifying manner of business regulations in the marketplace, the French authorities assumed the role of an arbiter between the supermarket and other economic actors, the smaller businesses and consumers.[101]

The confusing lack of consistency and clarity in Community law arises from the fact that, prior to *Keck*,[102] some State measures relating to market circumstances did not fall within the ambit of Article 30. Similarly, Article 30 often applied in other cases, but the State measure was permitted based upon the mandatory requirements contained in the *Cassis de Dijon*[103] judgment. When a State measure is justified on the grounds that it conforms to a mandatory requirement, the national court is required to determine whether the measure adopted is proportional to the end sought.

A comparison of these two types of cases presents an illustration of the analytic difficulty. In the *Oebel*[104] case, the Court considered whether a German prohibition on baking and transporting bread at night offended Article 30.[105] Mr. Oebel argued that the German legislation restricted the export of German baked goods to other countries, especially in border areas.[106] Mr. Oebel also asserted that the prohibition on night work distorted competition by preventing German bakers from arranging their production schedules in the most economically efficient manner.[107]

In rejecting Oebel's claim, the Court stated that the restriction on night production constitutes a legitimate element of economic and social policy consistent with the objectives of public interest articulated in the Treaty.[108] The Court noted that Article 30 was not contravened because trade within the Community was still possible with the condition that delivery to consumers and retailers be restricted equally for all producers.[109]

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101 *Id.*

102 *Id.*

103 Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 649.

104 Case 155/80, Summ. Proceedings Against Sergius Obel, 1981 E.C.R. 1993.

105 *Id.*

106 *Id.* ¶ 14.

107 *Obel*, 1981 E.C.R. at 1993 ¶ 17.

108 *Obel*, 1981 E.C.R. at 1993 ¶ 16.

109 *Obel*, 1981 E.C.R. at 1993 ¶ 20.

Similarly, in *Quietlynn v. Southend-on-Sea BC*,[110] even though goods from other Member States were subject to the ban, the Court still determined that a British law barring the sale of sex-related items from unlicensed establishments did not violate Article 30.[111] The challenged law was merely a rule regarding their distribution.[112] The Court also observed that intra-Community trade was possible at all times.[113]

Conversely, in the *Blesgen*[114] case, the Court rejected the same argument which prevailed in *Cassis de Dijon*[115] three years earlier. In this case, a Belgian café owner was prosecuted for selling consumption spirits stronger than those allowed under Articles 1, 2, and 14 of the Belgian Law of August 29, 1919, known as the Vandervelde Act.[116] This law was intended to control the consumption of strong spirits by limiting their accessibility during certain hours.[117] The defendant argued that the Belgian law hindered intra-Community trade by restricting the strong spirits produced in other Member States from reaching the Belgian market.[118]

Advocate-General Reischl's[119] distinction that the Belgian prohibition did not involve marketing rules appears strained in

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[110] Case C-23/89, Quietlynn Ltd. and Brian James Richards v. Southend Borough Council, 1990 E.C.R. i.

[111] *Id.*

[112] *Id.* ¶ 9.

[113] *Quietlynn*, 1990 E.C.R. at i ¶ 11.

[114] Case 75/81, Joseph Henri Thomas Blesgen v. State of Belg., 1982 E.C.R. 1211.

[115] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung fuer Branntwein, 1979 E.C.R. 649.

[116] The Vandervelde Act is articulated in the Belgian Law of August 29, 1919, the Vandervelde Law. This Law was enacted to limit the accessibility of alcoholic beverages. This was accomplished by imposing conditions on the retail sale of these beverages.

[117] *Blesgen*, 1982 E.C.R. at 1211 ¶ 4.

[118] *Blesgen*, 1982 E.C.R. at 1211 ¶ 3.

[119] The Advocate General is an officer of the Court. His or her role is to analyze the issues of Community law in each case and to present a public opinion to the Court on the proper result under Community law. Opinions of the Advocate General do not always correspond with the opinion of the Court. Opinions of the Advocate General can be quite influential, and they often foreshadow the future development of Community Law. Advocates General are usually legal scholars of high regard or indeed former judges in their own country. There are nine Advocates General, who are appointed to the Court for six year terms. There is no comparable judicial officer or procedure in the legal system of the United States.

reasoning.[120] Reischl's analysis clearly illustrates the central flaw of the Court's market circumstances jurisprudence prior to *Keck*[121] which was the lack of a principled basis by which to fashion a consistent doctrine.[122]

Reischl contended that the rules regulating alcohol were not marketing rules, but were rules regulating the use of alcoholic beverages because they only barred the serving and stocking of certain alcoholic drinks, and not their sale and stocking.[123] Consequently, the Belgian rules could not be considered MEQRs that offend Article 30. However, Reischl does not explain how establishments can sell goods without engaging in any form of marketing and his opinion does not attempt to reconcile this apparent logical inconsistency.

Relying on the Court's judgment in *Oebel*,[124] Reischl stated that since the Belgian law had no adverse effect on intra-Community trade, it was not protectionist and did not transgress Article 30.[125] The Court's judgment stated that the Belgian prohibition had nothing to do with the importation of goods.[126]

The Court did find Article 30 to be applicable in the *Oosthoek*[127] case. As a sales promotion, Oosthoek[128] offered subscribers a small free gift based on the value of the purchase, a practice that violated Dutch law.[129] The Court interpreting Netherlands legislation ruled that the sale of encyclopedias produced in that country was not linked with intra-Community trade and did not fall within the scope of Article 30.[130] In contrast, the Court observed that the Netherlands law did oblige Oosthoek to adopt different sales promotion schemes in differ-

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120 *Blesgen*, 1982 E.C.R. at 1211.

121 Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

122 *Blesgen*, 1982 E.C.R. at 1211.

123 *Id.*

124 Case 155/80, Summ. Proceedings Against Sergius Obel, 1981 E.C.R. 1993.

125 *Blesgen*, 1982 E.C.R. at 1211.

126 *Id.*

127 Case 286/81, Criminal Proceedings Against Oosthoek's Utigeversmaatschappij BV, 1982 E.C.R. 4575.

128 Oosthoek, a Dutch firm, marketed Dutch language encyclopedias throughout the Netherlands and in the Dutch-speaking part of Belgium.

129 The Dutch Law of 1977, Wet Beperking Cadeaustelsel, was the law on the restriction of free gift schemes.

130 *Oosthoek*, 1982 E.C.R. at 4575 ¶ 9.

ent Member States, limiting intra-Community trade in encyclopedias and thus coming within the sphere of Article 30.[131]

In *Cinétheque v. Féderation des Cinémas Françaises*,[132] the influential opinion of Advocate-General Slynn[133] indicated the contours of the standard which the Court would later adopt in *Keck*.[134] Cinétheque, a video importer, relied on *Dassonville*[135] to challenge a French law[136] which banned the selling or renting of film video-cassettes for a period of one year after the issuance of a performance certificate for the film in question. The measure, justified as a form of cultural preservation, applied equally to all trade in video-cassettes for the twelve-month period. Imported and domestic videos alike were barred from the market.[137]

The Court's ruling in *Cinétheque*[138] is significant in several respects. The Court heard the case in plenary session, indicating that it was dealing with a difficult and controversial interpretation of Article 30. The noteworthy opinion of Advocate-General Slynn also illustrates the unique function of the Advocate-General in affecting the development of Community law. The Advocate-General's role is derived from the French *Commissaire du Gouvernement*[139] at the *Conseil d'Etat*,[140] who is to act as "the embodied conscience of the Court,"[141] a non-partisan defender of justice. By proposing a new, principled solution to market circumstances cases that attempts to channel Community law in a new direction while preserving the market integrating force of Article 30, Slynn's opinion affirms his keen

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131 *Oosthoek*, 1982 E.C.R. at 4575 ¶ 10.

132 Joined cases 60 & 61/84, Cinetheque SA and Others v. Fédération nationales des cinémas français, 1986 E.C.R. 2605.

133 *Supra* note 119.

134 Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

135 Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

136 *Cinetheque*, 1986 E.C.R. at 2606.

137 *Id.*

138 *Cinetheque*, 1986 E.C.R. at 2605.

139 D. LASOK & J.W. BRIDGE, LAW INSTITUTIONS OF THE EUROPEAN COMMUNITIES, 283 (1991).

140 *Id.*

141 C. HAMSON, THE EXECUTIVE DISCRETION AND JUDICIAL CONTROL, *quoted in* LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES, 283 (D.Lasok & J.W. Bridge eds., 1991).

appreciation of the embodied conscience province of his office. Slynn's advice to the Court in *Cinétheque*[142] also illustrates the effective interplay of the three primary roles of the Advocate-General. The Advocate-General is expected to propose a solution for the case presented to the Court;[143] to relate the proposed solution in the case at hand to the overall pattern of the existing case law;[144] and to indicate, if possible, the future development of the case law.[145]

Advocate-General Slynn acknowledged that Article 30 jurisprudence "must inevitably develop on a case-by-case basis"[146] as different fact situations are continually presented to the Court. The Advocate-General then proposed that although Article 30 "appears to be couched in absolute terms,"[147] it cannot be read to impose an absolute injunction.

On this premise, Slynn urged the Court to find, in the absence of discrimination against foreign products and protection of the domestic market, that *prima facie* the measure does not fall within Article 30 even if it does in fact lead to a restriction or reduction of imports.[148] Despite the simplicity and logical force of this solution, the Court was not prepared to go as far in charting a new course for Article 30 as Advocate-General Slynn wanted. It found that the legislation being scrutinized did not discriminate against foreign goods, but observed that an obstacle to intra-Community trade may be created because video-cassettes that may be lawfully sold in one Member State may not be sold in France.[149] The Court found that this type of barrier to trade is lawful provided that it is necessary to attain an objective justified under Community law.[150] The Court also held that the encouragement of films in cinemas as a priority over other means of film distribution is compatible with the aims of the public interest, more specifically the free movement of goods, as stated in the Treaty.[151] The Court finally concluded

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142 *Cinetheque*, 1986 E.C.R. at 2605.
143 D. LASOK & J.W. BRIDGE, *supra* note 139, at 283.
144 *Id.*
145 *Id.*
146 *Cinetheque*, 1986 E.C.R. at 2611.
147 *Id.*
148 *Id.*
149 *Cinetheque*, 1986 E.C.R. at 2605 ¶ 22.
150 *Cinetheque*, 1986 E.C.R. at 2605 ¶ 24.
151 *Cinetheque*, 1986 E.C.R. at 2626.

that the proportionality of the measure to the intended consequence is a matter for the national court to decide.[152]

In *GB-INNO-BM v. Confédération du commerce luxembourgeois*,[153] the Court found that legislation that restricts or bans certain forms of advertising may restrict the volume of trade because it affects marketing opportunities, although it does not directly affect trade.[154] As compared to the French supermarket managers in *Keck*,[155] who operated a retail business near a border area, the Belgian company *GB-INNO-BM*[156] operated supermarkets close to the Luxembourg border. The company distributed advertising leaflets in Luxembourg which promoted the sale of retail goods at a temporarily reduced price.[157] The advertising complied with Belgian legislation relating to unfair competition, but not with the Grand Duchy's rules which prohibited the offering of retail goods at temporarily reduced rates.[158]

Advocate-General Lenz,[159] stressing the general nature of the prohibition against all MEQRs, stated that one could distinguish the national legislation at issue from other national legislation that might also affect intra-Community trade by geographic proximity.[160] According to his analysis, the Luxembourg regulations transgress Article 30 because they specifically affect the external trade of Belgium across the frontier; conversely, the prohibition in *Oebel*[161] against night-time work in bakeries does not affect external trade.[162]

In *Torfaen Borough Council v. B&Q plc*,[163] the Court considered whether a British Sunday trading law (The Shops Act),[164] which forbids the sale of certain items,[165] resulting in

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152 *Cinetheque*, 1986 E.C.R. at 2605 ¶ 26.

153 Case 362/88, GB-INNO-BM SA v. Confederation du Commerce Luxembourgeois Asbl., 1990 E.C.R. I-667.

154 *Id.* ¶ 7.

155 Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

156 *GB-INNO-BM*, 1990 E.C.R. at I-667 ¶ 2.

157 *Id.*

158 *GB-INNO-BM*, 1990 E.C.R. at I-667 ¶ 3.

159 *Supra* note 119.

160 *GB-INNO-BM*, 1990 E.C.R. at I-667 ¶ 6.

161 Case 155/80, Summ. Proceedings Against Sergius Obel, 1981 E.C.R. 1993.

162 *Id.*

163 Case 145/88, Torfaen Borough Council v. B & Q PLC, 1989 E.C.R. 3851.

164 Shops Act, 1950, 14 Geo. 6, ch. 28, § 47, sched. 5 (Eng.).

reduced total weekly sales, could survive Article 30 scrutiny. The Court found that the Sunday trading rules hindered trade, and would only be acceptable if they could be justified.[166] The application of the *Torfaen*[167] decision in the United Kingdom was chaotic, because certain courts had taken the view that the Shops Act was compatible with Article 30 while other courts reached the opposite conclusion.[168]

The disparate outcomes of these cases show how difficult they are to reconcile. *Torfaen*[169] and *GB-INNO-BM*[170] suggest that some reduction in the volume of imports or sales of a particular product will offend Article 30. However, the regulations in *Oebel*[171] and *Quietlynn*[172] were also capable of causing reduction in the volume of imports. The Court's justification in *Oebel*[173] and *Quietlynn*[174] that trade between Member States remained possible at all times was also applicable in *Torfaen*[175] and in *GB-INNO-BM*.[176] The prohibition in *Oebel*[177] withstands Article 30 examination because it is aimed at improving working conditions "in a manifestly sensitive industry."[178] The "sensitive industry" test[179] introduced by the Court raises more questions than it answers. One question raised is whether the baking industry is a more sensitive industry than the retail industry that is challenged in *GB-INNO-BM*.[180] The Court offers neither an explanation nor an objective standard for guidance. The Court's judgment suggests the possibility that a Member

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165 *Id.*

166 *Torfaen*, 1989 E.C.R. at 3851 ¶ 13.

167 *Torfaen*, 1989 E.C.R. at 3851.

168 STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 471-72 (1993).

169 *Torfaen*, 1989 E.C.R. at 3851.

170 Case 362/88, GB-INNO-BM SA v. Confederation du Commerce Luxembourgeois Asbl., 1991 E.C.R. I-667.

171 Case 155/80, Summ. Proceedings Against Sergius Obel, 1981 E.C.R. 1993.

172 Case C-23/89, Quietlynn Ltd. and Brian James Richards v. Southend Borough Council, 1990 E.C.R. at i, 1-3059.

173 *Obel*, 1981 E.C.R. at 1993.

174 *Quietlynn*, 1990 E.C.R. at 1-3059.

175 Case 145/88, Torfaen Borough Council v. B & Q PLC, 1989 E.C.R. 3851; *see generally* Steiner, *supra* note 98, at 757.

176 Case 362/88, GB-INNO-BM SA v. Confederation du Commerce Luxembourgeois Asbl., 1990 E.C.R. I-667.

177 *Obel*, 1981 E.C.R. at 1993.

178 *Id.* at 2008.

179 *Id.* ¶ 12.

180 *GB-INNO-BM*, 1991 E.C.R. at I-667.

State may raise the defense that an MEQR should pass Article 30 muster because it concerns a manifestly sensitive industry.

The judgments of these competing cases cannot be distilled into a coherent legal principle or set of principles. This variety of outcomes also illustrates that it was untenable for the Court to attempt to craft logically consistent distinctions in market circumstances cases. This is true even though Advocate-General Slynn argued in *Cinétheque*[181] that this is precisely how Community law develops.

These confusing, unpredictable results were a consequence of the application of the two-part inquiry articulated in *Cassis de Dijon.*[182] According to this inquiry, the Court must first decide whether the ends established by the national measure are mandatory and whether they promote objectives consistent with Community law. When the objective is clearly framed, the second inquiry stipulated in *Cassis*[183] requires the national court to assess whether the measure is proportional and whether it goes only as far as necessary to achieve the objective. Both elements of the *Cassis*[184] rule tend to increase the likelihood that the final result in the national courts will be unsatisfactory because it may be capable of more than one good-faith interpretation.

A broad interpretation of Article 30, with regard to mandatory requirements, invites a mechanical application[185] of the *Dassonville*[186] test, as Advocate-General Van Gerven[187] described in *Torfaen.*[188] Under this interpretation, the Court will be confronted with "countless new mandatory requirements and grounds of justification. . . . National policy decisions would constantly be submitted to it with a request to extend the list of examples of mandatory requirements."[189] Van Gerven feared

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[181] Joined cases 60 & 61/84, Cinetheque SA and Others v. Federation nationales des cinemas francais, 1986 E.C.R. 2605, 2611.

[182] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung fuer Branntwein, 1979 E.C.R. 649.

[183] *Id.* ¶ 14.

[184] *Id.*

[185] Case 145/88, Torfaen Borough Council v. B & Q PLC, 1989 E.C.R. 3851.

[186] Case 8/74, Procureur du Roi v. Benoit & Gustave Dassonville, 1974 E.C.R. 837 ¶ 5.

[187] *Supra* note 119.

[188] *Torfaen*, 1989 E.C.R. at 3879.

[189] *Id.* at 3880.

that such a constantly expanding list would "coincide with a certain residual power of the Member States."[190]

The application of the second *Cassis*[191] element, the proportionality test,[192] also presents severe challenges for national courts. It is the national courts that will be required to affirm the reasonableness of the policy decisions of Member States, Van Gerven noted, "where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products."[193] Steiner[194] argues that because proportionality is a question of fact, to be decided on the evidence adduced, the outcome of each case will turn on the strength of the evidence presented, resulting in an outcome which may vary from case to case.[195] This disparity in judicial outcome, which is most disturbingly evident in the British Sunday trading decision,[196] presents a compelling argument that the Court must craft a more principled rule that national courts can apply in a more even-handed fashion.

IV. Two Solutions To The Overreach of Article 30

In *Torfaen*,[197] Advocate-General Van Gerven stated that the case posed such a difficult inquiry relating to national measures that any further inquiries of this kind "should be avoided as far as possible by interpreting Article 30 in accordance with the intendment of the Treaty."[198]

Van Gerven proposed an economic solution, raising the threshold which triggers Article 30.[199] He derived a rule of application by distinguishing *Cinétheque*[200] from *Torfaen*.[201] In *Cinétheque*,[202] Van Gerven averred, the French law[203] banning

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190 *Id.*

191 Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 649.

192 *Id.*

193 *Torfaen*, 1989 E.C.R. at 3880.

194 Steiner, *supra* note 98, at 759.

195 Steiner, *supra* note 98, at 759.

196 *Torfaen*, 1989 E.C.R. at 3851.

197 *Id.*

198 *Torfaen*, 1989 E.C.R. at 3883.

199 *Id.*

200 Joined cases 60 & 61/84, Cinetheque SA and Others v. Federation nationales des cinemas francais, 1986 E.C.R. 2605.

201 *Torfaen*, 1989 E.C.R. at 3851.

202 *Cinetheque*, 1986 E.C.R. at 2605.

video-cassettes had compartmentalized the French market, screening it off from competition in other Member States. He stated the appropriate place to look for guidance on market partitioning in the Treaty is Article 85,[204] which deals with concerted practices that restrict or distort competition. Van Gerven suggested that the principle that should be applied is the principle contained in Article 85(1),[205] which prohibits agreements that make access to markets more difficult if it can be demonstrated, on the basis of the whole legal and economic context, that the agreement extends over the whole territory of the Member State.[206] In a situation like *Cinétheque*,[207] Van Gerven recognized that market integration was in jeopardy and

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[203] *Id.*

[204] ARTICLE 85 OF THE EEC TREATY, *supra* note 3, at 32, states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

—any agreement or category of agreements between undertakings;

—any decision or category of decisions by associations of undertakings;

—any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[205] *Id.*

[206] *Torfaen*, 1989 E.C.R. at 3877.

Article 30 would be automatically applicable.[208] On the other hand, he noted, the Sunday trading laws[209] in *Torfaen*[210] were only marginally relevant to intra-Community commerce and did not pose a serious obstacle to the creation of a common market.[211]

Van Gerven's notion of a 'screening test'[212] is intellectually appealing because it would appear to limit the application of Article 30 to national measures hostile to market integration. However, Van Gerven's proposed test is vague, with no clear criteria for application. It does not suggest any criteria for deciding when market integration is threatened, nor does it recommend a threshold for the application of such criteria. The Advocate General's opinion offers no guidance. Moreover, as Steiner notes,[213] it may be a very difficult matter for the Court to examine the entire national legal and economic context in order to determine whether a state measure that appears to partition a market is a *prima facie* breach of Article 30.

It is contended that "Van Gerven's solution puts excessive demands on national courts."[214] Relying on a French study, Mortelmans notes that "if the European Court of Justice instructs national courts to follow economic criteria, such as those relating to national price measures and EEC agriculture market regulations, the national courts fail to do so in a uniform manner."[215]

The new standard established by the Court in *Keck*[216] is quite similar to the legislative solution suggested by Eric White.[217] White's rule of decision simply provides that indistinctly applicable national measures which regulate the circum-

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[207] Joined cases 60 & 61/84, Cinetheque SA and Others v. Federation nationales des cinemas francais, 1986 E.C.R. 2605.

[208] *Torfaen*, 1989 E.C.R. at 3874.

[209] *Id.* at 3851.

[210] *Id.*

[211] *Id.* at 3879.

[212] *Id.* at 3874.

[213] *See* Steiner, *supra* note 98, at 764.

[214] Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Direction?*, 28 COMMON MKT. L. REV. 127 (1991).

[215] *Id.*

[216] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[217] Eric White served as the Agent for the Commission in *Torfaen*.

stances in which goods may be sold or used in a general and neutral manner "are not incompatible with the objective of creating a unified market comparable to a domestic market and do not fall under Article 30."[218]

The rule adopted by the Court in *Keck*,[219] which is similar to White's proposed rule, will be much easier for national courts to apply. Once the Court has determined that legislation regarding market circumstances, such as the French resale at loss regulations or the British Sunday trading law,[220] does not fall under Article 30, the national court does not have to refer the case. This will promote certainty and clarity in commercial exchanges both within the Community and in individual Member States. The Court will not be as burdened with the large number of time-consuming Article 177 references, and can spend its time dealing with serious threats to the single market, such as import bans,[221] import licenses,[222] unnecessary customs formalities,[223] delivery restrictions,[224] and regulations requiring preferential treatment of national products.[225] Article 30 will no longer be in danger of becoming "a busybody's charter for attacking national measures in purely national situations with scarcely the most tenuous link with intra-Community trade."[226]

CONCLUSION

There are perhaps more significant reasons for believing that the Court has adopted the correct approach with respect to market circumstances legislation in *Keck*.[227] First, the evidence is compelling that, with respect to national legislation restrict-

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[218] Eric White, *In Search Of The Limits To Article 30 Of The EEC Treaty*, 26 COMMON MKT. L. REV. 259 (1989).

[219] *Keck & Mithouard*, Joined Cases 267 & 268/91.

[220] Case 145/88, Torfaen Borough Council v. B & Q PLC, 1989 E.C.R. 3851.

[221] Case 2/73, Riseria Luigi Geddo v. Ente nazionale Risi, 1973 E.C.R. 865.

[222] Joined Cases 51-54/71, Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit, 1971 E.C.R. 1107.

[223] Case 42/82, EC Comm'n v. Fr., 1982 E.C.R. 841.

[224] Case 272/80, Frans-Nederlandse Maatschappij voor Biologische Producten BV, 1981 E.C.R. 3277.

[225] Case 13/78, Joh Eggers Sohn & Co. v. Freie Hansestadt Bremen, 1978 E.C.R. 1935.

[226] Gormley, *supra* note 94, at 197-99.

[227] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

ing or prohibiting certain selling arrangements, Article 30 jurisprudence in Member States had moved from theoretical coherence to practical dysfunction. The Court did not explicitly overrule *Cassis*,[228] even though the Court's authority does not derive principally from *res judicata*[229] and it could easily have done so. Instead, it modified the *Cassis*[230] principle by reshaping it into a presumption that national marketing rules must be shown to have a discriminatory effect before the Court will find that such rules violate the Treaty.[231] The *Keck*[232] judgment creates, in effect, a more sharply focused rule of reason which, like all exceptions to the fundamental principles of the Treaty, should be narrowly construed.[233]

The Court manifests a prudential approach in crafting a new market circumstances presumption that keeps with the nature of the evolution of Community law.[234] It has been noted that "the Community legal order is an emerging and developing legal order in which a formally binding, rigid precedent of the Court's case law would be hardly feasible. The stability of the case law must be reconciled with the requirements of an emerging Community and the corresponding development of its law."[235] In fashioning this new presumption, the Court signals that it is no longer willing to cobble together disparate cases in search of a unifying principle.[236]

Second, the Court's new presumption with respect to market circumstances in *Keck*[237] enhances the primary function of the Court, to assure the uniform application and interpretation

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[228] Case 120/78, Rewe-Zentrale v. Bundesmonopolverwaltung fuer Branntwein, 1979 E.C.R. 649.

[229] BLACK'S LAW DICTIONARY 905 (6th ed. 1991). *Res judicata* is defined as a matter that has been adjudicated.

[230] *Bundesmonopolverwaltung fuer Branntwein*, 1979 E.C.R. at 649.

[231] *See* Norbert Reich, The November Revolution of the European Court: Keck and Audi Revisited, (Feb. 1994) (unpublished manuscript, on file with author).

[232] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[233] *Id.*

[234] *Id.*

[235] GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 12-13 (1981).

[236] *Keck & Mithouard*, Joined Cases 267 & 268/91 at 236.

[237] *Keck & Mithouard*, Joined Cases 267 & 268/91.

of Community law by national courts.[238] According to Bebr,[239] the Court's central task is to ensure the rule of law, strengthen the Community legal order, and promote its coherent development.

Conflicting interpretations of Community law threaten the coherent development of a Community legal order when they spur waves of Article 177 challenges of dubious integrationist worth. The absence of a coherent market circumstances doctrine[240] in turn gives rise to even more meritless Article 177 claims. This haphazard jurisprudence threatens the very purpose of Article 177, which Bebr describes as, "[t]he indispensable guarantee for the very existence of the Community legal order and its further development."[241]

Although the Court does not present the final judgment in a case when it exercises its authority to rule on points of Community law under Article 177, a robust and unfettered Article 177 is nevertheless essential to the development of the Community legal order. Moreover, the obligation of a national court of last instance to refer is mandatory when a matter of interpretation arises. The Court has ruled that this obligation to refer is absolute, with no exceptions, "[T]he third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law. . .to refer to the Court every question of interpretation raised before them. . . ."[242] Absent a determination by the Court that a matter does not offend a Treaty article and need not be referred, the obligation to refer when a matter of interpretation arises cannot be disregarded.

Article 177 has launched some of the most integrationist concepts of Community law, including the doctrine of the supremacy of Community law[243] and the doctrine that elements

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238 EC LEGISLATION (Nigel G. Foster ed., 4th ed., Blackstone Press 1993). According to Article 164, as amended by the Treaty on European Union, the Court "shall ensure that in the interpretation and application of this Treaty the law is to be observed."

239 BEBR, *supra* note 235, at 4.

240 BEBR, *supra* note 235, at 7.

241 BEBR, *supra* note 235, at 7.

242 Cases 28-30/62, Da Costa v. Nederlandse Belastingadministratie, 1963 E.C.R. 31.

243 Case 6/64, Costa v. Ente Nazionale Per L' Energia Elettrica (ENEL), 1964 E.C.R. 585.

of Community law do not require implementing legislation to have direct effect in the legal systems of Member States.[244] Mandatory Article 177 references from national courts comprise about one half of the caseload of the Court in actions brought under the Treaty.[245] When meritless Article 177 claims clutter the Court's calendar, the average period of time that a national court must wait for the Court's judgment in a case that does have substantial integrationist merit can be as long as a year and a half.[246] Delays of this magnitude impair justice and may, at least in a de facto[247] sense, limit the supremacy of Community law.[248]

Also, the Court's decision in *Keck*[249] should be considered in light of the rapid constitutional development that has occurred within the Community. The European Court of Justice assumed a critical role in what Weiler terms the Foundational Period of the Community by proposing integrating legal rules in a judicially driven constitutionalization process to compensate for a disintegrating political framework.[250] During this period, rampant "Euro-pessimism," spurred by widespread disagree-

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[244] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1.

[245] Comm'n Report, XXIVth General Report on the Activities of the Communities 1990, 1991 EC Official Publications 449.

[246] *Id.*

[247] BLACK'S LAW DICTIONARY 287 (6th ed. 1991). De facto is a phrase used to characterize a state of affairs which must be accepted for all practical purposes but is really illegitimate or illegal.

[248] In the landmark Costa v. ENEL, 1964 E.C.R. 585, the Court resolved an issue fundamental to the legal role of the Community when the Court emphasized the autonomy of Community authority and asserted the unlimited duration of the Community itself. The case was based on an individual's claim in a local court that the law nationalizing the production and distribution of electricity was incompatible with the Treaty. The local court referred several questions to the Court. In its argument before the Court, the Italian Government claimed that the local court's Article 177 request was inadmissible because the Italian court was only entitled to apply Italy's nationalization law and not the law approving the Treaty, since the latter law was approved earlier and was therefore subordinate to subsequent Italian legislation. The Italian Government's argument was based on a previous decision by the Italian Constitutional Court. *ENEL*, 1964 E.C.R. at 585. This case aroused great concern in the Community before it was resolved by the Court. A delay of many months in resolving this critical issue might have encouraged other Member State action to qualify the supremacy of Community law, attenuating and perhaps dooming integration.

[249] Joined Cases 267 & 268/91, Republic of Fr. v. Bernard Keck & Daniel Mithouard, (E.C.J. Nov. 24, 1993).

[250] J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2426 (1991).

ment about the velocity and ultimate aims of integration and the parallel decline of the supranational features of Community decision-making, lead ardent proponents of integration to conclude that complete constitutionalization was improbable. Now, a revitalized constitutional structure has effectively "locked" the Member States into a functioning, though not harmonious, collective decision-making forum. Astute political leaders have long realized that a government that enjoys political legitimacy is one that will be able to economize on political resources. There is no government, whether a unitary state or a nascent federal coalition, that can afford to even appear ineffectual through the profligate allocation of decision-making authority.

Clashing legal rules that turn on fact situations not easily distinguished from one another may spark a lack of confidence in the Community and its legal structure. The Court has affirmed in *Van de Haar*[251] that there is no *de minimis*[252] exception to Article 30.[253] Even if the obstacle to intra-Community trade is ephemeral and imported products can be marketed in other ways, the offending legislation will still run afoul of the omnibus Article 30. The removal of culturally and socially driven market circumstances measures from the Article 30 calculus will afford a more rigorous analysis of whether a rule affects intra-Community trade and what the constitutional basis of these rules should be.

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[251] Case 177 & 178/82, Officer Van Justitie v. Jan Van de Haar & Aveka de Meern B.V., 1984 E.C.R. 1797.

[252] BLACK'S LAW DICTIONARY 297 (6th ed. 1991). *De minimis* is defined as a trifling matter.

[253] *Van de Haar*, 1984 E.C.R. at 1797.

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