







Last week's recap

Introduction to economic integration

Customs Union and the Internal Market

Fiscal barriers to the free movement of good

- A30 TFEU: customs duties and CEEs
 - Absolute prohibition unless exceptions
- A110 TFEU: internal taxation
 - 1)Direct/indirect discrimination b/n similar goods
 - 2)Protectionist effect b/n competing goods

NB. A30 & A110 TFEU are mutually exclusive!

Today's Lecture

- Article 34 TFEU: non-fiscal barriers to the free movement of goods relating to imports
 - CJEU judgments that introduced different tests depending on the type of measure constituting a nonfiscal barrier
- Article 36 TFEU: justifications for directly or indirectly discriminatory measures
 - Further justifications:
 - Cassis de Dijon: 'mandatory requirements' which can justify an 'indistinctly applicable' measure

Fiscal & non-fiscal barriers

- Fiscal barriers to the free movement of goods:
 - Customs duties or CEEs (e.g., statistical levy, storage costs, etc.) – A30 TFEU
 - Internal taxation
 - which discriminates between similar domestic and foreign goods – A110(1) TFEU
 - which has protectionist effects between competing domestic and foreign goods – A110(2) TFEU
- Non-fiscal/regulatory barriers to the free movement of goods – A34 TFEU
 - Quantitative restrictions and measures that have an equivalent effect (MEQRs – e.g., rules on alcohol content, packaging, marketing*, limiting consumer use, etc.)





Article 34

(ex Article 28 TEC)

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

What is a 'quantitative restriction'?

- Any restriction on imports which is based on numbers, e.g.:
 - Case 2/73 *Geddo*: defined as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit'.
 - Case 34/79 *Henn & Darby:* an outright ban on import of 'indecent and obscene' materials.
- Largely unproblematic application

MEASURES THAT HAVE AN EQUIVALENT EFFECT TO QUANTITATIVE RESTRICTIONS

Measures that have an equivalent effect to quantitative restrictions (MEQRs/MEEQRs/MEEs)

Based on complex CJEU case-law over many years

Four periods around landmark judgments:

- Dassonville (1974): border measures
- Cassis de Dijon (1979): product requirements
- Keck (1993): selling arrangements
- Commission v Italy (Italian Trailers 2009): restrictions on use





Defining MEQRs: Dassonville

- Case 8/74 Dassonville: Belgian law required a certificate of origin for all imports. This caused problems for the import of goods into Belgium from other member states
- An MEQR was defined in very wide terms:
- 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intracommunity trade'
- Potential effect of measure is key

What types of measures can be MEQRs?

- Important to distinguish between distinctly and indistinctly applicable measures
 - Distinctly applicable measures affect imports in a discriminatory way – can only be justified under A36 TFEU
 - Indistinctly applicable measures apply equally to domestic and imported goods – can be justified either under A36 TFEU or by rule of reason
- Does the Court's definition of MEQRs in Dassonville cover both, potentially leading to 'hyper-liberalization'?
 - Different views: Weiler, 2000 vs Schütze, 2018
- Measure in *Dassonville* was distinctly applicable
- What about indistinctly applicable measures?
 See Cassis de Dijon

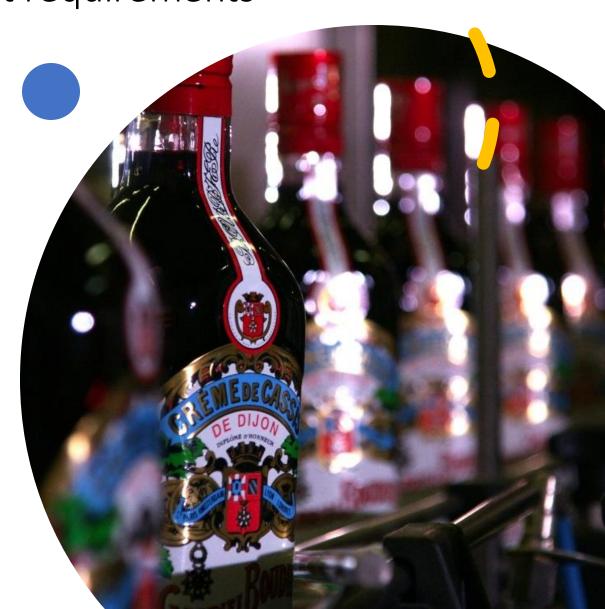
MEQRS: PHASE 2 – CASSIS DE DIJON AND INSTINCTLY APPLICABLE RULES ON PRODUCT REQUIREMENTS

Case 120/78 *Cassis de Dijon*: indistinctly applicable rules on product requirements

- German law provided that fruit liqueurs could only be marketed if they had a minimum alcohol content of 25%.
 French cassis was 15-20%. It could not be sold in Germany ... even though it was lawfully marketed in France.
- This was an MEQR: there was no ban on French cassis per se but it was impossible to market it in Germany. BUT: it was not distinctly applicable, but indistinctly applicable.
- Prior to *Cassis* indistinctly applicable measures would only exceptionally qualify as MEQRs (Article 3 of Directive 70/50)

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules (Cassis de Dijon)

 Following Cassis the principle of mutual recognition applies, which prohibits indistinctly applicable measures such as those in Cassis that imposed domestic product standards on imported goods, unless they can be justified by mandatory requirements or Article 36 TFEU





Case 120/78 *Cassis de Dijon*: mandatory requirements

- (...) Obstacles to movement within the [Union] resulting
 from disparities between the national laws relating to the
 marketing of the products in question must be accepted
 in so far as those provisions may be 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.
- Rule of reason: regulatory measures by MS that create barriers to free movement are accepted, but only if they could be justified by a mandatory requirement
- Open-ended list of justifications that MS can rely on in addition to those under Article 36 TFEU

What is the problem with *Cassis de Dijon*?

- Made it easy for indistinctly applicable measures to fall within the scope of Article 34.
- Numerous challenges to national economic regulation:
 - Consider 'Sunday Trading': Case 145/88 Torfaen v B&Q. Restrictions on Sunday trading hours were held to be an MEQR that could not even be justified by the rule of reason ... but they are clearly not aimed at imports or even discriminatory.
 - Where do we draw the line?



MEQRS: PHASE 3 – KECK AND SELLING ARRANGEMENTS



Case C-267/71 *Keck*and Mithouard:
Selling arrangements —
case law regenerates

- Issues with expansive jurisprudence of CJEU following Cassis de Dijon
- Keck: criminal proceedings against store manager b/c he had allowed products to be sold at a loss, which was prohibited in France. He argued that this was an MEQR similar to Sunday Trading cases.
- French rule was indistinctly applicable.
- CJEU: Divided MS measures into two types:
- 1. Product requirements (rules on designation, form, size, weight, composition, presentation, labelling, etc.)
- 2. Selling arrangements (rules on shop opening hours, methods and sites of sale, advertising, etc.)
- Certain 'Selling Arrangements' are not capable of being an MEQR



The CJEU's reasoning in Keck



Product requirements:

'It is established by the case-law beginning with "Cassis de Dijon" (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article [34]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.'

Selling arrangements:

'By contrast, **contrary to what has previously been decided**, the application to products from other Member States of national provisions restricting or prohibiting **certain selling arrangements** is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), **so long as** those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Keck: 'Selling Arrangements' are not capable of being an MEQR, so long as...

'(...) so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.'

Two conditions are required for the Keck approach to apply to a rule relating to selling arrangements:

- 1. That it applies to all relevant traders operating within the national territory;
- 2. That imported and domestic products are affected in the same manner, in law and in fact.
- ➤ If these two conditions are met, then the national measure does not constitute an MEQR
- ➤ In other words, discriminatory selling arrangements are MEQRs and fall within the remit of A34 TFEU



What is a 'selling arrangement'?

- Something that is not a specific product requirement, but instead relates to the way in which goods are marketed or sold.
- *Keck*: a prohibition on selling at a loss
- Case C-391/92 Commission v Greece (Baby Milk): baby milk can only be sold in pharmacies.
- Case C-292/92 Hünermund; Case C-412/93 Leclerc-Siplec: partial advertising bans.
- Cases C-401/92 and 402/92 Tankstation:
 Sunday trading rules





Measures which are not selling arrangements

- 'Product characteristics' are not selling arrangements: see Case C-470/93 Mars: '10% extra free!'
- Nor are 'product use' rules: Case C-110/03 Trailers; Case C-142/05 Mickelsson & Roos (see next slides).
- Some measures which could be selling arrangements in a different context might not be selling arrangements:
- ➤ Gourmet International: Sweden restricts the advertisement of alcoholic drinks to trade publications only. This applies to all alcoholic drinks. Does it satisfy Keck? Hünermund allowed an advertising ban ...

... but because although it applies *in law* equally, *in fact* this has the effect of maintaining the market position of domestic goods – i.e. those with which the Swedish consumer is familiar. You could not break into this market by advertising to the public.

Criticisms of Keck

- No clear definition of selling arrangement
 - CJEU case-law on case-by-case basis
- Distinction between product requirements and selling arrangements was crucial
 - Can all national rules fall within one of these definitions?
 - Artificial and unworkable distinction?

Product requirements

always MEQR

Selling arrangements

- MEQR if discriminatory/ distinctly applicable
- Not MEQR if it applies i) to all traders ii) in the same manner

MEQRS: PHASE 4 — MARKET ACCESS TEST

C-110/05 Commission v Italy (Italian Trailers): rules that limit consumer use & market access



• Italian Trailers: Italian Highway Code prohibited use of trailers on motorcycles on public highways; is this an MEQR even though the measure is neither a product requirement nor a selling arrangement?

"... measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of [Article 34 TFEU], as are [product requirements]. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept."

- Emergence of market access test: Does the measure hinder the access of imported goods to the market of a MS?
- Linked to effect on consumer behaviour

C-110/05 Commission v Italy (Italian Trailers): reasoning

'It should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State. Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer. Thus, Article 56 of the Highway Code prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation. It follows that the prohibition laid down in Article 56 of the Highway Code, to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], unless it can be justified objectively. "

Market access test (Mickelsson)

- It clearly applies even when restrictions on use are indistinctly applicable measures
- Test: Does it prevent market access of imported goods by preventing consumers from using them in the way it was intended or by greatly restricting their use?
 - If yes, then this is an MEQR.
 - Can be justified by A36 TFEU or overriding public interest justifications (= mandatory requirements)

So many tests...

- What is the relationship between the various tests?
- Not very clear signals by the CJEU post-Trailers
- For practical purposes category approach might be more helpful
 - Product requirements: Cassis
 - Selling arrangements: Keck
 - Restrictions on use: *Italian Trailers*



JUSTIFICATIONS FOR QRS AND MEQRS

Article 36 TFEU justifications

Article 36

(ex Article 30 TEC)

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Justifying QRs and MEQRs

- QRs and distinctly applicable MEQRs (i.e., selling arrangements that are an MEQR because they do not satisfy the conditions in *Keck*), can be justified under Article 36 TFEU only.
 - Exhaustive list of grounds: public morality, public policy, public security, protection of health, protection of national treasures, protection of industrial and commercial property.
 - The CJEU undertakes a proportionality-based assessment
- Indistinctly applicable measures (i.e., product requirements or rules restricting consumer use), can be justified under Article 36 TFEU or by mandatory requirements (product requirements) or overriding public interest justifications (restrictions on consumer use).



Successful applications of mandatory requirements

- This only be applied to indistinctly applicable measures: see Case 113/80 *Irish Souvenirs*.
- Mandatory **requirements are not an exhaustive list.** The point is that these can develop over time.
- Cassis itself: a public health justification was recognised to exist here
- Case 302/86 *Danish Bottles*; Case C-2/94 *Walloon Waste*: environmental protection
- Case C-368/95 Familiapress: media diversity
- *Schmidberger*: fundamental rights protection
- Case 60/84 *Cinéthèque*: cinema as cultural expression
- Proportionality is always the key!

1st ster

- Identify it it is a QR or MEQR
- If QR specify, and consider justifications under A36 TFEU

2. If MEQR

- Provide definition of MEQRs under Dassonville
- Identify type of MEQR and whether it is distinctly/indistinctly applicable
- If distinctly applicable consider justifications under A36 TFEU

3. If product requirement

- Cite Cassis de Dijon and talk about mutual recognition and rule of reason
- Consider possible justifications under A36 or by mandatory requirements

Article 34 PQs

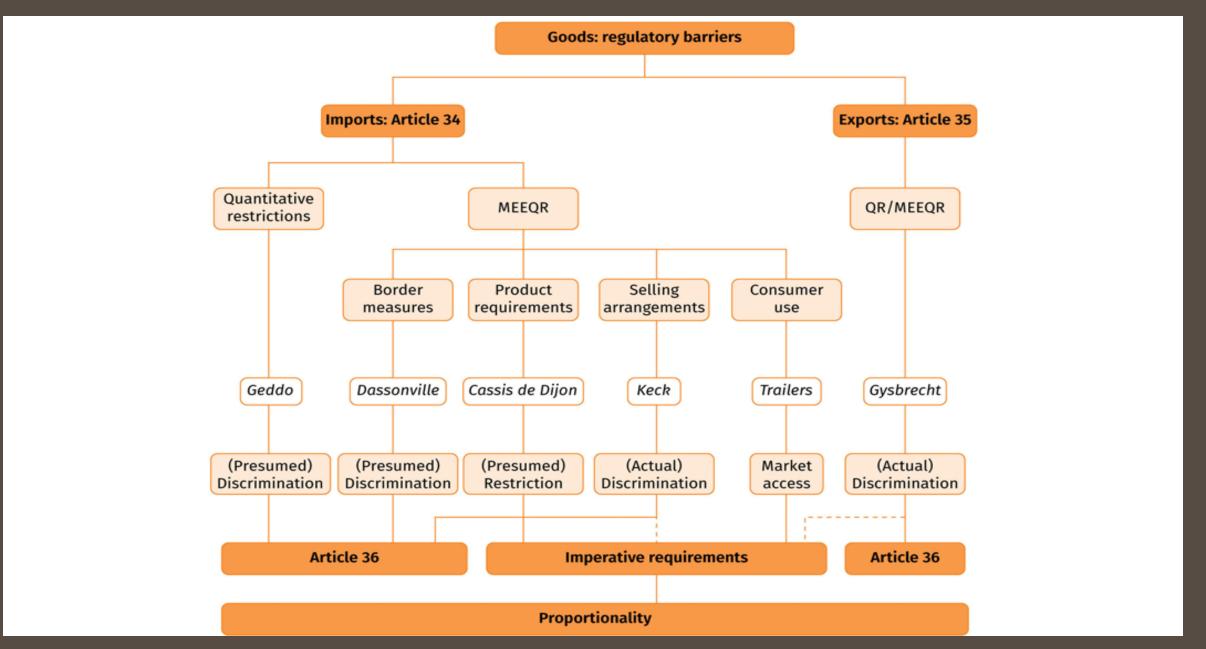
3. If selling arrangement

- Cite Keck and check conditions for selling arrangements that are not MEQRs
- If conditions are met, then no MEQR, therefore prohibition of A34 doesn't apply
- If MEQR, then distinctly applicable measure, and consider justifications under A36 only

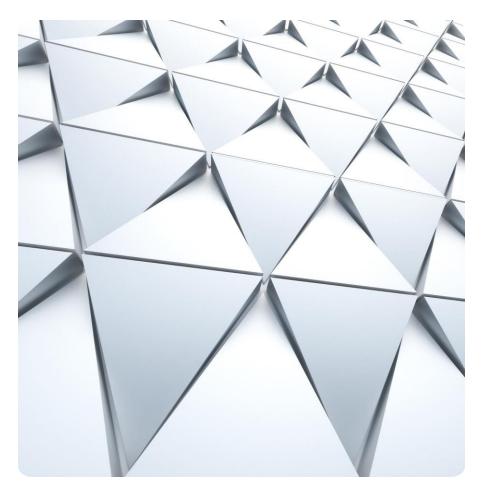
3. If restriction on use

- Cite Italian Trailers and engage with market access test
- Consider possible justifications under A36 or by overriding public interest

Bonus points if you identify any additional case-law that is similar to the context of the PQ







Non-fiscal/regulatory barriers to the free movement of goods Focus on Treaty provisions (A34 & 36 TFEU) that prohibits QRs and MEQRs on imports Distinction b/n QRs and MEQRs Complex CJEU case-law on MEQRs Dassonville Cassis de Dijon **Italian Trailers** Keck Justifications under A36 TFEU and mandatory requirements/overriding public interest

REVISION TIP: Create list of case-law for each type of measure

Tests and justification depend on type of MEQR (distinctly/indistinctly applicable; rules on product requirements/selling arrangements/restrictions of consumer use)



Any questions?

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Say that the Republic of Ireland has passed a law saying 'only 500 kilograms of flour may be imported into Ireland each year'. Is this likely to be a QR or an MEQR?

- Quantitative restriction (QR)
- Measure equivalent to a quantitative restriction (MEQR)

What type of barrier to trade did the Court of Justice define in the Dassonville case?

- A measure having equivalent effect to a quantitative restriction.
- A charge having equivalent effect to a customs duty.
- A selling arrangement of equal burden.
- A system of discriminatory taxation.

How is an 'indistinctly applicable' MEQR defined?

- A measure that applies equally to imported and domestic products.
- A measure that does not apply equally to domestic and imported products.
- A directly effective measure.
- A measure that is of individual concern to the applicant.

Which principle dictates that, provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction?

- The principle of proportionality.
- The principle of non-retroactivity.
- The principle of mutual recognition.
- The principle of supremacy.

Following the ruling in Keck, selling arrangements will always fall outside the scope of Article 34.

- True
- False

To which national rules would the market access test usually apply to identify whether they constitute MEQRs or not.

- Rules restricting how consumers use a product
- Rules requiring a certificate of origin of the product
- Rules on the composition of a product

Which of the following best describes how a Member State can justify an indistinctly applicable measure?

- Using Article 36 TFEU or by pointing to a 'mandatory product requirement'.
- Using Article 36 TFEU or by arguing it is a 'selling arrangement'.
- Using Article 36 TFEU or by pointing to consumer protection.
- Using Article 36 TFEU only