ARTICLES

Economic Analysis of Article 28 EC after the *Keck* Judgment

By Luigi Russi[*]

A. Introduction

European Union (EU) regulation of the free circulation of goods may be considered an eminent jurisprudential achievement; in fact, it has emerged from and been strengthened by the judgments of the European Court of Justice (hereinafter "the Court").

In particular, the Court's engagement with the prohibition on quantitative import restrictions and other measures having an equivalent effect established by Article 28 European Convention (EC),[1] has paved the road towards integration. This was especially true of the Court's "milestone" decisions in *Dassonville*[2] and *Cassis de Dijon*.[3]

The judicial parameter established by those judgments was built upon the interpretation of "quantitative restrictions" as encompassing any "measures hindering trade." Although this has proven to be, for a limited period of time, an efficient instrument in pursuing Treaty goals, like the creation of a single European market, it has also produced a few side effects, including: (a) an excessive broadening of the field of Article 28 EC's application; and, consequently, (b) an increase in the number of claims the Court has had to examine. This has placed the Court in the position of having to weigh, more and more frequently, the content of national policies in order to determine whether the restrictions they impose can be justified.

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[1] Formerly Article 30.

[2] Case C-8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837.

[3] Case C-120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

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As such, the *Keck*[4] judgment changed the judicial parameter, limiting the issues to a core of problems more closely linked to the goal of Article 28 itself, which is the field of application of the said disposition.

The afore-mentioned judgment has therefore modified the applicable judicial criterion, tailoring it to the economic essence of the problem of quantitative restrictions. This being said, it is my belief that a more thorough understanding of the new approach adopted by the Court in *Keck* can be achieved by analyzing its underlying economic logic. In order to achieve this goal, I have taken resort to simple instruments of microeconomic analysis that are helpful in illustrating the effects of international trade on the internal market of a State.

By following the afore-mentioned method, it is possible to:

1. provide an economic interpretation of the expression "measures having an effect equivalent to quantitative restrictions;"

2. distinguish between requirements related to the production of goods and selling arrangements;

3. clarify why selling arrangements escape Article 28 whenever they are, *de jure* and *de facto*, indistinctly applicable to all products negotiated within the internal market of a Member State; and

4. understand the reasons for the shift from the *obstacle-based* approach adopted in *Dassonville*, to a *discrimination-based* approach.

[4] Joined Cases C-267/91 & C-268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097.

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B. The Judicial Parameter Prior to the *Keck* Judgment

*I. T*he "Joint Provisions" of *Dassonville* and *Cassis de Dijon*

The two key passages which formed the basis of the judicial parameter until *Keck* were paragraph 5 of the *Dassonville* judgment and paragraph 8 of the reasoning of the *Cassis de Dijon* judgment. Paragraph 5 of the *Dassonville* judgment stated: "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 equivalent effect to quantitative restrictions."[5] Paragraph 8 of the *Cassis de Dijon* statement reads:

> 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 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[6]

The *Dassonville* formula, which is extremely wide *per se*, was completed by the *Cassis de Dijon* formula, which also provided the Member States with a relevant amount of freedom of action.

Altogether, the judicial criterion resulting from the combination of the two formulas can be schematised as follows:

1. Two types of provisions should fall within the prohibition of measures having an effect equivalent to quantitative restrictions: (a) measures legally applicable only to imported products thus causing a decrease in imports (*distinctly applicable measures*); and (b) measures legally applicable to all products, both domestic and imported, which have restrictive effects on international trade (*indistinctly applicable measures*).

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[5] Case C-8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837.

[6] Case C-120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

2. All provisions falling within one of the two categories should also fall within the prohibition imposed by Article 28. Despite that, they could still be "saved" by the specific derogations listed in Article 30 or, only in case of indistinctly applicable measures, if they are aimed at the implementation of the so-called mandatory requirements, judicially established since the *Cassis de Dijon*[7] judgement.

3. However, it has been noticed that: "… the *Dassonville* formula does not mean that all obstacles resulting from the activities of the regulatory state are actually going to be struck down. Article 30 (now article 28) is subject to the discipline of Article 36 (now article 30). It is not as if regulatory autonomy is truly removed. The state is left with plenty of social choice under the various rubrics of Article 36 (now article 30). It does, however, mean that such measures would be illegal on their face unless scrutinized and found permissible by reference to the authorized exceptions in Article 36 (now article 30). *Dassonville* restricts the autonomy, not the choice."[8]

4. Others[9] have approached the problem differently, drawing a further distinction within the category of "indistinctly applicable measures" between: (a) legally non-discriminatory measures whose effects fall, *de facto*, mostly on imported products (so-called *material restrictions*); and (b) measures indistinctly applicable, *de jure* and *de facto*, both to domestic and imported goods and that, by restricting trade in general, also end up restricting imports (so-called *indistinctly applicable measures in the strict sense of the word*).

According to the same approach, resort could be taken to mandatory requirements only in order to justify indistinctly applicable measures in the strict sense of the word. Furthermore, the above mentioned mandatory requirements, being nothing but goals *intrinsic* to indistinctly applicable trade regulations (in the strict sense of the word), should come into consideration at the stage of qualification of a certain provision as a "measure of equivalent effect." In other words, whenever an indistinctly applicable measure in the strict sense of the word pursues a mandatory requirement and is not disproportionate to the goal it seeks to achieve, for example

[7] *Id.* at paragraph 8 (The Court explicitly admitts that the justifiability through mandatory requirements only applies to national provisions regulating the trade of single categories of products, which are, by definition, indistinctly applicable; therefore distinctly applicable measures are implicitly excluded from such remedy.).

[8] J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in EU LAW 349 (Paul Craig and Grainne de Burca eds., 1998) (brackets added by the author).

[9] A. Mattera, *De l'arrêt* Dassonville *à l' arrêt* Keck*: l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions*, 1 REVUE DU MARCHE UNIQUE EUROPEEN 117 (1994).

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it does not bring about excessive market distortion, it shouldn't even be qualified as a "measure having an effect equivalent to a quantitative restriction."

It seems appropriate to anticipate that such distinction lacks simplicity, falls into excessive formalism, and deviates from the material essence of the definition of "measures having an effect equivalent to quantitative restrictions." In fact, as it will be clarified later,[10] technical regulations never weigh equally, in law and in fact, upon imported and domestic goods. Where regulations concerning selling arrangements, whenever indistinctly applicable in law and in fact, do not at all display the effects of measures imposing quantitative restrictions, they should not even be considered in the light of Article 28 EC.

II. The Principle of Mutual Recognition

The *Cassis de Dijon* judgement introduced an important principle, known as the principle of *mutual recognition.* According to this principle, the possible technical obstacles resulting from national regulations related to the production and marketing of goods can only be justified, in the absence of Community harmonization, by the following factors: mandatory requirements including the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer, or by the specific derogations listed in Article 30 EC.

Consequently, "the State intending to apply its own legislation to imported products has therefore the *onus probandi* that the technical requirements which the product has met in the State of production do not provide securities equivalent to those required by national technical regulations, for instance in the field of consumer protection. Otherwise, the State of destination cannot require that imported products undergo further tests equivalent to those already carried out in the country of origin, or that the same technical regulations provided for national products be observed ."[11]

Some scholars[12] have correctly submitted that it would be more correct to speak of functional parallelism, rather than mutual recognition. Functional parallelism is, in fact, nothing but the presumption that technical measures adopted in the exporting

[10] *Infra* § 3.3 (Discussion the distinction between requirements related to the production of goods and selling arrangements).

[11] L. Marini, *La libera circolazione delle merci*, *in* IL DIRITTO PRIVATO DELL'UNIONE EUROPEA 169 (A. Tizzano ed., 2000).

[12] Weiler, *supra* note 8.

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State should be recognised as being equally effective in pursuing a certain public-interest objective as the regulations in force in the importing State. This makes it unnecessary to subject the imported product to the same regulation in force in the State of destination.

After all, such reasoning is nothing but an application of the principle of proportionality stated in the third paragraph of Article 5 EC. If the Community wants to meet its goal of creating a single market through the implementation of the free circulation of goods, it must limit its intervention to the bare necessities. For this reason, the Court, by recognising that the technical provisions of the exporting State are functionally parallel to the technical standards in force in the importing State, can oblige the latter to recognise the validity of foreign regulations, without forcing it to change its own legislation in order to make it less strict. Thanks to this solution, it is possible to allow the importing State to set certain technical standards for its own domestic products (however, without being able to extend them to foreign products meeting functionally parallel technical standards), and to achieve, at the same time, the goal stated in the Treaty, namely, the free circulation of goods.

III. Crucial Problems

The approach initially adopted by the Court regarding quantitative restrictions wasn't free from weak points.

1. As it has been previously observed,[13] the "joint provisions" of the *Dassonville* and *Cassis de Dijon* judgements did not restrict the Member States' choice as to the policies they might pursue on a national level, they simply restricted their autonomy. In light of what has been said, what needed to be changed was not the material content of the two judicial precedents, but the resulting methodology, which, for fear of letting some measures that have an effect equivalent to quantitative restrictions escape, would end up questioning even completely legitimate national provisions.

2. In fact, during the few years prior to the *Keck*, Article 28 was invoked against any trade restriction, thus, bringing to the Court's attention an ever growing number of national regulatory measures. This expansive invocation of Article 28 obliged the Court to play a role that was a little too invasive regarding the internal policies adopted by every Member State.

[13] *Infra* § 2 point 3 (The judicial parameter until the Keck judgement).

C. The *Keck* and *Mithouard* Judgments

I. Controversial first impressions

Thus, the *Keck* judgement represents the turning point regarding the prohibition of measures having an effect equivalent to quantitative restrictions.

Although some scholars highlighted a lack of logical explanation in the reasoning of the *Keck* opinion, to the point of characterizing it as a useless rupture with the past, the exact goal it actually pursues is the sharpening of the juridical instruments applicable to quantitative restrictions.

Such "sharpening" does not, in my opinion, respond to a purely logical-juridical reasoning, but it does imply a few economic considerations, which, once having been clarified, make it possible to fully appreciate the Court's farsightedness. Without resorting to economic instruments, the bewilderment *Keck* brought about is understandable.

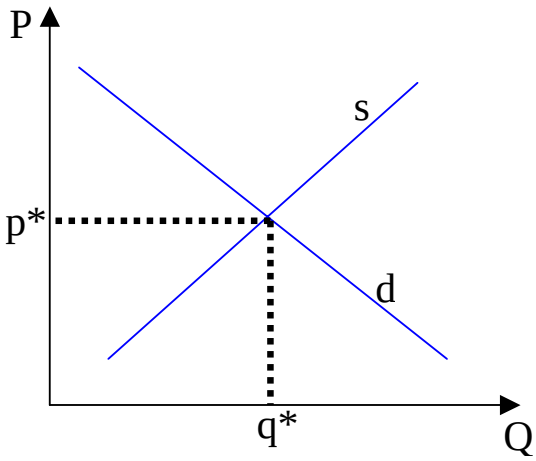
In order to grasp the gist of my thesis, it is appropriate to briefly display the instruments that have been used.

II. The Economic Effects of a Custom Duty and those of an Import Quota[14]

First of all, let us consider the graphic representation of market equilibrium for a certain type of goods, cleaning bleach for instance, without commercial exchange with foreign nations. Let the equilibrium price (p*) be 5 € (see *Picture 1*).

[14] For an accessible introduction, which does not require in-depth mathematical knowledge, *see* N.G. MANKIW, PRINCIPLES OF ECONOMICS chaps. 3 and 9 (2003). For further information, useful textbooks are: M. TODARO AND S. SMITH, DEVELOPMENT ECONOMICS chap. 12 (2003); H. VARIAN, INTERMEDIATE MICROECONOMICS chaps. 30 and 31 (6th ed. 2003).

Picture 1. Market equilibrium in the absence of exchange with foreign nations.



P = bleach price
Q = bleach quantity
s is the curve representing internal bleach supply
d is the curve representing internal bleach demand
p*= equilibrium price
q*= equilibrium quantity

Let us then imagine that the country we are considering, Spain for example, opens itself to commercial exchange with foreign nations. In order to make the global picture of our analysis more intelligible, let us hypothesize that: (a) all foreign-made bleach is sold at the same price; and that (b) at that price, the bleach quantity offered by foreign producers is infinite. After the two simplifying afore-mentioned hypotheses, the supply curve for imported goods turns out to be a horizontal straight line intersecting the Y-axis at the level of the import price (see *Picture 2*).

The opening to exchange with foreign nations thus brings about the insertion, in the Spanish market, of a second supply source, *i.e.* the foreign producers.

Assuming, then, that: (a) the price of imported bleach is lower than p* (5 €); and given that (b) at that price, the quantity offered by foreign producers is infinite, Spanish producers, in order not to be cut out of the market must reduce their selling prices to the level of the import price. In this way: (a) the new price for bleach on the Spanish market equals that of imports; and (b) all those Spanish producers who do not manage to lower the selling price of their bleach to the level of imports will remain out of the market.

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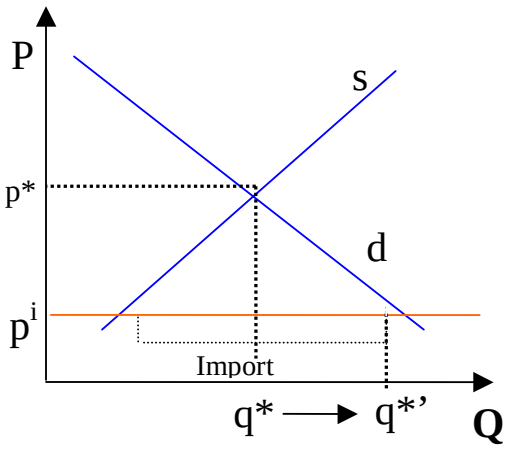
Picture 2. Market equilibrium after the opening to commercial exchange with foreign nations.



p^i= import price
q*'= the new demand for bleach, after the opening to commercial exchange with foreign nations.
q* = bleach demand in the absence of commercial exchange with foreign nations
p* = equilibrium price in the absence of commercial exchange with foreign nations

The fact that the price of imported bleach is lower than the equilibrium price on the Spanish market in the absence of commercial exchange with foreign nations shows that foreign producers have a "comparative advantage." In a nutshell, according to the economist David Ricardo, comparative advantage is the condition of the party that is able to produce a certain type of goods with a lower opportunity cost, and it is exactly in the light of such principle that it is possible to state that international trade yields benefits. In fact, if Spain does not have a comparative advantage in the production of bleach and its internal demand can be satisfied, even more extensively, by foreign producers, Spain will be able to re-direct the resources it previously employed in the production of bleach towards other industrial sectors in which it has a comparative advantage. But, the confrontation with imported goods often may be painful. All the Spanish producers that are cut out of the market will have to either try and reduce their production costs or adapt themselves to operate in different markets.

Therefore, it is not unusual that measures aimed at reducing confrontation with foreign production are invoked. These measures can either be custom duties or import quotas.

A custom duty is a tax to which an imported product is subjected. In the presence of custom duties, foreign producers are forced to sell their goods at a higher price. Consequently, Spanish producers themselves will raise their own selling prices eventually causing such rise in prices to have the effect of putting" some national producers "back in the game" who otherwise would have been left out of the market. (See Picture 3)

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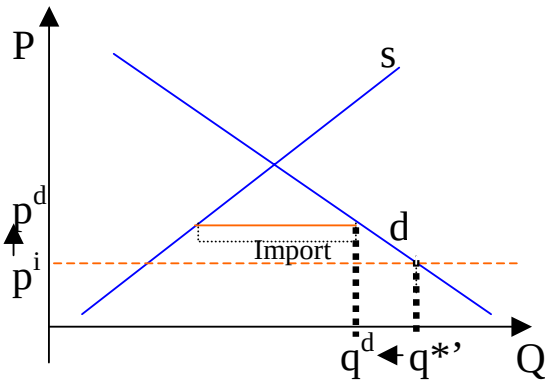
Picture 3. The effects of a custom duty.



p^i = import price
$q^{*'}$ = the new demand for bleach, after the opening to commercial exchange with foreign nations.
q^d = the demand for bleach in the presence of custom duties
p^d =the equilibrium price in the presence of custom

The effects of a custom duty on imports can thus be schematised as follows:

1. a rise in import prices, leading to an increase in the general price level;

2. such raising of the general price level allows internal producers to win back a share of the market they would have not otherwise held;

3. because of the raising of the general price level, internal demand decreases as compared with the situation in the absence of a custom duty;

4. the ultimate effect is an import reduction.

By contrast, a quota is a limitation on the amount of bleach produced abroad which can be imported in Spain (see *Picture 4*).

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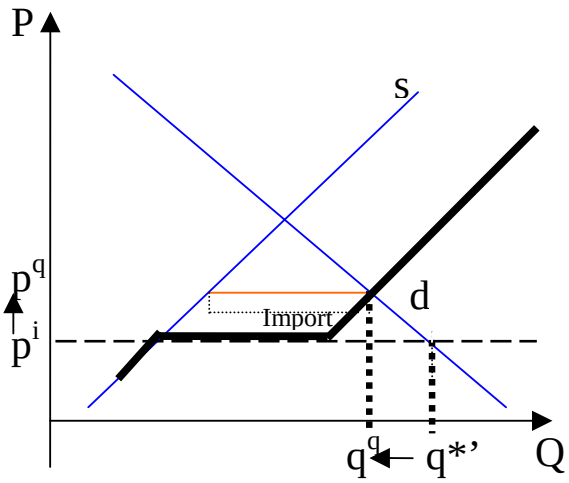
Picture 4. The effects of an import quota.



p^q = price in the presence of a quota
p^i = price in the absence of a quota
q^q = demand in the presence of a quota
$q^{*'}$ = demand in the absence of

A quota leads to the situation in which, at the import price, the quantity of goods supplied isn't enough to satisfy the demand. Excessive demand produces an increase in the price level because, if only a limited amount of goods are available, only the party that is eager to pay more for the product will eventually be able to buy it.

The afore-mentioned rise in prices: (a) eventually allows some Spanish producers that were not able to sell their bleach at p^i to come back on the market and win a bigger share of it back; and (b) it also brings about a decrease in the demand so that, once market equilibrium is reached, there will be fewer imports than before.

At this point it is essential to anticipate that the new, higher price of imports brought about "artificially" by a quota, would theoretically be equivalent to the "natural" price of imports (in the absence of a quota) if foreign producers had a smaller comparative advantage in the production of bleach and should, therefore, face higher costs to produce such good. (See *Picture 5*)

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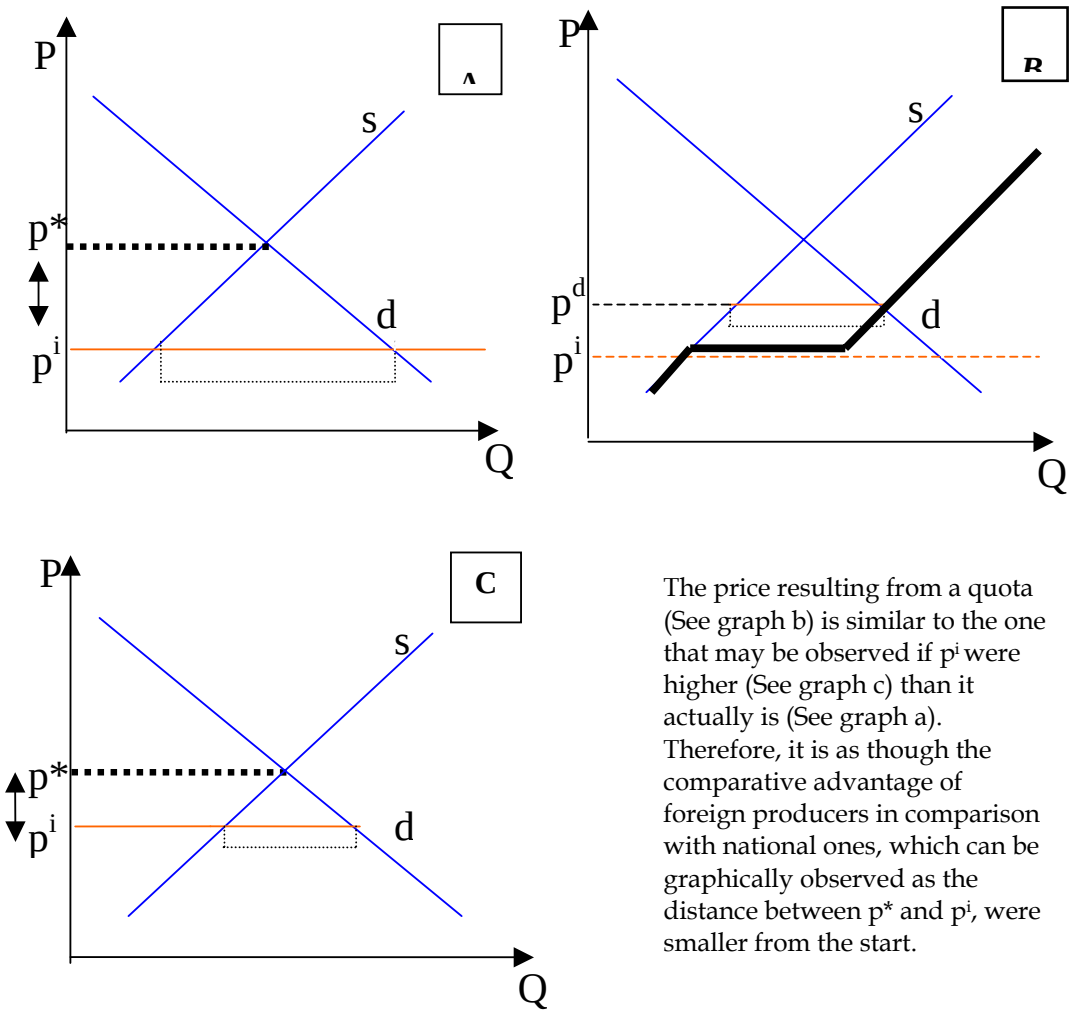
Picture 5. Considerations on the situation created by a quota.



The price resulting from a quota (See graph b) is similar to the one that may be observed if p^i were higher (See graph c) than it actually is (See graph a). Therefore, it is as though the comparative advantage of foreign producers in comparison with national ones, which can be graphically observed as the distance between p* and p^i, were smaller from the start.

All in all, then, the restrictive effect towards imports can be observed in both situations; however, a custom duty sets the price, whereas a quota the quantity. From this particular standpoint, a quota is more effective in limiting imports, since it allows the State to directly establish the desired amount.

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II. The Characteristics of a Measure Having an Effect Equivalent to a Quantitative Restriction

From an economic point of view custom duties and quotas yield, as it has just been pointed out, the very same effects. The difference is simply that: (a) with a custom duty it is the price to be fixed; whereas (b) with a quota it is the amount of imported goods. Following this distinction, Article 25 EC speaks of TAXES having an effect equivalent to custom duties, whereas Article 28 EC speaks of MEASURES having an effect equivalent to quantitative import restrictions.

In consideration of the afore-mentioned, a measure having an effect equivalent to a quantitative restriction is any regulation bringing about: (a) a raising in the import price and consequently; (b) an import reduction.

Speaking of measures of equivalent effect, the rise in prices is not obtained through the setting of a direct limitation in the amount of importable goods. Instead the price increases by forcing foreign producers to face additional expenses in order to sell their products on the market of destination, bringing about a reduction or an elimination of the comparative advantage (*i.e.* the advantage in terms of lower production costs) they can rely upon.

In order to achieve such a goal, it is possible to hinder access to the market of destination through regulations obliging foreign producers to meet various requirements they will need to stick to in order to export their products.

Having to meet such requirements, foreign producers will therefore have to alter their cost structure. Consequently, this could: (a) make it no longer profitable for them to export their product; or in the best situation, (b) cause a rise in the selling price minimizing the comparative advantage imported goods could benefit from in the absence of such regulations.

Therefore, the essence of the concept of "measure having an effect equivalent to a quantitative restriction" is that it forces the producer to reduce its comparative advantage, thus obliging it to alter the product, which "will therefore no longer be the product the trader started out to sell."[15]

[15] D. Chalmers, *Repackaging the Internal Market – The Ramifications of the* Keck *Judgement*; 19 EUROPEAN LAW REVIEW 385 (1994).

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Let us consider, for instance, Case C-358/01, *Commission vs. Spain*.[16] Spain prohibits the use of the denomination "detergent with bleach" by any product which does not contain an amount of chlorine at least equal to 35 g/l even if it is lawfully produced and marketed in the State of origin under such denomination. Practically:

1. Such regulation obliges foreign producers to alter their product and such alterations could have repercussions on their cost structure, thus diminishing their comparative advantage;

2. if they do not comply with such technical provisions, they won't be able to use the said denomination in selling their product. Consequently, this would prevent a good, which is, on the market of origin, a "detergent with bleach," from competing in Spain, where it presumably benefits from the biggest comparative advantage, as a "detergent with bleach."

These two series of consequences brought about by the questioned technical legislation are both apt to alter the comparative advantage of foreign producers of detergents with bleach, eventually causing a decrease in imports. In consideration of the afore-mentioned, it is possible to qualify the Spanish technical regulatory measure as a "measure having an equivalent effect" according to Article 28 EC.

For a comparative advantage (against which to consider the effects of measures equivalent to quantitative restrictions) to exist, it is necessary that the goods considered compete on the same market. Economically, a market is a complex of negotiations relating to a certain type of means, material or immaterial, all being equally apt to satisfy the same need. As can be easily understood, the notion is very elastic. In fact, a market virtually comes to existence anytime there is a convergence in the methods of satisfying a certain need expressed by consumers. Such methods, casting themselves all on the same type of means, allow it to be qualified as a "good." Therefore the principle of mutual recognition has exactly this meaning: if a product is able to satisfy certain needs in a certain country, it most likely will be able to do the same in the country of destination. Walking this path, the Court has even come to the point of stating that the existence of a competitive relationship between products has to be determined not only by observing the present state of the market, but also considering the possibilities of evolution in the context of goods circulation on a Community scale.[17] Therefore, the fact that a good is

[16] Case C-358/01, Commission v. Spain, 2003 *Official Journal of the European Union* C 7, 10.01.2004, p.13; not yet reported.

[17] Case C-170/78, Commission v. United Kingdom, 1983 E.C.R. 2265; Case C-356/85, Commission v. Belgium,1987 E.C.R. 3299; Case C-323/87, Commission v. Italy, 1989 E.C.R. 2275.

lawfully produced and marketed in a Member State operates on the presumption that such products can compete on the same type of market in other States as well.

Juridically, the notion of "a market" can be more strict since, besides the common aptitude to satisfy a certain need, the goods negotiated must also answer to certain requirements about third party protection and, more extensively, about protection of social life in general. When they do so, and that is in the majority of cases, these two definitions correspond: this is the reason why the presumption of mutual recognition (or of functional parallelism) has to be considered appropriate. Thanks to this presumption imported goods may gain access to the same competitive context as domestic goods. Whenever these two definitions do not match, it is the importing State that bears the *onus probandi* that there are enough reasons for the economic and juridical notion of market not to coincide. This would be the case, for example, when free competition would bring along a cost in terms of the protection of general and indefectible interests too high for the society to bear. Thus, national regulations forcing foreign producers to change their cost structure are justified when, derogating to the mutual recognition principle, it has to be agreed that the technical requirements a certain product has met in the State of origin do not offer securities equivalent to those required by national technical regulations.

III. Distinction Between Requirements Related to the Production of Goods and Selling Arrangements

After having introduced the indispensable underlying concepts of my analysis, it is now the moment to move back to the *case law*, and to interpret, in consideration of the ideas discussed above, the content of paragraphs 15 and 16 of the reasoning of the *Keck* judgment, in which the core of the judicial speculation on "measures having equivalent effect" is addressed.

The two key passages are:

> 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 30. 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.
>
> 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 […], 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.[18]

Thus in paragraph 15 it is stated that:

1. presuming that, in force of the principle of mutual recognition, the technical requirements imported products have met in their country of origin guarantee a protection of the "public-interest objectives" equivalent to the one provided by the legislation of the importing country (which is the same as presuming that the economic and juridical definition of the considered market coincide);

2. technical regulations introducing requirements with which goods have to comply, require an alteration of imported products, consequently minimizing the comparative advantage from which the latter benefit, under the threat of excluding such products from the very market on which they are negotiated in the country of origin.[19] Therefore, such provisions have to be considered measures having an effect equivalent to quantitative restrictions.

3. The conclusion is the same even if the technical regulation is applicable to all products negotiated on the market of the importing country. In fact, operating under the presumption of point (1), the regulation of the importing country cannot weigh upon the cost structure and on the productive methods of imported goods. Whenever this happens, we are faced with a measure having an effect equivalent to that of an import quota.

This last point can be made even clearer if it is economically interpreted:

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[18] Joined Cases C-267/91 & C-268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097.

[19] On which they presumably benefit from the largest comparative advantage.

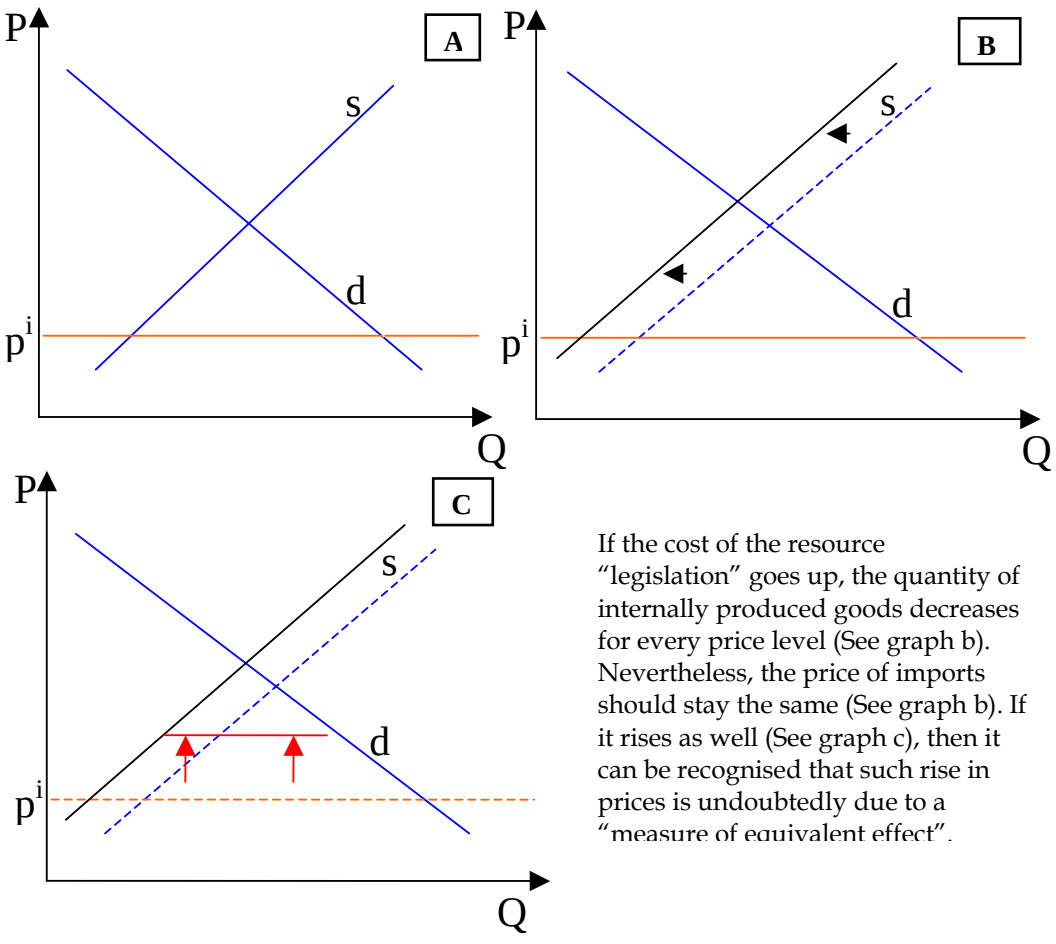
a. it is possible to state (when technical regulations of the different States are recognised equivalent) that the legislation of the State of origin is the only one that can influence the cost structure of the single producers operating on a certain market. In light of such a link between national legislation and cost structure, it can be assumed that legislation is, itself, a resource involved in the productive process;

b. thus, operating the principle of mutual recognition, it is reasonable to state that goods produced abroad do not depend on the resource "legislation" existing in the State of destination;

c. whenever the "price of such resource goes up," *i.e.* the technical regulation obliges producers to face further costs, the only ones having to be affected by such rise in prices should be those that actually rely upon such resource;

d. therefore, if, as the price of the resource "legislation" goes up the price of imported goods rises as well the cause of the rise in import prices is undoubtedly to be found in a measure of equivalent effect. (see *Picture 6*)

Picture 6. The costs of the resource "legislation".



If the cost of the resource "legislation" goes up, the quantity of internally produced goods decreases for every price level (See graph b). Nevertheless, the price of imports should stay the same (See graph b). If it rises as well (See graph c), then it can be recognised that such rise in prices is undoubtedly due to a "measure of equivalent effect".

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Therefore, the test one should follow in such cases can be schematised in *Table 1*.

Table 1. Test for production requirements

1	Technical provisions prevent market access of imported goods and do, *per se*, produce the effect of altering the comparative advantage foreign producers benefit from.
2	The Member State may "save" such regulations, provided that it manages to overcome the general presumption of functional parallelism.
3	Whenever the presumption of functional parallelism between the internal technical regulation and the exporting nation's technical regulation is overcome, and the measures adopted by the importing State are proportionate in consideration of the goal they are aiming to pursue, it will then be possible to subject imported goods to the internal regulation of the Member State "under accuse" as well.

Paragraph 16 of the motivation of the *Keck* judgment, instead, analyses "selling arrangements." Such arrangements *per se* "do not require the alteration of the identity or composition of any *individual* good. They therefore [do] not prevent the entry of any *individual* good on the national or local market but merely [regulate] the *modalities and structure* of the market on which the goods could be sold ."[20] Practically, then, such arrangements that do not hinder market access do not alter the foreign producers' comparative advantage and do not prevent the establishment of fair commercial competition. For this reason they shouldn't even be considered in the light of Article 28 EC.

Nevertheless, this is only true when they equally affect, in law and in fact, domestic and imported goods.

Let's consider, for instance the *Torfaen*[21] case, which was decided before *Keck*, and in which the Court held that it was possible to analyse, in the light of Article 28, an indistinctly applicable regulatory measure concerning shop closing on Sunday, although the Court eventually recognised that the regulation responded to legitimate internal political choices. After the *Keck* breakthrough, such a measure,

[20] Chalmers, *supra* note 15.

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

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being nothing but an indistinctly applicable selling arrangement, in law and in fact, wouldn't even have been qualified as a "measure of equivalent effect."

Nevertheless, whenever measures concerning selling arrangements more heavily weigh, *de jure* or *de facto*, upon imported goods, they may respectively: (a) limit the effective participation of foreign goods to the market; or (b) cause excessive additional expenses in order for them to be marketed, which actually prevents market access itself.

This last situation is the one presented in the *TK-Heimdienst*[22] judgement, in which a regulation concerning a selling arrangement had been qualified as a measure of equivalent effect, since it actually forced importers to face additional expenses that could eventually diminish their comparative advantage. In fact, the challenged regulation established that only individuals who did run a commercial activity within a fixed location inside a certain Austrian *Verwaltungsbezirk* could practice itinerant selling in the same *Verwaltungsbezirk*. Therefore, despite being indistinctly applicable in law, this regulation ended up, in fact, weighing more heavily upon entrepreneurs from other Member States who, in the event they wanted to practice itinerant selling in Austria, would have to establish and to run, besides their own commercial activity in the State of origin, another stable commercial activity within the Austrian Republic (with all the additional costs that might cause).

Therefore, whenever a State imposes regulatory measures that discriminate by limiting or prohibiting certain selling arrangements to goods coming from other Member States and thus hinder the effective participation of imports in the market, such State is not allowing foreign products to fully benefit from their comparative advantage in comparison with internal production and is, therefore, altering competition. In consideration of the afore-mentioned, the test as to selling arrangements could be the following:

Table 2. Test for selling arrangements

1	Is the regulatory measure concerning a selling arrangement indistinctly applicable?
2	If it isn't, it then prevents participation to the market of imported goods alone and it is, thus, a measure of equivalent effect.
3	If it is, one must check that it equally weighs, in fact, upon both imported and domestic products. (a) If it doesn't, this means that it alters the cost structure of foreign producers,

[22] Case C-254/98, Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH, 2000 E.C.R. I-151.

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	forcing them to face additional expenses which diminish their comparative advantage; therefore, it is a measure of equivalent effect. (b) If it is indistinctly applicable and it does not alter, even in fact, competition, it is not a measure of equivalent effect and it escapes the field of application of Article 28.

Having come to this point, it seems appropriate to highlight a few important considerations regarding how the *Keck* judgement distinguished between requirements related to the production of goods and selling arrangements.

1. The technical requirements are dealt with in paragraph 15 of the opinion. Whenever it is possible to admit a functional parallelism (*i.e.* being aimed at pursuing the same public-interest objective) between the technical provisions of different states, these requirements always represent measures of equivalent effect. Therefore, when faced with "technical" provisions, the hypothesis, pursuant to which they may weigh equally, in law and in fact, upon both domestic and imported goods, is not acceptable.

Whenever two products are allowed to compete on the same market, in force of the principle of mutual recognition, there is no reason to further force foreign producers to alter their cost structure. Such measures artificially diminish the comparative advantage of imported goods, bring about a rise in import prices and giving birth to an import restriction.

2. On the other hand, national regulatory measures concerning selling arrangements are able to alter the importers' opportunity cost only if they discriminate, in law or in fact, between domestic and imported goods. Otherwise, they do not produce economic effects equivalent to those of a quantitative import restriction.

D. After *Keck* -- The Shift from an Obstacle-based to a Discrimination-based Approach

The reasoning that has been developed above highlights the important shift from interpreting *quantitative restrictions* as any *measures hindering trade* to a discrimination-based approach.

In fact, before *Keck*, any provision hindering trade, even if it did not necessarily yield the effects of a measure of equivalent effect, would be considered as such. However, the choices made in *Dassonville* and in *Cassis de Dijon* may seem justifiable in consideration of the following reasons:

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1. the creation of a new economic conscience, free from the habits and instincts of protectionism which are, at times, so deeply rooted in a continent with a long history of protectionism;

2. the achievement of a single market, in a time when the harmonization of national legislations was hindered by the rule of unanimity adopted after the Luxembourg Compromise.

The approach adopted after *Keck* has instead restricted the obstacle-based logic only to requirements related to the production of goods.

Furthermore, as to the discrimination-based approach, it is reasonable to observe that, "the fact that the Court spoke of 'selling arrangements' rather than 'sales methods' made it clear that the Court did not intend to restrict its *dictum* to such methods: it extended to circumstances which themselves had nothing to do with the product or its presentation."[23] Therefore, such an approach can be considered extendable to all provisions that do not, *per se*, yield the effect of altering the foreign producers' comparative advantage, but that are able to do so if they discriminate.

The way the general test has been hypothesized by Weiler[24] can be very significant:

> *The General Rule of Free Movement*: National provisions which do not affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, must be justified by a public interest taking precedence over the free movement of goods.
>
> *The Special Rule of Free Movement*: National provisions which prevent access to the market of imported goods (the equivalent of technical provisions) must also be justified.

In consideration of the afore-mentioned, the obstacle-based approach, although not having disappeared, only comes in action against provisions which, despite being non-discriminatory, yield the effects of quantitative restrictions simply because they apply to foreign goods as well. On the other hand, all other conditions which

[23] L.W. Gormley, *Two Years after* Keck, 19 FORDHAM INT'L L. J. 866 (1996).

[24] Weiler, *supra* note 8.

do not directly alter the foreign producers' opportunity cost can only be punished if discriminatory, since it is by discriminating that they alter competition.

It then has to be pointed out that this last category of regulatory measures would include not only selling arrangements, but it could also extend to different provisions which do yield through discrimination effects similar to those of discriminatory selling arrangements.

E. A Few Recent Applications

The success of a rule ultimately lays in its ability to effectively apply to a vast plurality of situations, bringing a significant contribution to the certainty of law.

Considering this, it is therefore necessary, in order to verify the strength of the discrimination-based approach adopted after *Keck*, to delve into some recent case-law. To this purpose Cases C-441/04[25], C-405/98[26] and C-366/04[27] are considered and analysed in light of the considerations expressed in the previous sections of the article.

I. Case C-441/04 (A-Punkt Schmuckhandels GmbH v. Claudia Schmidt)

The present case focuses on the compatibility with Article 28 EC of an Austrian regulation[28] prohibiting the collection of orders for or the sale of silver jewellery in private homes. As to the facts, the plaintiff, A-Punkt Schmuckhandels Gmbh, sought to stop the business of a German competitor (Ms. Claudia Schmidt), which consisted in the sale in private homes of low-value jewellery, on the ground that it was prohibited in Austria under the afore-mentioned selling arrangement.

In paragraph 15 the Court refers to the *Keck* criterion as to selling arrangements. The Court later engages in the test that was schematised above[29] in Table 2. In particular, after ascertaining that the contested regulation indistinctly applies in

[25] Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 http://curia.eu.int ; not yet reported.

[26] Case 405/98, Konsumentombudsmannen v. Gourmet International Products AB, 2001 E.C.R. I-1795.

[27] Case 366/04, Georg Schwarz v. Bürgermeister des Landeshauptstadt Salzburg, 2005 *Official Journal of the European Union* C 36, 11.02.2006, p.14; not yet reported.

[28] Paragraph 57(1) Gewerbeordnung.

[29] *Supra* § 3.3 (Discussing the distinction between requirements related to the production of goods and selling arrangements).

law to all relevant traders operating in Austria (Paragraph 18), the Court later states that it should next be established whether the general prohibition on selling or collecting orders for silver jewellery in a doorstep-selling situation is not, in fact, liable to impede the access to the market from other member States more than it does for domestic products.

To this purpose, it has to be emphasised that, despite observing that it would generally be more efficient to allow the sale in private homes of low-value jewellery, since "sale in a commercial structure" could be "liable to give rise to costs that are proportionately very high," the Court later clarifies that it is not the efficiency of a certain selling arrangement in itself that has to be scrutinised. Instead, the interpreter has to understand whether: (1) the possible inefficiency connected to the regulation in consideration equally affects both Austrian and foreign jewellers; or (2) "affects products from other member States more than it affects domestic products" and consequently prevents market access.

In situation (1) above, the regulation would simply end up shaping the channel connecting consumers to all (home and foreign) traders. In the second situation, foreign traders would have to alter their cost structure, and would therefore be deprived of their comparative advantage.

Eventually then, despite leaving to the national court the decision on whether such selling arrangement should fall in situation (1) or (2), due to the lack of sufficient information, the Court confirms the approach adopted after *Keck* and, significantly, concludes with the following statement:

> [...] Article 28 EC does not preclude a national provision by which a member State prohibits in its territory the selling of, and collecting of orders for, silver jewellery in a door-step-selling situation where such a provision applies to all relevant traders in so far as it affects in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States. It is for the national court to ascertain whether, having regard to the facts in the main proceedings, the application of the national provision is liable to prevent the access to the market of products from other Member States or to impede that access more than it impedes the access to the market of domestic products and, if that is the case, to determine whether the measure concerned is justified by an objective in the general interest within the meaning given to that concept in the Court's case-law or by one of the

> objectives listed in Article 30 EC, and whether that measure is proportionate to that objective.[30]

II. Case C-405/98 (Konsumentombudsmannen v. Gourmet International Products AB)

The Court considers here the prohibition, contained in the Swedish Law on Alcohol, on advertising alcoholic beverages in periodicals or similar publications (owing to the subject of the cited Law, which is to restrict the possibilities of marketing alcoholic beverages to consumers, the prohibition of advertisements in periodicals does not apply to advertisements in the specialist press, meaning the press aimed essentially at traders, that is to say, in particular, at manufacturers and restaurateurs).

Gourmet International Products (hereinafter GIP) published a magazine containing such advertisements only in the edition for subscribers; 90% of which were traders, whereas the remaining 10% were private individuals. Because of that 10%, the Consumer Ombudsman applied to the Stockholms Tingsträtt for an injunction restraining GIP from contributing to the marketing of alcoholic beverages to consumers by means of such advertisements which were contrary to the prohibition contained in the Swedish Law on Alcohol.

Obviously the Swedish provision concerns a selling arrangement which, in law, applies indistinctly to all alcohol traders. In fact, however, 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.

In consideration of the above, such provision could be saved: (1) if justifiable under Article 30 EC or one of the specific derogations listed in the *Cassis de Dijon* ruling; and (2) if proportioned to the public-interest goal it seeks to protect. The Court held that the prohibition concerning the advertisement of alcoholic beverages could be justified by public health concerns but that, in order to be saved, it must also be proportionate. This last passage was left to be decided by the national court.

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[30] Joined Cases C-267/91 & C-268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097.

The justification given to the qualification as "discriminatory in fact" is relevant in this case. In fact, in order to reach the segment of consumers to whom a certain foreign product is addressed in its country of production, foreign traders would have to face much higher costs than local producers, who could benefit from the local knowledge already attained by their products. In other words, such a provision could, alone, represent a factor of alteration of the foreign producers' comparative advantage and therefore qualify as a measure of equivalent effect.

III. C-366/04 (Georg Schwarz v. Bürgermeister des Landeshauptstadt Salzburg)

Austrian Law prohibits the sale, from vending machines, of sugar confectionery or similar products made using sugar substitutes without wrapping.

Now, it is established that Paragraph 2 of the Confectionery Hygiene Regulation requires chewing gum which is put up for sale in vending machines in Austria to be packaged, although it is apparent from the file submitted to the Court by the national court that those same goods can be marketed abroad, in particular in Germany, without packaging. It follows from this that importers wishing to put those goods up for sale in Austria have to package them, which makes their importation into that Member State more expensive. It is also apparent from the file that vending machines designed for non-packaged goods cannot be used for packaged goods. It follows from this that, in principle, the aforementioned national provision constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC.

It is crucial to underline the passage in which the Court states that "importers wishing to put those goods up for sale in Austria have to package them, which makes their importation into that Member State more expensive," which clearly refers to the alteration of the comparative advantage brought about by a technical regulation, such as the one under observation.

Such a provision, however, has been saved because: (1) it answers to a public interest objective ex Article 30 EC; and (2) it is proportionate, for example it is not going "beyond what is necessary to attain the objective pursued.

Since it is obvious that the contested provision implements the goal of public health protection (thus falling within the scope of Article 30 EC), the Court has also deemed such provision to be proportionate, since it "considerably increases the safety of the foodstuffs at issue," thus satisfying the goal it was implemented for.

F. Conclusions

To summarize, we have seen how the judicial *acquis* established in the *Dassonville* and *Cassis de Dijon* judgements, although answering to the pressing need of building a common market, has led to an excessively complicated "weighing" of all national regulations on trade. In order to overcome such a problem, the *Keck* judgement has instead restricted the ambit of Article 28, making it possible to adhere more closely to the effective economic essence underlying the prohibition of quantitative restrictions, and marking the beginning of a new era of judicial self-restraint.

In fact, the *Keck* judgement was held in 1993, the year following the establishment of a single market. At that time, the circumstances were much different from those that made passages like *Dassonville* and *Cassis de Dijon* necessary. The Court had in fact managed to persuade national governments to the idea of a free from barriers economic integration and, like a father once having taught his son how to walk, it could now lay back and watch.

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