Economisch Recht

Is *Keck* still alive and kicking?

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Introduction

1. The editors of this journal gave the authors a marvellous opportunity. Free-wheeling about *Keck & Mithouard*,[1] a judgment of the Court of Justice (ECJ) that will be 20 years old next year and about which a lot has been written.[2]

How many times did I explain Keck to my students and how often, year after year, did I have to revise my understanding of its bearing, on the basis of new ways in which the Court applied its famous ruling?

How often did we, scholars, believe that on the basis of new unexpected cases that were referred to it the ECJ would eventually fine-tune or even abandon *Keck*? Advocates General have repeatedly invited the Court to do so. And yet *Keck* is still there,[3] albeit less gloriously than it used to be.

My students also ask me regularly why *Keck* is limited to Article 34 TFEU and why it was not extended to the other internal market freedoms (right of establishment, free provision of services, free movement of capital), while the "rule of reason" of *Cassis de Dijon*[4] from 1979 was. But then they discover that in some judgments relating to the other freedoms, the Court does use language that is somewhat reminiscent of *Keck*.

In this paper I want to explore what *Keck* still means today, how it has evolved and whether it can survive.[5] I will confront "*Keck* revisited" (in the case law on Article 34 TFEU) with the case law on exports (Article 35 TFEU) and on other freedoms (establishment and services). That case law shows comparable hesitations of the Court to bring certain restrictions that do not really affect "access to (or exit from) the market" under the scope of the Treaty freedoms.

I will conclude that while *Keck* may no longer be decisive anymore, it has certainly played its role.

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1 Joined cases C-267/91 and C-268/91 [1993] ECR I-6097.

2 Too much to mention here. I was one of the early commentators ("L'arrêt *Keck et Mithouard* (vente à perte) et ses conséquences sur la libre circulation des marchandises" *C.D.E.* 1994, at 435 *et seq.*). I trust that nothing of what I wrote then will be held against me now.

3 See also A. ROSAS, "Life after *Dassonvile* and *Cassis:* Evolution, but No Revolution", *The past and the Future of EU Law*, M. POIARES MADURO and L. AZOULAI (eds.), Oxford, Hart, 2010, at 442; as to *Keck* see however N. REICH, "The 'November Revolution' of the European Court of Justice: *Keck, Meng* and *Audi* revisited," *CML Rev* 1994, 459.

4 Case C-120/78, *Rewe Zentral* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR, 649

5 For the first part of the title of this contribution and the many interesting ideas and useful references article I am indebted to F. PICOD, "La jurisprudence *Keck et Mithouard* a-t-elle un avenir?", in L. AZOULAI (ed.), *L'entrave dans le droit du marché intérieur*, Bruylant, 2011, 47 *et seq.*

I. From Dassonville to Keck

2. For almost twenty years the Treaty provision that is now Article 34 TFEU (ex Article 28 EC; initially Article 30 EEC) (prohibition of quantitative import restrictions and measures having equivalent effect) had been interpreted by the ECJ straightforwardly and broadly. In *Dassonville*[6] the Court ruled that Article 34 TFEU applies to: "*all trading rules [...] which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade*." The Court added however that reasonable restrictions can be justified.

In *Cassis de Dijon*[7] the Court held, in line with *Dassonville*, that "*in the absence of common rules 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 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 defense of the consumer.*"

The grounds of justification mentioned in *Cassis* were just examples and do not constitute an exhaustive list. Other grounds, such as the protection of the environment or the plurality of the press, have been added in subsequent judgments. [8] The "rule of reason" of *Cassis* was welcome in view of the very broad definition of measures of equivalent effect given in *Dassonville* and the very limited list of express grounds of justification in Article 36 TFEU. The broad concept of measures having equivalent effect in Article 34 led to a flood of case law on a great variety of national regulations, including advertising and sales promotions. In *Yves Rocher*[9] the Court ruled that Article 34 TFEU precluded the application of a provision of the former German law on Unfair Competition which prohibited a seller established in Germany, for mail order sales by catalogue or sales brochure of goods imported from another Member State, to advertise with a certain form of price comparison.

In other cases the Court avoided applying Article 34 to national measures it found to have insufficient internal market relevance. In this regard one should mention *Krantz.* [10]

The case concerned a Dutch legal provision to the effect that a reservation of property by a seller could not be invoked against the tax receiver. It was argued before the Court that such a rule could deter a seller established in another Member State from selling to a company in the Netherlands. The Court, however, observed that "*the national provision referred to by the national court*

6 Case 8/74, *Dassonville* [1974] ECR I-838.
7 Case C-120/78, *Rewe Zentral* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR, 649
8 See the examples with reference to the case law in C. BARNARD, *The Substantive Law of the EU*, Oxford, 3rd ed., 2010, 166-167.
9 Case C-126/91, *Yves Rocher* [1979] ECR I-2384.
10 Case C-69/88, *Krantz* [1990] ECR I-6269, at §10 and 11.

applies without distinction to both domestic and imported goods, and does not seek to control trade with other Member States" and that "the possibility that nationals of other Member States would hesitate to sell goods on instalment terms to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Netherlands tax debts is too uncertain and indirect *to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States*". This test has also been applied to typical rules of private law, like in *CMC Motorradcenter.*[11] It would seem that the Court takes a reserved approach when confronted with questions of private law.[12] But the pre-*Keck Krantz* ("too uncertain and too indirect") -test has survived *Keck*, as can be seen in *Corsica Ferries*[13] (an obligation on shipping companies to have recourse to the services of a local mooring company) and *BASF*[14] (on the application of a language provision for patents).

And then came *Keck*. The Court wanted to restrain the scope of Article 34.[15] And it did so in a case concerning another legal provision on sales promotions, namely the French prohibition of resale at a loss. By making a carve out for "selling arrangements" (see hereafter) the Court avoided having to rule on the (probably very problematic) justification of such a prohibition. Today a prohibition of resale at a loss, at least in B2C relations, comes under the scope of Directive 2005/29/EC that has fully harmonised B2C unfair commercial practices.[16]

In *Keck & Mithouard*[17] the Court partly overruled *Dassonville/Cassis*. It held (in paragraph 16):

"*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, so long as such provisions apply to all relevant traders operating within a 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."

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11 Case C-93/92, *CMC Motorradcenter* [1993] ECR I-5009.

12 See J. STUYCK, "The Court of Justice as a Motor or Private Law" in C. TWIGG-FLESNER, *The Cambridge Companion to European Union Private law,* Cambridge University Press, 2010, 101 *et seq*

13 Case C-266/96, *Corsica Ferries* [1993] ECR I-3949 at §13.

14 Case C-44/98, *BASF* [1999] ECR I-6269, at §16.

15 Such restraint had been advocated i.a. by E. WHITE, "In Search of the Limits to Article 30 of the EEC Treaty", *CML Rev*. 1989, 259.

16 The ECJ has repeatedly confirmed the very broad character of the definition of commercial practice in the Directive; see in particular Case C-540/08, *Mediaprint*, Judgment of 9 November 2010, not yet reported in the ECR.

17 See footnote 1 above.

The Court gave the reasons for this new rule in the next paragraph (17) of the judgment:

"*Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products, such rules therefore fall outside the scope of [Article 34 TFEU]*."

In *Keck & Mithouard* the ECJ thus abandoned the strict standard of *Dassonville* and *Cassis de Dijon* for national regulations on "certain selling arrangements". Basically rules on selling arrangements are rules on the circumstances (place, time, sales methods, advertising, price regulations[18] etc.) in which goods are marketed. Henceforth such rules are immune for scrutiny under Article 34 TFEU on import restrictions if, in essence, they do not discriminate in law and in fact between imported goods and domestic goods. At the same time the Court maintained its *Dassonville/Cassis de Dijon* case law with respect to rules that lay down requirements to be met by goods (designation, form, size, weight, composition, presentation, labelling, packaging).

II. The aftermath of *Keck*

A. Keck *applied and fine tuned*

3. Increasingly the Court had to deal with cases that did not fit in the *Cassis/Keck* dichotomy.

Examples are commercial monopolies, authorisation systems, conditions under which goods can be used.[19] The case law showed hesitations, but the Court basically stood firm on *Keck*.

Cases like *Mars*[20] and *Vereinigte Familiapress*[21] made it clear that it is not so much its nature (*e.g.* an advertising or sales promotions rule) that qualifies a rule as a selling arrangement, but the fact whether it does, in its application, affect the good itself or not. If it does (*e.g.* because the labelling of a good is not in conformity with a prohibition on misleading advertising or a rule on sales promotions) it is not a "selling arrangement", but a requirement to be met by the goods within the meaning of *Cassis*.

18 See Case C-531/07, *Fachverband der Buch- und Medienwirtschaft/LIBRO Handelsgesellschaft* [2009] ECR I-3717; already in the1970s, in a "pure" Dassonville and pre-*Keck* era, the ECJ consistently applied a mere non-discrimination test (and not a broader "restrictions" test) to national price regulations; see J. STUYCK, footnote 2, at p. 447, with references to the case law.

19 See F. PICOD, footnote 5 above, 47 *et seq.*

20 Case C-470/93, *Mars* [1995] ECR I- 1923.

21 Case C-368/95, *Vereinigte Familiapress* [1997] ECR I-3689.

Other judgments, like *Gourmet*,[22] stressed the importance of the condition for application of the *Keck* "immunity" that the measure does not discriminate in law or in fact imported goods. The Swedish ban on magazine advertising for alcohol, in that case, had a greater negative impact on the marketing of imported alcohol than on the marketing of domestic alcohol and therefore impeded access to the Swedish market of foreign alcohol.

Interestingly, in order to determine whether a rule on selling arrangements, in particular in cases concerning advertising restrictions, falls outside the scope of Article 34 TFEU, the Court refers, since *de Agostini*,[23] to paragraph 17 of *Keck*, *i.e.* that is not by nature such as to *prevent the access* of goods originating in other Member States *to the market* or to *impede access any more* than it impedes the access of domestic products. This formula contains two alternatives. The latter is indeed a non discrimination test. However, the former refers to an impediment to market access for imported goods, without any comparison with the fate of domestic goods.[24] This can be seen as the seed for the new case law developed in 2009, discussed hereafter.

B. Keck *cut in pieces – motorcycle trailers and jet-skis*

4. When the Court was confronted with rules that were neither product-related (requirements to be met by goods), within the meaning of *Cassis de Dijon*, nor selling arrangements, within the meaning of *Keck & Mithouard*, it developed its new case law as expressed for the first time in *Commission* v. *Italy*[25] (hereafter "Italian Trailers"), soon followed by *Mickelsson and Roos*.[26] The first case concerned a prohibition in Italy to use trailers for motorcycles (for road safety reasons); the second a ban on the use of jet-skis on public waterways in Sweden, except those waterways specifically designated by the authorities (basically for environmental reasons), which amounted at the time of the reference to a (quasi) absolute impossibility to use these engines in the country. In *Italian Trailers* AG Léger proposed a strict *Cassis* approach. In *Mickelsson* AG Kokott suggested to decide the case on the basis of *Keck* (in view of the similarity of the kind of regulation in issue with selling arrangements), but stressed the access to the market aspect.

In §24 of *Mickelsson and Roos* the Court held:
"*It must be born in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods*

22 Case C-405/98, *Gourmet* [2001] ECR I-1795, see J. STUYCK, "*Gourmet* une nouvelle brèche dans la jurisprudence *Keck*?" in *C.D.E.*, 2011, 683 *et seq.*

23 Case C-405/98, *de Agostini* [2001] ECR I-1795, at paragraph 18 ; see also Case C-239/02, *Douwe Egberts* (2004) ECR I-7007.

24 See P. OLIVER, *Oliver on Free Movement of Goods in the European Union*, Hart, Oxford, 2010.

25 Case C-110/05, *Commission* v. *Italy* [2009] ECR I-519.

26 Case C-142/05, *Aklagaren* v. *Percy Mickelsson and Joakim Roos* [2009] ECR I-4273.

*coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as 'measures having equivalent effect to quantitative restrictions on import' for the purposes of Article [34 TFEU] (*with reference to Cassis de Dijon *and other judgments). 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 (see Case C-110/05) Commission* v. *Italy (...) §37).”*

In these cases the Court did not abandon *Keck*, but partly integrated it, without referring to it, in a broader category of discriminatory measures and it formulated a third category of measures that do fit neither in the category of discriminatory measures (including non discriminatory selling arrangements) nor in that of product related rules (*Cassis*), *i.e.* all other measures that hinder access to the market for goods originating in other Member State and in which it classified conditions under which goods can be used.

In both cases the measure in issue was very likely to deter consumers to buy the goods, the importation of which was allowed but the use of which was banned or heavily restricted. The regulations thus hindered access of the products to the national market.

It should be noted that half a year before *Italian Trailers*, namely in *Commission* v. *Portugal*,[27] the Court had already ruled that a national provision (prohibition in Portugal to affix a dark film on car windows, a “modality of use”) affected the marketing in that country of all tinted film legally manufactured and sold in other Member States to be affixed to the windows of motor vehicles and therefore constituted a measure having equivalent effect.

Actually the new test cuts *Keck* in two pieces. The traditional *Keck* formula of measures (selling arrangements) that discriminate in law or in fact vis-à-vis imported goods is a subcategory of the test in the first sentence, which includes other discriminatory measures than selling arrangements. Selling arrangements (and other measures) that impede access to the market even without discriminating in law or in fact against goods originating in other Member States are caught by the residuary third sentence.

At the same time the Court elevates the rationale for excluding non discriminatory selling arrangements from the scope of Article 34 TFEU (§16 of *Keck*), namely the absence of impediment for the access to the market (in §17 of *Keck*), to a new norm in its own right (the third sentence of §24 of *Mickelsson*). Hindering access to the market of products originating in other Member States to the national market becomes a new, residuary test, for those measures that are neither (*de jure* or *de facto*) discriminatory nor (whether discriminatory or not) product related.

27 Case C-265/06, *Commission* v. *Portugal* [2008] ECR I-2245.

C. The access to the market test coming of age

5. In some more recent case law, such as the judgments in *Ker-Optika bt*[28] and *Ascafor*,[29] the ECJ makes a further move towards making market access the central test of Article 34 TFEU.

In *Ker-Optika bt* the Court had to rule on a prohibition in Hungarian law to sell contact lenses via the internet. The Court confirms that this concerns a selling arrangement (§45). The Court then first refers to *Dassonville* (§47), but immediately adds, with reference to *Italian Trailers*, that its case law reflects the obligation to comply with the principles of non-discrimination, mutual recognition and access of EU products to national markets (§48 of the judgment, as in §24 *Mickelsson and Roos* above).Finally it refers to *Keck*. But then it states that a national rule on selling arrangements, unless it does not discriminate, is by nature such as to prevent the access of the imported goods to the market or to impede such access more than it impedes the access of domestic goods. The negative formula of §17 *Keck* (provided that the selling arrangement does not discriminate it does not impede access to the market) is reversed to a positive formula: a selling arrangement that discriminates does impede access to the market. In his opinion Advocate general Mengozzi had referred to *Keck* and came to the conclusion that the requirements laid down by Hungarian law for the marketing of lenses affected to a greater degree the selling of products from other Member States (the comparison test in *Keck*).[30]

Ascafor, rendered without opinion by the Advocate general (Bot), concerned Spanish regulations on certification for reinforcing steel for concrete. Both Spanish and non-Spanish certification bodies granting a quality label for these products had to fulfil all the conditions laid down by the regulations. The Court again started (at §52) with a reference to the *Dassonville* formula, quoting *Dassonville* and *Ker-Optika*, followed by a reference (§53) to the obligation to comply with the principles of non-discrimination and of mutual recognition (with reference to *Italian Trailers* and *Ker-Optika*). The Court found that the imposition of all the requirements may result in the rejection of an application for recognition of quality certificates granted in another Member States, which in its turn can discourage economic operators in Spain from importing reinforced steel produced in another Member State (§57).

III. Exports: exit of the market?

6. At the time when several Advocates general questioned *Keck*, Advocate general Trstenjak[31] also argued in favour of a new test for export restrictions. Since its very first judgment, *Groenveld*, in 1979, the ECJ had consistently interpreted Article 35 TFEU (export restrictions) as merely catching formally

28 Case C-108/09, *Ker-Optika bt*, judgment of 2 December 2010, not yet reported in the ECR.
29 Case C-484/10, *Ascafor*, judgment of 1 March 2012, not yet reported in the ECR.
30 Point 64 of his opinion.
31 Opinion in Case C-205/07, *Gysbrechts* [2008] ECR I-9947.

discriminatory restrictions, *i.e.* measures that specifically apply to export trade, in such a way as to provide a particular advantage for national production or for the national market of the Member State concerned.

Nearly 30 years later, in *Gysbrechts*,[32] the Court developed a new stricter test.

Article 35 TFEU also applies to national measures (in that case a prohibition on a distant seller to require a consumer's payment card number before the expiry of the period for the exercise of the right of withdrawal) that are applicable to all traders active in the national territory, but the factual effect of which is greater on goods leaving the market of the exporting State than on marketing of goods in the domestic market of that Member State. In other words Article 35 TFEU applies not only to measures that make a formal distinction between export and domestic trade, but also to those that have a discriminatory effect on exports. In her Opinion AG Trstenjak drew a parallel between the access to the market test of *Keck* and what she called "exit of the market" in case of exports. The AG stressed however that certain selling arrangements restrict exit from the market even though they do not discriminate either in law or in fact. The Court did not follow the AG in extending *Keck* to exports but applied the *de facto* discrimination test of *Keck* by holding the contested measure to be an obstacle within the meaning of Article 35 TFEU in that its consequences are generally more significant for cross-border sales made directly to consumers than for domestic sales (in particular where the seller has to sue abroad consumers who keep the goods without paying them). Even though such a prohibition applies to all traders active in the national territory, its actual effect is nonetheless greater on the goods leaving the market of the exporting State (§43). *Groenveld*, however, was not overruled. This means that under Article 35 TFEU there are now two tests: a formal, discrimination test (*Groenveld*) and in addition a *de facto* discrimination test (linked to exit of the market)(*Gysbrechts*).

Since *Mickelsson* and *Gysbrechts* there is a certain degree of convergence in the case law on Articles 34 and 35 TFEU. For both freedoms what matters is access to the market or exit from the market. But what does this mean? I will come back to this later.

IV. *Keck* and the other freedoms

7. At this stage I would like to examine what *Keck* means for the other fundamental freedoms, goods aside.

A. Services

8. *Säger*,[33] the first judgment in which the ECJ applied a full-fledged *Cassis de Dijon* "rule of reason" to Article 56 TFEU, was very much based on the similarity of restrictive legislation on goods and services. But in *Alpine Invest-*

32 Case C-205/07, *Gysbrechts* [2008] ECR I-9947.
33 Case C-76/90, *Säger* v. *Dennemeyer* [1991] ECR I-422.

ments[34] the Court expressly refused to extend Keck to services and maintained a strict restrictions approach with the ensuing necessity for Member States to justify, in the general interest, any type of restriction to the cross border provision of services.

But sometimes Articles 34 TFEU and 56 TFEU (free provision of services) will apply to the same facts. In *Gourmet*,[35] a case about a Swedish ban on alcohol advertising in magazines, the Court applied the *Keck* test and found that the impact of the ban on foreign alcohol was bigger than on Swedish alcohol (in view of the fact that domestic drinks are known by consumers via other channels). Hence the condition of *Keck* that the rule has no greater negative impact on imported goods than on domestic goods was not fulfilled. The Swedish ban also affected the cross border provision of advertising services (by Swedish magazines to the benefit of non Swedish advertisers). The ECJ therefore found that the measure restricted both the free movement of goods and the free provision of services (Articles 34 and 56 TFEU) but that it could possibly be justified for the protection of public health (Article 52 TFEU), subject to a proportionality assessment by the referring judge.

In *Karner*[36] the Court was inconveniently confronted with a situation where the answer under Article 34 and Article 56 TFEU might have been different. The case related to an advertising prohibition that fell outside the scope of Article 34, namely a prohibition, in Austria, to advertise that goods originate in a bankruptcy estate when at the time of the advertisement the goods are not any more present in that estate. The national legislation obviously concerned a selling arrangement and it was neither *de jure* nor *de facto* discriminating imported goods. So the Court found that there was no measure of equivalent effect within the meaning of Article 34. But there was also a service involved, namely by the company that organised the advertising campaign on behalf of the seller. However, since in its view the free provision of services was really subordinate to the free movement of goods, the Court said that it only had to examine the national provision in the light of the latter freedom. Admittedly the restriction did not, like in *e.g. Gourmet*, amount to a ban to use certain media and therefore the service issue was indeed less important. However, had the Court assessed the advertising rule in the light of Article 56 TFEU, it would probably have found that the prohibition was not justified in the interest of consumers. The result would have been that under Article 34 there was no problem (because of *Keck*) while the rule would have been incompatible with Article 56 (because of the absence of *Keck* "immunity" under that freedom).

In contrast in *Gourmet* the simultaneous application of Articles 34 and 56 TFEU did not cause any problem because the Court found that the measure did not satisfy the *Keck* condition that the measure had the same effect on imported goods and domestic goods and hence it had to be justified in the general interest to comply with Article 34 TFEU as well.

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34 Case C-384/93, *Alpine Investments* [1995] ECR I-1141.
35 See footnote 23 above.
36 Case C-71/02, *Karner* [2005] ECR I-9641.

In some judgments on free provision of services the Court used language that is somewhat reminiscent of *Keck*, or perhaps rather of *Krantz*. In *Viacom Outdoor*,[37] for example, the ECJ considered with respect to a municipal tax on outdoor advertising that the amount was fixed at a level which could be considered modest in relation to the value of the service provided. "*In those circumstances the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services*", including in cross-border situations.

This is language reminiscent of both *Keck* (the less attractive test) and of *Krantz* (the feeble impact on cross border transactions).

More importantly, since the entry into force of Directive 2006/123/EC on Services in the Internal market[38] the discrepancy between the appraisal of selling arrangements under Article 34 and Article 56 respectively may even have become bigger. Article 16(1) and 16(3) of this directive have repealed most of the possible grounds of justification for restrictions on the cross border provision of services (now limited to the legal exceptions of the Treaty plus the environment and in case of provision of services with commercial presence in the host Member State, also employment conditions).

In this regard it should be stressed that the entire area of commercial practices (including advertising and sales promotions) of businesses vis-à-vis consumers, such as advertising, that most often constitute selling arrangements (except where they affect the marketing of the goods themselves) has been fully harmonised by Directive 2005/29. Therefore national laws in this area do not longer have to be assessed in the light of the Treaty provisions.

B. Right of establishment

9. *Keck* is not really an issue here. In case *Semararo Casa Uno,*[39] however, the Court had to assess the Italian legislation on the closing of retail outlets on Sundays and public holidays in the light of both Articles 34 and 49 TFEU. With regard to Article 34 the Court applied *Keck* and found that its conditions were fulfilled. As to Article 49 TFEU on the right of establishment (at that time Article 52 of the Treaty) the Court merely noted that the legislation in question is applicable to all traders exercising their activity in the national territory, that its purpose is not to regulate the conditions of establishment of the undertakings concerned and that any restrictive effect which it might have on freedom of establishment was too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom. A formula that is more reminiscent of *Krantz* than of *Keck*.

37 Case C-134/03, *Viacom Outdoor* [2005] ECR I-1167, at §38.
38 Directive 2006/123, (2006) *O.J.* L 376/36.
39 Joined Cases 418/93 *et seq*. [1996] ECR I-2975.

C. Free movement of workers

10. In the area of the free movement of workers, where the Court has also broadened the scope of application of Article 45 TFEU to measures that do not discriminate directly or indirectly on the basis of nationality,[40] it has sometimes applied the *Krantz* test. In Case C-190/98 *Graf*[41] the Court had to rule on the compatibility with Article 45 TFEU of a German provision which denied a worker entitlement to compensation on termination of employment where he terminated his contract of employment himself in order to take up employment in another Member State. The German law however did grant the worker entitlement to such compensation if the contract ended without the termination being at his own initiative or attributable to him. The ECJ made an express reference to *Krantz* and *BASF*. It held that such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers where it does not attach to termination of a contract of employment by the worker himself the same consequence as it attaches to termination which was not at his initiative or is not attributable to him.

V. How to put this all together?

11. Under Article 34 TFEU (import restrictions) we have four tests: a non-discrimination rule (*Keck* and more), mutual recognition (*Cassis*), access to the market (*Mickelsson* §24, last sentence) and the "too remote" test (*Krantz*). Under Article 35 we have two tests: the non discrimination rule of *Groenveld* and the exit of the market test of *Gysbrechts*.

Under Article 56 (services) the Court basically sticks to a broad concept of restriction with no *Keck* but sometimes a kind of *Krantz* test. The same is true for the right of establishment and the free movement of workers. The free movement of capital has not so far been affected by *Keck* or *Krantz*.

What about a single market governed by four freedoms that, according to *Gebhard*[42] should not be restricted by national measure of any kind unless it can be justified in the general interest?

Had *Keck* not been repeated so often subsequently, it could be seen as an accident de parcours. But *Mickelsson* and *Italian Trailers*, followed by *Ker-Optika* and *Ascafor* might be seen as steps in rendering *Keck* less central and interpreting Article 34 TFEU, except for product related requirements that remain covered by Cassis, as a plain market access test. Likewise for exports (Article 35 TFEU) the decisive test is one of exit of the market. But the *Groenveld* test is maintained and covers formally discriminatory regulations.

40 See *e.g.* C-415/93, *Bosman* [1995] ECR I-4921.
41 Case C-190/98, *Völker Graf* [2000] ECR I-493.
42 Case C-55/94, *Gebhard* [1995] ECR I-416.

But are the notions of access to and exit from the market really helpful? When is access to the market impeded? Even after its upgrade, since *Italian Trailers* and *Mickelsson*, the market access test remains a residuary one. This is probably its best function, because in all its openness it will only have to be applied where a *de jure* or *de facto* discrimination and an effect on the very marketing of goods cannot be shown. But that being said, and especially in view of the three tests as expressed in *Mickelsson* with no mention of *Keck*, it would seem that we do not need the concept selling arrangements of *Keck* anymore.

But what about the market access test?
Even though the Court has given some guidance on this issue, such as the consideration in *Mickelsson* that consumers will be deterred to buy imported goods that cannot be used or not sufficiently used, the application on a case by case basis by the national courts will not lead to a uniform application of Union law.

Eventually harmonisation of laws reduces the uncertainties around Article 34 TFEU.
The origins of *Keck* can be found in the fact that the application of this Article was stretched so far as to cover rules on Sunday trading and rules on sales promotions and advertising, areas with a high degree of national sensitiveness. However the assumption that in particular rules on advertising and sales promotions are not sufficiently crucial for the internal market, even if they do not discriminate, can be questioned, especially in the light of the existence of the Unfair Commercial Practices Directive 2005/29, showing that national legislation in the field of commercial practices, including advertising and sales promotions is of high concern for the internal market. But at the same time, at least in B2C relations where commercial practices matter most, this Directive has fully harmonised national rules on sales promotions and advertising.

Therefore these rules do no longer need to be checked in the light of the Treaty provisions governing the free movement of goods or the free provision of services.[43] For certain other national rules that are far from crucial for the internal market, such as Sunday trading rules, and that were submitted to the Court before *Keck*, the Court indicated that, if they were restrictive, they could be justified in the general interest.

For restrictions on channels of trade, like online sales, that are important for the functioning of the internal market,[44] because they are typically used for cross-border trade, the case law is well established that *Keck* cannot put them outside the reach of Article 34 TFEU.[45]

43 Except in the field of financial services and immovables where Member State van maintain or introduce stricter rules (see Article 3(9) of the Directive).

44 See the full harmonisation of pre-contractual information duties and the right of withdrawal for distant selling (most often online these days) in Directive 2011/83 on consumer rights.

45 Case C-322/01, *Doc Morris* [2003] ECR I-14887.

Still the question remains what intensity is needed for an impediment to market access. In this respect the "too remote" test of *Krantz*, as a correction to *Dassonville*, which has never been abandoned as basic test, might be a better alternative,[46] but presently it is rarely applied.

There would seem to be an additional reason to apply a duo *Dassonville/Krantz*. It would mean more convergence with the free provision of services. But the drawback would be less convergence between Article 34 and Article 35, as these articles are presently interpreted.

Concluding remarks

12. *Keck* was probably inevitable, since after a flood of cases that were rather trivial from an internal market point of view, the ECJ had to limit the very wide scope it had given to Article 34 TFEU in *Dassonville*. The Court was right not to extend *Keck* as such to the other freedoms. The greater convergence, since *Gysbrechts*, between Article 34 and 35 TFEU should also be welcomed, although it should be recognised that the respective function of these two Treaty articles is somewhat different, as the Court rightly stressed in *Groenveld*. Lastly, the non-extension of *Keck* to the other freedoms should also be welcomed in view of the decreasing role of *Keck* for the application of Article 34 and the uncertainties of its scope.

The ECJ has been struggling with *Keck*. The dichotomy between selling arrangements and requirements to be met by goods does not cover the full reality, as was evidenced by cases like *Italian Trailers* and *Mickelsson* concerning "modalities of use".Moreover, the same rule can be a selling arrangement or a requirement to be met by goods depending on its factual application.

Under *Keck* "revisited", *i.e. Italian Trailers*, *Mickelsson* and judgments in the same vein, suggesting that "selling arrangements" may not be an important category of national rules after all, the problem resides in determining which measures hinder access to the market, both those that discriminate *de facto* and those that do not discriminate because there is no domestic equivalent. What is the market access threshold?

If we turn back to *Keck* itself: the prohibition at stake – the French prohibition of resale at a loss by retailers – did not as such apply to cross-border trade and its impact on imported goods was at most *indirect*. The same is true for restrictions on the use of certain channels of distribution for certain goods, opening hours of shops and indeed Sunday trading rules. In contrast, advertising and sales promotion rules, unless they relate to local advertising, such as in *Hünermund*[47] (prohibition for German pharmacies to advertise for certain products outside outside their pharmacy) or *Leclerc-Siplec* (prohibition on French retail companies to advertise on national TV channels)[48] can be of a

46 In this sense F. PICOD, footnote 5, at p. 71.
47 Case C-292/92, *Hünermund* [1993] ECR I-6787.
48 Case C-412/93 [1995] ECR I-179.

different nature. Even if they are not liable to impact on the goods themselves, like in *Familiapress or Mars*, they are likely to restrict cross-border advertising and sales promotions by forcing advertisers to adapt their pan European advertising campaigns to the local diverging rules. But then, as said above, advertising and sales promotion rules in B2C relations are fully harmonised by Directive 2005/29.[49]

Eventually the very broad scope for application of the *Keck* test as it appeared in 1993 may have evaporated to a large extent.

Yet too many uncertainties remain. A reorientation of the case law without *Keck*, like in *Mickelsson*, and with a renaissance of *Krantz* would be welcome. National rules that do not apply to goods as such but to all traders operating in the territory of a Member State and the effect of which on imported goods is rather incidental should indeed not be caught by Article 34 TFEU.

49 In B2B relations Article 24 of Directive 2006/123 Services in the Internal Market has reduced the power of Member States to regulate advertising, see Case C-119/09, *Société fiduciaire nationale d'expertise comptable*, Judgment of 5 April 2012.