

'The Problem With The ECJ's Approach To Free Movement Is Not Whether It Has Found The Ideal Analytical Techniques For Determining The Boundaries Of The Treaty Prohibitions, But Rather That Its Application Of The Proportionality Principle Undermines Any Attempt To Regulate The Market In The Public Interest'
Discuss.

With the creation of the E.C. Treaty¹, came the inclusion of the four freedoms. Articles 28, 39, 43 and 49² each prohibit restrictions of the free movement of goods, workers, establishment and services respectively. This essay will be focusing mainly on the European Court of Justice's approach to Article 28 and the free movement of goods, which prohibits quantitative restrictions (QRS) on imports and any measures having equivalent effect (MEQRs)³. When approaching Article 28, the ECJ widened the scope of the free movement rules to focus not solely on those measures which obviously discriminate, but also rules which restrict commercial or economic freedom where there is no element of discrimination involved.

Beginning in Dassonville⁴, the ECJ declared Article 28 covers measures which 'whether the law directly or indirectly, actually or potentially is capable of hindering intra-community trade'⁵. Supplementing this, Cassis de Dijon⁶, extended the scope of Article 28 to include both distinctly applicable rules (measures which are directly discriminatory and only apply to imported goods) and indistinctly applicable measures (rule which do not discriminate in law, but does in fact, making it more difficult or less favourable for the non-national to comply with). This was largely based on the reasoning that indistinctly applicable rules which relate to product composition and packaging create a dual burden for the importer, as the importer will have to comply with 2 sets of regulations. The court mitigated the effects of this widening, by allowing distinctly applicable rules to be justified by the Article 30 derogations, but also creating judicially created derogations known as mandatory requirements (discussed further on).

With regards to selling arrangements, i.e. those rules concerning who sells the product, when they sell the product and how they sell the product⁷, the ECJ in Keck⁸ carved a solid exclusion for provided they meet the two provisos universality & neutrality. (apply to all affected traders operating in the territory and in a non discriminatory manner having the same burden in law and in fact)⁹. When initially applying Article 28 to selling arrangements, the ECJ took a formalistic view; if the provision was classified as a selling arrangement, even if it concerned advertising which could infringe market access, it was excluded from Article 28¹⁰. As criticism came and different approaches were suggested by the likes of AG Jacobs for example (test of substantial hindrance to market access)¹¹, the ECJ subtly took note and applied the Keck provisos in more detail.

The Single European Act 1986¹², initiated an 'Internal Market' within the European Community – a common area where member states could trade freely between other member states and create uniformity. Whilst this may have been one of the key goals of the E.U, another

¹ Treaty of Rome 1957

² *ibid*

³ G. De Burca & P. Craig, *EU Law Text, Cases & Materials* 4th edition

⁴ Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837

⁵ *ibid*

⁶ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1974] ECR 649

⁷ Mortleman. K – 'Article 30 of the EEC Treaty & Legislation Relating To Market Circumstances: Time To Consider A New Definition' [1991] 28 *CMLRev.* p.115-116

⁸ Case C-267, 268-91, *Keck & Mithouard* [1993] ECR I-6097

⁹ Described by Advocate General Stix-Hackl – Case C-322/01 *Deutscher Apothekerverband v. 0800 DocMorris NV* [2003] ECR I-14887

¹⁰ Cases C-69, 258/93, *Punto Casa SpA v. Sindaco del Comune di Capena* [1994] ECR I-2355

Cases C-401, 402/92 *Tankstation Heutke* [1994] ECR I-2199

¹¹ C-412/93 *Leclerc-Siplec v. T1 Publicite* [1995] ECR I-179

¹² *Single European Act* 1986

objective pursued was the protection of public interests. This has been clearly shown by derogations covered by Article 30 covering the protection of public morality, policy, public security and the protection of health and life of humans, even stretching to include wider aspects of public interest, such as the protection of animals/plants and national treasures. Furthermore, in Cassis¹³, an additional set of judicial derogations were conceived, albeit, only applicable to indistinctly applicable rules. Although, given justifications including protecting public health and consumer protection are permissible, it again paints the picture of the ECJ when regulating the market has increasing awareness of the need to regulate the market in accordance with public interests.

A member state does not escape liability for a breach of Article 28 simply based on the fact they have a legitimate reason for their breaching measure. The action it takes must be proportionate and the fundamental issue at stake will always be whether the measure is proportionate. In Rau¹⁴, it was described that, 'such rules be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective, it should choose the means which least restricts the free movement of goods'¹⁵, with Barnard describes the test as comprising two parts – necessity and suitability¹⁶. The member state must show the measure they are taking is necessary to achieve the public interest goal stated, with the action taken being the least restrictive of trade. Thus, the national restriction must be proportionate to the aim pursued, with the national court required to perform a balancing exercising between the objectives which are being pursued by the measure and the detrimental effects on the free movement of goods. Theoretically national courts have the power to decide upon proportionality, but as observed by Tridimas¹⁷, it is often the ECJ itself which decides proportionality, indicating its view to the national courts.

It has to be mentioned the Courts approach to free movement is effects based. The approach isn't based on a formal legal distinction, but looks to see if there is a problem in effect, seeing if the measure makes it more harder/difficult for intra community trade and mobility. This in itself shows the ECJ wishes to regulate the market in the European Community's public interest as a whole. However, it must be discussed whether the application of this proportionality principle undermines any attempt to regulate the market in the public interest.

With regards to selling arrangements, the problem of the proportionality principle was highlighted in the Sunday Trading cases. DIY stores argued the Shops Act 1950¹⁸ breached Article 28 because goods could not be sold on Sunday and those goods included goods made elsewhere in the EU. The matter was referred to the Court of Justice in Torfaen¹⁹ where the court responded by stating what national court had to do was to apply the proportionality test. The problem identified by critics such as Weatherill²⁰ is by leaving a test of proportionality to national courts inevitably created inconsistent decisions – i.e. in Sunday Trading cases, it was left to the national courts to determine whether the restrictive effects of the Sunday trading ban exceeds the beneficial effects. Consequently, national courts reached different conclusions on the same piece of national legislation (B&Q v. Shrewsbury & Atcham BC²¹, Stoke on Trent City Council v. B&Q²²). This legal uncertainty would increase litigation as possible claimants would be unsure whether national measures were definitely prohibited by Article 28 and not justifiable or proportionate. Therefore,

¹³ Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1974] ECR 649

¹⁴ Case 261/81 Rau [1982] ECR 3961

¹⁵ *ibid*

¹⁶ C. Barnard, *The Substantive Law Of The EU* 2nd Edition (Oxford University Press, 2007) p.119

¹⁷ T. Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' p.68

¹⁸ *Shops Act 1950*

¹⁹ Case C-145/88 Torfaen Borough Council v. B&Q plc [1989] ECR 3851

²⁰ C. Barnard, *The Substantive Law Of The EU* 2nd Edition (Oxford University Press, 2007) p.142

²¹ Case B&Q v. Shrewsbury & Atcham BC [1990] 3 CMLR 535

²² Stoke on Trent City Council v. B&Q [1990] 3 CMLR 31

the proportionality test created confusion and deregulated the market, effectively harming public interest.

In *Henn*²³, the proportional measure of an outright ban on the import of pornographic material from continental Europe was proportional and justifiable under the Article 30 derogation of public morality. In doing so, I would argue by the ECJ inferring an outright ban as proportional to the UK's public morality objectives actually deregulates the market. If regulating the market is to allow the free movement of goods, an outright ban doesn't actually regulate the market, as it completely refuses the fundamental freedom of the movement of goods to exist in relation to the goods concerned here – pornographic material, from being imported into the UK. In support, Shucineck²⁴ states outright bans on products will always be difficult to justify on proportionality grounds unless there is a clear risk that cannot be dealt with in any other way.

However, when attempting to regulate the market, the ECJ must balance market regulation with state autonomy. As there is no uniform scale of moral values across the EU, each member states takes its own public policy regarding its moral stance, the Court wants to regulate the market having strong regard to public interests. Furthermore, a national court when applying the proportionality test, will do its best to protect its state interest. Therefore, the outright ban was actually proportional to the aim of the UK to protect public decency, highlighted by the fact that there was a general prohibition on the manufacture and marketing of such goods in the UK and the Obscene Publications Act²⁵. Therefore, on the surface, the proportionality principle has undermined attempts to regulate the market. However, when comparing this to regulating the market *in the public interest*, then the undermining is in fact justified.

Environmental concerns as a matter of public interest have also been held to be a legitimate and proportional derogation from Article 29. In the *Recycle Bottles Case*²⁶ The ECJ found Danish law requiring all containers for beer and soft drinks to be reusable based on a system of deposit and return points as proportional. The ECJ, accepting environmental protection concerns, stated the measure taken was 'an indispensable element of a system intended to ensure the re-use of contains and was therefore appropriate'²⁷. Again, this depicts the proportionality principle is not being used to undermine any attempt to regulate the market but instead to regulate the market, whilst conjunctionally having regard to the public interest – i.e. the environment.

Furthermore, in *Schmidberger*²⁸ the ECJ has accepted fundamental rights are legitimate public interests which must be balanced against economic freedoms, showing a clear case of a national measure being proportional and supporting the regulation of the market in the public interest – here being the freedom of expression and protest.

Moreover, *German Beer Purity*²⁹ demonstrates the proportionality principle has not undermined any attempt to regulate the market in the public interest, but instead it has been used in combination with the ECJ to promote public awareness and consumer protection. When the ECJ has applied the test, it took a very pragmatic approach, which has been done in order to protect consumers. For example, the ECJ itself came up with a way of making the national measure more proportionate, i.e. by identifying the content and putting a label on it. This would

²³ Case 34/79, *R v Henn & Derby* [1979] ECR 3795

²⁴ J. Steiner, I. Woods & C. Twigg-Flesner, *EU Law*, 10th edition (Oxford University Press, 2009), p. 221

²⁵ *Obscene Publications Act* 1964

²⁶ Case 302/86 *Commission v. Denmark* [1988] ECR 4607

²⁷ C, Barnard, *The Substantive Law Of The EU* 2nd Edition (Oxford University Press, 2007) p.

²⁸ Case C-112, *Schmidberger v. Austria* [2003] ECR I-5659

²⁹ Case 178/84, *Commission v. Germany (Beer Purity)* [1987] ECR 1227

in fact help regulate the market, here concerning the free movement of beer, whilst still protecting the public interest by providing them with a wider scope of knowledge and information about the choice, instead of restricting trade. Furthermore, in *Heimdienst*³⁰, the ECJ suggested instead of entailing grocers who sold their goods from a van to also have a shop in the locality or adjacent locality from where they were selling door to door, a more proportionate salutation would be to require vans to be refrigerated. This would also have the added effect of the member state ensuring goods supplied to their citizens were hygienic. Therefore, it's not a case of the proportionality principle undermining the regulation of the market in the public interest, but instead, the proportionality principle has been used as a pragmatic tool to effectively aid regulation of the market, balancing market regulation in hand with the protection of public interests.

Although, if labelling is a preferred method to protect public interest whilst regulating the market, then national rules which impose labels onto goods would itself breach Article 28 as it would be seen as a product specific rule and under *Cassis*, a breaching measure hindering intra community trade. *Von Heydebrand*³¹ suggests labelling is not a good substitute for goods regulation, believing labels can in fact have the effect of confusing consumers.

However, as the ECJ illustrated in *Estee Lauder*³² and *Clinique*³³, while the protection of public interest (via protecting consumers) is important, the ECJ will refrain from taking a paternalistic approach when applying the proportionality principle in regards to free move regulation. When seeking to protect consumers, an "average consumer who is reasonably well-informed and reasonable circumspect", is thought of. Accordingly, if a national measure seems to protect the unreasonable and unobservant consumer, which consequently has the effect of creating an obstacle to market integration, a line will be drawn. The proportionality principle will therefore be used as a method to protect the internal market, not undermine it as the initial statement suggests.

In conclusion, at times, the proportionality principle has shown to be problematic. It can hinder the regulation of the market in the public interest, by creating confusion and differing opinions based on national jurisdictions (i.e. the *Sunday Trading* cases). However, overall, the principle is a way for the ECJ to weigh up two key goals: market regulation and the protection of public welfare. Instead of approaching national measures in an either or manner, i.e. we will either protect public interest or we will protect free movement, the ECJ has shown to have high regard to all factors and attempt to reach the best possible conclusion. There will be times where the use of the principle will have the effect of undermining public interest, however during these times, the ECJ has attempted to circumvent this by taking a pragmatic approach. Thus, the application of the proportionality principle does not undermine any attempt to regulate the market in the public interest. Instead I would argue the correct observation is that the application of the proportionality principle supplements any attempts to regulate the market in the public interest by the ECJ.

³⁰ Case C-254/98, *Heimdienst* [2000] ECR I-151

³¹ C, Barnard, *The Substantive Law Of The EU* 2nd Edition (Oxford University Press, 2007) p.

³² Case C-220/98, *Estee Lauder Cosmetics GmbH v. Lancaster Group GmbH* [2000] ECR I-117

³³ Case C-315/92, *Verband Sozialier Wettbewerbe v. Clinique Laboratories SNC* [1994] ECR I-317