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Does Keck Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market

Daniel Wilsher

Abstract The aim of this paper is to consider the approach taken by the European Court to discrimination in the post-Keck lines of cases. The previous Article 28 jurisprudence had not considered discrimination in any detail. Thus the *Dassonville/Cassis* case law had deliberately shunned GATT-style anti-protectionist methods in favor of a more dynamic attack on barriers to trade. However introducing discrimination analysis in *Keck* has presented problems as the Court has had to work out what kind of methodology to employ. The paper seeks to set out a general framework for understanding discrimination in EC internal market law more broadly. Discrimination involves treating similar situations differently. The framework consists of three types of similar situations that have been employed in the internal market case-law. These are termed market, regulatory and status equivalence. The post-Keck case-law is analyzed in this context. It is concluded that the Court has failed to employ any coherent discrimination methods in to non-product rules. It has failed to set out well-defined product markets where domestic and foreign products compete. It has also failed to establish disparate impact in these markets using convincing methods. Instead it has found 'discrimination' based upon judicial hunches or intuitions rather than clear criteria and objective evidence about conditions of competition in the product markets. This has caused litigation to become unpredictable and has left both the European and national courts without any clear criteria for scrutinizing non-product rules. This is reminiscent of the problems that arose in the pre-Keck case-law but now the site of uncertainty is what constitutes 'discrimination' rather than what amounts to a barrier to trade. In fact, the case-law exhibits a judicial sleight-of-hand which continues to lean towards the favored 'barriers to trade' test under the guise of discrimination analysis. It would be better either to adopt a precise GATT-style economic methodology or to find a coherent European alternative approach. This author favors the latter because the proper concern of EU internal market law since *Dassonville* has always been the removal of demonstrably *arbitrary* barriers to trade. Only where a trader can establish that a restriction is truly arbitrary should Article 28 bite. For many non-product rules this will rightly be very difficult to do because such rules pursue broad policy goals that are largely non-justiciable.

A: Introduction:

This paper analyses the evolution of the concept of discrimination within the EU internal market case-law. The aim is to situate EU law in the broader context of the anti-discrimination concept within trade law. The experience under the GATT shows that rigorous discrimination analysis is both complex and quite limited as a tool of market integration. That is perhaps why the European Court deliberately moved away from this approach in the *Dassonville/Cassis De Dijon* line of cases and thereby achieved rapid negative harmonization of product rules. Weiler has highlighted the historical background to this difference between the limited anti-protectionist approach of the GATT and the ECJ's more dynamic emphasis on challenging barriers to trade.¹

* The author would like to express his great appreciation to Professor Gareth Davies of Free University, Amsterdam for all his input into this article which is hugely appreciated.

¹ JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in Craig P. and De Burca G.(eds), *The Evolution of EU Law* (Oxford, OUP, 1999)

The sudden introduction in *Keck* of discrimination as the tool for assessing non-product rules has required the Court to hastily revisit the concept. It will be argued that 'Keck-discrimination' has in practice proved to be an incoherent tool for considering non-product rules and this has led to considerable uncertainty amongst national courts seeking to apply it.

B: Discrimination in EC Law

There is no shortage of material from which to construct a model of discrimination in European law. Whilst most prominent in the social field, the concept is still utilized freely in the areas of the free movement of goods, workers and citizens. Even in the area of services and establishment, where market access largely prevails, the Court still employs discrimination analysis on many occasions.² Although market access language is now prevalent in the jurisprudence, a great many of these cases can be viewed as compatible with discrimination analysis. Discrimination has also attracted support from many academics as a workable and legitimate test to adopt in the law of the internal market.³ It leaves Member States with a large degree of autonomy to set regulatory standards but restrains them from acting in an arbitrary or protectionist manner. Despite this, discrimination analysis, as employed across the four freedoms, has not been put within a common framework.

C: Three Types of Equivalence

Although a critical concept, non-discrimination is not self-explanatory. For example, Barnard says: 'The principle of non-discrimination on the grounds of nationality is the cornerstone of the four freedoms... This model presupposes that domestic and imported goods are similarly situated and that they should be treated in the same way.'⁴ The problem is that one cannot presuppose any such thing. One must have a criteria for determining which goods (or services or workers) are equivalent and hence worthy of equal treatment. No credible discrimination model can exist without definitions of what we mean by equivalent or similar situations. A failure to treat equivalent situations the same is a hall-mark of arbitrary behavior.

² See for example C-17/00 *De Coster v College des bourgmestre et echevins de Watermael-Boitsfort* [2001] ECR I-9445 and see the tax cases under Article 43 such as C-446/03 *Marks and Spencer v David Halsey (HM Inspector of Taxes)* Judgment of December 13, 2005,

³ See AM Arnall, AA Dashwood, MG Ross and DA Wyatt, *Wyatt and Dashwood's European Union Law* (4th edn, London, Sweet and Maxwell, 2000) G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003), N. Bernard 'Discrimination and Free Movement.' (1996) 45 ICLQ 82, C Hilson, 'Discrimination in Community Free Movement Law' ELRev [1999] 24(5) 445-462. For a position which recognizes a role for both discrimination and market access see N Shuibhne, 'The Free Movement of Goods and Article 28 EC: An Evolving Framework.' ELRev [2002] 27(4) 408-425. Maduro also favors a type of discrimination approach based upon correcting the political exclusion for importers in M. Maduro, *We, The Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing, Oxford, 1998).

⁴ C. Barnard, *The Substantive Law of the EU* (OUP, Oxford, 2004) at p18.

The core of this paper adopts a framework for analysis based upon three kinds of equivalence. They each take a different approach to this all-important question of how a suitable comparator is identified. The three main kinds of equivalence are: market equivalence, regulatory equivalence and status equivalence. Market equivalence represents the standard approach within trade law approach to discrimination. As we shall see, however, the European Court has developed discrimination beyond this, using regulatory and status equivalence, in order to facilitate both market and social integration.

(a) Market equivalence

Goods and services that are within the same category according to their objective characteristics or uses are clearly equivalent in trade law terms. More broadly, we can say that economic actors show preference for one good or service over another. Where they are indifferent between choices we can consider those choices to be equivalents. Any difference in treatment, *de jure* or *de facto*, between such equivalents triggers an inquiry into whether protectionism is at work. This is an analysis which is essentially economic and empirical in nature. Its origins lie within general trade law as expressed in the General Agreement on Trade and Tariffs through the concept of 'like' products.⁵ We see many examples of this in EC law. For example, consumer preference has been important in discriminatory taxation cases under Article 90. The ECJ has adopted the view under Article 90(2) that only if consumer preference indicates that goods are substitutes can a difference in treatment between them amount to protectionism.⁶ Even under Article 90(1), where the Court has employed more qualitative rather than economic tests, the ultimate question has been: are these goods substitutes based upon their characteristics and uses?⁷ In relation to Article 49, we sometimes find similar market-based assessments of the degree of competition between services being undertaken by the Court.⁸ This is of course the methodology that is mandatory within the competition law field under Articles 81 and 82 where precise definition of relevant product markets is a *sine qua non*.^{9 10} There has been a vigorous debate within EC competition law about the extent to which rigorous economic tests

⁵ See the concept of 'like products' within World Trade Organisation law at Article III GATT which encompasses physical characteristics, end-uses, tariff groups and consumer tastes as interpreted by the Appellate Body in *European Communities – Asbestos* (AB-2000-11) 12 March 2001 WT/DS135/AB/R, 01-1157.

⁶ C-234/84 *John Walker* [1986] ECR 875.

⁷ C- 169/80 *Commission v Italy (Marsala wine)* [1980] ECR 385.

⁸ C-17/00 *De Coster v College des bourgmestre et echevins de Watermael-Boitsfort* [2001] ECR I-9445.

⁹ C-27/76 *United Brands v Commission* [1978] ECR 207 and Commission Notice on Market Definition [1997] OJ C372/5..

¹⁰ Similarly, employer market preference has been important in Article 141 cases. Male and female workers are considered to be equivalent if they perform the same work in market terms. This equivalence can also arise when they perform work of equal value is performed by an independent review of job classification which will take into training, skills and market demand for types of workers. C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR 5535.

demonstrating quantifiable harm to consumers must be satisfied to justify regulatory intervention.¹¹ There has however never been any doubt that precise economic analysis of the markets is required before regulators may intervene to correct market failure.

(b) Regulatory equivalence

Having considered the nature of equivalence from the perspective of economic actors, we turn now to regulators. Regulators make distinctions between products and services in order to promote public welfare. This may entail that products conform to, for example, minimum standards of safety, consumer information or environmental impact. Whether non-national goods or services are equivalent to home products requires a test of similarity based upon the policy objective being pursued. Thus imported goods which in practice satisfy the policy objectives of the regulator should be treated as similar to each other but not otherwise. There has recently been both academic and some judicial support for such an approach in relation to non-discrimination under the WTO agreements.¹² Rules should not be found to be protectionist when they indirectly restrict the marketing of imports that do not satisfy legitimate policy goals, even if such goods compete with domestic products in the market.

Whilst in the WTO literature, regulatory purpose has been advocated as a means of limiting the reach of trade law and preserving state autonomy, in the EU context, it's principal use has been, ironically, to remove trade barriers. The principle of mutual recognition set out in *Cassis*¹³ creates a rebuttable presumption that goods lawfully sold in other Member State have been adequately regulated to meet host state policy goals. They are presumed to be the regulatory equivalents of goods allowed on the host's market. This reflects the Court's assumption that Member States' political systems and culture are sufficiently similar that each Member State can rely upon the others to adopt and police adequate regulatory standards.¹⁴

¹¹ See for example J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford, Hart Publishing, 2002) and D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, clarendon Press, 1998) but also see M. Monti, 'Antitrust in the US and Europe: a history of convergence', American Bar Association, Washington DC, 14 Nov. 2001 and *XXXIIInd Report on Competition Policy* (2002) by the European Commission which argue that maximizing consumer welfare is now a more central element of EC competition policy (and law?).

¹² J Y Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization.' 23 Boston Univ. International L.J. 215 [2005]. For discussion of this type of equivalence in the EU and WTO contexts see G. De Burca, 'Unpacking the Concept of Discrimination in the EC and the WTO' in C Barnard and J Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002) and D Regan, 'Regulatory Purpose and 'Like Products' in Article III.4 of the GATT (with additional Remarks on Article III.2)' 36 Jour. World Trade Law 443 (2002). RE Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, in *Essays on the Nature of International Trade Law* (Cameron May, 1999).

¹³ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649.

¹⁴ Weiler talks of 'functional parallelism' to describe the ability for Member States to maintain different standards of regulation. See JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in Craig P. and De

The Court effectively gives the job of regulation to the home state and then ensures, through judicial review, that the host state does not unjustifiably discriminate against the home state's regulatory standards by arbitrarily denying goods access to *the* host market. It is important to note that the *Cassis* approach is focused upon relatively minor disparities in product specification rules between Member States (rather than those attributable to vast differences in regulatory goals or culture).¹⁵

Despite this emphasis on removing trade barriers, even within EU law, there have been occasions where recourse to a regulatory equivalence test has preserved Member State autonomy rather than undermined it. This has occurred particularly in relation to directly discriminatory measures aimed at environmental protection. In the famous decision in *Walloon Waste* for example, a market test of equivalence would have led to a finding of discrimination.¹⁶ The Court appeared to adopt the regulatory equivalence test so that, given the environmental goal of the policy, imported waste was not the same as waste produced at home, even if, from a 'user' perspective, the two products were identical.¹⁷ Similar cases can be seen in relation to alleged discriminatory taxation under Article 90. In *Chemial*, the products (alcohol produced by natural and industrial means) were clearly substitutes from a market perspective but from a regulatory perspective it was accepted that they were different because of their environmental impacts.¹⁸ Therefore the difference in their tax treatment did not amount to discrimination because they were not equivalents. In this context, we should note the vigorous debate in the WTO context concerning the extent to which the environmental impact of its production methods can permit regulators to treat a product less favorably than a competing, but less environmentally sound product.¹⁹

Burca G.(eds), *The Evolution of EU Law* (Oxford, OUP, 1999), 349.

¹⁵ Within WTO law this is dealt with by reference to the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. These do not employ discrimination concepts but rather rely upon largely procedural means to establish the arbitrary nature of barriers to imports. Importantly, however, these agreements do not create any presumption of marketability simply due to lawful marketing in the home state.

¹⁶ C-2/90 *Commission v Belgium* [1992] ECR I-4431.

¹⁷ C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099 concerned an obligation imposed upon electricity companies to buy up all the renewable power produced in their locality. This was directly discriminatory against imported energy which was equivalent from a market perspective. However the Court allowed the rules without saying if this was because imported energy was not the same as domestic renewable energy. It is arguable this was the basis for the decision, given the need to create and maintain a demand for such energy.

¹⁸ This contrasts with the more orthodox position established in the WTO context that the different environmental impacts of production methods cannot lead to a finding that goods are not 'like' products. See *Dolphin Tuna I* 30 I.L.M. 1594 (1991) where the Appellate body decided that dolphin-friendly tuna could not be a different product to other tuna. Although see *European Communities – Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) which accepted that carcinogenic properties of product meant that it was not like other products with the same functional characteristics.

¹⁹ There has been much controversy around how far production processes and methods ('PPMs') can be taken into account in defining 'like' products within the WTO system (see note 11 above and *United States – Restrictions on Imports of Tuna*, GATT BISD (39th Supp.) at 155 (1993)) but also within the context of public procurement within the EU itself. See Case C-513/99 *Concordia Buses Finland v Helsinki Municipality* [2002] ECR I-7213 and P Trepte, *Regulating Procurement* (Oxford, OUP, 2004) at 362.

Finally, to complete the picture in relation to the EU internal market, regulatory equivalence has also featured in the case-law on persons. This occurs when comparing educational and professional qualifications for persons who migrate to other Member States. The Court and the legislature has taken the view that practicing professionals and trained workers can enter the same profession when they migrate to other Member States if they can be considered regulatory equivalents.²⁰ The Court has however not adopted the full rigor of a *Cassis*-style presumption of compatibility with host state's standards in establishment cases. By contrast, for cross-border service providers based in other states who are regulated at home the Court has adopted a presumption that they are regulated to adequate standard to meet host state regulatory concerns.²¹

(c) Status equivalence

The most expansive kind of equivalence, we shall call status equivalence. This is rather different in character and is unique to EC law. It does not ostensibly concern market access, unlike those discussed at (a) and (b). Its focus is more social and political, addressing the inherent right of individuals to equal treatment derived from the Treaty prohibition on nationality discrimination. It seeks to ensure that Member States provide the same bundle of social, economic, cultural and other advantages to nationals and non-nationals. It began in the field of movement of persons, particularly workers, but has also been echoed in gender discrimination cases.²² The very fact of the status of being a lawfully resident migrant worker, rather than their professional qualifications or job classification, justified equal treatment. Thus migrant workers were held entitled to equal treatment in respect of social security, housing and other conditions in the host state that are granted to nationals.²³ As the court put it in *O'Flynn*:

'Conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially *migrants workers*...or the great majority of those affected are migrant workers, where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers...or where there is a risk that they may operate to the particular detriment of migrant workers...' [italics added]²⁴

²⁰ C- 71/76 *Thieffry v Conseil de l'ordre des avocats a la cour de Paris* [1977] ECR 765

²¹ C- 76/90 *Sager v Dennemeyer* [1991] ECR I-4221 and C-205/84 *Commission v Germany* [1986] ECR 3755

²² *Secretary of State for Employment, ex p. EOC* [1994] 2 WLR 409 where the issue was the discriminatory effect of UK law giving less employment protection for the mainly female population of part-time workers.

²³ C-316/85 *Centre Public d'aide Social de Courcelles v Lebon* [1987] 2811. Although this case was specifically based upon Article 7(2) of Regulation 1612/68, the principle stems from Article 12 EC Treaty.

²⁴ Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617, para.20.

Their status as 'denizens' entitles them to be treated as of equivalent status to nationals. This is clearly a more political form of equality less concerned with overly economic issues. As AG Jacobs once put it 'No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the 'ever closer union among the peoples of Europe' ...would be an empty slogan.'²⁵

The more recent case-law on citizenship takes the same approach and bestows a status of equivalence upon EU citizens who migrate.²⁶ Thus their mere lawful presence in another Member State generates a right to equal treatment which is grounded in their status²⁷ rather than any particular demonstration that they are suffering in competitive terms or being denied access to a market through regulatory barriers.²⁸ As the Court put it in *Sala* 'It follows that a citizen of the European Union...lawfully resident in the territory of the host Member State, can rely on [Article 12] EC in all situations which fall within the scope rationae materiae of Community law...'²⁹ In order to prove discrimination in such cases the court has relied upon inference and assumption rather than requiring empirical evidence.³⁰ The most important such assumption is that any linkage of a benefit to residence is indirectly discriminatory because non-nationals will be less likely to fulfill it.³¹

It will be argued below that the Court in the post-*Keck* case-law attempted to move to a similar position in relation to importers of goods lawfully sold in the host state. These enjoy the status of 'denizens' in that they cannot be subject to conditions making it harder for them to sell on the host market. Imported goods in this situation are viewed as having equivalent status to domestic goods and therefore any disparate impact caused by the existence, nature or effect of host state regulations amounts to

²⁵ C-138/02 *Collins v Secretary of State for Work and Pensions* para 11 and C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*. 15/3/05.

²⁶ C-184/99 *Grzelczyk v Centre public d'aide social d'Ottigues-Louvain la Neuve* [2001] I-6193

²⁷ The Court has sometimes sought to maintain a bare link between the discrimination felt and a restriction on free movement but this is rather formal. See *Konstantinidis v Stadt Altemsteig* [1993] ECR I-1663 and *Avello* [2003] ECR I-11613.

²⁸ Another example is that female workers have the same status as male workers as far as government regulations impact upon them. Where rules have a disparate impact upon female workers, then they must be justified if they are to be sustained. Women do not have to prove equivalence because they benefit from this status already. *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] 1 WLR 409 is a good example of this kind of reasoning in the UK House of Lords.

²⁹ Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691 at para.63. Also *Bidar* at para.32.

³⁰ For a critique of these assumptions see G Davies, 'Any Place I Hang My Hat?' or: Residence is the New Nationality.' 11 *European Law Journal* [2005] 43 at 46-7.

³¹ C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*. 15/3/05 where a three-year settlement precondition was imposed on those seeking educational loans. In the case of gender equality, by contrast, a close examination of the statistical data on how rules affect men and women has been a feature in indirect discrimination cases. The complainant must show that a rule affects their gender more severely by reference to empirical evidence rather than relying upon presumptions. Case 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

discrimination.³²

C: Equivalent Situations and the Evolution of the Case-law on Goods

(a) *Dassonville to Cassis – Market Equivalence and Similar Goods*

The above model of equivalent situations in helpful is explaining the evolution of the decisions of the ECJ in the field of goods. The famous definition of an MEQR under Article 28 laid down in *Dassonville* was extremely wide and did not mention discrimination of any kind. Despite this, the case was actually decided on the basis of indirect discrimination. The Court said that the rules on certificates of origin were such that ‘only direct importers are really in a position to satisfy without facing serious difficulties.’³³ It concluded that because the certificate of origin was less easily obtainable by indirect importers it was consequently an MEQR. In terms of equivalence, this was an easy case because the products being compared were physically the same, so the Court only had to consider the disparate impact of the rules. The facts presented no difficulty in identifying the relevant comparator.

Around the time of the *Cassis* decision we find the Court again considering situations where the goods subject to disadvantage are identical to home goods. Thus the Court said of price restrictions on certain specific spirits in *Van Tiggele*:

‘Thus imports may be impeded in particular when a national authority fixes price or profits margins at such a level that imported products are placed at a disadvantage in relation to *identical* domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.’³⁴ [emphasis added]

However, for the development of the single market, this kind of approach would have been far too restrictive. These cases relate to the very narrow situation where an *identical* domestic product exists and the rules have disparate impact on the imported version. Where an importer cannot point to an identical comparator, they would have to show domestic products which, if not identical, are *competitors* in economic terms.³⁵ They would also have to show discrimination by reference to empirical evidence. In the context of private litigation, this is difficult, costly and complex. The case-law with the World Trade Organization on the meaning of ‘like’ products shows just how difficult such questions can

³² In WTO trade law terms, we might be tempted to see this as reflecting the obligation to confer ‘national treatment’ upon imported goods once in circulation contained in GATT Article III. However, this obligation requires close analysis of the product markets concerned to demonstrate de facto discrimination in conditions of competition.

³³ C-8/74 *Procureur du Roi v Dassonville* [1974] 837 Para 7.

³⁴ C-8/77 *Openbaar Ministerie v Van Tiggele* [1978] ECR 25 at para 14.

³⁵ The Court was developing its market analysis tests in the competition field with definitions of the relevant market in C-27/76 *United Brands v Commission* [1978] ECR 207.

become.³⁶

Since these early cases, the European Court has been trying to develop new trade law concepts that make market integration easier. This was particularly important if the direct effect of community law was to have any real force as an engine of change. Litigation by private parties should not be too costly or uncertain.³⁷ As Davies has recognized, using the standard economic tools of trade law or competition law to identify markets would be extremely onerous.³⁸ The court recognized that the building of the single market through negative integration would be impossible without a move away from market equivalence tests for discrimination.³⁹

(b) *Cassis- the Move to Regulatory Equivalence*

In *Cassis*⁴⁰, the ECJ freed itself from the constraints of the market equivalence test of the Article 90 case-law and the identical/competing goods factual scenarios that arose in *Dassonville/Van Tiggele*. It did so by choosing a regulatory equivalence test. This meant that it did not need to identify economic competitors in the strict sense outlined above. Clearly *Cassis* was a drink that was rather different in character from the higher alcohol drinks already on the German market. Analysis of fruit liqueurs as against schnapps etc might have revealed separate product markets.⁴¹ However, in *Cassis* the importers goods fell into a group - 'alcoholic drinks' - that were essentially similar from a *regulatory* point of view. Such drinks presented broadly the same issues of product safety, public health, anti-social behavior etc that might cause the authorities to regulate them. Authorities in other Member States might take a different view about how to regulate such products but these differences should not become arbitrary barriers to trade. In such circumstances the court said:

'There is therefore no valid reason why, provided that they have been

³⁶ Matsushita et al put it thus 'The "like" product determination is one of the thorniest in GATT/WTO jurisprudence.' Matsushita M, Schoenbaum TJ, Mavroidis PC, *The World Trade Organization* (2006) Oxford University Press at 236.

³⁷ We can contrast the strong private enforcement element in removing state barriers to trade with the continued lack of such enforcement in EC competition law which is presently the subject of Commission discussion. One explanation is the sheer complexity of economic analysis required to bring such cases. See European Commission. Green Paper. Damages Actions for Breach of the EC Antitrust Rules. COM (2005) 672 final.

³⁸ G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003) at 88.

³⁹ See JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in Craig P. and De Burca G.(eds), *The Evolution of EU Law* (Oxford, OUP, 1999) who argues that, although the language and policy issues under Article 28 were open to differing solutions, the Court made a deliberate choice to go beyond the protectionist approach of GATT.

⁴⁰ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649.

⁴¹ See the extensive alcoholic case-law under Article 90 which did indeed find that many drinks were in distinct and non-competing markets. For example, Case 243/84 [1986] ECR 875 *John Walker*.

lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced to any other Member State.⁴²

The Court perhaps deliberately eschewed the language of discrimination in the *Cassis* decision. The term 'indistinctly applicable' has become established for these kinds of trading rules. The Court clearly wanted to move beyond comparisons between products on the home market and imports because this required careful identification of like goods. The test became one of regulatory not market equivalence. One is looking at discrimination against the regulatory means chosen by other Member States. As Chalmers et al put it 'Because the good has been regulated in France, the Germans must, in principle, accept the good sense of the French regulatory authorities and accept that what is good enough for the French is also likely to be good enough for the Germans.'⁴³ Other Member States seek to meet the same regulatory choice in different ways. Germany did not think that alcohol should be banned but regulated. France thought the same and adopted systems to ensure that lower alcohol products of adequate quality and labeling were permitted to be sold. Germany had to respect the French regulatory view unless it was demonstrated to be inadequate. A failure to do so was arbitrary discrimination against French regulatory standards given the German acceptance of alcoholic beverages on their market.⁴⁴

Despite this move away from market equivalence, in later cases the Court itself has sometimes attempted to locate the underlying the *Cassis* principle within a protectionism framework. It said in *Gilli and Andres*:

'In practice, the principal effect of provisions of this nature is to protect domestic production by prohibiting the putting onto the market of products from other Member States which do not answer the descriptions laid down by the national rules.'⁴⁵

Whilst understandable as a political attempt to locate Article 28 within traditional trade law thinking, this analysis is misleading for the reasons stated above. The Court's decision in *Cassis* was an attempt to move away from comparisons between home producers and importers in favor of a comparison between regulators. The *Cassis* line of cases is in fact

⁴² Para 14.

⁴³ Chalmers D, Hadjiemmanuil C, Monti G and Tomkins A, *European Union Law* (2005) CUP at 679.

⁴⁴ The presumption that the home regulator is a sufficient safeguard for the host state is of course rebuttable by reference to the mandatory requirements. This is where the European Court enters the fray. Stage one (first marketing) is delegated to the home regulator. Stage two is where host state policy is asserted. Stage three (judicial review) is a matter for the Court. The Court must be satisfied that there are no alternative less restrictive means of meeting the host state's policy goals. The *Cassis* case is a careful tri-partite allocation of regulatory power between home and host Member States and the European Court of Justice. It is only concerned with policy goals and regulatory tools to meet them. It requires no analysis of the underlying product markets at all. Market access can be guaranteed even if there is no domestic production to compete with home goods.

⁴⁵ Case 788/79 *Gilli and Andres* [1980] E.C.R. 2071 at para 10.

conspicuous for its total lack of analysis of product markets. Products are merely emissaries for a comparison between regulators' approaches to regulation. This is ultimately a means of challenging arbitrary regulatory barriers to trade through negative harmonization and so the focus is rightly upon this question rather than any demonstrable protectionist effects in favor of identifiable domestic producers. This contrasts with the more exacting approach within the WTO which always requires proof of a competitive relationship between imports and domestic goods.⁴⁶ A casual review of decisions under the GATT reveals how closely defined are (and must be) the product markets in question.⁴⁷ The *Cassis* approach, by contrast, allows the European Court, in a single decision, to cut through swathes of regulation affecting a whole sector, such as alcoholic drinks.

The Court has remained very unclear about this issue which is at the heart of its search for the appropriate balance between Member State and EC regulation of trade. Many commentators have tried to locate the *Cassis* line of cases as built on protectionism due to the 'dual regulatory burden'.⁴⁸ This is said to impose 'extra' costs on importers who have to adapt their products to comply with the second set of rules. This argument is unconvincing for several reasons and does not reflect the methods of the European Court. First, the idea that a second set of regulations imposes impermissible costs is only valid on the *critical assumption* that the first set of regulations provides adequate protection for consumers in the second state. It is this assumption, rather than the extra costs which is crucial. Second, in the case-law the Court almost never seeks to examine the product markets to identify suitable comparators amongst domestic producers. Third, the Court also never seeks to show disparate impact by reference to empirical evidence. For example, home state producers may be equally disadvantaged by the national product standard rules, particularly if they are recent. There is no reason to *presume* that imports are specially affected. Using standard trade law methodology, one would have to show through detailed statistical or qualitative evidence the effect on imports versus home goods.⁴⁹ Finally, the protectionist dual burden argument would also depend upon arbitrary questions about how much home production (if any) there is. If there is none, then there can be no competitive advantage for home producers.⁵⁰ Indeed, this very difficulty in utilizing

⁴⁶ See Qin at 247.

⁴⁷ See Matushita et al above at 236-240.

⁴⁸ See Wyatt and Dashwood, *European Union Law* (4th edn, Sweet and Maxwell, 2000) at 329, Barnard C, *The Substantive Law of the EU* at 19 says 'Indistinctly applicable measure are those rules and practices which in law apply to both national and domestic products but in fact have a particular burden on the imported goods. This different burden may arise because...the imported goods have to satisfy a dual regulatory burden.' S. Weatherill and P. Beaumont, *EU Law* (3rd edn, Penguin, 1999) at 614 say 'Such rules may be shown to be unequal in their factual application by reliance on the notion of the protectionist 'dual burden' of regulatory rules in the state of production and of marketing.'

⁴⁹ In relation to Article III GATT prohibition on on de facto discrimination under the national treatment standard see *United States – Measures Affecting Alcoholic and Malt Beverages* 19/6/92 GATT BISD (39th Supp) at 206 (1993).

⁵⁰ It may be better to suggest that, rather than dual burdens being felt by importers, product rules are worthy of close scrutiny because they clearly impose costs on importers and are therefore

traditional discrimination concepts to tackle such barriers to trade led, in the World Trade Organization context, to the TBT and SPS agreements. These use internationally agreed product standards, if any, rather than home state regulators as the principle tool to combat disparate national regulations.⁵¹

(c) *Keck: the Limits of Regulatory Equivalence*

The *Keck* decision⁵² of course held that Article 28 does not apply to selling rules. This is subject to the famous proviso that regulations must 'affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.'⁵³ This suggests that rules which discriminate directly or indirectly are caught by Article 28. Rules which are de jure unequal do not present a problem. Given that the Court has made such extensive use of this proviso, the crucial question is what test of equivalence has it employed when assessing this inequality 'in fact'?

Given the market-opening power of the *Cassis* approach, the Court might have been tempted to employ it to tackle selling rules. This would have required the ECJ to formulate the test as a presumption that selling arrangements practiced lawfully in the home state are acceptable throughout the EU. This was indeed the thinking behind pre-*Keck* cases like *Oosthoek*⁵⁴ where particular selling techniques had already been adopted by the importer in their home state. The logic of *Cassis* says that all Member States can be trusted, in principle, only to permit selling techniques that do not damage important public interests. Perhaps the importer should be able to use selling techniques permitted in *any* Member State for that type of product. It is not impossible to envisage a test of this kind.

However, there is a more fundamental objection. The importer in many such cases is seeking to engage in practices in the host state that are offensive to the latter's regulatory goals. Unlike the *Cassis* rules, which were designed to deal with relatively minor disparities in the form of product specification regulations, here the host state typically believes the marketing activity in question is damaging to some aspect of cultural or social life. That is why such methods are banned. The fact that the home

barriers to trade. Such rules are therefore not de minimis in their effects on inter-state trade and engage the jurisdiction of the Court under Article 28. Whether they impose *extra* costs compared to domestic producers is another (empirical) question which is impossible and unnecessary to answer.

⁵¹ Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.

⁵² C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁵³ Para.16.

⁵⁴ C-286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575. The importer was banned from using a sales technique that it had employed in its home member state. The court here seemed to draw upon the fact that the selling techniques had already been approved and employed in the home state to suggest they should prima facie be acceptable to other Member States.

state may authorize such marketing methods provides no reassurance to the host state because it broadly disapproves of such practices on its territory. There is no regulatory equivalence between home and imported producers. Qin reaches a similar conclusion in a detailed review of United States jurisprudence on challenges to trade barriers under the commerce clause.⁵⁵ She shows how the Supreme Court has held that traders seeking to engage in marketing practices that were legitimately prohibited are not similarly situated to those not so engaging.⁵⁶

So stage one of the *Cassis* approach, home state regulation, does not provide the same protection for the host state's values. Furthermore, unlike product rules, labeling is often not going to meet the regulatory objective. The test of alternative means supervised by the European Court does not provide a solution here. In fact, in *Keck* the Court rightly recognized that the *Cassis* test of regulatory equivalence is misplaced in the context of selling arrangements. This is because marketing rules are often an end in themselves rather than a means to another goal such as consumer protection. The selling rules of the host state are the embodiment of its regulatory choices for its population. The choice to keep Sunday a special day, protect impressionable children from intrusive advertising or limit consumption of alcohol cannot be met by home state regulations or importers changing their products or their marketing methods.⁵⁷ All producers, both home and importers, are subject to the rules. Such regulatory schemes are not *prima facie* arbitrary because they pursue policy goals in a consistent fashion and discriminate only in ways that are consonant with such goals.

If the regulatory equivalence test is inappropriate in the case of selling arrangements, is it legitimate to employ the more standard market equivalence test in selling arrangements cases? Arguably the Court cannot pick and choose when to look at regulatory purpose to determine whether goods are similar. It cannot simply use regulatory purpose when, as in *Cassis*, it yields market opening results and then abandon it when, as in *De Agostini* or *Gourmet Foods*, it does not.⁵⁸ In defence of the

⁵⁵ J Y Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization,' 23 Boston Univ. International L.J. [2005] 215 at 225-230. See also D Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,' [1986] 84 Michigan Law Review 1091.

⁵⁶ *Bread v Alexandria* 341 U.S. 622 (1951) in which a ban on door-to-door sales of magazines was upheld even though it favored local retailers because the out-of-state firms wished to engage in practices that breached privacy of residents. They were thus not similarly situated.

⁵⁷ Broad restrictions on commercialization of products that are lawfully sold presents greater problems. Here Member States regulation does begin to look arbitrary. If a product is lawful should it not be possible to market it aggressively to adults?

⁵⁸ There is a strong argument for saying that market equivalence and regulatory equivalence should be cumulative tests in the context of the WTO. The first establishes that some competitive disadvantage is being felt by imports. The burden is on the importer to show this. The second test looks to whether this is actually protectionist or rather simply a collateral effect of a legitimate regulatory purpose. The burden here may fall on the state. In the EU context however the closer integration of the European single market and the deeper penetration of common values may support the dispensing of the market equivalence test in order to forge negative harmonization by means of the regulatory equivalence test alone. In this case no actual disadvantage as against a

Court it might be argued that where an importer can clearly show that a measure is harming their ability to compete with a national producer in an economically well-defined market, the regulator should then bear a burden of demonstrating that the rules are necessary and proportionate to meet a legitimate policy goal. The demonstration of such truly protectionist *effects* are a clear harm in trade law terms that switches the burden onto the Member State to show that there was no such *purpose* behind the measure.

However let us leave that point of principle aside for the moment and consider what employing a market equivalence test looks like in selling arrangement cases. The Court helpfully did this in *Commission v Greece (formula milk monopoly)*,⁵⁹ an early post-*Keck* case. The facts concerned a Greek law banning retail sales of formula milk except in pharmacies. Importers argued that sales in supermarkets would allow for greater volumes and reductions in price, expanding the market. The ban applied equally in law. Greece did not produce formula milk. The Commission and AG Lenz argued that therefore 'in fact' the ban affected only importers and was caught by the proviso in *Keck*. The Court rejected this and then made it clear that the market equivalence test was the correct one to apply in such cases so that Article 28 would only bite:

'if it was apparent that the legislation at issue protected domestic products which were *similar* to processed milk for infants from other Member States or which were in *competition* with milk of that type.'⁶⁰[emphasis added]

As noted above, this is exactly the approach to tax discrimination under Article 90 and represents a demanding standard for importers to satisfy. They would have to engage in the detailed empirical analysis so typical of competition and WTO trade law cases. Where there is no competing product, then the importer cannot begin to prove discrimination. The market may simply have to remain largely un-penetrated.⁶¹

(d). *Post-Keck – the Move to Status Equivalence*

With these difficulties in mind, the Court has since abandoned serious use of the market equivalence test set out in *Commission v Greece* in 'selling arrangements' cases. It has also eschewed the regulatory equivalence approach – suggested in *Oesthoek* - that would require mutual recognition of marketing practices. It has instead chosen to avoid these complexities by conferring what I call 'status equivalence' on importers of goods who lawfully enter the host market. Take the case of

competitor need be shown, although there may well be such.

⁵⁹ C-391/92 [1995] ECR I-1621

⁶⁰ Para 18. The Court is of course mindful that the milk from a mother's breast, although not a 'good' in Community law terms, is clearly the market leader.

⁶¹ On breaking down selling arrangements barriers to trade see G Davies, 'Can Selling Arrangements be Harmonized?' [2005] 30 *ELRev* 370.

*De Agostini*⁶² where the facts concerned a ban on the advertising aimed at children on television. It was argued that this discriminated in fact against importers because they found it harder (than domestic companies) to obtain market share without access to this marketing medium. The first question should have been to establish specific markets in which actual or potential competition might take place between domestic and imported goods⁶³ In fact, the Court did not engage in any of this reasoning. It did not investigate the market but simply adopted the proviso in *Keck* saying that the rules must affect in the same way 'the marketing of national products and of products from other Member States.'⁶⁴ The Court then said:

'it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a *product which is lawfully sold there* might have a greater impact on *products* from other Member States.'⁶⁵ [emphasis added]

Applying this later on in *Gourmet* the Court said:

' A prohibition on advertising...must therefore be regarded as affecting the marketing of *products from other Member States* more heavily than the marketing of *domestic products*...' [emphasis added]⁶⁶

These two cases seem to reflect a rule that confers equal status upon importers whose goods are lawfully sold on the domestic market. It says that importers must be viewed as equivalent to home traders. The trading environment must therefore not impede their ability to penetrate the market in a manner which is directly or indirectly discriminatory. Rules which have a tendency to disadvantage imported goods are considered indirectly discriminatory. *Cassis* took goods lawfully sold in the *home* state as meeting regulatory equivalence. Post-*Keck* cases create a presumption that importers of goods lawfully sold in the *host* state have a status equivalent to home producers of such goods. This is the same reasoning as the ECJ adopted in relation to citizens in the line of cases from *Sala* to *Collins*.⁶⁷ Goods importers must not experience disparate impacts caused by the regulatory backgrounds they encounter in host states. At first sight, this appears perfectly reasonable, however as we shall, in reality it makes very little sense.

⁶² C-34-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AG and TV Shop I Sverige AB* [1997] I-3843.

⁶³ We can posit various markets that could then be analyzed in detail to see if conditions were indeed discriminatory by reference to market shares and so on. It is clear however that analysis in terms of a market comprised of 'Domestic and Imported Toys' would be too broad. Such products do not exhibit any features in common that would justify their being treated as equivalent. From an economic, market viewpoint, they consist of many sub-markets; 'video games', 'hand-carved wooden toys' and so on.

⁶⁴ Para 44.

⁶⁵ Para 42.

⁶⁶ Para. 25.

⁶⁷ See notes 16-21 above.

(e) *The Incoherence and Danger of Status Equivalence for Goods*

The use of status equivalence to assess the impact of background regulations on importers is seductive. Convenient as it is however, it fails to convince as an intellectually coherent exercise. This is because the cases considered by the court all concern differential 'market' access. Market access requires definition of a market. On the facts of the *Gourmet* and *De Agostini* cases the rules controlled broad industrial sectors – alcoholic drinks and products for children. The court takes these as suitable comparators without explaining why. This solution relies on very loose ideas about the 'products' to be given equal status.⁶⁸ Unlike real people, who are all considered equal in status as a political fact inherent in their status as Community citizens or workers and so forth, 'goods' are clearly not all the same. Nor, for that matter, are alcoholic drinks or children's products.

The bestowing of status equivalence on an imported good demands an explanation as to what other goods it should be given 'equal rights' to. In fact, products regulated by restrictions on selling sometimes have nothing remotely in common. This is obvious when one moves to marketing restrictions that limit the marketing of disparate classes of products. Where, for example, restrictions cover a wide range of wholly unconnected products such as were in issue in the Sunday trading litigation. Another example is the advertising ban in *Leclerc-Siplec*⁶⁹ which applied to disparate products. Simply choosing to regulate the marketing of a group of products cannot suddenly make them similar to each other such for the purposes of trade law.

Clearly the European Court has in mind the idea that some marketing rules are 'protectionist' in that they favor national producers in some sections of the regulated markets. If this is so, these 'protected' portions of the market must surely be identified. When we look at the *Gourmet Foods* case we can see that the European Court contradicts the findings of it's own case-law in the tax discrimination cases. It appeared to rule that the Swedish restrictions were discriminatory against all importers (or potential importers) of all alcoholic drinks. However, the numerous cases brought under Article 90 make it very clear that there is only competition within some sections of the alcoholic beverage 'market'.⁷⁰ For example *Commission v United Kingdom (wine/beer)* held that only light wines were in competition with beers.⁷¹ Outside of these sections, alcoholic drinks are simply not equivalent products. Discrimination analysis cannot begin to bite. We can support *Gourmet Foods* in so far as it concluded that some sections of the Swedish drinks industry were in competition with imports

⁶⁸ Davies calls this 'irreducible judicial wisdom'. See G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003)

⁶⁹ C-412/93 *Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA* [1995] ECR I-179.

⁷⁰ Case 168/78 *Commission v France* [1980] ECR 347 held that spirits were similar or in competition as a group. Case 243/84 [1986] ECR 875 *John Walker*.

⁷¹ Case 170/78 [1983] ECR 2265.

but not the whole market.⁷²

To conclude that a Member State is protecting a domestic producer is a serious allegation which requires credible evidence and analysis. Such a finding imposes a heavy burden of justification on the Member State. However the Court has used comparators which do not have any basis in standard trade law concepts of discrimination. They are usually simply the result of the regulators choice of which product or sector to regulate. As well as being inconsistent with trade law concepts, this is inconsistent with the Court's own case-law on discrimination under Article 90.

Of course, market equivalence tests, even when properly conducted, are limited in what they can achieve in terms of internal market integration. Thus where there is no competing domestic production there can be no discrimination and hence trade barriers would have to remain. However the post-*Keck* case-law seeks to mitigate this problem by being over-inclusive. Once there is any hypothetical competition between imports and home goods, the whole regulatory scheme may be subject to striking down, even though there may only be competition within a sub-market. However this is not legitimate if Article 28 is truly just an anti-protectionist tool. The 'discrimination' felt by some importers in some sections of the market has become a lever to deregulate the regulated sector to the benefit of all producers, wherever situated. This goes beyond combating protectionism into negative harmonization of non-product rules.

It is suggested that, if discrimination analysis is to be used, the only tenable approach is that of market equivalence that the Court discussed in *Commission v Greece* where it said that the goods must actually be economic competitors. The Court in *De Agostini* and *Gourmet* did not attempt any economic analysis to isolate these competitors and so it is impossible to say if discrimination was occurring.⁷³

(f) Intuitive Discrimination in the post-Keck Case-Law – The Failure to Show Disparate Impact

This failure to define the markets where competition takes place with some precision is serious. However, the post-*Keck* case-law is also deficient for failing to probably consider the next step in discrimination analysis - to show disparate impact on imported goods. The Court has

⁷² If it is argued that the Court has in mind 'potential' competition from imported drinks, this becomes indeterminate as there are no independent criteria by which to distinguish potential from non-potential competitors.

⁷³ For a coherent methodology one could adopt the approach taken to the 'national treatment' standard in the WTO context. The Appellate Body definition is that 'imported products are treated less favorably than like products if a measure modifies the conditions of competition in the relevant market to the detriment of imported products. However, the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product...' *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* WT/DS302/AB/R. Report of the Appellate Body (AB-2005-3), 25 April 2005 at para. 96.

developed a series of intuitive rules that point towards discrimination but again these bear little relation to empirical evidence. Thus in *DocMorris*⁷⁴ the foreign retailer of drugs was challenging a rule banning sales other than in pharmacies. The court made no attempt to analysis the goods markets in question. The restriction was actually felt by a *service* provider (retailer) and so clearly Article 49 might apply. However for foreign goods *producers* to be disadvantaged one would have to examine the degree of competition between home and foreign drugs. Then one would have to look at the range of drugs stocked by retailers at home and abroad. Only then could one say that there was competition between foreign drug producers seeking to enter the market and home producer incumbents. Analysis of the market might reveal that home retailers sold more foreign drugs than domestic ones and vice versa. It is not possible to adopt such a priori presumptions in a complex and integrating market like the EU. Even assuming domestic domination of product markets, one must show that importers face barriers to using existing wholesale or retail networks in the target markets. Only after all these empirical hurdles have been overcome can we say that discrimination is established.

In other cases the court has relied upon the notion that the market concerned is typified by customary patterns of consumption which are said to discriminate against importers. We can see such an approach in the *Gourmet Foods*⁷⁵ decision where the Court says '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 ban on advertising is 'liable to impede access to the market by products from other Member States more than it impedes access by domestic producers.' This is a general assertion, which was not based upon evidence about conditions in the actual market in question. In fact this conclusion applied '[e]ven without its being necessary to carry out precise analysis of the facts characteristic of the Swedish situation...'⁷⁶. The Court fails to provide any tools of analysis nor evidence to justify its conclusions nor to provide guidance on how this might be applied to other markets. It would appear to reflect the Court's view that, in general, any such restrictions must fall within Article 28, even where imports already dominate the sector. This looks like market access rather than rigorous discrimination analysis.

The Court has also used a sort of sliding scale of degrees of interference upon importers ability to enter the market.⁷⁷ Thus it is said that only if the marketing restrictions are sufficiently grave (a complete ban on

⁷⁴ C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV Jacques Waterval*. Judgment of 11/12/2003.

⁷⁵ C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB* [2001] ECR I-1795.

⁷⁶ Para. 21.

⁷⁷ C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB* [2001] ECR I-1795. where the total ban on advertising to the public was taken by the court to be so severe as to discriminate against importers. Whilst in Case C-441/04 *A-Punkt Schmuckhandels v Claudia Schmidt* 23rd February 2006 the ban on selling in the homes of customers of low-value jewellery was not one the Court could make a discrimination finding on.

advertising, for example) can there be discrimination. It is assumed that such bans will have a disparate impact on importers without looking at the market or the mechanism.⁷⁸ However this is not a credible or operable approach. Importers will rightly say that any restrictions on marketing impede them. Their commercial acumen and relative prices of marketing will dictate which is the best technique to gain market share. Advertising is only one method and it may be too costly even if available. In economic terms, incumbents are protected to the extent that *any* marketing techniques used by potential competitors are prohibited. The below-cost selling in *Keck* is such an example. Of course, incumbents may also wish to expand their market share by using such forbidden techniques. The market for goods is not simply a fixed pie with incumbents favoured by restrictions. Incumbents may bitterly resent their inability to use to aggressive marketing. They may believe they would be able to increase sales and profits if given the chance.

It would appear to be very difficult for courts to use forensic methods to assess the relative impact of these effects in terms of 'discrimination' against importers. All marketing regulation restricts competition but does it thereby restrict imports in particular? Given these uncertainties, it is no wonder that national courts have been referring large numbers of cases which ask the European Court to apply the facts to the post-*Keck* principles. The Court however has recently decided to vote with its feet and pass cases back to the national courts to force them to consider such imponderable questions.⁷⁹ This is valid as a matter of allocation of competence, but the European Court has created such vague principles that it is hard to blame the national courts for trying to get answers.

We can conclude that the balance of the post-*Keck* case-law on Article 28 follows an uneasy path. It steadfastly rejects analysis of the relevant markets where competition is actually taking place but formally maintains that preventing discrimination in the conditions of competition is the key focus of Article 28. However the effects of the European Courts' decisions go far beyond simply eliminating protection for national producers. They are more deregulatory than that because they permit the removal of the whole of a regulatory apparatus once this kind of 'discrimination' against any import is established. It begins to look like judicial sleight of hand in which 'market access' practice is being cloaked in discrimination language.⁸⁰ The court itself may be beginning to acknowledge this in

⁷⁸ See Kaczorowska A, 'Gourmet Can Have His Keck and Eat it!' [2004] Eur. LJ 479-494 who says 'Without carrying out any sophisticated economic analysis, it is obvious that products imported to one Member State from other Member States, especially products new to the market in a Member State and those intended for a mass market, will always be more affected by national rules prohibiting or restricting advertisement, or otherwise restricting or banning their marketing, than will domestic products. This is factual discrimination.' (at 484)

⁷⁹ See Case C-20/03 *Burmanger* [2005] ECR I-4133 and Case C-441/04 *A-Punkt Schmuckhandels v Claudia Schmidt* 23rd February 2006 where the matters were sent back to the national courts.

⁸⁰ See the market access discussion by Jacobs AG in *Leclerc-Siplec* and C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw.' [2001] 26 *ELRev* 35.

recent cases like *Douwe Egberts*⁸¹ which appear to adopt both market access and differential impact approaches cumulatively.

D: Conclusions: Moving Beyond Discrimination in Goods Cases

The establishment of a single market required creative development of discrimination thinking by the European Court beyond the standard tool of trade law – the market equivalence test. To help traders easily challenge regulatory barriers in the face of continued national legal diversity, the court developed the regulatory equivalence presumption. This test has now begun to be discussed in trade law more generally.⁸² Non-product rules have however presented new challenges in discrimination methodology because they do not fit into the regulatory equivalence model. Since *Keck* the Court's case-law on goods has become confused. It has maintained the language of discrimination in scrutinizing non-product rules but has not found a coherent methodology. It has failed to use either the market or regulatory equivalence tests that are both well-established and provide clear analytical tools. Instead, the Court has attempted to find a third method, derived from the case-law on persons, that of status equivalence. However a rule that says that all imported goods lawfully on the host market are entitled to equal treatment with other home goods has failed to produce workable rules. This idea of status equivalence should be reserved for the more political equality that underpins the free movement of citizens and natural persons.⁸³

If discrimination analysis is to be retained for non-product rules, the only workable methodology that is consistent with trade law theory is that of market equivalence.⁸⁴ This requires careful empirical consideration of the relevant markets where competition is taking place. It may be felt that this would largely nullify Article 28 as a tool of market integration through private litigation because of the costs and limited reach of such methods. However an alternative approach might be to abandon discrimination analysis whilst retaining the underlying principle behind it that has animated much of the European Court's jurisprudence. Discrimination is useful as a means of indicating arbitrariness in a scheme of trading rules. In a developed trading system like that of the EU, arguably the ultimate goal should be the removal of arbitrary barriers to trade. This lies at the heart of the *Cassis De Dijon* decision. A misleading and incoherent

⁸¹ Case C-239/02 *Douwe Egberts NV* [2004] E.C.R. I-7007. Again here there is no attempt to show how the rules particularly affect importers other than by judicial assertion. Domestic producers of novel products would be equally disadvantaged by inability to provide information to potential consumers.

⁸² D Regan, 'Regulatory Purpose and 'Like Products' in Article III.4 of the GATT (with additional Remarks on Article III.2)' 36 *Jour. World Trade Law* 443 (2002)

⁸³ More broadly see the Charter of Fundamental Rights (2000) O.J. C364/1. Article 1 on human dignity and Article 21 on equality. See also Directive 2000/43 on equal treatment irrespective of racial or ethnic origin and Directive 2000/78 on equal treatment in employment and occupation.

⁸⁴ I leave aside the legitimacy of using the market equivalence test after the Court has so clearly established regulatory equivalence as the touchstone for Article 28 in the *Cassis* line of cases. It is arguable that the Court cannot row backwards and resile from this test just because it yields unfavourable results.

discrimination finding is a side-track from this main question. There is a significant danger that a finding of 'discrimination' by judicial fiat wrongly puts the burden of justification on the Member State in relation to perfectly sensible rules. This is the discrimination tail wagging the dog of arbitrariness. Ultimately, a *well-grounded* discrimination test is a good indicator of an arbitrary barrier to trade but a poorly considered one is merely misleading.

It is important to state that many selling rules are not arbitrary at all but reflect deeply-held policy choices about the character of national life. We can see however that in the recent case-law some of the national rules in issue did go beyond that which was necessary to meet the policy goal. In the *DocMorris* case⁸⁵ the court claimed to find discrimination against imports without looking at the markets for competing drugs. A better approach would be to simply say the rules banning internet selling were arbitrary because they were not necessary to protect consumers in relation to non-prescription drugs. Similarly, the *Heimdienst*⁸⁶ rules requiring deliveries of groceries to be made only from local premises were arbitrary because they were not necessary to maintain food hygiene.⁸⁷ There is no need to rely upon the proxy of discrimination in such cases.

However adopting this approach need not lead to a deregulatory spiral or plunge the courts into the kinds of non-justiciable questions that featured during the Sunday trading saga. Selling and marketing restrictions should be presumed to impede trade where they go beyond de minimis levels. On the other hand, they should not be presumed to be arbitrary. This is because they are usually objectives in themselves that cannot be met by home state regulators. Therefore traders should have the burden of showing that they are not necessary to meet legitimate policy goals. Where the rules seek to meet intangible goals such as preserving the character of national cultural life or reducing gambling or alcohol consumption, this will be a very high hurdle to surmount.⁸⁸ Such questions are largely non-justiciable as the court itself has, perhaps grudgingly, accepted in cases concerning 'social morality' like *Schindler*.⁸⁹ It is easy to see many of the selling rules cases as falling into similar categories. It is notable that when reviewing actions by the EU institutions, the European Court has readily recognized that there are

⁸⁵ C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV Jacques Waterval*. Judgment of 11/12/2003.

⁸⁶ C-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH* [2000] ECR I-151.

⁸⁷ The attempt to find discrimination in this case was particularly incoherent. The companies concerned were all German. The rules affected retailers. There was no attempt to examine the extent to which goods from other Member States were likely to be prejudiced by looking at the composition of goods stocked by domestic and foreign retailers.

⁸⁸ As noted by Wyatt and Dashwood, these are virtually non-justiciable: 'Such broad policy question are less obviously appropriate for judicial determination, at any rate as long as national courts and the Court of Justice substitute their own judgment for those of competent national legislative authorities...' (at 329)

⁸⁹ Case C-275/92 *Schindler* [1994] ECR I-1039 where the banning of lottery marketing was held to within the wide discretion granted to Member States in such matters..

policy areas where regulators have a wide discretion that is largely beyond judicial review.⁹⁰

Finally, even if the subject matter is justiciable, courts should not pretend to be regulators. Courts cannot (re)devise complex systems of regulation nor do they have the legitimacy to do so.⁹¹ The beauty of *Cassis* was that courts did not have to function as primary regulators – the home state did that for them. Recognizing this strikes a sensible balance in relation to marketing rules. It meets the concern about excessive recourse to Article 28 but acknowledges that selling rules may sometimes be arbitrary such that courts can discern less restrictive means to meet the policy objectives of Member States.

⁹⁰ See G De Burca, 'The Principle of Proportionality and its Application in EC Law' [1993] 13 *YBEL* 105 at 111-112: 'It becomes apparent that the way the proportionality principle is applied by the court of Justice covers a spectrum ranging from a very deferential approach, to quite a rigorous and searching examination of the justification for a measure...' See Case C-331/88, *R v Minster for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR 4023 for an example of a wide degree of deference.

⁹¹ This is obvious when we look at the valiant but ultimately unconvincing efforts of Advocate General Jacobs to suggest alternative, more proportionate, regulatory schemes in *Leclerc-Siplec* and *Gourmet Foods*.