Handout № 9

Common Market III

Elimination of quantitative restrictions, contd.

10. f) *Keck and Mithouard* (C-267 & 268/91)
    - distinction between rules laying down 'requirements to be met' by goods (→ first *Cassis* principle) and rules relating to the 'selling arrangements' (contrast *Com v Greece* (C-391/92) and *Com v Germany* (C-51/94))
    - change in direction with respect to non-discriminatory national rules (with limited effect on intra-Community trade)/result of commitment to the principle of subsidiarity
    - lacking in principle ↔ tendency to cut back on unnecessary intrusions into the laws of MS
    - distinction between selling arrangements and product characteristics difficult to establish
    - later case law: importance of factual impediment to access by products from other MS (*Gourmet Int'l Products* (C-405/98)) → change to a different approach?

QR on exports, Art. 29 EC

1. principles relating to imports apply (for *distinctly* applicable measures see *Bouhelier* (case 53/76))
2. exception: *indistinctly* applicable measures will normally not breach Art. 29 EC, the *Dassonville* formula does not apply: measures must specifically establish a difference in treatment between domestic trade and export trade as to provide a particular advantage for national production → overt or covert protectionism, *Groenveld* (case 15/79)

Derogation, Art. 30 EC

1. Art. 30 EC ↔ first *Cassis* principle → distinctly ↔ indistinctly applicable measures (Art. 30 EC may also be applied to indistinctly applicable measures with a clear discriminatory effect, but not *vice versa*: *Importation of Souvenirs* (case 113/80))
2. grounds narrowly construed: not intedned to reserve matters to MS jurisdiction (*Com v Germany* (case 153/78)):
   a) a measure is only 'justified' if it is
      - necessary to achieve the desired result (proportionality principle, Art. 5 EC)
      - not arbitrarily discriminatory or a disguised restriction (*Cassis* presumption applies)
   b) public morality, public policy, public security
   c) health protection: ban, test, inspection to ensure compliance with domestic standards → a real health risk must be proven; the incovenience of administrative and financial burden must be weighed against the danger and risks to health and life (see *Bluhme* (C-67/97))
   d) industrial and commercial property protection

- specific subject matter of the right: existence ↔ exercise (improper exercise, namely the prohibition of 'parallel' imports, cannot be justified under Art. 30 EC)
- exhaustion: once a patent or trade mark protected product has been put on the market (with the consent of the owner) it may freely circulate
- common origin: *Van Zuylen v Hag* (case 192/73) and *CNL-SUCAL v Hag* (C-10/89)
- 'similar' goods: prevention of goods with same or similar goods on the grounds of a confusion of the customer (e.g. *Quattro'* and *'Espace Quadra'* in *Deutsche Renault v Audi* (C-317/91); see also *Trade Mark Directive (Dir 89/104)* (Article 5) and *Reg 40/94* (Article 9))

Further derogations

1. Art. 99 EC
2. Art. 109 EC
3. Art. 134 EC
4. Art. 296–7 EC