

FREE MOVEMENT OF GOODS

General principles

Article 28

Measures having equivalent effect and types of barriers

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Article 28 and 29 EC

- **Article 28 (Import and Transit)**
Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.
- **Article 29 (Export)**
Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States

Article 28 – Why is it so important?

- Safety net – guaranteeing the Internal Market
- Applies to restrictive measures taken by a Member State.
- Has direct effect
- Can be invoked by citizens and enterprises before national courts
- Can be invoked by the Commission within an infringement procedure according to Article 226 EC

Quantitative restrictions and measures having equivalent effect

- “The prohibition on **quantitative restrictions** covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.”
(Case 2/73)
- **Measures having equivalent effect:**
“All [state] measures which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having equivalent effect to quantitative restrictions and, on that basis, as prohibited by Article 28 EC.”
(Dassonville, Case 8/74)

Article 28 - Examples of restrictions

- Import inspections and controls (Case 4/75)
- National type approval (Case 21/84)
- Advertisement campaign for national products (Case 249/81, “Buy Irish”)
- Sectoral prohibition on road transport (Case C-322/03)
- Requirements as to the prohibition and labelling of products (Case C-470/93, “Mars”)
- Language requirements (Case C-33/97, “Colim”)
- Procedures for parallel import of pharmaceuticals or plant protection products or the lack thereof (Case C-112/02, “Kohlpharma”)
- Requirements on the registration of imported vehicles (Case C-451/99, “Cura Anlagen”)

Article 28 – Development of the jurisprudence

- *Dassonville* (Case 8/74) principle is designed to cover rules having the potential to reduce sales opportunities for imported products.
- *Cassis de Dijon* (Case 120/78) extended this possibility to indistinctly applicable measures.
- This construction is broad enough to render Article 28 EC applicable in an unlimited number of instances. Therefore the ECJ introduced with the *Keck* jurisprudence (Case 267 and 268/91) some limitations to this concept.

Article 28 – Selling arrangements (1)

- The touchstone of the Keck decision:
 - **rules relating to the goods themselves** (composition, packaging, presentation, ...) are covered by Article 28;
 - **rules relating to “selling arrangements”** are in principle not covered although they may affect the volume of imported goods sold.
- Because the purpose of the latter is not to regulate trade of goods.
- Although it may have the effect of reducing the volume of sales of products from other Member States.
- *Examples*: Time limitations for shops; duty to sell certain products over pharmacies

Article 28 – Selling arrangements (2)

- The rule is the *Dassonville* formula and *Keck* is the exception.
- Conditions laid down in the judgment:
 - the national measure “applies to all relevant traders operating within the national territory”.
 - the national measure “affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States”.
 - the national measure must not “prevent their access to the market or to impede access any more than it impedes the access of domestic products”.

Article 28 – Selling arrangements (examples)

- Example: Case **TK-Heimdienst (Case C-254/98)**
- A national measure imposed an obligation on bakers, butchers and grocers to set up or purchase another permanent establishment in the administrative district where they wanted to market their products or in an adjacent municipality
- Effect on market access: in order for goods from other Member States to enjoy the same access to the market of the Member State of importation as domestic goods, they have to bear additional costs (establishment in this Member State).
- **Crucial point : does the national measure makes the access to national market more difficult?**

Article 28 – Selling arrangement (example)

- Example: **DocMorris Case (Case C-322/01)**
- Fact: national measure prohibiting sale of pharmaceuticals via internet
- Rationale of the Court: “However, for pharmacies not established in Germany, the **internet provides a more significant way to gain direct access** to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products. ”
- **Crucial point : does the national measure makes the access to national market more difficult?**

Article 28 – Overview

