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Business law in the UK and EU

Assignment N5

**In formation and operation of the common market, the case of Procureur du Roi v Benoît and Gustave Dassonville, Case 8-74 was the most important of all in the 20-th Century.**

In July 1952 when European Coal and Steel Community was established, the greatest optimists could not even predict the result of it – great formation – European Union with 27 Member States, common currency and policy and the single or common market of EU countries.

Single market of EU means free movement of goods, services and labour inside of organization. It means that companies may move their capitals, goods and services from one country to another. Companies obtain good possibility to develop their business, enter new markets. On the other hand, consumers will get more competitive market as the result of it cheaper goods. It has positive impact on social life because people get more possibilities for employment.

In the modern world the development of the transport systems, information technologies lead to a new form of cooperation among the countries. One of them is the single market as the highest form of economical cooperation.

No doubt, the single market has its weaknesses, for example the national companies lose privileges from national governments, and some of them will be wound up. Eventually some employees will lose their jobs.

But in my point of view, there is no alternative to international cooperation by means of creation and development of the single market.

The meaning of single market is abolition of the restrictions in the free movements of goods and services. This is one of the fundamental principle of economy development. The sense of free movement of goods is simple: no restriction and the same rules and possibility for all countries. In other words, the single market is “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured...”<sup>1</sup>

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<sup>1</sup> Leicester Institute of Legal Practice, *Free Movement of goods (1) Introduction to Free Movement of goods*

The principle of free movement of goods is provided by the Treaty on the function of the European Union (hereafter referred to as “the Treaty”), Community Custom Code, Directives and case law.

The basic principle of single market is provided by the Article 3, p. “C” of the Treaty: ‘the abolition, as between the Member States, of obstacles of freedom movements of persons, services and capitals.’<sup>2</sup>

This principle became a fundamental ground for establishing of the European Community.

Having created the single market the member-states faced the problems of restrictions of free movement of goods provided by national rules. It was not only the matter some sort of discrimination but also ‘they apply in much wider ranger of circumstances, catching national rules that may have been enacted for legitimate, non-trade-related reasons, such a worker protection, consumer protection or protection of the environmental and which to domestic goods as well as to import or export.’<sup>3</sup>

The Article 30 of Treaty prohibits quantitative restrictions, and all measures having equivalent effect on imports, Article 34 contains a similar prohibition on export. The prohibition includes quantitative restrictions and measures of equivalent effect to quantitative restrictions.

On 22 December 1969 Commission adopted the Directive 70/50/EEC according to which ‘... of based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty’. This Directive gave wider definition of the restrictions of the free movement of goods, particularly ‘...covers measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production. In particular, it covers measures which make imports or the disposal at any marketing stage, of imported products subject to a condition-other than a formality-which is required in respect of imported products only, or a condition differing from that required for domestic products and more

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<sup>2</sup> Consolidated Version of the Treaty on European Union [2010] OJ C83/51 available from [https://vle.dmu.ac.uk/webapps/portal/frameset.jsp?tab\\_tab\\_group\\_id=\\_2\\_1&url=%2Fwebapps%2Fblackboard%2Fexecute%2Flauncher%3Ftype%3DCourse%26id%3D\\_384756\\_1%26url%3D](https://vle.dmu.ac.uk/webapps/portal/frameset.jsp?tab_tab_group_id=_2_1&url=%2Fwebapps%2Fblackboard%2Fexecute%2Flauncher%3Ftype%3DCourse%26id%3D_384756_1%26url%3D) accessed 27 November 2011

<sup>3</sup> Oxford University Press, *Free Movements of Goods* vol 3 available from [http://www.oup.com/uk/orc/bin/9780199219070/steiner10e\\_ch19.pdf](http://www.oup.com/uk/orc/bin/9780199219070/steiner10e_ch19.pdf) accessed 27 November 2011

difficult to satisfy. Equally, it covers, in particular, measures which favour domestic products or grant them a preference, other than an aid, to which conditions may or may not be attached.’<sup>4</sup>

But the issue was what was framework of the law? The case law of the European Court of Justice (hereafter referred to as the ECJ) had the essential impact in the determination of this issue. One of such cases, which had strong impact in the free movement of good area was the case of *Procuror do Rui v Benoit and Gustave Dassonville*, Case 8-74 (hereafter referred to as the *Dassonville case*).

No doubts, the *Dassonville case* was the landmark case providing the principle of the free movements of goods having impact to the further case law.

On the early stage the ECJ considered the restriction of free movement of goods as measures of total or partial restriction on import, exports or goods in transit. For example, in case *Riseria Luigi Geddo v Ente Nazionale Risi* the court stated: ‘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.’<sup>5</sup>

In generally there are three landmark cases in the matter of relating the measurers having equivalent effect to quantitative restrictions in free movement of goods: *Cassis Dijon*, *Cases Keck and Mithouard* and the case in question *Procuror do Rui v Benoit and Gustave Dassonville*

The *Dassonville case* was originated by the court of first instance - Tribunal de Premier Instance of Brussels and Under Article 177 of the Treaty and referred to Court of Justice of the European Communities concerning two questions of the interpretation of the Articles 30, 31, 33, 36 and 85 of the EEC Treaty. In the context of above mentioned articles the Court considered the number of issues: the forms of restriction of free movement of goods, the different custom regime for direct and indirect import, the exclusive agreement as the form of restriction of free movements of goods.

By Judgment of 11 January 1974, the Belgian court referred to the ECJ the following questions:

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<sup>4</sup> Commission Directive 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty OJ L 013 P. 0029 - 0031 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31970L0050:EN:HTML>, accessed 27 November 2011

<sup>5</sup> Case 2-73 *Riseria Luigi Geddo v Ente Nazionale Risi* [1973] CR 1973 00865 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88489&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=11401>, accessed 22 December 2011

1. Must Articles 30, 31, 32, 33 and 36 be interpreted as meaning that a national provision prohibiting, in particular, the import of good such as spirits bearing a designation of origin duly adopted by national government where such goods are not accompanied by an official document issued by the government of exporting country certifying their rights to such designation, must be considered as a quantitative restriction or as a measure having equivalent effect.

2. Is an agreement to be considered void if its effect is to restrict competition and adversely to affect trade between Member States only when taken in conjunction with national rules with regard to certificates of origin when that agreement merely authorizes or does not prohibit the exclusive importer from exploiting that rule for the purpose of preventing parallel imports?<sup>6</sup>

In *Dassonville case* the issue considered by the ECJ was the difference in legislative regime created by Belgium Government for direct and indirect importers. The direct importers had preferences. These preferences were provided under Belgian law of 18 April 1927. This Law provided requirements to accompany the goods by certificate of origin. Thus, the indirect importers, which imported the product from countries which did not require a certificate of origin were discriminated because they could not provide the certificate of origin. If importer delivered the goods from United Kingdom to France, importer did not need the certificate of origin. To the contrary, if importer delivered the goods from United kingdom to Belgium it needed the certificate of origin. Therefore, two Member States (France and Belgium) provided different customs regime.

Considering the *Dassonville case*, the ECJ gave the wider definition of measures having equivalent effect to quantitative restrictions: ‘All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.’<sup>7</sup> The result of this conclusion was wide interpretation, which gave reasonable grounds to participants of single market to defend their rights concerning restrictions of free movements of goods created by national rules. The claims were initiated against as the EU bodies as well as the different national public bodies central and regional. Moreover, the actions of the professional associations were considered by the ECJ in the context of abolition of restrictions of free movement of goods. For example the case *R v Royal Pharmaceutical Society of Great Britain* (cases 266 and 267/87). In this case the ECJ stated: ‘Measures adopted by a professional body such as the Pharmaceutical Society of Great Britain, which lays down rules of ethics applicable to the members of the profession and has a committee

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<sup>6</sup> Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] CR 1974 00837 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0008:EN:PDF> accessed 27 November 2011

<sup>7</sup> Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] CR 1974 00837 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0008:EN:PDF> accessed 27 November 2011

upon which national legislation has conferred disciplinary powers that could involve the removal from the register of persons authorized to exercise the profession, may constitute 'measures' within the meaning of Article 30 of the EEC Treaty.'<sup>8</sup>

The important issue of the *Dassonville* case was abolition the difference in legislative customs regime of the Member States. In this issue the ECJ considered: 'Consequently, the requirement by a member State of a certificate of authenticity is less easily obtainable by importers of authenticity which is less easily obtainable by importers of an authentic product which has been put into circulation in regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure an effect equivalent to a quantitative restriction as prohibited by the Treaty.'<sup>9</sup>

Another conclusion made by ECJ was that the exclusive dealing agreement may considered as the form of restriction of the free movements of goods. Taking to account the final conclusions, the ECJ considered that exclusive agreement was the form of restriction of free movement of goods having the monopoly effect in connection with national customs rules, which made preferences for national exclusive distributors. It means that the exclusive agreement does restrict the trade by itself and as Commission noted '... it can have the effect of restricting trade when, considered separately or in conjunction with parallel agreement, it confers on concessionaires, in law or in fact, an absolute territorial protection against parallel imports of the products concerned.'<sup>10</sup>

Answering the questions issued by Belgian Court, European Court of Justice created principles called as Dassonville formula, as following: 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community are to be considered as measures having an effect equivalent to quantitative restriction.' Broadly speaking the Dassonville formula shall be the test to consider whether the defined actions have the measures having effect to quantitative restriction.

In the further cases ECJ provided new principles in using of Dassonville formula. In case *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (case 120/78) so called case *Cassis de Dijon* the ECJ provided the rule of reason<sup>11</sup> 'Obstacles to movement within the Community

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<sup>8</sup> Joined Cases C-266 and 267/87 *R v Royal Pharmaceutical Society of Great Britain* [1989] CR 198901295 available from <http://curia.europa.eu/juris/liste.jsf?num=C-266/87&language=en> accessed 27 November 2011

<sup>9</sup> Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] CR 1974 00837 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0008:EN:PDF> accessed 27 November 2011

<sup>10</sup> Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] CR 1974 00837 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0008:EN:PDF> accessed 27 November 2011

<sup>11</sup> Oxford University Press, *Free Movements of Goods* vol 3 available from [http://www.oup.com/uk/orc/bin/9780199219070/steiner10e\\_ch19.pdf](http://www.oup.com/uk/orc/bin/9780199219070/steiner10e_ch19.pdf) accessed 27 November 2011

resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.<sup>12</sup>

The other principle of Dassonville formula in *Cassis de Dijon* case was the rule of proportionality which means, that certain measures, though within the *Dassonville* formula, will not breach article 30 the Treaty if they are necessary to satisfy as matters of overriding public interest.

The important principle of Dassonville formula in *Cassis de Dijon* case is mutual recognition principle, which means that there is no valid reason why the goods, which have been lawfully produced and marketed in one of the Member States, should not be introduced into any other Member State.<sup>13</sup>

The impact of *Dessonville case* may be observed in the scope judgment in joined Cases 267/91 and 268/91 *Keck and Mithouard* . In the decision the ECJ noted: “In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.”<sup>14</sup> The one of results of *Dessonville case* was the increasing of the number of cases concerning Article 30 of the Treaty. Thus, the court had to provide framework in using Dassonville formula.

In this case the claimants applied that the prohibition in France of resale at loss contradicted to the principals of free movement of goods, services and capital, free competition in the Common Market. Among the other, the advocate represented the claimant cited the Dassonville case arguing that this matter the restriction of free movement of goods took place as it was defined in the Court Decision in Dassonville Case.

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<sup>12</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] CR 1979 00649 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90055&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=35398> accessed 22 December 2011

<sup>13</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] CR 1979 00649 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90055&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=35398> accessed 22 December 2011

<sup>14</sup> Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] CR 1993 I-06097 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98137&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=36712> accessed 22 December 2011

Citing the rule of reason from *Cassis de Dijon* ECJ drew a distinction between rules which lay down “requirements to be met” by goods, such as those relating to designation, size, weight, composition, presentation, labelling and packaging, and rules relating to “selling arrangements”. Rules governing “requirements to be met” falling within the *Dassonville* formula remained subject to the rule of reason in *Cassis*. However, “contrary to what [had] previously been decided.”<sup>15</sup>

The ECJ stated:

By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.<sup>16</sup>

*Keck* thus seemed to suggest that where a selling arrangement was in issue, the *Dassonville* test would not be satisfied.<sup>17</sup>

I presume that ECJ faced the situation when any suspicion in any potential restricting of free movements of goods would lead to appeal to *Dassonville* formula. Therefore ECJ had to enter the framework for using *Dassonville* formula.

In my point of view the case in question had crucial influence on further development of common market. The court gave wider determination of barriers in the free movement of goods, wide determination of the free movement of goods, the unfair competition in the context of

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<sup>15</sup> Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] CR 1993 I-06097 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98137&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=36712> accessed 22 December 2011

<sup>16</sup> Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] CR 1993 I-06097 available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98137&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=36712> accessed 22 December 2011

<sup>17</sup> Oxford University Press, *Free Movements of Goods* vol 3 available from [http://www.oup.com/uk/orc/bin/9780199219070/steiner10e\\_ch19.pdf](http://www.oup.com/uk/orc/bin/9780199219070/steiner10e_ch19.pdf) accessed 27 November 2011

exclusive delivery agreement, direct and indirect discrimination. In this point I agree with Observation of the *Dassonvilles* filed to the ECJ, that ‘the rules of Common Market are aimed not only liberalization of direct trade between the producer country and the consumer country but also at all subsequent trade within the framework of a single market.’<sup>18</sup>

The Desonvile formula influenced the adoption of new EU Legislation. This formula was used in the article 250 of the Community Custom Code, establishing that the customs rules and procedures of the one Member State shall have the same legal effects in the other Member State. More over, ‘the findings made at the time controls are carried out by the customs authorities of a member State shall have the same conclusive force in other Member States as the findings made the custom authorities of those Member States.’<sup>19</sup>

What conclusion can be made on the basis this essay? No doubts the *Dassonville case* had positive impact on the principle of free movements of goods. The ECJ interpreted the Treaty. The ECJ interpretation announced that all measures that have any suspicions in reduce imports are measures having equivalent effect. Despite the fact the *Dassonville case* was criticised, it gave the strong impulse for further adoption and harmonization of the EU Law in the providing the principle of free movement of goods and services.

Having based on Dassonville formula a lot of participants of the single market could defence its rights against discrimination. The *Dassonville case* was the start for further development of the EU single market and its one of the main principles – free movement of goods.

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<sup>18</sup> Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] CR 1974 00837 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0008:EN:PDF> accessed 27 November 2011

<sup>19</sup> Council Regulation No 2913/92/EEC of 12 October 1992 Community Customs Code available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:302:0001:0050:EN:PDF>, accessed 27 November 2011



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