From *Dassonville* to *Cassis*: The Revolution that did *not* Take Place

Robert Schütze[*]

[*] Forthcoming in: A. Albors-Llorens, C. Barnard & B. Leucht (eds.), *Cassis de Dijon: Forty Years On* (Hart, 2020). This chapter is an abbreviated second "instalment" from my "Framing *Dassonville*: Text and Context in European Law". Parts of the "Introduction" and "Conclusion" party overlap with my "*Re-reading Dassonville: Meaning and Understanding in European Law*, (2018) 24 European Law Journal 376.

I. Introduction

Where did *Cassis de Dijon* come from; and what is its historic relationship to *Dassonville*? The "orthodox" *Dassonville-Cassis* story insists that the European Court of Justice drastically abandoned the international trade law solution in *Dassonville* by giving Article 34 TFEU a radically wide scope, while *Cassis* subsequently limited the consequences of this market-liberalizing revolution through the introduction of implied exemptions so as to pacify the Member States.[1] The best-known popularization of this orthodox view has come from the pen of Joseph Weiler. For the star philosopher of European law, the *Dassonville* Court "explicitly or implicitly reject[ed] the GATT philosophy" in an attempt to create a common market that "has as its implicit ideal type a transnational market-place which is identical to a national market-place".[2]

The view that *Dassonville* was intended to introduce a "national" market model according to which *all* restrictions of trade fall within the scope of Article 34 can equally be found in the standard textbooks. In Catherine Barnard's well-known manual on the EU internal market, we thus read that *Dassonville* "provide[d] individual traders with a vehicle to challenge *any national rule* which – even potentially and indirectly – stands in their way"; and that such a revolutionary solution was justified because "[l]ooked at in its historical context, *Dassonville* was an effective tool to cull the dead wood of centuries of accumulated legislation".[3] Seen against this background, *Cassis* becomes a "conservative" judgment that returns important regulatory powers to the Member States, especially because the *Cassis* principle of mutual recognition is reduced to "a banal doctrinal manifestation of the principle of [proportionality]".[4]

1 For representative examples of the "orthodox view" in English, see only: J.H.H. Weiler, "The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods", in: P. Craig & G. de Búrca (eds.), *The Evolution of European Law* (Oxford University Press, 1999), 349; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, 2016); as well as M. Maduro, *Revisiting the Free Movement of Goods in a Comparative Perspective*, in: Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case Law* (Asser, 2013), 485. For the German literature, see only: U. Haltern, Europarecht (Mohr Siebeck, 2005), Chapter 14 (essentially "translating" the Weiler "story" almost word for word into German); as well as: F.C. Mayer, Die Warenverkehrsfreiheit im Europarecht – Eine Rekonstruktion, (2003) 38 Europarecht 793 esp. at 797.

2 J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade*, in: J.H.H Weiler (ed.), *The EU, The WTO and the NAFTA: Toward a Common Law of International Trade* (Oxford University Press, 2000), 201 at 215.

3 C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (supra n.1), 74 (emphasis added).

4 J. H.H. Weiler, Epilogue: Towards a Common Law of International Trade (supra n.2), 231.

Hardly ever was there so much agreement among European law scholars; and it is therefore hardly surprising that political scientists, working on the internal market, have equally come to embrace the orthodox legal interpretation. In the most outstanding treatment of *Cassis de Dijon* here, the conventional legal interpretation is thus devotedly accepted – despite running counter to its own internal logic.[5] And in one of the more recent presentations of the standard political science narrative we read:

> [L]awyers know that the real radical breakthrough came in 1972 [sic] with *Dassonville*…At the time, it boldly struck down a Belgian provision (requiring that imported goods bearing a designation of origin be accompanied by a certificate of origin) with a sweeping approach: "all measures with an equivalent effect to quotas" [sic] were to be struck down! *This was already and much more radical than* Cassis *in terms of result, an obligation of recognition. But it did not enunciate mutual recognition, and was in fact set aside as too bold. In this sense,* Cassis *was not a continuation but a break from* Dassonville*, which sought to impose an obstacles-based approach to national regulation, whereby all national rules are potentially subject to an assessment of illegality.*[6]

This common reading of the *Dassonville-Cassis* story is however fundamentally flawed. For not only do these "authoritative" accounts ignore the original meaning of the *Dassonville* judgment.[7] The philosophy behind the EU internal market remained generally loyal to the traditional GATT categories until *Cassis de Dijon*. It is only through this – truly – revolutionary judgment that the scope of Article 34 becomes finally dissociated from the "ordinary" international law logic. And to better substantiate this argument,[8] this chapter

[5] K. J. Alter & S. Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, (1994) 26 Comparative Political Studies 535 at: 540: "Instead [!], legal scholars point to the landmark *Dassonville* (1974) ruling, which established a legal basis for challenging the validity of national laws that create nontariff barriers. To the extent that the Cassis decision ruled invalid a national law on the basis that it created a nontariff barrier, it was a straight application of the jurisprudence established in the *Dassonville* decision. In fact, rather than moving beyond the *Dassonville* decision, the legal innovation of the *Cassis* verdict, the rule of reason, actually softened the Court's position regarding nontariff barriers. In extending the rights of the member states to maintain all reasonable national policies, which had the effect of creating nontariff barriers, the Court seemingly opened a huge loophole, albeit a loophole which could be controlled exclusively by the Court itself."

[6] K. Nicolaïdis, *The* Cassis *Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees*, in F. Nicola & B. Davies, *EU Law Stories* (Cambridge University Press, 2017), 278 at 281 (emphasis added). Not only is the year of *Dassonville* wrong; the author quotes a passage that cannot be found in the *Dassonville* judgment. Alas, if political scientists – rightly – chastise lawyers for not reading enough non-legal materials, can we lawyers not equally complain if political scientists are unable to closely read (if they do read them at all) the fundamental judgments that they go on to write a great deal about?

[7] R. Schütze, *Re-reading Dassonville: Meaning and Understanding in European Law*, (2018) 24 European Law Journal 376.

[8] For an earlier and much shorter discussion of the jurisprudential period discussed in this chapter, see: R. Schütze, From International to Federal Market: The Changing Structure of European Law (Oxford University Press, 2017), 117-124.

aims to lay the jurisprudence on Article 34 between *Dassonville* and *Cassis* with under the legal microscope. It wishes to show, hopefully once and for all, that the traditional *Dassonville-Cassis* story offers a regrettable misreading of the evolution of the EU internal market – a misreading that sadly continues to hold its powerful sway over the EU academic community.[9]

In order to challenge this academic loyalty to a serious mistake, this chapter will thematically look at all the Articles 34/35 cases during the historical period between *Dassonville* and *Cassis* (Table 1).[10] And in order to make this "empirical" analysis more palatable, it will classify the cases into four broad categories. Following the GATT conceptualisation, we shall distinguish between "border measures" and "internal measures" in a first step; and within the internal measures group, we will need to further distinguish between industrial goods and agricultural goods in a second division. (The reason for that distinction lies in the exceptional principles that the EU Treaties established for agricultural goods from the start.[11]) Of particular importance in the category of internal measures dealing with industrial goods thereby are national laws on the protection of industrial property rights. For each of the resulting four categories the Court will develop a distinct form of judicial reasoning; and indeed, for each case category a distinct substantive "decision rule" is applied.

How will each decision rule relate to the *Dassonville* formula; and can we already find traces of *Cassis de Dijon*? Let us explore these questions and look at each of our four categories in turn.

9 Professor Barnard has, for example, come to yet again repeat the "orthodox" view in the 2019 edition of her standard textbook – an choice that is emblematic for how strong the attachment to the traditional *Dassonville-Cassis* story really is!

10 The following table omits a number of cases during this period that mention Article 34 or Article 35 TFEU but do not directly concern these provisions, e.g. Case 29/75, Kaufhof v Commission, EU:C:1976:55; or, Case 5/77, Tedeschi v Denkavit, EU:C:1977:144.

11 R. Schütze, European Union Law (Cambridge University Press, 2018), Chapter 14 – Section 4.

Table 1. Jurisprudence on Article 30 and 34 between *Dassonville* and *Cassis de Dijon*[*]

Border Measures	**Internal Measures**			
	Industrial Products		**Agricultural Cases**	
	General Aspects	**Industrial Property**		
Rewe, Case 4/75	Germany, Case 12/74	Centrafarm, Case 15/74	*Van Haaster, Case 190/73*	*Kramer, Case 3, 4, 6/76*
Simmenthal, 35/76	De Peijper, Case 104/75	Centrafarm, Case 16/74	Galli, Case 31/74	*Van den Hazel, Case 111/76*
Donckerwolcke, Case 41/76	*Bouhelier, Case 53/76*	EMI Cases†	Charmasson, Case 48/74	Ramel, Case 80-81/77
Bouhelier, Case 53/76	Ianelli, Case 74/76	Terrapin, Case 119/75	*Van der Hulst, Case 51/74*	Dechmann, Case 154/77
France, Case 68/76	GB-Inno, Case 13/77	Hoffmann La Roche, Case 102/77	French Wine Cases‡	Bussone, Case 31/78
Cayrol, Case 52/77	Van Tiggerle, Case 82/77	Centrafarm, Case 3/78	Tasca, Case 65/75	*Redmond, Case 83/78*
Thompson, Case 7/78	Eggers, Case 13/78		Sadam, Joined Cases 88-90/75	Sukkerfabriken, Case 151/78
Category 1	**Category 2**	**Category 3**	**Category 4**	

[*] In order to help the reader distinguish between Article 34 and Article 35 cases, all export cases are italicised.

† This is a collection of three cases, namely: Case 51/75, EMI Records v CBS United Kingdom, EU:C:1976:85; Case 86/75, EMI Records v CBS Grammofon, EU:C:1976:86; and Case 96/75, EMI Records v CBS Schallplatten, EU:C:1976:87.

‡ This is a collection of three (joined) cases: Cases 10-14/75, Procureur de la République at the Cour d'Appel Aix-en-Provence and Fédération Nationale des Producteurs de Vins de Table and Vins de Pays v Paul Louis Lahaille and others, EU:C:1975:119; Joined cases 89-74, 18 and 19-75, Procureur Général at the Cour d'Appel Bordeaux v Robert Jean Arnaud and others, EU:C:1975:118; Case 64/75, Procureur Général at the Cour d'Appel Lyon v Henri Mommessin and others, EU:C:1975:171.

II. Case Category 1: "Border Measures" and the *Dassonville* Formula

In the period between *Dassonville* and *Cassis de Dijon*, the Court deals with seven Articles 34/35 cases that concern – in GATT terminology – "border measures". A typical case here is *Rewe*,[16] where the Court was asked to assess phytosanitary inspections at the national border with regard to imports of apples. These border inspections were easy prey. Dutifully reciting the *Dassonville* formula,[17] the Court nevertheless did not reach its conclusion on the basis of *Dassonville*. Instead, it grounded its reasoning in Article 2(2) of Directive 70/50 and held:

> "It is clear from the questions put that the phytosanitary inspections in question *only concern importations* of plant products and that similar domestic products, such as apples, are not subject to comparable compulsory examinations for the purpose of distribution. *These inspections thus amount to a condition which is required in respect of imported products only, within the meaning of Article 2(2) of the abovementioned directive*. (…) It follows that phytosanitary inspections *at the frontier* which plant products, such as apples, coming from another Member State are required to undergo, constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article [34] of the Treaty, and are prohibited under that provision subject to the exceptions laid down by [Union] law."[18]

This decision rule against *frontier* inspections was elaborated in *Simmenthal*.[19] Quoting once more its *Dassonville* formula,[20] the Court again categorically held that "veterinary and public health inspections *at the frontier* – whether carried out systematically or not – *on the occasion of the importation*" constitute a violation of Article 34 of the Treaty.[21] And importantly: this absolute rule would equally apply to exports. The Court thus subsequently confirmed that "the imposition of any special *export* formality constitutes an obstacle to trade by the delay which it involves and the dissuasive effect that is has upon exporters."[22] Within the context of border measures, the Court indeed comes to rhetorically apply the *Dassonville* formula as if it was a substantive decision rule (while it may also rely on Directive 70/50 for intellectual support).

16 Case 4/75, Rewe-Zentralfinanz eGmbH v Landwirtschaftskammer, EU:C:1975:98.

17 The Court cites the formula in paragraph 3 of the judgment: "For the purposes of this prohibition it is enough for the measures in question to be capable of acting as a direct or indirect, real or potential hindrance to imports between Member States."

18 Ibid., paras. 3-5.

19 Case 35/76, Simmenthal SpA v Ministero delle Finanze italiano, EU:C:1976:180.

20 Ibid., para.7: "To come within the prohibition contained in these provisions it is enough for the measures in question to be capable of acting as a direct or indirect, real or potential hindrance to imports between Member States."

21 Ibid., para.8 (emphasis added).

22 Case 68/76, Commission v France, EU:C:1977:48, para.16 (emphasis added).

Would this absolute rule apply to all goods – including third-country goods in free circulation within the Union? That special considerations would apply to goods coming from third countries had been clear since *International Fruit*.[23] And *Dassonville* had thereby clarified that this exceptional status would also extend third-country goods in free circulation.[24] In the post-*Dassonville* jurisprudence, this was expressly confirmed in *Donckerwolke*.[25] Belgian traders had imported Lebanese and Syrian textile products from Belgium into France. The importation of these goods had violated French customs legislation, which then required third-country goods to be accompanied by a certificate of origin.[26] Where these certificates allowed in the EU's customs union? According to Article 28 (2) TFEU, they were clearly not;[27] yet the Court made this *theoretical* solution "conditional upon the establishment of a common commercial policy",[28] and held:

> "*The assimilation to products originating within the Member States of goods in 'free circulation' may only take full effect if these goods are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective of the State in which they were put in free circulation.* Under Article [207] of the Treaty this unification should have been achieved by the expiry of the transitional period and supplanted by the establishment of a common commercial policy based on uniform principles. The fact that at the expiry of the transitional period the [Union] commercial policy was not fully achieved is one of a number of circumstances calculated to maintain in being between the Member States differences in commercial policy capable of bringing about deflections of trade or of causing economic difficulties in certain Member States."[29]

In essence: since the third-country goods in question did not yet come within the (positively harmonised) Common Commercial Policy (CCP),[30] the Member States were "*not* prevented from requiring from an importer a declaration concerning the actual origin of the goods in question even in the case of goods put into free circulation in another Member State".[31] In the absence of Union harmonisation, there was consequently no absolute prohibition of import or export formalities or restrictions for third-country goods! This national freedom was nonetheless – like in *Dassonville* –

23 Case 51-54/71, International Fruit Company NV and others v Produktschap voor groenten en fruit, EU:C:1971:128.

24 R. Schütze, Re-reading Dassonville: Meaning and Understanding in the History of European Law (supra n.7), esp.399.

25 Case 41/76, Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs, EU:C:1976:182.

26 Ibid., para.12.

27 Ibid., paras.14-23. The main elements of the Court's reasoning here were, in addition to Article 28 (2), the *Dassonville* formula (ibid., para.19), and the more specific judgment in *International Fruit* (ibid., para.20).

28 Ibid., para.24.

29 Ibid., paras.25-27 (emphasis added).

30 Ibid., para.6.

31 Ibid., para.33.

subject to a rule of reason.[32] While the certificate of origin in *Donckerwolke* would thus "*not in itself* constitute a measure equivalent to a quantitative restriction",[33] it could violate Article 34 if it were excessive in the means to achieve its given end.[34] The Court thus confirmed that the scope of Articles 34/35 was – in the absence of a completed CCP – narrower in the context of third country goods.[35]

III. Case Category 2: "Internal Measures" and the Discrimination Test

With regard to internal measures, two categories must be distinguished: intellectual property measures and all the rest. This residual category will be analysed in this section; and the two major subgroups of cases that can be found here relate to national price fixing and national market regulations.

The regulation of prices was from the very beginning seen as a core problem for Article 34. It was therefore hardly surprising that Directive 70/50 listed a whole range of possible price regulations that could constitute MEEQRs. When dealing with national measures *not* equally applicable to domestic and imported goods, Article 2 of the Directive 70/50 thus stated:

> "The measures referred to must be taken to include those measures which:
>
> (a) lay down, *for imported products only*, minimum or maximum prices below or above which imports are prohibited, reduced or made subject to conditions liable to hinder importation;
>
> (b) lay down *less favourable prices for imported products* than for domestic products;
>
> (c) fix profit margins or any other price components *for imported products only* or fix these differently for domestic products and for imported products, to the detriment of the latter;
>
> (d) preclude any increase in the price *of the imported product* corresponding to the supplementary costs and charges inherent in importation;
>
> (e) fix the prices of products *solely on the basis of the cost price or the quality of domestic products* at such a level as to

[32] Ibid., para.35: "Nevertheless the Member States may not require from the importer more in this respect than an indication of the origin of the products in so far as he knows it or may reasonably be expected to know it."

[33] Ibid., para.41.

[34] Ibid., para.42. See also: Case 52/77, Leonce Cayrol v Giovanni Rivoira & Figli, EU:C:1977:196 where the Court confirmed this result at esp. paras.33-36.

[35] The Court had already indicated this solution in Case 86/75, EMI Records Limited v CBS Grammofon (supra n.†) in the context of intellectual property rights. For a more extensive discussion of the status of third-country goods in the common market, see: R. Schütze, Third Country Goods in the EU Internal Market, in: F. Amtenbrink et al. (eds.), The Law of the EU Internal Market and the Future of European Integration (Cambridge University Press, 2019), 200.

create a hindrance to importation[.]"[36]

These categories of price measures were perceived as *distinctly* applicable to imports; but the question remained how the Court would deal with *indistinctly* applicable price measures.[37] The most famous case between *Dassonville* and *Cassis* here is *GB Inno*.[38] It concerned a Belgian measure that imposed a fixed consumer price for tobacco products. The Court thereby began its Article 34 analysis with a reference to the *Dassonville* formula,[39] then pointed to Directive 70/50,[40] but finally settled on the following solution:

> "*Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction*, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, *if not impossible, more difficult than that of domestic products*. On the other hand a system whereby the prices are freely chosen by the manufacturer or the importer as the case may be and imposed on the consumer by a national legislative measure, and whereby no distinction is made between domestic products and imported products, *generally has exclusively internal effects*. However, the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-[Union] trade."[41]

In essence: indistinctly applicable price measures do *not* in themselves constitute MEEQRs, because they are generally regarded as having exclusively *internal* effects. However, formally indistinctly applicable measures may fall within the scope of Article 34 where they (materially) *discriminate* against imports; and this was the case, where the internal sale of imported goods becomes "if not impossible, more difficult than that of domestic products".

36 (Commission) Directive 70/50/EEC 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, (1970) OJ English Special Edition: Series I 17, Article 2 (a)-(e) (emphasis added).

37 For two brilliant early academic discussions of this question, see only: D. Waelbroeck, Les règlementations nationales de prix et le droit communautaire (Université de Bruxelles, 1975), esp. 40 et seq. ; as well as K. Winkel, Die Vereinbarkeit staattlicher Preislenkungsmaßnahmen mit dem EWG-Vertrag, (1976) 45 Neue Juristische Wochenschrift 2048.

38 Case 13/77, G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB), EU:C:1977:185.

39 Ibid., para.28 but especially paras. 46-47: "Article [34] of the Treaty prohibits in trade between Member States all measures having an effect equivalent to quantitative restrictions. For the purpose of this prohibition it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between Member States."

40 Ibid., para.48: "It should be pointed out that, as stated in Commission Directive No 70/50 … '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' are measures which have an effect equivalent to a quantitative restriction on imports."

41 Ibid., paras52-54 (emphasis added).

This solution was subsequently confirmed in *Van Tiggerle*.[42] A Dutch victualler had been accused of selling gin at a price below the minimum price set by a Dutch distillers agency. In the course of the national court proceedings, he argued that Article 34 was violated; and when asked about this, the European Court emphatically underlined that "national price-control rules applicable without distinction to domestic products and imported products *cannot in general produce such an effect they may do so in certain specific cases*".[43] And since the marketing rule in question applied to domestic and imported products alike it "cannot produce effects detrimental to the marketing of *imported products alone* and *consequently* cannot constitute a measure having an effect equivalent to a quantitative restriction on imports".[44] Only where a specific form of discrimination could be shown would the national measure violate Article 34.[45]

This discrimination criterion was subsequently developed in a second subgroup of cases that predominantly concern quality-ensuring measures. In *Commission v Germany (Sekt & Weinbrand)*,[46] the Court had thus been asked to review a German law that reserved the appellations "Sekt" (sparkling wine) and "Weinbrand" (brandy) to wines produced in Germany or from a fixed amount of German grapes. The solution suggested by Directive 70/50 was clear: national laws that "confine names which are not indicative of origin or source to domestic products only" were *distinctly* applicable measures that would constitute measures having an equivalent effect to quantitative restrictions.[47] And rejecting the German argument that the appellations were true geographic indications of origins,[48] the Court had no scruples to find that the German law was "calculated to favour the deposal of the domestic products on the German market to the detriment of the products of other Member States".[49] Without even citing *Dassonville*, the Court exclusively based its analysis on the presence of formal discrimination.

[42] Case 82/77, Openbaar Ministerie (Public Prosecutor) of the Kingdom of the v Jacobus Philippus van Tiggele, EU:C:1978:10.

[43] Ibid., para.13.

[44] Ibid., para.16 (emphasis added).

[45] Ibid., para.18.

[46] Case 12/74, Commission v Germany (Sekt & Weinbrand), EU:C:1975:23.

[47] Article 2(3) (s) Directive 70/50 (supra n.32).

[48] Case 12/74, Commission v Germany (supra n.42), para. 7. See also ibid., para.12: "It results from the foregoing considerations that the appellations 'Sekt' and 'Weinbrand' do not constitute indications or origin."

[49] Ibid., para.14.

This solution was confirmed in *Eggers*,[50] where the Court substantially dealt with the same questions.[51] This time, however, the bone of contention was the German condition that *home* produced brandies could only use the designation "Weinbrand" if 85% of the alcoholic content would be derived from wine distillate whose distillation had taken place inside the national territory. This element was new, since the German rule was confined to the designation of *German* products. Yet the Court followed its previous reasoning and insisted that while the Member States were "empowered to lay down quality standards for products marketed on their territory and may make use of designations of quality subject to compliance with such standards", this was "dependent solely on the existence of the intrinsic objective characteristics which give the product the quality required by law".[52] To thus insist that part of a production process had to take place within Germany was to formally (!) discriminate against production processes in other Member States and thus clearly constituted a MEEQR.[53]

This discrimination criterion equally applied to export restrictions – a choice confirmed in *Bouhelier*.[54] A French law had required exporters of quality watches to obtain an export licence or, in the alternative, a "standards certificate" issued by a French Centre for Industry. With regard to the export licence, the Court could of course simply refer to its earlier (absolute) rule for border measures; but since the standards certificate was an internal measure, this jurisprudence was not open. The Court thus reverted to a discrimination analysis;[55] and it was only thanks to the latter that the second aspect of the national measure was "capable of constituting a direct or indirect, actual or potential obstacle to intra-[Union] trade".[56]

50 Case 13/78, Eggers Sohn & Co. v Freie Hansestadt Bremen, EU:C:1978:182.

51 Interestingly, the Court now refers to the *Dassonville* formula in ibid., para. 23; yet immediately reverts to Directive 70/50 and in particular its Article 2(3)(s). The subsequent analysis then reproduces extensively the ruling in Case 12/74, Commission v Germany.

52 Case 13/78, Eggers (supra n.46), para.25.

53 Ibid., para.26.

54 Case 53/76, Procureur de la République de Besançon v Les Sieurs Bouhelier and others, EU:C:1977:17.

55 Ibid., para.13-15.

56 Ibid., para.16.

IV. Case Category 3: "Industrial Property Laws" and Article 36

A sizable number of Article 34 cases between *Dassonville* and *Cassis* concern national industrial or intellectual property rights.[57] These cases thereby continued the jurisprudential line that had started with *Deutsche Gramophone* and *Hag*.[58] And, in a powerful illustration of judicial path dependency, the subsequent development of this special jurisprudential line indeed exclusively draws on the doctrinal tools invented in the pre-*Dassonville* era. Amazingly, and as if *Dassonville* had never happened, the judicial logic and rhetoric of these cases is indeed distinctly different from the rest of the "internal measure" cases discussed within category 2. The reason for this difference lies, in my view, in the fact that the Court had originally developed its intellectual property cases in the context of EU competition law, where it could not concentrate on the legality of the state measure as such but instead focused on the private actions of individual parties.

A. The Specific Subject Matter and Exhaustion Doctrines: Centrafarm I *and* II

Prior to 1970, the Court had originally tried to fight restrictions on parallel imports caused by intellectual property rights under the EU competition law rules. But once the free movement provisions became directly effective after the end of the transitional period, the Court started to swiftly shift its analytical efforts to Article 34. The tools originally developed for intellectual property rights cases within the competition law context were thereby simply "imported" into Article 34 by *Hag*; and the *Hag* legal transplant was – after *Dassonville* – further elaborated in the two *Centrafarm* judgments.[59]

[57] See Table 1. For an early academic analysis of this special jurisprudential line, see especially: J. Andermann, Territorialitätsprinzip im Patentrecht und Gemeinsamer Markt (Duncker & Humblot, 1975); F.A. Mann, Industrial Property and the E.E.C. Treaty, (1975) 24 International and Comparative Law Quarterly 31; E.A. van Nieuwenhoven Heldbach, Industrial Property, The *Centrafarm* Judgments, (1976) 13 Common Market Law Review 37; B. Harris, The Application of Article 36 to Intellectual Property, (1976) 1 European Law Review 515; C. von Bar, Territorialität des Warenzeichens und Erschöpfung des Verbreitungsrechts im gemeinsamen Markt (Alfred Metzner Verlag, 1977); A. Deringer, Gewerbliche Schutzrechte und freier Warenverkehr im Gemeinsamen Markt, (1977) 46 Neue Juristische Wochenschrift 469.

[58] Case 78/70, Deutsche Grammophon v Metro-SB-Großmärkte, EU:C:1971:59; and Case 192/73, Van Zuylen frères v Hag AG, EU:C:1974:72.

[59] Case 15/74, Centrafarm and de Peijper v Sterling Drug (Centrafarm I), EU:C:1974:114 and Case 16/74, Centrafarm and de Peijper v Winthrop, EU:C:1974:115 (Centrafarm II).

In both *Centrafarm* judgments the Court was asked to determine the exclusionary scope of national intellectual property rights. *Centrafarm I* involved an American company – Sterling Drug – that held parallel patents for the sale of pharmaceuticals in the United Kingdom and the Netherlands. One British and one Dutch subsidiary had been licensed to manufacture the drugs in the two Member Sates, respectively. Due to governmental price restrictions, the British drugs were thereby much cheaper than the Dutch drugs and a third party – Centrafarm – decided to exploit these price differences by importing British goods into The Netherlands. The sale of these parallel imports was opposed on the basis of Sterling's *Dutch* patent, because the patent holder had not *itself* placed the goods on the *Dutch* market. The question before the European Court was thus this: could a patent holder who holds two parallel patents within two Member States block the sale of goods within each of these national markets by third parties even though these goods had been lawfully marketed by the same patent holder in each of these national markets? In *Centrafarm II* – a case decided on the same day as *Centrafarm I* – this question was extended from national patents to national trademark legislation.

Without any reference to *Dassonville*, the Court quickly drew on its earlier distinction – originally derived for EU competition law – between the existence and the exercise of an intellectual property right. Finding that exercises of intellectual property rights can only be justified (!) under Article 36 when they fall into the "specific subject matter" of that intellectual property right, the Court dutifully defined the specific subject-matter for patents (and trademarks). Defining this to be the exclusive right to *market the product for the first time*,[60] the subsequently Court claimed that once these rights were exhausted in specific national markets,[61] national intellectual property laws could no longer be used to ban parallel imports. In the famous words of *Centrafarm* I:

> "[A] derogation from the principle of the free movement of goods *is not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the Member State from which it has been imported*, in particular in the case of a proprietor of parallel patents. In fact, if a patentee could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation

[60] In Centrafarm I, we thus read (ibid., para.9 (emphasis added)): "In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and *putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements*.". With regard to trademarks, Centrafarm II states (ibid., para.8): "In relation to trade marks, the specific subject-matter of the industrial property is the guarantee that the owner of the trade mark has the exclusive right to use that trade mark, *for the purpose of putting products protected by the trade mark into circulation for the first time*, *and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark."*

[61] For Union limits to the specific subject-matter and exhaustion doctrines, see however: Case 102/77, Hoffmann-La-Roche, EU:C:1978:108; as well as Case 3/78, Centrafarm BV v American Home Products Corporation (Centrafarm III), EU:C:1978:174. In these cases, the Court defended a trade mark holders right to object to some forms of re-packaging and re-affixing of a trademark.

where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents".[62]

When viewed against an international law frame,[63] the emerging doctrine of Union exhaustion was a major development of the European "common market". For the insistence on the internal sovereignty of States is replaced by a quasi-federal perspective that explores the relationship between two national markets within the Union. However, and fundamentally: this quasi-federal perspective is only triggered by (and confined to) the *personal conduct of the individual right holder*. Where a patent holder has placed her goods into *two* separate Member State markets, parallel imports *between these two national markets* cannot be blocked by that person.

The doctrine of Union exhaustion is consequently rooted in an estoppel rationale: a person that has consented to exploit her patents in more than one national market within the Union, cannot block the free circulation of goods between these national market! And since the key characteristic for the doctrine of exhaustion is the *consensual* marketing *in another(!) Member State*, Union exhaustion is only triggered by a specific private party action; and as such it did not, strictly speaking, follow a federal – let alone national – market philosophy. For it would not affect the rights of parallel patent holders in Member States *where they had not consented to the marketing of their product*; nor would their rights – as under a national market model – be exhausted whenever they had marketed their products in a single Member State.

B. Locating Violations: Article 36 TFEU and Arbitrary Discriminations

The jurisprudential line on intellectual property would, for a long time, remain different and distinct from all other Article 34 cases. But what exactly were the doctrinal steps the Court employed here? The taciturn rhetoric within the early intellectual property cases makes it hard to decipher the Court's "reasoning". Markedly, the early Court never really concentrated on whether or not the national intellectual property law constitutes a MEEQR within Article 34; instead, it exclusively

62 Centrafarm I (supra n.55), paras.11-12. For the equivalent statement in Centrafarm II (supra n.55), see: paras.9-11.

63 According to the 1883 Paris Convention for the Protection of Industrial Property, "parallel" rights are absolute rights and independent of each other. They flow from the internal sovereignty of each signatory state with the result that there is no principle of exhaustion (see especially ibid., Article 4 *bis*).

explored whether the private "exercise" of such a right constituted an "arbitrary discrimination" (or a disguised restriction on trade) under Article 36.

A good example for this doctrinal reductionism is *Terrapin v Terronova*.[64] The case involved the owner of the British trademark "Terrapin" who had appealed against a decision of a German court finding that the British trademark was confusingly similar to the existing German trademark "Terranova". There was no dishonest intent to free-ride on the commercial reputation of the other party; the obstacle to trade simply arose from the parallel co-existence of two – unharmonized – national intellectual property regimes. Would such an obstacle arising from the disparities in national laws violate Article 34 and therefore be in need of justification under Article 36? The Court's answer was this:

> "[I]n the present state of [Union] law an industrial or commercial property right legally acquired in a Member State may legally be used to prevent under the first sentence of Article 36 of the Treaty the import of products marketed under a name giving rise to confusion where the rights in question have been acquired by different and independent proprietors under different national laws. If in such a case the principle of the free movement of goods were to prevail over the protection given by the respective national laws, the specific objective of industrial and commercial property rights would be undermined.[65]

On its surface, the judicial argumentation here seemed to imply that obstacles arising from the (un-harmonised) co-existence of national laws would fall within the scope of Article 34 but could equally, under the then state of Union law, automatically be justified under Article 36. In one sense, then, the post-*Dassonville* intellectual property right cases may be seen as an interesting precursor to the inclusion of non-discriminatory national measures in *Cassis* – unless one sees the exclusionary right granted under a *national* intellectual property law as a distinct form of indirect discrimination.

V. Case Category 4: "Agricultural Legislation" and *Dassonville* Pre-emption

The EU Treaty title on agriculture constituted – from the very beginning – a collective *lex specialis* within the law governing the free movement of goods. The reason for this special treatment was the close connection between negative and positive integration established for this part of the

[64] Case 119/75, Terrapin (Overseas) Ltd. v Terranova Industrie CA Kapferer & Co, EU:C:1976:94.

[65] Ibid., para.7.

Rome Treaty;[66] and the strong nexus between the creation of a common *market* and the creation of a common *policy* had been clarified by the very first provision for the Common Agricultural Policy.[67] Much of the early case law on agricultural goods is therefore concerned with EU legislation designed to offer a comprehensive legislative "framework" for goods falling within its scope. The application of the *Dassonville* formula for this case category must be seen in this special – legislative – context.

A. Export Restrictions and Dassonville *Preemption*

The first case to be decided after *Dassonville* was indeed an agricultural case: *Van Haaster.*[68] A Dutch law had made the production of flower bulbs subject to a cultivation licence; and a Dutch producer that had nonetheless (and illegally) grown hyacinth bulbs was consequently prosecuted under national law. In the course of the national proceedings, the grower argued that the Dutch production system violated Regulation 234/68 establishing a "common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage",[69] and in particular Article 10 of the Regulation prohibiting all quantitative restrictions and all measure having an equivalent effect on exports.[70]

This was a novel argument: for the idea that Article 35 TFEU – which obviously stood behind Article 10 of the Regulation – could cover *production* measures was new.[71] The Dutch government, opposed such an extensive interpretation and argued that since the notion of MEEQR "only refers

66 See supra n.11.

67 Article 38 (4) TFEU: "The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy."

68 Case 190-73, Officier van Justitie v J.W.J. van Haaster, EU:C:1974:113. While the case was registered before *Dassonville* it was only decided after it.

69 Regulation 234/68 on the establishment of a common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, (1968) OJ English Special Edition: Series I, 26.

70 Ibid., Article 10 (1) stated: "The following shall be prohibited in the internal trade of the [Union]: - the levying of any customs duty or charge having equivalent effect; - any quantitative restriction or measure having equivalent effect[.]"

71 For a subsequent confirmation of this ruling, see Joined cases 3, 4 and 6-76, Kramer and others, EU:C:1976:114 which dealt with national measures fixing the catch quota for fish against the backdrop of the relevant common market organization. However, the Court here ingeniously avoided ruling that the national measure was a MEEQR by insisting that a quota was not a measure limiting production in the long term because it was designed to preserve and thus enhance the future "production" of fish.

to regulations relating to *trade*", it could "not extend to measures relating to production itself";[72] and it thereby made no difference whether the concept was used in the context of primary or secondary Union law. The Commission concurred and proposed a solution (implicitly) based on Article 3 of Directive 70/50:

> "*The fact that measures regulating or limiting production have an effect upon the quantity and, if applicable, the quality of products capable of being the subject of trade within the [Union], is not in itself sufficient to place them on a par with quantitative restrictions or measures having an equivalent effect, directed at trade*. Many measures, despite their restrictive effect upon trade, are not incompatible with Articles [34 and 35]: they fall within the framework of the powers or possibilities which the Treaty has implicitly or explicitly left to Member States and a restrictive effect upon trade is inherent in them…
>
> The terms 'quantitative restriction or measure having an equivalent effect' referred to in Article 10 of Regulation No 234/68 do not apply to measures by which a Member State limits production, unless these measures act as a greater brake upon exports than upon the flow of the goods in question to the market of the Member State concerned *and unless this restrictive effect exceeds the effects proper to such measures, as would be the case if the latter pursued an object incompatible with the Treaty*." [73]

How did the Court decide? The Court acknowledged that Article 10 of the Union Regulation principally related to *marketing* measures, whereas the national law squarely concerned the *production* process.[74] Yet the Court nevertheless chose to place Article 10 of the Regulation "back into the global system of the organization of the market";[75] and "[i]n the absence of express provisions as to the compatibility of a national regulation restricting production with the organization of the market", it explored the aims of objectives of the Union market organisation.[76] Having found that that "the organization of the market also involves diverse provisions applicable to the production stage",[77] the Court identified a wish of the Union legislator to provide for "a totality of [Union] measures on the introduction of common quality standards".[78] And from there, the Court found as follows:

72 Case 190/73, Van Haaster (supra n.64), Written Submissions at 1126.

73 Ibid., 1127. This was further elaborated during the oral proceedings (ibid., 1129): "As regards the cultivation licences it is right to point out — and on this point the Commission would like to define more clearly its written observations — that national measures for restricting production cannot as such and by themselves amount to measures having an effect equivalent to quantitative restrictions."

74 Case 190/73, Van Haaster, Judgment, para.5: "The national system in question and the provision under [Union] law of which the interpretation is requested relate to different stages of the economic process, that is to say to production and to marketing respectively."

75 Ibid., para.6.

76 Ibid., para.7.

77 Ibid., para.11.

78 Ibid., para.13.

> "[A]s regards the internal trade of the [Union], the organization of the market for the products in question is based upon freedom of commercial transactions under conditions of genuine competition, thanks to stabilization of the quality of the products. *Such a system excludes any national system of regulations which could impede directly or indirectly, actually or potentially, trade within the [Union]*. A national organization having the purpose of rationing production affects — or is at any rate capable of affecting — the system of trade thus defined, and must accordingly be considered a measure having an effect equivalent to quantitative restrictions *within the meaning of the Regulation*."[79]

The very last words within the quote are essential: the Court held the national law to be a MEEQR on exports *within the meaning of the Regulation*. This however did, crucially, not mean that this wide definition of a MEEQR would also be projected onto Article 35 TFEU. For Article 10 of the Regulation was, as the Advocate General in this case expressly counselled,[80] much wider than Article 35 of the Treaty! It was wider *because* it was placed within a comprehensive legislative scheme established by the Union. And it was this legislative scheme that pre-empted (!) any national law which directly or indirectly, actually or potentially, interfered with the quality system established by the common market organisation.[81]

B. Import Restrictions and Dassonville Preemption

This legislative preemption logic was extended to imports in *Galli*.[82] The case involved Regulation 120/67 on the common market organization in cereals. The latter had, again, been adopted to

79 Ibid., paras.15-17.

80 In the words of Advocate General-Mayras (Case 190/73, Van Haaster, EU:C:1974:93 at 1139): "I consider therefore that the prohibition in Article 10 of the Regulation has a scope wider than that of Article [35], all the more so, since it appears in a common organization of the market."

81 For the same solution, in the context of Regulation 123/67 on the common market organisation in poultrymeat, see only: Case 111/76, Officier van Justitie v Beert van den Hazel, EU:C:1977:83 where the Court held (paras.13 and 18-19): "Once the [Union] has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. (…) It thus follows from the general tenor of the regulation that, as regards the internal trade of the [Union], the organization of the market in the product in question is based upon freedom of commercial transactions under conditions of genuine competition. Even if the national restrictions on slaughter must be regarded as referring to the production and not to the marketing of the products they are also prohibited by Article 2 of Regulation No 123/67 as amounting to withdrawal of the products from the market and as constituting quantitative restrictions capable of affecting, potentially at any rate, the system of trade as it has been set up by the organization of the market established by Regulation No 123/67."

82 Case 31/74, Galli, EU:C:1975:8.

establish "a framework of organization calculated to meet all foreseeable situations";[83] and it had in particular created a "price system" so as "to make possible complete freedom of trade within the [Union] and to regulate external trade".[84] Galli had been accused of breaching an Italian law fixing maximum prices for cereal goods; and in his defence, he pleaded that the Italian legislation was preempted by the Union legislative system. The Court found that this was indeed the case:

> "So as to ensure the freedom of internal trade the regulation comprises a set of rules intended to eliminate both the obstacles to free movement of goods *and all distortions in intra-[Union] trade due to market intervention by Member States other than that authorized by the regulation itself*. (…) *Such a system excludes any national system of regulation impeding directly or indirectly, actually or potentially, trade within the [Union]*. Consequently, as concerns more particularly the price system, any national provisions, the effect of which is to distort the formation of prices as brought about within the framework of the [Union] provisions applicable, *are incompatible with the regulation*. Apart from the substantive provisions relating to the functioning of the common organization of the market in the sector under consideration, Regulation No 120/67 comprises a framework of organization designed in such a way as to enable the [Union] and Member States to meet all manner of disturbances."[85]

The Court here, again, used the *Dassonville* formula to delineate the preemptive scope of the Union *legislation*. This total pre-emption was justified on the basis that "the very existence of a common organization of the market" had "the effect of precluding Member States from adopting in the sector in question unilateral measures capable of impeding intra-[Union] trade".[86] Yet this "conceptualist-federalist" approach to Union preemption was, as the insightful analysis by Waelbroeck has shown, subsequently complemented by a "pragmatic" approach.[87] In *Sadam*, the Court thus held:

83 Ibid., para. 9.

84 Ibid., paras.9 and 11.

85 Paras. 12-16. In a second part of the judgment the Court even extended this to CMOs that would not include a "price system" (para.26-27)

86 Ibid., para.27. See also Case 51/74, P.J. van der Hulst's Zonen v Produktschap voor Siergewassen, EU:C:1975:9, esp. para. 25: "Once the [Union] has, pursuant to Article 40 of the Treaty, legislated for establishment of a common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it."; as well as Case 83/78, Pigs Marketing Board v Raymond Redmond, EU:C:1978:214, paras.55 and 58: "It follows that, having regard to the structure of Regulation No 2759/75, which is now in force, the provisions of the Treaty relating to the abolition of tariff and commercial barriers to intra-[Union] trade and in particular Articles [34 and 35] on the abolition of quantitative restrictions and of all measures having equivalent effect on imports and exports are to be regarded as an integral part of the common organization of the market. (…) Hence any provisions or national practices which might alter the pattern of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State, in conditions laid down by [Union] rules and from taking advantage directly of intervention measures or any other measures for regulating the market laid down by the common organization are incompatible with the principles of such organization of the market."

87 The two approaches were famously identified by M. Waelbroeck, The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation, in: T. Sandalow & E. Stein, Courts and Free Markets: Perspectives from the United States and Europe: Volume 2 (Oxford University Press, 1982), 548.

> "Article [34] of the Treaty prohibits in trade between Member States all measures having an effect equivalent to quantitative restrictions and this prohibition is repeated in Article 35 of Regulation No 1009/67 as regards the market in sugar. *For the purposes of this prohibition it is sufficient that the measures in question are likely to constitute an obstacle, directly or indirectly, actually or potentially, to imports between Member States*. Although a maximum price applicable without distinction to domestic and imported products *does not in itself constitute a measure having an effect equivalent to a quantitative restriction*, it may have such an effect when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products."[88]

What is interesting about the "pragmatic" approach here is that the Court, after having defined the scope of the legislative prohibition on import restrictions via the *Dassonville* formula, held that measures "applicable without distinction to domestic and imported products" would generally *not in themselves* constitute import restrictions. On the contrary, the Court would in future cases have recourse to a classic discrimination analysis so as to see whether such indistinctly applicable measures would fall within the scope of the specific Regulation![89] The shift from a "conceptualist-federalist" approach to a "pragmatic" approach is here a shift from *total* preemption, expressed via the *Dassonville* formula, to an obstacle preemption analysis that reproduced, at least to some extent, the discrimination test discussed in Section III above.

VI. Conclusion: Towards a Re-reading of *Cassis*

What meaning can be given to the judicial "raw material" presented in the previous four sections? And to what extend can they shed new light on the meaning of *Dassonville* and its famous formula? The following preliminary conclusions from the case law up to *Cassis* can immediately be drawn:

First, the Court clearly analysed Article 34 and Article 35 TFEU in the same manner. The notions of MEEQR in Article 34 and Article 35 were regarded as identical. This parallelism is particularly apparent when the Court uses the *Dassonville* formula for Article 35 cases.[90]

[88] Joined cases 88 to 90-75, Società SADAM and others v Comitato Interministeriale dei Prezzi and others, Joined cases 88 to 90-75, para.15. For an extensive early discussion of SADAM, see: M. Waelbroeck, Annotation on SADAM, (1977) 14 Common Market Law Review 89. See also: Case 65/75, Tasca, EU:C:1976:30.

[89] For such a discrimination rationale, see: Joined Cases 10-14/75, Procureur de la République at the Cour d'Appel Aix-en-Provence and Fédération Nationale des Producteurs de Vins de Table and Vins de Pays v Paul Louis Lahaille and others, EU:C:1975:119; Joined cases 89-74, 18 and 19-75, Procureur Général at the Cour d'Appel Bordeaux v Robert Jean Arnaud and others, EU:C:1975:118; as well as Case 64/75, Procureur Général at the Cour d'Appel Lyon v Henri Mommessin and others, EU:C:1975:171.

[90] E.g. Case 53/76, Procureur de la République de Besançon v Les Sieurs Bouhelier and others (supra n.50), para.16.

Second, despite its common approach towards Articles 34 and 35, the Court develops a plurality of jurisprudential lines that follow their own distinctive logic and rhetoric.[91] The judicial analysis of "border measures" thus follows a different line of reasoning than that for "internal measures"; and within the category of internal measures, the judicial reasoning with regard to intellectual property rights is fundamentally different to all other internal measures.

Third, in the context of border measures, the Court does not apply a discrimination test but an absolute restriction test. That absolute restriction test is often expressed via the *Dassonville* formula. However, the Court here also elaborates a distinction that it had previously made in *International Fruit*: border measures hindering goods produced in Member States are per se prohibited, while border measures for third-country goods are subject to a "rule of reason". Yet importantly, this rule of reason was originally specific and exclusive to this third-country context.[92]

Fourth, internal measures are, in the absence of Union harmonisation, subject to a discrimination test.[93] With regard to indistinctly applicable measures, the Court thus expressly examines whether the national measure formally or materially discriminates against imports or exports. An important – but limited – interpretative pointer here is Directive 70/50 but only with regard to one category of national measures.[94]

91 This point was perhaps first made by Luigi Daniele, who already argued in 1984 that there was not one but many notions of MEEQR (L. Daniele, Réflexions d'ensemble sur la notion de mesure ayant un effet équivalant à une restriction quantitative, (1984) Revue du Marché commun 477 at 481 « Notre examen nous permit, en effet, de constater que la Cour a dû, au cours des années, adopter des approches sensiblement différentes, selon le type de mesure examinée et selon le domaine visé. L'impression que l'on retire de la jurisprudence des dernières années est que l'unité de la notion de mesure d'effet équivalent, telle que consacrée dans la « formule Dassonville », n'a pas résiste à l'épreuve des fait que dans une mesure limitée, et qu'à l'heure actuelle il ne serait pas hasardeux de parler, tout au moins sue le plan de l'application pratique, d'une pluralité de notions, toutes rapportables, plus ou moins directement, à la « formule Dassonville », mais en même temps toutes suffisamment diversifiées les unes des autres pour qu'elles soient examinées séparément. »

92 This is a point that hardly any of the post-*Cassis* commentators of Dassonville picked up; and because this was not realized, it was (wrongly) assumed that the *Dassonville* rule-of-reason applied to all measures falling within Article 34 and this, in turn, led to the mistaken view that *Cassis* simply placed the *Dassonville* rule-of-reason approach on firmer ground. One of the early "culprits" in this context is probably Laurence Gormley's "Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30–36 of the EEC Treaty" (North Holland, 1985), 51. For the "modern" version of this mistake, see: C. Kaupa, The Pluralist Character of the European Economic Constitution (Hart, 2016), 175.

93 In this sense, see also: W. Veelken, Maßnahmen gleicher Wirkung wie mengenmäßige Beschränkungen, (1977) 12 Europarecht 311. For the opposite view, see L. Gormley, Prohibiting Restrictions in Trade within the EEC (supra n.88), 22 where it is claimed that through *Dassonville* "[t]he discrimination criterion was firmly rejected". For the modern version of this error, see inter alia C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (supra n.1), 74 as well as: M. Maduro, *Revisiting the Free Movement of Goods in a Comparative Perspective*, in: Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case Law* (Asser, 2013), 485 at 490.

94 The Directive is only dominant within category 2 cases (four out of seven cases); yet it hardly plays any role within the other case categories. There indeed appears to be only one case in which the directive was invoked for border measures (*Rewe*), while there seem to be no intellectual property or agricultural cases invoking the directive.

Fifth, there appears to exist one important exception to the discrimination test for internal measures: national intellectual property laws. The reasons behind the special treatment given to national intellectual property rights probably lie in their nature as *exclusive national* rights, and the Court consequently comes to treat them as analogous to "import" bans. National intellectual property laws are therefore treated as automatic violations of Article 34, which require justification under Article 36.

Sixth, and finally, with regard to national agricultural laws, a completely different jurisprudential logic is altogether developed. The prohibition of quantitative restrictions on imports or exports is here embedded in positive Union legislation; and due to the CAP's aim to establish a complete Union scheme, the legislative (!) prohibition on quantitative restrictions generally receives a broader scope – a scope that may include all measures that "directly or indirectly, actually or potentially" interfere with the Union legislative system.

What will these six conclusions mean for the orthodox *Dassonville-Cassis* story – told and retold in the "authoritative" accounts of European law? This story is based on a serious misunderstanding when arguing, as the *Introduction* set out, that the *Dassonville* Court radically abandoned the international GATT categories by giving Article 34 a "national" scope.[95] In light of the "empirical" evidence submitted above, it is impossible to agree with such a reading. Indeed, the normative solution that emerged from the early jurisprudence was this: in the absence of a textual equivalent to Article III:4 GATT, Article 34 TFEU assumed two functions. In addition to outlawing "border measures" à la Article XI GATT that would directly or indirectly affect international trade, the provision would also outlaw "internal measures" – but only when they discriminated against imports. This solution ingeniously filled the textual gap that the EU Treaty-makers had originally left open. But by importing the Article III:4 GATT solution into Article 34 TFEU, the Court in no way challenged the conceptual framework of international trade law: the internal sovereignty of a State to regulate its national market.

This doctrinal frame will only be fundamentally challenged in *Cassis de Dijon* – the subject of this book. Through *Cassis* a true – federal – revolution will take place. The "orthodox" reading, by contrast, that *Cassis* is but a "conservative" judgment that returns (!) regulatory powers to the Member States after *Dassonville* must thus be rejected as a complete folly.[96] It shows, once more, that each generation of European law scholars must "re-read" the classics in order to critically

[95] For representative of this view, see supra n.1.

[96] J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade* (supra n.2), 231. For a detailed discussion where "Cassis" potentially comes from, see: R. Schütze, *Framing* Dassonville (supra n.*); as well as Catherine Barnard's chapter below.

engage with the "traditional" interpretations that are "given to us" by the past "authorities" of European law. And more importantly still: it also means that any EU law "theory" worthy of that name must first establish its "facts" and the concrete "order(s)" through which they are transmitted to us before moving into the abstract heights of speculative "philosophical" thought. We need, to quote Quentin Skinner, "more history" and "less philosophy"– and if I may politely add: please, "no theology" – in the study of the European Union. The internal market here constitutes an excellent starting point for such a "critical" programme. For no other area of European law was historically more essential – both in substantive *and* constitutional terms – for the changing *normative* and *decisional* frame within the European Union.