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Kir Forever?

The Journey of a Political Scientist in the Landscape of Mutual Recognition

KALYPSO NICOLAÏDIS*

As this volume aspires to bring the Court's jurisprudence into interdisciplinary perspective, let me start with teaching anthropology. On the day I teach *Cassis* in my international political economy course, students usually find a bottle in the middle of the classroom table. 'Who has ever tasted *Cassis De Dijon*,' I ask the jittery group. A few hands go up. 'How about Kir?' 'Ah!' says the class. This is meant to be the first 'ah moment' in an exploration of the dialectics of economic integration, indeed more broadly of the transnational nature of integration. 'Can you believe that until 1979, not a soul had experienced the joys of Kir on German soil?' Ah! These are the micro-foundations to the macro-story of spillovers and inter-state bargains. 'This was because *Cassis* fell between two stools … too strong for a wine … but too weak for a spirit.' Ah! Discrimination veiled in the absurdities of state regulation. 'Still, the Germans could have won the day as they called the goddesses of "fairness" and "health" to their side.' Ah! Redemption through the rule of reason. And the conversation follows its course through its ultimate conclusion: Euro-Kir comes in many bottles.

Indeed, after almost three decades, it would seem far fetched to believe that the expectations created by the groundbreaking judgment have been fulfilled. At the EU summit in June 2007, the newly elected French president, Nicolas Sarkozy successfully lobbied to have the principle of 'undistorted competition' taken out of the formal objectives of the treaties. He might not have meant much by this except as a PR gesture, but the quick acquiescence of his peers is a sign of our times and one more echo of the protracted saga around the services directive, which culminated in the simple elimination of mutual recognition by the European Parliament. To a highly disgruntled EU legal community, this appeared as a public pillorying of *Cassis*. In the last few years, simply to utter support for the principle '*du pays d'origine*' in Paris's street or highbrow intellectual circles alike was enough to have one excommunicated to the burning hell of heartless neo-liberalism. Trust me. And yet, and at least, by issuing a clear political endorsement of the Court's *Cassis* jurisprudence, the directive succeeded in bringing EU services consumers closer than ever to the Kir fans of yesteryear.

Not only does Euro-Kir come in differently shaped bottles (Court decisions, Council-EP decisions, single country regulations), but it also comes in shades of red. Political scientists tend to see the bottles, legal scholars the subtle variation in shades.

* Kalypso Nicolaïdis is Professor of International Relations at Oxford University (Kalypso.Nicolaidis@sant.ox.ac.uk). More information can be found on her website: www.sant.ox.ac.uk/esc/knicolaidis/.

Indeed, when it comes to jurisprudential analysis, the dance between Articles 30 and 36, market integration and regulation, the European economic constitution and state autonomy, we must defer *inter alia* to our editor (Maduro 1998). Political science only asks about the before and after, the role of politics in legal judgments and vice versa—the why and the so what? Of course, the 'so what' feeds back into the 'why' as the Court considers the plausible institutional alternatives to its own decisions in its further jurisprudence. Nevertheless, it is fit for a contribution to an anniversary volume from the 'outside view' to ask about the legacy of *Cassis* (and its forbearer *Dassonville*) through an impressionist account of its ripple effects or echoes in the political sphere. As a heuristic, let me use three personal venture points, one decade at a time, which reflect my own journey in the landscape of mutual recognition: 1989, 1999, and our EU at 50.

Cassis in Action: Founding Myth, Conspiracy and Revolution

1989. When I recently asked Lord Cockfield, Commissioner for the internal market, what he considered the greatest achievement of his career, he answered without a beat: to have exported *Cassis* from the European Court of Justice and goods to the single market Europe 1992 programme. Indeed, there are many like him in the Commission who seem to believe that without *Cassis* and the aura of legitimacy it lent to their 'new approach' they would not have been able to pull through the legal coup spelled out in Cockfield's White Paper endorsed by Member States through Delors' Single Act only three years ago. An EU without *Cassis* would have borne 'the cost of non-Europe', the several points of GDP growth famously uncovered by Padoa Schioppa. Well, that might be true, but we still need to address a few nagging questions.

To start with, why the gap between this pan-*Cassis* rhetoric and the actual court jurisprudence of the last 10 years when reviewing national measures with an effect on trade under Article 30 and then Article 57 for services? Take one of my favourites, the *machine tool* decision. French workers will not have the privilege of using those German machines built for their better-trained counterparts across the Rhine. This is wise if the judges do not relish the prospect of receiving a finger in the mail! As for services, not a modicum of liberalisation has survived the tests of mandatory requirements and the rule of reason. Even in the *insurance* decision three years ago, the judges felt that recognition could be applied to non-mass risk but shied away from doing it themselves. Of course, they know that even businesses cannot always read the fine print in their insurance contracts. Indeed, the Court has stepped back from the recognition abyss even in the beverage and foods department, as with cheese additives banned by the Dutch. No matter that most Europeans, indeed most human beings, while they delight in very different tastes, find the same poisons poisonous. Even then different publics, consumers, societies might accept different levels of risk. And when the Court did strike—it did often enough to ensure the free movement of beer, butter, oil and pasta—not everyone was happy. 'Ah, I cannot recognise as *pasta* anything which comes so gluey out of the pot,' a well-loved Italian ECJ judge confided in me the other day. Ultimate recognition lies in the eye of the beholder—or in this case his stomach.

Since 1986, the press coverage of the EC and the single market has increased by orders of magnitude, along with the mentions of *Cassis* in the popular press, but no-one seems to pay attention to this paradox. To be sure, the Court's cautious jurisprudence, even after *Cassis*, is not surprising. *Cassis* was not only about casting the net of Article 30 more widely (after all, this was what *Dassonville* was about), but most importantly about widening the Article 36 gaps in the net through which fishy state regulations would be able to escape the rigours of liberalisation.

The question then is not why the Court has shied away from extending 'recognition of equivalence' to a wide array of cases beyond *Cassis*, but how come Cockfield and his friends were able to use *Cassis* in spite of the subsequent record, as if this was a matter of choosing a new bottle not of exploring shades of red. The reason is simple. Like all enterprises calling for individual sacrifice in the name of a collective, the new single market programme required its galvanising founding myth. Cassis happily obliged. The court provided EU worriers with a single formula, a motto easy to understand—'all … products lawfully produced and marketed … must be recognised as equivalent.' Freedom has always been a good rallying cry. No matter the full story—the decision's contingent and narrow applicability and the constraining nature of the list of 'mandatory requirements'. Founding myths are about agreeing on what to forget.

Indeed, the myth has several additional strands, outside the EC law profession of course. One is that Cassis 'introduced' mutual recognition in the EC legal landscape. Well of course lawyers know that the real radical breakthrough came with *Dassonville* in which, five earlier, the court struck down a Belgian provision requiring that imported goods bearing a designation of origin be accompanied by a certificate of origin. The formula may have been more sweeping—all measures with an 'equivalent effect' to quotas are to be struck down! But it was also less memorable and its timing less propitious. More to the point, mutual recognition can be found in the Treaty of Rome itself, referring to the mutual recognition of diploma, a task finally tackled seriously this year with the general system directive.

Another strand of the myth, popular these days among political scientists, is that recognition was one of several options available out there and that with *Cassis* the Court provided a new focal point for legislators. False. In fact, there are no other options. The question is not *which* but *whether*. In most instances of regulated goods or services, mutual recognition is the only game in town for effective free movement short of harmonisation. Even harmonisation is not an alternative to mutual recognition when it comes to the need to do away with host country certification—unless of course the EU was to be one regulatory jurisdiction, a goal neither desirable nor feasible.

One can legitimately ask, then, how did we get here? How did a judgment merely meant to popularise Kir beyond the French border end up changing the European constitutional order? A first part of the answer I believe is that it certainly was not 'merely meant' to do that. Indeed, as the story goes, the Commission fished around for a case of this sort and worked closely with the plaintiffs to bring it forward. No wonder, then, that as soon as the Court spoke, the Commission was ready to issue a detailed communication on its implications beyond alcoholic products, suggesting a detailed game plan to generalise the judgment to most regulated goods, including through an information and consultation procedure between national regulators and legislators. In the space of 10 years, this crucial

Commission communication seems to have been all but forgotten. We can legitimately infer that the initial conspiracy worked including as a conspiracy of silence—myths cannot afford to lose their innocence.

In short, taken together, the Commission's 1979 communication and 1986 White Paper (labelled as Cockfield's) simply took the decision to its ultimate logic in both *scope* and *depth*:

1) Generalising it in three steps: from alcoholic products to all products, from underlying standards to certification, and from goods to services.
2) Turning this judicial principle of 'recognition of equivalence' into a legislative-political principle of 'mutual recognition'. The latter does obviously imply an assessment of *equivalence* between home and host countries' rules, but the word, and thus the strictly legal constraint, is removed. Recognition becomes a political judgment, which does not necessarily need to be made on a careful case-by-case basis, but can be predicated on a host of other factors like trust, solidarity, proximity, political mood, linkage politics, paternalism . . .

Brilliant!

Why did Member States buy this? Apparently a majority of them did not even like *Cassis* in the first place, let alone its dual extension as engineered by the Commission. *Cassis* introduced (or uncovered depending on your legal school of thought), more visibly and strategically than *Dassonville*, Constitutional limits to state intervention beyond the bounds of intended discrimination. Europe 1992 then sets these limits into legislative stone through majority voting! Political scientists have it all wrong when they explain the turn to mutual recognition as a choice for the 'easy option', easier than harmonisation. To be sure, it might take longer to come up with a common standard on the height of lights in the back of trucks but once it is done, citizens live with a regulation to which their government of the day contributed. Under mutual recognition, they must live with regulations adopted in other polities, in which they have no say. In democratic terms such horizontal transfer of sovereignty is a much more radical option than a vertical one.

And of course if we move from static to a dynamic analysis, the picture is even starker. How will national regulators, their political master and their market clients react to this new state of affairs? Will such competition between rules significantly affect the ways rules are designed in the first place? How will regulators and legislators reconcile the contradictory pulls between competitiveness/cost effects of high standards and their reputational/benefits effects? Clearly, every mutual recognition deal seems to be predicated on opposite predictions on the part of politicians. The Thatchers of this world believe that it will help them export deregulation. The Mitterrands and Kohls tend to believe that it will induce reregulation. Analysts are starting to build models, which argue the usual: it depends.

Whatever the case may be, it seems as thought the myth has become a self-fulfilling prophecy. The hype seems warranted, as *Cassis* has truly proved to spell the start of a revolution in European affairs. Thanks to the supranational conspiracy uniting the Court, the Commission and big business, it has set off a revolution in decision makers' thinking about market integration that simply cannot be stopped. Yet, my prediction (the argument of my doctoral thesis), for what it is worth is that such radical horizontal transfer of sovereignty between states is highly conflictual and will not happen without serious resistance.

Kalypso Nicolaïdis

Cassis Fever: The Era of Managed Mutual Recognition

1999. In the last 10 years, old questions have been clarified while new ones have arisen. Clearly, the progress made towards a single market in services through the White Paper directives owes a lot to the adoption of mutual recognition as a guiding core principle. And there has been no blatant 'race to the bottom', rather 'to the top'.

But resistance there has been! Indeed, when I asked at the time: why did the Member States buy it, I had identified the wrong 'it'. What Member States have imported from the Court's jurisprudence has had little to do with the mere extension of the *Cassis* formula (as opposed to the entire judgment) to other products and sectors, an outcome which we can call 'pure recognition' (considering the labelling requirement as *de facto* not a costly adaptation). Instead, Member States have adopted a highly politicised version of recognition involving complex sets of rules and procedures that may serve precisely to reduce, if not eliminate, the open-endedness of mutual recognition. This I have called managed mutual recognition.

This is the conclusion I have drawn from analysing not only single market directives in services but also the attempts by the EU to export *Cassis* beyond its borders. As an outcome, managed mutual recognition can be contrasted with 'pure' mutual recognition in the same sense as managed trade can be contrasted with absolute free trade. Pure mutual recognition implies the granting of fully unconditional and open-ended rights (of action, access) to private market agents as a product of a free trade contract between states. In contrast, managed mutual recognition introduces conditionality in the contract. The four main dimensions along which mutual recognition can be managed or fine-tuned are: (a) prior conditions for equivalence, from convergence to inter-institutional agreements; (b) varying degrees of automaticity of access (for example, residual host country requirements; (c) scope of activities or features covered by recognition; and (d) *ex post* guarantees or safeguards, including mutual monitoring and ultimately provisions for reversibility. On this basis, managed mutual recognition can be viewed in a static or a dynamic manner. Statically, variation along each of these dimensions can be seen to indicate how far parties have travelled down the road to full recognition. Dynamically, the management of mutual recognition can be viewed as a process, involving trade-offs between these dimensions that may change over time. In short, the burden of co-operation is shifted in time from *ex ante* to *ex post* costs, so that liberalisation can appear to occur immediately, while it will need to be managed to be sustainable.

I have come to believe that a better understanding of these trade-offs and their dynamic adaptation over time is key to reaching agreements on mutual recognition in the first place.

Clearly then, 'managed' mutual recognition belongs to the political, not the judicial sphere. Nevertheless, it deeply bears the marks of the Court's footprints. First, it is the Court which traces the frontier, or the equivalence threshold, beyond which political decisions and political action will be necessary in order to ensure free movement on the basis of a home country rule. It also makes clear that such political action might not necessarily be harmonisation or centralised regulation. When deciding whether to replace a given state regulation with its own assessment of that regulation, the Court may or may not be weighing the institutional alternatives to its own approach, but it certainly shapes such alternatives.

Indeed, the Court is all the more relevant when we understand the legacy of *Cassis* as that of managed recognition. Take the debate that has dominated both the case law of the Court and the legal writing on the review of state measures under Article 30, namely whether the Court does/should apply a non-discrimination test or a balancing test in such cases. As Maduro argues in his recent book, even when apparently restricting decisions to an anti-discrimination test the Court always weighs costs and benefits and balances between the desirability of centralisation versus decentralisation, deregulation versus sustained regulation. Such balancing tests might lean towards a decentralised approach and yet determine that national treatment (or pure anti-discrimination) does not suffice to ensure free trade; they might point to the need for sustained regulation in a given sector but assess a home country approach to be sufficient, if the necessary safeguards are taken. In both cases, it may call for mutual recognition while stopping short of its judicial imposition.

When generalised through the legislative process most of the ECJ jurisprudence post-*Cassis* translates as managed, not pure recognition, whereby recognition is not an alternative to national treatment and harmonisation but an overarching principle, which retains residual host country control and harmonisation. In this sense, *Cassis* after all was not a continuation but a break from *Dassonville*. The latter's jurisprudence of generalising an *obstacles-based approach* to national regulation, whereby all national rules are potentially subject to an assessment of illegality, amounts to pure mutual recognition by judicial fiat. In contrast, the more circumscribed *Cassis* doctrine of *functional equivalence*, especially as further constrained in *Keck*, involves precisely the identification of the conditions and limits of recognition. But only by migrating from the judicial to the legislative arena is it possible to spell out the full panoply of instruments for the management of recognition.

While it is important to analyse the role of the rulings of the ECJ in the European story of mutual recognition, it is also true that all the Court could do when it came to designing this more sophisticated understanding of the principle was to provide a *roadmap* for politicians and technical experts later crafting legislation. For instance, the distinction made in the first, second and third generation insurance directives between types of consumers that could or could not withstand the logic of mutual recognition was an instance of political translation of the Court's jurisprudence. The Court had not imposed judicial recognition but pointed to the possibility of using this distinction to reduce the initial scope of recognition and introduce it in a progressive manner; or take the 1996 directive on the posting of workers—the line drawn between home and host country jurisdiction is a direct reading of the jurisprudence. If and when the political arena generates a demand for effective liberalisation, the Commission takes the politicians at their word in fact 'upping the ante' by proposing a radical generalisation of the Court's approach to complete the single market, which is after all what the political masters are asking for. But during the properly political process of bargaining, a winning coalition of Member States succeeds in watering down the extent of horizontal transfer of sovereignty in order to make liberalisation politically acceptable.

In this decade, managed mutual recognition has become the name of the game in the field of services, whether through residual host country control (professions), reduced scope (finance) or ex-post monitoring (media). In the field of goods, it has led not only to the new approach and agreement on minimal standards as prior condition, but also to the global approach whereby certification bodies throughout Europe can sustain recognition

without undue fear of lowered standards thanks to an extensive process of mutual monitoring—mutual spying, as I like to say. In spite of these collaborative networks between certifiers, recognition has been far from automatic in many instances. It should come as no surprise, then, that when exported into the transatlantic realm, and even while restricting it to certification, rather than recognition of the underlying standards, mutual recognition has been highly managed. When covering highly sensitive sectors like pharmaceuticals, mutual recognition agreements (MRAs) have stopped short of denying the FDA (Federal Drugs Agency) its right of residual control even if at the last stages of the approval process. And MRAs have simply floundered when it comes to services. At the global (WTO) level, under TBT (technical barriers to trade) and GATS (the services agreement) recognition is optional and conditional, not subject to MFN, and has been cumbersome to apply. Non-discriminatory mutual recognition could appear as an oxymoron to the non-legally trained eye.

Perhaps in order to counter the natural inertia of regulators and their resistance to any trade-induced assault on their autonomy, the OECD trade directorate—which has appointed me as their 'mutual recognition expert'—has launched a multi-year programme on the promotion of trade-friendly regulatory reform around the world. Fascinating to see attempts at the liberalisation of professional services meet resistance to horizontal approaches, precisely because each believes their particularities require a specific approach to managing recognition, from fiddling with acceptable titles to the need for additional training, adaptation periods and the like. Yet, what is a 'trade-friendly' regulatory reform if not one where modes and avenues for recognising foreign standards and actors are embedded in the very process of drafting law?

Cassis on Trial: Polish Plumbers, Butchers and Models

2009. This time around *Cassis* has truly been invoked in vain. If the recourse to mutual recognition has long been considered as a path of least resistance, 'easier than harmonisation', we can no longer doubt its highly contentious character. Twenty years after Lord Cockfield, another liberal Commissioner, Fritz Bolkestein considered worthy of a personal crusade the export of mutual recognition to the realm of all services trade spared until then from legislative scrutiny. And yet, the analogy stops here. In contrast to 20 years ago, mutual recognition has not been hailed as the magic bullet but has been put on trial along with Polish plumbers and butchers seeking temporary work in France and Germany (who in fact are required to work under host state laws but actually work under home state of mind).

To be sure, the public hysteria and PR disaster spurred by the Commission's draft directive can be attributed to many factors, including the propensity of some trade unions to play up their members' fears of globalisation and unfair competition. Moreover, the radical enlargement of the EU may well have lowered the 'mutual recognition tolerance threshold' while at the same time increasing the social, economic and regulatory diversity of the Union.

But given these factors, the Commission made a crucial mistake: to depart from its experience with managed mutual recognition and to press for a radical form of recognition across the board. It should have been clear by now to Brussels law drafters that a blanket application of home country jurisdiction is not faithful to the *Cassis* spirit. Under

the Court's jurisprudence, recognition was a conditional process and did not have the either-or character of the country-of-origin principle. A test must be applied to host state measures, and if found 'un-equivalent' with that of the home state they can be considered justified restriction to free trade. To adjudicate *a priori* between home and host state law is akin to setting a rule under a 'conflict of law' agreement, whereby mutual recognition becomes an unconditional obligation. In fact, the final draft to emerge from the European Parliament's negotiations amounts to endorsing the Court's jurisprudence, prescribing the usual proportionality and necessity tests for host country rules—a glass half full for advocates of a cautious and progressive approach to liberalisation, but half empty for those who believed that 20 years after the Treaty of Rome political actors could afford to take a bolder step than judges.

The Poles, thankfully, were undeterred. During the crisis, an ad from their Tourism Ministry featured the picture of a handsome plumber with the caption 'Come to see me, I am staying at home'. In the end, whether or not he leaves home, all will want to claim him. Maduro argues that Member States should be able to make different policy judgments. What we should not permit is that they ignore out-of-state interests in the making of those judgments. Others like Regan argue that the same result can be obtained from a fair representation of *all* domestic interests, as *proxies* for the under-represented interests from the outside. Whatever the benchmark, however, this normative view calls for a recognition managed by state regulators themselves but policed by the Commission, the Court, consumers and providers alike.

Cassis in Spirit: Europe as a Demoi-cratic Politics

What would EU law have been without *Cassis*? Indeed, what would the EU be without *Cassis*? Almost 30 years ago, at a time when the EC was ripe for a new approach that would deliver the completion of a market promised 20 years earlier, I believe there would have been another similar case, sooner or later. Perhaps the greatest irony today is that while questioned in the single market area, the spirit of *Cassis* thrives elsewhere. For one, we are witnessing a systematic extension of the principle of mutual recognition to the realm of justice and home affairs, in other words the acceptance by judges and police forces throughout Europe of each other's procedures and judgments. To be sure, 'wanted in one EU country, wanted everywhere in the EU' does not sound as liberal as its *Cassis* forbear and we do not yet have refugees 'admitted here, admitted everywhere'. But the time will come. In the meanwhile we must live with the 'rejected here, rejected everywhere'.

Indeed, an (idealised) European vision is becoming increasingly realistic which understands the enterprise as a one of intertwined polities, open to each other's soft influences and hard laws, and bound together not by some overarching sense of common identity or peoplehood but by the daily practice of mutual recognition of identities, histories and social contracts (Nicolaidis, 2007). To live in such a European 'demoi-cracy' means living with our differences and seeking to harmonise if and only if such differences are illegitimate in the eyes of either one of the parties involved. Recognition is a tough call on all sides of the political spectrum. The left fears social dumping when recognition means importing market rules; libertarians fear political dumping when recognition means importing, say, curbs on free speech. Even if these fears can be exploited, they must be

assuaged through respecting the spirit of *Cassi*s, that of managed recognition. Ultimately, however, they must be transcended if we are to live in Europe and in the world as a community of others, in Weiler's inspired formula.

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3

On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis de Dijon* Revisited

NICOLAS BERNARD

In classical legal narratives on the development of the law on the free movement of goods within the European internal market, the judgments of the Court in *Dassonville*[75] and *Cassis de Dijon*[76] are usually presented as fateful moments, in which the Court took a momentous decision destined to shape the future evolution of the law. In these accounts, however, the two cases do not stand on an equal footing. Conceptually, the more important one is *Dassonville*, in the sense that it is there that the Kuhnian[77] paradigm shift takes place, that the conceptual ground is moved and the legal revolution operated. In this perspective, *Cassis de Dijon* acts primarily as a clarification and tidying-up exercise, as well as a revealer for the heretofore undiscovered potential inherent in *Dassonville*.

An excellent example of this kind of narrative is provided by Joseph Weiler's account of the 'Constitution of the Common Market Place':[78] Weiler identifies five generations in the development of the internal market, with *Dassonville* and *Cassis de Dijon* playing a prominent role in the first two phases. *Dassonville* represents the first, foundational period in which free movement law is firmly based on a logic of removal of obstacles to free trade, as distinct from a mere anti-discrimination/anti-protectionist regime. *Cassis de Dijon* then represents the second generation in which key issues left unsolved by *Dassonville* are addressed, namely the need to provide a mechanism to safeguard legitimate measures that could not be foreseen in 1957 and therefore not included in the grounds of derogations of the ex Article 36 EEC and to address the problem of market fragmentation resulting from the adoption of differing standards by the Member States coupled with the *blocage* of decision making under ex Article 100 EEC. The 'mandatory requirements' doctrine and the so-called 'mutual recognition' or, as Weiler prefers, 'functional equivalence' principles in *Cassis* respectively address each of these two problems.

The beauty of Weiler's account, the reason why it resonates so much with us, is that it presents the development of the case law[79] as the product of conscious, deliberate choices by the Court of Justice at crucial moments. We progress from one generation to the next, if not seamlessly at least logically. The Court wanted to move away from a discrimination

[75] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

[76] Case 120/78 *Cassis de Dijon* [1979] ECR 649.

[77] T Kuhn, *The Structure of Scientific Revolutions* 3rd edn (Chicago, University Of Chicago Press, 1996).

[78] JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 349–76.

[79] Weiler is far too sophisticated to confuse the development of the case law and the development of the law and acknowledges the limitations of an approach that focuses on cases, and especially on key cases.

approach in *Dassonville* and therefore adopted the '*Dassonville* formula'. *Dassonville* left some issues unsolved. The Court then set out to address some of these through the mandatory requirements doctrine and the mutual recognition principle in *Cassis*. This does not mean that the Court never gets it wrong, even within its own terms, or never changes its mind, as *Keck*[80] shows. Nonetheless, we remain within a narrative of deliberate, progressive and continuous case law development by the Court.

The downside of such narratives, however, is that they are written, necessarily, with the benefit of hindsight and may unconsciously read cases in the light of later developments and, in so doing, invest judgments with a meaning and significance that they did not necessarily possess, or were meant to possess, when they were first handed down. Weiler's account of *Dassonville* puts the emphasis on the *Dassonville* formula. Indeed, *Dassonville* becomes the *Dassonville* formula. *Cassis de Dijon* is read so as to provide continuity with *Dassonville*. In the following pages, I shall put forward an alternative reading of these cases, downplaying the significance of the *Dassonville* formula and emphasising a clash between the approaches adopted by the Court in *Dassonville* and in *Cassis de Dijon*. My purpose is not to argue that Weiler's reading of these cases is 'wrong'. Certainly, historically, Weiler's account is 'right' in the sense that this is the way in which we have come to understand those cases. Rather, my aim is to emphasise how our reading of the cases in a particular way has resulted in some pathological developments in the law that have bedevilled and continue to bedevil the development of the law of the internal market.

This Chapter consists of three main sections. In the first two sections, I will revisit *Dassonville* and *Cassis de Dijon* to highlight some profound differences between those two cases in they way they approach the problem of attributing meaning to the prohibition on measures having equivalent effect to quantitative restrictions in the context of the European internal market. In the third section, I will consider some problems created by the *Dassonville* and *Cassis de Dijon* case law, and how, in particular, a pathological reading of the relationship between these cases has promoted an unhealthy development of the law relating to free movement in the internal market. Finally, in conclusion, I will return to Weiler's classic account to assess the appropriateness, from a normative perspective, of convergence between the EC and international trade regimes.

The Dassonville Formula: Myth or Reality?

'All trading rules enacted by the 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.'

Clearly, if read literally and free of all context, the *Dassonville* formula is capable of supporting the wide interpretation that has later been attributed to it, both in textbooks and in case law, an interpretation that underpins Weiler's claim of a deliberate move away from a logic of anti-protectionism and non-discrimination in the law relating to the free movement of goods. However, this is not how we normally read cases, or, for that matter, most texts. Meaning is usually regarded as determined by context and just about everything in the context of the *Dassonville* formula would suggest another reading. The

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

facts of the case, as construed by the Court, the overall language of the judgment as well as the wider context of European integration all push in a different direction.

As regards the facts of the case, for the Court, the problem with the Belgian legislation was that it created a barrier to parallel imports. If the Court's purpose was to put forward a wide obstacle theory of the kind it would later use in such cases as *Cinéthèque*[81] or the Sunday Trading cases,[82] this is a rather bizarre way to look at the issue. One would have expected it to note that any formality prior to placing goods on the market constitutes a *prima facie* obstacle to inter-state trade, in much the same way as import formalities constitute such obstacles.[83] The channelling effect seems largely irrelevant in an obstacle analysis. At most, it might be of secondary relevance at the level of justification. The Court, however, is very clear right at the beginning of the judgment that the issue in the case is that 'a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate only with great difficulty, unlike the importer who imports directly from the producer country'.[84] Put in the terminology currently in vogue, as read by the Court, the rule did not create a barrier to market access for the product as such, but favoured certain channels of distribution over others. This was clearly confirmed in *Dassonville II*,[85] where the Court found that there was no longer any breach of ex Article 30 EEC after Belgium amended its legislation and practices to facilitate parallel imports.[86]

As regards the language of the judgment as a whole, one cannot fail to notice that it is saturated with the language of discrimination. It is particularly noteworthy that the Court states that the power of Member States to adopt measures to prevent unfair practices in connection to guarantees of authenticity of product is, in the absence of Community legislation, subject to a requirement of reasonableness and that the means of proof required 'should not act as a hindrance to trade between Member States and *should, in consequence, be accessible to all Community nationals*'.[87]

With regard to the wider context of European integration, one might perhaps be tempted to draw a parallel with the Court's judgment in *Reyners*,[88] decided a mere three weeks earlier, in which the Court held that ex Article 52 EEC (now Article 43 EC) was capable of direct effect. The Court has often been credited for kick-starting the stalled engine of European integration in the face of stagnant political processes in that period of 'Eurosclerosis'. Yet, there is a problem in seeing the Court in *Dassonville* as making up for the deficiencies of the legislative process by strengthening negative integration, as it undoubtedly does in *Reyners*. The problem in *Dassonville* is not one of lack of harmonisation. Like *Keck* and unlike *Cassis de Dijon*, *Dassonville* was not concerned with an

[81] Joined cases 60–61/84 *Cinéthèque v FNCF* [1985] ECR 2605.

[82] Eg Case 145/88 *Torfaen BC v B & Q plc* [1989] ECR 385.

[83] On import formalities, see Joined cases 51–54/71 *International Fruit Company v Produktschap voor Groenten en Fruit* [1971] ECR 1107. The significance of *Dassonville* compared to this case law would have been that formalities at the marketing stage rather than the importation stage would also constitute measures having equivalent effect to a quantitative restriction.

[84] See paragraph 4 of the judgment.

[85] Case 2/78 *Commission v Belgium* [1979] ECR 1761.

[86] Some authors dismiss *Dassonville II* as anomalous (see P Oliver, *Free Movement of Goods in the European Community* (London, Sweet & Maxwell, 2003), 133–4). However, it is only anomalous if we accept that the *Dassonville* formula has to be taken at face value ignoring the context of the case. This might have been justified later on, as the Court's case law developed in that direction, but not at that point in time.

[87] See paragraph 6 of the judgment (emphasis added).

[88] Case 2/74 *Reyners v Belgian State* [1974] ECR 631.

obstacle resulting from disparities between the laws of the Member States. It would therefore seem singularly inappropriate to read it as a case of substitution of the Court for the weakness of political processes.

There is therefore little in the context of the case to suggest that it constituted a momentous decision to radically alter the conceptual basis of the free movement of goods. Indeed, later case law until *Cassis de Dijon* would seem to confirm this. In the period between *Dassonville* and *Cassis*, *Dassonville* appears to have been cited by either the Advocate-General or the Court itself in 23 cases. These cases fall in three broad categories: (i) cases concerning obstacles to parallel imports;[89] (ii) cases in which the Court conditions the applicability of ex Article 30 EEC to the existence of discrimination against imports[90] and (iii) cases in which ex Article 30 EEC is neither interpreted nor applied.[91] In none of these cases was the *Dassonville* formula used to strike down a non-discriminatory regulatory measure adopted by a Member State.

A final reason why it is rather strange that Dassonville should be regarded as constituting a deliberate move by the Court heralding a new era, opening wide the scope of ex Article 30 EEC, lies in its rather limited analytical approach. At no point is there any attempt in the judgment to explain how the building of an internal market differs from liberalisation of international trade. If the Court did intend to move away from the logic of anti-protectionism and non-discrimination then prevalent in international trade liberalisation instruments, such as GATT, one would have expected a greater degree of elaboration of the issues. Admittedly, at that time, the style of the Court was rather terser than it currently is. But even so, other cases in which the Court justifies a departure from traditional approaches, such as *Van Gend en Loos* and *Costa v ENEL*,[92] were rather more explicit on the need for a departure from ordinary international law in the EU context.

Cassis de Dijon: Actual or Potential Mutual Recognition?

It is precisely on this last point that *Cassis* differs markedly from *Dassonville*. *Dassonville* proceeds by way of a peremptory definition without any explanation as to why the context of the internal market necessitates such a definition. It is as if the notion of a measure having equivalent effect was so self-evident as not to require any explanation. By way of contrast, instead of starting from an *a priori* definition, the Court in *Cassis* begins by characterising the problem as one of disparities between the laws of the Member States. If we start from the Court's definition of the internal market in *Schul*[93] as entailing the

[89] These are primarily cases concerning intellectual property rights and the doctrine of exhaustion (see, eg, Case 119/75 *Terrapin v Terranova* [1976] ECR 1039).

[90] The majority of these cases concern either measures applying specifically to imports (eg phyto-sanitary inspections as the border as in Case 4/75 *Rewe v Landwirtschaftskammer* [1975] ECR 43) or price control measures (see, eg, Case 82/77 *Van Tiggele* [1978] ECR 25).

[91] See, eg, Case 31/74 *Galli* [1975] ECR 47 concerning the inability of Member States to take unilateral action in the context of the common organisation of agricultural markets when the matter is regulated at Community level.

[92] See also Case 270/80 *Polydor v Harlequin* [1982] ECR 329 for another example of the Court explaining the specificity of the internal market context to justify a different solution in intra-EC trade as compared to ordinary international treaties.

[93] Case 15/81 *Schul* [1982] ECR 1409, para 33.

elimination 'of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market', it is clear that the issue of disparities between the laws of the Member States lies at the heart of the *problématique* of free movement in the internal market. Plurality of legal orders, and therefore potential disparities between those legal orders, are precisely what distinguishes a multi-state market compared with a domestic market within a single jurisdiction. In the context of classic international trade law, we are bound to proceed from the principle of state sovereignty and therefore recognise the competence of each state to regulate its own market. Regulatory competence therefore falls on the host state and, as a result, obstacles resulting from disparities between national laws are unavoidable. We can seek to minimise them but, ultimately, we have to accept that different polities will make different regulatory choices and that such differences will create insurmountable obstacles to trade. In an internal market, however, we cannot content ourselves with such an answer. The abolition of all obstacles to trade, including those resulting from disparities between the laws of the Member States, is precisely what distinguishes an internal market from a mere liberalised international trade regime. The only question is how we go about removing those obstacles. If, to use Poiares Maduro's tripartite classification,[94] the decentralised model of host state control does not solve the problem, we still have a choice between either the 'centralised model' of harmonisation or the 'competitive model' of mutual recognition. Thus, regulatory competence falls either in the hands of the Community under the centralised model or in the hands of the home state under the mutual recognition regime.

Cassis has been widely criticised for introducing the principle of mutual recognition in the legal landscape. However, this introduction was immediately neutralised by the mandatory requirements doctrine. The possibility for the host state to justify rules by reference to legitimate public interest objectives ensured that what was presented as the default principle, namely that products lawfully produced and marketed in one Member State should in principle be admitted in all other Member States, was confined to marginal situations, where no significant regulatory objectives were at stake. There is, therefore, something slightly disingenuous in stating that mutual recognition was a 'colossal market failure'[95] when the Court precisely rejected the mutual recognition route in anything but marginal cases.

There are, of course, good reasons why the Court refused to engage down the route of what we might call, by analogy with Tiebout's model of fiscal federalism,[96] 'regulatory federalism' and the risk of a race to the bottom attendant on it. Whether the economic situation among the then nine—soon to be 10—Member States made such a race a genuine and realistic threat rather than a purely theoretical prospect is a moot point, as there can in any event be no denying of the salience of the point from a political point of view. It is also probable that a system based on regulatory competition would have added a layer of difficulties in successive enlargement negotiations. The controversy surrounding the so-called 'Bolkenstein Directive' on services in the internal market[97] serves as an *a posteriori* vindication of the wisdom of a cautious approach on this issue.

[94] M Poiares Maduro, *We the Court—The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1997).

[95] Weiler, above note 78, at 368.

[96] C Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *Journal of Political Economy* 416–24.

[97] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L376/36.

Even as a virtual rather than operative legal principle, mutual recognition is an important point of reference and *Cassis*, unlike previous case law—least of all *Dassonville*—provides us with a conceptual framework in which to think about the problem of regulation in the internal market and the role of harmonisation in it. This significance was not lost on the Commission[98] and opened the door to a programme of harmonisation based on essential requirements, which would later become one of the elements of the new approach to technical harmonisation.

Re-reading *Dassonville* post-*Cassis*: Why Whisky and Crème de Cassis Do not Mix

While *Cassis de Dijon* represented a major intellectual breakthrough, it nonetheless gave rise to two kinds of problems.

The first problem, which has already been alluded to, is one of disappointed expectations. If mutual recognition and home country control were supposed to single-handedly solve the problem of realising the internal market and obviate the need for harmonisation, then clearly this has not happened. However, this would have been an unrealistic expectation of mutual recognition. The problem stems from seeing mutual recognition and home country control as a replacement for harmonisation. A regulatory system based entirely on mutual recognition and home country control would place high demands in terms of homogeneity and mutual trust among the Member States, which is plainly unrealistic in the European internal market. The real potential of mutual recognition and home country control in the single market is in conjunction with, rather than instead of, harmonisation, so as to promote a more reflective and selective approach to harmonisation. To some extent, this has happened with the focus on essential requirements in the context of the new approach to technical harmonisation. Mutual recognition of diplomas outside the harmonised professions could also be cited as another example, as well as Directive 98/5 on freedom of establishment for lawyers.[99] However, the potential of a combination of harmonisation and mutual recognition has not been fully exploited. The preference given to total harmonisation, particularly in the context of the new approach—rather than minimal harmonisation coupled with a free movement clause for products complying with home country rules—has limited the potential for regulatory experimentation and innovation, even though the voluntary nature of compliance to standards has somewhat alleviated the danger of ossification and obsolescence inherent in total harmonisation.

The second problem is more directly concerned with the case law of the Court and its interpretation of Article 28 EC. The issue here concerns the relationship between *Cassis de Dijon* and *Dassonville*. While *Dassonville* had until then remained pretty much dormant, it was invested with a new vigour after *Cassis*. This involved re-reading *Dassonville* in the

[98] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*), [1980] OJ C256/2.

[99] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, [1998] OJ L77/36.

light of *Cassis* and, conversely, interpreting *Cassis* as a confirmation and clarification of *Dassonville*. *Dassonville* ceased being regarded as a case about parallel imports and, instead, as the basis for a general theory of measures having equivalent effect to quantitative restrictions based on the *Dassonville* formula. From this perspective, *Cassis* was to be seen as having first and foremost expanded on the 'rule of reason' in *Dassonville* through the development of the mandatory requirements and mutual recognition dismissed as mere rhetorical fluff, a nice formula which adds strictly nothing to the existing body of law, since the job of bringing a measure within the scope of Article 28 EC was done by the *Dassonville* formula.

This return to *Dassonville* constituted a major impoverishment of the intellectual debate. To the conceptual richness of *Cassis*, stimulating reflection on tools and techniques of market integration, was substituted the vacuity of the *Dassonville* formula. The limitations of that formula as a conceptual basis on which to found the internal market are patent: the formula has little to tell us beyond the assertion that regulation is bad for the internal market: 'all trading rules' are prima facie suspect although they may have to be, reluctantly, tolerated under the rule of reason. The only way to endow the formula with any intellectual content and respectability is to adopt a neo-liberal reading of the Treaty designed to minimise public intervention in the market and maximise private commercial freedom. Some authors, notably in the German ordo-liberal school, have defended such a reading of the Treaty.[100] The problem for those authors is that neither the historical context nor the structure and wording of the Treaty, whether in its original form or following the amendments introduced by the Single European Act and the Maastricht Treaty, offer convincing support for a neo-liberal reading.

As some authors have observed,[101] the Court has, rightfully, not gone down that route and has, through the mandatory requirements doctrine, been quite tolerant of state regulation in the internal market. However, it has, unfortunately, listened to the sirens calling for a reading of *Cassis de Dijon* as an extension of the *Dassonville* formula. The problem with interpreting Article 28 EC on the basis of a formula whose sole underlying message is that regulation is inimical to the internal market is that it invites litigants to use Article 28 EC whenever they object to constraints on their commercial freedom inherent in any regulation, even in situations which do not raise any genuine issue of market integration.

The Court in *Keck*[102] attempted to redress the excesses to which excessive reliance on the *Dassonville* formula had led. Unfortunately, it did so by following a number of authors in addressing the symptoms rather than the root cause. The source of the problem is that *Cassis* was designed to deal with the core issue of free movement in a multi-state market, namely the problem of disparities between the laws of the Member States. The reason why *Keck* should have remained outside the scope of Article 28 EC is not so much that it concerned 'selling arrangements' *per se* but rather that it—like for that matter the Sunday Trading cases[103] or, in the context of the other freedoms, *Alpine Investments* [104]—did not raise any issue of disparities between the laws of the Member States. In all these cases, we

[100] Cf, eg, ME Streit and W Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"', (1995) 1 *European Law Journal* 5.

[101] See, eg, M Poiares Maduro, above note 74.

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

[103] Eg Case 145/88 *Torfaen BC v B & Q plc* [1989] ECR 385.

[104] Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141.

were dealing with home state regulation,[105] which, in the absence of discrimination, should remain outside the scope of free movement law, as established by the Court in its case law on Article 29 EC.[106]

The Court's decision in *Keck* attracted strong criticisms for its opportunistic but rather unprincipled distinction between rules relating to the product itself and rules concerning selling arrangements. While those criticisms are justified, the alternatives put forward, such as those centred on the notion of a restriction or hindrance to 'market access' are also problematic. If we take restriction on market access as meaning impossibility to sell in the host state market, then clearly the test is too narrow. If, on the other hand, we take it as meaning making sales more difficult in the host market, the test looks as vacuous as the *Dassonville* formula as it is capable of covering virtually any kind of regulation. The conceptual emptiness of the market access test is implicitly recognised by the more sophisticated of its advocates, such as Weatherill[107] or Advocate-General Jacobs,[108] who feel compelled to qualify it by requiring a *substantial* hindrance or barrier to market access, where the job of delineating the scope of Article 28 EC rests entirely on the test of intensity or remoteness implied in the notion of a substantial hindrance, rather than in the notion of a hindrance to market access itself. There is, of course, nothing objectionable in using the language of market access *per se*. It is a rather nice form of words, like the *Dassonville* formula in its day. However, we should accept it for what it is, viz. a discursive technique or rhetorical device whose conceptual content verges on nil and which is incapable of providing any meaningful guidance on the problem of legitimate regulation in the internal market or the scope of free movement law.

Tempting though it may be, the search for yet another set of words to act as the perfect definition of a measure having an equivalent effect or the ultimate test for the scope of Article 28 EC or the other internal market freedoms, is unlikely to prove very fruitful. The strength of *Cassis* lay precisely in putting the emphasis on the structure of regulation in the internal market rather than searching for a dogmatic definition of a measure having equivalent effect. *Keck* and the post-Keck case law show that the full potential of *Cassis* in this respect has still not yet been fully explored. Such exploration could provide rather more useful pointers for the interpretation of the treaty provisions on internal market freedoms than the search for that elusive formula to define the scope of Article 28 EC.

Conclusion: Beyond the Internal Market: *Cassis* and International Trade

In conclusion, I would like to return to Weiler's classic paper on the Constitution of the Common Market Place.[109] For Weiler, the next phase in the evolution of this Constitution, the 'fifth generation', would be one of convergence between the international trade regime

[105] It is beyond the scope of this contribution to discuss why *Keck* should be seen as a home country control case. On this issue, see N Bernard, *Multilevel Governance in the European Union* (London and The Hague, Kluwer Law International, 2002), 24 *ff*.

[106] See Case 15/79 *Groenveld* [1979] ECR 3409.

[107] S Weatherill, 'After *Keck*: Some thoughts on how to clarify the clarification' (1996) 33 *CML Rev* 885.

[108] See, in particular, his Opinion in Case 412/93 *Leclerc-Siplec* [1995] ECR I-179.

[109] Above note 78.

of GATT and that of the European internal market. That such a convergence can be identified, as an empirical matter, is plain. How far that convergence should be taken, as a normative matter, is a different question. Weiler makes much of a number of similarities between the WTO regime and the EC Treaty, notably the parallel that can be established between Article XI of GATT and Article 28 EC or the development in the WTO context of various tools providing a partial functional equivalent to the harmonisation provisions of Articles 94 and 95 EC.

In this Chapter, I have insisted on the importance of the context in which provisions are situated for their interpretation and contrasted, in this respect, the judgment of the Court in *Cassis de Dijon*, which focused on the issues raised by the process of constructing an internal market from problematic interpretations based on a decontextualised *Dassonville* formula. The same is, of course, true of the WTO regime. From this perspective, there is a world of difference between, on the one hand, establishing a worldwide fair trade regime between sovereign nations with vastly different social, economic and political conditions and, on the other, developing a single market among a relatively homogenous group of countries as part of a project of political integration for which the Member States have, 'albeit within limited fields', agreed to limit their sovereign rights. Despite a fairly dense institutional network for the communication of economic, social and political preferences, the EU is constantly confronted with legitimation difficulties. We should proceed with caution lest we overload an international system with demands that far outstrip its legitimation capabilities.