

Article 34 and economic liberalism: the consequences and implications for consumers, producers and member states regulatory autonomy

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Abstract

The historic economic goal of the European Union to achieve an internal market has led to the use of many instruments, one of them being Article 34 of the Treaty of the Functioning of the European Union. This article will explore the substantial impact on consumers, producers and the regulatory autonomy of member states that an economically liberalist driven approach to Article 34 has had. Furthermore, the importance of Article 34 for the UK will be examined in light of its current reliance on it, and how the UK's departure from the European Union may influence its capacity to depend on Article 34.

Keywords

Economic liberalism, regulatory autonomy, quantitative restrictions, consumer protection, internal market

I. Introduction

Article 34 Treaty on the Functioning of the European Union (TFEU)¹ is one of the main facilitators of trade between member states that seek to give effect to the economic objective of the European Union (EU). The aim of this article is to introduce Article 34 TFEU and critique its broad definitions, as well as highlight the challenges surrounding the adoption of an economic liberalist approach. The consequences of such an approach will be discussed in relation to consumers, producers and national regulator autonomy. At the same time, the importance of Article 34 TFEU will be emphasised, especially to the UK, and how the different options for Brexit may influence the relationship between Article 34 TFEU and the UK. For the purpose of this article, the economic liberalism ideology takes the meaning of market forces being the best mechanism to allocate resources and promote individual economic freedom. This is often achieved by Article 34 TFEU through the removal of barriers to facilitate market forces to allocate resources and promote individual economic freedom.

II. Economic liberalism and consumers and producers

The economic objective of the EU being the creation of an internal market which is defined in Article 26 TFEU,² allows for the optimal allocation of resources due to the removal of (technical) barriers between member states. Article 34 TFEU a proponent for the removal of such barriers prohibits “quantitative restrictions on imports and all measures having equivalent effect.”³ The scope of such “quantitative restrictions” are defined in both *Geddo*⁴ and *Dassonville*,⁵ which covers from total bans⁶ to differing regulatory standards.⁷ Such measures can be justified under Article 36 TFEU⁸ if it meets one of the exhaustive criteria and proportionality.⁹ Such an approach works well in facilitating the economic aims of the internal market and exemplifies an economic liberalist approach, by removing barriers of trade between member states. It promotes a number of benefits such as the creation of a greater market for competition, which would consequently lead to lower consumer prices and promote greater

¹ Consolidated version of the Treaty of the Functioning of the European Union [2010] OJ C326/01

² Consolidated version of the Treaty of the Functioning of the European Union [2010] OJ C326/01

³ Consolidated (n 1)

⁴ Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECR 865, [16]

⁵ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, [5]

⁶ See Case 231/78 *Commission v UK* [1979] ECR 1447

⁷ See Case 261/81 *Walter Rau Lebensmittelwerk v de Smedt Pvbba* [1982] ECR 3961

⁸ Consolidated version of the Treaty of the Functioning of the European Union [2010] OJ C326/01

⁹ Proportionality is a means of deciphering the suitability and necessity of a measure adopted, see further in the article for more information

consumer choice, both highly beneficial to consumers. This can be seen in the UK for instance with the rise of *Aldi* and *Lidl*. Through their competitive lower prices, they have forced bigger brands such as *Asda* and *Sainsburys* into a merger, as well as forcing *Tesco* to launch their own discount chain, “Jacks.”¹⁰ The removal of such barriers can be very beneficial to consumers, as highlighted through the above examples.

However, for producers this may not be the case, as the removal of barriers to trade through Article 34 TFEU creates a greater market which may force incumbent firms out, due to being undercut by the competition. This can be observed once again in the UK through the rise of *Aldi* and *Lidl* that have forced *Morrison’s* to close a large number of stores in order to cut costs to remain somewhat competitive.¹¹ It would appear that the removal of barriers has a negative effect on producers if they are unable to cope, potentially forcing them out of the market, as this would have the detrimental effect of reducing consumer choice, and opening consumers up to exploitation from the resulting monopolistic/oligopolistic¹² market structures that follow. However, such a negative effect is limited as competition law found at both the EU¹³ and UK¹⁴ levels, seek to prevent such exploitation.

Overall, the economic liberalist approach to Article 34 TFEU sees the consumer in this regard as a principal beneficiary of the removal of barriers, with producers being forced to adapt or be potentially forced out of the market.

III. Market liberalism and regulatory autonomy

This then begs a discussion of, “Measures having Equivalent Effect” (MEQR’S), to understand the implications upon the regulatory autonomy of member states as a consequence of the economic liberalist approach. MEQR’s are defined in *Dassonville*¹⁵ as “trading rules... which are capable of hindering, directly or indirectly, actually or potentially intra community

¹⁰ Xan Rice ‘The Aldi Effect: how one discount supermarket transformed the way Britain Shops’ (*the Guardian* 5 May 2019) <www.theguardian.com/business/2019/mar/05/long-read-aldi-discount-supermarket-changed-britain-shopping>

¹¹ *ibid*

¹² An oligopolistic market structure is comprised of only a few firms that dominate the market, see for further information, Economics online “Oligopoly” (Economics online) <www.economicsonline.co.uk/Business_economics/Oligopoly.html>

¹³ This would be through Article 102 that prohibits abuse by dominant undertakings that imposes heavy fines on abusers. See <http://europa.eu/rapid/press-release_IP-19-1770_en.htm>

¹⁴ The UK makes use of the Competitions and Markets Authority (CMA) to promote competition and reduce anti-competitive activity

¹⁵ *Dassonville* (n 6)

trade.”¹⁶ Such a definition has been the subject of criticism because it is seen as exceptionally broad, making it “far from operational”¹⁷. Furthermore, it gives rise to two questions. Firstly, what measure constitutes a trade rule? Secondly, how serious of an impact must the measure have before it “hinders intra community trade”? In practice the CJEU assigns very little emphasis on the aim of national law, meaning measures not even aimed at trade between member states can fall within Article 34 TFEU’s remit.

Furthermore, the fact that a measure “may be capable of potentially” hindering intra community trade without any form of *de minimis* test being adopted, consequently means that trade indirectly or potentially affected, falls within Article 34 TFEU’s remit. This has led to some highly peculiar outcomes, such as the Court of Justice of the European Union (CJEU) disregarding statistical evidence showing that imports have increased after a measure was introduced on the basis that imports might have increased even more in the absence of such measures (i.e. that profit maximisation has been prevented, because of the measures adopted by the member states, despite imports increasing).¹⁸ This circular and artificial reasoning indicates that the CJEU is ideologically driven by an economic liberalist approach to facilitate trade between member states through the removal of any potential barriers, having the consequences previously mentioned on both consumers and producers, rather than adopting an approach rooted in the reality of the situation. Additionally, such a broad approach has negative connotations for the regulatory autonomy of member states. Such a broad approach can be reconciled with a market access test with any trade rule capable of hindering “directly, indirectly, actually or potentially.” Commentators such as Reid are critical of such an approach because if the goal of article 34 TFEU is to provide unfettered access to the market (given the broadness of *Dassonville*¹⁹ definition this seems the case), then a market access approach restrains national regulatory autonomy to a greater extent than a discrimination approach would. This is because in essence taking such a broad approach allows the CJEU to extensively review member states’ regulatory choices, impeding upon their national regulatory autonomy by not allowing them to protect and regulate their own interests.²⁰

¹⁶ *ibid.*, [5]

¹⁷ Niels Fenger, ‘To Use or Not to Use—That’s the Question. On Article 34 and National Rules Restricting the Use of Lawfully Marketed Products’ in Mads Andenas, Tarjei Bekkedal and Luca Pantaleo (eds), *the reach of free movement* (1st edn, Asser press 2017)

¹⁸ *ibid*

¹⁹ *Dassonville* (n 6)

²⁰ Emily Reid, ‘Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits’ (2010) 44 *Journal of World trade* 877

As a result, the economic liberalist approach adopted by the CJEU, negatively impacts the regulatory autonomy of the member states due to the broadness of *Dassonville*²¹ definition. This reduces the member states capacity to regulate and protect their own interests. Furthermore, it leaves these barriers to be potentially dealt with through positive integration and harmonisation which can be problematic in itself, as it requires compromise between the current member states.

IV. Reduced consumer protection

The subsequent case of *Cassis*²² has somewhat mitigated the broad reach of *Dassonville*²³ through the development of the rule of reason and introduction of the mandatory requirements.²⁴ The rule of reason states, in the absence of harmonisation member states can set their own regulatory standards protecting their own interests that align with a mandatory requirement, being a non exhaustive list of justifications separate from Article 36. Such a development helps reinforce national regulatory autonomy, because the mandatory requirements provide a greater sphere of justification that are aligned with the member states objectives. However, the measures must still be proportionate, meaning it must be suitable and necessary to achieve the desired objective through the least restrictive means possible. As a result, proportionality seeks to allow only minimal barriers to trade. For instance, in *Rau*²⁵ the measure adopted to protect consumers was held not to be proportionate, as it was ‘suitable but not necessary’.

Such a position is desirable for the economic liberalist’s perspective, as using proportionality to ensure only minimal barriers to trade reduces the dual burden placed upon importers to comply with other member states national regulation, thus facilitating trade between those member states. However, such reasoning has been the subject of criticism by Lasa, who argues that “informative labelling”²⁶ approach encompasses the risk that consumer protective standards would be diminished within the EU, due to the minimalist approach taken

²¹ *Dassonville* (n 6)

²² Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649

²³ *Dassonville* (n 6)

²⁴ *Cassis* (n 23), [8]-[14]

²⁵ *Rau* (n 8). A label was deemed to be a more suitable way of achieving the desired objective, rather than requiring butter and margarine to be packaged in different shapes

²⁶ HC von Heydebrand e.d Lasa, ‘Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got it Wrong?’ (1991) 16 *European Law Review* 391, 490-413

with proportionality in such a regard. Furthermore, Lasa argues that the CJEU places too much emphasis on free trade, rather than ensuring consumers are adequately protected.²⁷ Lasa's argument can be vindicated, as by using proportionality to allow only for minimal protection such as labelling like in *Rau*,²⁸ it severely limits the capacity of the member states to protect consumers in the absence of harmonised rules. This can be especially problematic for food labelling, as a label may not provide sufficient warning as to the contents of a product, rather than a required packaging for instance. Secondly, such a minimalist approach ensures that businesses encounter as little friction as possible when they are trading, because of the minimalistic use of proportionality, emphasising the importance placed by the CJEU on free trade. Such an outcome is indicative of an economic liberalists approach, which the CJEU is clearly adopting. Consequently, Lasa's criticism in this regard is highly valid.

While *Cassis*²⁹ through the rule of reason and the introduction of the mandatory requirements somewhat reinforces the member states national regulatory autonomy, there is still a burden imposed upon these member states to justify their national regulatory measure. Furthermore, the economic liberalist approach adopted by the CJEU has reduced the protections available to consumers by using proportionality to aim for minimal protection, to facilitate trade rather than ensure strong protections are in place for consumers.

V. Market access test

Following *Dassonville*³⁰ and *Cassis*,³¹ the scope of Article 34 TFEU remained very wide, which led to many individuals abusing their rights found in EU law to challenge national regulatory measures that impacted their contractual freedom. This is evident in the Sundry trading cases, such as *Torfaen*,³² in which Sundry trading was prohibited from imposing an equal burden on both domestic producers and importers. Subsequently it did not breach Article 34 TFEU, as discrimination between national and imported products was needed to find a breach. *Keck*³³, frustrated with the "increasing tendency of traders to invoke Article 34 TFEU as a means to challenge any rules whose effect is to limit their contract freedom"³⁴, stated that

²⁷ *ibid*

²⁸ *Rau* (n 8)

²⁹ *Cassis* (n 23)

³⁰ *Dassonville* (n 6)

³¹ *Cassis* (n 23)

³² Case 145/88 *Torfaen BC v B & Q plc* [1989] ECR 3851

³³ Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097

³⁴ *ibid.*, [30]

selling arrangements do not fall within the meaning of *Dassonville*³⁵ MEQR's. To constitute selling arrangements the measures must satisfy the *Keck*³⁶ proviso that demands that the member states provision applies to all effected traders in the same manner in law. In fact, if they do, there are equal burden rules, thus falling outside the scope of Article 34 TFEU.³⁷ The Sunday trading cases would now fall under this category.

This is highly beneficial to member states as they would no longer have to justify such measures, thereby reinforcing their national regulatory autonomy, providing the member states increased scope to act in their own interests, without being forced to justify their actions. There is some difficulty in defining selling arrangements as *Keck*³⁸ failed to define them. As a result, breaches of Article 34 TFEU has been found in regard to measures that appear like selling arrangements, but do not satisfy the *Keck* proviso, and thus fall inside Article 34 TFEU's remit. For instance, in *Gourmet*,³⁹ a total ban on alcohol advertising was challenged as without any form of advertising consumers would only be familiar with domestic products. This meant that the measure was caught by Article 34 TFEU due to the differential impact it had that impeded the importers market access.⁴⁰ The economic liberalist approach of the CJEU once again comes to the fore, as catching a measure on the basis that it hinders market access is rooted in the economic liberalist ideology.

Such a test has negative connotations on both consumers and regulatory autonomy, as a market access test is significantly wider in scope than a discrimination-based test. Subsequently, this would increase the removal of obstacles to trade, impeding on national regulatory autonomy and consumer protection, with standards previously put in place to protect consumers, potentially being minimised or even removed. For instance in *Gourmet*⁴¹ the advertising ban sought to prevent adverts about alcohol being shown to children, yet the measure was still caught by Article 34 TFEU. *Keck*⁴² has somewhat narrowed down the scope of Article 34 TFEU through selling arrangements that reinforce national regulatory autonomy. However, due to the lack of a definition as to what constitutes a selling arrangement.

³⁵ *Dassonville* (n 6)

³⁶ *Keck* (n 34)

³⁷ *Keck* (n 34), [17]

³⁸ *ibid*

³⁹ Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795

⁴⁰ *ibid.*, [38]

⁴¹ *Gourmet* (n 40)

⁴² *Keck* (n 34)

*Gourmet*⁴³, adopted a market access test that is pervasive on both consumer protection and national regulatory autonomy. This is a result of the increased scope to remove obstacles in comparison with a discrimination based test.

Despite debate⁴⁴ surrounding *Keck*⁴⁵ extending restrictions on use of a product, *Italy*⁴⁶ has made clear that measures restricting the use of a product constitute a measure equivalent to a qualitative restriction. The CJEU stated that restrictions on use of products have a considerable influence on the behaviour of consumers (despite the rules being non-discriminatory in nature), because this impedes the access of that product to the market requiring it to be justified under Article 36, or the mandatory requirements.⁴⁷ This market access test has since been confirmed in *Roos*.⁴⁸ A market access test poses many problems for regulatory autonomy, as regulatory autonomy is reduced with the wide scope of a market access test that could see a large number of obstacles to trade removed for the purpose of facilitating trade. This reduces the capacity of member states to prevent or restrict the use of a certain product that may require more limitations especially in their own national area. Correspondingly, through the adaptation of a market access test in relation to restrictions on the use of products, the CJEU is favouring their economic liberalist ideology to facilitate trade between member states, while consequently encroaching on national regulatory autonomy.

VI. UK implications

Despite the criticisms that can be made of Article 34 TFEU and the economic liberalist approach adopted by the CJEU, it is nevertheless invaluable to the free movement of goods across the internal market. This creates questions as to the implications for the UK following its departure from the EU. As it currently stands, 50% of UK imports go to the other 27 member states of the EU; furthermore, 25% of American exports heading to Europe first come through the UK.⁴⁹ Article 34 TFEU is invaluable to the UK current trade prospects. However, the implications are dependent upon the circumstances on which the UK leaves the EU. If UK had

⁴³ *Gourmet* (n 40)

⁴⁴ See Eric White, 'In search of the limits to article 30 of the EEC treaty' (1989) 26 Common Market Law Review 235, 246

⁴⁵ *Keck* (n 34)

⁴⁶ Case C-110/05 *Commission v Italy* [2009] ECR I-519

⁴⁷ *ibid.*, [55]-[57]

⁴⁸ Case C-142/05 *Aklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, [47]-[56]

⁴⁹ Jarrod Tudor, 'Consumer protection and the free movement of goods in the European Union: the ability of Member-States to block the entry of goods across borders' (2017) 39 Houston Journal of International Law 557, 557

left with a no deal Brexit, it would see the UK take a clean break away from the EU, as this would mean that UK traders would lose the mutual recognition of UK technical standards, as well as harmonised standards. Furthermore, the UK would not have the capacity to challenge technical barriers in other member states. Given the high volume of trade the UK has with the EU this would likely have a negative economic impact upon the UK. However, the UK would have the option to pursue a trade deal with the EU similar to what Japan has achieved, which could see some of these barriers reduced.

A softer Brexit would see the UK remain within the European Economic Area (EEA) like Norway or in the European Customs union, or both, meaning that the UK would still have the protection of the derogations under Article 34 TFEU, but the UK would become a rule taker as a result. The current transition agreement would see the UK keep almost all EU rules in place until 2020 (including article 34 TFEU) with free trade to carry on during this time.⁵⁰

VII. Conclusion

This Article has aimed to introduce Article 34 TFEU, and how the economic liberalist approach adopted by the CJEU has had a number of notable consequences on consumers, producers and upon national regulatory autonomy. The approach taken by the CJEU to quantitative restrictions has seen a number of notable benefits to consumers, such as lower prices and greater consumer choice, which was illustrated through *Lidl* and *Aldi*. The removal of barriers in this instance was not as beneficial to producers, and while it created a wider market for competition, it did force out or cause incumbent firms to engage in cost cutting tactics to stay within the market. However, the broadness of *Dassonville's* ⁵¹MEQR's and the CJEU circular reasoning had negative connotations for the regulatory autonomy of the member states, as the broadness of *Dassonville's*⁵² definition allows the CJEU to extensively review the national regulatory choices of a member state, impeding upon their own national regulatory autonomy. While *Cassis*,⁵³ somewhat reinforced the national regulatory autonomy of the member states, through the introduction of the rule of reason and the mandatory requirement -

⁵⁰ Department for exiting the European Union: Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (*Gov.*, 25 November 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf>

⁵¹ *Dassonville* (n 6)

⁵² *ibid*

⁵³ *Cassis* (n 23)

and due to the minimalistic approach taken to proportionality to provide minimal barriers – it provides minimal protection to consumers, as a consequence for further facilitating trade between member states. *Keck*⁵⁴ did reinforce national regulatory autonomy through the creation of selling arrangements that provides member states an increased scope to act in their own interests without being forced to justify their actions. However, due to the difficulty in defining a selling arrangement, this led to the adaptation of a market access test which arose in *Gourmet*.⁵⁵ With the market access test being much wider in scope than a discriminatory test, the result is that it allows more obstacles for trade to be removed, encroaching on national regulatory autonomy, while potentially reducing the level of consumer protection. The rise of *Italy*⁵⁶ further exemplifies these issues. However, despite the issues of the economic liberalist approach adopted by the CJEU, it is invaluable to the UK's trade prospects, and its relationship with Article 34 TFEU in view of UK's departure from the EU.

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⁵⁴ *Keck* (n 34)

⁵⁵ *Gourmet* (n 40)

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