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Abstract

In the cases *Burmanjer* and *A-Punkt Schmuckhandel*, the CJEU examines whether the Belgian legislation prohibiting the itinerant selling of subscriptions to periodicals without prior authorisation (*Burmanjer*) and the Austrian legislation prohibiting the doorstep selling of silver jewelry (*A-Punkt Schmuckhandel*) are compatible with the free movement of goods. Answering these questions, the Court applies the reasoning formerly adopted in *Keck and Mithouard.*After analysing the reasoning of the Court in these cases, this paper examines whether this jurisprudence is still relevant today when determining whether a prohibition of itinerant selling of (certain) goods without prior authorisation or a prohibition on doorstep selling of certain goods are compatible with European law. When answering this question, the *Unfair Commercial Practices Directive* and the *Consumer Rights Directive* will also be taken into account.

In *Société Fiduciaire Nationale d'Expertise Comptable*, the CJEU decides that national legislation which totally prohibits the members of a regulated profession from engaging in canvassing is incompatible with article 24 (1) of the *Services Directive*, which precludes total prohibitions on commercial communications by regulated professions. Determining whether rules on the doorstep selling, the itinerant selling or canvassing of services are compatible with European law, requires an analysis of the scope and content of article 56 TFEU, the *Services Directive* and the *Unfair Commercial Practices Directive*.

Are rules prohibiting the doorstep selling of certain goods and prohibiting the itinerant selling of goods and services without prior authorization compatible with the EU-Treaty and the Unfair Commercial Practices Directive?

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§1. Introduction

1. In the cases *Burmanjer* and *A-Punkt Schmuckhandel*, the CJEU examines whether the Belgian legislation prohibiting the itinerant selling of subscriptions to periodicals without prior authorisation (*Burmanjer*) and the Austrian legislation prohibiting the doorstep selling of silver jewelry (*A-Punkt Schmuckhandel*) are compatible with the free movement of goods. Answering these questions, the Court applies the reasoning formerly adopted in *Keck and Mithouard*[1].

After analysing the reasoning of the Court in these cases, we will examine whether this jurisprudence is still relevant today when determining whether a prohibition of itinerant selling of (certain) goods without prior authorisation or a prohibition on doorstep selling of certain goods are compatible with European law. When answering this question, the *Unfair Commercial Practices Directive*[2] and the *Consumer Rights Directive*[3] will also be taken into account.

2. In *Société Fiduciaire Nationale d'Expertise Comptable*, the CJEU decides that national legislation which totally prohibits the members of a regulated profession from engaging in canvassing is incompatible with article 24 (1) of the *Services Directive*[4], which precludes total prohibitions on commercial communications by regulated professions. Determining whether rules on the doorstep selling, the itinerant selling or canvassing of services are compatible with European law, requires an analysis of the scope and content of article 56 TFEU, the *Services Directive* and the *Unfair Commercial Practices Directive.*

[1] Joined cases C-267/91 and C-268/91 Bernard Keck and Daniel Mithouard [1993] ECR I-06097.
[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, [2005] OJ L, 149/22.
[3] Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7EC of the European Parliament and the Council [2011] OJ L, 304/64.
[4] Directive 2006/123/EC of 12 December 2006 on services in the internal market, [2006] OJ L, 376/36

§2. Itinerant and doorstep selling of goods

A. The Court's reasoning in Burmanjer and A-Punkt Schmuckhandel: an application of Keck and Mithouard

3. When examining the compatibility of national legislation prohibiting the doorstep selling of silver jewelry on the one hand and of national legislation requiring a prior authorisation for the itinerant selling of subscriptions to periodicals on the other hand, the CJEU applies its reasoning developed in *Keck and Mithouard*.[5]

In *Keck*, the Court restrained the scope of article 34 TFEU, as it was determined in *Dassonville*.

In *Dassonville*, the Court had ruled that article 34 TFEU - which prohibits measures having an equivalent effect to quantitative restrictions - applied to all trading rules which are capable of hindering actually or potentially, directly or indirectly, intra-Community trade.[6] It is beyond doubt that rules prohibiting the doorstep selling of certain goods as well as provisions requiring a prior authorisation for the itinerant selling of goods would fall within the scope of article 34 TFEU under the *Dassonville* jurisprudence.

4. However, in *Keck* the Court decided that national provisions restricting or prohibiting certain *selling arrangements* do not fall within the scope of application of article 34 TFEU, if they meet two requirements (paragraph 16):

- The provisions must apply to all relevant traders operating within the national territory, independent of the nationality of the traders (no direct discrimination) and

- The provisions must affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (no indirect discrimination)[7].

When these conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State *is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products* (paragraph 17). In other words, if these conditions are met, *selling arrangements* are presumed to be compatible with the European Treaty.[8]

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[5] Azottes, G., Luby, M. and Marmise-d'Abbadie d'Arrast, "Chronique Droit Européen des Affaires", 59 *Revue Trimestrielle du Droit Commercial* (2006), pp. 511; Boret, C., "Vente ambulante d'abonnements à des périodiques", *Juris Classeur* (2006), pp. 670; Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp 337. See also: Stuyck, J., "The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotions and the Law of Unfair Competition", *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, (Oxford: Hart Publishing, 2007), pp. 164.

[6] Case 8-74 Procureur du Roi versus Benoît and Gustave Dassonville [1974] ECR 837, (paragraph 5). See also: Maduro, M.P., "Revisiting the Free Movement of Goods in a Comparative Perspective", *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law*, (The Hague: Asser Press, 2013), pp.489-490; Oliver, P. (ed.), *Free Movement of Goods in the European Community under Article 28 to 30 of the EC* Treaty (London: Sweet & Maxwell, 2010), pp. 93.

[7] See also paragraph 15 *A-Punkt Schmuckhandel* and paragraph 24 *Burmanjer*. See also: Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 13; Picod, F., "La jurisprudence Keck et Mithouard a-t-elle un avenir?" *L'entrave dans le droit du marché intérieur*, (Brussel: Bruylant, 2011), pp. 49; Unberath, H. and Johnston, A., "The double-headed approach of the ECJ concerning consumer protection", 44 *Common Market Law Review* (2007), pp. 1245-1246.

[8] Rennuy, N. and Van Nieuwenhuyze, E., "Arrêt 'Ker-Optika': nouvelle étape dans la jurisprudence sur la libre circulation des marchandises?", 19 *Journal de Droit Européen* (2011), pp. 37.

In that way, the Court distinguishes between *selling arrangements* and *product requirements*.[9] Whereas selling arrangements can escape from the application of article 34 TFEU, product-related requirements must always be regarded as measures having an equivalent effect to quantitative restrictions of imports. Falling within the scope of article 34 TFEU, product requirements can only be compatible with the principle of free movement of goods if they can be justified by one of the objectives listed in article 36 TFEU or by an objective in the general interest within the meaning of the *Cassis de Dijon*[10] jurisprudence (the so-called rule of reason).

Provisions concerning certain *marketing methods*, such as provisions containing a prohibition on doorstep selling of certain goods or requiring a prior authorisation for the itinerant selling of (certain) goods, can be considered rules on *selling arrangements* (paragraph 26 *Burmanjer* and paragraph 17 *A-Punkt Schmuckhandel*).[11] The purpose of these provisions is not to regulate trade in goods between Member States. Therefore, if they apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, they fall outside the scope of article 34 TFEU.

5. In *A-Punkt Schmuckhandel*, the Court indicates that provisions affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States if:

- they do not make a distinction according to the origin of the products in question (i.e. they do not prevent the access of goods originating in other Member States to the market) (paragraph 19) and

- they are not liable to impede access to the market of the products concerned from other Member States more than it does for domestic products (paragraph 20)[12].

Whereas the latter requirement is a non-discrimination test, the former refers to an impediment to market access for imported goods, *without any comparison with the fate of domestic goods*.[13] Selling agreements that prevent market access of imported products are

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[9] Caro de Dousa, P., "Through Contact Lenses, Darkly: Is Identifying Restrictions to Free Movement Harder than Meets the Eye? Comment on *Ker-Optika*", 37 *European Law Review* (2012), pp. 82; Cavalini, J., "Les libertés de circulation: marchandises, capitaux, prestation de services et établissement", 502 *Revue du Marché Commun et de l'Union européenne* (2006), pp. 616; De Sadeleer, N., "Arrêt Ker-Optika : de l'ophtalmologue à l'opticien, la réglementation de la vente en ligne des lentilles de contact au regard de la libre circulation des marchandises", 9 *European Journal of Consumer Law* (2011), pp. 442; Maduro, M.P., "Revisiting the Free Movement of Goods in a Comparative Perspective", *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law*, (The Hague: Asser Press, 2013), pp. 493-494; Oliver, P. and Enchelmaier, S., "Free movement of goods: recent developments in the case law", 44 *Common Market Law Review* (2007), pp. 672-673; Spaventa, E., "Leaving Keck behind? The free movement of goods after the rulings in Commission versus Italy and Mickelsson and Roos", 33 *European Law Review* (2009), pp.917.

[10] Case C-120/78 Rewe-Zentral [1979] ECR 649.

[11] Azottes, G., Luby, M. and Marmise-d'Abbadie d'Arrast, "Chronique Droit Européen des Affaires", 59 *Revue Trimestrielle du Droit Commercial* (2006), pp. 511; Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp 337.

[12] This market access test was introduced in *Gourmet* (case C-405/98 Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP) [2001] ECR I-1795) as a clarification of the second *Keck* condition. See also: Straetmans, G., "Case C-405/98, Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP), Judgment of the Court (Sixth Chamber) of 8 March 2001", 39 *Common Market Law Review* (2002), 1418.

[13] Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 347.

covered by the concept of measures having equivalent effect to quantitative restrictions of imports.[14]

6. In *Burmanjer*, as well as in *A-Punkt Schmuckhandel*¸ the Court decides that whether a prohibition on itinerant selling of subscriptions to periodicals without prior authorisation (*Burmanjer*) or a prohibition on doorstep selling of silver jewelry (*A-Punkt Schmuckhandel*) affect products originating from other Member States more than they affect domestic products as regards access to the domestic market, must be determined by the national court.[15]

Both cases show that the mere fact that a national provision is, in principle, likely to limit the total volume of the sales of those goods from other Member States is not enough for that provision to be considered a measure having an equivalent effect.[16] In *A-Punkt Schmuckhandel* (paragraph 23), the Court also argues that the fact that a marketing method is apparently more efficient and profitable is not a sufficient reason to assert that a national provision is caught by the prohibition laid down in article 34 TFEU.

When determining whether the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products, it is important to find out whether the prohibition concerns all the ways of marketing the goods in question, or only one of them.[17] In other words, do the provisions concerned exclude the possibility of selling the goods concerned by other methods?[18]

In *Burmanjer*, the Court suggests that the requirement of a prior authorisation is compatible with the second *Keck* requirement where it states: "*it seems to follow from the information in the file transmitted to the Court that, if those rules* (i.e. the requirement of a prior authorisation) *did have such an effect, it would be too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States*" (paragraph 31). In *A-Punkt Schmuckhandel* no suggestion is made to the national court as regards the fulfillment of the *Keck*-criteria.[19]

7. If it were to be found that provisions apply to all relevant traders in the same way, but are liable to impede the access to the market of the products concerned from other Member States more than they do for domestic products, the national court will need to examine whether such a restriction can be justified by one of the objectives listed in article 36 TFEU or by an objective in the general interest within the meaning of the *Cassis de Dijon*[20] jurisprudence (the so-called rule of reason) (paragraph 32 *Burmanjer* and paragraph 26 *A-Punkt Schmuckhandel*). Whether or not the restriction of the free movement of goods can be justified, must - once again - be determined by the national court.

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[14] Rosas, A., "Dassonville and Cassis de Dijon", *The Past and future of EU Law. The classics of EU Law revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), pp. 442. See also: Case C-110/05 Commission versus Italy [2009] ECR I-519.

[15] Paragraph 25 (*A-Punkt Schmuckhandel*) and 31 (*Burmanjer*). See also: Boret, C., "Vente ambulante d'abonnements à des périodiques", *Juris Classeur* (2006), pp. 670; Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 61-63; Unberath, H. and Johnston, A., "The double-headed approach of the ECJ concerning consumer protection", 44 *Common Market Law Review* (2007), pp. 1247.

[16] See also: Cavalini, J., "Les libertés de circulation: marchandises, capitaux, prestation de services et établissement", 502 *Revue du Marché Commun et de l'Union européenne* (2006), pp. 616.

[17] See: paragraph 24 *A-Punkt Schmuckhandel* and paragraph 29 *Burmanjer*.

[18] Cavalini, J., "Les libertés de circulation: marchandises, capitaux, prestation de services et établissement", 502 *Revue du Marché commun et de l'Union européenne* (2006), pp. 617; Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp 337.

[19] Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp. 337.

[20] Case C-120/78 Rewe-Zentral [1979] ECR 649.

It is clear that the protection of the economic interests of consumers is one of the major grounds of justification under the rule of reason.[21] Therefore, consumer protection can justify provisions prohibiting certain marketing methods (Paragraph 27 *A-Punkt Schmuckhandel*). However, two requirements must be met. First, the prohibition must be *appropriate* to attain the objective pursued. Secondly, it must be *proportionate*, i.e. not go beyond what is necessary to reach the objective pursued[22]. The latter implies that the prohibition of a certain marketing method is only allowed if no other means, which restrict the free movement of goods to a lesser extent, are available to reach the objective pursued.[23]

Although related to article 35 TFEU (export of goods[24]), the judgment of the CJEU in the *Gysbrechts* case[25] provides a good example of the proportionality test. At stake was the Belgian prohibition to demand payment within the withdrawal period in the case of a distance agreement. The Court decided that "*Article 29 EC does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article 29 EC does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card* (as a guarantee)". Although it is clear that both prohibitions aim at protecting consumers, the latter cannot be justified on the basis of the rule of reason since such prohibition is not proportionate. It goes beyond what is necessary to attain the objective pursued.

In *A-Punkt Schmuckhandel* (paragraph 28), the Court explicitly states that the assessment by the national court must take into account the level of protection enjoyed by consumers under the Directive 85/577 on off-premises contracts[26].[27] This Directive, which in the meantime has been repealed by the *Consumer Rights Directive*, was based on the principle of minimum harmonisation. Minimum harmonisation implies that Member States retain the possibility to maintain (and even introduce) protection measures which offer a higher level of protection to consumers than the level of protection laid down in the Directive. Therefore, a consumer protection Directive which is based on minimum harmonisation only determines the minimum protection which must be offered to consumers, and not the maximum level of

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[21] Anagnostaras, G., "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" 47 *Common Market Law Review* (2010), pp. 158; Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 12; Oliver, P. and Enchelmaier, S., "Free movement of goods: recent developments in the case law", 44 *Common Market Law Review* (2007), pp. 690; Stuyck, J., "The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotions and the Law of Unfair Competition", *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, (Oxford: Hart Publishing, 2007), pp.162; Unberath, H. and Johnston, A., "The double-headed approach of the ECJ concerning consumer protection", 44 *Common Market Law Review* (2007), pp.1245. See also: Case 382/87 R. Buet and Educational Business Services SARL [1989] ECR 1235, paragraph 10; Joined Cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843, paragraph 46.

[22] Anagnostaras, G., "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" 47 *Common Market Law Review* (2010), pp. 158; Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 12-13; Reich, N., "Economic Law, consumer interests and EU integration", *Understanding EU Consumer Law* (Oxford: Intersentia, 2009), pp. 40.

[23] Case 205/84 Commission v. Germany [1986] ECR I- 03755; Case 382/87 R. Buet and Educational Business Services SARL [1989] ECR 1235 paragraph 11. See also: Maduro, M.P., "Revisiting the Free Movement of Goods in a Comparative Perspective", *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law*, (The Hague: Asser Press, 2013), pp. 490.

[24] In the case of the export of goods a market exit test applies: Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 350-351.

[25] Case C-205/07 Lodewijk Gysbrechts and Santurel Inter BVBA [2008] ECR I-9947.

[26] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L 372, 31.

[27] In *Burmanjer* the Court does not explicitly refer to this Directive.

protection that can be awarded to consumers.[28] However, minimum harmonisation does not mean that there are no limits to the protection Member States can offer to consumers. As shown in *A-Punkt Schmuckhandel* and *Burmanjer*, additional protection measures must comply with the principle of free movement of goods, as incorporated in article 34 TFEU.[29] In some European Directives, this has been stated explicitly.[30]

Looking more closely at the Court's decision in *A-Punkt Schmuckhandel*, it immediately becomes clear that the Court guides the national judge, who must determine whether the restriction of the free movement of goods can be justified by an objective in the general interest, by supplying him with some arguments which could justify the prohibition on the doorstep selling of jewelry on the basis of consumer protection reasons.[31] More specifically, the Court refers to the risk of consumers being cheated due to the lack of information, the impossibility of comparing prices or the provision of insufficient safeguards as regards the authenticity of the jewelry and the greater psychological pressure to buy where the sale is organized in a private setting (paragraph 29).

8. In conclusion, *Burmanjer* and *A-Punkt Schmuckhandel* made clear that the *Keck*-jurisprudence does not only apply in the case of absence of harmonisation of legislation, but also when a Member State has made use of the possibility offered by a Directive to offer consumers additional protection. Therefore, if national legislation offering additional consumer protection can be considered as dealing with a selling arrangement in the meaning of *Keck*, such legislation will fall outside the scope of application of article 34 TFEU (and therefore escape the requirement of proportionality) if it meets the requirements laid down in *Keck and Mithouard* (see paragraph 4).[32] However, if the *Keck*-criteria are not fulfilled, the national court must verify whether the restriction of the free movement of goods can be justified by an objective in the general interest (see paragraph 7). When examining whether the additional protection is proportionate, national courts must take into account the level of protection guaranteed by the European Directive.[33]

B. Has the presumption of the legality of selling arrangements been abandoned?

9. Whereas the Court applies the *Keck* reasoning in the cases *Burmanjer* and *A-Punkt-Schmuckhandel*, it seems to render *Keck* less central in the case *Commission versus Italy*. In this case, concerning national legislation prohibiting mopeds from towing trailers, the Court seems to interpret article 34 TFEU as a plain market access test (except for product requirements which remain covered by *Cassis*). More specifically, the Court stated "*that*

[28] Mak, V., "Review of the Consumer Acquis: Towards Full Harmonization?", 17 *European Review of Private Law Volume* (2009), pp. 58-59; Twigg-Flesner, C., "No sense of purpose or direction? The modernization of European Consumer Law", 3 *European Review of Contract Law* (2007), pp. 204.
[29] See also: Unberath, H. and Johnston, A., "The double-headed approach of the ECJ concerning consumer protection", 44 *Common Market Law Review* (2007), pp. 1257.
[30] See e.g.: Art. 14 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, [1997] OJ L 144, 19 (in the meantime repealed by the *Consumer Rights Directive*): "Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions *compatible with the Treaty*, to ensure a higher level of consumer protection".
[31] Azottes, G., Luby, M. and Marmise-d'Abbadie d'Arrast, "Chronique Droit Européen des Affaires", 59 *Revue Trimistrielle du Droit Commercial* (2006), pp. 512.
[32] Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp. 338; Stuyck, J., "The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotions and the Law of Unfair Competition", *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, (Oxford: Hart Publishing, 2007), pp. 165.
[33] Hofhuis, Y., note under Case C-20/03 and Case C-441/04, 54 *Sociaal Economische Wetgeving* (2006), pp. 338.

measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favorably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35[34] of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept". [35] Different authors have argued that the wording "any other measure" includes selling arrangements[36] and that therefore one must simply examine whether provisions on selling arrangements hinder the access to the market.

In *Ker-Optika*, which related to national legislation which authorised the selling of contact lenses only in shops which specialise in medical devices (and therefore prohibited the sale of contact lenses over the Internet), the Court states: "*For that reason, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from Dassonville, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States.*[37] Although the negative formula of *Keck* is reversed into a positive one,[38] this case clearly shows that the *Keck*-requirements have survived. In my opinion, it is not possible to argue that the Court has abandoned the presumption of the legality of selling arrangements.[39]

10. In conclusion, if selling arrangements *impede market access*, they are considered measures having an equivalent effect to quantitative restrictions of imports, which implies that they can only be compatible with article 34 TFEU if they can be justified by an objective in the general interest. However, this market access test remains a residual one. It must only be applied to those measures that are not (*de jure* or *de facto*) discriminatory.[40]

C. The impact of the Consumer Rights Directive and the Unfair Commercial Practices Directive

11. The question arises whether national legislation prohibiting the doorstep selling of certain goods and national legislation requiring a prior authorisation for the itinerant selling of (certain) goods falls within the scope of application of the *Consumer Rights Directive* on the

[34] Paragraph 35 refers to product requirements.
[35] Case 110/05 Commission versus Italy [2009] ECR I-519.
[36] Barnard, C., *The substantive law of the EU: The four freedoms* (Oxford: Oxford University Press, 2010, 141; Rosas, A., "Dassonville and Cassis de Dijon", *The Past and future of EU Law. The classics of EU Law revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), pp. 442; Spaventa, E., "Leaving Keck behind? The free movement of goods after the rulings in Commission versus Italy and Mickelsson and Roos", 33 *European Law Review* (2009), pp. 921-923.
[37] Case 108/09 Ker-Optika [2010] ECR I-12213.
[38] Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 349.
[39] De Sadeleer, N., "Arrêt Ker-Optika : de l'ophtalmologue à l'opticien, la réglementation de la vente en ligne des lentilles de contact au regard de la libre circulation des marchandises", 9 *European Journal of Consumer Law* (2011), pp. 443; Oliver, P., "The Scope of Article 34 TFEU after Trailers", 10 *European Journal of Consumer Law* (2012), pp. 317; Rennuy, N. and Van Nieuwenhuyze, E., "Arrêt 'Ker-Optika': nouvelle étape dans la jurisprudence sur la libre circulation des marchandises?", 19 *Journal de Droit Européen* (2011), pp. 38.
[40] Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 354.

one hand and the *Unfair Commercial Practices Directive* on the other hand. The question is important since these Directives are based on maximum (= total) harmonisation.[41]

Maximum or total harmonisation implies that Member States cannot introduce or even maintain measures offering additional protection to consumers, at least not within the field of law which is harmonized by the Directive.[42] In the case of maximum harmonisation, the Directive does not only determine the minimum level of protection that must be offered to consumers, but also the maximum level of protection that can be offered.

12. A national measure in an area which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of that harmonising measure and not in the light of the Treaty.[43] Recourse to article 34 TFEU is ruled out if the matter is fully covered by harmonising community measures, based on maximum harmonisation.[44] Only for matters that fall outside the scope of application of the Directive or for matters not specifically covered by the harmonisation realised by the Directive, do Member States remain free to maintain and even introduce additional protection measures (of course within the limits imposed by the Treaty).[45]

This implies that when examining the compatibility of a national provision with European Union law, it is crucial to determine whether it falls within the scope of application of a

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41 Art. 4 *Consumer Rights Directive*: Hesselink, M., "Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive", 18 *European Review of Private Law* 18 (2010), pp. 89-90; Smits, J., "Full Harmonization of Consumer Law? A Critique on the Draft Directive on Consumer Rights", 18 *European Review of Private Law* (2010), pp. 5-6; Tonner, K. and Fangerow, K., "Directive 2101/83/EU on Consumer Rights: a new approach to European Consumer Law?", 1 *Zeitschrift für Europäisches Unternehmers- und Verbraucherrecht* (2012), pp. 74-77. Art. 4 *Unfair Commercial Practices Directive*: Joined Cases C-361/07 and C-299/07 VTB-VAB NV versus Total Belgium NV and Galatea BVBA versus Sanoma Magazines Belgium NV [2009] ECR I-2949; Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV versus Plus Warenhandelsgesellschaft GmbH [2010] ECR I-217; Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 182; Pliakos, A. and Anagnostaras, G., "Harmonizing National Laws on Commercial Practices: Sales Promotions and the Impact on Business to Business Relations", 35 *European Law Review* (2011), pp. 426; Stuyck,J., Terryn, E. and van Dijck, T. "Confidence Through Fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market", 43 *Common Market Law Review* (2006), pp. 115; Wilhelmsson, T., "Harmonizing unfair commercial practices law: the cultural and social dimensions", 43 *Osgoode Hall Law Journal* (2006), pp. 476-477.

42 Mak, V., "Review of the Consumer Acquis: Towards Full Harmonization?", 17 *European Review of Private Law Volume* (2009), pp. 58-59; Twigg-Flesner, C., "No sense of purpose or direction? The modernization of European Consumer Law", 3 *European Review of Contract Law* (2007), pp. 204; Verdure, C., "L'Harmonisation des Pratiques Commerciales Déloyales dans le Cadre de la Directive 2005/29/CE: Premier Bilan Jurisprudentiel", 46 *Cahiers de Doit Européen* (2010), pp. 321-322.

43 Case C-37/92 Vanacker and Lesage [1993] ECR I-4947, paragraph 9; Case C-324/99 DaimlerChrysler [2001] ECR I-9897, paragraph 32; Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 64; Case C-470/03 A.G.M.-COS.MET Srl versus Suomen valtio and Tarmo Lehtinen [2007] ECR I-2749 paragraph 50.

44 Oliver, P. (ed.), *Free Movement of Goods in the European Community under Article 28 to 30 of the EC* Treaty (London: Sweet & Maxwell, 2010), pp. 467; Rosas, A., "Dassonville and Cassis de Dijon", *The Past and future of EU Law. The classics of EU Law revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), pp. 443; Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 355.

45 Compare: Case C-602/10, Volksbank România v. Autoritatea Naţională pentru Protecţia Consumatorilor [2012] not yet published in ECR, where the Court stated with regard to consumer credit that the full harmonisation approach, used in the Consumer Credit Directive (Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] OJ L, 133/66) does not retain Member States from applying the rules that are incorporated in the CCD to credit agreements not falling under the scope of the CCD and does not prevent Member States from offering additional protection with regard to matters not specifically covered by the harmonization. See also: Hesselink, M., "Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive", 18 *European Review of Private Law* (2010), pp. 90; Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 183; Verhoeven, A., "Consument en interne markt – beschouwingen bij het Voorstel van Richtlijn Consumentenrechten", *Het EG-Consumentenacquis: nu en straks*, (Antwerpen: Intersentia, 2009), pp. 51.

Directive based on maximum harmonisation.[46] In what follows, we will examine whether prohibitions on the doorstep selling of certain goods or prohibitions on the itinerant selling of certain goods without prior authorisation fall within the harmonised field of the *Consumer Rights Directive* and the *Unfair Commercial Practices Directive*.

13. The *Consumer Rights Directive* harmonises certain aspects of the law on off-premises contracts. More specifically, the Directive harmonises the information traders have to provide to consumers, as well as the provisions on the right of withdrawal. Neither a ban on the doorstep selling of certain goods nor the requirement of a prior authorisation for the itinerant selling of certain goods fall under the field specifically covered by this Directive. Therefore, the *Consumer Rights Directive* does not preclude the application of the *Keck* and *Cassis de Dijon* jurisprudence to national prohibitions on the doorstep selling of certain goods or on the itinerant selling of (certain) goods without prior authorisation.

14. However, one has to take into account the *Unfair Commercial Practices Directive*, which aims to protect consumers against unfair commercial practices, in particular against misleading and aggressive commercial practices. In order to reach this objective, the Directive contains a so-called black list of misleading and aggressive commercial practices which must be considered unfair *in all circumstances*. These specific commercial practices are prohibited *per se*.[47]

In addition to this so-called black list of misleading and aggressive commercial practices, the Directive contains two open norms prohibiting misleading and aggressive commercial practices. Deception can take place by providing (wrongful) information, as well as by omitting essential information. However, with regard to practices not included in the black list(s), one will have to prove that the misleading or aggressive practice was likely to cause the average consumer to take a transactional decision that he would not have taken otherwise (art. 6, 7 and 8 Directive), meaning that the consumer would not have acted, or at least would not have acted on the same terms or in the same way, in the absence of the unfair commercial practice (art. 2, k Directive). Therefore, the burden of proof will be heavier if one wants to prove that one of the open norms prohibiting misleading and aggressive commercial practices has been violated.

Finally, the Directive prohibits all commercial practices that are contrary to the requirements of professional diligence and that materially distort or are likely to distort the economic behaviour of the average consumer (art. 5.2 Directive).[48]

15. The question arises whether the doorstep selling and the itinerant selling of goods can be considered as commercial practices in the meaning of the *Unfair Commercial Practices Directive*. If this were the case, national provisions prohibiting the doorstep selling of certain goods or prohibiting the itinerant selling of certain goods without prior authorisation would be

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[46] See also: Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 227

[47] Stuyck,J., Terryn, E. and van Dijck, T. "Confidence Through Fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market", 43 *Common Market Law Review* (2006), pp. 130; Verdure, C., "L'Harmonisation des Pratiques Commerciales Déloyales dans le Cadre de la Directive 2005/29/CE: Premier Bilan Jurisprudentiel", 46 *Cahiers de Doit Européen* (2010), pp. 328.

[48] The latter rule only applies to commercial practices that are considered unfair without being misleading or aggressive: Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 294; Stuyck, J., "De nieuwe richtlijn oneerlijke handelspraktijken. Gevolgen voor de wet op de handelspraktijken", 111 *Revue du Droit Commercial* (2005), pp. 911.

incompatible with the *Unfair Commercial Practices Directive* and therefore prohibited (*infra* nr. 17).

16. Commercial practices are defined by the *Unfair Commercial Practices Directive* as any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers' (art. 2, d)). According to the CJEU, the Directive gives a particularly wide definition to the concept of commercial practices. It refers to commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development.[49]

There is no doubt that the doorstep selling of goods, as well as the itinerant selling of goods[50] fall under the wide concept of commercial practices[51]. Several arguments support this view. First, it is important to understand that the concept of commercial practices does not only relate to advertising, but to any act, code of conduct or *commercial communication including marketing* which is directly connected to the sale of goods. It is clear that doorstep selling, as well as itinerant selling, can be considered as marketing techniques, which are a part of a trader's commercial strategy and which relate directly to the promotion or sale of goods. The black list of prohibited commercial practices confirms this view, since it prohibits conducting *personal visits to the consumer's home* ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation (prohibition nr. 25).

The fact that doorstep selling and itinerant selling constitute commercial practices can also be derived from the terminology used in the case-law of the CJEU with regard to the application of article 34 TFEU. In *Burmanjer*, the Court clearly states that national rules on itinerant sales relate to a *marketing method*. In *A-Punkt Schmuckhandel*, the Court decides that the body of national legislation prohibiting selling in private homes is concerned with *a marketing method*. In this context, it is also worth mentioning that selling at a loss was considered by the CJEU, as a selling arrangement in the meaning of *Keck*[52] on the one hand, and on the other hand as a commercial practice in the meaning of the *Unfair Commercial Practices Directive.*[53] As far as combined offers are concerned, the Advocate General not only concluded that combined offers are commercial practices in the meaning of the *Unfair Commercial Practices Directive*, but also that they are a measure on selling arrangements in the meaning of *Keck*.[54] There is definitely a close link between the concept of selling arrangements under *Keck* and commercial practices in the meaning of the *Unfair Commercial Practices Directive.*

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[49] Joined Cases C-361/07 and C-299/07 VTB-VAB NV versus Total Belgium NV and Galatea BVBA versus Sanoma Magazines Belgium NV [2009] ECR I-2949, paragraphs 49 and 50. See also: Tamas, R. and Verdure, C., "Arrêt Köck: la Vente en Liquidation passée au Crible des Pratiques Commerciales Déloyales", 11 *European Journal of Consumer Law* (2013), pp. 141.

[50] See also: Anagnostaras, G., "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" 47 *Common Market Law Review* (2010), pp. 157-158; Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 162.

[51] This is also the view of the European Commission. The Commission started a procedure against Belgium, in which it argued that the Belgian prohibition to sell goods costing over 250 euros at consumers' homes is incompatible with the *Unfair Commercial Practices Directive* (Case C-421/12, Commission versus Belgium, 26 October 2012).

[52] Joined cases C-267/91 and C-268/91 Bernard Keck and Daniel Mithouard [1993] ECR I-06097.

[53] Case 3423/12 Euronics Belgium CVBA versus Kamera Express [2013] not yet published in ECR.

[54] Joined Cases C-361/07 and C-299/07 VTB-VAB NV versus Total Belgium NV and Galatea BVBA versus Sanoma Magazines Belgium NV, Opinion of the A.G., points 110-119. See also: Anagnostaras, G., "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" 47 *Common Market Law Review* (2010), pp. 158; Pliakos, A. and Anagnostaras, G., "Harmonizing National Laws on Commercial Practices: Sales Promotions and the Impact on Business to Business Relations", 35 *European Law Review* (2011), pp. 428-429.

The Directive only applies to unfair *business-to-consumer* commercial practices (art. 3.1). It does not aim at protecting competitors against unfair commercial practices. In this context, the CJEU argued that only national legislation relating to unfair commercial practices which harm *only* competitors' economic interests or which relate to a transaction between traders is excluded from the scope of the Directive.[55] Provisions relating to commercial practices which also aim at the protection of consumers and therefore not exclusively at the protection of competitors and other operators in the market, fall within the scope of the Directive. Therefore, it is clear that provisions prohibiting the doorstep selling of certain goods to consumers and provisions prohibiting the itinerant selling of goods to consumers cannot escape the scope of the Directive, since they also aim at protecting consumers.[56]

Further, the Directive is without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing *regulated professions* in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals (art. 3.8). However, this provision does not imply that prior authorisation requirements with regard to the itinerant selling of (certain) goods fall outside the scope of the Directive. Article 3.8 covers only specific national rules governing *a regulated profession*[57].[58]

17. Taking into account the fact that the Directive is based on maximum harmonisation and the fact that it harmonises commercial practices completely, Member States cannot prohibit commercial practices which are not included in the Directives' black list *in all circumstances*.[59] Commercial practices that are not included in the black list can only be tackled on the basis of the open norms. It is up to the national courts and administrative authorities to determine whether a given commercial practice can be considered unfair, taking into account the specific circumstances of the case.[60]

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[55] Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV versus Plus Warenhandelsgesellschaft GmbH [2010] ECR I-217, paragraph 39; Case 540/08 Mediaprint Zeitungs- und Zeitschriftenverlag versus 'Österreich'-Zeitungsverlag GmbH, [2010] ECR I-10909, paragraph 21; Case 126//11, 288/10 Wamo versus JBC [2011] ECR I-5835, pargraph 22; Case C-206/11 Georg Köck versus Schutzverband gegen unlauteren Wettbewerb [2013], not yet published in ECR, paragraph 30.

[56] This is clearly indicated in the legislative documentation of the Belgian Act of 25 June 1993 concerning the exercise of itinerant activities.

[57] A regulated profession means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing of which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions (art. 23.l).

[58] See also: Case C-206/11 Georg Köck versus Schutzverband gegen unlauteren Wettbewerb [2013], Opinion of the A.G., point 41, relating to the Austrian legislation which required prior authorisation for an announcement of a clearance sale.

[59] Joined Cases C-361/07 and C-299/07 VTB-VAB NV versus Total Belgium NV and Galatea BVBA versus Sanoma Magazines Belgium NV [2009] ECR I-2949; Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV versus Plus Warenhandelsgesellschaft GmbH [2010] ECR I-217; Verdure, C., "L'Harmonisation des Pratiques Commerciales Déloyales dans le Cadre de la Directive 2005/29/CE: Premier Bilan Jurisprudentiel", 46 *Cahiers de Doit Européen* (2010), pp. 323-324.

[60] Joined Cases C-361/07 and C-299/07 VTB-VAB NV versus Total Belgium NV and Galatea BVBA versus Sanoma Magazines Belgium NV [2009] ECR I-2949; Case C-206/11 Georg Köck versus Schutzverband gegen unlauteren Wettbewerb [2013], not yet published in ECR, paragraph 35. See also: Pliakos, A. and Anagnostaras, G., "Harmonising National Laws on Commercial Practices: Sales Promotions and the Impact on Business to Business Relations", 35 *European Law Review* (2011), pp. 433; Stuyck, J. and Keirsbilck, B., "Een kritische analyse van de wet marktpraktijken en consumentenbescherming", 116 *Revue de Droit Commercial* (2010), pp. 713-714; Stuyck, J., "The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotions and the Law of Unfair Competition", *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, (Oxford: Hart Publishing, 2007), pp. 170-171; Verdure, C., "L'Harmonisation des Pratiques Commerciales Déloyales dans le Cadre de la Directive 2005/29/CE: Premier Bilan Jurisprudentiel", 46 *Cahiers de Doit Européen* (2010), pp. 328.

Therefore, national provisions which absolutely prohibit the doorstep selling of certain goods, such as jewelry (as in: *A-Punkt Schmuckhandel*), are contrary to the *Unfair Commercial Practices Directive*. This finding has important consequences for the existing Belgian legislation. More specifically, article 4 of the Act of 25 June 1993 concerning the exercise of itinerant activities - which prohibits the sale of goods of which the price exceeds 250 euros at consumer's homes - as well as article 5.4° of the Royal Decree of 24 September 2006 concerning itinerant activities - which prohibits the itinerant selling of precious metals, precious and semi-precious stones, natural pearls and cultured pearls - are contrary to the *Unfair Commercial Practices Directive*.[61] They can no longer be justified on the basis of the *Keck* or *Cassis de Dijon* jurisprudence.

Further, the question arises whether the *Unfair Commercial Practices Directive* also precludes provisions requiring a prior authorisation for the itinerant selling of (certain) goods, such as article 3 of the Belgian Act of 25 June 1993 concerning itinerant activities[62]. In *Köck*, which related to the Austrian legislation prohibiting the announcement of a clearance sale without prior authorisation, the Court argues that "*anticipatory or preventive measures may in certain circumstances prove more adequate and more appropriate than subsequent measures ordering the cessation of a commercial practice that has already been carried out or is imminent*". Therefore, the *Unfair Commercial Practices Directive* as such does not preclude a system of prior authorisation.[63]

However, there are some additional requirements. First, prior authorisation schemes can only be compatible with the Directive if they relate to *certain practices whose nature makes such measures necessary with a view to combating unfair commercial practices*. Secondly, according to the Court, "*such a system cannot result in a commercial practice being prohibited solely because prior authorisation has not been granted by the competent authority, without there having been an assessment of the practice's unfairness*".[64] More specifically, national provisions requiring prior authorisation can only be compatible with the *Unfair Commercial Practices Directive* when, *at the time of granting the prior authorisation*, the competent administration carries out an assessment of the unfairness of the practice in question taking into account the circumstances of the case.

In my opinion, the Belgian provisions requiring a prior authorisation for the itinerant selling of certain goods do not meet these criteria. Since there are no good reasons to assume that these criteria would not apply with regard to itinerant selling, the requirement of a prior authorisation, as laid down in Belgian legislation, is contrary to the *Unfair Commercial Practices Directive.*

18. In conclusion, national provisions prohibiting the doorstep selling of certain goods, as well as national provisions prohibiting the itinerant sale of (certain) goods without prior authorisation relate to commercial practices in the meaning of the *Unfair Commercial Practices Directive*. Since these practices are not prohibited in the so-called black list of misleading and aggressive commercial practices, the prohibition on these practices is incompatible with the Directive. The Directive, being based on the principle of maximum

[61] This is also the view of the European Commission (Case C-421/12, Commission versus Belgium, 26 October 2012).
[62] Article 3 determines that the exercise of an itinerant activity requires a prior authorisation.
[63] Tamas, R. and Verdure, C., "Arrêt Köck: la Vente en Liquidation passée au Crible des Pratiques Commerciales Déloyales", 11 *European Journal of Consumer Law* (2013), pp. 144.
[64] Case C-206/11 Georg Köck versus Schutzverband gegen unlauteren Wettbewerb [2013], not yet published in ECR, paragraphs 45-46. See also, Stuyck, J., "Het aankondigen van uitverkopen mag niet vooraf tot bepaalde situaties beperkt worden", to be published in *Droit de la Consommation* (2013), nr. 31.

harmonisation, does not allow measures offering additional protection, not even when they could be justified by reasons of consumer protection.[65]

§3. The freedom to provide services and the prohibition on canvassing of services by regulated professions

A. The freedom to provide services under the TFEU and the Services Directive

19. In the past, the CJEU refused to extend *Keck* to services.[66] This implies that *any type of* restriction of the cross-border provision of services remained incompatible with article 56 TFEU, unless it could be justified under the "*Cassis de Dijon*" rule of reason.[67]

National measures restrict the freedom to provide services when the cross-border provision of services is *prohibited, impeded or rendered less attractive*[68]. National rules do not constitute a restriction in the meaning of article 56 TFEU solely by virtue of the fact that other Member States apply less strict, or economically more favourable rules to providers of similar services established in their territory.[69] The concept of restriction covers measures taken by a Member State, which, although applicable without distinction, affect *access to the market* for economic operators from other Member States. Market access is affected when a trader is faced with a substantial interference to the freedom of contract which causes significant additional costs in terms of organisation and investment or induces the trader to rethink his business policy and strategy and, thus, to change the characteristics of the services offered[70].

Since the entry into force of the *Services Directive*, the compatibility of a restriction to provide services with European law no longer needs to be ascertained on the basis of article 56 TFEU and the *Cassis de Dijon / Säger* rule of reason, but on the basis of article 16 of the *Services Directive*.[71] Only with regard to services excluded from the scope of the Directive (such as financial services and transport services[72]), does the compatibility of restrictions to the freedom to provide services still need to be decided on the basis of article 56 TFEU and the *Cassis de Dijon / Säger* rule of reason.[73]

20. When looking at article 16 of the *Services Directive* it immediately becomes clear that the grounds on which restrictions on the cross-border provision of services can be justified are

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[65] Anagnostaras, G., "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" 47 *Common Market Law Review* (2010), pp. 159.
[66] Case C-384/93 Alpine Investments [1995] ECR I-1141. See also: Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 351.
[67] More specifically, reference can be made to Case C-76/90 Säger versus Dennemeyer [1991] ECR I-4221. See also: Reich, N., "Economic Law, consumer interests and EU integration", *Understanding EU Consumer Law* (Oxford: Intersentia, 2009), pp. 40; Heremans, T., *Professional Services in the EU Internal Market* (Oxford: Hart Publishing, 2012), pp. 158.
[68] Case C-442/02 Caixa-Bank France versus Ministère de l'Économie, des Finances et de l'Industrie [2004] ECR I-8961; Case C-518/06 Commission versus Italy [2009] ECR I-3491.
[69] Case C-518/06 Commission versus Italy [2009] ECR I-3491. See also: Hatzopoulos, V., *Regulating Services in the European Union*, (Oxford: University Press, 2012), pp. 118-119.
[70] Case C-602/10, Volksbank România v. Autoritatea Naţională pentru Protecţia Consumatorilor [2012] not yet published in ECR (with regard to consumer credit). See also: Hatzopoulos, V., *Regulating Services in the European Union*, (Oxford: University Press, 2012), pp. 119.
[71] Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 16-17.
[72] See Article 2 *Services Directive*.
[73] See e.g.: Case C-602/10, Volksbank România v. Autoritatea Naţională pentru Protecţia Consumatorilor [2012] not yet published in ECR (with regard to consumer credit). See also: Steennot, R., "Case Volksbank România: Limits of the full harmonization approach of the Consumer Credit Directive", 11 *European Journal of Consumer Law* (2013), pp. 97.

limited. More specifically, the *Services Directive* mentions public policy, public security, public health and the protection of the environment as reasons which can justify restrictions on the free movement of services (art. 16.3 *Services Directive*) if they are in accordance with the principles of non-discrimination, necessity and proportionality.[74]

As one notices, consumer protection is not included in the list. Whereas some authors have argued that the rule of reason still applies and that consumer protection can therefore still justify the restriction of the free movement of services[75], others have doubted this, on the one hand because the justification on the basis of consumer protection was a creation of the Court *in the absence of community rules*[76], and, on the other hand, because of the difference in wording between the provisions on the free movement of services (only mentioning public policy, public security, public health and the protection of the environment) and the freedom of establishment (only requiring that restrictions are in "the public interest")[77].

Even if it is accepted that consumer protection can no longer justify restrictions on the free movement of services, the impact of this finding with regard to provisions relating to the itinerant selling, doorstep selling or canvassing of services is rather limited, since these can be considered commercial practices falling within the scope of application of the *Unfair Commercial Practices Directive*. This Directive, being based on maximum harmonisation, already prohibits national legislation offering additional protection to consumers (*supra* nr. 17). Only in the field of financial services is the *Unfair Commercial Practices Directive* not based on the principle of maximum harmonisation.[78] However, since the *Services Directive* does not apply to financial services, the compatibility of national prohibitions on the doorstep selling or itinerant selling of financial services needs to be determined on the basis of article 56 TFEU and the rule of reason (in so far as sector-specific regulation has not harmonised the field of law concerned on the basis of maximum harmonisation).

B. Canvassing of services by regulated professions

21. As has been mentioned above, the *Unfair Commercial Practices Directive* is without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing *regulated professions* in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals (art. 3.8). However, this does not mean that the compatibility of national provisions on commercial communications by regulated professions must be assessed on the basis of article 56 TFEU and the rule of reason.

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[74] Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 17.
[75] Fallon, M. and Simon, A.-C., "La Directive 'services': quelle contribution au marché intérieur?", 17 *Journal des Tribunaux de Droit Européen* (2007), pp. 41 who argue that a Directive cannot change the Treaty.
[76] Which means that the Directive can be seen as a further step in the liberalisation of services for which the legislature is competent and which automatically excludes the rule of reason: Micklitz, H.-W., Stuyck, J. and Terryn, E., *Cases, Materials and Text on Consumer Law*, (Oxford: Hart Publishing, 2010), pp. 17. See also: Stuyck, J., "Is Keck still alive and kicking?", 10 *European Journal of Consumer Law* (2012), pp. 353.
[77] Davies, G., "The Services Directive: extending the country of origin principle and reforming public administration", 32 *European Law Review* (2007), pp. 236. Davies also doubts whether this exclusion really matters (pp. 235).
[78] Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 191

Commercial communication in the meaning of the *Services Directive* is any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession (art. 4, 12°). According to the CJEU, canvassing (a form of communication of information intended to seek new clients and involving personal contact between the provider and a potential client) constitutes a form of direct marketing and therefore a commercial communication in the meaning of the *Services Directive*.[79] There is no doubt that the itinerant selling of services also constitutes a commercial communication in the meaning of the *Services Directive*.

22. Article 24 of the *Services Directive* contains two specific rules on commercial communications by regulated professions. First, total prohibitions on commercial communications by regulated professions are always contrary to the *Services Directive* (art. 24 (1)). Second, professional rules on commercial communications can be compatible with the free movement of services, but only if they are non-discriminatory, justified by an overriding reason related to the public interest and proportionate (art. 24 (2)). The difference between these two provisions is clear. Whereas rules *on* commercial communication can be justified by an overriding reason of public interest (if they are proportionate), total prohibitions on commercial communication cannot.[80]

In *Société Fiduciaire Nationale d'Expertise Comptable*, the Court decides that a provision prohibiting any canvassing employed by qualified accountants, whatever its form, content or means, includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication. Therefore, it must be regarded as a *total prohibition*, which cannot be justified by an overriding reason of public interest.[81] It is clear that the Court gives a wide interpretation to the concept of a *total prohibition* on commercial communication, since in order to apply article 24 (1) of the *Services Directive* it is sufficient that a particular form of communication (such as canvassing) is totally prohibited. The fact that other forms of commercial communication remain possible, is irrelevant. Therefore, article 24 (2) will be limited to provisions which do not prohibit a certain form of commercial communication but only govern the content and methods of commercial communication.[82]

§4. Conclusion

23. Canvassing, doorstep selling and itinerant selling are to be considered commercial practices in the meaning of the *Unfair Commercial Practices Directive*. The Directive, being based on maximum harmonisation, precludes provisions which totally prohibit the doorstep selling of certain goods or prohibit the itinerant selling of (certain) goods without prior authorisation irrespective of the circumstances of the case. Therefore, the Directive precludes prohibitions which could previously be accepted, either because they fell outside the scope of

[79] Case C-119/09 Société Fiduciaire Nationale d'Expertise Comptable versus Ministre du Budget, des Comptes publics et de la Fonction publique, [2011] ECR I-2551, paragraphs 38.
[80] Case C-119/09 Société Fiduciaire Nationale d'Expertise Comptable versus Ministre du Budget, des Comptes publics et de la Fonction publique, [2011] ECR I-2551, paragraph 45.
[81] Case C-119/09 Société Fiduciaire Nationale d'Expertise Comptable versus Ministre du Budget, des Comptes publics et de la Fonction publique, [2011] ECR I-2551, paragraphs 41-42.
[82] See also: Bredael, S., "L'interdiction total de démarchage dans les professions réglementé contrevient à la directive Services", 118 *Revue de la Jurisprudence de Liège, Mons et Bruxelles* (2011), pp. 1100-1101; Waltuch, J., "Les Règles déontologiques professionnelles en matière de communication commercial face au droit européen: à propos de l'arrêt "Société fiduciaire nationale d'expertise comptable"", 20 *Revue du Droit de l'Union Européenne* (2011), pp. 440-441.

article 34 FTEU on the basis of the *Keck* jurisprudence, or because they could be justified on the basis of the rule of reason (*Cassis de Dijon*).[83]

24. In the case of cross-border *selling of services*, a distinction must be made between several categories of services, since the *Services Directive* does not apply to all types of services (e.g. financial services are excluded) and because the *Unfair Commercial Practices Directive* is not based on the principle of maximum harmonisation with regard to financial services.

The *Unfair Commercial Practices Directive* precludes (except for financial services) prohibitions on canvassing, doorstep selling and itinerant selling, even where such prohibitions could be justified on the basis of article 16 of the *Services Directive*. With regard to financial services, the compatibility of provisions on canvassing, doorstep selling and itinerant selling needs to be ascertained on the basis of article 56 TFEU and the rule of reason (*Säger*), since these provisions fall outside the scope of the *Services Directive*. Commercial communications by regulated professions are excluded from the *Unfair Commercial Practices Directive.* Article 24 of the *Services Directive* as interpreted by the Court of Justice makes a distinction between provisions which prohibit a form of communication and provisions regarding the content and methods of commercial communication. Whereas the first are always incompatible with European law, the second can be justified if they are non-discriminatory, justified by an overriding reason of public interest and proportionate.

[83] Keirsbilck, B., *The new European Law of unfair commercial Practices and competition law* (Oxford: Hart Publishing, 2011), pp. 232; Pliakos, A. and Anagnostaras, G., "Harmonising National Laws on Commercial Practices: Sales Promotions and the Impact on Business to Business Relations", 35 *European Law Review* (2011), pp. 430.

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