

Durham Research Online

Deposited in DRO:

17 July 2018

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Schutze, Robert (2018) 'Rereading' Dassonville : meaning and understanding in the history of European law.', *European law journal*, 24 (6). pp. 376-407.

Further information on publisher's website:

<https://doi.org/10.1111/eulj.12290>

Publisher's copyright statement:

This is the accepted version of the following article: Schutze, Robert (2018). 'Rereading' Dassonville: Meaning and Understanding in the History of European Law. *European Law Journal* 24(6): 376-407, which has been published in final form at <https://doi.org/10.1111/eulj.12290>. This article may be used for non-commercial purposes in accordance With Wiley Terms and Conditions for self-archiving.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

“Re-Reading” *Dassonville*: Meaning and Understanding in the History of European Law

Robert Schütze*

Abstract

There are few “mythical” judgments that every student of European integration has read or ought to have read. *Dassonville* is one of these judgments. The Court here makes one of its “most famous pronouncement[s] ever”; and yet very little historical research on where the *Dassonville* formula came from and what it was intended to mean in 1974 has yet been undertaken. The conventional wisdom holds that the Court offered a hyper-liberalist definition of the European internal market, which radically dissociated itself from the conceptual shackles accepted in modern international trade law. According to this view, *Dassonville* represents the substantive law equivalent of *Van Gend en Loos*. This traditional view, it will be argued, is simply not born out by the historical facts. A contextual interpretation indeed shows a very different meaning of *Dassonville*; and a closer author-centric analysis reveals a very different understanding of the *Dassonville* formula in its historical context. What does this “re-reading” mean for our understanding of European law and its history? Not only is a re-reading of the “classics” an obligation for every generation of young European lawyers; more importantly still: in order to understand the *history* of European law, we must try to reconstruct the – doctrinal – context to each classic case.

Introduction

There are few “mythical” judgments that every serious student of European integration has read or ought to have read.¹ Journal articles will analyse them, academic textbooks will sanctify them; and, sometimes, broader theoretical superstructures will arise from them.²

* Among the many people to thank, I am particularly grateful to Vilmos Budovari, Brigitte Leucht, Agustín Menéndez, and Dieter Schlenker. The paper is warmly dedicated to Quentin Skinner, whose intellectual brilliance and personal modesty represent the best of academic and republican virtues.

¹ For a qualitative selection of “mythical” judgments, see: M. Poiars Maduro & L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010); and from a quantitative “network” perspective, see: M. Derlén and J. Lindholm, *Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments*, (2014) 20 *European Law Journal* 667.

² For example: Professor Weiler’s “convergence thesis” with regard to international economic law and European internal market law (cf. J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade*, in: J.H.H. Weiler (ed.), *The EU, The WTO and the NAFTA: Toward a Common Law of International Trade* (Oxford University Press, 2000), 201) is built on a particular reading of *Dassonville*; while Professor Maduro’s “We the Court: The European Court of Justice and the European Economic Constitution” (Hart, 1998) is, in my view, a theoretical elaboration of the Court’s *Keck* judgment.

The *Dassonville* judgment of the European Court of Justice is one of these judgments. It is, quantitatively, the second most-cited case in the history of European Union law;³ and, qualitatively, it is – for a great number of scholars – the most important judgment ever decided on the internal market.⁴ The meaning of the judgment is thereby often condensed into a famous “formula” that has come to define which national laws constitute illegal barriers to intra-Union trade. The “*Dassonville* formula” has here come to delineate the scope of Article 34 TFEU, according to which all “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”, by famously identifying the notion of a “measure having equivalent effect to a quantitative restriction” (MEEQR) with “[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade”.⁵

But what was this “most famous pronouncement ever” supposed to mean?⁶ The conventional reading within European law scholarship has come to believe that the Court offered a hyper-liberalist interpretation of the European internal market – an interpretation that radically dissociated itself from the conceptual shackles accepted in modern international trade law. According to this view, *Dassonville* represents the substantive law equivalent of *Van Gend en Loos*, which had – a decade earlier – formally cut the umbilical cord with the old legal order of international law.⁷

The best-known popularization of this “orthodox” view has come from the pen of Joseph Weiler.⁸ For the leading philosopher of European law, the *Dassonville* Court was inspired by “a certain Jacobean conception of the common market-place” – whatever that means – that “explicitly or implicitly reject[ed] the GATT philosophy of trying to find an uneasy balance between transnational free trade and broad choice of national social and economic options excised by states enjoying wide regulatory autonomy, which really has as its implicit *ideal type a transnational market-place which is identical to a national market-place*”.⁹ The view that *Dassonville* was intended to introduce a “national” market model according to which *all* trade restrictions – be they distinctly or indistinctly applicable to imports – fall within the scope of Article 34 can also be found in the standard textbooks. In Catherine Barnard’s well-known manual on the internal market, we thus read that *Dassonville* “provide[d] individual traders with a vehicle to challenge *any national rule* which – even potentially and indirectly – stands in their way”; and that such a revolutionary solution was justified because “[l]ooked at in its historical context, *Dassonville* was an effective tool to cull the dead wood of centuries of accumulated legislation”.¹⁰ And for the author of the first theoretical monograph on the constitutional structures of the internal market, the meaning of the *Dassonville* judgment is equally clear:

³ M. Derlén and J. Lindholm, *Goodbye van Gend en Loos, Hello Bosman?* (supra n.1), 673.

⁴ *Ibid.*, 678.

⁵ Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837, para.5.

⁶ J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade* (supra n.2), 205.

⁷ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

⁸ J.H.H. Weiler, *Epilogue: Towards a Common Law of International Trade* (supra n.2). This essay is an almost perfect replica of his earlier “The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods”, in: P. Craig & G. de Búrca (eds.), *The Evolution of European Law* (Oxford University Press, 1999), 349.

⁹ J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade* (supra n.2), 215 (emphasis added). On the idea of various market models, including the “national” market model, see: R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press, 2017), Introduction.

¹⁰ C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, 2016), 74 (emphasis added).

In its landmark *Dassonville* judgment of 1974, the ECJ made clear that also indistinctly applicable national measures were prohibited. The fact that it was sufficient for a measure to be “captured” by Article 34 for it to be “capable of hindering directly or indirectly, actually or potentially, intra-[Union] trade”, could potentially subject all market regulations to a strict review under the free movement of goods, since they all have by their very nature an impact on trade. *In other words, such [a] test did not require a national measure to be protectionist or to discriminate against foreign products to be subject to review under Article 34.*¹¹

Hardly ever was there so much agreement among European law scholars; and it is therefore hardly surprising that political scientists, working on the internal market, have come to devotedly embrace the orthodox legal interpretation. In the most outstanding treatment of judicial politics in the context of Article 34, the conventional legal interpretation is thus devotedly accepted – despite running counter to its own internal logic;¹² and in one of the most recent presentations of the standard political science narrative we read:

[L]awyers know that the real radical breakthrough came in 1972 [sic] with *Dassonville*, in which the court had to decide once again what was meant by the Treaty of Rome’s summary statement, “Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States” (Article [34]). At the time, it boldly struck down a Belgian provision (requiring that imported goods bearing a designation of origin be accompanied by a certificate of origin) with a sweeping approach: “all measures with an equivalent effect to quotas” [sic] were to be struck down! *This was already and much more radical than Cassis in terms of result, an obligation of recognition. But it did not enunciate mutual recognition, and was in fact set aside as too bold. In this sense, Cassis was not a continuation but a break from Dassonville, which sought to impose an obstacles-based approach to national regulation, whereby all national rules are potentially subject to an assessment of illegality.*¹³

But is that really the meaning of *Dassonville*? Ought the “text” of the famous “formula” be taken at face value; or, must the judgment be understood in its historical context; and if so, what can the historical context tell us about the original meaning of the judgment? Was the radical thought of prohibiting all state barriers that somehow affected external or internal trade judicially conceivable at the time of *Dassonville*; or is this historical foreshortening at its worst? This article indeed wishes to provide a counter-interpretation to the orthodox reading of

¹¹ M. Maduro, *Revisiting the Free Movement of Goods in a Comparative Perspective*, in: Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case Law* (Asser, 2013), 485 at 489-490 (emphasis added).

¹² K. J. Alter & S. Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, (1994) 26 *Comparative Political Studies* 535 at: 540: “Instead [!], legal scholars point to the landmark *Dassonville* (1974) ruling, which established a legal basis for challenging the validity of national laws that create nontariff barriers. To the extent that the *Cassis* decision ruled invalid a national law on the basis that it created a nontariff barrier, it was a straight application of the jurisprudence established in the *Dassonville* decision. In fact, rather than moving beyond the *Dassonville* decision, the legal innovation of the *Cassis* verdict, the rule of reason, actually softened the Court’s position regarding nontariff barriers. In extending the rights of the member states to maintain all reasonable national policies, which had the effect of creating nontariff barriers, the Court seemingly opened a huge loophole, albeit a loophole which could be controlled exclusively by the Court itself.”

¹³ K. Nicolaïdis, *The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees*, in F. Nicola & B. Davies, *EU Law Stories* (Cambridge University Press, 2017), 278 at 281 (emphasis added). Not only is the year of *Dassonville* wrong; the author quotes a passage that cannot be found in the *Dassonville* judgment. Alas, if political scientists – rightly – chastise lawyers for not reading enough non-legal materials, can we lawyers not equally complain if political scientists are unable to closely read (if they do read them at all) the fundamental judgments that they go on to write a great deal about?

Dassonville in the legal and political science literature. It will argue that the traditional interpretation is utterly dissociated from the historical and jurisprudential context of the case; and that the original meaning of the *Dassonville* formula can only be understood against the background of the Court's early case law on the status of third-country goods in the EU internal market and its judicial treatment of parallel import restrictions in the context of EU competition law.

This article's brief "re-reading" of *Dassonville* must necessarily omit much historical background;¹⁴ and due to its limited scope, it also cannot completely set out the broader philosophical "framework" so as to explain how *Dassonville* came to mean what it means today.¹⁵ For the purposes of the present study, I will therefore use a methodological "shortcut" and directly draw on the work of the intellectual historian Quentin Skinner.¹⁶ His "Meaning and Understanding in the History of Ideas" offers, in my view, one of the best keys to unlock the treasures of "classic" texts.¹⁷ Section 1 will therefore briefly introduce Skinner's three ways of "reading" and "interpreting" texts before Sections 2-4 discuss the meaning of *Dassonville*. Section 2 here begins with a re-construction of the (inter)national legal environment, while Section 3 recreates the doctrinal context in which *Dassonville* must be placed. Section 4 offers an "evolutionary" and "contextualized" re-reading of the judgment itself; while Section 5 compares this "new" counter-interpretation to one – very important – subsequent judgment. A *Conclusion* returns to the question of what it all "means" and how *Dassonville* ought best to be understood.

1. "Meaning and Understanding in the History of Ideas"

How are we to read or "re-read" the "classics" – texts that have survived their time and become "canonical"?¹⁸ Should we treat them as "autonomous" units that discuss "eternal" and "general" truths dissociated from the times in which they were written; or should we see them as offering "concrete" and "special" answers to questions considered "problematic" at the time they were conceived? This is the question a young Cambridge historian of ideas posed nearly fifty years ago in an article that would profoundly challenge the methodological premises of his discipline. In "Meaning and Understanding in the History of Ideas", Skinner indeed tried to uncover the various "mythologies" that bedevilled the reading of classic texts by closely analysing the hermeneutic presuppositions within the interpretative methods of his time.

For Skinner, the reading of canonical texts will typically follow one of two "classic" methodologies. A first methodology "insist on the autonomy of the *text* as the sole necessary key to its own meaning"; whereas a second methodology, by contrast, "insists that it is the *context* 'of religious, political, and economic factors' which determines the meaning of any

¹⁴ For an in-depth discussion here, see: R. Schütze, *Framing Dassonville: Text and Context in European Law* (Cambridge University Press, in preparation), Chapters 1 and 2.

¹⁵ *Ibid.*, Chapter 5 and Conclusion.

¹⁶ Professor Skinner has become the most well-known representative of the "Cambridge School" of intellectual history. For an overview of the various strands within the history of ideas and "Begriffsgeschichte", see only: E. Müller & F. Schmieder, *Begriffsgeschichte und historische Semantik: Ein kritisches Kompendium* (Surkamp, 2016). On a personal level, I am very grateful to Professor Skinner for allowing me, in 2007/08, to audit his famous "Hobbes Seminar" at the University of Cambridge.

¹⁷ Q. Skinner, *Meaning and Understanding in the History of Ideas*, (1969) 8 *History and Theory* 3.

¹⁸ The reader might recall Calvino's witty definition of the classics as "those books about which you usually hear people saying: 'I'm rereading...', never 'I'm reading....'". See: I. Calvino, *Why Read the Classics?* (Penguin Classics, 2009), 3.

given text”.¹⁹ These two ways of reading consequently encounter a text from two fundamentally different hermeneutic perspectives: the textual methodology will tend to emphasize what is “permanent” (the text), whereas the contextual methodology will concentrate on the “transient” historical aspects (the context) in which the text was written. For Skinner, importantly, “neither approach seems a sufficient or even adequate means of achieving a proper understanding of any literary or philosophical work” because both methodologies “commit philosophical mistakes in the assumptions they make about the conditions necessary for the understanding of utterances”.²⁰

What are these mistakes; and what philosophical alternative did Skinner propose? Building on the work of Wittgenstein,²¹ the idea of an “innate” – permanent – meaning inherent in “the” text is fiercely discounted.²² The meaning of a word – as well as the meaning of a text – is its use; and since that use is constitutive, yet historically changing, there cannot be an “essentialist” meaning that remains identical throughout the ages. On the contrary, various “paradigms” of meanings must be distinguished;²³ and a simple textual or literal reading will therefore often be “contaminated by the unconscious application of paradigms whose familiarity to the historian disguises an essential inapplicability to the past”.²⁴ The results of such historical foreshortenings are “historical absurdities” that “may in consequence be classified not as histories at all, but more appropriately as *mythologies*”.²⁵ To simply concentrate on the classic texts – as text – will therefore lead to “writing historical non-sense”.²⁶

For Skinner, as for many others,²⁷ there thus exists a fundamental hermeneutic distinction between “the retrospective significance of a given historical work or action” and its “meaning for the agent himself”.²⁸ And while we cannot look inside the agent or author’s head to discover his or her subjective motives, the historian must aim to reconstruct the contemporary paradigm in which the actor said what s/he said so as to exclude interpretations that are “dependent on the use of criteria of description or classification not available to the agent himself”.²⁹

But, then, what is wrong with the “contextual” methodology in interpreting classic texts? While much closer to the historian’s heart, Skinner’s criticism with regard to this second traditional way of reading is targeted at discrediting social determinism: the study of the social context may “help in the understanding of a text” but it is a fundamental mistake to claim that “the ideas of a given text should be understood *in terms of* its social context”.³⁰ A classic text may rebel

¹⁹ Q. Skinner, *Meaning and Understanding* (supra n.17), 3 (references omitted).

²⁰ *Ibid.*, 4 (emphasis added).

²¹ See particularly: L. Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 2001; originally published 1953).

²² Q. Skinner, *Meaning and Understanding* (supra n.17), 37.

²³ *Ibid.*, 6-7. Skinner here draws on the prior work of E.H. Gombrich “Art and Illusion” (London, 1960), but already recognizes the significance of the path-breaking work by T. Kuhn on “The Structure of Scientific Revolutions” (Chicago, 1962).

²⁴ Q. Skinner, *Meaning and Understanding* (supra n.17), 7.

²⁵ *Ibid.* Skinner discusses in great detail the various “mythologies” that are engendered by a textual or essentialist reading (*ibid.*, 7 et seq.).

²⁶ *Ibid.*, 31. Skinner’s direct object of attack is of course the “philosophical” Hobbes literature of his time.

²⁷ This is – almost – universally accepted, see: E. Müller & F. Schmieder, *Begriffsgeschichte und historische Semantik* (supra n.16).

²⁸ Q. Skinner, *Meaning and Understanding* (supra n.17), 22.

²⁹ *Ibid.*, 29.

³⁰ *Ibid.*, 43 (emphasis in original).

against its own historical background through omissions or innovations;³¹ and to understand these semantic “moves” made by the author, one must try to re-construct what the author of a text tried to “do” with it. Drawing on Austin’s theory of “speech acts”,³² Skinner here argued that “meaning” and “understanding” are not, strictly speaking, correlative terms;³³ and that a complete understanding of a text is only possible if we can reconstruct its invisible “illocutionary force”.³⁴ That force is the “intention” with which the text was written; and in order to distil that intention we need to know *the specific question that an author wished to answer*.³⁵

To quote this complex train of thought at some length:

The essential question which we therefore confront, in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate *by the utterance of this given utterance*. It follows that the essential aim, in any attempt to understand the utterances themselves, must be to recover this complex intention on the part of the author ... The problem about the way in which these facts are handled in the methodology of contextual study is that they get fitted into an inappropriate framework. *The ‘context’ mistakenly gets treated as the determinant of what is said. It needs rather to be treated as an ultimate framework for helping to decide what conventionally recognizable meanings, in a society of that kind, it might in principle have been possible for someone to have intended to communicate.*³⁶

With both the textual and the traditional contextual methodologies discarded,³⁷ what is the alternative methodology that Skinner proposes? For him, the way to reconstruct the “meaning” and (contemporary) “understanding” of a classic text will first of all require a survey of “the whole range of communications which could have been conventionally performed on the given occasion”, and, secondly, “to trace the relations between the given utterances and this wider *linguistic* context as a means of decoding the actual intention of the given writer”.³⁸ The context to a text here acts “as a sort of court of appeal for assessing the relative plausibility” of

³¹ With regard to omissions, Skinner mentions the example of Locke’s “Second Treatise” in which Locke fails to use historical arguments – despite their being a prevalent argumentative *topos* at the time; and claims that this omission “constituted perhaps the most radical and original feature of his whole argument” (ibid., 47).

³² J.L. Austin, *How to Do Things with Words* (Harvard University Press, 1975). The book was originally published in 1962.

³³ Q. Skinner, *Meaning and Understanding* (supra n.17), 45. The distinction maps onto Max Weber’s famous distinction between “erklären” and “verstehen”.

³⁴ Ibid., 46.

³⁵ Skinner here draws on R.G. Collingwood in whose “An Autobiography”, we read: “[T]he history of political theory is not the history of different answers given to one and the same question, but the history of a problem more or less constantly changing, whose solution was changing with it.” See R.G. Collingwood, *An Autobiography* (Clarendon Press, 1978), 62.

³⁶ Q. Skinner, *Meaning and Understanding* (supra n.17), 48-49.

³⁷ Ibid., 47: “It must follow that in order to be said to have *understood* any statement made in the past, it cannot be enough to grasp what was said, or even to grasp that the meaning of what was said may have changed. It cannot in consequence be enough to study either what the statement meant, or even what its context may be alleged to show about what it must have meant. The further point which must still be grasped for any given statement is *how* what was said was meant, and thus what *relations* there may have been between various different statements even within the same general context.”

³⁸ Ibid., 49.

statements; yet, importantly, it still leaves the author free to “do” something different with the normative vocabulary that is at her disposal. And to quote Skinner once more:

What exactly does this approach enable us to grasp about the classical tests that we cannot grasp simply by reading them? The answer, in general terms, is I think that it enables us to characterize what their authors were *doing* in writing them. We can begin to see not merely what arguments they were presenting, *but also what questions they were addressing and trying to answer, and how far they were accepting and endorsing, or questioning and repudiating, or perhaps even polemically ignoring, the prevailing assumptions and conventions of political debate.* We cannot expect this level of understanding if we only study the texts themselves. In order to see them as answers to specific questions, we need to know something about the society in which they were written. *And in order to recognize the exact direction and force of their arguments, we need to have some appreciation of the general political vocabulary of the age.*³⁹

What will this agent-centred contextual methodology offer to a re-reading of classic judgments? Today, much constitutional scholarship within European Union law has come to treat these judgments as if they were “general” answers to “eternal” problems of the Union legal order. Seen through this abstract “theoretical” lens, *Van Gend en Loos* or *Costa v. ENEL* are no longer read as “internal market” cases addressing the specific problems of their time and place; they are reduced and purified to “foundational” cases, whose philosophical quintessence is limited to a single “unit” idea: *Van Gend* here abstractly “represents” the doctrine of direct effect (even if the provision for which that doctrine was specifically established has long since disappeared), while *Costa* is presented as offering the “definitive” answer to the supremacy of European Union law (without much regard to either the pre-*Costa* or the post-*Costa* jurisprudential contexts). This type of constitutional scholarship indeed continues to “presents the [Union] as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology”.⁴⁰

But constitutional law is *not* legal philosophy. Constitutional law is where political theory meets historical reality; and any constitutional theory without historical realities is a remote – and banal – legal formalism.⁴¹ This methodological project holds particularly true for legal judgments, which are – by definition – words in action. For a court will always “do” something when writing a judgment; and it will always have (a) specific question(s) to answer. And yet, these specific answers might come to travel through time, especially in legal orders based on “precedents”, that is: “sentences” that are meant not only to “decide” a concrete case in the present but to also offer “binding” meaning for the future. The legal historian must therefore try to strictly separate what a classic case originally meant and what it has come to mean. And in order to discover the original meaning *and* understanding of a classic judgment, the legal

³⁹ Q. Skinner, *The Foundations of Modern Political Thought: Volume 1* (Cambridge University Press, 1979), xiii (emphasis added). Skinner here acknowledges a parallel to the (French) *mentalités* historical school, which formed part of the *Annales* School whose leader was of course Fernand Braudel.

⁴⁰ M. Shapiro, *Comparative Law and Comparative Politics*, (1980) 53 *Southern California Law Review* 537 at 538.

⁴¹ For the perfect example of this imperfect “constitutionalism”, see: N. Walker, *Postnational Constitutionalism and the Problem of Translation*, in: J. Weiler (et al, eds.), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), 27.

historian cannot simply engage in the historical reconstruction of its broader social or political context; s/he must, additionally try to discover the strategic “moves” that a court, as an agent, was making. These moves are partly determined by the “facts” and the “arguments” of the parties to the dispute; yet much more importantly, a court will continually be in a conversation with its own – judicial – past; and it is this “doctrinal” context – *pace* legal realists – that will largely determine the formal reasoning and substantive outcome of a given case. If we thus want to fully “understand” a classic case, we need to not only explore the broader social and legal context but also the specific *doctrinal* context in which a court “moves”; and to better illustrate this methodology let us apply it to one of the most famous cases of European Union law: *Procureur du Roi v Benoît and Gustave Dassonville*.

What was the original meaning of *Dassonville* when decided in 1974; and how did its author – the European Court of Justice – intend it to be understood? While this is – in the absence of crucial documents on the authors’ original intention⁴² – a hard interpretative enterprise, the following three sections will nevertheless try to historically reconstruct the legal and doctrinal stage on which *Dassonville* was played out.

2. Legal Environment I: The (Inter)National Legal Context

Eighty-four bottles of whisky had shipped from Scotland to France. Imported in 1970, a year in which the United Kingdom was still a country outside the Union,⁴³ the British imports had entered the “common market” on the basis of the French customs rules.⁴⁴ They were subsequently delivered to the two exclusive distributors of “Johnnie Walker” and “VAT 69” in France from whom a certain Gustave Dassonville had bought them. This proud owner of a wholesales business in wines and spirits in Halluin – a small French border town next to Belgium – swiftly exported the bottles to Belgium where he knew the sales prices of these whisky brands to be significantly higher. In December 1970, just in time for the pre-Christmas sales, the eighty-four bottles were put up for sales in Brussels, where Benoît Dassonville – Gustave’s son – managed a branch of his father’s business. To underline the “Scottish” origin of their bottles, the Dassonvilles fatefully decided to affix labels bearing the printed words “British

⁴² While the European Commission archives have been open for some time, the judicial “dossiers” were, until very recently, not publically available. The Court has however now opened the gates to its past, yet the “délibéré” in which the judges discuss and compose a draft judgment is still not publically accessible. The relevant pages in the judicial “dossier” are extracted.

⁴³ It may be remembered that the Accession Treaty between the Member States of the European Communities and the United Kingdom (as well as the Kingdom of Denmark, Ireland, and the Kingdom of Norway) was signed on 22 January 1972 with the Treaty entering into force on 1 January 1973. The facts of *Dassonville* thus occurred, when the United Kingdom was still a third country outside the European Union. And importantly, as regards the judgment in *Dassonville* in 1974, the prohibition on measures having equivalent effect in Article 34 TFEU did not have direct effect in the United Kingdom until 1 January 1975 – that is: *after* the Court delivered *Dassonville*. For Article 42 of the Act concerning the Conditions of Accession and the Adjustment to the Treaties expressly stated (emphasis added): “Quantitative restrictions on imports and exports shall, from the date of accession, be abolished between the [Union] as originally constituted and the new Member States and between the new Member States themselves. *Measures having equivalent effect to such restrictions shall be abolished by 1 January 1975 at the latest.*”

⁴⁴ The European Economic Community was conceived as a customs union in which third country goods could travel freely once “the import formalities have been complied with and any customs duties or charges having equivalent effects which are payable have been levied” in the Member State of first import. See Articles 28-29 TFEU; and for a fuller discussion, see: R. Schütze, *From International to Federal Market* (supra n.9), 187 et seq.

Customs Certificate of Origin” – even though they were not in possession of such certificates. Following an on-the-spot inspection of their Brussels shop, they were charged with forgery because according to Belgian law, all foreign designations of origin – like “Scotch” Whisky – were legally required to be accompanied by an official certificate of origin issued by the country of origin.

The ensuing criminal case, brought by a Public Prosecutor on behalf of the Belgian King, was joined by two civil parties: Fourcroy and Breuval – the two exclusive distributors of “Johnny Walker” and “VAT 69” in Belgium. These two Belgian dealers were part of a network of exclusive distribution agreements concluded by “The Distillers Company” the legality of which the Commission had investigated for some time.⁴⁵ The two competitors of the Dassonvilles claimed that the parallel importation of “their” brands into Belgium had caused them economic losses in “their” national territory; and it indeed seemed likely that it had been these two competitors that had denounced the Dassonvilles to the Belgian authorities in the first place.

Be that as it may, the resulting criminal case against the Dassonvilles raised a number of important questions that can only be understood if we first reconstruct the legal context in which the above facts occurred.

a. Legal Background: The Protection of Foreign “Designations of Origin”

Following the 1883 Paris Convention for the Protection of Industrial Property,⁴⁶ a set of bilateral treaties had been concluded between “Belgium” and France as well as “Belgium” and Portugal in the 1920s.⁴⁷ These bilateral treaties committed the High Contracting Parties to take the necessary legislative and administrative measures to outlaw the use of false designations of origin; and in order to fulfil its international obligations, the Belgian State adopted a “Law on the Protection of Designations of Origin for Wines and Spirits” in 1927. In light of its international origin, the aim of the law was to exclusively protect *foreign* wines and spirits bearing a designation of origin.⁴⁸ The scope of the law nonetheless went beyond a mere

⁴⁵ On 30 June 1963, the Distillers Company Limited, a consortium of 38 subsidiaries that covered the labels of “Johnny Walker” and “VAT 69”, had applied to the Commission under Regulation 17 for an exemption under Article 101 (3) TFEU. During the travails of *Dassonville*, the Commission had however not yet been taken a decision. A – negative – decision was in fact only taken in 1978, [1978] OJ L50/16. For a contemporary academic analysis of the Commission decision, see: V. Korah, *Goodbye Red Label: Condemnation of Dual Pricing by Distillers*, (1978) 3 *European Law Review* 62.

⁴⁶ The 1883 Paris Convention for the Protection of Industrial Property covers “appellations of origin” under its wider definition of industrial property, see: *ibid.*, Article 1(3): “Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.” And importantly, Article 10 of the 1883 Convention expressly assimilated the “direct or indirect use of a false indication of the source of the goods” to a violation of a trademark right. For the express view that “appellations” or “designations” of origin constitute intellectual property, see: H. Matthies, *Herkunftsangaben und Europäisches Gemeinschaftsrecht*, in G. Lüke (ed.), *Festschrift für Gerhard Schiedermaier* (Beck, 1976) 391 at 398: “Nach allgemeiner Ansicht fallen Herkunftsangaben und Ursprungsbezeichnungen unter den Begriff des “gewerblichen und kommerziellen Eigentums” im Sinne [des Artikels 36].”

⁴⁷ Treaty between the Belgian-Luxembourg Union and France (4 April 1925); and Treaty between the Belgian-Luxembourg Union and Portugal (6 January 1927). Technically, these two treaties were not concluded by “Belgium” but by the Union of States of which Belgium formed part.

⁴⁸ The text of the law can be found here: <http://www.wipo.int/wipolex/en/details.jsp?id=346>. Article 1 states: “En ce qui concerne les vins et les eaux-de-vie, sont considérées comme appellations d’origine celles qui auront été notifiées au gouvernement belge par les gouvernements intéressés, comme étant des appellations d’origine

implementation of the two bilateral treaties, mentioned above, since it also allowed other States to have their designations of origin protected once they were officially recognized by the Belgian government.⁴⁹

The core provision within the 1927 Belgian law thereby stated:

The abusive attribution of a designation of origin for wines or spirits in connection with their importation, storage, exportation, production, circulation, sale or put up for sale constitutes an illegal use of that designation of origin. The addition of such corrective terms such as “kind”, “type” or “manner” will not remove the abusive character of such an illegal use of a designation of origin.

The following persons are, in the absence of evidence to the contrary, presumed to abuse a designation of origin:

1. The owners, producers or traders who offer or sell under a designation of origin wines or alcoholic spirits at prices manifestly below the prices generally adopted for wines or spirits of that designation;
2. Those whose name or address misleadingly recalls a designation of origin so as to cause confusion, unless the seller expressly and specifically indicates his name and address in addition to the real origin of the wines or spirits.

The abusive use of a designation of origin shall entitle any natural or legal person to bring civil proceedings to prevent the illegal use of the designation of origin when the latter leads to a direct or indirect damage to that person.⁵⁰

The legal protection of designations of origin had thus originally been left to the civil courts and the private enforcement by affected competitors; yet in the middle of the Great Depression during the 1930s, the Belgian legislator suddenly empowered the Belgian King “in the hope of economic and financial recovery” to enhance the protection of industrial and commercial property rights;⁵¹ and, as the 1927 Law on Foreign Designations of Origin was seen as “insufficient”,⁵² a 1934 Royal Decree henceforth prohibited the illegal use of such designations under criminal law sanctions. The new regime had been specifically adopted in light of Belgium’s international obligations vis-à-vis France, and its central provisions stated:

Article 1

officiellement et définitivement adoptées. Toute appellation d’origine adoptée devra avoir été signalée par la voie du *Moniteur belge*.”

⁴⁹ The United Kingdom government had “signalled”, on 5 August 1949, to the Belgian government its wish to protect the designation of origin “Scotch Whisky”, and, the “*Moniteur Belge*” immediately published the following note: “L’Ambassade de Sa Majesté Britannique à Bruxelles a notifié la protection de l’application d’origine “Scotch Whisky” conformément aux disposition de la section 24 to “British Finance Act” de 1933.” The British Act here stated in Section 24: “For the purpose of subsection (9) of section one hundred and five of the Spirits Act, 1880 (which relates to the accuracy of the description of spirits in a permit or certificate), spirits described as Scotch whisky shall not be deemed to correspond to that description unless they have been obtained by distillation in Scotland from a mash of cereal grains saccharified by the diastase of malt and have been matured in a bonded warehouse in casks for a period of at least three years.” This 1933 Act had subsequently been amended by the 1969 Finance Act, Schedule 7, which stated: “Miscellaneous provisions as to Customs and Excise: Definition of Whisky... (b) the expression of “Scotch Whisky” shall mean whisky which has been distilled in Scotland.”

⁵⁰ 1927 Belgian Law on the Protection of Designations of Origin for Wines and Spirits, Article 2 (my translation).

⁵¹ Belgian Royal Decree No. 57 of 20 December 1934, Preamble 1 (my translation).

⁵² One of the reasons behind this desire to strengthen the protection of foreign designations of origin may have been the 1934 London Act revising the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, see: <http://www.wipo.int/treaties/en/ip/madrid/>.

It is prohibited to import, sell, put up for sale, store or transport alcoholic spirits bearing a designation of origin officially recognized by the Belgian government if these spirits are not accompanied by an official document proving their right to bearing that designation.

Article 2

It is prohibited to employ on containers, labels, packaging, caps and other closure devices, as well as invoices, waybills or other documents used in commerce as well as prospectus, catalogues, price lists, maps, posters, signs, billboards and any indications or signs that:

1. Deceive about the manufacturing process, the nature or the origin of the spirits;
2. Assign a designation of origin to spirits that has not been officially recognized by the Belgian government.

It is moreover expressly forbidden to use characters for the name and address of the manufacturer or seller that are higher than 2mm when these names or addresses evoke a designation of origin to which the product is not entitled to.

A breach of either provision could – according to Article 4 of the Royal Decree – be punished by a term of imprisonment of up to two months and a fine; and it was a breach of these rules that the Dassonvilles had been charged with. The formal violation of the Belgian Royal Decree was thereby caused by the lack of an official document attesting that the Dassonvilles were entitled to import and sell “Scotch Whisky” in Belgium.

b. Legal Foreground: Administrative and Judicial Developments

But there is more. Just after the Dassonvilles had imported their bottles into Belgium, the relevant Belgian customs rules had been significantly strengthened. Two customs circulars in particular now interpreted the 1927 and 1934 acts in such a way as to give them an even stricter content. According to the first circular, the “importation” of wines and spirits would, in the future, be subject to a special regulatory regime:

A document henceforth called “entry document” (*titre d’introduction*) must be produced for these products when they are imported for consumption or transit; and this document must be presented at the same time as the customs declaration for these goods. *The entry document can be a certificate of designation, a certificate of origin etc., but in each of these cases it must be issued by either the government or a functional organ under the control of the government of the State or origin ...* Customs officials thereby must not accept entry documents other than originals. They will refuse all copies, even certified ones, all photocopies or other forms of reproduction.⁵³

This first customs circular was joined by a second one in 1972, adopted on behalf of the public health ministry, and just before the British entry into the European common market.⁵⁴ It stated:

Resulting from a Communication issued by the Public Health Ministry, the customs administration must ensure that the name and address of the Belgian recipient is indicated on all documents required for customs clearance. The recipient of the designated goods or his agent must moreover make this declaration, unless the recipient has authorised a client to present these documents to the customs administration. *Furthermore, as regards all spirits*

⁵³ (Belgian) Custom Legislation 3/13.800, Articles 3, 4 and 7 (my translation, emphasis added). The various Belgian customs circulars can be found in: Cour de justice de l’Union européenne, *Dossier de Procédure Originale 1: Affaire 8/74* (CJUE – 1553), 174 et seq.

⁵⁴ (Belgian) Customs Legislation 3/17.388, which can be found in *ibid.*, 199.

*under the designation of origin “Scotch Whisky”, the same Ministry has decided that the document “Customs and Excise Certificate for Spirits Exported to Belgium – C & E 94 A”, as issued by the British customs authorities, constitutes the official entry document that must accompany the goods.*⁵⁵

These Belgian norms were clearly distinctly applicable to imports; and by asking for a special “entry document”, they seemed – at least as regards intra-Union trade – in clear tension with the idea of a customs union in which the free circulation of goods was to be ensured.⁵⁶ For the British Customs Certificate – which can be found in Figure 1– was specific to imports into Belgium and expressly excluded products in free circulation in another Member State. It was this document that the Dassonvilles did not possess when they – fatefully – decided to affix labels on their bottles bearing the printed words “British Customs Certificate of Origin”.

⁵⁵ Ibid (emphasis added).

⁵⁶ The exact legal regime established by European Union law at the time was however not so clear. For the customs legislation existing at the time, see: R. Schütze, *Framing Dassonville* (supra n.14), Chapter 2.



H.M. CUSTOMS AND EXCISE

CERTIFICATE FOR SCOTCH WHISKY EXPORTED TO BELGIUM

Note: 1. When the spirits are exported in bottles, the serial number of the certificate, the bottling rotation number and date of bottling may be quoted on a separate strip label affixed to each bottle. When the spirits are bottled in Belgium, the serial number of the certificate and the date of the certificate may similarly be quoted on a separate strip label affixed to each bottle. Otherwise, this certificate is issued on condition that it shall not be reproduced or quoted on any label or in any advertisement, or used for any advertising purpose whatever. Any breach of this condition will entail the refusal of further certificates to the exporter concerned.

the Officer of Customs and Excise of (exporter's name and address BLOCK LETTERS)

declare that the spirits contained in the undermentioned..... packages which were (number in words) (name and address of consignee BLOCK LETTERS)

be imported into Belgium by (name and address of importer BLOCK LETTERS) the day of 19...

- are *blended Scotch whisky;
have been manufactured in compliance with the laws of the United Kingdom regulating the manufacture of Scotch whisky for home consumption; and
conform to the requirements of Section 109 of the Customs and Excise Act, 1952, of the United Kingdom for spirits intended for home consumption.

PARTICULARS OF SCOTCH WHISKY EXPORTED (Unused spaces to be ruled through)

Table with 7 columns: Marks and numbers, Number and description of packages, Bottling rotation and date of bottling and, if labelled, the brand description, Strength of spirits (Sikes, Gay Lussac), Liquid gallons, Period of maturation in cask. Includes row numbers (1)-(7) for each column.

I request certification of the correctness of the above declaration and particulars.

Signature..... Station date stamp..... * (Proprietor, partner, director, secretary, duly authorised person) * Delete as necessary.

certify that the name and address of the importer and of consignee have been verified from commercial evidence that the official records show the other statements contained on this form to be correct.

Serial number of certificate Warehouse code number / Progressive number

Officer of Customs and Excise

Figure 1. British Customs and Excise Certificate for Scotch Whisky

Once the forgery had been discovered, a public prosecutor charged the Dassonvilles with a violation of Article 1 of the 1934 Royal Decree before the Brussels First Instance Court. Its Eighteenth Chamber met on 11 January 1974; and a single judge – a certain Madam Schmidt – considered that in light of the internal market questions raised, “a decision on the[se] question[s] [was] necessary to enable [her] to give judgment”.⁵⁷ She suspended the criminal proceedings before her court and referred two preliminary questions to the European Court of Justice. The two questions were:

1. Must Articles [34 and 36] be interpreted as meaning that a national provision prohibiting, in particular, the import of goods such as spirits bearing a designation of origin duly adopted by a national government where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation, must be considered as a quantitative restriction or as a measure having equivalent effect?
2. Is an agreement to be considered void if its effect is to restrict competition and adversely to affect trade between Member States only when taken in conjunction with national rules with regard to certificates of origin when that agreement merely authorizes or does not prohibit the exclusive importer from exploiting that rule for the purpose of preventing parallel imports?⁵⁸

These two questions must themselves be understood against the specific doctrinal context existing at the time – a judicial context to which we must now turn.

3. Legal Environment II: The European Court’s Doctrinal Context

One of the most pressing concerns within the early internal market was the problem of parallel imports. Parallel imports are imports that run “in parallel” to the official trade channels – set up by the Member States or by private traders.

Private traders may wish to channel the distribution of their goods for a number of commercial reasons the most important of which is the exploitation of price differentials between national markets. The price of consumer goods – be they television sets or whisky bottles – can significantly differ depending on whether they are purchased in Britain, France or Germany; and in order to have consumers pay the highest price possible, private parties might wish to limit the importation or exportation of their goods via a number of commercial mechanisms. The most important contractual mechanisms here are exclusive distribution agreements. Such (vertical) agreements limit the distribution of a good to a sole distributor within a defined territory; and their potentially negative effects on intra-brand competition was quickly seen as a problem for EU competition law.⁵⁹ By contrast, the most important public law mechanism to control the production or distribution of goods are intellectual property rights. Going beyond the relative (territorial) protection offered by contract, such property rights promise to offer absolute (territorial) protection against third parties wishing to import or market a product without the consent of the producer. All parallel trade can here be blocked because national intellectual property laws offer a private “sales ban” within the national territory.⁶⁰

⁵⁷ One of the great innovations of the Rome Treaty had been a judicial reference procedure that would allow national courts to ask “preliminary” questions to the European Court of Justice under (what is today) Article 267 TFEU.

⁵⁸ *Dassonville* – Facts, 841.

⁵⁹ For a discussion of this point, see: R. Schütze, *European Union Law* (2nd Edition, Cambridge University Press, 2018), Chapter 17 – Section 1(c/aa) and 2 (a/aa).

⁶⁰ For an early analysis here, see: W. Alexander, *Industrial Property Rights and the Establishment of the European Common Market*, (1972) 9 *Common Market Law Review* 35.

How would the European Union deal with such private “sales bans”? While undoubtedly restricting the importation and sale of a foreign good, these restrictions are the result of *private* parties (ab)using national laws. Would the Court therefore examine them, as private party actions, under the competition rules of the Rome Treaty; or would it examine them, as State actions, under the internal market provisions? How indeed would the Court deal with such “mixed situations”? Would it disentangle them and separately look at the competition law aspect as well as the internal market aspect; or would it combine both aspects into a single judicial analysis?

The answer to this question has changed over time.⁶¹ For blocked from directly using Article 34 until the end of the transitional period in 1970,⁶² the Court exclusively employed, in a first step, the – directly effective – provisions of European competition law, and especially Article 101; and only once Article 34 had itself become directly effective, did the Court transfer some of the doctrinal principles established under Article 101 to Article 34.

a. Constructing the Internal Market during the Transitional Period

With Article 34 lacking direct effect until the transitional period had ended, how could the Court review national laws that hindered international trade in goods? The Court’s answer during the “foundational” period of European law is a complex one – and one that builds on the competition law provisions of the Rome Treaty. For having found these provisions to have direct effect early on,⁶³ it was *through the medium* of these provisions that the European Court could *indirectly* review national legislation that it perceived to hinder the establishment of the internal market.

The primary target for the Court during this first period was national intellectual property laws; and the most famous case here undoubtedly is *Consten & Grundig*.⁶⁴ Grundig had appointed Consten as its exclusive distributor in France. The German manufacturer had contractually agreed not to deliver its television sets to other traders on the French market, while it had also consented to contractually prohibit its German wholesalers from exporting goods into France. This (relative) territorial protection was to allow Consten to exploit the higher price level on the French market, and in order to further prevent parallel traders from selling its products into France, Grundig had additionally agreed to transfer its international trademark (GINT) to Consten. This intellectual property right prohibited anyone else to market Grundig products on the French market and thus granted absolute territorial protection to Consten.

⁶¹ See my LLM Dissertation entitled “Untangling ‘Mixed Situations’: A Historical Analysis of the European Court’s Jurisprudence on the Free Movement of Goods *from Consten & Grundig until Cassis de Dijon*” (2000, unpublished manuscript).

⁶² The Court denied the direct effect of Articles 34 TFEU during the transitional period in Case 20/64, *Albatros v Société des pétroles et des combustibles liquides (Sopéco)*, [1965] ECR 29 at 35: “The Treaty thus does not imply the immediate abrogation of all the measures for controlling imports existing when it entered into force, but does on the other hand involve the prohibition of any new restriction or discrimination, the obligation progressively to abolish existing restrictions and discriminations the necessity that they should disappear totally at the latest by the end of the transitional period.”

⁶³ The direct effect of the core competition provisions, and especially Article 101 (1), was confirmed in Case 13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, [1962] ECR 45.

⁶⁴ Joined Cases 56 and 58-64, *Établissements Consten and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 299. For a specific discussion of the trademark aspects of the case, see: H.W. Wertheimer, *National Trademark Law and the Common Market Rules of Competition: A Case Study of the Trademark Implications in the Consten-Grundig Case*, (1967) 4 *Common Market Law Review* 399.

How would the Court deal with such a selective “sales ban”? Was the national trademark law not operating like a MEEQR in that it hindered imports into France – almost as much as a (public) import licence would? Due to the lack of direct effect of Article 34 during the transitional period, the Court could not analyse the national law under this provision; and it therefore, somewhat creatively, attributed the trade restrictive effect caused by the French trademark law to the *private agreement* conferring the trademark.⁶⁵ This doctrinal “move” would allow the Court to apply Article 34 *analogously* via the medium of Union competition rules. This ingenious solution was subsequently confirmed in *Sirena*,⁶⁶ where the Court offered an extensive clarification of the relationship between the free movement of goods provisions and the competition rules:

Article [101] and subsequent articles of the Treaty do not deal expressly with the relationships between the [Union] system of competition and national laws concerning industrial and commercial property rights and, more particularly, trade-marks... In the sphere of provisions relating to the free movement of products, prohibitions and restrictions on imports justified on the grounds of protection of industrial and commercial property are allowed by Article 36, subject to the express condition that they 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. *Article 36, although it appears in the Chapter of the Treaty dealing with quantitative restrictions on trade between Member States, is based on a principle equally applicable to the question of competition, in the sense that even if the rights recognized by the legislation of a Member State on the subject of industrial and commercial property are not affected, so far as their existence is concerned, by Articles [101 and 102] of the Treaty, their exercise may still fall under the prohibitions imposed by those provisions.*⁶⁷

In light of Article 101's inability to review state measures as such, the Court here established the idea that while it could not restrict the “existence” of intellectual property rights, it could nevertheless limit their “exercise”. Article 101 would consequently apply where “*the combination of assignments to different users of national trade-marks protecting the same product has the result of re-enacting impenetrable frontiers between the Member States*”.⁶⁸ For in the eyes of the Court, Article 101 not only exercised a market *regulation* function, it also exercised a market *building* function. The Union's competition law regime had indeed been specifically conceived to outlaw activities that would “affect trade between Member States”, and in the memorable formulation established during the first decade of the Rome Treaty, this

⁶⁵ *Consten & Grundig* (supra n.64), 345: “The applicants maintain more particularly that the criticized effect on competition is due not to the agreement but to the registration of the trade-mark in accordance with French law, which gives rise to an original inherent right of the holder of the trade-mark from which the absolute territorial protection derives under national law. Consten's right under the contract to the exclusive user in France of the GINT trade mark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports. Thus, the agreement by which Grundig, as the holder of the trade-mark by virtue of an international registration, authorized Consten to register it in France in its own name tends to restrict competition. Although Consten is, by virtue of the registration of the GINT trade-mark, regarded under French law as the original holder of the rights relating to that trade-mark, the fact nevertheless remains that it was by virtue of an agreement with Grundig that it was able to effect the registration. That agreement therefore is one which may be caught by the prohibition in Article [101] (1). The prohibition would be ineffective if Consten could continue to use the trade-mark to achieve the same object as that pursued by the agreement which has been held to be unlawful.”

⁶⁶ Case 40/70, *Sirena Srl v Eda Srl and others*, [1971] ECR 69.

⁶⁷ *Ibid.*, paras.4-5 (emphasis added).

⁶⁸ *Ibid.*, para.10 (emphasis added).

was the case for any agreement that had an influence “*direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States*”.⁶⁹

That the analogous use of Article 34 via the medium of the competition rules would apply beyond intellectual property laws was confirmed in *Béguelin*.⁷⁰ The case involved a Japanese producer of cigarette lighters that had concluded an exclusive distribution agreement with Béguelin for the “French market” and with Marbach for the “German market”. The second exclusive distributor had nonetheless imported goods into France and Béguelin therefore brought an action before a French commercial court for unlawful and unfair competition. Could the (French) law on unfair competition here be used to transform the relative territorial protection granted by an exclusive distribution agreement into an absolute legal shield? To quote the Court a little more extensively:

To be incompatible with the common market and prohibited under Article [101], an agreement must be one which ‘may affect trade between Member States’ and have ‘as [its] object or effect’ an impediment to ‘competition within the common market’ ... An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market fulfils the two aforementioned conditions when, *de jure* or *de facto*, it prevents the distributor from re-exporting the products in question to other Member States or prevents the products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers ... *More especially, an exclusive dealing agreement is liable to affect trade between Member States and may have the effect of impeding competition if, owing to the combined effects of the agreement and of national legislation on unfair competition, the dealer is able to prevent parallel imports from other Member States into territory covered by the agreement.* The dealer may, therefore, rely on such legislation only if the alleged unfairness of his competitors' behaviour arises from factors other than their having effected parallel imports.⁷¹

The combined effect of a private distribution agreement and a national law could thus lead to a violation of Article 101, where a private party would *use the national law so as to establish de jure or de facto absolute territorial protection for its national market*. The “use” of a national law that re-created hard national borders could thus potentially fall foul of the competition law provisions of the Rome Treaty.

⁶⁹ Consten and Grundig (supra n.64), 341; as well as Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 235 at 249: “It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in [Union] law found in Article [101], whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.”

⁷⁰ Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export*, [1971] ECR 949.

⁷¹ *Ibid.*, paras.10, 12 and 14-15. Consider also the view of Advocate-General Dutheillet de Lamothe (*ibid.*, 970): “In my view, the principles established on the subject of trademarks and intellectual property are equally valid in the more general field of the protection of a trader against acts amounting to unfair competition. Is not the essential aim of national legislation on trademarks or intellectual property to provide special protection against a certain form of competition judged to be unfair?”

b. Constructing the Internal Market after the Transitional Period

With the direct effect of Article 34 potentially starting in 1970, the Court swiftly shifted its attention to that provision when it came to national hindrances to international trade. With regard to intellectual property rights, this development started in *Deutsche Grammophon*.⁷² The plaintiff here expressly objected to the use of the competition law prism to evaluate a national copyright law on the ground that “it [w]as [the] *national law itself which create[d] barriers*”;⁷³ and the Court accepted the argument. It consequently examined whether the national law *itself* was “compatible with other provisions of the Treaty, *in particular those relating to the free movement of goods*”.⁷⁴ The direct use of Article 34 with regard to national intellectual property rights was definitely confirmed in *Hag* – a case decided a week before *Dassonville*;⁷⁵ and the message of the Court was thus clear: legal situations that affected both the competition law rules and the free movement rules could henceforth be analysed – independently – under both parts of the Treaty.

What, however, were the doctrinal principles governing Article 34 after the transitional period? To assist the Court in its interpretation of the provision after 1970, the Commission had adopted a Directive that offered its position on the meaning of the concept of MEEQR.⁷⁶ Drawing a categorical distinction between distinctly and indistinctly applicable measures, Directive 70/50 was based on the idea that – in principle – only the former category would violate Article 34.⁷⁷ Directive 70/50 thus confirmed the GATT principle that non-discriminatory “internal measures” were excluded from the scope of Article 34 and that obstacles “*inherent in the disparities between rules applied by Member States*” would not be caught by the provision.⁷⁸

What was the Court to make of these interpretative guidelines? A first case that directly dealt with Article 34 was *International Fruit*.⁷⁹ In this preliminary ruling, the question had arisen whether Article 34 would apply to Dutch rules formally prohibiting the importation of goods

⁷² Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, [1971] ECR 478.

⁷³ *Ibid.*, 492 (emphasis added).

⁷⁴ *Ibid.*, para.7 (emphasis added). And when analysing Article 36, the Court here held (*ibid.*, paras.12-13 (emphasis added)): “If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market. That purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States. Consequently, it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State.”

⁷⁵ Case 192-73, *Van Zuylen frères v Hag*, [1974] ECR 731. The judgment was delivered by the Full Court and the Reporting Judge in *Hag* was Judge Mackenzie Stuart, who will also be the Reporting Judge in *Dassonville*.

⁷⁶ Directive 70/50 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, [1970] OJ L13/29.

⁷⁷ *Ibid.*, Article 2. The Directive acknowledged however an exception to this rule in its Article 3. The provision captured “measures governing the marketing of products” “where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules”.

⁷⁸ *Ibid.*, preamble 8 (emphasis added).

⁷⁹ Case 51-54/71, *International Fruit Company NV and others v Produktschap voor groenten en fruit*, [1971] ECR 1107.

without an import licence – despite the fact that the national rules were actually “not applied because exemptions [were] granted from the prohibition and, where this [was] not so, because the licence [was] always issued on request”.⁸⁰ The Dutch system of import licences indeed only existed “in the books”; and the Dutch Government consequently argued that the national measure constituted a purely potential obstacle to trade that was not prohibited because Article 34 only applied when the “actual application of measures” created *actual* obstacles to trade.

To this the Commission had responded as follows:

[T]he expression 'quantitative restrictions' refers to all national measures directly excluding, totally or partially, the import or export of a product on the basis of numbers or quantities. With regard to the concept of 'measures having equivalent effect', these are measures the prohibition of which appears, within the system of the Treaty, as a necessary complement to the prohibition of quantitative restrictions ... However, whilst with regard to quantitative restrictions such an effect is *direct*, in the case of measures having equivalent effect it is *indirect* and arises from the fact that imports or exports are rendered more difficult or costly in comparison with the marketing of the domestic product. The difficulties created for imports or exports may be absolute or relative but it is in any event the *potential* effect of the measure in question which must be taken into consideration.⁸¹

The Commission here essentially defined the concept of MEEQR as any measure that constituted a “direct” or “indirect”, “actual” or “potential” hindrance to imports; yet it also suggested that this wide definition should be confined to *intra*-Union trade and would therefore not extend to trade with third countries.⁸²

The Court partly followed these suggestions and held:

Under Articles [34 and 35] of the Treaty quantitative restrictions and measures having equivalent effect are prohibited between Member States both with regard to imports and exports. Consequently, apart from the exceptions for which provision is made by [Union] law itself those provisions preclude the application to intra-[Union] trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure. *On the other hand in trade with third countries the application of quantitative restrictions and of measures having equivalent effect forms part of the common commercial policy under Article [207] of the Treaty and the provisions on the common agricultural policy, in particular Article 40[2], which provides for the establishment of 'common machinery for stabilizing imports or exports'.*⁸³

This interpretation was important in two ways. First, the Court clarified that the scope of application of Article 34 depended on whether trade with Member States or trade with non-Member States was involved; and secondly, it held, with regard to intra-Union trade, that import formalities – even if they had no actual effect on imports – would fall within the scope of Article 34.⁸⁴ This was a very important signal: Article 34 would, as a result, not require an

⁸⁰ *International Fruit* – Judgement, para.5.

⁸¹ *International Fruit* – Facts, 1113 (emphasis added).

⁸² *Ibid.*, 1114.

⁸³ *International Fruit* – Judgment, paras.7-10 (emphasis added).

⁸⁴ In its written observations to the Court, the Dutch government had insisted that only the “actual application” of the measure could ever be contrary to Article 34 (*International Fruit* – Facts, 1112), while the Commission had expressly countered that even a potential effect on intra-Union trade was enough (*ibid.*, 1113). On import/export formalities within the early customs union, see: N. Vaulont, *Die Vereinfachung der Verfahren und Förmlichkeiten im innergemeinschaftlichen Warenverkehr im Lichte der Rechtsprechung des Europäischen Gerichtshofs zum Verbot der Erhebung von Abgaben zollgleicher Wirkung*, (1977) 12 *Europarecht* 1.

actual effect on imports but a potential effect on interstate trade was enough; and while not expressly contradicting Directive 70/50,⁸⁵ the Court had here shown its willingness to establish its own – judicial – definition of MEEQR.

Its ambition to offer an autonomous definition of the scope of Article 34 was confirmed in *Geddo v. Ente Nazionale Risi*,⁸⁶ where the Court held:

The prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit. *Measures having equivalent effect not only take the form of restraint described; whatever the description or technique employed, they can also consist of encumbrances having the same effect.*⁸⁷

This suggested that Article 34 covered all “encumbrances” or hindrances amounting to even a “partial restraint” of imports. Yet this first – abstract – judicial definition of the scope of Article 34 and its concept of MEEQR would soon be overshadowed by a second definition. This second definition was offered in *Dassonville*; and it is a closer analysis of that case to which we must now turn.

4. Enter the “Court”: Advocate-General Opinion and Court Judgment

Dassonville was registered in Luxembourg on 8 February 1974 and henceforth carried the case number 8/74.⁸⁸ On 11 February, the (then) President of the Court Robert Lecourt requested Alexander Mackenzie Stuart – since 1973 the new British judge and a Scotsman – to act as Reporting Judge;⁸⁹ and he also charged Alberto Trabucchi, one of the most experienced members on the Court, to act as Advocate-General in the case.⁹⁰

On 13 February, Lecourt allocated the case to the Second Chamber of the European Court of Justice,⁹¹ and two days later, pursuant to Article 20 of the Protocol on the Statute of the Court of Justice,⁹² the Registrar of the Court notified the parties, the Member States and the Commission

⁸⁵ Directive 70/50 suggested, in its Article 2(2), that import formalities would, as a rule, not be covered; yet its recital 3 envisaged exceptions to this rule: “[w]hereas the formalities to which imports are subject do not as a general rule have an effect equivalent to that of quantitative restrictions and, consequently, are not covered by this Directive”.

⁸⁶ Case 2/73, *Geddo v Ente Nazionale Risi*, [1973] ECR 865.

⁸⁷ *Ibid.*, para.7 (emphasis added).

⁸⁸ Interestingly, however, in the “*Dassonville* files” the case is consistently referred to as *Fourcroy and Breuval & Cie v. Dassonville and Dassonville* – indicating that the Court originally and, perhaps primarily, saw this as a “competition law” case between two exclusive dealers and two parallel importers.

⁸⁹ Cour de justice de l’Union européenne, *Dossier de Procédure Original 1: Affaire 8/74* (CJUE – 1553), 96.

⁹⁰ *Ibid.*, 97.

⁹¹ *Ibid.*, 98. The chamber consisted of M. Sørensen (President of the Second Chamber), P. Pescatore, and A.J. Mackenzie Stuart.

⁹² Article 20 of the (then) Protocol read: “In the cases governed by Article [267] of this Treaty, the decision of the court of tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and also to the Council if the act the validity or

of their right to submit written observations to the Court.⁹³ Belgium and the United Kingdom immediately signalled their wish to participate in the written procedure; yet neither France nor Germany found the case of any special importance.⁹⁴ The date of oral procedure was – finally – set for 29 May 1974 at 10 am in the courtroom of the Court of Justice.

Enter the “Court”.

a. The Opinion of Advocate-General Trabucchi

Publically delivered on 20 June 1974, three weeks before the Court gave judgment, and originally written in Italian, Advocate-General Trabucchi’s opinion unashamedly concentrated on the first preliminary question, that is: whether or not the Belgian law constituted a MEEQR under Article 34.⁹⁵

The seasoned Advocate-General started by reminding the Court of the function of certificates of origin within free trade areas: in the absence of a common external customs border, it was necessary to distinguish between goods produced by the Member States themselves and goods coming from third countries outside the trading block. This “customs function” of certificates of origin was however otiose within the Union, since the latter was based on a customs union in which the free circulation of third-country goods was guaranteed once “the import formalities have been complied with and any customs duties or charges having an equivalent effect which are payable have been levied in that Member State” – here France.⁹⁶

States had nonetheless remained free, in the absence of Union harmonisation, to protect foreign designations of origin. This freedom was however not unlimited; and Trabucchi now indulged in a lengthy analysis of the potential effect of the Belgian law on the free movement of goods in general and parallel imports by non-authorized traders in particular. The Advocate-General thereby analysed a number of scenarios beginning with the extreme case in which parallel imports were completely prevented “where the certificate of origin is required to be made out directly in the name of the importer”.⁹⁷ But even under a softer scenario in which a certificate could subsequently be obtained from the British customs authorities, the Belgian rules were problematic: “[T]he need to possess the precise details enabling the batch in question to be correctly identified as the subject of a particular export, makes it in practice rather difficult, if not completely impossible, to obtain this certificate, especially for small quantities forming part of a larger consignment.”⁹⁸ This was particularly the case where help had to come from within an exclusive distribution network. In essence:

interpretation of which is in dispute originates from the Council. Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the Council, shall be entitled to submit statements of case or written observations to the Court.”

⁹³ Cour de justice de l’Union européenne, *Dossier de Procédure Original 1: Affaire 8/74* (CJUE – 1553), 95.

⁹⁴ Symptomatic for this lack of interest is the German letter by Dr Seidel, on behalf of the German Economics Ministry, to the ECJ Registrar (*ibid.*, 88): “Sehr geehrter Herr Kanzler! Ich beehre mich, Ihnen mitzuteilen, daß die Regierung der Bundesrepublik Deutschland in der oben bezeichneten Rechtssache keine schriftliche Stellungnahme abgeben wird. Für die Übersendung der Stellungnahmen der Verfahrensbeteiligten wäre ich Ihnen dankbar; die Bundesregierung behält sich vor, gegebenenfalls in der mündlichen Verhandlung eine Erklärung abzugeben.”

⁹⁵ According to the Advocate-General, the competition law aspect raised by *Dassonville* was “of minor importance” (*Dassonville* (Judgment) – Advocate-General, 863).

⁹⁶ On the status of third country goods and Articles 28 and 29 TFEU, see *supra* n.44.

⁹⁷ *Dassonville* (Judgment) – Advocate-General Opinion, 856.

⁹⁸ *Dassonville* (Judgment) – Advocate-General Opinion, 857.

The result of this is in practice completely to prevent freedom of movement between the various national markets, such movement as there is running along a single well-defined path and involving the recognized likelihood of differences, objectively unjustified, in the price of a particular product from one Member State to another. The products in question can in fact be imported legally into Belgium only by exclusive concessionaires or agents of the producers, since the latter are the only ones having access to direct supplies and they can therefore obtain the certificate of origin without any difficulty.⁹⁹

This was a clear reference to *Consten & Grundig*; yet unlike the private use of a national trademark law in *that case*,¹⁰⁰ this time it was the automatic operation of the – public – Belgian criminal law itself that constituted the obstacle to the free movement of goods.

Having thus identified the trade-restrictive effect of the Belgian law on the free movement of (parallel) imports, Trabucchi's second analytical step explored the Union tools available to remove the national trade restriction. Beginning with Article 115 TFEU and the harmonization of national laws, this first option was swiftly rejected. For in the view of Trabucchi, the restriction to intra-Union trade in the present case did not stem from a disparity between national laws. (For even if the relevant French legislation had been identical, the practical problems in obtaining the said certificates at second or third hand would have continued to exist.) The hindering effect did, in his view, therefore “*result directly from the law of the State which imposes this requirement*”; and this meant that Article 34 was potentially the sole method for removing the undesirable obstacle to trade.¹⁰¹ Having briefly analysed Directive 70/50, the Advocate-General nonetheless chartered his own course here. For instead of following the Commission's categorisation into distinctly and indistinctly applicable measures, Trabucchi set out a “first-principles” approach that warrants to be quoted at length:

The right of freedom of movement within the [Union] of goods which are in free circulation in a Member State constitutes one of the fundamental principles of the Treaty. *A trade rule enacted by a State which is unlike a quota but which, considered in the context in which it applies, is capable of seriously hindering intra-[Union] trade in certain categories of goods, must be regarded in principle as a measure having an effect equivalent to a quantitative restriction.*

Contrary to the opinion of the British Government, the prohibition on measures having an effect equivalent to quotas is not subject, for its application, to the condition that there should actually be a quantitative reduction in the movement of goods between Member States. *In accordance with the reasoning adopted by the Court in its case law on the subject of customs duties and measures having equivalent effect, which satisfies requirements of logic and practice, the prohibition operates automatically by reason of the sole fact that the measures in question, even though not discriminatory or protectionist, constitute an unjustified additional burden for importers, which means that they are liable to restrict, in an improper manner, intra-[Union] trade (Judgment No 2-3/69, Sociaal Fonds voor de Diamantarbeiders).* This corresponds precisely with the text of the Treaty, which provides, on the expiry of the transitional period, for the prohibition, in the same absolute and automatic manner, of both quantitative restrictions and measures having equivalent effect, *independently of proof in individual cases of the quantitative effects which the measure in question actually had on trade.*¹⁰²

⁹⁹ Ibid.

¹⁰⁰ For a discussion of *Consten & Grundig*, see Section 3(a) above.

¹⁰¹ *Dassonville* (Judgment) – Advocate-General Opinion, 858 (emphasis added).

¹⁰² Ibid., 859 (emphasis added).

The Advocate-General here drew a direct analogy between Article 34 and the case law on customs duties and charges having an equivalent effect by insisting that the same absolute principles should apply to measures having an equivalent effect to quantitative restrictions.¹⁰³

And having identified the Belgian law as a MEEQR, Trabucchi moved to a third step in his analysis. Could the law be justified by means of Article 36, and especially on the ground of the protection of industrial and commercial property rights? The Advocate-General's view here was complex yet brilliant:

The protection of designations of origin of products is covered by the principle of protection of industrial and commercial property for which Article 36 allows necessary derogations to the prohibition on quantitative restrictions and measures having equivalent effect. *However, on the basis of this rule, States can derogate in the said manner only for the purpose of the protection of their own interests and not for the protection of the interests of other States ... Article 36 allows every State the right to protect exclusively its own national interests.* Consequently, for the purpose of protecting industrial and commercial property, each State can restrict the freedom of movement of goods only with reference to the protection of individual rights and economic interests falling under its own sphere of interest. In the context of property rights, it is clear that the protection of a designation of origin relates to the economic interest of the producer. *Consequently, in the case of a foreign product, and even more so where a third State is involved, the interest to be protected lies outside the sphere of interest which every State is allowed by virtue of Article 36.*¹⁰⁴

For Trabucchi, then, a national law protecting *foreign* designations of origin could not be justified on the ground of protecting *domestic* industrial and commercial property.¹⁰⁵ Yet in the (hypothetical) event that the Court would find another public policy ground available, he nevertheless continued his analysis by pointing out that no national law falling within one of the grounds mentioned in Article 36 must ever be a means of an arbitrary discrimination or a disguised restriction on trade between Member States. And returning to his nuanced analysis of the restrictive effect of the Belgian law, outlined above, he ultimately concluded that whatever the private or public interests protected by the Belgian law “importers who have not received the goods directly from the country of origin must at least be allowed to prove their authenticity by any other means definitely establishing this fact”.¹⁰⁶ The Belgian law would therefore always constitute an unnecessary and disguised restriction of trade.

What about the second preliminary question and the potential violation of European competition law? Trabucchi found it an “easy” question: “*No interest other than the maintenance of an exclusive position can have induced the Belgian concessionaires to invoke a rule protecting the designation of origin of goods[.]*”¹⁰⁷ Yet recognising the “public” nature of the Belgian legislation, the Advocate-General admitted that the initiative to invoke the law would have come *ex officio* from a public prosecutor and that the restriction on competition therefore

¹⁰³ For an academic discussion of this point, see R. Schütze, *Framing Dassonville* (supra n.14), Chapter 1.

¹⁰⁴ *Dassonville* (Judgment) – Advocate-General Opinion, 860 (emphasis added).

¹⁰⁵ *Ibid.* 860-1 (emphasis added): “It appears to me, therefore, that one can completely reject the argument that Article 36 allows a Member State to apply in respect of imports from other Member States restrictive measures having an effect equivalent to quotas for the purpose of protecting the *designations of origin of products of third States*.” I take the reference to a “third State” here to refer to the United Kingdom not (yet) being a Member State of the Union when the facts of *Dassonville* occurred.

¹⁰⁶ *Ibid.*, 862-3.

¹⁰⁷ *Ibid.*, 863 (emphasis added).

derived “*directly from the national law itself*”.¹⁰⁸ He nevertheless felt that “the combined effect” of the domestic law and the behaviour of the private undertakings led to “an *actual division of national markets* resulting in the isolation of some of these from intra-[Union] trade”, which permitted him to “deduce from this the existence of a concerted practice intended to ensure the absolute territorial protection of the national market in question”.¹⁰⁹ And for Trabucchi, this was a practice that could render the exclusive distribution agreements illegal under Article 101 TFEU.

b. The Dassonville Judgment: A Historical Re-Construction

Having mysteriously moved from the Second Chamber to the Full Court, the Court of Justice delivered its judgment in *Dassonville* on 11 July 1974. What had prompted the decision to move the case to the Full Court? What had the Reporting Judge originally proposed; and what deliberations had been conducted “inside” the Court? We shall (probably) never know.¹¹⁰ All we have are fifteen short paragraphs in search of meaning. What do they say and how should we read them? Having restated the procedural background in paragraph 1, the judgment is almost evenly divided into a free movement part (paragraphs 2-9) and a competition law part (paragraphs 10-15). Let us look at both parts in three consecutive steps.

aa. Free Movement I: The Concept of “Measures having Equivalent Effect”

The Court begins the free movement part by briefly summarizing the substantive issues in paragraphs 2-3. It here characterises the Belgian law as “a national provision *prohibiting the import* of goods”, while also emphasising that the goods in question were “in free circulation” within the Union – a wording that hinted at their third-country origin. And by characterising the Belgian law as requiring “a certificate of origin from the British *customs* authorities”, it seems that the Court saw the Belgian law as a *customs* measure that was *distinctly* applicable to imports.

Paragraph 4 then presents the central problem of the case: underlining, once more, that the British goods were already “in free circulation in France”, the Court states that imports from France would have “great difficulty, unlike the importer who imports directly from the producer country” to obtain the legally required British customs certificate. And from there the Court continues in paragraphs 5 and 6 with a general definition of what constitutes a MEEQR:

All trading rules enacted by Member States which are capable of *hindering, directly or indirectly, actually or potentially, intra-[Union] trade* are to be considered as measures having an effect equivalent to quantitative restrictions. *In the absence of a [Union] system* guaranteeing for consumers the authenticity of a product’s designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all [Union] nationals.

¹⁰⁸ Ibid (emphasis added).

¹⁰⁹ Ibid., 864 (emphasis added).

¹¹⁰ Having visited the private archive of Judge Mackenzie Stuart in Cambridge in the hope of finding the “lost” draft judgment or the “*délibéré*”, I sadly left empty-handed. Sincere thanks nonetheless go to the Sidney Sussex College archivist Mr Nicholas Rogers for granting me access in 2016.

Devoid of any reference to its previous jurisprudence (and with no alternative normative pointers, such as Directive 70/50, which would frame its analysis), what were the Court's intellectual and textual inspirations? And more importantly still: what was the Court hoping to "do" in offering its famous definition?

For the Court, the effect of the 1934 Royal Decree, especially as interpreted by the Belgian customs circulars, was to stop imports not accompanied by a British Customs Certificate at the Belgian border.¹¹¹ The national law could therefore easily be classified as a "border measure" that distinctly applied to imports; and by requiring an official customs certificate as "entry document", a first jurisprudential pointer for the *Dassonville* Court must undoubtedly have been *International Fruit*.¹¹² It may be recalled that in that case, the Court had held Article 34 to preclude "the application to intra-[Union] trade of a provision which require[d], even as a pure formality, import or export licences or any other similar procedure";¹¹³ and the requested certificate undoubtedly constituted such an import formality.¹¹⁴

Yet *International Fruit* had concerned direct imports from one State to another State, and doubts existed as to whether the judgment would also extend to *indirect* imports of goods already in free circulation within the Union.¹¹⁵ Paragraph 5 of *Dassonville* now answered this question. Drawing on its established "pattern-of-trade" test – developed in the context of EU competition law – the Court here confirmed that Article 34 captured *quantitative* as well as *qualitative* restrictions of trade between Member States; and since the Belgian law favoured *direct* British imports over *indirect* imports from France, it indirectly affected trade between Member States. To also counter the British argument (made in the course of the proceedings)

¹¹¹ It will be recalled that Article 1 of the 1934 Belgian Royal Decree prohibits already the "import" of goods not accompanied by an official document proving its right to use a foreign designation of origin. The subsequently adopted customs circulars only clarified which type of document was needed.

¹¹² Case 51-54/71, *International Fruit Company* (supra n.79).

¹¹³ *International Fruit*, para.9.

¹¹⁴ If any additional proof were needed, consider the "Supplementary Answer" of the Commission to Written Question No. 44/78, [1979] OJ C 253/4-5 (emphasis added): "As the Court has pointed out on numerous occasions, Article [34] et seq. of the Treaty forbid the application in intra-[Union] relations of national legislation requiring, even as a purely formal measure, the production of import or export licences, or compliance with any similar procedure, other than in exceptional cases covered by [Union] law. Such formalities are regarded as measures having equivalent effect to quantitative restrictions on imports or exports, which are prohibited by the abovementioned Treaty Articles. *Clearly, making imports subject to the production of certificates of origin constitutes a like measure. Irrespective of the conditions upon which an origin certificate is issued, or the purposes for which it is required, the very fact of requiring it constitutes a formality liable to make the importation of products subject to it more difficult, and hence is 'capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade'. A certificate of origin required for products originating in the [Union] or for products originating in non-member countries, but in free circulation, constitutes a formality which is incompatible with the rules set out in Article [34] et seq. of the Treaty.*"

¹¹⁵ Advocate-General Roemer in *International Fruit* had indeed suggested that Article 34 was concerned exclusively with direct imports. Drawing on the liberalizing code of the OEEC and the GATT, he claimed in *International Fruit* (supra n.), 1123 that "[a]ccording to those provisions [Article 34] encompasses national measures which wholly or in part preclude *direct* [emphasis in original] imports which are not based on technical features (which also apply to the marketing of domestic products), but rather solely relate to the number and quantity of the products in question". This solution had also been suggested by the Commission in its answer to Written Question 236/74, [1974] OJ C 121/15. There is only one specific provision that arguably dealt with parallel imports in the Rome Treaty and this was ex-Article 91 EEC ("Dumping"), whose paragraph 2 stated (emphasis added): "As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, *on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect.*" However, a literal reading confined the provision to reimportation into the Member State where the goods were produced or first brought into circulation within the Union.

that potential effects on trade could not be captured by European law – an argument previously made before the Court¹¹⁶ - the *Dassonville* definition of MEEQR equally re-clarified that *actual* as well as *potential* hindrances to intra-Union would be captured. And to express both of these ideas in one formula, the Court brilliantly recruited a textual formulation that had already made a distinguished career within European competition law.¹¹⁷

But what was the meaning of this act of doctrinal transplantation? What was the intention of the Court in employing a competition law formula within Article 34? One possible understanding could be this: *Dassonville* concerned a “mixed situation” in which national legislation combined with a set of exclusive distribution agreements to re-create national barriers to trade; and the use of the *Consten/Dassonville* formula was intended to underline the symbiotic complementarity of the competition law provisions and the rules establishing the free movement of goods. Within the context of competition law, it may be recalled, the “effect-on-trade” criterion thereby operates primarily as a jurisdictional criterion that delineates “the field of application of the prohibition by laying down the condition that it may be assumed that there is a possibility that the realization of a single market between Member States might be impeded”;¹¹⁸ and the *Dassonville* Court now projected this “jurisdictional” frame into the context of the free movement of goods. (However, unlike the “neutral” pattern-of-trade formulation in the context of EU competition law, the express reference to a “hindering” effect on imports potentially suggested that the *Dassonville* formula could generally operate as a substantive decision rule. That this was nevertheless not the case would however be shown in the post-*Dassonville* jurisprudence.¹¹⁹)

Be that as it may, the famous formula in paragraph 5 is immediately followed by a substantive qualification in paragraph 6, where the Court acknowledges that in the absence of Union legislation,¹²⁰ the Member States had remained free to guarantee consumer protection and to “take[] measures to prevent unfair practices in this connexion”. But this freedom was itself “subject to the condition that these measures should be reasonable” and accessible to all EU nationals. Alas, where did the qualification to the *Dassonville* formula – and the qualification of the qualification – in paragraph 6 textually or spiritually come from? What were the Court’s sources of inspiration here? The reference to the law on “unfair practices” revealed, once more, the competition law context of the entire *Dassonville* case; and it is – according to a first possible view – from here that the “rule of reason” in paragraph 6 was imported. According to a

¹¹⁶ The argument had been made in *Consten & Grundig* as well as *International Fruit*.

¹¹⁷ Just to repeat: in *Consten & Grundig*, the Court had held (*ibid.*, 341): “The concept of an agreement ‘which may affect trade between Member States’ is intended to define, in the law governing cartels, the boundary between the areas respectively covered by [Union] law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of [Union] law contained in Article [101]; otherwise it escapes the prohibition. In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, *either direct or indirect, actual or potential*, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.” According to Pescatore’s “Vade-mecum” (Bruylant, 2007), 300, the case behind the *Dassonville* formula was really Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 235; yet it was *Consten & Grundig* – and not its relatively unknown predecessor – that was cited in the Written Observations. But of course, Pescatore was present when the judicial deliberations took place!

¹¹⁸ Case 56/65, *Société Technique Minière* (*supra* n.117), 249.

¹¹⁹ The immediate post-*Dassonville* jurisprudence indeed shows that the Court originally developed the *Dassonville* formula as a jurisdictional criterion that only comes close to a substantive decision rule in the context of border measures. On this point, see: R. Schütze, *Framing Dassonville* (*supra* n.14), Chapter 4.

¹²⁰ See the Proposal for a Council Directive on the harmonization of procedures for the release of goods into free circulation, [1974] OJ C 14/45.

second view, on the other hand, the Court derived its “rule of reason” from Article 3 of Directive 70/50;¹²¹ yet in light of the marked absence of the Directive in the text of the *Dassonville* judgment, this view is hard to defend – especially because the Court regarded the 1934 Belgian law as a distinctly applicable measure. There is, finally, a third view; and one – as the post-*Dassonville* jurisprudence would decisively confirm – that must have been the strongest source of inspiration for paragraph 6: the Court’s previous judgment in *International Fruit*.¹²² *International Fruit* had, as we saw above, distinguished between imports of goods from within the Union and imports of goods from third States; and while an absolute prohibition on import formalities applied in the former scenario, in the absence of Union harmonisation, a rule of reason applied, by contrast, to import formalities for goods coming from third States.

Within the *Dassonville* context, this however meant the following: the Belgian rules when applied to direct imports from the United Kingdom – still a third State when our 84 bottles were imported – could have been legitimate; and since the Belgian law in *Dassonville* generally applied to all imports regardless of their origin, the Court may have wished to extend its rule of reason from direct to indirect imports of third country goods. Viewed in this light, *Dassonville* becomes an extension of *International Fruit*: in the absence of harmonised customs rules, the Member States may continue to adopt reasonable customs formalities for third country goods – whether directly imported or already in free circulation within the common market. *Dassonville* is here no “Jacobean” judgment establishing a “transnational market-place which is identical to a national market-pace” (Weiler) but a parallel imports case that simply follows the international law logic of an international customs union.

bb. Free Movement II: Article 36 and the Question of Justification

Without having expressly found the Belgian law an unreasonable restriction to intra-Union trade, paragraphs 7 and 8 of the judgment see the Court shift its focus to an analysis of Article 36, and its limits. They state:

Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.¹²³

¹²¹ For the text of Article 3 of the Directive, see *supra* n.85. But while the Directive indeed covered third country goods in free circulation (*ibid.*, Preamble (emphasis added): “Whereas the provisions concerning the abolition of quantitative restrictions and measures having equivalent effect between Member States apply both to products originating in and exported by Member States and to products originating in third countries and put into free circulation in the other Member States”); the problem for the Court was perhaps that neither Articles 2 or 3 were drafted to expressly refer to a situation where a national rule limited parallel imports at the expense of direct imports. The comparisons within the Directive are always between imported and domestic goods. A good example here is, within the context of customs procedures, Article 2(3) (r), which positively defines as MEEQR those national rules that “subject imported products to controls or, other than those inherent in the customs clearance procedure, to which domestic products are not subject or which are stricter in respect of imported products than they are in respect of domestic products, without this being necessary in order to ensure equivalent protection”.

¹²² This “rule of reason” thinking was only implicit in *International Fruit*; yet it becomes much clearer in the post-*Dassonville* case law. As we saw above (*supra* n.83), what paragraph 10 of *International Fruit* had done was simply to state that the application of Article 34 to imports from third-countries was subject to harmonisation under the Common Commercial Policy (or the Common Agricultural Policy).

¹²³ *Dassonville* – Judgement, paras.7 and 8.

The Court here wholeheartedly adopts the intellectual shortcut that had been brilliantly suggested by Advocate-General Trabucchi. For even if designations of origins were industrial and commercial property rights,¹²⁴ it was far from clear whether the *Belgian* law could have been justified under Article 36 on the ground of – extraterritorially – protecting *British* industrial or commercial property rights. The Court therefore rightly concentrated, from the very beginning, on the formal limits governing Article 36 as such and here analysed whether the Belgian law possibly constituted an arbitrary discrimination or a disguised restriction of international trade. And finding that “only direct importers [were] really in a position to satisfy [the Belgian law] without facing serious difficulties”, the Court had no difficulties in holding that the national law was in fact unjustifiable.¹²⁵ A source of additional inspiration may here have come from *Hag I* – a case decided a week before *Dassonville* and having the same Reporting Judge.¹²⁶

cc. Competition Law: Article 101 and the Exclusive Distribution Agreements

What about the second preliminary question and its emphasis on EU competition law? Would the exclusive distribution agreements concluded, respectively, by Fourcroy and Breuval violate Article 101? The answer the Court gives in paragraphs 11 and 12 was – especially in light of its previous *Béguelin* judgment – fairly succinct. It held:

An exclusive dealing agreement falls within the prohibition of Article [101] when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer. More particularly, an exclusive dealing agreement may adversely affect trade between Member States and can have the effect of hindering competition if the concessionaire is able to prevent parallel imports from other Member States into the territory covered by the concession *by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity*.¹²⁷

¹²⁴ For this point see in particular the Commission’s answer to Written Question 189/73, [1974] OJ C22/9 at 10: “[A]s it is a measure aimed at protecting a particular registered designation of origin it is covered by Article 36 of the Treaty by virtue of which the Member States may maintain or introduce prohibitions or restrictions on exports which are justified, in particular, on grounds of the protection of industrial and commercial property.” Many early commentators indeed “read” *Dassonville* as part of the Court’s jurisprudence on intellectual property rights. See only: R. Joliet, *EEC Law and Appellations of Origin: The Scottish Whisky Case*, (1975) 38 *Modern Law Review* 200: “The recent *Scotch Whisky* case before the European Court of Justice has for the first time drawn attention to a possible conflict between national law relating to the protection of appellations of origin, one of the branches of industrial property law according to the Paris Union Convention and Community Law.” Joliet here criticised the Court for its “reasonableness” criterion because it should have used the specific subject matter doctrine (*ibid.*, 204): “In my view, the *Deutsche Grammophon* rule would have been preferable to the reasonableness test adopted by the Court: restrictions on imports should be considered as being covered by the exception of Article 36 in so far as they are justified by the specific subject matter of the industrial property right at issue. This already implies the reasonableness of the means of proof imposed to demonstrate the specific qualities that products bearing appellations of origin must have.”

¹²⁵ This point is expressly made in paragraph 9 of the *Dassonville* judgment.

¹²⁶ Case 192/73, *Van Zuylen frères v Hag AG*, [1974] ECR 731. The Court here stated (*ibid.*, para.14) that “[w]hilst in [a common] market the indication of origin of a product covered by a trade mark is useful, information to consumers on this point may be ensured by means other than such as would affect the free movement of goods”. It is probably from this case that the reference to consumer protection in *Dassonville* came from.

¹²⁷ *Dassonville* – Judgment, paras.11-12.

The Court here simply confirmed that a private agreement must always be placed within its legal and economic context;¹²⁸ and that the combined effect of a distribution agreement and national law could lead to absolute territorial protection. However, as the Belgian law was a *criminal* law whose enforcement was not dependent on a private party invoking its right, the Court held that the mere fact that a sole distributor benefited from a national rule on certificates of origin could not, as such, render the underlying agreement unlawful.¹²⁹ This seemed to suggest, as the two exclusive dealers had argued, that only those national laws that required active “utilisation” by private parties could fall within the Court’s jurisprudence on mixed situations under Article 101. In the present case, the “public” nature of the law however meant that solely the free movement of goods provisions, and not the “private” competition law rules, controlled the case.

5. “Re-Reading” *Dassonville*: The Author as Interpreter

Die-hard apostles of the orthodox reading of *Dassonville* may still not be convinced. But unbeknownst to these “theologians” of European law, the Belgian legislation from *Dassonville* was subject to a second judicial analysis. Only two years following the first judgment, the Commission indeed felt that Belgium had not sufficiently adjusted its legislation on foreign designations of origin in light of the *Dassonville* judgment and started an administrative investigation under Article 258 TFEU.¹³⁰ The latter ultimately led to *Commission v Belgium (Dassonville II)*,¹³¹ which offers a fascinating “controlling” device to the contextual and “doctrinal” interpretation of *Dassonville* set out in the previous section. For even if *Dassonville II* is not a perfect replica, it still offers no support – whatsoever – to a “radical” neo-liberal reading of the *Dassonville* formula. On the contrary, *Dassonville II* fits even better into the international law reconstruction made in the previous section. But let us tread slowly and first revisit the legal environment in which the second *Dassonville* case took place.

a. Revisiting the Legal Environment after *Dassonville I*

Since *Dassonville I*, two developments had potentially changed the legal environment governing designations of origin in Belgium. One was an amendment to the 1934 Belgian legislation; the other concerned a change in French (!) customs law resulting from an international treaty with Great Britain.

With regard to the relevant Belgian legislation, nothing ever seemed straightforward. Belgium had tried to amend it by means of a 1976 Ministerial Decree so as to comply with *Dassonville I*; and the wording of Article 1 here was this:

The following shall be treated as accompanied *at the time of customs clearance* by the document provided for in Article 1 of the Royal Decree No 57 of 20 December 1934 on spirits:

¹²⁸ Ibid., para.13.

¹²⁹ Ibid., para.15.

¹³⁰ A copy of the “Avis Motive” can be found in: Cour de justice de l’Union européenne, *Dossier de procédure original: affaire 2/78* (CJUE-2123), 30 et seq.

¹³¹ Case 2/78, *Commission v Belgium*, [1979] ECR 1761. Importantly: this is a post-*Cassis* case, which was decided on 16.5.1979 – that is nearly three months after the *Cassis* judgment of 20. 2.1979.

1. Spirits bearing a designation of origin and imported directly *from the country of origin* in containers intended for sale to consumers, provided that:

(a) the closure of the container is automatically rendered unusable on opening and bears the name or registered trade-mark of the manufacturer;

(b) the label on the container carries the following particulars in clearly legible print:

— ‘bottled in the country of origin’;

— the name or registered trademark and address of the manufacturer.

2. Spirits bearing a designation or origin, other than those referred to in paragraph (1) above, imported from a Member State of the [EU], provided that they are accompanied by one of the following official documents:

(a) the document relating to the product, issued by the authorities of the country of origin, certifying the right to the designation of origin;

(b) the copy or photocopy of the document referred to in subparagraph (a) above certified as a true copy of the original by the authorities of the exporting country, provided that those authorities state on the copy or the photocopy of the document of origin the quantity of spirits exported to Belgium if this differs from the quantity stated in the original document;

(c) a document relating to the product issued by the authorities of the exporting country certifying the right to the designation of origin.¹³²

The Ministerial Decree thus eliminated the requirement of possessing a certificate of authenticity for *direct* imports; yet it still required such a document for *indirect* imports – even when coming from a Member State of the European Union. And in its Article 258 proceedings against Belgium, the Commission therefore argued that the new Belgian legislation (still) violated Article 34 because it formally discriminated between direct and indirect imports by making indirect imports in free circulation in the Union “subject to more onerous conditions than those referred to in Article 1(1) of the [Ministerial Decree]”.¹³³ It consequently requested that the Belgian legislation “be amended so that a uniform system is established for the importation into Belgium of the products in question from other Member States, whether or not the products are imported directly from the country of origin”.¹³⁴

Belgium accepted this argument in 1978, when it repealed the 1976 amendment.¹³⁵ And this – ironically – meant however that by the time *Dassonville II* was decided, the Belgian law in existence was the original 1934 Royal Decree on certificates of origin! Belgium nevertheless claimed that the provisions of the 1934 law had been subject to a much more flexible

¹³² Arrête Ministériel du 2 Décembre 1976 Précisant les Eaux-de-vie qui Peuvent être considérées comme étant accompagnées du document prévu à l’Article 1^{er} de l’Arrête Royal N°57 du Décembre 1934 relatif aux eaux-de-vie. The latter can be found in: Cour de justice de l’Union européenne, *Dossier de procédure original: affaire 2/78* (CJUE-2123), 40.

¹³³ *Dassonville II* (supra n.131) – Facts and Issues, 1766.

¹³⁴ *Ibid.*, 1768.

¹³⁵ This happened on 27 February 1978 through the “Arrête Ministériel Abrogeant l’Arrête Ministériel du 2 Décembre 1976 Précisant les Eaux-de-Vie qui peuvent être considérées comme étant accompagnées du Document prévu à l’article 1^{er} de l’Arrête Royal N°57 du 20 Décembre 1934 relatif aux Eaux-de-Vie”. The document can be found in: Cour de justice de l’Union européenne, *Dossier de procédure original: affaire 2/78* (CJUE-2123), 66.

“administrative” interpretation. This flexibility was said to be the result of a number of administrative “circulars”, whose effect was described as follows:

- (a) Elimination of the requirement of a statement of the name of a Belgian consignee in the certificate of origin.
- (b) Acceptance of certificates issued by the United Kingdom authorities for countries other than Belgium.
- (c) Abolition of the rejection at the frontier of consignments of spirits bearing a designation but submitted without the necessary document and provision of opportunity for importers of one or more periods in order to obtain the document.¹³⁶

These administrative changes in the Belgian legal order were complemented by a second change – this time regarding the international legal environment. For after *Dassonville I* was decided, France and the United Kingdom had concluded a bilateral agreement “concerning the reciprocal protection of French designations of origin and the designation of ‘Scotch Whisky’”, which inter alia stated that – henceforth - “[t]he Government of the French Republic also requires, subject to its obligations under [European] law, that all importations of Scotch Whisky into French territory be accompanied by certificates, issued by the competent British authorities, that testify their origin and age”.¹³⁷ France had thereby chosen to implement this new international obligation by means of a 1976 French Customs Circular, which – ironically – now also required imports of Scotch Whisky to be accompanied by a British Customs Certificate. And, irony of ironies, like the Belgian authorities had originally demanded, the British customs certificate had to be specifically issued for the *French* market!

b. Re-Enter the “Court”: Advocate-General Opinion and Court Judgment

Should these national and international changes in the legal regime governing designations of origin lead to a different judicial result to the one in *Dassonville I*?

Advocate-General Reischl did not think so. For him, there remained four formal and substantive problems. First, he dismantled the argument that because France had followed the Belgian “example”, this would in any way influence the analysis: “[T]he Commission’s interest in a declaration of infringement of the Treaty does not fall away simply because other Member States have rules similar to the rules in question”.¹³⁸ Second, the legal regime examined by *Dassonville II* was for him the same as in *Dassonville I*.¹³⁹ Thirdly, the Advocate-General doubted that an administrative circular was enough to adjust the – formal – Belgian legislation.¹⁴⁰ And, finally, he still thought that the Belgian rules made the (parallel) importation

¹³⁶ *Dassonville II* (supra n.131) – Facts and Issues, 1772.

¹³⁷ Décret n° 75-1086 du 12 novembre 1975 portant publication de l’échange de lettres des 31 juillet et 11 septembre 1975 entre la France et la Grande-Bretagne concernant la protection réciproque d’appellations d’origine française et de l’application «Scotch Whisky» available here: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000500869.

¹³⁸ *Dassonville II* – Opinion of Advocate-General Reischl, 1791.

¹³⁹ *Ibid.*, 1792: “In my view, therefore, the problem which confronts us today is basically no different from the question which the Court had to decide in the reference for a preliminary ruling in the case of *Dassonville*.”

¹⁴⁰ *Ibid.*, 1793.

of goods in free circulation within the Union, while no longer impossible, more difficult.¹⁴¹ The *ratio* of *Dassonville I* had thus remained the same:

The requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.¹⁴²

This re-confirmation of the – limited – *ratio decidendi* of *Dassonville* hardly squares with any radical “neoliberal” interpretation of Article 34. And what should come to astonish – if not bewilder – the apostles of the “*Dassonville* revolution”, the Court did not even hold that this narrow *ratio* was fulfilled in the present case.¹⁴³ On the contrary, it found that the Belgian law did no longer violate Article 34; and more surprisingly still, it did not even quote the *Dassonville* formula!¹⁴⁴

What line of reasoning did the Court adopt? It started by (re)presenting its *Dassonville I* judgment,¹⁴⁵ and here focused on paragraph 6 – not paragraph 5 – of that judgment.¹⁴⁶ The Court thus insisted that “[t]he essential question” was whether the Belgian measures were “unreasonable in that they [were] disproportionate” in relation to the objective of guaranteeing the authenticity of the product.¹⁴⁷ Importantly, the Court underlined that it was not reviewing the unreasonableness of the Belgian requirement of a certificate of origin as such – perhaps because this ultimately depended on whether or not third-country goods were involved – and held:

¹⁴¹ *Ibid.*, 1794: “Finally, the fact remains that an importer who does not import the foods directly from the country of origin and cannot produce a certificate of origin cannot sell the relevant products under Article 1 of the Royal Decree No 57 until he is in a position to produce a certificate of origin. As the Commission rightly points out, it makes no difference in this respect whether the goods are stopped at the frontier or remain unsold in a dealer’s warehouse until the document is obtained. Above all, however, the intermediary in another Member State who re-exports only part of the goods in question cannot reasonably be expected to part with the original of the certificate of origin. In contrast to the repealed Arrêté Ministériel of 2 December 1976, Article 17 in conjunction with Article 6 of the circular to the Belgian customs officials of 4 August 1978 again expressly stipulates that customs officials may accept only original certificates and must reject photocopies.”

¹⁴² *Ibid.*, 1789.

¹⁴³ Importantly, the *Dassonville II* Court was – with regard to its judicial composition – almost the same Court as the *Dassonville I* Court. While not a Full Court judgment but only a chamber judgment with seven judges, five of the *Dassonville I* judges were nevertheless also present in the deliberation to *Dassonville II*, namely: H. Kutscher, J. Mertens de Wilmars, Lord Mackenzie Stuart, P. Pescatore, and M. Sørensen. Only two new judges (A. O’Keeffe and G. Bosco) had since joined the *Dassonville II* chamber. And crucially, Lord Mackenzie Stuart acted – again – as the Reporting Judge in *Dassonville II*.

¹⁴⁴ One is therefore slightly at a loss, when Gormley claims in “Articles 30-36 of the E.E.C. Treaty: The cases and some problems, with special reference to their relationship with the Articles of the Treaty concerning competition” (unpublished dissertation, 1979), Part III – Section 1, 13 that in its judgment in *Dassonville II* the Court “repeated its *Dassonville* formula”. I could not find the formula quoted – neither in the English or French version.

¹⁴⁵ When characterising the *ratio decidendi* of *Dassonville I*, the Court made no reference to the “*Dassonville* formula” but makes a reference to the first “Ground” of the first judgement (*Dassonville II* – Judgment, para.36): “The requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.”

¹⁴⁶ *Ibid.*, para.37.

¹⁴⁷ *Ibid.*, para.38.

[I]t is for the Court to settle *not* the question as to which method of checking authenticity is the most effective, but rather the question whether the method adopted by the Belgian Government, the effectiveness of which is not questioned and which is based on the examination of certificates of origin issued in the exporting Member State, causes a trader, *who wishes to import into Belgium from a Member State other than that of origin spirits bearing a designation of origin, difficulties in obtaining certificates which are unreasonable in relation to those which that State imposes on a direct importer* [.]¹⁴⁸

Put differently: the Court was not interested in the reasonableness of a certificate of origin as such; but rather whether the Belgian requirement was unreasonable in relation to goods not directly coming from the producer State. *Dassonville I* had thought that this was the case; yet in light of the administrative changes subsequently introduced by the Belgian customs authorities, the *Dassonville II* Court now felt that the national measures were no longer unreasonable.¹⁴⁹ And refuting the Commission's argument that any discrimination between direct and indirect importers would constitute a MEEQR, the Court – surprisingly – found that the Belgian administrative amendments had, with regard to parallel importers, “contributed to an appreciable improvement in the position in relation to direct importers”;¹⁵⁰ and it thus followed:

[E]ven if the system for checking the authenticity of products bearing a designation of origin as applied by the Belgian Government involves the importer of those products into Belgium in more difficulties than would result from a system of sealing and labelling, that fact cannot in itself constitute a failure by the Kingdom of Belgium to fulfil its obligations under Article [34] of the Treaty... It is necessary, however, to emphasize that the Kingdom of Belgium has a duty to ensure ... that traders wishing to import into Belgium spirits bearing a designation of origin ... and in free circulation in a regular manner in a Member State other than that of origin are able to effect such imports and are not placed at a disadvantage in relation to direct importers, save in so far as appears reasonable and strictly necessary to ensure the authenticity of those products.¹⁵¹

In essence: even if the Belgian system of certificates of origin – as customs formalities – would create more obstacles to all importers of those products than, say, a system of sealing or labelling, the Belgian measure was found *not* to violate Article 34. Unlike the view of the Commission,¹⁵² the Court held that the change in the administrative enforcement of the 1934 Royal Decree had significantly transformed the latter; and it would thus fall outside the scope of Article 34 altogether – despite the fact that it continued to be a *distinctly* applicable measure that

¹⁴⁸ Ibid., para.39 (emphasis added).

¹⁴⁹ Ibid., paras.42-43.

¹⁵⁰ *Dassonville II* – Judgment, para.44.

¹⁵¹ Ibid., paras.46 and 48 (emphasis added).

¹⁵² The Commission had of course argued that the Belgian law still violated Article 34 TFEU. Compare here also the Commission's answer to Written Question No 44/78, [1979] OJ C 253/4 about the complaint that France required certificates of origin when certain goods were imported. The Commission here held (ibid., 5): “Clearly, marking imports subject to the production of certificates of origin constitutes a like measure. Irrespective of the conditions upon which an origin certificate is issued, or the purposes for which it is required, the very fact of requiring it constitutes a formality liable to make the importation of products subject to it more difficult, and hence, is capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade. A certificate or origin required for products originating in the [Union] or for products originating in non-member countries, but in free circulation, constitutes a formality which is incompatible with the rules set out in Article [34] et seq. of the Treaty.”

should, theoretically, be subject to an absolute prohibition because it hindered directly or indirectly, actually or potentially imports into Belgium.

The Court here ceased to insist that any discrimination between import channels needed justification; only *unreasonable* discriminations between two importing countries would fall foul of Article 34. The *Dassonville II* Court was also no longer concerned with the treatment of third country goods in free circulation within the Union. Instead, the *ratio decidendi* of *Dassonville II* seemed to be that for all national measures having only a *qualitative* effect on imports, a rule of reason would apply within the scope of Article 34. *Dassonville II* can thus be seen to complete the path started by *Dassonville I*. For had the latter extended the rule of reason in *International Fruit* from direct to indirect imports of third-country goods, *Dassonville II* now extended that rule of reason to all qualitative restrictions on imports – including imports of Member State goods.

Conclusion

What is the best possible “meaning” of *Dassonville* – a case decided a few years after the end of the transitional period established for the internal market by the Rome Treaty, and long before the Single European Act? What was the *Dassonville* formula intended to “mean”; and how did the Court want it to be “understood”?

This article has tried to offer some – preliminary – answers to these questions. It will be recalled that on a textual level, the *Dassonville* formula suggests that all national laws that “directly or indirectly, actually or potentially” hinder trade would fall within the scope of Article 34; and that they would therefore, *prima facie*, be prohibited under European law. This radical “national” understanding of the internal market however encounters major problems when the judgment is placed in its historical context. For once this is done, it is extremely implausible that the normative and legal vocabulary of the time allowed the Court to even “think” in “national” categories. *Dassonville*, historically reconstructed, must rather be seen against the background of the Court’s past jurisprudence on the status of third-country goods in the customs union and its treatment of “mixed situations”, that is: situations in which private parties try to use national laws to restrict parallel trade.

What about *Dassonville*’s “illocutionary force”? What was the Court hoping to “do” for the future in deciding the case? The move from the Second Chamber to the Full Court suggests that the Court felt that this was an important judgment; yet why did it feel so? The principal answer suggested above was that the use of the *Dassonville* formula allowed the Court to signal – from the perspective of Article 34 – the existence of a doctrinal bridge between the free movement of goods provisions and the competition law rules. This bridge was the “pattern of trade” test that clarified, now for both parts of the Treaty, that public laws or private agreements that affected – directly or indirectly, actually or potentially – imports or exports within the common market could be judicially reviewed in the Union legal order. For Article 34 this specifically meant that the Court could analyse restrictions on *parallel* imports because the provision would cover *quantitative* as well as *qualitative* restrictions of intra-Union trade.¹⁵³ The Court’s primary intent was thus, in essence, to provide an – abstract – definition of MEEQR that would offer a judicial

¹⁵³ Commenting on the parallelism between the free movement provisions and the competition law provisions, Barents therefore rightly noted that “the concurrence between the jurisprudence on both groupings of provisions constitutes a logical consequence of the principle of unity of the (common) market”; see: R. Barents, *New Developments in Measures Having Equivalent Effect*, (1981) 18 Common Market Law Review 271 at 274.

pass-partout; yet that would also confirm – and not (!) contradict – the general-yet-GATT-consistent definition of MEEQR previously offered by the Commission.¹⁵⁴

This “author-centric” contextual interpretation of the judgment contrasts – strikingly – with the orthodox reading that sees the *Dassonville* formula as offering a hyper-liberalist definition of the internal market that radically dissociated itself from all conceptual shackles generally accepted in classic international trade law. While this is what the formula eventually *came to mean* today – after a complex reception history that will be discussed elsewhere;¹⁵⁵ the idea that the *Dassonville* Court was inspired by “a certain Jacobean conception of the common market-place” that “explicitly or implicitly rejects the GATT philosophy” by denying the Member States “wide regulatory autonomy, which really has as its implicit ideal type a transnational market-place which is identical to a national market-place”,¹⁵⁶ is utter historical nonsense that must be rejected as a complete “philosophical” folly. And while this article could not explore the immediate post-*Dassonville* context in detail to further strengthen this point,¹⁵⁷ at least one case – *Dassonville II* – was discussed to show that even regardless of what the *Dassonville I* judges subjectively intended, their subsequent judgments simply do not confirm – whatsoever – the “national market-place” view.

What does this all mean for the “meaning and understanding of European law”? First and foremost: the classic *Dassonville-Cassis* story according to which *Dassonville* radically abandons the international GATT categories by giving Article 34 a “national” scope, while *Cassis* subsequently “limits” the *Dassonville* revolution through the introduction of implied exemptions to pacify the Member States is fundamentally flawed.¹⁵⁸ The idea that *Cassis* is a “conservative” judgment and that the *Cassis* principle of mutual recognition constitutes “a banal doctrinal manifestation of the principle of [proportionality]” following *Dassonville* commits one of the greatest mistakes in the history of European law.¹⁵⁹ Two further methodological conclusions must therefore also be drawn. To begin with, each generation of European integration scholars should “re-read” the classics and discover their meaning for itself. Previous readings – including this one – must always be critically tested; for simply to accept an “orthodox” interpretation that is “given to us” by the past “authorities” is to engage in religious not academic thinking. Importantly, this conclusion is not meant to “postmodernistically” challenge the idea of meaning at all; because it unconditionally accept that there are – better – reconstructions than others; yet it unconditionally challenges the “positivist” fallacy that the meaning of a legal provision or case – like that of any text – is permanent and intransient. To quote Quentin Skinner one last time:

As we analyse and reflect on our normative concepts, it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual traditions must be *the* ways of thinking about them. Given this situation, one of the contributions that historians can make is to offer us a kind of exorcism. If we approach

¹⁵⁴ On the idea that the Court here indeed “only” confirmed (!) the Commission view, see: R. Schütze, *Framing Dassonville* (supra n.14), Chapters 2 and 4.

¹⁵⁵ *Ibid.*, Chapters 4 and 5.

¹⁵⁶ J. H.H. Weiler, *Epilogue: Towards a Common Law of International Trade* (supra n.2), 215.

¹⁵⁷ For a closer analysis here, see: R. Schütze, *Framing Dassonville* (supra n.14), 4.

¹⁵⁸ For representative examples of the “orthodox view” in English, see supra nn.9-13 above, and for the German literature, see only: U. Haltern, *Europarecht* (Mohr Siebeck, 2005), Chapter 14 (essentially “translating” the Weiler “story” almost word for word into German); as well as: F.C. Mayer, *Die Warenverkehrsfreiheit im Europarecht – Eine Rekonstruktion*, (2003) 38 *Europarecht* 793 esp. at 797.

¹⁵⁹ *Ibid.*, 231. For a detailed discussion where “Cassis” potentially comes from and how it relates to *Dassonville*, see: R. Schütze, *Framing Dassonville* (supra n.14), Chapter 5.

the past with a willingness to listen, with a commitment to trying to see things their way, we can hope to prevent ourselves from becoming readily bewitched.¹⁶⁰

Alas, *sapere aude!* But to dare means to challenge (and criticise), and to challenge requires courage and time – two essential and “critical” elements that seem to be in short supply “these days” in European constitutional law scholarship.¹⁶¹

But there is also an important – and much more positive – third conclusion for European law and lawyers: the re-reading of classic cases cannot be left to historians and sociologists alone. While the historical and sociological work done by – to name just two brilliant colleagues and friends – Morten Rasmussen and Antoine Vauchez is mesmerising,¹⁶² the best way to arrive at an “understanding” of what the European Court as a *judicial* actor is doing is to analyse the *judicial* moves that it makes. Law, as an *order* of legal rules and principles, is a discipline that exercises *discipline* on its actors. A history of European law must therefore, in addition to its “external” and “contextual” dimensions, always take account of the “internal” judicial perspective. Every judicial decision will always have a doctrinal context, which is itself surrounded by a broader legal, sociological and political context. The study of “*law in context*” must thus mean a study in contextualised “law” because a legal order constitutes a “system” that has its own *context-independent* internal logic. The “new history of European law” must therefore be an interdisciplinary project that takes the “law” – and its “moves” and “games” – seriously.

With the historical archives of the European Court now open to academic interlocutors, the “classics” of European law are bound to experience a “renaissance” – and what historically more appropriate setting than Florence! Let us hope that a re-birth and re-reading of the classics of European law will soon follow – a re-reading that will hopefully leave all conventional-yet-mistaken “orthodoxies” of the past behind. For in these uncertain times of crisis after crisis, the future of the European Union may well be decided; and in order to evaluate and comprehend the various “futures” on offer, to see where we came from and where we are going, we need to better understand the past. A return to the classics here promises liberation from the “medieval” thinking offered by today’s high priests of European law. Stuck in their “old” ways and believing the present to be the past and the past to be the present, these “philosophical” – and more often than not: pop-philosophical – authorities do not help but hinder directly or indirectly, actually or potentially a vital re-reading and re-imaging of the European Union in its past, present and future.

¹⁶⁰ Q. Skinner, *Visions of Politics – Volume 1: Regarding Method* (Cambridge University Press, 2002), 6.

¹⁶¹ The criticism holds particularly true for EU constitutional theory scholarship, where it has become fashionable in the past twenty years to engage in a cyclical revisiting of the past secondary literature and where past “authorities” are combined and re-combined, criticised and re-criticised, cited and re-cited; and in which the tertiary literature derived from that stale process of abstract commentary then becomes itself the subject of study for the next generation of constitutional “theorists”.

¹⁶² The work on *Van Gend* and *Costa* that Professors Rasmussen and Vauchez have done is fascinating; and excellent illustrations of their respective research programmes can be found here: M. Rasmussen, *Revolutionizing European law: A history of the Van Gend en Loos judgment*, (2014) 12 *International Journal of Constitutional Law* 136; and A. Vauchez, *Brokering Europe: Euro-Layers and the Making of a Transnational Polity* (Cambridge University Press, 2015) – with references to Vauchez’s earlier work.