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AUTHOR	Jukka Snell
TITLE	<i>Cassis de Dijon</i> and the Principle of Mutual Recognition
YEAR	2025
DOI	http://dx.doi.org/10.5040/9781509954209.ch-002
VERSION	Publisher's PDF
CITATION	Snell, J. (2025). <i>Cassis de Dijon</i> and the Principle of Mutual Recognition. In P. Craig & R. Schütze (Ed.). <i>Landmark Cases in EU Law, Volume 2: Substantive Cases</i> (pp. 35–50). Oxford Dublin: Hart Publishing. Retrieved August 4, 2025, from http://dx.doi.org/10.5040/9781509954209.ch-002

2

Cassis de Dijon and the Principle of Mutual Recognition

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I. Introduction

There are few cases that have had a more profound impact on European integration than *Cassis de Dijon*.¹ According to Lord Stuart Mackenzie, a judge at the Court of Justice of the European Union between 1973 and 1988, *Cassis* was the most important decision made by the Court during his tenure,² while Lord Cockfield, the internal market Commissioner between 1984 and 1988, is reported to have considered the exportation of *Cassis* from the Court and goods to the broader single market 1992 programme his greatest achievement.³

The ruling in *Cassis* responded to a serious problem for the common market. The economies of European Union (EU) countries are typically highly regulated, sometimes with centuries' worth of regulatory traditions. Their national rules are often very different from each other. This hinders trade and may even make it impossible. The European Economic Community (EEC, later the EU) had attempted to deal with the issue through legislative harmonisation. This had not been particularly successful. The Luxembourg Accords of 1966 had maintained national vetoes on EU legislation,⁴ and made laws harder to pass. At the same time, the task of harmonisation was greater than had been anticipated. The removal of the obvious barriers like tariffs and quotas revealed the sheer quantity of non-tariff barriers that also obstructed trade,⁵ and technological progress meant that new topics for harmonisation arose continuously. In *Cassis*, the Court sought to cut the Gordian knot with the principle of mutual

¹Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 ('*Cassis de Dijon*').

²Reported in P Craig and G de Búrca, *EC Law*, 1st edn (Oxford University Press, 1995) 614.

³Reported in K Nicolaïdes, 'The *Cassis* Legacy' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2017) 279.

⁴See, eg, J Gillingham, *European Integration 1950–2003: Superstate or New Market Economy?* (Cambridge University Press, 2003) 68–72.

⁵See MP Egan, *Constructing a European Market: Standards, Regulation, and Governance* (Oxford University Press, 2001) 41.

recognition.⁶ The Treaty could be invoked to solve at least some of the problems that divergent national rules created. And as a corollary, perhaps everything did not need to be harmonised and instead different national rules could be mutually recognised. However, this was tempered with the creation of a doctrine of ‘mandatory requirements’ with unclear legal origins.

This chapter will begin by considering the context from which the case arose. It will then home in on the judgment itself. This will be followed by an examination of the reception of the ruling. Both the political and the academic reception will be analysed. The overall picture that emerges is one of profound disagreement concerning the legal principles underpinning the decision, as well as its application and its implications, but a broad agreement on the constitutional model that it advances for the EU. Finally, the chapter will conclude with a brief assessment of follow-up cases, looking at how the Court has answered some of the questions *Cassis* left open and contrasting the sometimes cautious and sometimes bold approaches of the Court.

II. Historical and Doctrinal Context

Free movement of goods occupied pride of place in the EEC Treaty. At the heart of the Treaty was the common market, and goods were at the heart of that. Yet the legal rules written into the Treaty were characterised by their cryptic language. The key provision, Article 34 of the Treaty on the Functioning of the European Union (TFEU) in today’s parlance, prohibited quantitative restrictions on imports and all measures having equivalent effect between Member States. What did it mean? The reference to quantitative restrictions was clear. Quotas that set numerical limits to the number of items that can be imported are a well-known evil in the international trading system and had already been addressed under the General Agreement on Tariffs and Trade (GATT). But what were measures of equivalent effect? Apparently, the origin of the phrase was a query by a mid-level customs official during the Treaty negotiations; they were concerned that a simple ban on quotas could be circumvented.⁷ In principle, the words could be read narrowly to outlaw national rules that discriminate against foreign products. After all, import quotas have a discriminatory effect. But they were open to a much wider reading as well – anything that reduces the quantity of imported products could be caught.

The Commission had engaged with the breadth of Article 34 TFEU in Directive 70/50/EEC,⁸ where it set out its view of the measures Member States needed to abolish. The Commission laid down two main categories. The first were national

⁶The Court only used this term explicitly in Case C-110/05 *Commission v Italy* EU:C:2009:66, para 34. See C Barnard, ‘The Missing Ingredient in *Cassis de Dijon*: An Exercise in Legal Archaeology’ in A Albors-Llorens, C Barnard and B Leucht (eds), *Cassis de Dijon 40 Years On* (Hart Publishing, 2021) 43, 57–63 on the origins of the principle.

⁷A Prate, *Quelle Europe?* (Commentaire Julliard, 1991) 55; A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (UCL Press, 1999) 146.

⁸Commission Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L13/29.

measures that discriminated in one way or another – they were the target of Article 2 of the Directive. The second category was measures that related to the marketing of products and which applied equally to domestic and imported products. As a general rule, the Commission did not deem them equivalent to quantitative restrictions ‘since such effects are normally inherent in the disparities between rules applied by Member States in this respect’. However, the Commission identified a particular group of equally applicable national rules that could nevertheless fall foul of the free movement of goods. These were the rules that either precluded imports or had the effect of making imports more costly than domestic products, provided this was not necessary to achieve objectives the Treaty permitted the Member States to pursue. This idea was operationalised in Article 3, which targeted national measures

governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.

The Directive explained that this was the case, in particular, where the restrictive effects on free movement of goods were out of proportion to their purpose or where the same objective could be attained by other means which were less of a hindrance to trade. In other words, in the Commission’s view Article 34 TFEU was primarily concerned with discriminatory national rules, but in special cases it could also capture rules that did not discriminate on their face but had effects that went beyond those intrinsic to trade rules.⁹

The Court took its first real look at the reach of Article 34 TFEU in *Dassonville*.¹⁰ The Court borrowed a phrase from competition law¹¹ and found that the concept of measures having an effect equivalent to quantitative restrictions captured ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[EU]trade’. This phrase was open to a wide interpretation, going well beyond targeting just discriminatory national rules. However, the Court continued that ‘reasonable’ national rules could still be accepted under the provision. On the facts, the Court unsurprisingly ended up condemning the relevant Belgian rules requiring certificates of authenticity. However, only in *Cassis de Dijon* did the Court engage properly with factual circumstances that did not involve any border restrictions or manifest discrimination.¹² In *Cassis* the Court put the abstract *Dassonville* formula into practice and also elaborated on the remark that restrictive but reasonable national rules could still be accepted.

⁹ See B Leucht, ‘The Policy Origins of the European Economic Constitution’ (2018) 24 *European Law Journal* 191 on the background to the Directive.

¹⁰ Case 8/74 *Dassonville* EU:C:1974:82. This case is examined in ch 1 of this volume.

¹¹ Joined Cases 56 and 58/64 *Consten and Grundig* EU:C:1966:41.

¹² This is emphasised by N Bernard, ‘On the Art of Not Mixing One’s Drinks: *Dassonville* and *Cassis de Dijon* Revisited’ in M Póiares Maduro and L Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) 456, 457–59. In the same vein, R Schütze, ‘From *Dassonville* to *Cassis*: The Revolution that Did Not Take Place’ in Albers-Llorens, Barnard and Leucht (eds) (n 6) 23 shows that the case law before *Cassis* did not on the facts contain any real departures from the international trade law logic of GATT.

III. Facts and Judgment

Cassis de Dijon was a test case.¹³ A German supermarket chain, Rewe, decided to challenge national rules on the sale of alcohol. Specifically, the challenge concerned the importation of traditional 'Cassis de Dijon' blackcurrant liqueur from France into Germany. The applicable national law provided, *inter alia*, that fruit liqueurs could only be sold in Germany if their alcoholic content exceeded 25 per cent. Cassis was below this threshold, with an alcoholic content of only 15–20 per cent. Importantly, the rule applied equally both to domestic and imported fruit liqueurs. The national court decided to refer the case to the European Court, asking in particular whether the German rules constituted measures having an effect equivalent to quantitative restrictions on imports within the meaning of Article 34 TFEU.

Advocate General Capotorti began his Opinion¹⁴ by stating that the German rules at first sight fell within the *Dassonville*-formula set out in the previous section. He then turned to examine and ultimately refute the argument of the defendant, according to which this was an area left to the Member States pending EU harmonisation, and Article 34 TFEU was limited to trading measures relating solely to imported goods. The argument was based on Directive 70/50, also dealt with in section II. The Advocate General noted that the Directive was a part of the EU's early effort to abolish quotas progressively, and this context explained the Commission's cautious attitude to equally applicable rules. He also pointed out that although Member States retained their regulatory powers, those powers had to be exercised in accordance with the Treaty, including Article 34 TFEU. Further, the mere fact that the EU had the power to harmonise rules, such as the one at hand, did not render those rules immune from Article 34 TFEU. In this context, he noted the failure of the Council to address effectively the many non-tariff barriers to free movement of goods.

Having found that the German rules constituted an obstacle, the Advocate General turned to the issue of justification. Three aims had been put forward: public health; consumer protection against fraud; and the suppression of unfair competition. He was able to situate the first two into the framework of Article 36 TFEU, but expressed doubts whether unfair competition issues fell within the remit of its public policy ground. He was not convinced that the rules protected public health, and argued that the real motive behind the rules was the protection of a national market tradition to which local producers had conformed but which was vulnerable to the imports of fruit liqueurs from other Member States. He concluded that the rules were disproportionate and could not be justified.

The Court came to the same conclusion as its Advocate General, although with more creative reasoning. It began its ruling by stating that in the absence of detailed EU rules on the production and marketing of alcoholic beverages, every Member State

¹³ See on the background to the ruling Barnard (n 6); and B Leucht, 'The Cassis de Dijon Judgment and the European Commission' in Albors-Llorens, Barnard and Leucht (eds) (n 6) 69.

¹⁴ Opinion of AG Capotorti in Case 120/78 *Cassis de Dijon* EU:C:1979:3.

was competent to regulate the matter on its own territory. However, it then pointed out that differences between national laws could create obstacles to free movement of goods. These obstacles could in turn only be accepted if the national rules were 'necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.¹⁵

The Court then turned to the issue of possible justifications. The Court rejected the public health argument out of hand. Germany had claimed that weak alcoholic beverages were a particular menace from the health perspective, but the Court laconically pointed out that Germany already allowed a wide range of low-alcohol beverages and in any event strongly alcoholic drinks can be diluted with water.

Germany's second argument was better. It claimed that its rules were necessary to protect consumers against unfair practices. The concern expressed by Germany was that producers might seek to lower the alcohol content to secure a competitive advantage; given the taxes imposed on alcohol, weaker drinks could be sold more cheaply. In this context, Germany warned of a kind of 'race to the bottom', where the lowest standard among the Member States would prevail. The Court ended up rejecting this argument too. It accepted that rules on alcohol content can have some benefits for market transparency, but held that a compulsory fixing of minimum alcohol contents went too far. The Court reasoned that the fairness of commercial transactions could be achieved by requiring that the origin and alcoholic strength be displayed on the packaging; content rules could be replaced by less intrusive labelling requirements.

Based on this reasoning, the Court drew the conclusion that the German rules could not be justified and had the effect of excluding from the German market products of other EU countries. As a result, they violated Article 34 TFEU. Famously, the Court ended its reasoning by putting forward the idea of mutual recognition. This was not strictly necessary for the ruling, but allowed the Court to express a broader principle:

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.¹⁶

Accordingly, it provided the referring national court with the following answer:

The concept of 'measures having an effect equivalent to quantitative restrictions on imports' contained in [Article 34 TFEU] is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

¹⁵ Case 120/78 *Cassis de Dijon* (n 1) para 8.

¹⁶ *ibid* 14.

IV. Reception of the Judgment

A. Political Reception: Disagreement on the Significance

The Commission and the Council had diverging views of the significance of the ruling in *Cassis de Dijon*, with the Commission stressing the importance of the judgment and the Council playing down its impact. It is worth comparing their reactions.

Roughly 20 months after the ruling was handed down, the Commission issued a Communication on the implications of the judgment.¹⁷ It emphasised the broadness of the Court's interpretation of Article 34 TFEU, which encompassed equally applicable national rules, and the establishment of the principle of mutual recognition. This implied, explained the Commission, that Member States were not allowed to take an exclusively national viewpoint but instead had to consider the legitimate requirements of the other Member States. The Commission continued that exceptions to the principle of mutual recognition could only be accepted under very strict conditions. Following from this, the Commission set out two guidelines: First, Member States could not prohibit the importation of products which 'suitably and satisfactorily' met the objectives of its rules, even if they did so in a different way from domestic products. In this respect, the Commission undertook to tackle a whole body of national commercial rules which imposed technical or qualitative conditions on products. Second, harmonisation efforts would now be concentrated on those instances where barriers to trade could still be justified under the Court's criteria.¹⁸

The Council Legal Services took a different view.¹⁹ It argued that *Cassis* had changed little. The criteria of Directive 70/50/EEC remained in operation. Instead of a semi-automatic mutual recognition envisaged by the Commission, the Council Legal Services maintained that national rules had to be examined on a case-by-case basis. An intense debate followed, involving not only academics but also consumer and producer groups. The Commission Communication and the reaction that followed served to highlight the importance of the ruling in *Cassis*. Without them, the judgment might have languished in relative obscurity; now it was thrust to the limelight and the centre of discussion.²⁰

Despite the stark initial differences in the interpretation of *Cassis*, in the medium term the judgment proved to have a significant impact on the political shaping of the

¹⁷ Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('*Cassis de Dijon*') [1980] OJ C256/2.

¹⁸ In practice, Member States have often wished to harmonise instead of allowing mutual recognition to prevail, even when the harmonisation was not strictly necessary. As pointed out by S Weatherill, 'Did *Cassis de Dijon* Make a Difference?' in Albers-Llorens, Barnard and Leucht (eds) (n 6) 119, 133 a prime example is Council Regulation (EEC) No 1576/89 laying down general rules on the definition, description and presentation of spirit drinks [1989] OJ L160/1, which harmonised the subject matter of the *Cassis* case itself.

¹⁹ Conseil des Communautés européennes: Conséquences des arrêts de la Cour de justice dans les affaires 120/78 (*cassis de Dijon*) et 788/79 (*vinaigre*) quant à l'application des règles du traité CEE sur la libre circulation des marchandises, Service juridique du Conseil des Communautés européennes 1980 no 10690/80, 9.

²⁰ KJ Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision' (1994) 26 *Comparative Political Studies* 535, 540–45.

internal market. Following an intense pressure from European industry and a turn towards centre-right political parties in many national elections, the market integration project was relaunched under the new name of the ‘internal market.’²¹ This culminated in the Single European Act, which established the goal of the creation of the internal market by the deadline of 1992 and brought in qualified majority voting in the Council as a means of achieving it. Mutual recognition became a key aspect of the EU’s new approach to harmonisation.²²

B. Academic Reception: Disagreement on the Underlying Principles

It was not just EU institutions that differed in their interpretation of *Cassis de Dijon*; it also engendered an intense academic debate. This had a number of aspects, only some of which can be covered here due to the massive volume of literature devoted to the ruling. First of all, there was disagreement concerning the legal principles that underpinned the judgment. How could the decision be best explained and justified? The Court did not draw from the language of the Treaty, and neither Directive 70/50/EEC nor *Dassonville* was mentioned in the ruling itself. Instead, the Court engaged in legal innovation. It asserted that equally applicable rules could constitute obstacles but limited this by developing a doctrine of mandatory requirements which could be brought in to save them. The wide differences in opinion can be appreciated by comparing the views of Gormley and Marengo, discussed below.

One possible explanation and justification was offered by Gormley.²³ For him, *Cassis* was, first of all, a corollary of *Dassonville*. A negative prohibition was put in place in *Dassonville*, while *Cassis* expressed the positive ‘mutual acceptance’ dimension of free movement of goods.²⁴ As regards mandatory requirements, Gormley termed this an expression of ‘the rule of reason’. Again, the origins of this could be found in *Dassonville*, but the idea was put forward more clearly in *Cassis*. He acknowledged that there was a potential objection to the Court simply creating exceptions to the Treaty rules at will. However, the objection could in his view be met. The rule of reason did not deny that national rules fell within the ambit of Article 34 TFEU ‘but rather it is a reflection of the *lacunae* which exist in the present state of integration.’²⁵ In other words, the Court recognised that certain interests and values had to be protected in the general interest. Eventually this would be done by the EU legislature, but pending that, Member States had to be allowed to take the necessary actions on a provisional basis. Mandatory

²¹ See A Moravcsik, ‘Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community’ (1991) 45 *International Organization* 19; and W Sandholtz and J Zysman, ‘1992: Recasting the European Bargain’ (1989) 42 *World Politics* 95 for classic studies of the impetus behind the single market project.

²² See generally, eg, J Pelkmans, ‘The New Approach to Technical Harmonization and Standardization’ (1987) 25 *Journal of Common Market Studies* 249.

²³ LW Gormley, *Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30–36 of the EEC Treaty* (TMC Asser Instituut, 1985).

²⁴ *ibid* 46–51.

²⁵ *ibid* 52.

requirements were temporary stopgaps that the Court had developed in the same manner as domestic courts had developed equitable principles.

Marenco put forward a very different view.²⁶ He specifically sought to defend the idea that restrictive effects on imports could only be derived from a comparison with the way in which the corresponding situations were treated in the importing State. He argued that, even after *Cassis*, at the core of Article 34 TFEU was the prohibition of discrimination in all its forms, including subtle, indirect forms of discrimination,²⁷ as in *Cassis* itself. His analysis focused on the actual facts of the case, rather than just on the language of the judicial pronouncements. In the presence of disparate local traditions, national legislation that is only shaped by domestic traditions automatically disadvantages imports; it amounts to material discrimination. Uniform national rules are applied to the objectively different situation of traditional products coming from another EU country. He also pointed out that if national rules of the importing country required that changes be made to the product, this could put goods originating in other Member States at a disadvantage. As for the mandatory requirements, Marenco posited that the examination of the objectives and the proportionality of national rules allowed the Court to detect subtle, hidden forms of discrimination. If the scrutiny of national rules with protective effects failed to detect worthy objectives, or if the rules were found to be disproportionate, this served to reveal their discriminatory character.²⁸ For Marenco, this interpretation of free movement of goods was consistent with the most fundamental objectives of integration: Member States had to remain free to experiment and make mistakes, as long as they did not engage in protectionism. Trying to impose uniformity through Article 34 TFEU would run counter to the whole concept of Europe.²⁹

The divergence between the readings of Gormley and Marenco is striking, especially given that they both worked for the EU Commission at the time. For Gormley, Article 34 TFEU had transcended discrimination. For Marenco, it was bound to that concept, but the Court had simply developed ways to tackle subtle forms of discrimination. For Gormley, Member States could continue to protect interests and values in the general interest until the EU got around to the job of legislating. For Marenco, Member States were free to legislate as long as they did not engage in protectionism, and this feature was inherent in the non-centralised nature of Europe.

C. Academic Reception: Disagreement and Criticism of the Consequences

The academic debate did not end with the analysis of the legal principles underpinning *Cassis de Dijon*. The reasoning and consequences of the ruling were also criticised, and there were diametrically opposing views of its impact on the integration project as a

²⁶ G Marenco, 'Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative' (1984) 19 *Cahiers de droit européen* 291.

²⁷ *ibid* 304.

²⁸ *ibid* esp 323–24.

²⁹ *ibid* 351.

whole. Some thought that the Court had gone too far and that the implications of the judgment were ultimately harmful for Europe. Others downplayed the significance of the ruling and argued that a functioning internal market could not be built solely on the foundations it had established.

Von Heydebrand ud Lasa offers an example of the camp of commentators who argued that the Court had gone too far.³⁰ He directed his critique at the reasoning and the consequences of the judgment. For him, the assertion made by the Court that product composition rules were excessive as consumers could be protected by labelling was frequently wrong on the facts. The majority of consumers do not necessarily pay attention to the information given on labels,³¹ and of course some cannot even read them. Further, he raised the concern that the people of a Member State could no longer enforce their democratically expressed views on the quality, composition, designation and presentation of their food, assuming that the country of export held different views. He warned of the danger of a race to the bottom, and concluded that ‘the Court of Justice emphasises free trade too much and local needs too little.’³²

Scharpf pushed a similar critical approach further, arguing that the broader implications of the approach the Court adopted in *Cassis* were deeply damaging for Europe.³³ His first point was institutional: in *Cassis* the Court had elevated its own institutional position. It could now engage in ‘quasi-discretionary control over the substance of member state policies’³⁴ by applying mandatory requirements and proportionality. For him, in *Cassis* the Court had ‘visibly gone beyond the outer limits of text-based Treaty interpretation and asserted its claim to share the Treaty-amending powers of the unanimous member states.’³⁵ From this flowed substantive and structural consequences. *Cassis* was an invitation to litigate directed at international companies. Legal actions brought by them inevitably resulted in court-driven deregulation. At the same time, the regulatory competition unleashed by mutual recognition put pressure on national systems. Yet this strengthening of negative integration was not matched by an increased capacity for positive integration. The EU legislative process remained as difficult as ever, with veto points and super-majority requirements. Further, the EU legislature itself was not immune from the free movement of goods rules, which put substantive limits to its ability to legislate. Scharpf argued that this had profound consequences, such as the general weakening of political legitimacy as a result of the loss of problem-solving capacity. For him, a European social market economy cannot come about, and social market economics at the national level will be destroyed, ‘unless the politically uncontrolled dynamics of (negative) “integration through law” can be contained.’³⁶

³⁰ H-C von Heydebrand ud Lasa, ‘Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got It Wrong?’ (1991) 16 *European Law Review* 391.

³¹ When I have made this point in my teaching, students tend to accept it in general but invariably argue that alcoholic strength is an exception.

³² von Heydebrand ud Lasa (n 30) 413.

³³ See FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) esp ch 2; and FW Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211.

³⁴ Scharpf, ‘The Asymmetry of European Integration’ (n 33) 219.

³⁵ *ibid.*

³⁶ *ibid.* 244.

Weiler put forward a very different critical take on *Cassis*.³⁷ In his view, the term ‘mutual recognition’ was a misleading rhetorical device, and a more accurate description of the Court’s actual practice was ‘functional parallelism’. Only once a label indicating the lower alcoholic content had been affixed did the French cassis become functionally similar to German fruit liqueurs from the perspective of the German rules on the fairness of commercial transactions. Rather than being a radical departure, this was a conservative application of the principle of proportionality.³⁸ Further, it failed to solve the problem of divergent national standards in practice. Weiler identified two major reasons for this. First, the insistence on European rights will result in litigation and may bring victory, but from a commercial perspective companies cannot base their investments and operations on a hope of an eventual triumph in a court. Second, in many instances there are real differences between national regulatory regimes and therefore no functional parallelism. For him, *Cassis* was ‘perhaps, an intellectual breakthrough but a colossal market failure’.³⁹

Pelkmans echoed the conclusions of Weiler.⁴⁰ He approached the issue from an economic perspective, drawing a distinction between judicial mutual recognition, as in *Cassis*, and mutual recognition obligations written into legislation. While he was reasonably optimistic for the latter category of regulatory mutual recognition, he was highly sceptical of the practical benefits of judicial mutual recognition.⁴¹ First, there are information costs, which are particularly high for judicial mutual recognition. What companies see are the requirements in national laws. They may not be aware of the Court’s case law and may find it difficult to verify whether it applies to their products. Further, there is uncertainty about equivalence, and national civil servants tend to insist on compliance with local rules rather than explore the opportunities for mutual recognition. As a result, companies either fail to export or are forced to modify their products to comply with local requirements. Second, there are transaction costs. This includes waiting costs and reputational costs if product withdrawal is imposed by national authorities. Enforcement of EU rights can be slow and costly, and may also jeopardise future business opportunities in the destination country. Finally, there are compliance costs if judicial mutual recognition fails. Pelkmans’ view was that while the mutual recognition rulings on goods ‘might give the impression of a monumental edifice, governing and safeguarding free movement’,⁴² serious obstacles remain for the effectiveness of judicial mutual recognition.

³⁷ JHH Weiler, ‘The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 349.

³⁸ P Oliver and M Martínez Navarro, ‘Free Movement of Goods’ in C Barnard and S Peers (eds), *European Union Law*, 3rd edn (Oxford University Press, 2020) 366, 383–84; see mutual recognition as resulting from the joint application of the principles of proportionality and the duty of sincere cooperation.

³⁹ Weiler (n 37) 368. In the words of S Weatherill, ‘The Principle of Mutual Recognition: It Doesn’t Work Because It Doesn’t Exist’ (2018) 43 *European Law Review* 224, 232: ‘The space allowed by EU law for justification is simultaneously a laudable expression of managed but admitted regulatory diversity and a serious obstacle to confident cross-border trading.’

⁴⁰ J Pelkmans, ‘Mutual Recognition in Goods. On Promises and Disillusions’ (2007) 14 *Journal of European Public Policy* 699.

⁴¹ *ibid* 708–11.

⁴² *ibid* 713.

D. Academic Reception: General Agreement on the Implications for the EU's Constitutional Model

While there was disagreement on the basis and effects of *Cassis de Dijon* among academic commentators, as has been seen above, a greater consensus has emerged on the implications of the judgment for the EU's constitutional set-up. This has two elements. The first concerns the degree of centralisation that the European integration project entails. Is it aiming for a market akin to one of a unitary state, is the model a federal one, or does it only resemble an international free trade area? Second, what are the respective roles of the judiciary and the legislature in the system?

On the first element, the degree of centralisation, Póitres Maduro saw mutual recognition, introduced in *Cassis* and included in the new approach to harmonisation, as the basis of the 'competitive model of the European Economic Constitution'.⁴³ For him, this model promotes competition among national rules and can be contrasted with a centralised model based on harmonisation and with a decentralised model that only demands non-discrimination. For Snell, *Cassis*, when read in the light of the subsequent judgments in *Keck* and *Alpine Investments*,⁴⁴ contributed to a 'decentralised, federal Community, where Member States' regulatory competences are preserved'.⁴⁵ The rulings served to allocate the primary legislative responsibility for products and production to the home state and for market circumstances to the host state. Schütze argued that *Cassis* introduced a 'federal perspective into Article 34 TFEU'.⁴⁶ The problem that it solved was the danger of a simultaneous application of multiple different national standards. He saw *Cassis* as an important move away from an international model of economic constitution towards a federal one. Despite various differences on the specifics,⁴⁷ there is an agreement that *Cassis* was a major constitutional moment.

On the second element, the role of the judiciary vis-à-vis the legislature, already the title of Póitres Maduro's book 'We the Court' is illustrative.⁴⁸ Póitres Maduro contrasted the decisive role played by the Court in the shaping of the EU constitutional model with the US, where the Constitution famously starts with the words 'We the People'. Before *Cassis*, the primary responsibility for advancing economic integration had been in the hands of the EU legislature, which was supposed to create the common market through harmonisation. Following its failure to achieve this, the Court seized a more prominent role and set out new parameters for market integration based on mutual recognition. Further, in this system the Court, together with national courts, also became the key

⁴³ M Póitres Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998) 131.

⁴⁴ Joined Cases C-267/91 and C-268/91 *Keck* EU:C:1993:905; Case C-384/93 *Alpine Investments* EU:C:1995:126.

⁴⁵ J Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms* (Oxford University Press, 2002) 45.

⁴⁶ R Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press, 2017) 134.

⁴⁷ See, eg, R Schütze, 'Judicial Majoritarianism Revisited: "We, the Other Court"?' (2018) 43 *European Law Review* 269.

⁴⁸ Póitres Maduro (n 43).

decision maker on the balance between free movement and various public interest goals through the application of mandatory requirements and proportionality.⁴⁹

V. Subsequent Cases

There have been numerous follow-up cases to *Cassis de Dijon*.⁵⁰ The principles it ushered in have been applied to national rules on vinegar, beer, pasta and countless other food-stuffs, as well as to diverse other subject matter. In this section, two categories of cases will be highlighted: those that have answered some of the key questions left open by *Cassis*, and those that have sought to fine-tune mutual recognition and export it to the other freedoms.⁵¹

A. Answering Open Questions

The first question that had to be answered concerned mandatory requirements: were they an extension of the justifications included in Article 36 TFEU? An argument in support of such a view is that the Court included ‘public health’ as one of the mandatory requirements it listed in *Cassis de Dijon*, while the ground of ‘the protection of health and life of humans’ was already found in Article 36 TFEU. However, in *Irish Souvenirs* the Court drew a distinction between the express Treaty derogations and the judge-made mandatory requirements.⁵² At issue were Irish rules that prohibited the sale of imported jewellery that depicted Irish motifs, such as a shamrock, unless it bore an indication of its country of origin or the word ‘foreign’. Ireland sought to rely on the interests of consumer protection and fairness of commercial transactions, but the Court was not impressed. It held that the exceptions contained in Article 36 TFEU could not be extended and did not include the grounds put forward by Ireland. Further, the Court found that Ireland could not rely on mandatory requirements either, since they ‘relate exclusively to provisions that regulate in a uniform manner the marketing of domestic products and imported products’,⁵³ while the Irish rules applied solely to imports. In other words, mandatory requirements were not a simple extension of Article 36 TFEU grounds such as public policy, but were distinct from them.

Another question concerned the Court’s reference to the mutual recognition of products ‘lawfully produced and marketed in one of the Member States’ in *Cassis*.⁵⁴ Were both truly required? The meaning of this phrase arose in particular in

⁴⁹ For a highly critical take on the role of the Court, see AJ Menéndez, ‘The Existential Crisis of the European Union’ (2013) 14 *German Law Journal* 453, 478–84.

⁵⁰ For statistical data, see A Albors-Llorens, C Barnard, and B Leucht, ‘Introduction: Why Revisit *Cassis de Dijon*?’ in Albors-Llorens, Barnard and Leucht (eds) (n 6) 1, 2–6.

⁵¹ For a further category of subsequent cases, see I Govaere, ‘“*Ceci n’est pas ... Cassis de Dijon*”: Some Reflections on Its Triple Regulatory Impact’ in Albors-Llorens, Barnard and Leucht (eds) (n 6) 97, 110–16 on the positive duties imposed on Member States.

⁵² Case 113/80 *Commission v Ireland* EU:C:1981:139 (*Irish Souvenirs*).

⁵³ *ibid* para 11.

⁵⁴ Case 120/78 *Cassis de Dijon* (n 1) para 14.

Czech Hallmarking.⁵⁵ The case concerned the refusal by Czechia to recognise hallmarks affixed by WaarborgHolland, which was an assay office established in the Netherlands but with branches in third countries. A particular issue related to precious metals that originated in third countries and had been hallmarked there in accordance with Dutch law, and then imported into the EU. The Grand Chamber of the Court drew a distinction between two situations. If the products had been imported from the third country into the EU and then lawfully marketed in one of the Member States, the principle of mutual recognition applied to them and Czechia's refusal to recognise would violate Article 34 TFEU. By contrast, if the products had simply been imported into the EU, but had never been placed on the market in any of the Member States before arriving in Czechia, the preconditions for mutual recognition were not met. In other words, based on *Czech Hallmarking*, judicial mutual recognition does not actually require production in one of the Member States. A product that came from a third country could benefit from it. However, lawful marketing in a Member State, or lawful production in a Member State in accordance with its marketing rules,⁵⁶ is a necessary precondition for mutual recognition.

B. Calibrating and Exporting Mutual Recognition

The Court's approach to the application of *Cassis de Dijon* has varied. Sometimes it has been cautious – mutual recognition has been denied in the absence of a close functional equivalence between the rules of the exporting and importing countries. Sometimes it has been more adventurous, not requiring any similarity between the rules of the different countries involved and even exporting the principle to other freedoms. In what follows, two cases from the opposite ends of the spectrum will be examined.

Woodworking offers an example of a ruling where the Court insisted on the equivalence of national rules as a precondition for mutual recognition.⁵⁷ The Commission claimed that the French safety regulations for woodworking machines violated Article 34 TFEU. The national rules were based on the idea that the users of the machines had to be protected from their own mistakes and that the machines had to be designed so that the users' intervention was limited to the strict minimum. This caused significant problems for free movement of goods, as machines manufactured in other Member States such as Germany were based on the assumption that workers had received training which allowed them to respond correctly in case of a machine malfunction. The Commission asserted that at least in certain instances machines which complied with the legal requirements of other Member States and provided similar guarantees of safety could not be sold in France. The Commission argued that France could not lawfully prevent the importation of machines that were designed to a different approach but did not statistically cause more accidents than the French machines.

⁵⁵ Case C-525/14 *Commission v Czech Republic* EU:C:2016:714 ('*Czech Hallmarking*').

⁵⁶ P Oliver, 'Mutual Recognition: Addressing Some Outstanding Conundrums' in Albers-Llorens, Barnard and Leucht (eds) (n 6) 171, 186.

⁵⁷ Case 188/84 *Commission v France* EU:C:1986:43 ('*Woodworking*').

The Court, following Advocate General Van Gerven, ruled against the Commission. The Court held that the French rules did fall within the scope of Article 34 TFEU, and that, in principle, France could not require strict and exact compliance with its own technical requirements if imported products afforded the same level of protection. However, if the standard of protection was lower, France did not have to accept imports. Here the Court drew attention to the differences in the basic approaches to protection. Machines that had caused few accidents in Germany under conditions of extensive training of operators might not produce the same statistical results in France where the same training could not be assumed. In other words, the protection that the rules of other Member States offered was not functionally equivalent to that of France. The lack of similarity meant that mutual recognition could not be applied.

In *Säger*,⁵⁸ by contrast, the Court did not analyse the similarity between national rules at all. In this seminal case the Court also exported *Cassis* into the field of services.⁵⁹ The case concerned German rules on patent renewal services. The defendant was a company offering these services in the UK. It sought to expand its activities into Germany, but was challenged under national rules that reserved the activity to patent agents.

Advocate General Jacobs argued that inspiration should be drawn from the case law on goods, specifically from *Cassis*. He thought this was particularly appropriate for cases where services were transmitted by telecommunications and did not involve the physical movement of providers, as in the case at hand.⁶⁰

The Court followed its Advocate General. It held that there was a restriction. In the words of the Court, the free movement of services

requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.⁶¹

Just like in *Cassis*, the Court held that indistinctly applicable rules are caught if they interfere with subject matter that is lawful in another Member State – in other words, there is a rule of mutual recognition.

Next, again as in *Cassis*, the Court turned to the issue of justification. It held that equally applicable but restrictive national rules could stand if they were justified by imperative reasons relating to the public interest, provided they were objectively necessary and did not exceed what was necessary. It pointed out that the intention of the national rules was to protect service recipients against the harm that unqualified professional advice could inflict on them, which was indeed an objective in the general interest. However, the German rules failed the test of necessity. The services did not involve advising clients, who in any event often were sophisticated economic actors, but consisted only of sending reminders and making payments on clients' behalf.

⁵⁸ Case C-76/90 *Säger* EU:C:1991:331.

⁵⁹ For an earlier approach of the Court in cases such as Case 110/78 *Van Wesemael* EU:C:1979:8, see Snell (n 45) 56–60.

⁶⁰ Opinion of AG Jacobs in Case C-76/90 *Säger* EU:C:1991:72, paras 24 and 26.

⁶¹ Case C-76/90 *Säger* (n 58) para 12.

These tasks, the Court explained, were ‘of a straightforward nature and [did] not call for specific professional aptitudes’,⁶² and could be computerised. Further, the consequences of a failure were minimal, since the German patent office would in any event send a reminder, although a small increase in the renewal fee would be accrued. As a result, the German rules were found to be an unjustified restriction.

In *Säger*, as in *Cassis* itself, the Court did not inquire into the national rules of the exporting state and consider their equivalence with the rules of the importing state. Instead, the Court simply accepted that the patent renewal services were lawful in the country of origin, and then considered the justification of the restrictive rules of the state of destination without any reference to the rules of the home country. In both cases, the Court may have been influenced by the relatively minor character of the risk that the imports entailed: there was no health risk in *Cassis* and in *Säger* the Court went out of its way to point out the straightforward nature of the service and the minor consequences of a failure. In this way, the cases differed substantially from *Woodworking*, where there was a real threat to life and limb in case of an untrained operator and a machine malfunction.⁶³

Säger was not the only example of *Cassis* being exported.⁶⁴ Other examples are easy to find, and in *Gebhard*, concerning the right of establishment, the Court even pronounced as a more general rule that

national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.⁶⁵

VI. Conclusion

Cassis de Dijon was a remarkable judgment, both as a matter of law and for its practical consequences. It put the abstract *Dassonville*-formula into practice in a case that involved national rules applying equally to domestic and imported products. It tempered that finding with a doctrine of mandatory requirements that did not have an obvious basis in the text of the Treaty. *Cassis* provided the foundation for an extensive line of cases on goods, and it has inspired similar developments in the fields of the other freedoms as well.

Cassis moved the common market from a model based on limited judicial activity but extensive harmonisation to one where mutual recognition significantly reduced the need for EU legislative intervention. Instead of goods moving only when they complied

⁶² *ibid* para 18.

⁶³ See A Rosas, ‘Life after *Dassonville* and *Cassis*: Evolution but No Revolution’ in Poiaras Maduro and Azoulai (eds) (n 12) 433; at 444 Rosas emphasises that the circumstances of an individual case can lead to a certain solution ‘by instinct’ regardless of the niceties of legal doctrine.

⁶⁴ See generally, eg, W-H Roth, ‘Mutual Recognition’ in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU’s Internal Market* (Edward Elgar, 2017). According to Oliver (n 56) 172, the principle of mutual recognition reached its apogee in *Opinion 2/13* EU:C:2014:2454.

⁶⁵ Case C-55/94 *Gebhard* EU:C:1995:411, para 37.

with EU rules, it was in principle enough that they complied with the national rules of one of the Member States. This both tackled the problems that the simultaneous application of multiple national laws created and moved the European market away from the spectre of harmonised euro-products towards greater diversity.⁶⁶ Constitutionally, this was a step towards a decentralised, federal model.

Institutionally, *Cassis* reduced the role that the legislature had to play and thrust the judiciary into a more prominent position. Not only did the application of mutual recognition in the field of free movement of goods stem from the pen of the judges, the EU and national judges became the key arbiters of free movement through the application of justifications and proportionality.

The real-world consequences of *Cassis* are contested. It did undoubtedly influence the Commission's harmonisation program and even the Single European Act. Some see this as a kind of original sin where Member States were thrust into regulatory competition against each other that ultimately erodes Europe's standards and social model, while others doubt the practical ability of judicially driven mutual recognition to bring about a real single market.

⁶⁶ A Mattera, 'Le principe de la reconnaissance mutuelle: instrument de préservation des traditions et des diversités nationales, régionales et locales' [1998] *Revue du Marché Unique Européen* 5.