ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF THE CJEU – FIRST PART

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PROCUREUR DU ROI V DASSONVILLE: THE JUDICIAL *DOSSIER* BEHIND THE MEASURE EQUIVALENT TO TRADE RESTRICTION *FORMULA*

JUSTINE MULLER*

ABSTRACT: In 1974 the Court of Justice of the European Union (CJEU) stated that measures having an effect equivalent to quantitative restrictions were prohibited. The famous *Dassonville formula* is known and repeated by judges and students alike. The release by the CJEU of the *dossier de procédure* provides however a new take on the story that led to one of its most notable decisions. The discovery of new arguments, sources and evidence offers valuable insights into the parties' interests and goals. Behind the *formula*, technical and personal arguments are hidden. The *dossier* puts the *Dassonville* case back in its context. This context reveals how the definition of measure having equivalent effect to quantitative restrictions was an ongoing subject in all the institutions of European Economic Community. The *dossier* thus extends understanding of the *Dassonville* case and sheds light on the circumstances that led to the famous *formula* that was elaborated therein.

KEYWORDS: European Court of Justice – trade – measure equivalent – archive – procedure – single market.

I. INTRODUCTION

Dassonville is considered a landmark case in EU law. It is known for its definition of measures having equivalent effect to quantitative restriction (MEEQR). In the then European Economic Community (EEC), and today European Union's single market, quantitative

* Researcher, European University Institute, justine.muller@eui.eu.

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restrictions to trade are forbidden by art. 30 of the Treaty of Rome (EEC Treaty) (currently art. 34 TFEU).[1] It reads: "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". Measures that are not restrictions to trade *per se* but create the same effect are considered equivalent and prohibited in the same way. *Dassonville* is the first key case of the Court of Justice of the European Union (CJEU) to deal with this question of MEEQR. The Court adopted a broad view and opened the path for other landmark cases such as *Cassis de Dijon* in 1979.[2] *Dassonville* is said to be the most important judgement ever decided on the EEC internal market.[3]

In 1970 Dassonville (or to be precise, father and son Benoît and Gustave Dassonville) imported Scotch whisky into Belgium after purchasing it from French importers. With a view to the whisky being sold in Belgium, the French wholesalers affixed "British Customs Certificate of Origin" labels on the bottles. This label was not however considered a certificate of origin by the Belgian authorities and thus did not properly satisfy the objective of the Royal Decree n. 57. The Public Prosecutor instituted proceedings against Dassonville for forgery with fraudulent intent. Fourcroy and Breuval, which were the exclusive importers and distributors of the two specific brands of whisky into Belgium, brought a civil claim in parallel to the criminal case. By judgment of 11 January 1974, the Belgian court referred to the CJEU with two questions pursuant to the preliminary reference procedure.[4]

At the time of the decision, the EEC was pursuing its integration objective. For Commissioner Spinelli the European Union was "still in its infancy".[5] Globally the EEC was facing two crises: a monetary crisis and an oil crisis that started in 1973, a year before the decision. These events stimulated talks about the Economic and Monetary Union but also seemed to have convinced Heads of States that a common political will on foreign affairs was needed.[6] This was thus a time of constructing what was subsequently to become the European Union. Concomitantly, the EEC was expanding. Negotiations on accession started with Denmark, Ireland, Norway and the United Kingdom in 1970. Three of them, including the UK, joined the EEC in 1973. This means that the facts of the *Dassonville* case, which occurred in 1970, took place when the UK was still a third country to the EEC. Moreover, the decision was taken at the end of a transitional period. The Treaty of Rome, establishing the Common Market, provided for a transitional period of twelve years.[7] Many articles of the Treaty were thus just starting to be enforced, including art. 30, which is interpreted in the *Dassonville* case.

[1] Art. 30 of the Treaty establishing the European Economic Community.

[2] P Graig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press 2015).

[3] M Derlén and J Lindholm, 'Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) ELJ 667.

[4] Belgian 1st instance Court judgement of 11 January 1974, n. 370.

[5] WFV Vanthoor, *A Chronological History of the European Union. 1946-2001* (Edward Elgar 2002).

[6] *Ibid*.

[7] Art. 8 of EEC Treaty cit.

The famous *Dassonville formula* is well-known and repeated by judges and students alike. However, the release by the CJEU of the *dossier de procédure* provides a new take on the story that led to one of its most notable decisions. Reading through the *dossier* two striking elements are unearthed. First, the parties' written observations extend the understanding of legal arguments that were only summarized in the Court's decision (see II). A comprehensive examination of parties' legal sources shed light on the context of the *Dassonville* case and place the *formula* into an ongoing discussion on MEEQR. Second, the *dossier* reveals the prominent place of facts and evidence (see III).

II. The hidden sources in written observations: *Dassonville* and the EEC's definition of MEEQR

The central elements in the *dossier* are the written observations. The basis for the parties' arguments are presented in full which provides the reader with a thorough understanding of their reasoning. The written observations also bring to light the various sources underpinning the parties' legal arguments, many of which were not identified in the CJEU decision (see II.1). These newly found sources place the *Dassonville* case back in the context of the construction of the internal market when the definition of MEEQRs was the subject of discussion amongst all EEC institutions (see II.2).

II.1. New sources revealed

The *dossier* reveals the importance of international law as a reference for the parties' legal reasoning. Some of these sources are mentioned in the CJEU decision and some were discarded. To give examples, Fourcroy and Breuval mentioned an agreement between France and Germany to support their argument that refusing products because they do not have certificate of origin is a widespread practice.[8] The Commission used an Organisation for Economic Co-operation and Development (OECD) code as well as the General Agreement on Tariffs and Trade (GATT) to give its definition of a quantitative restriction.[9] The GATT, and in particular its art. III.1, is also put forward as part of the context in which art. 30 and subsequent arts concerning the free movement of goods should be interpreted. For the Commission, the authors of the EEC treaty had the GATT in mind whilst drafting the Treaty and the same approach to states' freedom to regulate must be taken by the Court.[10] Another indication that international law played a significant role in the participating parties' argumentations is the importance of the Paris Convention on intellectual property.[11] Cited by all the parties arguing for the legality of the Belgian regulation,

[8] Agreement between France and Germany of the 8th March 1960, art. 6/2 in *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations 10.

[9] *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553 cit. Commission written observations 7.

[10] *Ibid*. 11.

[11] Paris Convention for the Protection of Industrial property of 20 March 1883.

the full text of the Paris Convention is present in the *dossier* (see Annex VII of the UK's written observation). This convention is 60 pages long, which makes this document the longest included of the *dossier*. It is followed, in terms of length, by an annex containing Dassonville's written observation which includes 45 pages setting out the legislation of different European countries on proof of origin and examples of certificates. International or comparative law thus played an important role for both sides in substantiating their reasoning.

Specific types of sources used in several written observations are totally absent from the CJEU decision. Both Fourcroy and Breuval[12] and the Commission used legal literature to substantiate their arguments. For instance, Fourcroy and Breuval[13] referred to Ulmer. The Commission referred to Ulmer twice.[14] The Commission also referred to other legal and economic articles as evidence that their preferred meaning of MEEQR was well-established.[15] The Commission also engaged with the literature on the question of the unlimited power of Member States to regulate trade if the measures are applied indiscriminately to domestic and imported products. The Commission presented and criticised Ver Loren van Themaat's approach on this question.[16] From this, the Commission representatives developed their legal reasoning, based principally on the French notion of *abus de droit*. Only the last few sentences of this paragraph appear in the Court's Decision. The *dossier* here makes possible a more comprehensive understanding of the Commission's reasoning and legal grounds.

Work from the Commission is also cited in two written observations. The Commission refers to its own previous work on MEEQR and notably its written observations in the *International Fruit Company* case.[17] The UK Government also refers to Commission work but to express its disagreement.[18] The UK denounces the opinion expressed by the Commission in one of its Working Papers.[19] The UK considers that the Commission's definition of MEEQR "represents an unwarrantable extension of the clear words of the Treaty".[20]

[12] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, I 14 Fourcroy and Breuval written observations cit. 8-9.

[13] 'Concurrence déloyale – droit comparé' in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 9.

[14] 'Zum Verbot mittelbarer Einfurbeschränkungen im EWG-Vertag' A.W.D, July-August 1973' in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Commission written observations cit. 9.

[15] '"Les mesures d'effet équivalent au sens des articles 30 et suivants du Traité de Rome' (1968) Revue Trimestrielle de droit européen" in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, Commission written observations cit. 9.

[16] *Ibid*. 12, referring to the piece of P Vorloren van Themaat (1967) Social Economische Wetgeving 632.

[17] Joined cases 51/71 to 53/71 *International Fruit Company NV and others v Produktschap voor groenten en fruit* ECLI:EU:C:1971:128.

[18] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit., UK written observations, 4.

[19] Working Paper n. 191/XI/74-E of 19 February 1974 in *Dossier de Procédure Original Dassonville*, HAEU CJUE-1553, UK written observations cit. 4.

[20] *Ibid*. 5.

They also underline the non-binding force of such working papers. This is particularly interesting knowing that the UK was a new Member State. The UK had only acceded to the EEC a year prior to the decision and was still a third country when the facts occurred. Moreover, art. 30 did not yet have direct effect in the UK.[21] This shows the strong will of the UK to be involved in the development of EEC law and reveals tensions with the Commission. Moreover, all these sources relate directly to the concept of a MEEQR and show that the definition was already in progress in EEC institutions and legal literature. The *Dassonville* case thus seems less of a breakthrough on the part of the CJEU and more like another brick in the construction of the MEEQR definition for the EEC internal market.

II.2. MEEQR as an ongoing discussion in EEC institutions

The *dossier* provides several indications that put the *Dassonville* case in context. In fact, references to other sources demonstrate how the definition of MEEQR was at the time a topic of interest for all EEC institutions and several legal scholars. The CJEU *formula* was not created out of the blue but was part of a broader discussion.

In 1974 the Commission had already produced several documents on MEEQRs. The Commission pointed out in its written observation that during the transition period, important Directives on art. 30 had been published.[22] They argued that 10 years of experience had provided the Commission with the opportunity to elaborate the appropriate definition of MEEQRs, of which Directive 70/50[23] on MEEQRs was deemed the supreme example. This Directive is cited by all parties except the UK, which shows that this was a leading text on the question of MEEQRs and that the Commission had already discussed the topic extensively. Moreover, the Commission's written observations show the deep analysis and work already done by the Commission on the question of the concept of a MEEQR. Firstly, the Commission was conducting a pilot procedure on exclusive contracts and their compatibility with several common market rules. Working with a French distributor of Scotch whisky, they were making several modifications to the contract so that it was appropriately adapted to the provisions of the Treaty.[24] Secondly, the UK's reference to a Commission Working Paper on the topic demonstrate further the Commission's influence on the question of MEEQRs.[25]

[21] R Schütze, 'Re-reading Dassonville: Meaning and Understanding in the History of European Law' (2018) ELJ 376.

[22] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Commission written observations cit. 8; Directives 3745/66 and 3748/66 of the Commission of 7 November 1966 and Directives 70/50/CEE of 17 and 22 December 1969.

[23] Directive 70/50/EEC of the Commission of 22 December 1969 based on the provisions of art. 33(7), 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.

[24] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Commission written observations cit. 3.

[25] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, UK written observations cit. 4.

The European Parliament was also invested in reaching a definition of MEEQRs. Parliamentary questions had been addressed by Members of the European Parliament to other EEC institutions. Be they oral or written, such questions are considered a direct form of parliamentary scrutiny and an important democratic tool.[26] The *dossier* shows the importance of those parliamentary questions by their presence in the parties' written observations and their annexes. They were actually cited by more parties than appears in the decision. One question from M Deringer (169/67)[27] is also cited in the Commission's observation in addition to that of Dassonville. Fourcroy and Breuval, the UK and Belgium referred to the question by M Cousté.[28] Fourcroy and Breuval also made reference to another written question to the Commission that is not mentioned in the decision.[29] These parliamentary questions to the Commission show how the concept of a MEEQR had already been a much discussed and important topic for the EEC institutions.

The judicial institution of the EEC was also already involved in the discussion surrounding MEEQR at that time, but this is, however, not explicitly pointed out in the *dossier*. The *Dassonville* case legal context shows the ongoing work of the CJEU on the matter. Art. 30, on which the case is based, had only been subject to interpretation for four years at the time of the judgement.[30] The first case on this article was *International Fruit*.[31] This case is abundantly cited by the participating parties since three of the four written observations refer to it. In this case, the CJEU had started to provide its own definition, notably by stating that only a potential effect on trade was enough for a measure to qualify as a MEEQR.[32] In 1973 the Court went further in the *Geddo v Ente Nazionale Risi* case.[33] With this case, the CJEU already provided an abstract judicial definition of MEEQR.[34] Surprisingly, this case was cited neither by the parties nor the CJEU. The absence of reference to this case, especially by the Court, leads to the question formulated by Schütze: "what were the Court's intellectual and textual inspiration?".[35] One can hypothesise that the Court's goal was to give a strong and definitive definition of MEEQR. The wording of the definition supports this interpretation. It is seen as a *formula* since it is short and abstract. Secondly, the case was first assigned to the second chamber but was ultimately decided by the Full Court. [36] This change of chamber shows that *Juge Rapporteur* Mackenzie Stuart

[26] European Parliament research service blog, *Parliamentary questions* epthinktank.eu.

[27] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit., written question of M Deringer and written question n.118/66-67.

[28] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. written question of M Cousté.

[29] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. written question 197/69.

[30] R Schütze, 'Re-reading *Dassonville*: Meaning and Understanding in the History of European Law' cit. 376.

[31] *Ibid*.

[32] *Ibid*.

[33] Case 2/73 *Riseria Luigi Geddo v Ente Nazionale Risi* ECLI:EU:C:1973:89.

[34] R Schütze, 'Re-reading *Dassonville*: Meaning and Understanding in the History of European Law' cit. 376.

[35] *Ibid*.

[36] *Ibid*.

must have, at some point, decided or realized that this case was important – maybe because it was an opportunity for the CJEU to give its definitive interpretation of art. 30 .[37] The lack of textual inspiration, and in particular the absence of reference to the Directive 70/50 in the Court's decision, might be explained by the fact that the Court gave its own definition, different from the one laid down in the Directive. This would add to the case being seen as important by the judges and the choice to change chamber.

The questions posed by the Court to the Commission is another key feature of the *dossier* indicating an ongoing discussion on MEEQRs. The court questions the Commission on other complaints arising from the importation of products with protected designation of origins. This indicates the importance of framing this question in an EEC context and not as just the Belgian problem. Such a question could mean that the CJEU objective was already to produce a *formula* (see question sent May 10, 1974) and thus not only to partake in but to conclude the discussion on MEEQRs.

Dassonville as a landmark case must thus be put in the context of an ongoing discussion on the scope of art. 30. Many EEC institutions were involved: the Commission, with the adoption of Directive 50/70, the Parliament with the various written questions, and the CJEU in several earlier cases.

III. Behind the CJEU *formula*, the story of wholesalers and the technicity of trade regulations

The full name of the case, *Procureur du Roi v Benoît and Gustave Dassonville*, was coined during the procedure. At the beginning, case was referred to by the name of the three whisky sellers: Dassonville and Fourcroy and Breuval. There is no explanation in the *dossier* for this change of name, but it shows the prime importance, at least at first, of the parties. This is supported in the *dossier* by the striking significance of personal grudge amongst the parties (see III.1) but also the high technicity of the evidence (see III.2).

III.1. The unseen critics: personal attacks and blame the neighbour

The *dossier* and in particular the parties' written observations give the reader an opportunity to observe hidden tensions. CJEU decisions offer a summary of each parties' legal arguments but the *dossier* provides a closer and more comprehensive look into legal, moral and personal quarrels.

[37] The fact that the *Dassonville* case was not considered as possibly ground-breaking at first would explain the lack of intervention from France which had not submitted written observations.

Three written observations, from Dassonville, Fourcroy and Breuval and the Belgian government, include personal attacks and criticism of the lack of EEC harmonization. Dassonville accused Belgium of protectionism.[38] Fourcroy and Breuval and Belgium attacked differences between France and Belgium.[39]

Dassonville, which asserted that the Belgian law is a MEEQR, questioned the goal of the contentious Royal Decree n. 57. It explained that such a measure, which dated from 1934, was surely enacted in a "protectionist spirit".[40] The Decree was adopted in a purely national context and was solely aimed at regulating domestic trade. This situation had led incidentally to the reinforcement of monopolies for national distributors. Furthermore, Dassonville expressed its concern about a generalization of the protectionist system if the court did not find the Decree to be a MEEQR. To them, using the pretense of safeguarding trade rules in each Member State would lead to a complete shutdown of the single market and go directly against the EEC Treaty's objectives.[41]

Belgium also promoted harmonization of norms in the single market, but it argued that this harmonization had to be achieved by France following the same rules as Belgium. The Belgian government defended its regulation and argued that it was a good way of protecting designations of origin. A finding that the Decree was a MEEQR would lead to a serious abuse and hinder the protection of designations of origin. Since there was no harmonization on this question at the EEC level, each Member State ought to be free to regulate. There was a small insinuation that France did not adequately protect designations of origin and that this is why the whisky was not accepted.[42] Fourcroy and Breuval did not make small insinuations. Rather, they stated plainly that France did not offer sufficient protection. They claimed that France was in breach of its international commitments regarding designations of origin because products were circulated under a simple pink excise bond.[43]

Both parties attacked the other in a language that was more vigorous than reported in the Court's decision. In addition to arguments on the insufficient harmonization of rules amongst EEC Member States, the Court's decision omitted strong personal attacks on the part of each of the private parties. For example, Fourcroy and Breuval stated that Dassonville forged a fake certificate rather than bother to ask for one.[44] Though Dassonville's argument that Fourcroy and Breuval were only acting in the interest of conserving their

[38] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. Dassonville written observations 10 and 12.

[39] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 12 and I 9 Belgian Government observation 11.

[40] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Dassonville written observations cit. 10.

[41] *Ibid*, 12.

[42] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. Belgian Government written observations 11.

[43] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Fourcroy and Breuval written observations cit. 11.

[44] *Ibid*.

monopoly is mentioned in the decision, it is presented in greater detail in their written observations. In several pages, they aimed to expose how the Decree was instrumentalized by the other party. In addition, they gave more information about the reality of the monopoly. They believe that, by solidarity, the French companies "Amer Picon" and "Simon Frères" refused to provide them with the relevant attestation of origin.[45] They also observed that some sales receipts from French distributors were marked "export prohibited".

This additional reasoning is interesting to understand exactly what made the Belgian legislation a MEEQR. Small facts and insights into the business practices add to the conclusion that it was in fact difficult or impossible for Dassonville to obtain the appropriate certificate. The reader is offered a more factual and technical view of the *Dassonville* case and is able to go further than the *formula*'s brief understanding of what exactly constitutes a MEEQR.

III.2. Technicity of MEEQR, the importance of evidence in the procedural *dossier*

The decision is overall less factual and more focused on the mechanics of EEC law than the *dossier*. For instance, the argument that the certificate of designation of origin needed to mention the name of the Belgian importer is a key element in both Dassonville's and the Commission's submissions. It shows that the proper certification was impossible to obtain for Dassonville and the powerful effect of the monopoly of Fourcroy and Breuval. This element is not developed in the Decision even though it is presented as a major component of the parties' reasoning. This distance between the focus on facts by the parties and the focus on legal reasoning by the Court may be explained by the judges' intention to use the *Dassonville* case to define MEEQRs with a *formula*.

The significant space that the annexes take in the *dossier* is also a sign of the technicality of the case. The annexes of the parties' written observation are found in 12 different documents and represent 34 per cent of the *dossier.*[46] This is an impressive number since the written observations represent only 17 per cent and the procedure-related documents represent 22 per cent. Annexes are thus the most important documents (in length) in the *dossier*. In addition, the annexes of the UK observations are found at several occurrences in the *dossier*. This manifests the importance, throughout the CJEU procedure, of the actual method of certification of designations of origin in the UK. Moreover, the Commission and Dassonville both insisted on other measures that could have been used to achieve the aim of protecting designation of origin. Dassonville's annex contains 45 pages of different certificates of origins and legislation in Europe in order to provide examples of other means of protection that are less trade restrictive.

[45] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553, Dassonville written observations cit. 14.
[46] Of the 458 pages accessible to the reader.

The importance of such technical issues is again exemplified by the questions from the Court to the UK government. The Court asked for more precision on "what would amount to sufficient details" for the UK Government. This question related to UK observation's annex IV that presented UK regulation on Scotch whisky's certificates of origin.[47] The part relevant to the question was marked manually by a line from a red pen. It states that a person outside of the UK can request certification providing that they give "sufficient details" of the consignment. The Court inquired what these "sufficient details" were because they were fundamental to determine if Dassonville was able to obtain the certificate of origin for the whisky they were selling in Belgium. Unfortunately, we do not have the answer to the question in the *dossier*. Nonetheless, the question in itself reveals the investigative work of the court on technical details. The *dossier* thus offers great insight into all the documents necessary to understand the existing practices of both the UK and Belgium in order to determine if the Royal Decree was a MEEQR. With the *dossier*, the reader can enhance his or her understanding of *Dassonville* and go beyond the famous *formula*.

IV. Conclusion

This *Article* demonstrated the richness of the CJEU procedural *dossier* and the insights that a reader can gain from it. A comprehensive analysis of the parties' written observations has shown how deeply linked the *Dassonville* case was with the development of the EEC internal market and the end of the transition period. The influence that these newly uncovered sources ultimately had on the Court's decision is impossible to determine but the *dossier* places the *Dassonville formula* in a broader context: one that includes the European Parliament, the Commission and European legal scholars. The *dossier* also grounds the famous *formula* in the reality as experienced by the different parties. Written observations and annexes demonstrate the crucial role of evidence and facts in the case. The *dossier* helps the reader see beyond the *formula* in many ways. This *Article* does not expect to have exhaustingly extracted the value of the procedural *dossier* but it hopes to have teased out some of its key aspects.

[47] *Dossier de Procédure Original Dassonville* HAEU CJUE-1553 cit. UK Annex IV, WP 5.