
EU Law Concentrate: Law Revision and Study Guide (8th edn)
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# 5. Free movement of goods

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## Abstract

This chapter discusses the law on the free movement of goods in the EU. Free movement of goods is one of the four 'freedoms' of the internal market. Obstacles to free movement comprise tariff barriers to trade (customs duties and charges having equivalent effect), non-tariff barriers to trade (quantitative restrictions and measures having equivalent effect), and discriminatory national taxation. The Treaty on the Functioning of the European Union (TFEU) prohibits all kinds of restrictions on trade between Member States. Article 30 TFEU prohibits customs duties and charges having equivalent effect; Article 34 TFEU prohibits quantitative restrictions and all measures having equivalent effect; and Article 110 TFEU prohibits discriminatory national taxation.

**Keywords:** EU law, free trade, trade barriers, tariffs, TFEU, customs duties, taxation

## The assessment

Free movement of goods is a key area of EU law and a popular assessment topic. Problem questions frequently concern national legislation that hinders trade between Member States. You may be asked, for instance, to advise a trader who is being prevented from importing goods from one Member State to another, by rules of the state of importation imposing requirements that are difficult or expensive to satisfy. Essay questions may ask you to discuss the nature of free movement rules, the scope and development of derogation and the approach of the Court of Justice in support of free trade, through liberal interpretation of the Treaty prohibitions and restrictive interpretation of the derogation provisions.

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## Key facts

- Free movement of goods is one of the four 'freedoms' of the internal market.
- Obstacles to free movement comprise of tariff barriers to trade (customs duties and charges having equivalent effect), non-tariff barriers to trade (quantitative restrictions and measures having equivalent effect) and discriminatory national taxation.
- Where Member States set up such obstacles, they may do so to protect domestic products from competition from imports.
- The **TFEU** prohibits all kinds of restrictions on trade between Member States. **Article 30** prohibits customs duties and charges having equivalent effect; **Article 34** prohibits quantitative restrictions and all measures having equivalent effect; and **Article 110** prohibits discriminatory national taxation.
- A limited category of charges may fall outside the scope of **Article 30**.
- Indirectly discriminatory national taxation may be justified on objective grounds.
- **Article 36** allows derogation from the presumption of free trade, setting out the grounds on which Member States may justify non-tariff restrictions.
- In ***Cassis de Dijon***, the Court of Justice held that measures satisfying certain 'mandatory requirements', which would otherwise be classified as measures having equivalent effect, do not breach **Article 34**, provided they are proportionate to their objective. In ***Keck***, the Court declared that certain 'selling arrangements' will fall outside the scope of **Article 34**.

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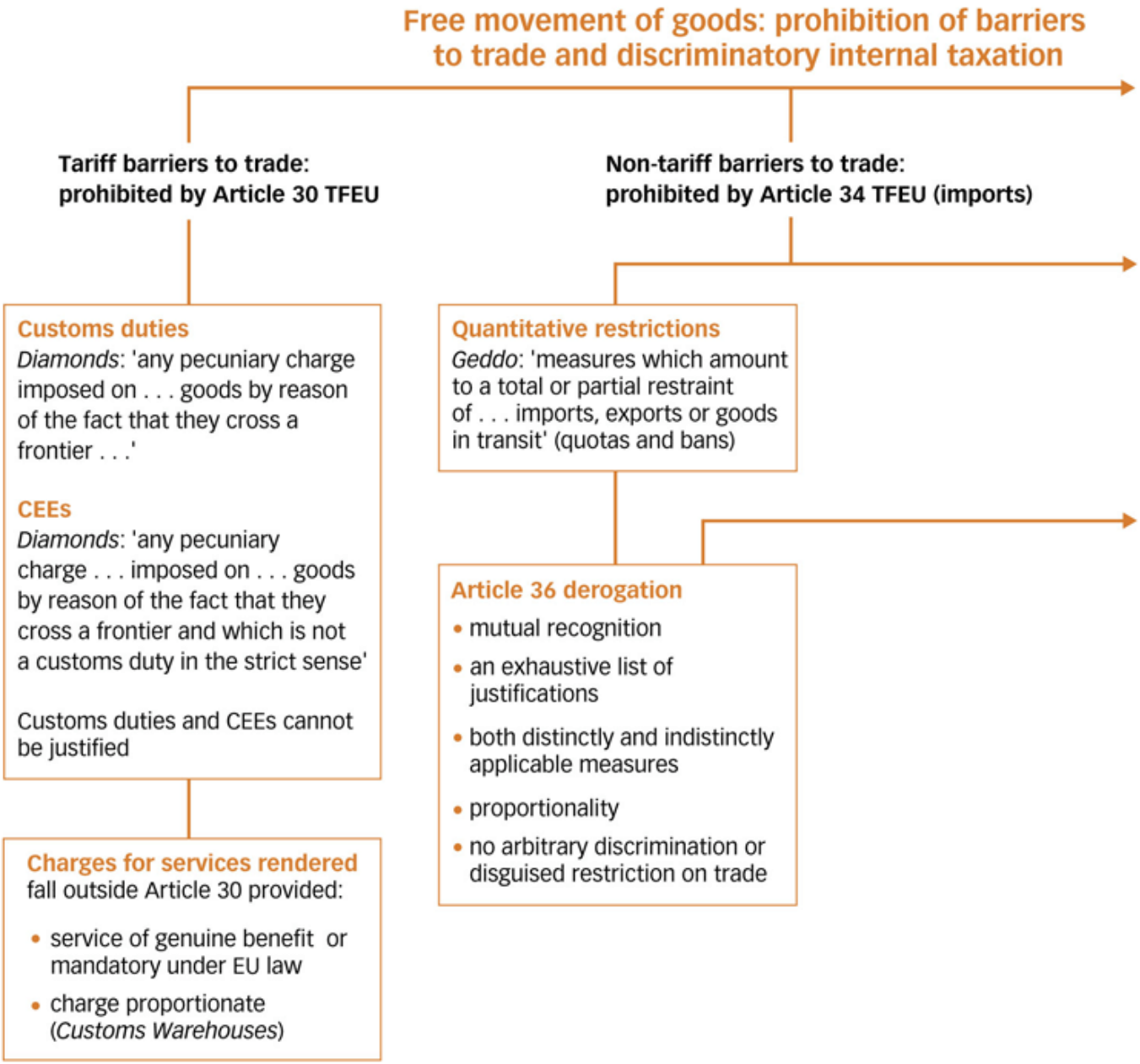
## Chapter overview

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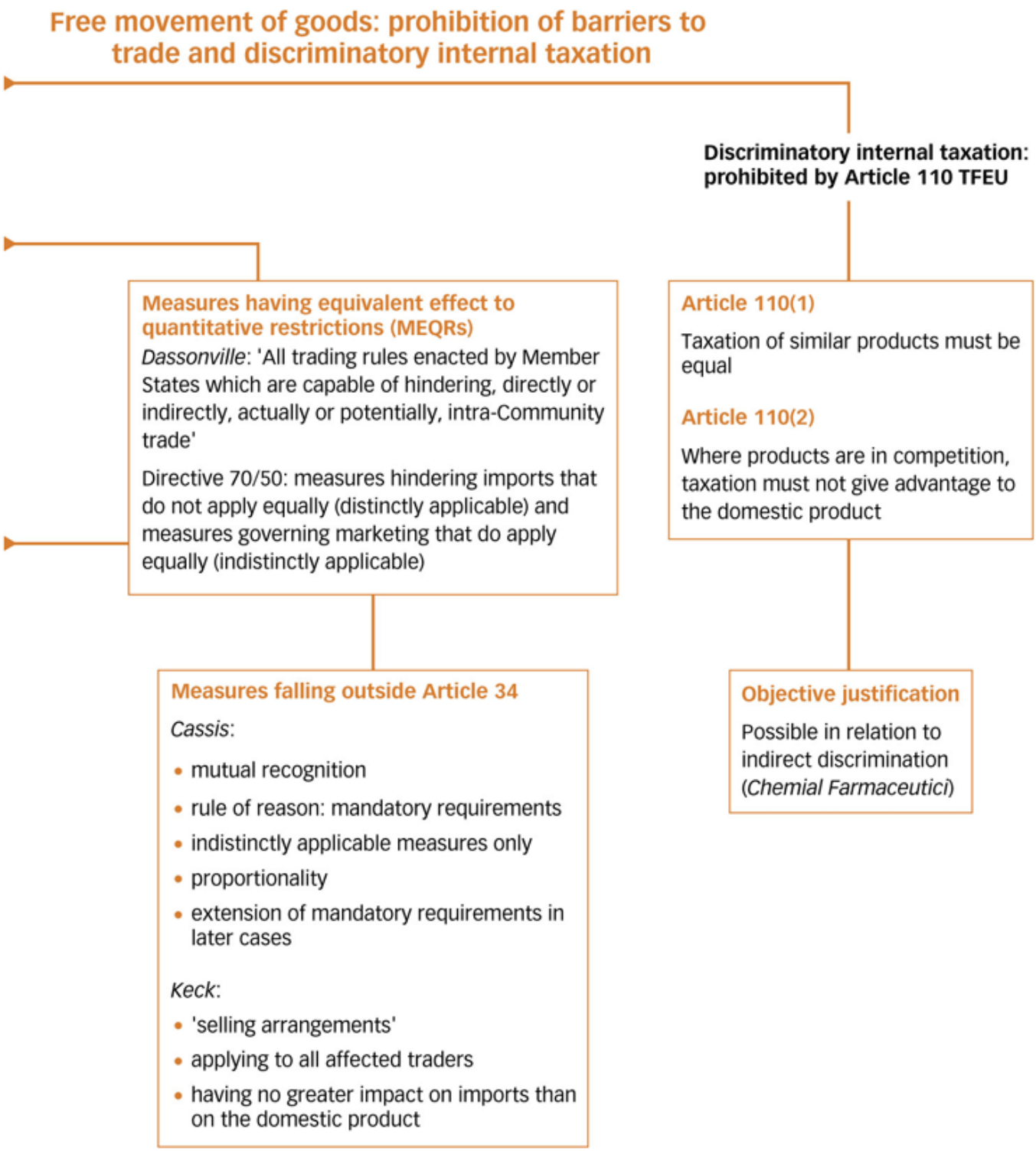


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## Introduction

The establishment of an **internal market**, in which goods, persons, services, and capital move freely without restriction, is fundamental to the goal of economic integration within the EU. Before turning to the EU rules supporting free trade in the internal market, it is useful to briefly consider the relationship between the EU internal market and the customs union.

## Customs union

The EU **customs union** is based upon provisions concerning the movement of goods both into and within the EU. It has an external aspect, incorporating the **common customs tariff** (a common level of duty charged by all Member States on goods imported from third countries) and an internal aspect (a **free trade area** where customs duties and other trade restrictions between Member States are prohibited). The internal aspect of the customs union is an element of the EU internal market.

## Internal market

**Article 26 TFEU** defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. This definition identifies the **four freedoms** and highlights the free movement of goods as a core EU principle.

## Restrictions on the free movement of goods

To achieve free movement of goods within the internal market, the **TFEU** prohibits import and export restrictions between Member States. Such restrictions, commonly referred to as 'barriers to trade', may be imposed by Member States for **protectionist motives**, to protect domestic products from competition from imports. Barriers to trade can be tariff or non-tariff and both are prohibited (subject to any derogation).

# Tariff barriers to trade

**Tariff barriers** to trade are import (or export) restrictions involving payments of money. They comprise customs duties and charges having equivalent effect to customs duties (CEEs) and are prohibited by **Article 30 TFEU**. The **TFEU** also prohibits national taxation that discriminates between imported and domestic products.

## Customs duties and CEEs

A **customs duty** has two defining elements, referred to in numerous cases, such as ***Diamonds*** (***Sociaal Fonds voor de Diamantarbeiders) v Chougol Diamond Co (Cases 2 & 3/69)***). First, it is a pecuniary charge (payment of money) and, secondly, it is imposed on goods by reason ↵ of the fact that they cross a frontier. The Court of Justice defined '**CEE**' in ***Diamonds*** as 'any pecuniary charge … imposed on … goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense'. The charge need not be protectionist to constitute a breach.

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Customs duties can never be justified and are a clear infringement of **Article 30**. However, a charge having equivalent effect may fall outside **Article 30** altogether, for example if the CEE is charged for services rendered to the importer.

### Revision tip

Because they are easily identified, customs duties are now unlikely to occur in practice. Consequently, they rarely feature in assessment questions, but be prepared to deal with CEEs.

## Charges for services rendered

Member States have argued that charges imposed on imports (or exports) fall outside **Article 30** because they are levied for services rendered, such as health inspection services (see for instance ***Commission v Germany (Health Inspection Service) (Case 314/82)***). It should be noted, however, that the argument is difficult to sustain and will be closely scrutinised by the European Commission and the Court of Justice.

### *Commission v Italy (Statistical Levy)* (Case 24/68) [1969] ECR 193

**Facts:** Italy relied on the 'charges for services rendered' argument in relation to a charge it imposed on imports and exports, used to fund a statistical service for importers and exporters.

**Held:** The Court of Justice rejected this claim, holding that any benefit was so general and difficult to assess that the charge could not constitute a charge for services rendered. It was a breach of [**Article 30**].

For the charge to escape **Article 30**, not only must the service be of direct benefit to the importer (or exporter) but the charge must be **proportionate** to the value of the service.

### *Commission v Belgium (Customs Warehouses)* (Case 132/82) [1983] ECR 1649

**Facts:** Belgium levied charges for storage of imported goods at public warehouses irrespective of whether the importer was depositing the goods to await customs clearance or simply presenting the goods for customs clearance.

**Held:** The Court of Justice held that a charge is a CEE unless it is the 'consideration for a service actually rendered'. In addition, the charge must not exceed the value of the service.

p. 97 ↵ Fees for health inspections required by EU law fall outside **Article 30**, provided they are proportionate, mandatory under EU law (and not merely permissive) and promote the free movement of goods (***Commission v Germany (Animal Inspection Fees) (Case 18/87)***).

The structure of **Article 30 TFEU** is illustrated in Figure 5.1.

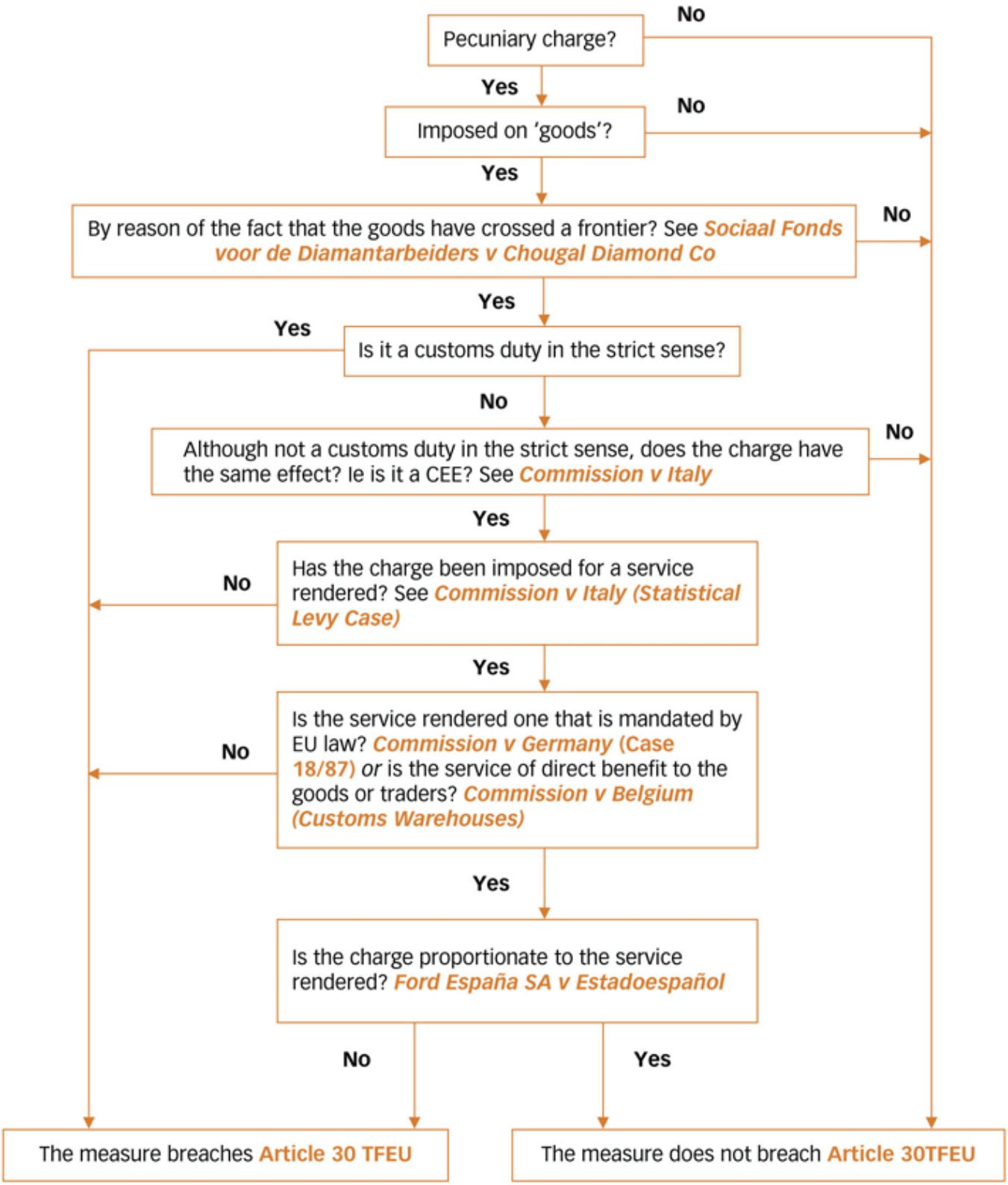

**Figure 5.1** Article 30 TFEU

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## Prohibition of discriminatory taxation: Article 110 TFEU

**Article 110** relates to national taxation systems operating internally within Member States. ***Denkavit v France (Case 132/78)*** defined internal taxation as 'a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike'. Internal taxation must be distinguished from customs duties and CEEs. A charge is a tax if it is part of an internal system of taxation, as indicated by ***Denkavit***. Customs duties and CEEs are charges levied on goods by reason of importation. **Articles 110** and **30** are complementary yet mutually exclusive (***Deutschmann v Germany (Case 10/65)***), so a charge on goods cannot be both a tax and a customs duty/CEE. The distinction is important because if classed as a customs duty or CEE it is unlawful under **Article 30 TFEU**. If classed as a tax, it is permissible provided it is not discriminatory between imported and domestically produced goods as provided for in **Article 110 TFEU.**

**Article 110(1)** prohibits taxes on imported products exceeding those applied to similar domestic products. **Article 110(2)** prohibits taxes on imported products giving indirect protection to domestic products. The Court of Justice has interpreted this to mean that where imported and domestic products are in competition, national taxation must not give advantage to domestic products. It should be noted that if **Article 110(1)** is breached, the Member State must equalise taxation. If **Article 110(2)** is breached, the Member State only has to remove the competitive effect of the tax regulation. Before turning to these provisions in more detail, the concepts of **direct** and **indirect discrimination** are considered, since both kinds of discrimination can infringe **Article 110**.

### Direct and indirect discrimination

Measures that openly tax imported and domestic goods at different rates are directly discriminatory. Direct discrimination is now rarely encountered. However, it has occasionally occurred, for example in ***Lütticke (Alfons) GmbH v Hauptzollamt Saarlouis (Case 57/65)*** concerning a German tax on imported, but not domestically produced, powdered milk.

Indirectly discriminatory taxation is more difficult to identify. This is taxation that appears not to discriminate between imported and domestically produced goods but nevertheless has a discriminatory effect.

#### *Humblot v Directeur des Services Fiscaux* (Case 112/84) [1985] ECR 1367

**Facts:** A French system of annual vehicle taxation subjected cars with a low power rating to a lower tax than higher power-rated cars.

**Held:** As France did not produce higher power-rated cars, the effect was to place imported cars at a competitive disadvantage, amounting to indirect discrimination and a breach of [**Article 110**].

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## Methods of tax collection and the basis of assessment

Discrimination may arise from the way in which tax is collected or the basis of assessment.

### *Commission v Ireland (Excise Payments)* (Case 55/79) [1980] ECR 481

**Facts:** Ireland allowed domestic producers of spirits, beer, and wine deferment of tax payments until the products were marketed, whilst importers had to pay on importation.

**Held:** The tax rate was equal but the system of collection was discriminatory and breached [**Article 110**].

### *Outokumpu Oy* (Case C-213/96) [1998] ECR I-1777

**Facts:** Finnish tax on domestically produced electricity varied according to the method of production, whereas imported electricity was taxed at a flat rate that was higher than the lowest rate charged on the domestic product.

**Held:** The Court of Justice held that there is a breach of [**Article 110**] where a different method of calculation leads, if only in certain cases, to a higher tax on the imported product.

## Objective justification

Directly discriminatory taxation can never be justified and always breaches **Article 110**. By contrast, indirectly discriminatory taxation may be **objectively justified**.

### *Chemial Farmaceutici SpA v DAF SpA* (Case 140/79) [1981] ECR 1

**Facts:** Italy imposed a higher tax on synthetic alcohol than on alcohol produced by fermentation, even though the products had identical uses. Italy produced very little synthetic alcohol. It argued that the system was based on a 'legitimate choice of economic policy' aimed to encourage production by fermentation rather than from ethylene, which, it maintained, should be reserved for more important economic uses.

**Held:** Although, on the facts, the Court of Justice found no discriminatory effect on the imported product, it accepted that legitimate policy objectives would justify differential taxation.

## ‘Similar’ products

Since **Article 110(1)** prohibits the differential taxation of ‘similar’ products, the ‘similarity’ of the imported and domestic products is clearly important. In a number of cases concerning alcoholic drinks, the Court of Justice has interpreted ‘similar’ broadly, to mean similar characteristics and comparable use, for instance in considering the similarity of Scotch whisky and liqueur fruit wine (***John Walker v Ministeriet for Skatter (Case 243/84)***) and non-fruit spirits and fruit spirits (***Commission v France (French Taxation of Spirits) (Case 168/78)***).

## ‘Indirect protection to other products’

Under **Article 110(2)**, where imported and domestic goods are not ‘similar’, but simply in competition with each other, national taxation must not give an advantage to the domestic product.

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### *Commission v United Kingdom (Excise Duties on Wine)* (Case 170/78) [1980] ECR 417, [1983] ECR 2265

**Facts:** The UK taxed wine at a higher rate than beer. Clearly wine and beer are not similar products within the meaning of **Article 110(1)** and therefore the Court of Justice considered whether the products were in competition.

**Held:** Comparing beer with the cheaper varieties of wine, the Court of Justice found that there was a degree of substitution between them and that the two products were in competition. Since the taxation system favoured the domestic product, it breached [**Article 110(2)**].

The structure of **Article 110 TFEU** is illustrated in Figure 5.2.

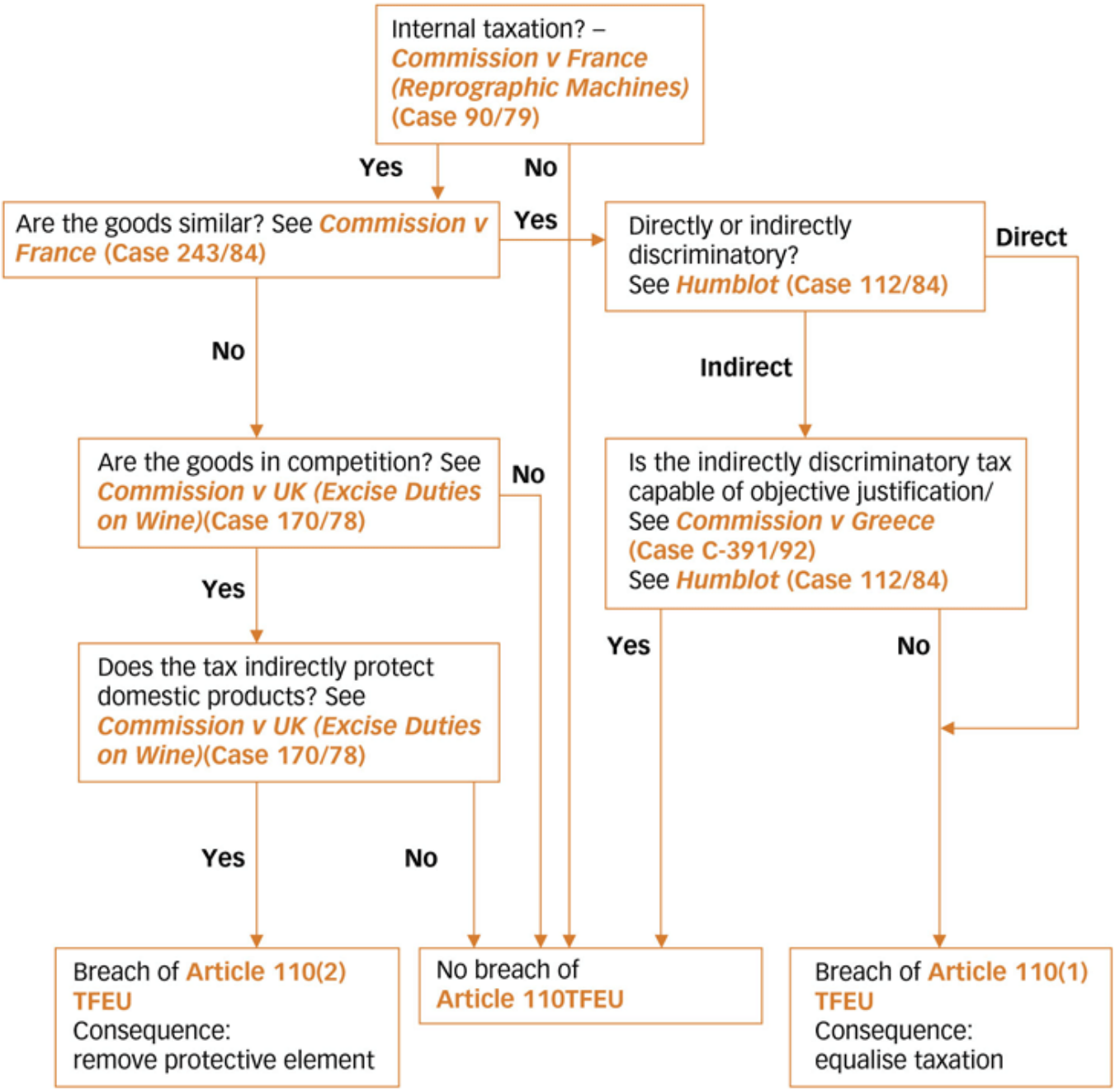


**Figure 5.2** Article 110 TFEU

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## Harmonisation of taxation

**Harmonisation** of taxation within the EU could solve the problems arising from discriminatory taxation. However, whilst progress has been made on the approximation of VAT, excise duty and corporation tax, Member States remain resistant to further transfer of control to the EU in this area.

## Non-tariff barriers to trade

These are barriers to trade that do not involve direct payments of money, comprising of quantitative restrictions and all measures having equivalent effect. Both are prohibited by **Article 34 TFEU** (relating to imports) and **Article 35 TFEU** (relating to exports). Most of the case law on **non-tariff barriers** concerns imports and so **Article 34** is the focus of this section.

### Revision tip

Be able to distinguish 'tariff barriers' from 'non-tariff barriers' to trade. This will help you to correctly categorise restrictions presented in a problem question.

## Quantitative restrictions

Like customs duties, **quantitative restrictions** are generally easily recognised. They were defined in ***Geddo v Ente Nazionale Risi (Case 2/73)*** as 'measures which amount to a total or partial restraint of … imports, exports or goods in transit', in other words import (or export) quotas and bans. A **quota** is a 'partial restraint' as it places a limit on the quantity of particular goods that can be imported. A **ban** is a 'total restraint' as it blocks the import of particular goods altogether.

## Measures having equivalent effect to quantitative restrictions (MEQRs)

**Measures having equivalent effect to quantitative restrictions (MEQRs)** are more difficult to identify than quantitative restrictions. They take many different forms, including health and safety requirements, packaging requirements, and requirements relating to the composition or marketing of goods. 'MEQR' was defined in ***Dassonville***, in what has become known as the '***Dassonville*** formula'. Directive 70/50 (now no longer formally applicable, but still referred to) provides guidance on the scope of an 'MEQR'.

### Revision tip

Problem questions almost invariably feature at least one MEQR. Learn to recognise this category of restriction by considering the relevant case law.

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## Definition of 'MEQR': Dassonville

### *Procureur du Roi v Dassonville* (Case 8/74) [1974] ECR 837

**Facts:** Traders who had imported Scotch whisky from France into Belgium were prosecuted in Belgium for infringement of national legislation requiring imported goods bearing a designation of origin to be accompanied by a certificate of origin issued by the state of origin. In their defence, the traders claimed that the requirement was an MEQR.

**Held:** The Court of Justice defined 'MEQRs' as: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. Applying this definition, the Court held that the Belgian requirement was an MEQR and a breach of [**Article 34**].

This definition is wide in scope, covering measures that are capable of hindering interstate trade actually and directly and also potentially and indirectly. Nonetheless, in ***Dassonville,*** the Court accepted that 'reasonable' restraints may not be caught by **Article 34**, signalling an approach which, as will be seen later, it developed further in the ***Cassis*** 'rule of reason'.

### Scope of MEQR: Directive 70/50

Directive 70/50 was a transitional measure, now expired, but it still gives useful guidance on the scope of MEQRs. Firstly, it refers to measures that do not apply equally to domestic and imported products (Article 2), commonly called '**distinctly applicable measures**' because they make an overt distinction between domestic and imported products. Secondly, the Directive refers to measures that do apply equally to domestic and imported products (Article 3), commonly called '**indistinctly applicable measures**' because they make no distinction between domestic and imported products.

The Directive provides examples within each category, for instance distinctly applicable measures that restrict the advertising of imported products or lay down less favourable prices for imported products, and indistinctly applicable measures that deal with the 'shape, size, weight, composition, presentation, identification, or putting up' of products.

### Revision tip

Problem questions: be confident about the ***Dassonville*** formula and its application. In addition, be prepared to distinguish between distinctly and indistinctly applicable MEQRs.

## Distinctly applicable MEQRs: examples from the cases

Typically, distinctly applicable measures treat imported and domestic products unequally by applying only to the imported product, placing it at a competitive disadvantage as against the domestic product.

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### *Rewe-Zentralfinanz v Landwirtschaftskammer Bonn (San Jose Scale)* (Case 4/75) [1975] ECR 843

**Facts:** A preliminary reference concerned German phytosanitary inspections of imported (but not domestic) plant products to prevent the spread of a pest known as San Jose Scale and whether such inspections amounted to an MEQR.

**Held:** The inspections did amount to an MEQR and, as they only applied to imported products, they were distinctly applicable.

### *Procureur du Roi v Dassonville* (Case 8/74) [1974] ECR 837

**Held:** The Belgian rule requiring certificates of origin applied only to imports. The measure was a distinctly applicable MEQR.

Sometimes, distinctly applicable measures treat imported and domestic products unequally by applying only to the domestic product, giving it a competitive advantage over the imported product.

### *Commission v Ireland ('Buy Irish' Campaign)* (Case 249/81) [1982] ECR 4005

**Facts:** An Irish government campaign was established to help promote Irish products, including widespread advertising of domestic (but not imported) products and use of the 'Guaranteed Irish' symbol.

**Held:** The campaign amounted to an MEQR.

### *Commission v Germany* (Case C-325/00) [2002] ECR I-9977

**Facts:** A 'quality label' was awarded by a German public body to German products of a certain quality which indicated their German origin.

**Held:** As the measure was likely to encourage consumers to buy these, rather than imported products, it was an MEQR, even though its use was optional.

All these cases concerned national provisions constituting a hindrance or disincentive to the importer, because they imposed conditions which were difficult or costly to satisfy and/or because they provided an advantage to the domestic product.

## Indistinctly applicable MEQRs: examples from the cases

Indistinctly applicable measures apply equally to imported and domestic products.

Whilst indistinctly applicable MEQRs appear not to be discriminatory, their effect is to place imported products at a disadvantage, creating a disincentive to importation and a hindrance to interstate trade.

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### *Commission v United Kingdom (Origin Marking of Goods)* (Case 207/83) [1985] ECR 1202

**Facts:** A UK measure required that certain goods for example domestic electrical appliances for retail sale in the UK be marked with their country of origin.

**Held:** The measure was an MEQR because, although it applied equally to imports and domestic products, it enabled consumers to distinguish between domestic and imported products, allowing them to assert any prejudices they may have against foreign products.

### *Walter Rau Lebensmittelwerke v de Smedt PvbA* (Case 261/81) [1982] ECR 3961

**Facts:** Belgium required all margarine for retail sale to be cube-shaped.

**Held:** Although there was no distinction between imports and the domestic product, the effect was to increase the costs of non-Belgian producers, who would need to adapt their packaging to comply with a requirement that was not imposed by their own national legislation. The measure was an MEQR.

### Revision tip

In order to apply ***Cassis de Dijon*** and **Article 36** (see later) appropriately, it is vital that you can correctly distinguish between distinctly and indistinctly applicable MEQRs.

## Obligation to ensure the free movement of goods

Not only must Member States refrain from imposing measures that restrict the free movement of goods, they must also take steps to ensure the free movement of goods.

### *Commission v France* (Case C-265/95) [1997] ECR I-6959

**Facts:** The French authorities had failed to prevent violent protests by French farmers against agricultural products being imported from other Member States, such as interception of lorries, violence against lorry drivers and damage to goods displayed in French shops.

**Held:** The Court of Justice held that France was in breach of what is now **Article 4 TEU**, which requires Member States to take all appropriate measures to fulfil Treaty obligations.

### *Schmidberger v Austria* (Case C-112/00) [2003] ECR I-5659

**Facts:** Austria allowed a demonstration by environmental protesters, which caused a 30-hour motorway closure and impeded the free movement of goods.

p. 105 ↵ **Held:** Austria's decision to allow the demonstration was a breach of **Article 34**, though the decision was justified on the grounds of the rights to freedom of expression and assembly.

## Derogations available for non-tariff barriers

There are a number of potential ways for a Member State to seek to justify rules, which have the effect of restricting the free movement of goods.

Some restrictions introduced by Member States exist for valid reasons, which have nothing to do with trade policy, and this situation is provided for in **Article 36 TFEU**. Rather than claiming a derogation under **Article 36**, Member States have also sought to argue that **Article 34** is inapplicable to some trading rules. The Court of Justice accepted this argument in principle in the ***Cassis de Dijon*** case. This has become known as the 'rule of reason' and this will be discussed below.

## Article 36 TFEU: derogation

**Article 36** sets out the grounds on which Member States may justify restrictions on interstate trade, allowing **derogation** from the general presumption of free trade. Because of the fundamental importance of free movement to the internal market, the Court of Justice interprets these grounds very restrictively. It is notable that there is some overlap between the **Article 36** grounds and the ***Cassis de Dijon*** list of mandatory requirements to be discussed below (eg public health).

### Article 36

**Article 36** provides:

> **Articles 34** and **35** shall not preclude prohibitions or restrictions on imports, exports and goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

### An exhaustive list

In contrast with the ***Cassis*** list of mandatory requirements, which has been extended by the Court of Justice, the **Article 36** list of justifications is exhaustive, as was made clear in ***Commission v Ireland***.

#### *Commission v Ireland (Restrictions on Importation of Souvenirs)* (Case 113/80) [1981] ECR 1625

**Facts:** A distinctly applicable Irish measure required imported souvenirs depicting Irish motifs to be marked 'foreign' or with their country of origin.

**Held:** The Court of Justice refused to apply the ***Cassis de Dijon*** rule of reason to the distinctly applicable measure. The Court also refused to accept a justification based on consumer protection, since this justification is not listed in [**Article 36**].

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## Distinctly and indistinctly applicable measures

**Article 36** is broader than ***than the rule of reason*** in that the justifications can apply to both distinctly and indistinctly applicable measures and also quantitative restrictions.

## Proportionality

**Article 36** requires measures to be 'justified' on one of the specified grounds. They must be no more than is necessary to achieve the desired aim; in other words, they must be proportionate to their objective.

## No arbitrary discrimination or disguised restriction on trade

For derogation to apply, a measure must not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'. This precludes protectionist measures.

### *Commission v United Kingdom (Imports of Poultry Meat)* (Case 40/82) [1982] ECR 2793

**Facts:** A UK licence requirement, introduced purportedly to prevent the spread of Newcastle disease, effectively imposed a ban on turkey meat imports.

**Held:** The Court found that, in reality, the measure was designed to protect domestic producers, just as the Christmas season was beginning. The measure amounted to arbitrary discrimination and a disguised restriction on trade.

## Mutual recognition

**Mutual recognition** is the fundamental principle underlying free movement of goods, articulated in ***Cassis de Dijon*** (to be discussed below): provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. The principle of mutual recognition also applies when considering derogation under **Article 36**. Unless restrictions are justified and proportionate, there is no reason why goods that have been lawfully produced and marketed in one Member State should not be introduced into another.

## Article 36 grounds

### Public morality

This ground was considered in two cases concerning restrictions on imports of pornography.

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### *R v Henn and Darby* (Case 34/79) [1979] ECR 3795

**Facts:** English customs legislation prohibited imports of pornographic films and magazines, despite there being no absolute ban on trade in similar material in the UK.

**Held:** Declaring that it was for Member States to determine the requirements of public morality nationally, the Court of Justice accepted the UK's argument that the legislation was justified on public morality grounds.

### *Conegate Ltd v Customs and Excise Commissioners* (Case 121/85) [1986] ECR 1007

**Facts:** The UK customs authorities had seized a consignment of inflatable dolls and other erotic articles imported from Germany.

**Held:** The Court took a stricter view than in ***Henn and Darby***. Although there were restrictions on similar domestic goods, these did not prohibit manufacture and sale. The UK could not rely on the public morality ground, though it would not be precluded from applying the same restrictions to the imported goods once they had entered the UK.

## Public policy

Potentially wide in scope, 'public policy' has been interpreted narrowly by the Court of Justice. This ground cannot be used as a general justification embracing more specific defences, such as consumer protection, but must be given its own independent meaning (***Commission v Italy (Re Ban on Pork Imports) (Case 7/61)***). The public policy ground has rarely been invoked. ***R v Thompson*** provides one example.

### *R v Thompson* (Case 7/78) [1978] ECR 2247

**Facts:** Three UK nationals had been found guilty of being knowingly concerned in a fraudulent evasion of the UK's prohibition of the import of gold coins into the UK and the export of certain silver alloy coins from the UK.

**Held:** The Court of Justice held that a prohibition on import and export of collectors' coins was justified on public policy grounds, recognising a state's need to protect its right to mint coinage and to protect coinage from destruction.

### Public security

This ground was successfully invoked in ***Campus Oil.***

#### *Campus Oil Ltd v Minister for Industry and Energy* (Case 72/83) [1983] ECR 2727

**Facts:** Irish legislation required importers to purchase a percentage of their requirements from a state-owned oil refinery.

**Held:** The Court of Justice found that the measure was justified on public security grounds, since it ensured the maintenance of Irish refining capacity for products that were fundamental to the provision of essential services. An interruption of supplies could seriously threaten public security.

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### Protection of health and life of humans, animals, or plants

Two contrasting decisions, referred to earlier in this Chapter, clarify the scope of this ground. German inspections of imported (but not domestically produced) apples were held to be justified on health grounds, as the imported fruit presented a risk not present in domestic apples. There must be a genuine health risk (***San Jose Scale***). However, the Court of Justice rejected health justifications for UK restrictions on poultry meat imports. The measures were not part of a seriously considered health policy and constituted a disguised restriction on trade (***Imports of Poultry Meat***). The health risk was also assessed in ***DocMorris*** (to be discussed below in relation to the ***Keck*** judgment).

One difficult area is the use of additives in foodstuffs, since there may be scientific uncertainty as to the extent of any risk.

#### *Officier van Justitie v Sandoz BV* (Case 174/82) [1983] ECR 2445

**Facts:** The Netherlands prohibited the sale of muesli bars with added vitamins, maintaining that the vitamins were harmful to health. The bars were freely available in Germany and Belgium. The vitamins themselves presented no health risk, and were in fact necessary to human health, but their over-consumption across a range of foodstuffs would constitute a risk.

**Held:** As scientific research had been unable to determine the critical amount or the precise effects, the Court of Justice declared that it was for Member States to decide the appropriate degree of public health protection, whilst observing the principle of proportionality. Member States must authorise marketing when the addition of vitamins to foodstuffs meets a technical or nutritional need.

In ***Beer Purity***, a German ban on additives was held to be to be disproportionate.

### *Commission v Germany (Beer Purity Laws)* (Case 178/84) [1987] ECR 1227

**Facts:** In addition to the rule on beer ingredients, noted earlier, German legislation also banned the use of all additives in beer. Seeking to rely on the [**Article 36**] public health derogation, the German government argued that because the German population drank large quantities of beer, the use of additives presented a greater public health risk in Germany than elsewhere in the [EU].

**Held:** Noting that Germany permitted additives in virtually all other drinks, the Court of Justice decided that high beer consumption did not justify banning all additives in this particular product.

#### Protection of national treasures possessing artistic, historic, or archaeological value

The scope of this justification remains uncertain. In ***Commission v Italy (Export Tax on Art Treasures, No 1) (Case 7/68)*** the Court indicated that quantitative restrictions (but not charges) would be justified where the object of those restrictions was to prevent art treasures from being exported from a Member State.

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#### Protection of industrial and commercial property

EU law protects the ownership of industrial and commercial property rights, such as patents, copyright, trade marks, and design rights. However, any improper use of these rights, constituting an obstacle to trade, will be condemned by the Court of Justice.

#### No harmonising rules

**Article 36** applies only in the absence of EU rules governing the interest concerned. If there is harmonising legislation in a particular area, Member States may not impose additional requirements, unless the legislation expressly permits it.

## *Cassis de Dijon:* Justification of indistinctly applicable MEQRs

The notion that 'reasonable' restraints were capable of justification, introduced in ***Dassonville***, was developed in ***Cassis de Dijon***.

### *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] ECR 649 (*Cassis de Dijon*)

**Facts:** The applicant was refused permission to import Cassis de Dijon (blackcurrant liqueur) into Germany from France because the product did not comply with a German requirement that, to be marketed lawfully in Germany, fruit liqueurs must have a minimum alcohol content of 25 per cent. The alcohol content of the French Cassis was between 15 and 20 per cent. The applicant challenged the legislation, claiming that it was an MEQR.

Germany argued that the measure was justified on grounds of public health and the fairness of commercial transactions, asserting that low-alcohol spirits create a tolerance to alcohol and cause alcoholism and that the high rate of national tax on high-alcohol drinks gave low-alcohol drinks a competitive advantage. The Court of Justice applied two principles that have become known as the 'principle of mutual recognition' and the ***Cassis*** 'rule of reason'.

## Principle of mutual recognition

As mentioned earlier, **mutual recognition** is the fundamental principle underlying free movement of goods, articulated in ***Cassis de Dijon***: provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. The principle operates as a rebuttable presumption. ***Prantl*** provides an example of the principle.

### *Criminal Proceedings against Karl Prantl* (Case 16/83) [1984] ECR 1299

**Facts:** German legislation restricted the use of bulbous 'Bocksbeutel' bottles to wine produced in certain German regions, where the bottles were traditional. These bottles were also traditional in parts of Italy. Prantl was prosecuted for importing into Germany Italian wine in 'Bocksbeutel' bottles.

p. 110 ↵ **Held:** Applying the principle of mutual recognition, the Court of Justice held that national legislation may not prevent wine imports by reserving the use of a particular shape of bottle to its own national product, where similar shaped bottles were also used traditionally in the state of origin.

## The *Cassis* rule of reason

According to the principle of mutual recognition, free trade between Member States is based upon the assumption that goods lawfully produced and marketed in one Member State are acceptable in another. However, this assumption will be set aside if the ***Cassis*** '**rule of reason**' applies. If so, certain measures which would otherwise be classified as MEQRs under ***Dassonville***, may fall outside the prohibition in **Article 34**.

## *Cassis de Dijon* continued

**Held:** Unsurprisingly, the Court was unimpressed by Germany's arguments relating to alcohol tolerance and the competitive advantage afforded to low-alcohol drinks by German taxation. However, the Court held that certain kinds of restriction would be permissible on particular grounds, the 'mandatory requirements':

> … obstacles to movement within the [EU] resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being 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.

This is known as the ***Cassis*** 'rule of reason'.

The rule of reason provides that restrictions on trade resulting from national provisions on product marketing, which differ from those applying in other Member States, are permissible if they are necessary to satisfy one of the **mandatory requirements**. The mandatory requirements are the justifications that allow restrictions of this kind to escape the scope of **Article 34**.

### No harmonising rules

The ***Cassis*** rule of reason applies only in the absence of EU rules governing the interest concerned. If there is EU **harmonising legislation** in a particular area, Member States may not impose additional requirements, unless that legislation expressly permits it.

### Only indistinctly applicable measures

The ***Cassis*** rule of reason applies only to indistinctly applicable measures. Distinctly applicable measures cannot be justified by the *rule of reason* (but see above discussion of **Article 36**). This limitation was not contained in the ***Cassis*** judgment itself but has been applied by the Court of Justice subsequently, for example in ***Commission v Ireland***.

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## *Commission v Ireland (Restrictions on Importation of Souvenirs)* (Case 113/80) [1981] ECR 1625

**Facts:** An Irish measure requiring imported souvenirs depicting Irish motifs (such as shamrocks) to be marked 'foreign' or with their country of origin was argued to have been adopted.

**Held**: The Court of Justice refused to apply the rule of reason to a distinctly applicable Irish measure, adopted allegedly in the interests of consumers and fair trading.

### Extension of the mandatory requirements

The rule of reason enunciated in the ***Cassis*** judgment incorporates four mandatory requirements: the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer. This list is not exhaustive and, in later cases, the Court of Justice has added further mandatory requirements, including environmental protection (***Danish Bottles***), legitimate interests of economic and social policy (***Oebel***), and national and regional socio-cultural characteristics (***Torfaen Borough Council***).

## *Commission v Denmark (Danish Bottles)* (Case 302/86) [1988] ECR 4607

**Facts:** Danish legislation for the protection of the environment limited the use of beer and soft drinks containers that had not been approved by the National Agency for the Protection of the Environment and required all containers to be reusable and subject to a deposit-and-return system.

**Held:** The Court of Justice held that the protection of the environment, as 'one of the [EU's] essential objectives', may justify restrictions on the free movement of goods.

## *Oebel* (Case 155/80) [1981] ECR 1993

**Facts:** German legislation prohibited night working in bakeries and night deliveries of bakery products which, it was claimed, restricted deliveries into neighbouring Member States in time for breakfast.

**Held:** The measure was compatible with **Article 34** because 'trade within the [EU] remained possible at all times'. Whilst it was not necessary for the German government to justify the legislation, the Court recognised that legitimate interests of economic and social policy, designed to improve working conditions, could constitute a mandatory requirement.

## *Torfaen Borough Council v B&Q plc* (Case 145/88) [1989] ECR 3851

**Facts:** With limited exceptions, the Shops Act 1950 prohibited Sunday trading in the UK. B&Q argued that this provision was an MEQR because its consequence was to reduce sales and hence the volume of imports from other Member States.

**Held:** The Court of Justice found that the Sunday trading rules were justified because they were in accord with national or regional socio-cultural characteristics.

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## Looking for extra marks?

It is important to note that restrictions of the type in ***Oebel*** and ***Torfaen Borough Council*** may not now fall within the scope of **Article 34** as they will be classified as 'selling arrangements' (see discussion of the ***Keck*** judgment below).

### Proportionality

By permitting only 'necessary' restrictions, the rule of reason includes a **proportionality** requirement. Restrictions must go no further than is necessary to achieve their objective, namely any of the mandatory requirements. Proportionality has frequently proved a difficult hurdle for Member States to overcome, as demonstrated by ***Cassis***, ***Walter Rau***, and ***Beer Purity***.

## *Cassis de Dijon* continued

**Facts:** Germany's justifications for its legislation on the alcohol content of fruit liqueurs, the protection of public health, and the fairness of commercial transactions, fell within the 'mandatory requirements'. However, the Court also had to consider whether the provision was proportionate.

**Held:** The provision was not necessary to satisfy those requirements. The same objectives could have been achieved by means that were less of a hindrance to trade, such as a requirement to label the products with their alcohol content.

## *Walter Rau* continued

**Facts:** Belgium maintained that national legislation requiring margarine to be retailed in cube shapes was necessary to protect the consumer from the risk of confusing butter and margarine.

**Held:** The Court held that whilst, in principle, legislation designed to prevent consumer confusion is justified, legislation prescribing a particular form of packaging goes further than is necessary to achieve that objective. Consumer protection could be achieved by measures which were less of a hindrance to interstate trade, such as a labelling requirement.

## *Commission v Germany (Beer Purity Laws)* (Case 178/84) [1987] ECR 1227

**Facts:** Germany sought to justify a rule requiring all drinks marketed as 'Bier' to contain only specified ingredients on grounds of consumer protection, claiming that German consumers associated 'Bier' with products containing only these ingredients.

**Held:** The Court of Justice declared that consumer protection could be achieved by measures that were less of a hindrance to imports, namely a requirement for beer to be labelled with an indication of its ingredients.

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## *Scotch Whisky Association and Others v Lord Advocate* (Case C-333/14)

**Facts:** The **Alcohol (Minimum Pricing) (Scotland) Act 2012** was introduced in Scotland to enable the Scottish government to set a minimum price per unit of alcohol by secondary legislation. The relevant legislation clearly amounted to an obstacle to the free movement of goods as an indistinctly applicable MEQR falling within **Article 34 TFEU**, but the Scottish government sought to justify the measure on the basis of public health.

**Held:** The Court of Justice accepted the argument for justification on the basis that it both targeted 'harmful and hazardous' drinkers, while also reducing general alcohol consumption in the wider population 'albeit only secondarily'. However, the Court questioned the proportionality of the measure and whether the objective could be achieved in a way that proved less of a hindrance to trade, for example by means of taxation.

In November 2017, after consideration of new evidence and argument, the UK Supreme Court in ***Scotch Whisky Association v Lord Advocate [2017]*** concluded that the measure was proportionate to its objective.

> A critical issue is, as the Lord Ordinary indicated, whether taxation would achieve the same objectives as minimum pricing … [T]he main point stands, that taxation would impose an unintended and unacceptable burden on sectors of the drinking population, whose drinking habits and health do not represent a significant problem in societal terms in the same way as the drinking habits and health of in particular the deprived, whose use and abuse of cheap alcohol the Scottish Parliament and Government wish to target. In contrast, minimum alcohol pricing will much better target the really problematic drinking to which the Government's objectives were always directed and the nature of which has become even more clearly identified by the material more recently available [63].

### Revision tip

Understand the meaning of proportionality and be familiar with its application in the cases. Typical problem questions will require you to apply this general principle.

## *Keck and Mithouard:* selling arrangements

### Dual burden and equal burden rules

A number of cases following ***Cassis*** exposed a distinction between two categories of indistinctly applicable measures. First, there are rules relating to goods themselves, referred to as '**dual burden**' rules. These impose additional requirements to those that may be applied in the state of origin, creating an extra burden for producers. The 'cube-shaped margarine' requirement in ***Walter Rau*** is an example. Secondly, there are rules that concern the marketing of goods, described as '**equal burden**' because they impose an equal burden on domestic and imported products. They have an impact on the overall volume of sales, and therefore on imports, but they have no greater impact on imported products than on domestic products. ***Keck*** articulated this distinction.

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## The *Keck* judgment

### *Keck and Mithouard* (Cases C-267 & 268/91) [1993] ECR I-6097

**Facts:** Keck and Mithouard were prosecuted for reselling goods at a loss, breaching French competition law. Relying on [**Article 34**] as a defence, they argued that the French legislation breached the free movement of goods principles.

**Held:** The Court of Justice acknowledged that the legislation restricted the overall volume of sales and hence the volume of sales of products from other Member States. However, the Court held, national measures prohibiting certain 'selling arrangements' do not fall within the ***Dassonville*** formula 'provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. Such provisions do not impede market access for imported products any more than for domestic products and fall outside [**Article 34**].

### Looking for extra marks?

In ***Keck***, the Court of Justice indicated that its judgment was aimed at traders who put forward [**Article 34**] to challenge national rules restricting their commercial freedom. Challenges of this kind had been made in the UK 'Sunday trading' cases, for instance in ***B&Q***, referred to earlier.

## Application of *Keck*

***Keck*** applies only to rules concerning 'selling arrangements' and not to rules relating to the goods themselves, such as packaging, content, and labelling. In practice, this distinction may prove difficult to make, though later decisions have provided guidance on the scope of 'selling arrangement'. This term includes restrictions on shop opening hours (***Tankstation 't Heukske vof and JBE Boermans (Cases C-401 & 402/92)***), on the kinds of retail outlets from which certain goods can be sold (***Commission v Greece (Case C-391/92)***), and on product advertising (***Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV Shop i Sverige AB (Cases C-34–36/95)***).

Even where a restriction is characterised as a selling arrangement, ***Keck*** provides that it will only escape **Article 34** if it applies to all affected traders in the national territory and affects in the same manner, in law and in fact, the marketing of domestic products and imported products. Any restriction with a discriminatory effect on imports constitutes an MEQR.

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### *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (Case-254/98) [2000] ECR I-151

**Facts:** Austrian legislation prohibited butchers, bakers, and grocers from selling their goods on rounds from door to door unless they also conducted business from permanent establishments in the district.

**Held:** Whilst the legislation concerned selling arrangements applying to all traders, the Court of Justice found that traders from other Member States, to have the same access to the Austrian market as local traders, would need to incur the additional cost of setting up permanent establishments. The legislation impeded access to the Austrian market for imports and infringed [**Article 34**].

In ***Leclerc-Siplec (Case C-412/93)***, Advocate-General Jacobs proposed the use of an 'impediment to market access' test to be applied to all measures. The approach was embraced in ***Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) (Case 405/98)*** in relation to a selling arrangement (advertising restrictions). The position in relation to selling arrangements can therefore be usefully summarised by saying that discriminatory selling arrangements and those that prevent access to a market remain MEQRs. This is also illustrated in the ***DocMorris*** case.

### *Deutsche Apothekerverband v 0800 DocMorris NV* (Case C-322/01) [2003] ECR I-14887

**Facts:** Germany banned the sale of medicines by mail order and over the internet. The measure related to 'selling arrangements', but fell outside ***Keck*** because it had a greater impact on imports than on domestic products. Thus, the ban infringed [**Article 34**].

**Held:** The Court of Justice held that the measure could be justified on health grounds in relation to prescription medicines because consumers needed to receive individual advice and the authenticity of prescriptions must be checked. By contrast, non-prescription medicines did not present a risk, because the 'virtual pharmacy' could provide an equal or better level of advice than traditional pharmacies. Here, the prohibition was not justified.

## Revision tip

***Keck*** applies to 'selling arrangements', but only where they have no greater impact on imports than on domestic products. Remember that both elements of the rule must be satisfied. If they are both satisfied, the measure falls outside ***Dassonville*** and therefore does not breach **Article 34** Where a measure fails to satisfy the ***Keck*** requirements, it remains an MEQR and potential justification should be considered under the ***Cassis*** rule of reason or the **Article 36** derogation.

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## Looking for extra marks?

The account of ***Cassis*** and **Article 36** presented earlier sets out the established position that the **Article 36** list of justifications cannot be extended in the way that the ***Cassis*** list of mandatory requirements has been extended and that the ***Cassis*** rule of reason can apply only to indistinctly applicable measures. These principles, perfectly encapsulated, for instance, in ***Commission v Ireland (Restrictions on Importation of Souvenirs)***, together with the principles of mutual recognition and proportionality, still hold good. You should discuss and apply them in answers.

At the same time, be aware that the Court of Justice has sometimes blurred the distinction between ***Cassis*** and **Article 36**, particularly regarding national measures for the protection of the environment. This point is illustrated by ***PreussenElektra AG v Schleswag AG (Case C-379/98)***, concerning German legislation requiring German electricity suppliers to purchase the electricity produced from renewable sources in their area of supply. Here, the Court avoided any discussion of the distinction between [**Article 36**] and ***Cassis***, finding that this distinctly applicable measure was justified on environmental grounds.

As noted above, there is some overlap between the ***Cassis*** mandatory requirements and the **Article 36** justifications, notably the public health ground. Where this ground is invoked to justify an indistinctly applicable measure, the case may be presented under either ***Cassis*** or **Article 36**.

### Harmonisation

**Harmonisation** aims to eliminate disparities between national product standards that hinder interstate trade, by establishing EU-wide standards. Once a measure harmonising an area comprehensively is adopted, Member States have no recourse to derogation in that area. **Article 115 TFEU** provides for the adoption of harmonising directives for this purpose. Early progress on harmonisation was slow, as the adoption of measures under **Article 115** required unanimity in the Council of Ministers.

In 1985, a new approach focused on a minimum level of EU regulation in relation to technical harmonisation and standards, rather than on comprehensive rules. A Council Resolution of 7 May 1985 states that directives are to be based upon the essential requirements with which products must conform. The detailed technical specifications are not a matter for EU legislation but for competent organisations, such as research and standards institutes.

Harmonisation was progressed further with **Article 114 TFEU**, introduced by the Single European Act 1986, providing for the adoption of measures concerning the establishment and functioning of the internal market, by qualified majority vote. Member States wishing to apply ↲ stricter standards than those contained in EU harmonising measures may seek approval from the Commission on the basis of 'major needs' or in relation to the environment or the working environment.

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The structure of **Article 34 TFEU** is illustrated in Figure 5.3.

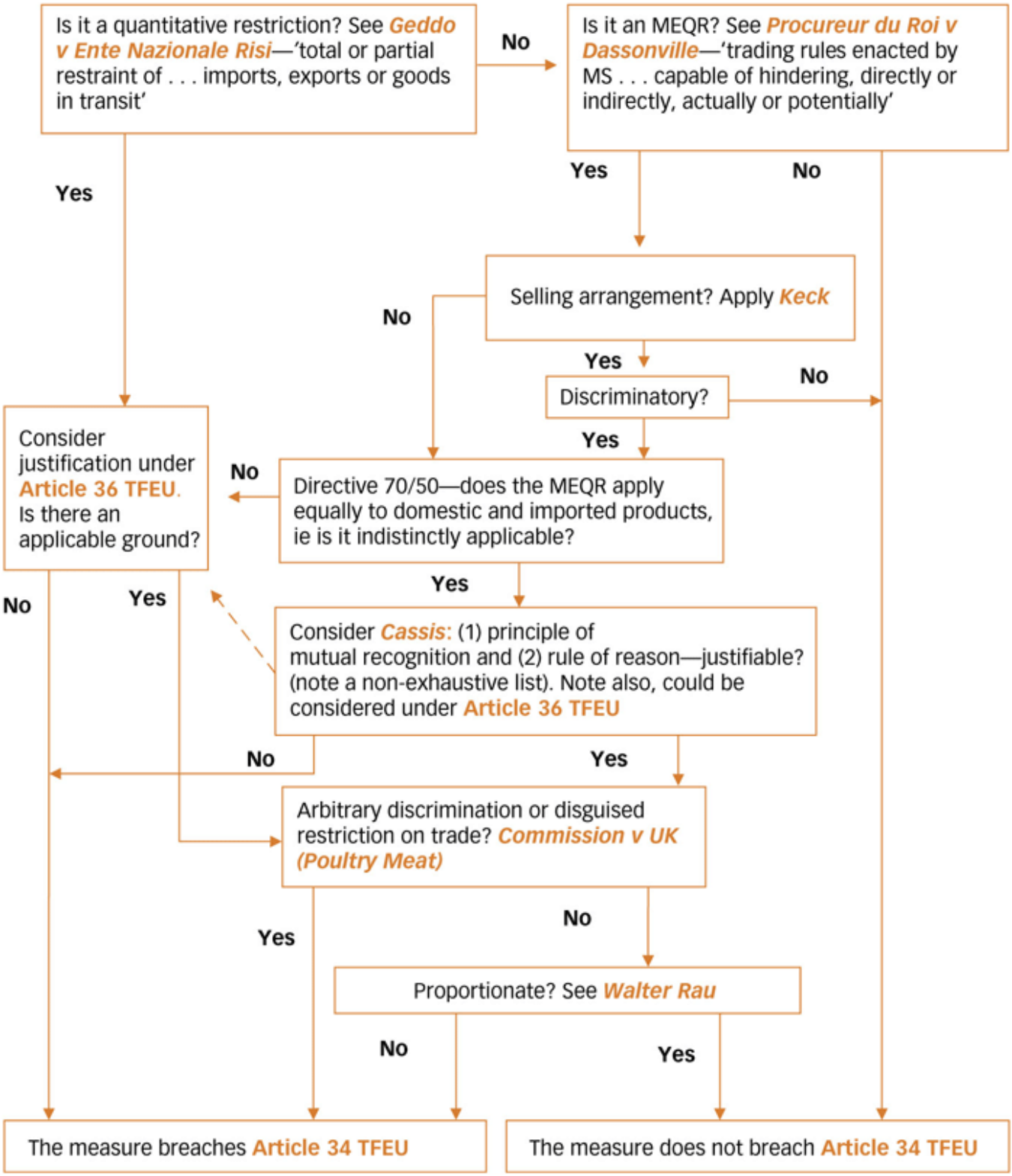


**Figure 5.3** Article 34 TFEU

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## Looking for extra marks?

Taking an overview of this area of EU law, two distinct but complementary approaches to achieving the free movement of goods can be identified. The first is deregulatory and negative, entailing the prohibition of national rules that frustrate the internal market objective. The second is based upon positive integration. This approach seeks to eliminate barriers to interstate trade through the application of the principle of mutual recognition and through harmonisation in areas such as technical requirements and health and safety.

## Implications of Brexit

Following the outcome of the referendum on UK membership of the EU in 2016 and the departure of the UK from the EU in January 2020, terms such as free trade area, customs union, and the internal market have become ever more part of the common vocabulary but are often misunderstood.

A new agreement, the Trade and Co operation Agreement to regulate the future trading relationship between the EU and the UK, came into force on 31 December 2020. There must be no taxes on goods (tariffs) or limits on the amount that can be traded (quotas) between the UK and the EU with effect from 1 January 2021. However, some new checks will be introduced at borders, such as safety checks and customs declarations. At the time of writing, the fine details of the implementation of the Trade and Co operation Agreement are still being debated.

## Key cases

| CASE | FACTS | PRINCIPLE |
|---|---|---|
| ***Chemial Farmaceutici SpA v DAF SpA (Case 140/79) [1981] ECR 1*** | Italy taxed synthetic alcohol at a higher rate than alcohol produced by fermentation. | Indirectly discriminatory taxation can be objectively justified. |
| ***Commission v Belgium (Customs Warehouses) (Case 132/82) [1983] ECR 1649*** | Belgium charged importers for storage facilities. | For a charge to escape **Article 30**, the service must be of direct benefit to the importer (or exporter) and the charge must be proportionate to the value of the service. |
| ***Commission v Denmark (Danish Bottles) (Case 302/86) [1988] ECR 4607*** | Danish legislation for the protection of the environment concerning drinks containers. | The ***Cassis*** list of mandatory requirements extended by the Court of Justice to the protection of the environment. |

| CASE | FACTS | PRINCIPLE |
|---|---|---|
| p. 119 ↵ ***Commission v Ireland (Restrictions on Importation of Souvenirs) (Case 113/80) [1981] ECR 1625*** | Ireland required imported souvenirs depicting Irish motifs to be marked 'foreign' or with their country of origin. | The ***Cassis*** rule of reason applies only to indistinctly applicable measures. The **Article 36** list of justifications is exhaustive. |
| ***Denkavit v France (Case 132/78) [1979] ECR 1923*** | French charge on meat products. | Internal taxation: 'a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike'. |
| ***Diamonds (Sociaal Fonds voor de Diamantarbeiders) v Chougol Diamond Co (Cases 2 & 3/69) [1969] ECR 211*** | Belgian charge on imported diamonds. | 'CEE': 'any pecuniary charge … imposed on … goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense.' The charge need not be protectionist to constitute a breach. |
| ***Geddo v Ente Nazionale Risi (Case 2/73) [1973] ECR 865*** | Italian levy on rice. | Quantitative restrictions: 'measures which amount to a total or partial restraint of … imports, exports or goods in transit'. |
| ***Humblot v Directeur des Services Fiscaux (Case 112/84) [1985] ECR 1367*** | French two-tier system of car taxation based on power-rating. | Indirect discrimination: does not openly discriminate on the basis of product origin but its effect is to disadvantage imports. |
| ***Keck and Mithouard (Cases C-267 & 268/91) [1993] ECR I-6097*** | French competition rules prohibiting resale of goods at a loss. | National measures prohibiting 'selling arrangements' fall outside ***Dassonville*** 'provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. |
| ***Procureur du Roi v Dassonville (Case 8/74) [1974] ECR 837*** | Belgian legislation requiring certificates of origin. | MEQRs: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.' |

| CASE | FACTS | PRINCIPLE |
|---|---|---|
| ***Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Case 120/78) [1979] ECR 649(Cassis de Dijon)*** | German requirement: fruit liqueurs sold in Germany must have a minimum alcohol content of 25 per cent. | Principle of mutual recognition: provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. Rule of reason: restrictions must be accepted insofar as they are necessary to satisfy 'mandatory requirements'; the measure must be proportionate. |
| p. 120 ↵ ***Rewe-Zentralfinanz v Landwirtschaftskammer Bonn (San Jose Scale) (Case 4/75) [1975] ECR 843*** | Germany inspected imported (but not domestic) apples. | A distinctly applicable measure: the measure did not apply equally to imports and the domestic product. |
| ***Walter Rau Lebensmittelwerke v de Smedt PvbA (Case 261/81) [1982] ECR 3961*** | Belgium required margarine for retail sale to be cube-shaped. | An indistinctly applicable measure: the measure applied equally to imports and the domestic product. |

## Exam questions

## Problem question

Consider the following fictitious situation:

Freddie is a Spanish manufacturer of metal-grinding machines ('MGMs'), which he has supplied to manufacturers in Spain and France for the past ten years. Freddie now plans to export his machines into Portugal.

Freddie has learned that under Portuguese legislation a licence is required for the import of MGMs. Licence applications are considered by the Portuguese authorities in January and July each year. Freddie has been told that Portugal places an annual limit on the number of MGMs that may be imported and has regulations stipulating that manufacturing machinery, including MGMs, can only be sold through government sales outlets.

Portugal also has health and safety legislation requiring all MGMs to be fitted with an external 'vacuum filtration' unit to collect particles emitted by the grinding process. This legislation has recently been introduced following the publication of a research study conducted in Portuguese heavy industry. The study suggests that, over the past six months, the number of new cases of industrial lung disease has been significantly lower amongst metal-grinding operatives working on Portuguese-manufactured machines (most of which already comply with the new legislation) than amongst operatives working on imported machines (none of which currently complies). Freddie's machines do not comply with the Portuguese legislation. They are fitted with internal 'vacuum filtration' units which, in Freddie's view, operate much more efficiently than the externally fitted filtration units required by the legislation.

Advise Freddie as to the application, if any, of EU law on the free movement of goods to all aspects of this situation.

## Essay question

The free movement of goods is an essential element of the internal market and both EU legislation and the decisions of the Court of Justice support the achievement of this aspect of economic integration. However, the EU internal market is imperfect, so far as goods are concerned. There remain impediments to free movement which are not only embedded in the legislation but also arise from the case law of the Court of Justice.

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In the light of this statement, critically discuss the extent to which EU legislation and the case law of the Court of Justice ensure the free movement of goods in the internal market.

## Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer <https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-5-outline-answers-to-essay-questions?options=showName> to the essay question
- An outline answer <https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-5-outline-answers-to-problem-questions?options=showName> to the problem question
- Further reading <https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-5-further-reading?options=showName>
- Multiple-choice questions <https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-5-multiple-choice-questions?options=showName>

## Concentrate Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

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