Complete EU Law: Text, Cases, and Materials (5th edn)
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10. Free movement of goods

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter discusses the principle of the free movement of goods in the context of the internal market. It covers the stages of economic integration; the principle of non-discrimination; the main Treaty provisions governing the free movement of goods; the meaning of 'goods'; Article 30 TFEU: the prohibition of customs duties and charges having equivalent effect; charges for services rendered; Article 110 TFEU: the prohibition of discriminatory taxation; and Articles 34 and 35 TFEU: the prohibition of quantitative restrictions and measures having equivalent effect. This chapter also considers Treaty and case law-based derogations from free movement rules including Article 36 TFEU, *Cassis de Dijon*, and *Keck v Mithouard*. Finally, this chapter explores a potential new category of measures having an equivalent effect.

Keywords: EU law, free movement, internal market, economic integration, mutual recognition, selling arrangements

Key Points

By the end of this chapter, you should be able to:

- understand the principle of free movement of goods in the context of the internal market;
- be familiar with the relevant provisions of the Treaty on the Functioning of the European Union (TFEU);
- distinguish between the various barriers to trade with reference to relevant Treaty provisions; and
- understand the applicability and scope of the exceptions.

Introduction

The principle of the free movement of goods has been and continues to be of fundamental importance to the establishment and maintenance of the EU internal market. In essence, the principle implies that any unnecessary trade barriers must be removed by Member States. The principle's status and importance as one of the four fundamental freedoms of the European Union (EU) is clearly set out in Article 26 TFEU.

Article 26 TFEU

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

   However, whilst many trade barriers resulting from regulatory differences between Member States have been removed by EU-wide harmonizing procedures and trading rules, there remain areas that are still governed by differing national rules. It is the principle of the free movement of goods and the legislation in place to give effect to it that help to ensure that such non-harmonized rules do not amount to trade barriers.

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10.1 Development

The concept of a common market was at the very heart of the Treaty of Rome 1957 establishing the European Economic Community (EEC). It has been referred to in many ways since, from the 'common market' at the outset, moving through a mixture of the 'common market' and 'internal market' following the Single European Act 1986 (SEA), to now be known, following the Lisbon Treaty, solely as the 'internal market'. Despite this, the term 'single market' is often used in political discussions. All three terms are taken to mean the same thing in practice, although strictly speaking there are differences between them. The subtle nuances between the various terms are outside the scope of this text.

> *Cross-Reference*
>
> See 1.4.1 on economic integration.

Whichever term is used, it essentially relates to a specific stage of economic integration between Member States. 'Economic integration' refers simply to an arrangement by which countries agree to coordinate their trade and monetary policies. In practice, such integration occurs over a number of different stages and these are set out below.

10.1.1 Free trade area

A free trade area involves Member States agreeing to remove all customs duties and quotas between themselves. Thus, goods can move freely between the Member States without limitations on quantity and without being subjected to further **pecuniary charges** that may make non-national goods uncompetitive.

> *pecuniary charges*
>
> Pecuniary charges are charges relating to the payment of money.

However, each Member State may impose its own quotas and customs duties as regards countries outside the free trade area. These countries are referred to as third countries. Of course, should a producer in a third country wish to penetrate the market within the free trade area, they will inevitably do so by introducing goods through the country with the lowest import duty or tariff.

10.1.2 Customs union

A customs union develops this further by introducing an agreement between the Member States to impose a common level of duty on goods from non-member countries. This common level of duty is known as a common customs tariff.

Article 28 TFEU

> The union shall comprise a customs union which shall cover all trade in goods and ... the adoption of a common customs tariff in their relations with third countries.

Article 31 TFEU

> Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Cross-Reference

See 2.2 on the Council of the European Union.

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10.1.3 Internal market

An internal market develops this further still by introducing a further agreement between the Member States to remove restrictions on the factors of production. This is referred to as the free movement of goods, persons, services, and capital. A common market also introduces a competition policy. (See 10.1 on terms other than 'internal market' and their use in the EU context.)

10.1.4 Economic and monetary union

Economic and monetary union (EMU) develops this further still by introducing unified monetary and fiscal policies. Amongst other things, it includes a single currency and common policies on interest rates.

Thinking Point

> Which stage has the EU reached?

It can be argued that the EU is currently somewhere between the stages of an internal market and EMU. However, it can further be argued that a true internal market has yet to be achieved and the cases we will go on to consider in this chapter are evidence that a number of obstacles remain in place.

It should be noted that EMU was not one of the founding aims of the original European Communities and was not formally introduced until the TEU (1992). It remains a contentious political issue, especially given the current economic climate and difficulties faced in the eurozone (especially Greece and Italy, amongst others) as a result of the global economic crisis. However, currently over half of the Member States have established an EMU, with a central bank (the European Central Bank, or ECB) and a single currency (the euro).

Key to an understanding of the rules, both legislative and derived from case law, governing the free movement of goods is an appreciation of the principle of non-discrimination. This fundamental principle is enshrined in Article 18 TFEU and pervades this topic.

Article 18 TFEU

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

p. 413 ↵ This principle, in the context of free movement of goods, seeks to ensure that goods crossing borders are free from discriminatory internal rules. Of course, such discrimination can be both direct and indirect in form, and whilst Article 18 TFEU applies to both, there is a difference in how each are treated. Where direct discrimination exists, it can be justified only under the Treaty-provided exceptions, and even then will be subject to scrutiny to ensure such a rule goes no further than is necessary to achieve its aim (proportionality) and is indeed necessary. This contrasts with indirect discrimination, which may also be justified by exceptions developed within the case law.

10.2 Legislative provisions

The main Treaty provisions governing the free movement of goods are set out in Table 10.1.

Thinking Point

> Despite leaving the EU, why will UK goods still need to comply with EU rules and standards?

Table 10.1 Main Treaty provisions governing the free movement of goods

Treaty Article	Covers
Article 30 TFEU	Tariff barriers to trade prohibiting customs duties and charges having equivalent effect (CHEEs)
Articles 34 and 35 TFEU	Non-tariff barriers to trade prohibiting quantitative restrictions and measures having an equivalent effect on imports (Article 34) and exports (Article 35)
Article 36 TFEU	Derogations to Articles 34 and 35 TFEU justified upon certain grounds
Article 110 TFEU	Prohibition of discriminatory national taxation

Simply leaving the EU does not necessarily mean that a country no longer has access to the internal market. Indeed, it is entirely possible for a non-EU Member State to have full access to the internal market (and be subject to the rules that govern it) in much the same way as Norway currently has. Similarly, it is also possible for a non-EU Member State to have partial, but not full, access to the internal market. Switzerland, for example, has access to the Single Market for many of its industries, but the banking sector does not.

Post Brexit, the UK has opted to leave the single market and customs union and so the Treaty provisions relating to the Free Movement of Goods no longer apply to the UK. Under the EU–UK Trade and Cooperation Agreement, which governs post-Brexit EU–UK relations, the EU and UK trade in goods is governed by a Free Trade Agreement which, though preventing tariffs and quotas, does introduce customs duties and inspections on goods which move between the EU and UK. Moreover, UK goods entering the EU will still have
p. 414 to comply with EU regulatory standards in order to secure market access. Broadly speaking the EU–UK may ↵ be characterized more as 'hard' rather than 'soft' Brexit when it comes to trading arrangements and this trade agreement is highly unusual in that it raises barriers to trade between the parties where once there were none. But this was inevitable once the UK decided to leave the EU Single Market and Customs Union and while the barriers to EU–UK trade will not be as high compared to a no deal outcome, barriers are significantly higher than during the UK's membership of the EU. This will almost certainly add increased costs and delays to the movement of goods between the UK and EU.

10.3 Meaning of 'goods'

As a starting point, it is logical that, when considering the principle of the free movement of goods, consideration should be given to the meaning of the term 'goods'.

In Case 7/68 *Commission v Italy* [1968] ECR 423, the Italian government had subjected exports of articles of an artistic, historical, archaeological, or ethnographic nature to a tax. The Commission argued that such articles fell under the provisions relating to the customs union. The Italian government disputed this, arguing that they were excluded, as the articles in question could not be compared to consumer goods or articles of general use. The Court of Justice held as follows.

Case 7/68 *Commission v Italy* [1968] ECR 423

> [T]he Community is based on a customs union which shall cover all trade in goods. By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.
>
> The Articles covered by the Italian law, whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money and so be the subject of commercial transactions.

The scope of 'goods', for the purposes of the principle of free movement of goods, is therefore defined widely. However, subsequent case law has identified the outer edges of the scope of the concept.

Case C-97/98 *Jägerskiöld v Gustafsson* [1999] ECR I-7319

1. Are fishing rights or spinning licences 'goods' in accordance with the judg-

ment in Case 7/68 *Commission v Italy* [1968] ECR 423?

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30. Before this question is answered, it must be reiterated that, in its judgment in Case 7/68 *Commission v Italy*, cited above, which is expressly referred to by the national court, the Court defined goods, for the purposes of Article 9 of the EC Treaty (now, after amendment, Article 23 EC) [now Article 28 TFEU], which forms the first article of the third part of Title I of the EC Treaty, entitled 'Free movement of goods', as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.

31. Mr Jägerskiöld contends that fishing rights and fishing permits derived from them constitute 'goods' within the meaning of that judgment, in so far as they can be valued in money terms and may be transferred to other persons, as is expressly provided for by Article 5 of the Law on Fishing.

32. However, in *Commission v Italy* the Court was asked whether articles of artistic, historic, archaeological or ethnographic interest escaped the application of the Treaty provisions relating to the customs union on the ground that they could not be assimilated to 'consumer goods or articles of general use' and did not constitute 'ordinary merchandise'. As is clear from the actual definition given by the Court, the status of 'products' of the goods in question was not therefore contested, so that this definition cannot in itself serve to define fishing rights or permits as goods within the meaning of the Treaty provisions relating to the free movement of goods.

33. It must also be observed that anything which can be valued in money and which is capable, as such, of forming the subject of commercial transactions does not necessarily fall within the scope of application of those Treaty provisions.

34. As is clear from Council Directive 88/361/EEC of 24 June 1988 ... the Treaty provisions on the free movement of capital cover, in particular, operations relating to shares, bonds and other securities which, like fishing rights or fishing permits, can be valued in money and may be the subject of market transactions.

35. Similarly, as is clear from the judgment in Case C-275/92 *Schindler* [1994] ECR 1-1039, the organisation of lotteries does not constitute an activity relating to 'goods', even if such an activity is coupled with the distribution of advertising material and lottery tickets, but must be regarded as a provision of 'services' within the meaning of the Treaty. In that activity, the provisions of services in question are those provided by the lottery organiser in letting ticket buyers participate in the lottery against payment of the price of the lottery tickets.

36. The same applies to the grant of fishing rights and the issue of fishing permits. The activity consisting of making fishing waters available to third parties, for consideration and upon certain conditions, so that they can fish there constitutes a provision of services which is covered by Article 59 et seq. of the EC Treaty (now, after amendment, Article 49 EC et seq. [now Article 56 TFEU *et seq*]) if it has a cross-frontier character. The fact that those rights or those permits are set down in

> documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods.
>
> [...]
>
> 39. Consequently, the answer to be given to the first question must be that fishing rights or fishing permits do not constitute 'goods' within the meaning of the provisions of the Treaty relating to the free movement of goods but form a 'provision of a service' within the meaning of the Treaty provisions relating to the freedom to provide services.

p. 416 ↵ In *Jägerskiöld*, it was concluded that the granting of fishing rights and the issue of fishing permits were not 'goods' within the meaning of Treaty provisions. Although seemingly within the *Commission v Italy* definition, the intangibility of the fishing rights and permits—that is, their lack of physicality and inability to be touched—resulted in them being excluded from classification as goods regardless of the fact that such rights could be set down in documents. It is therefore clear that whilst *Commission v Italy* provides a useful and practical first test for the classification of goods, one must be wary of assuming that simply being capable of being valued in money and being capable of forming the subject of commercial transactions will automatically result in such a classification.

10.4 Article 30 TFEU: the prohibition of customs duties and charges having equivalent effect

Article 30 TFEU

> Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Two elements were identified by the Court of Justice in Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders v Chougol Diamond Co* [1969] ECR 211 in relation to customs duties.

Thinking Point

> As you read the following extract from the *Diamonds Case*, can you identify the two elements the Court referred to?

Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders v Chougol Diamond Co* [1969] ECR 211, 221–2

> In prohibiting the imposition of customs duties, the Treaty does not distinguish between goods according to whether or not they enter into competition with the products of the importing country. Thus, the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect in order to ensure the free movement of goods. It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member States that customs duties are prohibited independently of
p. 417 any consideration ↵ of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that any pecuniary charge—however small—imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.

Thus the two elements considered in the identification of a customs duty were (a) a pecuniary charge (that is, a monetary charge) which is (b) imposed by reason of the fact that the goods have crossed a frontier.

10.4.1 Charges having an equivalent effect

Thinking Point

> Why is Article 30 TFEU drafted in such a way as to include not only customs duties, but also charges having equivalent effect (CHEEs)? If it were not drafted in this way, how might a Member State try to impose charges?

Whilst Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders v Chougol Diamond Co* [1969] ECR 211 (see 10.4) defined customs duties in a wide way, to prohibit only customs duties would not be enough to ensure the elimination of tariff-based trade barriers. A Member State could always argue that whilst a charge was imposed at the time goods crossed a frontier, the reason for the charge was something other than the mere fact that the goods entered the country, for example a charge imposed for an import licence or some kind of service provided for the importer. For this reason—that is, to prevent protectionist measures that have the same effect as a customs duty—Article 30 TFEU is drafted in a wider way and therefore encompasses not only customs duties, but also CHEEs.

It is therefore clear from the outset that the concept of a CHEE is necessarily wider than that of a customs duty.

The Court of Justice provided a definition of a CHEE in Joined Cases 2 & 3/62 *Commission v Luxembourg (Gingerbread)* [1962] ECR 425.

Joined Cases 2 & 3/62 *Commission v Luxembourg ('Gingerbread')* [1962] ECR 425

> A duty, whatever it is called, and whatever its mode of application, may be considered a charge having equivalent effect to a customs duty, provided that it meets the following three criteria: (a) it must be imposed unilaterally at the time of importation or subsequently; (b) it must be imposed specifically upon a product imported from a member state to the exclusion of a similar national product; and (c) it must result in an alteration of price and thus have the same effect as a customs duty on the free movement of goods.

p. 418 ↵ Thus the emphasis is not (as we might expect) upon the label attached to the charge, but rather attention is paid to the effect of the charge. This was developed further in Case 24/68 *Commission v Italy ('Statistical Levy Case')* [1969] ECR 193, in which the Court of Justice defined a CHEE in the following way.

Case 24/68 *Commission v Italy ('Statistical Levy Case')* [1969] ECR 193, 201

> … any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect … even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product.

This broad definition was a clear statement of the strict approach in which CHEEs were to be considered. A pecuniary charge imposed by reason of the fact that goods crossed a frontier would amount to a CHEE regardless of who was affected and irrespective of whether the measure was discriminatory or the importing country produced competing goods.

The Court of Justice continued (*Statistical Levy Case*, at 201): 'It follows … that the prohibition of new customs duties or charges having equivalent effect, linked to the principle of the free movement of goods, constitutes a fundamental rule which, without prejudice to the other provisions of the Treaty, does not permit of any exceptions.'

However, whilst it is eminently clear that the Treaty itself does not allow for exceptions, the Court of Justice has considered circumstances in which such charges could be justified by reason of the fact that they constitute a charge for a service rendered. If categorized as such, the charge should not be regarded as a CHEE.

Cross-Reference

See 10.5 on charges for services rendered.

10.4.2 Examples of CHEEs

In Joined Cases 2 & 3/62 *Commission v Luxembourg and Belgium (Gingerbread)* [1962] ECR 425, Luxembourg and Belgium had increased and extended a special import duty levied upon the issue of import licences for gingerbread. The two governments argued that the charge concerned was in place to 'equate the price of the foreign product with the price of the Belgian product'. The Court pointed out that such an argument ignores the principle that the activities of the EU shall include the institution of a system ensuring that competition in the common market is not distorted. The Court of Justice was clear in determining that Article 30 TFEU was intended to prohibit not only measures in the classic form of a customs duty, but also measures that were presented under different names or which were introduced indirectly by virtue of other procedures that had the same discriminatory or protective results. The charge in this case therefore amounted to a CHEE.

p. 419 ↵ In Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders v Chougol Diamond Co* [1969] ECR 211, a charge had been imposed upon diamonds imported into Belgium. Although the Court of Justice did not find the charge to be protectionist, it was held to be a CHEE. This causes us to refer back to the wide definition given in *Commission v Italy*. Thus it is the effect of the charge that is all-important and not its purpose.

In Case 24/68 *Commission v Italy ('Statistical Levy Case')* [1969] ECR 193, the Italian government had imposed a 10 lira levy on all imports and exports, with a view to financing the compilation of statistics that, it was argued, were of benefit to traders. However, the Court of Justice stressed that any charge hampers the interpenetration of goods into the market at which the Treaty aims and therefore has an effect upon the free circulation of goods. Further, the fact that the charge was in fact quite small did not preclude its being defined as a CHEE.

Thinking Point

> Why do you think the Court of Justice has chosen to interpret Article 30 TFEU in this way?

The Article 30 TFEU prohibition is a fundamental element of the customs union and the single market. As such, Article 30 TFEU has been applied strictly by the Court of Justice and an expansive interpretation has been given to CHEEs. This ensures that not only customs duties in the strict sense are prohibited, but also

measures that create a similar barrier to trade, with an emphasis on the effect of the measure as opposed to its stated (or, indeed, actual) intent or purpose.

10.5 Charges for services rendered

In Case 24/68 *Commission v Italy ('Statistical Levy Case')* [1969] ECR 193, one argument advanced by the Italian government was that the charge constituted consideration for a service rendered and as such could not be designated as a CHEE. However, the Court of Justice determined that any alleged advantage was, in fact, so general and difficult to assess that the charge could not be classed as 'consideration for a specific benefit actually conferred'.

However, whilst the Court rejected the argument on the facts of the case before it, the Court did not appear to reject the potential for such justification out of hand.

In Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders v Chougol Diamond Co* [1969] ECR 211 (considered in 10.4), the Belgian government argued that the levy was imposed in order to contribute to a social fund for those working within the diamond industry. In this case, at 222–3, the Court of Justice openly acknowledged the 'charge for services rendered' argument: '[A]lthough it is not impossible that in certain
p. 420 circumstances a specific ↵ service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of Articles 9 and 12 of the Treaty.'

The argument of a charge for a service rendered has been raised in many cases. It is now clear that the following requirements must apply.

10.5.1 The service must be of direct benefit to the goods or traders concerned

In Case 132/82 *Commission v Belgium ('Customs Warehouses')* [1983] ECR 1649, EU rules allowed for customs formalities to be completed either at the frontier or within the territory at special public warehouses if the importer did not wish them to be placed immediately under a specific customs formality (a concept known as EU transit). Where goods were presented for completion of formalities at these special public warehouses, a storage charge was imposed on the goods whilst they awaited clearance. The Commission argued that the charge amounted to a CHEE as there was no service rendered to the importer, the charge being connected solely with completion of customs formalities. The Belgian government argued that it could not be a CHEE as it was imposed not by reason of crossing a frontier nor the completion of customs formalities, but for the use of the storage facilities. As such, the Belgian government argued, it amounted to a charge for a service rendered to the importer and was therefore justified. The Court was acceptant of the view that the placing of goods in temporary storage was a service rendered to the importer. Furthermore, the Court and the Commission accepted that such a service may legally give rise to a payment commensurate with the service provided. However, on the facts, the Court noted that the charge applied whether or not use was made of the temporary storage facility (i.e. where goods had been presented to the warehouses *solely* for the completion of

customs formalities). As a result, the Court held that where payment of storage charges is demanded solely in connection with the completion of customs formalities, it could not be regarded as a charge for a service actually rendered to the importer.

Thinking Point

> What do you think is the purpose of this requirement?

Therefore, whilst the *principle* of a charge being in place for a service rendered was accepted by the Court of Justice, on the application of the facts, the charge in question was *not accepted* as a permitted charge.

In the absence of strict requirements and structured application, the scope for the imposition of tariff barriers
p. 421 to trade would be much greater, allowing Member States to justify ↵ protective measures in vague and uncertain terms. This, in turn, would severely hamper the free movement of goods.

In *Statistical Levy*, the Italian government's argument was set out as follows.

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

> 15. According to the Italian government the object of the statistics in question is to determine precisely the actual movements of goods and, consequently, changes in the state of the market. It claims that the exactness of the information thus supplied affords importers a better competitive position in the Italian market whilst exporters enjoy a similar advantage abroad and that the special advantages which dealers obtain from the survey justifies their paying for this public service and moreover demonstrates that the disputed charge is in the nature of a quid pro quo.
>
> 16. The statistical information in question is beneficial to the economy as a whole and inter alia to the relevant administrative authorities.

However, the Court decided that even if there was a particular advantage enjoyed, any direct benefit occasioned was still too general and difficult to assess. As such, the argument was rejected and the charge was held to be a CHEE.

In Case 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129, a charge had been imposed on imported raw cowhides for veterinary and public health inspections. In determining whether the charge amounted to a CHEE, the Court of Justice focused upon who benefited from the alleged 'service' provided.

Case 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129

> 10. … The activity of the administration of the State intended to maintain a public health inspection system imposed in the general interest cannot be regarded as a service rendered to the importer such as to justify the imposition of a pecuniary charge. If, accordingly, public health inspections are still justified at the end of the transitional period, the costs which they occasion must be met by the general public which as a whole benefits from the free movement of Community goods.

The pecuniary charge imposed was therefore held to be a CHEE.

Thus it is clear that, in order to sustain the argument that a charge is justified on the basis of being in place for a service rendered, the service concerned must be of direct benefit to the goods or traders concerned. This is not satisfied where the service is merely in the 'general interest'. Furthermore, it is clear from *Statistical Levy* that the argument is a difficult one to sustain.

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10.5.2 The charge must be proportionate to the services rendered

Many cases have been decided upon whether the charge is **proportionate**. It should be noted here that the important consideration is not the amount of the charge, but rather the extent to which the amount levied is commensurate with the service provided. Perhaps the clearest illustration of this is found in Case 170/88 *Ford España SA v Estado español* [1989] ECR 2305, in which a charge had been imposed relating to operations incidental to customs clearance when carried out at premises or places not open to the public. The charge concerned was calculated as a proportion of the declared value of the imported goods. The Court of Justice made it clear that even if the levying of a charge was allowed for a service rendered, the charge in the instant case amounted to a CHEE as the amount could not be *proportionate* to the service rendered, being based as it was on the value of the goods concerned rather than the costs related to the service.

> *proportionate*
>
> A proportionate measure is suitable for its objective, but goes no further than is necessary to achieve it.

In Case 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129, the charge imposed was held to be a CHEE regardless of the fact that the charge was proportionate to the cost of the compulsory public health inspections and was calculated according to the quantity of imported goods rather than the value of the goods. Whilst proportionality will always be a vital consideration in determining the validity or otherwise of a charge for a service rendered, it will not in itself justify a charge. The same principle is applicable also to direct benefit to traders in the absence of proportionality. As was made clear by the Court of Justice in *Bresciani*:

Case 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129

> 9. Consequently, any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another Member State by reason of the fact that they cross a frontier, constitutes a charge having an effect equivalent to a customs duty. In appraising a duty of the type at issue it is, consequently, of no importance that it is proportionate to the quantity of the imported goods and not to their value.

Note

> To justify a charge, that charge must be of direct benefit to the goods or traders concerned AND the charge must be proportionate to the services rendered.

10.5.3 'Services' permitted under EU law

In Case 314/82 *Commission v Belgium* [1984] ECR 1543, the Belgian government contended that the charges
p. 423 imposed for inspections were justified on the basis that Council Directive ↵ 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultrymeat, OJ 1971 L55/23, permitted the inspections concerned. However, as the service provided was merely part of the administrative activity of the State intended to protect in the public interest, public health, and hygiene, it could not be regarded as a service that benefited the importer. As such, the fact that the health checks were permitted by EU law did not preclude them from classification as CHEEs.

10.5.4 'Services' mandated by EU law

Thinking Point

> While reading this section, consider why the conditions are different when the services or inspections are mandated by EU law. Which key principle (considered earlier) remains an integral element?

In Case 46/76 *Bauhuis v Netherlands State* [1977] ECR 5, the Dutch administrative authorities imposed fees on importers for veterinary and public health inspections on bovine animals and swine prescribed and provided for by Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine, OJ 1964 121/1977. One cattle dealer who had paid the fees claimed a refund on the basis that the charges amounted to a CHEE. The Court of Justice determined that where fees are charged for inspections that are prescribed by an EU provision, are uniform, and are required to be carried out before despatch within the exporting country, they do not constitute CHEEs, provided that they do not exceed the actual cost of the inspection for which they were charged.

In Case 18/87 *Commission v Germany* [1988] ECR 5427, the authorities charged a fee payable on the transit and importation of live animals from other Member States to cover the cost of veterinary inspections carried out under Council Directive 81/389/EEC of 12 May 1981 establishing measures necessary for the implementation of Directive 77/489/EEC on the protection of animals during international transport, OJ 1981 L150/1. Article 2 of the Directive required all Member States of transit and designation to carry out the inspections when animals were brought into the territory and, as such, the inspections were obligatory. The Court of Justice, applying and developing the principle established in Case 46/76 *Bauhuis v Netherlands* [1977] ECR 5, stated as follows.

Case 18/87 *Commission v Germany* [1988] ECR 5427

> 8. … [S]uch fees may not be classified as charges having an effect equivalent to a customs duty if the following conditions are satisfied:
>
> (a) they do not exceed the actual costs of the inspections in connection with which they are charged
>
> p. 424 (b) the inspections in question are obligatory and uniform for all the products concerned in the Community
>
> (c) they are prescribed by Community law in the general interest of the Community
>
> (d) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 of the Treaty.

It is useful to consider the application of the tests to the facts and the conclusion at which the Court arrived.

Case 18/87 *Commission v Germany* [1988] ECR 5427

> 9. In this instance these conditions are satisfied by the contested fee. In the first place it has not been contested that it does not exceed the real cost of the inspections in connection with which it is charged.
> 10. Moreover, all the Member States of transit and destination are required, under, inter alia, Article 2(1) of Directive 81/389/EEC, cited earlier, to carry out the veterinary inspections in question when the animals are brought into their territories, and therefore the inspections are obligatory and uniform for all the animals concerned in the Community.
> 11. Those inspections are prescribed by Directive 81/389/EEC, which establishes the measures necessary for the implementation of Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport, with a view to the protection of live animals, an objective which is pursued in the general interest of the Community and not a specific interest of individual States.
> 12. Finally, it appears from the preambles to the two above-mentioned directives that they are intended to harmonize the laws of the Member States regarding the protection of animals in international transport in order to eliminate technical barriers resulting from disparities in the national laws (see third, fourth, and fifth recitals in the preamble to Directive 77/489/EEC and third recital in the preamble to Directive 81/389/EEC). In addition, failing such harmonization, each Member State was entitled to maintain or introduce, under the conditions laid down in Article 36 of the Treaty, measures restricting trade which were justified on grounds of the protection of the health and life of animals. It follows that the standardization of the inspections in question is such as to promote the free movement of goods.

10.5.5 No other exceptions

Although the argument has certainly been advanced (see e.g. Case 7/68 *Commission v Italy* [1968] ECR 423), there are no other grounds upon which a Member State can seek to derogate from Article 30 TFEU. In particular, there is no applicable counterpart to Article 36 TFEU or the list of mandatory requirements laid down in *Cassis de Dijon* (see 10.8.6).

p. 425

Case 7/68 *Commission v Italy* [1968] ECR 423, 430

> The provisions of Title 1 of Part Two of the Treaty introduced the fundamental principle of the elimination of all obstacles to the free movements of goods between Member States by the abolition of, on the one hand, customs duties and charges having equivalent effect and, on the other hand, quantitative restrictions and measures having equivalent effect. Exceptions to this fundamental rule must be strictly construed.
>
> Consequently, in view of the difference between the measures referred to in … Article 36, it is not possible to apply the exception laid down in the latter provision to measures which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States.
>
> Finally, the fact that the provisions of Article 36 which have been mentioned do not relate to customs duties and charges having equivalent effect is explained by the fact that such measures have the sole effect of rendering more onerous the exportation of the products in question, without ensuring the attainment of the object referred to in that Article, which is to protect the artistic, historic or archaeological heritage.

Review Question

> Do you think that the Court of Justice accepts the ‘charge for a service rendered’ argument in many cases or do you think it is a significant hurdle to overcome?
>
> *Answer*: With consideration to jurisprudence in this regard, it is clear that the Court of Justice subjects such an argument to rigorous scrutiny, with strict adherence to narrowly defined conditions. As such, comparatively few cases result in the Court being willing to accept the justification.

10.6 Related considerations

10.6.1 Article 30 TFEU is inapplicable when dealing with internal taxation

When a charge relates not to the fact that a good has crossed a frontier and is instead imposed as part of a general system of internal taxation, it does not amount to a CHEE and should not be considered under Article 30 TFEU (see Figure 10.1). Such a charge amounts to a tax and, if challenged, should be considered under Article 110 TFEU.

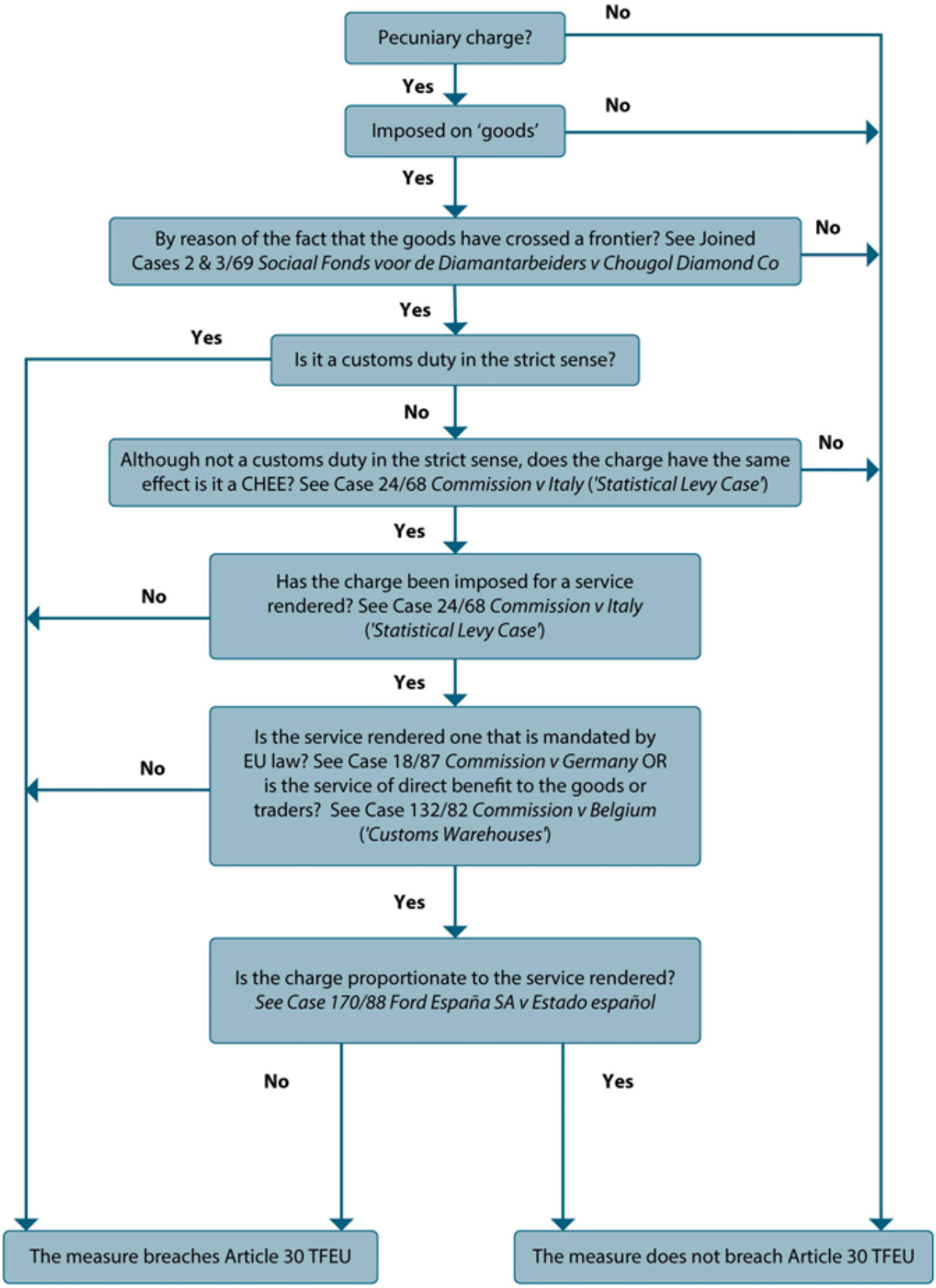

Figure 10.1 Article 30 TFEU

10.6.2 Determining when the charge is a tax and when it is a CHEE

Before addressing the issue of categorization, it is worth taking time to consider why the distinction is important.

Cross-Reference

See 10.7 on Article 110 TFEU.

p. 426 ↵ If a measure amounts to a customs duty or a CHEE, it must be abolished. Article 30 TFEU prohibits the imposition of such charges, reflecting the danger that such barriers pose to the existence of the customs union and the realization of the single market.

If the measure amounts to a matter of internal taxation, it is lawful subject to Article 110 TFEU. The Treaty does not prescribe an appropriate level of taxation, but is concerned with discriminatory or protective taxation measures.

p. 427 ### 10.6.3 The relevant Treaty Articles are mutually exclusive

It is important to appreciate from the outset that the relevant Treaty Articles are mutually exclusive. In Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis* [1966] ECR 293, a case concerning a German tax on imported powdered milk, the Court of Justice clarified the applicability of the two Articles to the same measure (although, on the facts, it was not required to do so).

Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis* [1966] ECR 293

> 2. It should however be made clear that Articles 12 [now Article 30 TFEU] and 13 [now repealed] on the one hand and Article 95 [now Article 110 TFEU] on the other cannot be applied jointly to one and the same case. Charges having an effect equivalent to customs duties on the one hand and internal taxation on the other hand are governed by different systems.

In most cases, determining the applicable Article is straightforward.

- Where the fiscal charge is imposed by reason of the fact that goods have entered a territory, it should be considered under Article 30 TFEU.
- Where the fiscal charge is part of a system of internal dues applied systematically and in accordance with the same criteria to domestic producers and imported products alike, it should be considered under Article 110 TFEU.

10.7 Article 110 TFEU: the prohibition of discriminatory taxation

Article 110 TFEU relates to national taxation systems operating internally. Case 132/78 *Denkavit v France* [1979] ECR 1923, at 1927, 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 is distinguished from customs duties and CHEEs. A charge is a tax if it is part of an internal system of taxation, as indicated by *Denkavit*. Customs duties and CHEEs are charges levied on goods by reason of importation.

Articles 110 and 30 TFEU are complementary, yet mutually exclusive (Case 10/65 *Deutschmann v Germany* [1965] ECR 469), so a charge on goods cannot be both a tax and a customs duty or CHEE. The distinction is
p. 428 important because if classed as a customs duty or ↵ CHEE, it is unlawful under Article 30 TFEU. If classed as a tax, it is permissible, provided that it complies with Article 110 TFEU.

It is important to recognize that EU law does not prohibit national taxation, but it does prohibit taxation that discriminates between imported and domestically produced goods.

10.7.1 Article 110 TFEU prohibition

Article 110 TFEU draws a distinction between similar products and products in competition.

Article 110 TFEU

> No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such nature as to afford indirect protection to other products.

Thus the first paragraph prohibits unequal taxation of similar products, whereas the second paragraph prohibits internal taxation that indirectly protects domestic products that, although not similar to the imported products, are nevertheless in competition with them.

The approach of the Court of Justice used to be to treat the concepts of similar and competing as interchangeable. Case 168/78 *Commission v France (Tax on Spirits)* [1980] ECR 347 is an example, with the Court of Justice considering differential tax rates for fruit-based and non-fruit-based spirits.

The Court of Justice considered first the differing functions of the two paragraphs of Article 110 TFEU.

Case 168/78 *Commission v France (Tax on Spirits)* [1980] ECR 347

5. The first paragraph of Article 95 [EC, now Article 110 TFEU], which is based on a comparison of the tax burdens imposed on domestic products and on imported products which may be classified as 'similar', is the basic rule in this respect. This provision, as the court has had occasion to emphasize in its judgment of 10 October 1978 in Case 148/77, *H. Hansen Jun. & O. C. Balle GMBH & Co. v Hauptzollamt Flensburg* (1978) ECR 1787, must be interpreted widely so as to cover all taxation procedures which conflict with the principle of the equality of treatment of domestic products and imported products; it is therefore necessary to interpret the concept of 'similar products' with sufficient flexibility. The court specified in the judgment of 17 February 1976 in the *Rewe* case (Case 45/75 (1976) ECR 181) that it is necessary to consider as similar products which 'have similar characteristics and meet the same needs from the point of view of consumers'. It is therefore necessary to determine the scope of the
p. 429 first paragraph of Article 95 on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use.
6. The function of the second paragraph of Article 95 is to cover, in addition, all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph, are nevertheless in competition, even partial, indirect or potential, with certain products of the importing country. The court has already emphasized certain aspects of that provision in its judgment of 4 April 1978 in Case 27/77, *Firma Fink-Frucht GMBH v Hauptzollamt Munchen-Landsbergerstrasse* (1978) ECR 223, in which it stated that for the purposes of the application of the first paragraph of Article 95 it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled.
7. Whilst the criterion indicated in the first paragraph of Article 95 consists in the comparison of tax burdens, whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof, in view of the difficulty of making sufficiently precise comparisons between the products in question, the second paragraph of that Article is based upon a more general criterion, in other words the protective nature of the system of internal taxation.

In applying this to the subject matter of the case, the Court continued as follows.

Case 168/78 *Commission v France (Tax on Spirits)* [1980] ECR 347

> 13. It appears from the foregoing that Article 95 [EC, now Article 110 TFEU], taken as a whole, may apply without distinction to all the products concerned. It is sufficient therefore to examine whether the application of a given national tax system is discriminatory or, as the case may be, protective, in other words whether there is a difference in the rate or the detailed rules for levying the tax and whether that difference is likely to favour a given domestic production. It will be necessary to examine within this framework the economic relationships between the products concerned and the characteristics of the tax systems which form the subject-matter of the disputes in the case of each of the applications lodged by the Commission.
>
> [...]
>
> 39. After considering all these factors the court deems it unnecessary for the purposes of solving this dispute to give a ruling on the question whether or not the spirituous beverages concerned are wholly or partly similar products within the meaning of the first paragraph of Article 95 when it is impossible reasonably to contest that without exception they are in at least partial competition with the domestic products to which the application refers and that it is impossible to deny the protective nature of the French tax system within the second paragraph of Article 95.

p. 430 ↵ Thus the Court of Justice rather glossed over the distinction between the two paragraphs and the effect of each, treating them as one. However, classifying correctly under Article 110 TFEU is important as the action needed to be taken by the relevant Member State is dependent upon this classification. If the first paragraph of Article 110 is breached, the Member State must equalize taxation. If the second paragraph is breached, the Member State has only to remove the competitive effect of the tax regulation. Later cases (see Case 170/78 *Commission v United Kingdom (Excise Duties on Wine)* [1980] ECR 417) show a greater focus by the Court of Justice on determining the relevant paragraph.

Before turning to the interpretation of these paragraphs in more detail, the concepts of direct and indirect discrimination are considered, since both kinds of discrimination can infringe Article 110 TFEU.

10.7.2 Direct and indirect discrimination

Article 110 TFEU provides a clear example of the importance of the general principle of non-discrimination (Article 18 TFEU) in ensuring the free movement of goods. Discrimination can, of course, be both direct and indirect in form, and being able to distinguish between them is important in dealing with arguments of potential justification.

Thinking Point

> As you read the following section, consider why one form of discrimination is capable of justification, whilst the other is not. Which form of discrimination seems more serious?

Measures that openly tax imported and domestic goods at different rates are directly discriminatory.

Direct discrimination is rarely seen in practice. It is easily identified and therefore usually avoided. However, it has occasionally occurred, for example in Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis* [1966] ECR 293, concerning a German tax on imported, but not domestically produced, powdered milk.

Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085 provides a further example of directly discriminatory taxation. In *Haahr*, all goods unloaded at certain Danish ports were subject to a shipping tax. However, where imported goods were being unloaded, these imported goods were subject to an additional 40 per cent surcharge. The Court of Justice was very clear in its judgment that such directly discriminatory behaviour breached what is now Article 110 TFEU.

Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085

> 27. Next, Article 95 of the [EC] Treaty [now Article 110 TFEU] provides that no Member State is to impose, directly or indirectly, on the products of other Member States internal taxation in excess of that imposed on similar domestic products or of such a nature as to afford indirect protection to other domestic products. It is therefore beyond question that application of a higher charge to imported products than to domestic products or application to imported products alone of a surcharge in addition to the duty payable on domestic and imported products is contrary to the prohibition of discrimination laid down in Article 95.

p. 431

Indirectly discriminatory taxation is taxation that appears (in law) not to discriminate between imported and domestically produced goods, but which nevertheless has a discriminatory effect in reality. Such measures are usually more difficult to identify. Case 112/84 *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367 provides a useful illustration of just such an indirectly discriminatory measure.

In *Humblot*, French annual tax on cars differentiated between cars below 16 horsepower (hp) and above 16 hp, with those in the higher power rating category being taxed at several times the rate of those below. French manufacturers did not produce cars above 16 hp. Humblot purchased a Mercedes in France and challenged the French taxation measure. The Court of Justice held that the French law was protectionist and discriminatory in respect of cars imported from other Member States, and therefore breached what is now Article 110 TFEU.

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

> 14. … Under that system there are two distinct taxes: a differential tax which increases progressively and is charged on cars not exceeding a given power rating for tax purposes and a fixed tax on cars exceeding that rating which is almost five times as high as the highest rate of the differential tax. Although the system embodies no formal distinction based on the origin of products it manifestly exhibits discriminatory or protective features contrary to Article [110 TFEU], since the power rating determining liability to the special tax has been fixed at a level such that only imported cars, in particular from other Member States, are subject to the special tax whereas all cars of domestic manufacture are liable to the distinctly more advantageous differential tax.

This passage is interesting, drawing attention as it does to the nature of the system in place—a progressive rate to which domestic products were also subject and a flat rate almost five times in excess of the next highest rate to which, coincidentally, domestic products were not subject.

Case 140/79 *Chemial Farmaceutici SpA v DAF SpA* [1981] ECR 1 provides a further example of indirectly discriminatory taxation relating this time to alcohol products, one derived from petroleum (synthetic ethyl alcohol) and the other produced by distilling products of the soil (fermented ethyl alcohol). The two products were found to not only be similar under what is now the first paragraph of Article 110 TFEU, but were found to be chemically identical and therefore fully interchangeable. Despite this, the Italians taxed synthetic ethyl alcohol at six times the rate at which it taxed fermented ethyl alcohol. Moreover, synthetic ethyl alcohol was not produced in Italy, meaning that the higher rate of tax in effect applied only to imported products.

Cross-Reference

See Case C-132/88 *Commission v Greece* [1990] ECR I-1567, at 10.7.4.

p. 432

10.7.3 Methods of tax collection and the basis of assessment

In some cases, the discrimination is not down to the rate of taxation levied, but the rules relating to collection or the basis of assessment.

In Case 55/79 *Commission v Ireland (Taxation of Alcohol)* [1980] ECR 481, the focus was upon the timing with which importers were required to pay the relevant tax.

Case 55/79 *Commission v Ireland (Taxation of Alcohol)* [1980] ECR 481

> 2. The facts which gave rise to the action are not contested by Ireland. It is in fact common ground that the legal provisions applicable in Ireland, in particular pursuant to the Imposition of Duties (No 221) (Excise Duties) Order 1975, provide in favour of producers of spirits, beer and made wine for deferment of payment of between four and six weeks according to the product whereas, in the case of the same products from other Member States, the duty is payable either at the date of importation or of delivery from the customs warehouse.
> 3. The Commission acknowledges that there is no discrimination as regards the rates of duty applicable. On the other hand, it considers that the fact that Irish products are granted deferment of payment beyond the date on which the products are put on the market amounts to conferring on national producers a financial benefit in comparison with importers who are obliged to pay the duty on the actual date on which the products are released to the market. This results, according to the Commission, in a disadvantage to imported products in competition with the corresponding Irish national production …
> 5. The government of Ireland claims in its defence that the detailed arrangements for levying the duty have to be adaptable to the different circumstances of home-produced products and imported products. It states that the decisive criterion is the rate of duty applied, whilst the wording of Article 95 merely prohibits the Member States from imposing on the products of other Member States taxation 'in excess' of that imposed on domestic products; to introduce factors which do not appear in its wording is to do violence to that provision.

In rejecting the argument of the Irish government, the Court of Justice held that Ireland was in breach of what is now Article 110 TFEU by bringing into force and applying tax measures that benefited domestic producers and were not available to importers of the same products from other Member States.

In Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, the question concerned how the rate of tax was calculated. The referring court usefully summarized the facts.

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

17. [...]

> 'Under Finnish national legislation on the taxation of energy, excise duty on electricity is levied in Finland on electrical energy produced there, the amount of the duty depending on the method of production of the electricity. On electricity produced by nuclear power, the excise duty charged is a basic duty of 1.5 p/kWh and an additional duty of 0.9 p/kWh. On electricity produced by water power, the excise duty charged is only an additional duty of 0.4 p/kWh. On electricity produced by other methods, for example from coal, excise duty is charged on the basis of the amount of input materials used to produce the electricity. On electrical energy produced by some methods, for example in a generator with an output below two megavolt-amperes, no excise duty at all is charged. On imported electricity, the excise duty charged, regardless of the method of production of the electricity, is a basic duty of 1.3 p/kWh and an additional duty of 0.9 p/kWh. The excise duty on electricity is thus determined with respect to imported electricity on a different basis from that applied to electricity produced in Finland. The levying of excise duties determined on the basis of the method of production of the energy is founded on environmental grounds in the drafting history of the law. The amount of duty chargeable on imported electricity is not, however, determined on the basis of the method of production of the electricity. The excise duty chargeable on imported electricity is higher than the lowest excise duty chargeable on electricity produced in Finland, but lower than the highest excise duty chargeable on electricity produced in Finland. The excise duty on imported electricity is levied on the importer, whereas the excise duty relating to electricity produced in Finland is levied on the electricity producer. ...'

The Court of Justice was therefore required to consider whether such a basis for calculation amounted to a breach of what is now Article 110 TFEU.

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

34. The Court has consistently held that that provision is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product (see, in particular, Case C-152/89 *Commission v Luxembourg* [1991] ECR I-3141, paragraph 20).

35. That is the case where, under a system of differential taxation of the kind at issue in the main proceedings, imported electricity distributed via the national network is subject, whatever its method of production, to a flat-rate duty which is higher than the lowest duty charged on electricity of domestic origin distributed via the national network.

36. The fact that electricity of domestic origin is in some cases taxed more heavily than imported electricity is immaterial in this connection since, in order to ascertain whether the system in question is compatible with Article 95 of the [EC] Treaty [now Article 110 TFEU], the tax burden imposed on imported electricity must be compared with the lowest tax burden imposed on electricity of domestic origin (see, to that effect, *Commission v Luxembourg*, paragraphs 21 and 22).

p. 434

37. The Finnish Government raises the objection that in view of the characteristics of electricity, the origin and consequently the method of production of which cannot be determined once it has entered the distribution network, the differential rates applicable to electricity of domestic origin cannot be applied to imported electricity. It submits that in those circumstances application of a flat rate, calculated so as to correspond to the average rate levied on electricity of domestic origin, is the only logical way of treating imported electricity in an equitable manner.

38. The Court has already had occasion to point out that practical difficulties cannot justify the application of internal taxation which discriminates against products from other Member States (see, inter alia, Case C-375/95 *Commission v Greece* [1997] ECR I-5981, paragraph 47).

39. While the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method.

[...]

41. In the light of the foregoing considerations, the answer must be that the first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of

> domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

Thus the Court of Justice held that there is a breach of what is now Article 110 TFEU where a different method of calculation leads, if only in certain cases, to a higher tax on the imported product. It is interesting to note also the swift dismissal of the attempted justification relating to the practical difficulties in applying the same regime to both domestic and imported products. In so doing, the importance of the fundamental principle of non-discrimination was upheld.

10.7.4 Objective justification

The distinction between directly and indirectly discriminatory measures is all-important. In this regard, it is worth noting that there are no express defences to Article 110 TFEU in the Treaty. As such, directly discriminatory taxation can never be justified and always breaches Article 110 TFEU, underlining the importance of the principle of non-discrimination.

p. 435 ↵ By contrast, indirectly discriminatory taxation may be objectively justified if there exists some objective policy reason that is acceptable to the EU. Such objective justifications have developed through the case law of the Court of Justice.

In Case 140/79 *Chemial Farmaceutici SpA v DAF SpA* [1981] ECR 1, the Italian government argued that its taxation of two interchangeable products at different rates according to the way in which they were produced was justified. The Italian government said that the higher taxation of synthetic alcohol constituted a legitimate choice of economic policy aimed to encourage production using a different raw material (agricultural products), leaving the existing raw material (petroleum ingredients) for more important uses.

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

> 14. As the court has stated on many occasions, particularly in the judgments cited by the Italian government, in its present stage of development Community law [now EU law] does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty and its secondary law and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.
>
> 15. Differential taxation such as that which exists in Italy for denatured synthetic alcohol on the one hand and denatured alcohol obtained by fermentation on the other satisfies these requirements. It appears in fact that that system of taxation pursues an objective of legitimate industrial policy in that it is such as to promote the distillation of agricultural products as against the manufacture of alcohol from petroleum derivatives. That choice does not conflict with the rules of Community law or the requirements of a policy decided within the framework of the Community [now the Union].

In Case C-132/88 *Commission v Greece* [1990] ECR I-1567, the Court of Justice considered an environmental justification for a car tax system providing for differential rates according to power rating. Greece imposed a tax on new and second-hand cars wherever they were produced and, once over a 1.8 litre engine, the tax rose steeply. Greece did not produce cars with engines above 1.6 litres.

Cross-Reference

See Case 112/84 *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367, at 10.7.2.

Case C-132/88 *Commission v Greece* [1990] ECR I-1567

> 17. It must be emphasized in this regard that Article 95 of the [EC] Treaty [now Article 110 TFEU] does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products in the light of considerations of social policy. As the Court held in particular in *Humblot* [Case 112/84 *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367] ... as Community law [now EU law] stands at present, the Member States are at liberty to subject products such as cars to a system of tax which increases progressively in amount according to an objective criterion, such as cylinder capacity, provided that the system of taxation is free from any discriminatory or protective effect.
>
> 18. It must be made clear that a system of taxation cannot be regarded as discriminatory solely because only imported products, in particular those from other Member States, come within the most heavily taxed category (see judgment of 14 January 1981 in Case 140/79 *Chemial Farmaceutici v DAF* [1981] ECR 1, paragraph 18).
>
> 19. In order to determine whether [relevant taxes] have a discriminatory or protective effect, it is necessary to consider whether they are capable of discouraging consumers from purchasing cars of a cylinder capacity in excess of 1,800 cc, which are all manufactured abroad, in such a way as to benefit domestically produced cars.
>
> 20. If it is assumed that the particular features of the system of taxation at issue actually discourage certain consumers from purchasing cars of a cylinder capacity greater than 1,800 cc, those consumers will choose either a model in the range of cars having cylinder capacities between 1,600 and 1,800 cc or a model in the range of cars having cylinder capacities below 1,600 cc. All the models in the first-mentioned range are of foreign manufacture. The second range includes cars of both foreign and Greek manufacture. Consequently, the Commission has not shown how the system of taxation at issue might have the effect of favouring the sale of cars of Greek manufacture.

p. 436

Thus the Court of Justice held that the tax measure would escape Article 110 TFEU notwithstanding that all higher-taxed cars were imported because the taxation did not have the effect of discouraging Greeks from purchasing foreign cars. On the facts, the tax was motivated by other considerations and there was no discernible protective effect.

10.7.5 Article 110 TFEU, first paragraph: ‘similar’ products

Thinking Point

> Reflect on the decision in Case 112/84 *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367 in the light of Case C-132/88 *Commission v Greece* [1990] ECR I-1567, paras 17–20. Can you distinguish the two cases?

Since the first paragraph of Article 110 TFEU 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.

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Note

> Directly discriminatory measures can never be justified. Indirectly discriminatory measures may be objectively justified if there exists some objective policy reason that is acceptable to the EU.

In Case 168/78 *Commission v France (Tax on Spirits)* [1980] ECR 347, the Court of Justice considered the relative similarity of non-fruit-based spirits (such as whisky, gin, and vodka) and fruit-based spirits (such as brandy, armagnac, and calvados). Acknowledging the need to interpret ‘similar’ with ‘sufficient flexibility’, the Court stated, at para 5, that ‘[i]t is therefore necessary to determine the scope of the first paragraph of Article [110] on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use.’

The Court of Justice in Case 243/84 *John Walker v Ministeriet for Skatter* [1986] ECR 875 considered the similarity of Scotch whisky and liqueur fruit wine and, with reference to the ‘similar characteristics and comparable use’ approach, decided as follows.

Case 243/84 *John Walker v Ministeriet for Skatter* [1986] ECR 875

> 11. … [I]n order to determine whether products are similar it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same needs from the point of view of consumers.

In this regard, the Court considered the goods in question and applied the test in the following way, reaching the conclusion that the products were not similar within the meaning of Article 110 TFEU.

Case 243/84 *John Walker v Ministeriet for Skatter* [1986] ECR 875

> 12. It should be noted that the two categories of beverages exhibit manifestly different characteristics. Fruit wine of the liqueur type is a fruit-based product obtained by natural fermentation, whereas Scotch whisky is a cereal-based product obtained by distillation. The organoleptic properties of the two products are also different … [T]he fact that the same raw material, for example alcohol, is to be found in the two products is not sufficient reason to apply the prohibition contained in the first paragraph of Article 95 [EC, now Article 110 TFEU]. For the products to be regarded as similar that raw material must also be present in more or less equal proportions in both products. In that regard, it must be pointed out that the alcoholic strength of Scotch whisky is 40 per cent by volume, whereas the alcoholic strength of fruit wine of the liqueur type, to which the Danish tax legislation applies, does not exceed 20 per cent by volume.
>
> 13. The contention that Scotch whisky may be consumed in the same way as fruit wine of the liqueur type, as an aperitif diluted with water or with fruit juice, even if it were established, would not be sufficient to render Scotch whisky similar to fruit wine of the liqueur type, whose intrinsic characteristics are fundamentally different.

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10.7.6 Article 110 TFEU, second paragraph: ‘indirect protection to other products’

Under the second paragraph of Article 110 TFEU, where imported and domestic goods are not ‘similar’, but simply in competition with each other, national taxation must not give advantage to the domestic product.

Reaching such a determination of being in competition is a complex matter indeed and a number of factors are taken into account. One such approach is to look at the concept of cross-elasticity of demand, something which will be considered in some detail in relation to competition law (see Chapter 14). In essence, the question to be asked is whether demand in one product increases due to an increase in price or reduction in the availability of the other.

Manufacturing processes, product composition, and present and future consumer preferences are also considered in reaching a conclusion as to whether the measure in question affords indirect protection to the domestic product.

The case that best illustrates the complexity of this consideration is Case 170/78 *Commission v United Kingdom (Excise Duties on Wine)* [1980] ECR 417, in which the Court of Justice looked at differential taxation of beer and wine. The Commission argued that beer and wine could be substituted and met the same purposes as thirst-quenching and meal-accompanying beverages. As such, the argument was that the difference in tax amounted to discrimination against imported wine, which encouraged customers to buy beer (the domestic product). The UK argued that the products had entirely different manufacturing processes, differing alcoholic strengths, and entirely different pricing structures since wine was appreciably more expensive than beer. As regards consumer habits, the UK stated that, in accordance with long-established tradition, beer was a popular drink consumed preferably in public houses or in connection with work; domestic consumption and consumption with meals was negligible. In contrast, the consumption of wine was more unusual and special from the point of view of social custom.

Following years of information-gathering and detailed evidence on volume, price, and alcoholic strength, the Court of Justice reached the following conclusion.

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

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> 27. It is clear, therefore, following the detailed inquiry conducted by the court—whatever criterion for comparison is used, there being no need to express a preference for one or the other—that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production … Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.

The Court of Justice therefore held that the UK had imposed a higher duty on wine to give protection to beer. Beer was generally a domestic product, whilst wine was generally imported. As the tax favoured the domestic product, the second paragraph of Article 110 TFEU had been breached.

It should be noted that emphasis was placed upon competition existing between beer and the cheaper wines with lower alcoholic content. Importantly, the Court also stressed the need to assess not only the situation now, but also whether they would potentially be in competition in the future. The case is now almost 40 years old and has proven to be a shrewd judgment, as it can be argued that these products are more in competition now than ever.

For an overview of the operation of Article 110 TFEU, see Figure 10.2.

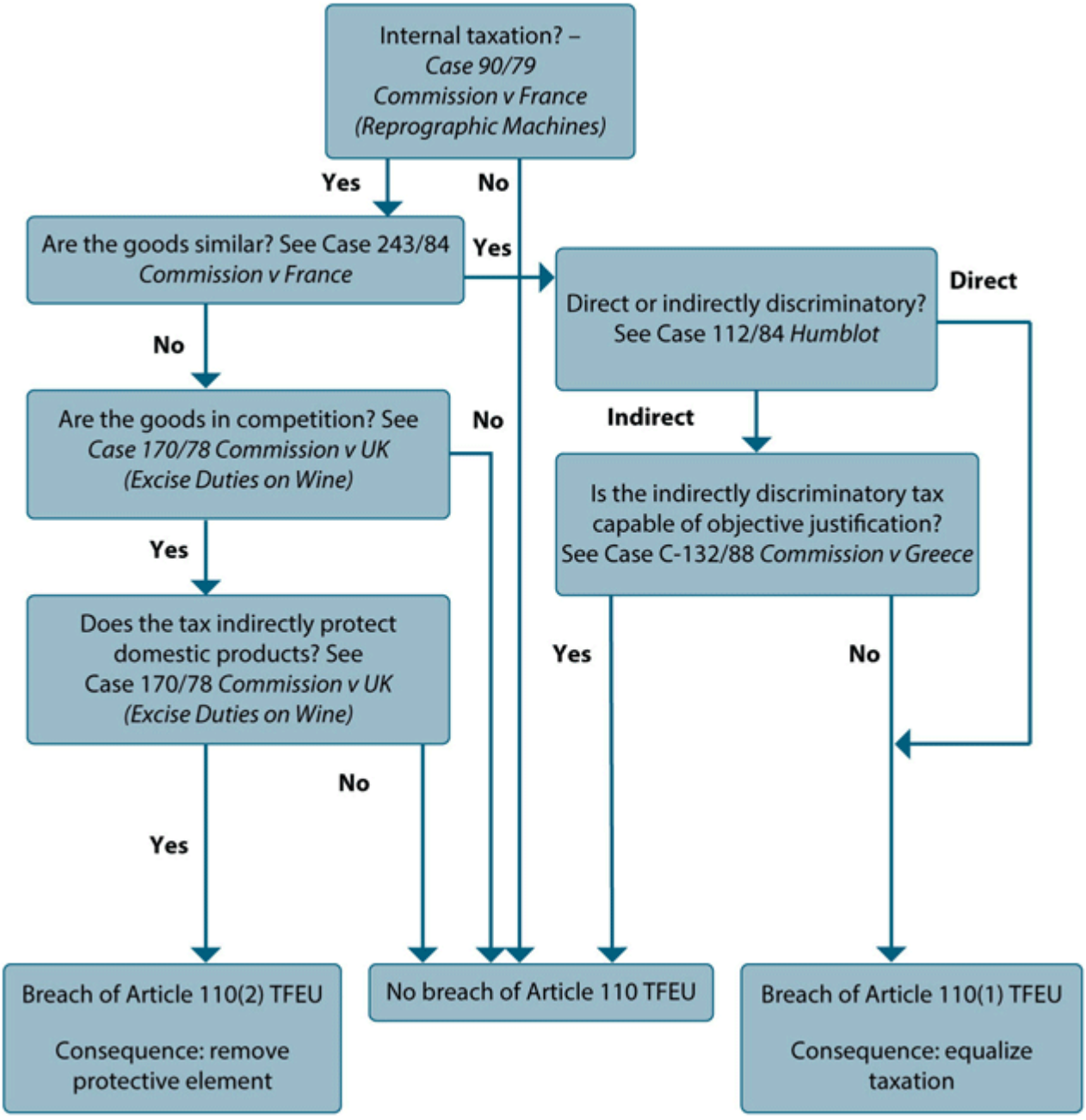

Figure 10.2 Article 110 TFEU

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10.7.6.1 Harmonization of taxation

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

10.8 Articles 34 and 35 TFEU: the prohibition of quantitative restrictions and measures having equivalent effect

Merely removing customs duties and CHEEs and prohibiting discriminatory taxation is not enough to secure the free movement of goods within the EU.

As well as these pecuniary restrictions, there are other barriers of a non-pecuniary nature, such as administrative rules or procedures, which can prevent the free movement of goods. It is these that Articles 34 and 35 TFEU are concerned with.

Article 34 TFEU

> Quantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 35 TFEU

> Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

10.8.1 Scope

Article 34 TFEU sets out the prohibition on quantitative restrictions and measures having equivalent effect to quantitative restrictions (MEQRs) on imports. Article 35 TFEU extends this to exports. The prohibition is addressed to Member States, but it has been interpreted widely, and includes measures adopted by public and semi-public bodies, and even private bodies where there has been a significant amount of State involvement.

In Joined Cases 266 & 267/87 *R v Royal Pharmaceutical Society of Great Britain* [1989] ECR 1295, it was held that Article 34 TFEU applied to the Royal Pharmaceutical Society, an organization that regulated the conduct of and set standards for chemists and pharmacists.

Article 34 TFEU applies also to measures applied to only part of a Member State's territory.

p. 441 ↵ In Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033, a legislative measure prohibiting the keeping on the Danish island of Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) constituted an MEQR despite the fact that the measure applied to only part of the national territory.

10.8.2 Quantitative restrictions

Quantitative restrictions are measures that limit the import or export of goods by reference to an amount or value. In Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECR 865, at 879, the Court of Justice defined them as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports, or goods in transit'.

In Case 34/79 *R v Henn and Darby* [1979] ECR 3795, a ban on the import of pornographic material amounted to a quantitative restriction under Article 34 TFEU.

Review Question

> Do you think the *Geddo* definition is a narrow or wide definition?
>
> *Answer*: The definition from *Geddo* is clearly quite wide. It incorporates both partial restrictions in the form of quotas (such as a measure limiting the importation of wine to 10,000 litres) and total restrictions in the form of bans.

10.8.3 Measures having equivalent effect to quantitative restrictions

Measures having equivalent effect to quantitative restrictions are much 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. The Court of Justice defined MEQRs in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, at para 5, in what has become known as the '*Dassonville* formula': 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community [now Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions.'

Although the test has undergone minor modifications in subsequent case law (the term 'trading rules' does not usually appear in more recent cases, for it is clear that the *Dassonville* formula is not merely limited to trading rules, but also includes, for example, technical regulations), this definition remains the decisive test for an MEQR.

Review Question

> Do you think the *Dassonville* formula provides a narrow or a wide definition?
>
> *Answer*: As with *Geddo* in the previous review question, it is important that you appreciate just how wide this definition is. It covers those measures that merely have the capability of hindering trade. Indeed, virtually any measure that could hinder imports or exports in any way could be caught. Thus the crucial factor is the effect, with a discriminatory intent not needing to be identified.

p. 442 ↵ The *Dassonville* formula emerged in a preliminary reference to the Court of Justice (see Chapter 6) arising from criminal proceedings in a Belgian court against traders who acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules. The national court asked whether a national provision prohibiting the import of goods bearing a designation of origin, where those goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation, constitutes an MEQR within the meaning of what is now Article 34 TFEU. The Court of Justice articulated the decisive test for the existence of an MEQR and, applying this to the facts before it, concluded as follows.

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

> 9. … [T]he requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

In essence, because it was very difficult for anyone but the original producers to obtain the certificate, to require it was, in effect, to restrict the importation of the goods to which it applied, contrary to the fundamental principle of the free movement of goods. Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions are adopted in pursuance of the EEC Treaty, OJ 1970 L13/29, provides further guidance on the scope of MEQRs.

10.8.4 Directive 70/50

Directive 70/50 was a transitional measure introduced to provide guidance during a transitional period when the common market was becoming established. As such, it is no longer formally applicable, but it does indicate the Commission's view of MEQRs, and shows a clear intention to catch both those measures that provide different treatment for domestic and imported goods and those that are applied to them equally. As such, we can delineate between what are referred to as 'distinctly applicable' measures and 'indistinctly applicable' measures.

10.8.4.1 Distinctly applicable measures

Distinctly applicable measures are those other than those applicable equally to domestic or imported products. Thus they distinguish between imported goods and domestic products. These measures are contained within Article 2 of the Directive, and a non-exhaustive list is set out in Article 2(3).

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Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 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, OJ 1970 L13/29

Article 2

1. This Directive covers measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production.
2. In particular, it covers measures which make imports or the disposal, at any marketing stage, of imported products subject to a condition—other than a formality—which is required in respect of imported products only, or a condition differing from that required for domestic products and more difficult to satisfy. Equally, it covers, in particular, measures which favour domestic products or grant them a preference, other than an aid, to which conditions may or may not be attached.
3. The measures referred to must be taken to include those measures which:
   (a) lay down, for imported products only, minimum or maximum prices below or above which imports are prohibited, reduced or made subject to conditions liable to hinder importation;
   (b) lay down less favourable prices for imported products than for domestic products;
   (c) fix profit margins or any other price components for imported products only or fix these differently for domestic products and for imported products, to the detriment of the latter;
   (d) preclude any increase in the price of the imported product corresponding to the supplementary costs and charges inherent in importation;
   (e) fix the prices of products solely on the basis of the cost price or the quality of domestic products at such a level as to create a hindrance to importation;
   (f) lower the value of an imported product, in particular by causing a reduction in its intrinsic value, or increase its costs;
   (g) make access of imported products to the domestic market conditional upon having an agent or representative in the territory of the importing Member State;

(h) lay down conditions of payment in respect of imported products only, or subject imported products to conditions which are different from those laid down for domestic products and more difficult to satisfy;

(i) require, for imports only, the giving of guarantees or making of payments on account;

(j) subject imported products only to conditions, in respect, in particular of shape, size, weight, composition, presentation, identification or putting up, or subject imported products to conditions which are different from those for domestic products and more difficult to satisfy;

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(k) hinder the purchase by private individuals of imported products only, or encourage, require or give preference to the purchase of domestic products only;

(l) totally or partially preclude the use of national facilities or equipment in respect of imported products only, or totally or partially confine the use of such facilities or equipment to domestic products only;

(m) prohibit or limit publicity in respect of imported products only, or totally or partially confine publicity to domestic products only;

(n) prohibit, limit or require stocking in respect of imported products only; totally or partially confine the use of stocking facilities to domestic products only, or make the stocking of imported products subject to conditions which are different from those required for domestic products and more difficult to satisfy;

(o) make importation subject to the granting of reciprocity by one or more Member States;

(p) prescribe that imported products are to conform, totally or partially, to rules other than those of the importing country;

(q) specify time limits for imported products which are insufficient or excessive in relation to the normal course of the various transactions to which these time limits apply;

(r) subject imported products to controls or, other than those inherent in the customs clearance procedure, to which domestic products are not subject or which are stricter in respect of imported products than they are in respect of domestic products, without this being necessary in order to ensure equivalent protection;

(s) confine names which are not indicative of origin or source to domestic products only.

10.8.4.2 Indistinctly applicable measures

Indistinctly applicable measures are those that are equally applicable to domestic and imported products. Article 3 of the Directive again sets out a non-exhaustive list and draws attention to the importance of a test of proportionality.

Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 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, OJ 1970 L13/29

Article 3

> This Directive also covers measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification, or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.
>
> p. 445 ↵ This is the case, in particular, where:
>
> - the restrictive effects on the free movement of goods are out of proportion to their purpose;
> - the same objective can be attained by other means which are less of a hindrance to trade.

Thinking Point

> Why do you think a distinction is drawn between these two types of measure? Reflect upon this when you have worked through the remainder of the chapter.

In Joined Cases 51–54/71 *International Fruit Company v Produktschap voor Groenten en Fruit (No 2)* [1971] ECR 1108, the Court of Justice made it clear that the mere requirement of an import or export licence would amount to an MEQR even if the granting of such a licence was a mere formality.

Applying *Dassonville* to this requirement, it can be seen that such a requirement hinders trade in three ways:

- goods are effectively banned pending processing of the application;
- there is, at least in theory, the potential for rejection; and

- any additional paperwork will result in additional costs, which will need to be accounted for in determining the price of the goods, and this may impact upon the eventual sales figures.

In Case 113/80 *Commission v Ireland ('Irish Souvenirs')* [1981] ECR 1625, Irish legislation required imported goods bearing or possessing characteristics suggesting that they were souvenirs of Ireland to bear an indication of the country of origin or the word 'Foreign'. The Court of Justice found as follows.

Case 113/80 *Commission v Ireland ('Irish Souvenirs')* [1981] ECR 1625

> 17. Thus by granting souvenirs imported from other Member States access to the domestic market solely on condition that they bear a statement of origin, whilst no such statement is required in the case of domestic products, the provisions contained in the sale order and the importation order indisputably constitute a discriminatory measure.
>
> 18. The conclusion to be drawn therefore is that by requiring all souvenirs and Articles of jewellery imported from other Member States which are covered by the sale order and the importation order to bear an indication of origin or the word 'foreign', the Irish rules constitute a measure having equivalent effect within the meaning of [Article 34 TFEU].

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Thinking Point

> Think carefully about this case and others in this section, and consider the application of *Dassonville*. Identifying MEQRs can be quite difficult in practice and therefore reflecting upon decided cases, with a view to understanding how and why they fall within the *Dassonville* formula, is important.

10.8.4.3 Case law examples of indistinctly applicable measures

In Case 261/81 *Walter Rau Lebensmittelwerke v de Smedt PvbA* [1982] ECR 3961, a Belgian requirement that all margarine for sale should be in cube-shaped form or cube-shaped packaging was questioned as to its validity under what is now Article 34 TFEU. The imported product was supplied and packaged in plastic tubs having the shape of a truncated cone. It should be noted that the Belgian requirement applied to all margarine sold in Belgium, and therefore did not discriminate between the domestic and imported product. However, the Court of Justice held the measure to be an MEQR, with consideration of the effects of the measure.

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

> 13. Although the requirement that a particular form of packaging must also be used for imported products is not an absolute barrier to the importation into the Member State concerned of products originating in other Member States, nevertheless it is of such a nature as to render the marketing of those products more difficult or more expensive either by barring them from certain channels of distribution or owing to the additional costs brought about by the necessity to package the products in question in special packs which comply with the requirements in force on the market of their destination.
>
> 14. In this case the protective effect of the Belgian rules is moreover demonstrated by the fact, affirmed by the Commission and not disputed by the Belgian government, that despite prices appreciably higher than those in some other Member States there is practically no margarine of foreign origin to be found on the Belgian market.
>
> 15. Therefore it may not be claimed that the requirement of special packaging for the product is not an obstacle to marketing.

Attention should be drawn to the effects-based reasoning used by the Court of Justice. Applying *Dassonville*, the potential to hinder trade is clear from the reasoning given: the marketing of such products would be more difficult or more costly as a result of the additional costs of altering production processes to comply with the Belgian requirement.

In Case 207/83 *Commission v United Kingdom* [1985] ECR 1201, the Trade Descriptions (Origin Marking)
p. 447 (Miscellaneous Goods) Order 1981, SI 1981/121, required certain goods ↵ to be marked with the country of origin. Again, this was a measure that applied equally to domestic and imported goods. The Commission pointed out that the order imposed a not inconsiderable burden upon the retailer of any product listed in one of the four categories of goods covered by the Order. Under the scheme introduced by the Order, it remained for the retailer to prepare appropriate notices, display them near the goods, and ensure throughout the day that the notices were not detached, knocked over, obscured, or moved. None of those problems would arise if the product were already origin-marked at the time when it was delivered to the retailer, which would encourage the retailer to choose to sell only goods that were already origin-marked. The burden of the requirements laid down in the Order would inevitably be passed up the sales chain and come to rest on the manufacturer, who, anxious to retain its customers, would feel obliged to origin-mark its products. Such a requirement would necessarily increase the production costs of the imported article and make it more expensive. The Court of Justice, whilst acknowledging that the measure applied equally to domestic and imported goods, held as follows.

Case 207/83 *Commission v United Kingdom* [1985] ECR 1201

> 17. … [T]he origin-marking requirement not only makes the marketing in a Member State of goods produced in other Member States in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community [now Union] by handicapping the sale of goods produced as the result of a division of labour between Member States.
>
> 18. It follows from those considerations that the United Kingdom provisions in question are liable to have the effect of increasing the production costs of imported goods and making it more difficult to sell them on the United Kingdom market.
>
> […]
>
> 22. Those considerations lead to the conclusion that Article 2 of the order constitutes a measure which makes the marketing of goods imported from other Member States more difficult than the marketing of domestically-produced goods and for which Community law [now EU law] does not recognize any ground of justification. That provision therefore falls within the prohibition laid down in Article 30 of the EEC Treaty [now Article 34 TFEU].

10.8.5 Obligation of Member States to ensure free movement of goods

Article 34 TFEU also applies where a Member State fails to adopt the necessary measures in order to ensure the free movement of goods, even where obstacles are not caused by the State.

This obligation to ensure the free movement of goods is an obligation arising from the Treaty itself. In Case C-265/95 *Commission v France* [1997] ECR I-6959, the Commission stated that, for more than a decade, it had
p. 448 regularly received complaints concerning the passivity of the ↵ French authorities in the face of violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States. Those acts consisted of the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and the damaging of those goods when on display in shops in France.

Considering what is now Article 34 TFEU, the Court of Justice held as follows.

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

> 29. That provision, taken in its context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to flows of imports in intra-Community [now Union] trade.
>
> 30. As an indispensable instrument for the realization of a market without internal frontiers, Article 30 [EC, now Article 34 TFEU] therefore does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.
>
> 31. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.
>
> 32. Article 30 therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty [replaced, in substance, by Article 9 TEU (renumbered 13)], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.

In Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, the Austrian authorities had actually implicitly granted environmental protesters permission for a demonstration to take place, the effect of which was to close a motorway for almost 30 hours. The national court made a reference to the Court of Justice under Article 267 TFEU asking a number of questions, the most important of which related to what is now Article 34 TFEU.

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

> 1. (1) Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC) [now Article 34 TFEU], or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, *inter alia*, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?
>
> [...]

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The Court addressed this question by restating the importance of the free movement of goods and making reference to the judgment in Case C-265/95 *Commission v France* [1997] ECR I-6959.

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

51. It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community [now Union].

52. Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC [now Article 8 TFEU]), inserted in the first part thereof, entitled Principles, provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty [now repealed] the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.

53. The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC [now Article 26 TFEU/TEU]) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.

54. That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty [now Articles 36 and 40 TFEU/TEU].

55. In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.

56. It is settled case-law since the judgment in Case 8/74 *Dassonville* ([1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 29).

57. In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission* v *France*, cited above, paragraph 30).

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58. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission* v *France*, cited above, paragraph 31).

> 59. Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty [replaced, in substance, by Article 9 TEU (renumbered 13)], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission* v *France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.
>
> 60. Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods ...
>
> 61. In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law [now EU law] obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Thus it is clear that Article 34 TFEU is concerned not only with measures that a Member State puts into place that could hinder the free movement of goods, but also failure by a Member State to adopt adequate measures to prevent obstacles.

10.8.6 Cassis de Dijon

As detailed earlier, measures that apply equally to domestic and imported products are called indistinctly applicable measures. Article 3 of Directive 70/50 stated that such measures would breach Article 34 TFEU only where the restrictive effect on the free movement of goods exceeds the effects necessary for the trade rules—
p. 451 that is, only in the case of those ↵ measures that are disproportionate and tend to protect domestic products at the expense of imported products.

Thinking Point

> Reflect upon the difference between distinctly and indistinctly applicable measures, and consider the following material in the context of the reason why such a distinction is made.

Although *Dassonville* does not make provision for indistinctly applicable measures to be justified on certain grounds, there are dicta acknowledging the possibility.

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

> 6. In the absence of a Community [now Union] system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

Thus, without focusing on whether such a measure is distinctly or indistinctly applicable, the possibility for justification was noted.

This was developed further in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, recognizing the difficulties that flow from indistinctly applicable measures introduced for arguably good reason. In this vitally important case, the Court of Justice developed a basis for the justification of such indistinctly applicable measures.

In *Cassis*, German legislation required fruit liqueurs to have a minimum alcohol content of 25 per cent if they are to be marketed lawfully in Germany. French Cassis had an alcohol content of only between 15–20 per cent and therefore could not be sold in the German market. It was argued that the condition was an MEQR. The Court of Justice established two important principles:

- the principle of mutual recognition; and
- the rule of reason.

10.8.6.1 The principle of mutual recognition

The principle of mutual recognition works as a presumption to be applied to differing Member State requirements. The presumption is that where goods have been lawfully produced and marketed in one
p. 452 Member State, there is no reason why they should not be introduced into ↵ another Member State. As stated in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR

649, at para 14: 'There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; …'

In Case 16/83 *Prantl* [1984] ECR 1299, Italian wine was imported in an Italian *bocksbeutel* bottle. This has a characteristic bulbous shape similar to a German (*Franconia bocksbeutel*) bottle used for a wine of particular quality. The Court of Justice noted that bulbous wine bottles had been manufactured in Italy for over 100 years and therefore found as follows.

Case 16/83 *Prantl* [1984] ECR 1299

> 30. The answer … must therefore be that Article 30 of the EEC Treaty [now Article 34 TFEU] must be interpreted as meaning that the application by a Member State to imports of wine originating in another Member State of national legislation allowing only certain national producers to use a specific shape of bottle when the use of that shape or a similar shape of bottle accords with a fair and traditional practice in the state of origin constitutes a measure having an effect equivalent to a quantitative restriction.

However, although an important principle, it is merely a presumption and can therefore be rebutted with reference to the rule of reason.

10.8.6.2 The rule of reason

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

> 8. … Obstacles to movement within the Community [now Union] 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 recognized 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.

The Court of Justice therefore, appreciating that indistinctly applicable measures may be introduced for good reason, set out particular, but non-exhaustive, grounds whereby such measures could be justified—namely:

- the effectiveness of fiscal supervision;

- the protection of public health;
- the fairness of commercial transactions; and
- the defence of the consumer.

p. 453 ↵ In *Cassis*, the German government argued on two main grounds. First, it argued that the measure was in place to protect public health on the basis that it avoids the proliferation of alcoholic beverages on the national market—in particular, alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages. Second, the German government argued that the measure protected the fairness of commercial transactions as the lower alcohol provided a price advantage for the imported products that was unfair, and which would force down alcohol rates and quality of drinks. The Court was unconvinced by these arguments. The result was effectively an indirect ban. As such, the measure was held to be a breach of what is now Article 34 TFEU.

Scope of the rule of reason

It is important to note that the rule of reason applies to indistinctly applicable measures only.

In Case 113/80 *Commission v Ireland ('Irish Souvenirs')* [1981] ECR 1625, Irish legislation required Irish souvenirs not manufactured in Ireland to bear the label 'foreign'. The Commission argued that this breached what is now Article 34 TFEU on the basis that the measure had the effect of lowering the value of an imported product by causing a reduction in value or an increase in costs. The Irish government argued that it was justified on the basis of consumer protection. However, as the measure applied only to imported products, it was a distinctly applicable measure and therefore could not be covered by the rule of reason principle in *Cassis*.

Thinking Point

> Why does the *Cassis* rule of reason apply only to indistinctly applicable measures? What is it about these measures that differentiates them such that this basis of justification is reserved only to them?

It should be noted that a number of more recent cases, including Case C-320/03 *Commission v Austria ('Brenner')* [2005] ECR I-9871, have appeared to indicate that the Court has relaxed its approach of needing an indistinctly applicable measure for the *Cassis* rule of reason to apply, but it is important to state that it has never been repudiated and, until it has, it remains correct to draw this distinction between *Cassis* and Article 36 TFEU.

No harmonizing rules

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

10.8.6.3 Application of the principle of proportionality

In order to satisfy the rule of reason, the measures used must be no more than is necessary to achieve their aim. If the measure goes beyond what is necessary, it will fall outside *Cassis* and will therefore be classified as a breach of Article 34 TFEU.

p. 454 ↵ In Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, the German government's arguments were met by a consideration of proportionality, with the Court of Justice noting that the proposed aims could be met with clearer labelling. The measure in question therefore amounted to a breach of Article 34 TFEU.

In Case 261/81 *Walter Rau Lebensmittelwerke v de Smedt PvbA* [1982] ECR 3961, the Belgian requirement that all margarine for sale should be in cube-shaped form or cube-shaped packaging was argued to be in place for the defence or protection of the consumer, on the basis that the Belgian consumer was so used to purchasing margarine in this particular form that to sell margarine in other forms may cause confusion. The Court of Justice's response to this argument was both clear, yet subtle.

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

> 17. It cannot be reasonably denied that in principle legislation designed to prevent butter and margarine from being confused in the mind of the consumer is justified. However, the application by one Member State to margarine lawfully manufactured and marketed in another Member State of legislation which prescribes for that product a specific kind of packaging such as the cubic form to the exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less.

Thus, if the aim of the measure was to prevent confusion amongst Belgian consumers, this could be achieved in a way that was more proportionate and therefore less of a hindrance to the free movement of goods—namely, effective labelling.

Thinking Point

> Do you understand the application of the principle of proportionality within *Walter Rau*? The case provides a useful and engaging example of the application of the principle in practice.

A more recent example of a potentially justifiable restriction falling foul of the principle of proportionality is Case C-15/15 *New Valmar BVBA v Global Pharmacies Partner Health Srl* EU:C:2016:464. In this 2016 preliminary reference, the Court of Justice considered the 'effectiveness of fiscal supervision' mandatory requirement in relation to Belgian legislation requiring every undertaking established within a federated entity (in this case, the Dutch-speaking region of the Kingdom of Belgium) to draw up invoices relating to cross-border transactions only in the official language of that entity. Indeed, the legislation in question provided that any invoices falling foul of the requirement were to be declared null and void by the national court.

p. 455

Case C-15/15 *New Valmar BVBA v Global Pharmacies Partner Health Srl* EU:C:2016:464

> 55. Thus, as regards the objective of ensuring the effectiveness of fiscal supervision, the Belgian Government itself indicated, at the hearing, that, according to an administrative circular of 23 January 2013, the right of deduction of VAT cannot be refused by the tax authorities on the sole ground that the details that are required by law to be in an invoice were drawn up in a language other than Dutch, which tends to suggest that the use of another language is not liable to prevent the attainment of that objective.
>
> 56. In the light of all the foregoing, it must be held that legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objectives referred to in paragraphs 49 to 51 of this judgment [i.e. 'encouraging the use of the official language of the linguistic region concerned'] and cannot therefore be regarded as proportionate.

This case is an example of the extension of the mandatory requirements.

10.8.7 Extension of the mandatory requirements

The list of mandatory requirements set out in *Cassis* under the rule of reason was never articulated as an exhaustive list. As such, they have been developed further by the Court of Justice in subsequent case law and no doubt will continue to be developed still further in the future.

An example of a requirement developed post *Cassis* is found in Case 302/86 *Commission v Denmark* [1988] ECR 4607, in which Danish legislation required certain drinks sold in Denmark to be packaged in reusable containers and deposit-and-return schemes to be established. These measures were all designed to protect the environment. The Court of Justice recognized environmental protection as a mandatory requirement, but was clear that the measures were still required to satisfy the test of proportionality. Unfortunately for the Danish government, they did not.

In Case 155/80 *Oebel* [1981] ECR 1994, the Court of Justice found that German legislation prohibiting night working in bakeries and night deliveries of bakery products, which, it was claimed, restricted deliveries into neighbouring Member States in time for breakfast, was compatible with Article 34 TFEU 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 recognized that legitimate interests of economic and social policy, designed to improve working conditions, could constitute a mandatory requirement.

In Case 145/88 *Torfaen Borough Council v B&Q plc* [1989] ECR 3851, consideration was given to the Shops Act 1950, which, with limited exceptions, 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. The Court of Justice found that the Sunday trading rules were justified because they were in accord with national or regional socio-cultural characteristics. In including these, the mandatory requirements were again developed further.

p. 456 ↵ As such, when considering an indistinctly applicable MEQR, if an objective justifiable reason for having such a measure in place can be identified, this reason can be argued under the non-exhaustive *Cassis* rule of reason.

10.8.8 Development of principles relating to indistinctly applicable measures

The expansive interpretation of MEQRs under *Dassonville* and the treatment of indistinctly applicable MEQRs was problematic in that the Court of Justice was inconsistent in dealing with 'equal burden rules'—that is, those rules that apply to all goods that may have an impact upon the overall volume of sales, but which do not have a protectionist effect.

In some cases, such equal burden rules were deemed by the Court to be within Article 34 TFEU subject to justification under the rule of reason or Article 36 TFEU (see 10.8.6.2). Thus, in Case 145/88 *Torfaen BC v B&Q plc* [1989] ECR 3851, the national court found that a ban on Sunday trading had the effect of reducing B&Q's total sales, that approximately 10 per cent of the goods sold by B&Q came from other Member States, and that a corresponding reduction of imports from other Member States would therefore ensue. Recognizing that national rules governing the hours of work, delivery, and sale constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty, the Court of Justice stated as follows.

Case 145/88 *Torfaen BC v B&Q plc* [1989] ECR 3851

> 14. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law [now EU law], is a matter for the Member States. Furthermore, such rules are not designed to govern the patterns of trade between Member States.
>
> 15. Secondly, it is necessary to ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view. As is indicated in Article 3 of Commission Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), the prohibition laid down in Article 30 [now Article 34 TFEU] covers national measures governing the marketing of products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.
>
> 16. The question whether the effects of specific national rules do in fact remain within that limit is a question of fact to be determined by the national court.

Thus such a measure fell within Article 34 TFEU, but could be justified to the extent that it was proportionate (see 10.8.6.3). This was a matter for the national court to judge.

In other cases, equal burden rules were held to be outside Article 34 TFEU where the rule did not relate to the characteristics of the product, but only the conditions in which they were sold.

p. 457 ↵ Thus, in Case 155/80 *Oebel* [1981] ECR 1994, when considering German rules on night work in bakeries whereby, subject to certain exceptions, no person would be permitted to work on the making of baker's wares between the hours of 10 pm and 4 am, the Court of Justice, when looking at whether such measures fell within Article 34 TFEU, held as follows.

Case 155/80 *Oebel* [1981] ECR 1994

> 15. … Article 34 concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the state in question.
>
> 16. This is clearly not the case with rules such as those in issue, which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular industry which are established within the national territory, without leading to any difference in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the state in question and the export trade.
>
> […]
>
> 21. The reply to the second question must therefore be that Articles 30 and 34 of the EEC Treaty [now Articles 36 and 40 TFEU] do not apply to national rules which prohibit the production of ordinary and fine baker's wares and also their transport and delivery to individual consumers and retail outlets during the night up to a certain hour.

In the light of these inconsistent judgments, a general rule was needed for equal burden cases and, in *Keck*, the Court of Justice produced just such a rule.

10.8.9 The *Keck* judgment: selling arrangements

In Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097, the issue of equal burden rules was raised in a preliminary reference concerning criminal proceedings brought by the French authorities against Keck and Mithouard. Keck and Mithouard were being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price, contrary to French law stating that goods could not be resold at a loss. The Court of Justice summed up the issue in relation to free movement of goods thus.

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

p. 458

> 11. By virtue of Article 30 [now Article 34 TFEU], quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community [now Union] trade constitutes a measure having equivalent effect to a quantitative restriction.
>
> 12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.
>
> 13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

Thus the question ultimately became: do selling arrangements that may have an effect upon trade between Member States, but which are not designed to regulate it, fall within Article 34 TFEU? In re-examining and clarifying its case law on this matter, the Court of Justice concluded as follows.

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

> 15. It is established by the case-law beginning with 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30 [now Article 34 TFEU]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.
>
> 16. By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
>
> 17. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30.

p. 459

Review Question

> What are the key requirements to be met in determining whether a measure falls outside *Dassonville* as a legitimate selling arrangement?
>
> *Answer*: Following *Keck*, it is clear that 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.

10.8.9.1 ‘Selling arrangements’

Many references have been made to ‘selling arrangements’. Selling arrangements can be defined as rules relating to the market circumstances in which the goods are sold, as opposed to rules relating to the composition of the product or its packaging. Selling arrangements have been held to include rules relating to:

- where or by whom goods may be sold (Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151; Case C-391/92 *Commission of the European Communities v Hellenic Republic* [1995] ECR I-1621);
- when goods may be sold (Joined Cases C-418–21, 460–2, & 464/93 and C-9–11, 14, 15, 23, 24, & C-332/94 *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* [1996] ECR I-2975);
- advertising restrictions (Cases C-34–6/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB* [1997] ECR I-3843); and
- price controls (Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097).

In Joined Cases C-401 & 402/92 *Tankstation ‘t Heukske* [1994] I-2199, the Court of Justice held that Article 34 TFEU did not apply to rules concerning the opening times of shops at petrol stations that applied to all and affected all in the same manner. Such matters amounted to selling arrangements.

However, those discriminatory restrictions that do not satisfy the *Keck* test will remain within Article 34 TFEU and fall to be considered within Article 36 TFEU or *Cassis* (as appropriate).

Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151 concerned Austrian legislation prohibiting door-to-door sales unless the sellers also carried on the trade from permanent premises in the same area. Although it applied to all traders, it had a discriminatory effect on traders from other Member States, as they would have the additional cost of setting up a permanent base. Therefore it impeded access to the Austrian market and thus breached Article 34 TFEU.

Joined Cases C-34–6/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB* [1997] ECR I-3843 concerned a ban on television advertising aimed at children under the age of 12. The Court of Justice found that where a producer is unable to advertise its product, it may be prevented from accessing a market. These same restrictions may have less impact on domestic products, as they will already be known and are less
p. 460 reliant upon television ↵ advertising as a means of penetrating the market. Thus the measure fell outside *Keck* due to the discriminatory effect and, as an MEQR, it fell to be considered under Article 36 TFEU or *Cassis*.

10.8.10 Further developments: a further category of MEQRs?

In a number of recent cases, the Court of Justice has been faced with circumstances involving tariff barriers to trade that affect market access, but which do not fall easily within either of the categories considered earlier. As such, a new category has started to develop. These barriers are characterized by the imposition of restrictions on the *use* of a product, rather than the characteristics or the market circumstances in which it is sold.

An example can be found in Case C-110/05 *Commission v Italy ('Italian Trailers')* [2009] ECR I-519, in which Italian legislation (set out in article 56 of the Highway Code) imposed a ban on the towing of trailers by two- and three-wheeled vehicles. The Court of Justice began its judgment by considering the types of measure that fall within what is now Article 34 TFEU as MEQRs and restating the *Dassonville* formula.

Case C-110/05 *Commission v Italy ('Italian Trailers')* [2009] ECR I-519

Preliminary observations

33. It should be recalled that, according to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community [now Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 28 EC [now Article 34 TFEU] (see, in particular, *Dassonville*, paragraph 5).

34. It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 26; Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraphs 6, 14 and 15; and *Keck and Mithouard*, paragraphs 16 and 17).

35. Hence, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike (see, to that effect, '*Cassis de Dijon*', paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67).

p. 461

36. By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from *Dassonville*, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see *Keck and Mithouard*, paragraphs 16 and 17).

37. Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 of the

> present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.

Paragraph 37 of *Italian Trailers* is a clear recognition of the breadth of the MEQR concept and, in finishing the paragraph in this way, the Court ensures flexibility in approach, recognizing that it is the object or effect of a measure that is paramount regardless of whether it neatly falls within existing categories.

The Court continued, explaining why the measure in question amounted to an MEQR.

Case C-110/05 *Commission v Italy ('Italian Trailers')* [2009] ECR I-519

> 56. It should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.
>
> 57. Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer (see, by analogy, Case C-265/06 *Commission* v *Portugal* [2008] ECR I-0000, paragraph 33, concerning the affixing of tinted film to the windows of motor vehicles). Thus, Article 56 of the Highway Code prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation.
>
> 58. It follows that the prohibition laid down in Article 56 of the Highway Code, to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC [now Article 34 TFEU], unless it can be justified objectively.

p. 462 ↵ It is therefore clear that the restrictions on the use of the product amounted to an MEQR on the basis that market access was affected.

Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos ('Swedish Jet Skis')* [2009] ECR I-4273 provides a further example of an MEQR falling within the 'use of a product' category. In *Åklagaren*, Swedish legislation placed restrictions on the use of jet skis, limiting their use to generally navigable waterways, of which there were very few and which, in any event, were generally unsuitable for jet-ski use. Again, the Court of Justice considered whether restrictions on the use of a product could amount to an MEQR within what is now Article 34 TFEU.

Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos ('Swedish Jet Skis')* [2009] ECR I-4273

24. It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as 'measures having equivalent effect to quantitative restrictions on imports' for the purposes of Article 28 EC [now Article 34 TFEU] (see to that effect, Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67). Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (see Case C-110/05 *Commission* v *Italy* [2009] ECR I-0000, paragraph 37).

25. It is apparent from the file sent to the Court that, at the material time, no waters had been designated as open to navigation by personal watercraft, and thus the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European Communities [now EU] maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden are, therefore, merely marginal.

26. Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State (see to that effect, *Commission* v *Italy*, paragraph 56).

27. Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, *Commission* v *Italy*, paragraph 57).

p. 463

28. In that regard, where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such

> regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article 30 EC or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article 28 EC.

Thus the Court concluded that the restrictive measure amounted to an MEQR on the basis that demand for jet skis would be limited as consumers would not be able to use them and therefore market access would be hindered. The Court further considered a potential justification on the basis of protection of health, life, and the environment, but found the measure to be disproportionate even in this regard, because the restrictions prevented use on some waterways where risks to health and the environment did not exist.

Thinking Point

> Can you identify the different categories that an MEQR can fall into?

10.8.11 Article 36 TFEU

Article 36 TFEU provides exceptions to the prohibition in Article 34 and 35 TFEU. It allows Member States to restrict the free movement of goods for certain specific reasons only. In contrast to the *Cassis* list of mandatory requirements (see 10.8.6), the Article 36 TFEU list of derogations is exhaustive.

Article 36 TFEU

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports … justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants … protection of national treasures … 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.

The following cases provide examples of obstacles to the free movement of goods that have been justified on Article 36 TFEU grounds.

p. 464 ### 10.8.11.1 Public morality

The ‘public morality’ ground was considered in two cases concerning restrictions on imports of pornography.

In Case 34/79 *R v Henn and Darby* [1979] ECR 3795 (see 6.4.1 and 9.2.2.3), a ban on the import of pornographic material amounted to a quantitative restriction under Article 34 TFEU. Such a ban was held to be justified on the ground of public morality, with the Court of Justice noting that it is for each Member State to determine standards. The legislation banning the material in question was found not to discriminate in favour of a domestic product and therefore was justified under Article 36 TFEU.

In Case 121/85 *Conegate Ltd v HM Customs and Excise* [1986] ECR 1007 (see 9.2.2.3), inflatable dolls that were clearly of a sexual nature and other erotic articles were seized by UK customs authorities. The UK government argued that the ban was justified on the basis of public morality under Article 36 TFEU. However, a distinction was drawn between this case and *R v Henn and Darby*.

Case 121/85 *Conegate Ltd v HM Customs and Excise* [1986] ECR 1007

> 15. However, although Community law [now EU law] leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles, it must be pointed out that the fact that goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.
> 16. It follows that a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory.

Thinking Point

> Can you identify the distinction drawn by the Court of Justice?

10.8.11.2 Public policy

Although the ground is potentially wide in scope, 'public policy' has nevertheless 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 (Case 7/61 *Commission v Italy (Re Ban on Pork Imports)* [1961] ECR 317). The public policy ground has rarely been invoked.

p. 465 ↵ In Case 7/78 *R v Thompson* [1978] ECR 2247, a ban on the unlawful importation into the UK of krugerrands (South African gold coins) and a ban on the export of coins was at issue. The Court of Justice held that the right to mint and thus control coinage was a fundamental interest of the State. Thus a State that prohibits the destruction of a coinage and imposes a ban to prevent their destruction abroad is justified in doing so on the basis of public policy under Article 36 TFEU.

10.8.11.3 Public security

In Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy* [1984] ECR 2727, Irish legislation ensuring that a percentage of oil was bought from the State-owned refinery was argued to be in place to ensure that Ireland could continue with its refining capability, which ensured its public security. The Court of Justice held that as an interruption of supplies could seriously threaten public security, the maintenance of essential oil supplies was covered by the public security exception and therefore the measure was justified under Article 36 TFEU.

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

Two contrasting decisions elucidate the scope of this ground. In Case 4/75 *Rewe-Zentralfinanz v Landwirtschaftskammer Bonn ('San Jose Scale')* [1975] ECR 843, German inspections of imported (but not domestically produced) apples were held to be justified on health grounds as the imported fruit presented a genuine health risk not present in domestic apples. By contrast, the Court of Justice rejected health justifications (the aim of avoiding the spread of Newcastle disease) for the UK's prohibition on the import of poultry meat and the adoption of an import licensing system in Case 40/82 *Commission v UK (Imports of Poultry Meat)* [1984] ECR 283. Whilst it was acknowledged that Article 36 TFEU presented an appropriate ground for potential justification, the argument failed for a number of other reasons. The measures were not part of a seriously considered health policy and constituted a disguised restriction on trade.

The issue of health risk was assessed in Case C-322/01 *Deutsche Apothekerverband v 0800 DocMorris NV* [2003] ECR I-14887 concerning a German ban on 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 (see 10.8.9). Thus the ban infringed what is now Article 34 TFEU. 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.

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

Case 174/82 *Officier van Justitie v Sandoz BV* [1983] ECR 2445 concerned a Dutch prohibition on the sale of muesli bars with added vitamins. The Dutch argued that the vitamins were harmful to health, although they were freely available in Germany and Belgium. The vitamins themselves presented no health risk and were in fact
p. 466 necessary to human health, ↵ but their overconsumption across a range of foodstuffs would constitute a risk. 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 authorize marketing when the addition of vitamins to foodstuffs meets a technical or nutritional need.

In Case 178/84 *Commission v Germany (Re Beer Purity Laws)* [1987] ECR 1227, German rules stated that all beer in Germany under the designation 'Bier' could be made only from certain ingredients and that beers containing additives could not be marketed. One of the arguments advanced by the German government was that, due to the extent of German consumption of the products in question, the use of additives was more of a problem for German nationals than it was for nationals of other countries. 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.

In Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* EU:C:2016:776, the Court held that a system of fixed prices of prescription-only medicines for sale in pharmacies amounted to an MEQR within Article 34 TFEU. In considering whether the measure could be justified under the Article 36 TFEU ground of public health, the Court began by setting out some key principles.

Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* EU:C:2016:776

> 30. As regards a national measure coming within the field of public health, the Court has on numerous occasions held that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion (see judgment of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, paragraph 118 and the case-law cited).
>
> 31. In particular, the need to ensure that the country has reliable supplies for essential medical purposes may, so far as Article 36 TFEU is concerned, justify a barrier to trade between Member States if that objective is one of protecting the health and life of humans (see judgment of 28 March 1995, *Evans Medical and Macfarlan Smith*, C-324/93, EU:C:1995:84, paragraph 37).
>
> [...]
>
> 36. It follows that, where a national court examines national legislation in the light of the justification relating to protection of the health and life of humans under Article 36 TFEU, that court must examine objectively, through statistical or ad hoc data or by other means, whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods (see, to that effect, judgment of 23 December 2015, *The Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 59).

p. 467 ↵ The Court then evaluated each of the arguments put forward to justify the measure.

Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* EU:C:2016:776

37. As to whether the national legislation at issue in the main proceedings is appropriate for attaining the objectives invoked, it must be stated that there is no evidence to substantiate the contention that it is necessary to ensure a uniform supply of prescription-only medicinal products for essential medical purposes throughout Germany that satisfies the conditions set out in paragraph 35 above. In particular, by the general nature of the contentions made in the present case in that regard, it has not been demonstrated, as the Advocate General has, in essence, noted in point 51 of his Opinion, how setting fixed prices for such medicinal products allows for a better geographical allocation of traditional pharmacies in Germany.

38. Quite to the contrary, certain factors on which the Commission relies tend to suggest that increased price competition between pharmacies would be conducive to a uniform supply of medicinal products by encouraging the establishment of pharmacies in regions where the scarcity of dispensaries allows for higher prices to be charged.

39. As regards the argument based on a high-quality supply of prescription-only medicinal products, it must be found that, contrary to what the German Government claims, no factor has been laid before the Court that is capable of establishing that, in the absence of a system such as that at issue in the main proceedings, mail-order pharmacies would be able to compete in terms of price in such a way that essential services, such as emergency care, could no longer be ensured in Germany due to a consequential fall in the number of dispensing pharmacies. In that regard, it must be reiterated that competition factors other than price, such as those set out in paragraph 24 above, could potentially allow traditional pharmacies, faced with competition from mail-order sales, to remain competitive in the German market.

40. Similarly, the elements laid before the Court in the present case do not suffice to show that price competition for prescription-only medicinal products would adversely affect traditional pharmacies in performing certain activities in the general interest, such as producing prescription medicinal products or maintaining a given stock and selection of medicinal products. On the contrary, as the Advocate General stated, in essence, in point 47 in his Opinion, it may be that, faced with price competition from mail-order pharmacies, traditional pharmacies will be encouraged to improve such activities.

41. Nor has the alleged relationship between the fixed sales price in the case in the main proceedings and a consequential reduction of the risk that patients might attempt to pressurise doctors in order to obtain prescriptions of convenience been established in compliance with the conditions cited in paragraph 35 above.

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42. As regards the argument put forward by the ZBUW and the German Government that a patient in poor health ought not to be required to carry out a market analysis in order to determine which pharmacy offers the medicinal product sought at the most attractive price, it should be noted that the existence of a genuine risk to human health must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research (see, to that effect, judgment of EU:C:2016:776 7 JUDGMENT OF 19. 10. 2016—CASE C-148/15 DEUTSCHE PARKINSON VEREINIGUNG 14 July 1994, *van der Veldt*, C-17/93, EU:C:1994:299, paragraph 17). Such general conjecture made in that regard does not in any way suffice to prove that the possibility for the consumer to seek to acquire prescription-only medicinal products at lower prices poses an actual risk to public health.

43. Moreover, the Court notes, as did DPV and the Netherlands Government, that, in the present case, price competition could be capable of benefiting the patient in so far as it would allow, where relevant, for prescription-only medicinal products to be offered in Germany at more attractive prices than those currently imposed by that Member State. As the Court has previously held, the effective protection of health and life of humans demands, inter alia, that medicinal products be sold at reasonable prices (see judgment of 20 May 1976, *de Peijper*, 104/75, EU:C:1976:67, paragraph 25).

44. Finally, it should be added that the fact that there are other national measures, such as the rule excluding non-pharmacists from the right to own and operate pharmacies, which have the objective, according to the documents before the Court, of supplying safe and high-quality prescription-only medicinal products in Germany, does not affect the Court's assessment of the fixed-price system at issue in the case in the main proceedings.

45. Having regard to all of the foregoing considerations, it must be found that a restriction such as that resulting from the legislation at issue in the main proceedings has not been shown to be an appropriate means of attaining the objectives relied on and cannot therefore be regarded as justified by the attainment of those objectives.

The analysis given of the various arguments justifying the measure provides a useful insight into the restrictive approach of the Court of Justice when considering potential justifications. Clearly, in this case, the Court remained unconvinced.

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

The scope of this justification remains uncertain. In Case 7/68 *Commission v Italy (Export Tax on Art Treasures, No 1)* [1968] ECR 423, the Court of Justice 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.

10.8.11.6 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.

p. 469 ↵ It is therefore clear that the interpretation and application of Article 36 TFEU by the Court of Justice, as with all the other potential means by which obstacles to the free movement of goods may be justified, is quite restrictive in practice, with a significant burden placed upon those seeking to justify such obstacles.

10.8.12 No arbitrary discrimination, disguised restriction on trade

Article 36 TFEU, emphasis added

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or 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*.

In essence, the final element of Article 36 TFEU requires that any claims of justification under the Article must conform to the overall desire to ensure the free movement of goods. Thus they cannot be an attempt merely to discriminate between products or an attempt, albeit disguised, to restrict trade between Member States.

In Case 40/82 *Commission v UK (Imports of Poultry Meat)* [1982] ECR 2793, the UK's argument that prohibition of the importation of poultry products and the adoption of an import licensing system had the aim of avoiding the spread of Newcastle disease failed. Amongst the reasons identified was a failure to fully recognize measures taken elsewhere, the likelihood of spread of the disease, lobbying by farmers, and the timing of the measure.

Cross-Reference

See 10.8.6.3 on proportionality.

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

> 37. Certain established facts suggest that the real aim of the 1981 measures was to block, for commercial and economic reasons, imports of poultry products from other Member States, in particular from France. The United Kingdom government had been subject to pressure from British poultry producers to block these imports. It hurriedly introduced its new policy with the result that French Christmas turkeys were excluded from the British market for the 1981 season. It did not inform the Commission and the Member States concerned in good time, as the letter in which the Commission was informed of the new measures—which took effect on 1 September 1981—was dated 27 August 1981. It did not find it necessary to discuss the effects of the new measures on imports with the Community [now Union] institutions, with the standing veterinary committee or with the Member States concerned.

p. 470 ↵ For an overview of Article 34 TFEU, see Figure 10.3.

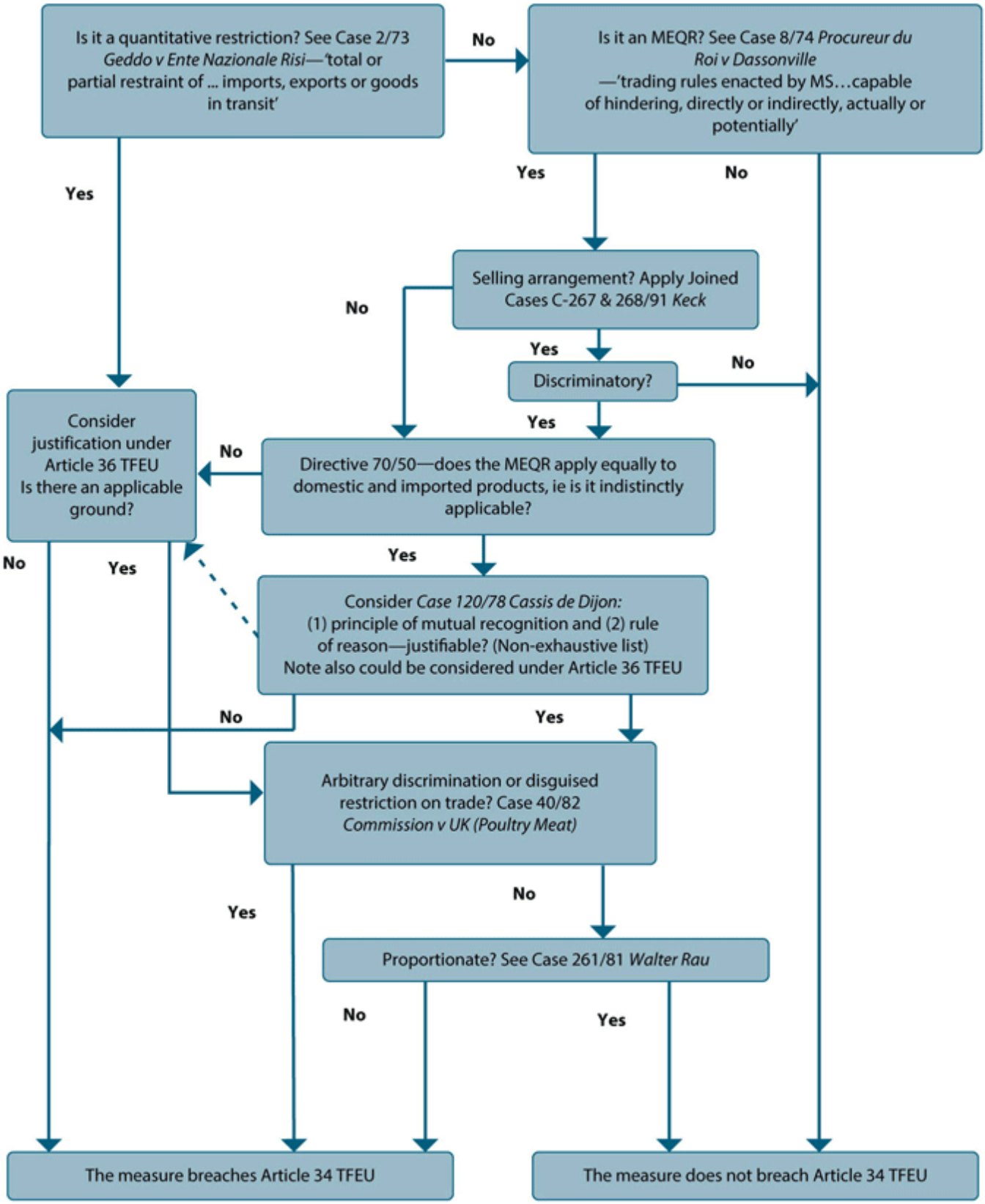

Figure 10.3 Article 34 TFEU

10.8.13 Proportionality

As with *Cassis*, the measures must go no further than is necessary to achieve the desired aim. In Case 40/82 *Commission v UK (Imports of Poultry Meat)* [1982] ECR 2793, the UK government's argument for the restrictive measures in place also failed on the basis of their lack of proportionality to the risk identified.

10.8.13.1 No harmonizing rules

Article 36 TFEU applies only in the absence of EU rules governing the interest concerned. If there is harmonizing legislation in a particular area, Member States may not impose additional requirements unless the legislation expressly permits them to do so.

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Summary

- Article 30 TFEU prohibits customs duties and charges having an equivalent effect (CHEEs).
- The concept of a customs duty incorporates two elements—namely, (a) a pecuniary charge that is (b) imposed on goods by reason of crossing a frontier.
- The concept of a CHEE is wider and includes measures that are not customs duties in the strict sense, but which have the same effect even in the absence of a protective or discriminatory purpose. Thus the emphasis is upon the effect of the measure and not its purpose.
- There are exceptions: Article 30 TFEU is not breached if the charge is justified as a fee for a service rendered, in which case it must be of direct benefit to the goods or traders, or if it is mandated by EU law and proportionate to the service rendered.
- The first paragraph of Article 110 TFEU prohibits unequal taxation of similar products and the second prohibits internal taxation which indirectly protects domestic products that, although not similar to the imported products, are nevertheless in competition with them.
- A distinction can be drawn between direct and indirect discrimination.
  - Measures that openly tax imported and domestic goods at different rates are directly discriminatory.
  - Indirectly discriminatory taxation is taxation that appears (in law) not to discriminate between imported and domestically produced goods, but which nevertheless has a discriminatory effect in reality.
- Directly discriminatory measures can never be justified. Indirectly discriminatory measures may be objectively justified if there exists some objective policy reason that is acceptable to the European Union (EU).
- 'Similar products' within the first paragraph of Article 110 TFEU has been interpreted by the Court of Justice broadly to mean similar characteristics and comparable use.
- In determining the meaning of 'indirect protection to other products' within the second paragraph of Article 110 TFEU, the Court needs to establish whether the products are in competition. A number of factors are taken into account, including cross-elasticity of demand, manufacturing processes, product composition, and present and future consumer preferences.

- If the first paragraph of Article 110 TFEU is breached, the Member State must equalize taxation.
- If the second paragraph of Article 110 TFEU is breached, the Member State has to remove the competitive effect of the tax regulation.
- Article 34 TFEU prohibits quantitative restrictions and measures having equivalent effect to quantitative restrictions (MEQRs).
- Quantitative restrictions are measures that limit the import or export of goods by reference to an amount or value.
- The *Dassonville* formula defines MEQRs as 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade'.
- A distinction can be drawn between distinctly and indistinctly applicable measures.
  - Distinctly applicable measures are those other than those applicable equally to domestic or imported products.
  - Indistinctly applicable measures are those that are equally applicable to domestic and imported products.
- *Cassis de Dijon* established two important principles: (a) the principle of mutual recognition; and (b) the rule of reason. These exceptions apply to indistinctly applicable MEQRs only.
- In order to satisfy the rule of reason, the measures used must be no more than is necessary to achieve their aim (proportionality).

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- Certain selling arrangements do not fall within the *Dassonville* formula provided that they apply to all affected traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic and imported products.
- Article 36 TFEU allows Member States to restrict the free movement of goods for certain specific reasons only. Measures must not amount to arbitrary discrimination or a disguised restriction on trade and must be proportionate.
- Article 36 TFEU and *Cassis* mandatory requirements can be compared as follows.
  - Article 36 TFEU applies to distinctly and indistinctly applicable measures and is exhaustive.
  - *Cassis* applies only to indistinctly applicable MEQRs and is non-exhaustive.

Further Reading

Articles

R Barents, 'Charges of Equivalent Effect to Customs Duties' (1978) 15 CML Rev 415

Focuses on tariff barriers to trade.

T Connor, 'Accentuating the Positive: The "Selling Arrangement", the First Decade and Beyond' (2005) 54 ICLQ 127

Reflects upon the development of the *Keck* judgment.

P Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?' (2011) 33(5) Fordham International LJ 1470

A useful chronology of case developments concerning Article 34 TFEU and interesting consideration of future developments.

A Tryfonidou, 'Was *Keck* a Half-Baked Solution After All?' (2007) 34 Legal Issues of Economic Integration 167

A critical consideration of *Keck*.

D Wilsher, 'Does *Keck* Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market' (2008) 33 EL Rev 3

Focuses on the requirements for selling arrangements under *Keck*.

Books

P Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th edn (Oxford: Hart, 2010)

A specialist text for academics and practitioners on all aspects of the free movement of goods.

L Woods, *Free Movement of Goods and Services within the European Community* (Farnham: Ashgate, 2004)

A specialist text focusing on two fundamental freedoms of the EU internal market.

Question

SOUPS YOU SIR Ltd is an English company that manufactures a range of soups. Tom Ato, managing director, has been looking for opportunities to expand the business and has recently concluded that the time is right to export to the rest of Europe. However, things have not been straightforward.

The Latvian authorities have informed Tom that he will be unable to sell soup in Latvia unless changes are made to the way in which the products are packaged. SOUPS YOU SIR Ltd has always sold its products in cartons and has invested heavily in packaging processes, with the upmarket cartons being a key element in the branding of the range. However, the Latvian authorities insist that if SOUPS YOU SIR Ltd products are to be sold in Latvia, they must be sold in jars.

p. 473 ↵ Recent Belgian legislation aimed at tackling a rise in the obesity figures bans television advertising of all food products. Tom fears that the legislation may prevent SOUPS YOU SIR Ltd's products from breaking into the Belgian market.

The German authorities have informed Tom that all soup imported into Germany is subject to a €3 fee. When Tom queried this, he was informed that the fee is levied 'for the compilation of data deemed beneficial to importers'.

Finally, Polish taxation policy taxes soups in cartons at 15 per cent, whilst soups in tins are taxed at 1.5 per cent. Poland does not produce soups in cartons and Polish officials insist that the measure is justified, as tins are easier and cheaper to recycle than cartons.

Advise Tom as to the impact of relevant EU law in relation to the free movement of goods.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-10-guidance-on-answering-assessment-questions?options=showName>***, and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-10-self-test-questions?options=showName>* **with feedback.**

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