Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

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6. The Free Movement of Goods

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary, and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about the free movement of goods in the EU. The questions focus on charges and measures having equivalent effect, the restrictions allowed under Art 36 TFEU, and the principles of law which have emerged from the case of *Cassis de Dijon* and subsequent cases. The significance of the judgment of the Court of Justice in *Keck* is addressed.

Keywords: EU law, European Union, Cassis de Dijon, Keck, trade, cases

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The basic provisions governing the free movement of goods which remained unchanged following the Treaty of Lisbon.
- The Court of Justice of the EU (CJEU) decisions and statements in the cases of ***Cassis de Dijon (120/78)***, ***Keck***, and ***Mithouard (C-267 and 268/91)*** and subsequent case law.

● Charges and measures having equivalent effect, the restrictions allowed under **Art 36 TFEU**, and the principles of law which have emerged from the case of ***Cassis de Dijon*** and subsequent cases.

Key Debates

Debate: the continuing significance of the *Keck* case

Whilst this title includes the Common Customs Tariff in **Arts 31–32 TFEU**, questions are more likely to be concentrated on the elimination of customs duties and measures having equivalent effect, **Art 30 TFEU**, and the elimination of quantitative restriction and measures having equivalent effect under **Arts 34–36 TFEU**, and in particular what the significance of the CJEU judgment was in the case of ***Keck***.

Question 1

‘However wide the field of application of Article 34 TFEU may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty. Thus, obstacles which are of a fiscal
p. 120 ↵ nature or have equivalent effect and are covered by Articles 28–30 and 110 TFEU do not fall within the prohibition of Article 34 TFEU.’

Discuss.

Caution!

■ Although apt to cause difficulties in any part of the course, the renumbering of the **EC Treaty** by the **Treaties of Amsterdam** and now **Lisbon** is even more problematic in this area, as very old Art 30 EEC is old Art 28 EC, and now **Art 34 TFEU**. Very old Art 36 EEC is old Art 30 EC but back again following **Lisbon** to **Art 36 TFEU**! Make sure you make it clear which Treaty you are referring to.

■ The caution on renumbering applies, of course, to all questions in this chapter.

■ This quotation is taken from the Court of Justice judgment in the case of ***Ianelli and Volpi v Meroni (Case 74/76)***, but amended to take account of the renumbering of the Treaty. However, it is not necessary to know that, or even that it is a quotation from the Court of Justice, to be able to discuss the meaning of the quotation.

Diagram Answer Plan

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Suggested Answer[1]

[1] Determine whether **Arts 28–30** and **110 TFEU** apply only to charges or measures with an equivalent effect or to fiscal measures and whether **Art 34 TFEU** applies only to physical measures with no overlap.

The free movement of goods, as one of the fundamental freedoms[2] or cornerstones of the internal market and the original Community and Union itself, has been carefully protected by the Court of Justice in its judgments. It interprets the main provisions, which provide the freedoms, very widely, but any exception allowed the Member States, very restrictively.

[2] Start with a general view of the approach of the Court of Justice to this area of law.

The scope of Art 34 TFEU[3]

[3] You will need to consider the scope of the application of **Art 34 TFEU** by considering the provision itself and by giving examples from the case law of the Court of Justice.

Article 34 TFEU provides a general prohibition on quantitative restrictions and measures having equivalent effect. Its scope has been determined both by legislation and case law. In ***Geddo v Ente Nationale Risi (2/73)***, the CJEU held that a prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of imports, exports, or goods in transit. The most obvious examples of quantitative restrictions on imports and exports are complete bans or quotas restricting the import or export of a given product by amount or by value. These are clearly in contravention of **Art 34 TFEU** and prohibited. The cases of ***Commission v France (Import of Lamb) (232/78)*** and ***Commission v UK (Import of Potatoes) (231/78)*** are straightforward examples of unlawful import bans.

The concept of measures having equivalent effect was defined by **Directive 70/50, Art 2**, which provides 'measures having equivalent effect' to include those 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'. They also include any measures which subject imported products or their disposal to a condition which differs from that required for domestic products and which is more difficult to satisfy.

In ***Procureur du Roi v Dassonville (8/74)*** the term 'measures having equivalent effect' was held to include 'all trading rules enacted by a Member State which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade'.

Basically, therefore, any measure which makes import or export unnecessarily difficult, and thus discriminates between the two, would clearly fall within the definition.

Article 34 TFEU has been held to apply widely to a number of indirect measures, including:

(a) a government sponsored advertising campaign in ***Commission v Ireland (Buy Irish Campaign) (249/81)***

(b) national marketing rules in ***Commission v Belgium (Packaging of Margarine) (314/82 and 189/83)***

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(c) import bans on health grounds on food additives have been held to be in breach of **Art 34 TFEU** in two cases against Germany, ***Commission v Germany (Beer Purity) (178/84)*** and ***Commission v Germany (Sausage Purity) (274/87)***

(d) in ***R v Pharmaceutical Society of Great Britain (267/87)***, the rule of the Pharmaceutical Society prohibiting dispensing pharmacists from substituting for the product named on a doctor's prescription any other with identical therapeutic effect except under certain exceptional conditions.

Moreover, the scope of **Art 34 TFEU** applies not just to measures which are directly discriminatory but also to measures affecting both imports and domestic goods, termed equally or indistinctly applicable measures. **Directive 70/50, Art 3** provides that measures which are equally applicable to domestic and imported goods will breach **Art 34 TFEU** where the restrictive effect on the free movement of goods exceeds the effects necessary for the trade rules, i.e. they would be disproportionate to the aim and would thus tend to protect domestic products at the expense of the imports. See e.g. cases concerned with health checks and spot checks, ***Commission v UK (UHT Milk) (124/81)*** and ***Commission v France (Italian Table Wines) (42/82)***.

Thus, the scope of **Art 34 TFEU** is extremely wide,[4] covering physical trade barriers, government assistance, and measures which are applicable to both imports and domestic products. The scope of **Arts 28–30 and 110 TFEU** will now be outlined to compare with **Art 34 TFEU**.[5]

[4] The first sentence of the question suggests that the scope of application of **Art 34 TFEU** does not extend to prohibiting obstacles which are covered by other Treaty Articles.

[5] The question proceeds in the second sentence to spell out which other Treaty Articles serve to cover the obstacles that lie outside the scope of **Art 34 TFEU**, which you should now outline.

The scope of Arts 28–30 TFEU

Articles 28–30 TFEU are aimed at the abolition of customs duties and charges having equivalent effect and at prohibiting the introduction of any such measures.

Article 28 TFEU states that the Union shall be based on a customs union, with a common customs tariff, involving the prohibition of all customs duties on imports and charges having equivalent effect.

Article 28 TFEU prohibits the introduction of new customs duties or charges having equivalent effect, and equally prohibits the increase of those which are already in existence. The prohibition applies both to imports and exports. A customs duty is usually clear to recognise but a charge having an equivalent effect is more difficult and has been the subject of a considerable body of case law. In ***Commission v Luxembourg and Belgium (Gingerbread) (2 and 3/62)***, the Court of Justice held that:

> 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 products.

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Furthermore, charges which are argued to be fees for services rendered have also been classified as contrary to **Art 30 TFEU** unless they meet specific criteria including that they have been sanctioned under either EU or international law. The **Treaty of Amsterdam** amended what is now **Art 30 TFEU** by adding a second sentence to make it expressly clear that the prohibition also applies to customs duties of a fiscal nature which are applied when goods cross the border.

Is it a duty, a charge, or a tax?

However, if a fee, imposed by a Member State on imported goods, is a measure of internal taxation, it cannot be a charge having equivalent effect, and cannot be caught by **Arts 28–30 TFEU**. It is instead governed by **Art 110 TFEU** on taxation but **Art 110 TFEU** is designed to prevent circumvention of the customs rules by the substitution of discriminatory internal taxes.

The scope of the tax provision in Art 110 TFEU

Article 110(1) TFEU prevents Member States from imposing on imports internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. This prohibits discrimination in favour of the domestic products. **Article 110(2) TFEU** prohibits Member States from imposing on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products. This serves to cover products that may be different but are nevertheless in competition with the domestic products.

Taxation was defined in ***Commission v France (Re: Reprographic Machines) (90/79)*** as a general system of internal dues applied systematically to categories of product in accordance with objective criteria irrespective of the origin of the products. In ***Molkerei-Zentrale (28/67)*** the Court of Justice ruled that the words ‘directly or indirectly’ were to be construed broadly and embraced all taxation which was actually and specifically imposed on the domestic product at earlier stages of the manufacturing and marketing process.

The relationship between Arts 28–30 and 110 TFEU

Article 110 TFEU is therefore complementary to **Arts 28–30 TFEU** in that it is also concerned with outlawing fiscal measures which are discriminatory. **Article 28 TFEU** applies to charges which occur as goods pass a frontier and **Art 110 TFEU** should apply only internally within the importing state. **Articles 28 and 110 TFEU** were held to be mutually exclusive by the Court of Justice in the case of ***Deutschmann v Germany (10/65)***.

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↲ The final part of this answer[6] addresses the issue of whether **Arts 28 and 110 TFEU** overlap in any way with **Art 34 TFEU**. The area of fees charged for inspection has emerged as the situation where all of the Articles under examination may come into play. The imposition of charges or alleged taxes may occur at the same time or following an inspection of goods. Thus a consideration of measures having equivalent effect may be undertaken, the result of which may be that the inspection proves to be a breach of **Art 34 TFEU** and not excused by **Art 36 TFEU**. If a fee for this is charged, it will still have to be considered either as a measure of taxation under **Art 110 TFEU** or under **Arts 28–30 TFEU** because it may not be acceptable as a tax (see ***Dansk Denkavit (29/87)***). However, if it is the case that a Member State claims that a charge made on import inspection is a tax and there is not a fee levied at a similar stage internally of a counterpart domestic product, it may be held to be a charge having equivalent effect, as in the cases of ***Commission v Belgium (314/82)*** and ***Commission v Denmark (C-47/88)***. The distinction, however, between the physical barrier of the inspection and the fee charged remains quite distinct. The Court of Justice has considered in the case of ***Ianelli and Volpi v Meroni (74/74)*** that **Arts 28–30** and **110 TFEU** do not overlap with **Art 34 TFEU**. It is possible that inspections may be lawful, but the fees for them may not; see e.g. the ***Marimex case (29/72)***. Note though, as a matter of law and logic, that if an inspection was held to be unlawful, it must follow that the fee levied for it must also be unlawful. Therefore, the conclusions to be drawn from observing the scope of the articles are that there is no overlap of **Arts 28–30 or 110** with **Art 34 TFEU**.

[6] The question suggests the Treaty Articles create mutually exclusive categories, so you need to address this specific point.

Looking for Extra Marks?

■ More general information on the approach of the court with reference to case law as in the cases of ***Van Gend (26/62)***, ***Commission v Italy (Art Treasures) (7/68)*** and ***Commission v Belgium and Luxembourg (Gingerbread) (2 and 3/62)***.

■

If time, inclusion of ***Denkavit (29/87)*** on the border or distinction between cases arising under **Arts 28–30** and **110 TFEU**.

Question 2

Healthy-eat Ltd is a UK manufacturer of fruit-flavoured yoghurt and breakfast muesli. It has recently decided to try to export to the Continental European market. In order to ensure the products are in good condition when they reach the shops in the Member States, certain measures are taken by Healthy-eat Ltd in the marketing of three special Continental product lines. The first is 'frozen yoghurt' containing only natural ingredients. The second is unfrozen yoghurt to which preservatives are added. The third is muesli in sealed cellophane bags. All the ingredients of the products are listed on the packaging.

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↲ Healthy-eat Ltd found that the products were particularly popular in Germany and for four months sales boomed until Germany imposed a ban, justified on 'public health grounds', on the importation of any dairy product containing preservatives. A new German consumer protection law forbids the application of the description yoghurt to all frozen yoghurts. Following this, consignments of yoghurt were turned back at the frontier.

Meanwhile, consignments of muesli were subject to long delays at the German ferry port whilst spot checks for health reasons were carried out. These involved opening three packets in every fifth case of muesli. Payment was required for the inspections and parking fees were imposed on the trucks whilst they were parked up waiting for the inspections to take place.

When Healthy-eat Ltd challenged the parking fees and charges for the health checks, they were told that they are the equivalent of an internal tax imposed on domestic food products to finance a system of factory inspection in the German food industry.

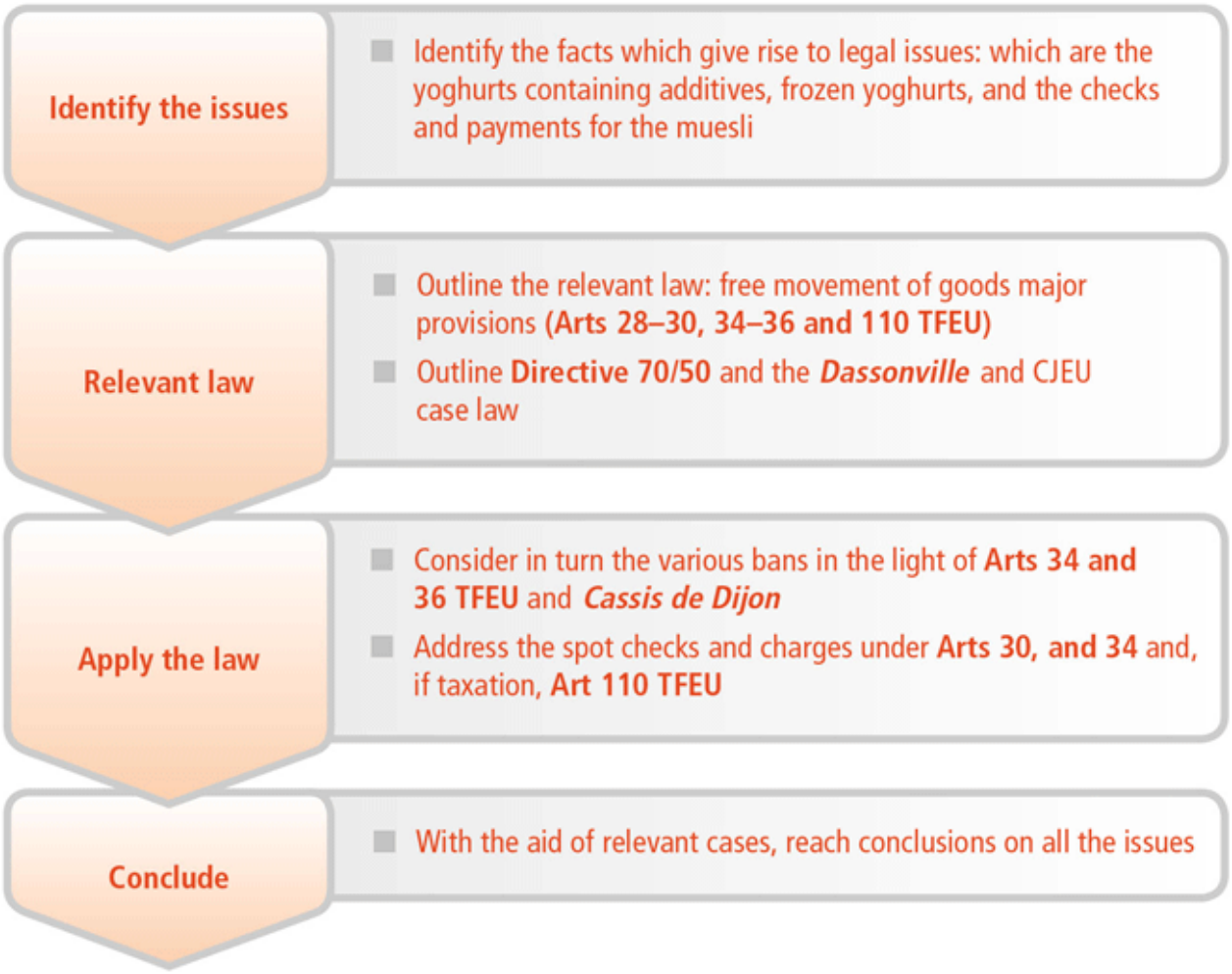
Advise Healthy-eat Ltd as to its rights under EU law.

Caution!

■ As with other long and involved problem questions, pacing your answer and getting a good balance in dealing with the issues is crucial.

■ Additionally, as there are a number of issues, a good structure to your answer is also vital.

Diagram Answer Plan



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Suggested Answer

Subject area of the problem and the principal legislative provisions[1]

[1] This problem is concerned with the free movement of goods including aspects of charges having equivalent effect, measures having equivalent effect, and internal taxation measures.

The applicable legal regime is that of the free movement of goods contained in **Arts 28–30, 34–36 TFEU,** and **110 TFEU** concerned with taxation. Free movement of goods is one of the fundamental freedoms guaranteed by the **EU Treaties** and is a cornerstone or one of the foundations of the Union.[2]

As a result, the Court of Justice has interpreted the legislative provisions widely and the exceptions allowed to the Member States have been interpreted restrictively. Furthermore, **Art 110 TFEU** may be applicable, because a claim has been made that the charges are equivalent to a domestic tax.

[2] A brief introduction to the area of law and the attitude of the Court of Justice would help to set the scene before answering the specific points in the question.

The facts of the problem[3]

[3] The material facts to be considered are the yoghurts containing additives, frozen yoghurts, and the checks and payments for the muesli.

The problems that have been identified are those concerned with the additives in yoghurts, the frozen yoghurts, and the checks and payments for the muesli.

The law applicable to the facts[4]

[4] Determine whether the bans breach **Art 34 TFEU** or the measures introduced by the German government are justified under EU law by **Art 36 TFEU** or justified under the rule of reason.

First of all, in relation to the yoghurt with preservatives, **Art 34 TFEU** prohibits all quantitative restrictions or measures having equivalent effect (MHEE). Measures which are in breach of **Art 34 TFEU** are those which meet formulae provided by the provisions of **Directive 70/50** or the Court of Justice in the ***Dassonville case (8/74)*** in that they impose measures to hinder imports. The imposed ban would appear to be the case here. However, **Art 36 TFEU** allows exceptions on public health grounds and this is what Germany pleads in respect of the ban on preservatives. There is considerable case law[5] now dealing with bans on health grounds to the effect that any measure must be reasonable and proportional to the aim; see ***Commission v UK (UHT Milk) (124/81)*** and ***Commission v Germany (German Beer Purity Law) (178/84)***. In the latter case it was not contested that the prohibition on the marketing of beers containing additives fell within the definition of a measure having equivalent effect to a quantitative restriction in present **Art 34 TFEU** but the German Government argued instead that it was justified, under present **Art 36 TFEU**, on public health grounds. The Court of Justice held that the use of a given additive—which was permitted in another Member State, was tested and found safe by international scientific research, in particular the work of the World Health Organization, and was present in the eating habits in the country of importation—did not constitute a danger to public

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health. Certain of the additives used in beers from other Member ↵ States were permitted in Germany in the manufacture of almost all drinks other than beer. Therefore, there must be a real danger to human health, the alleged harmful effects must be proved, and the additives must be banned in all products. It is thus unlikely therefore that this ban will be acceptable, unless it meets those strict requirements laid down by the Court of Justice.

[5] Careful selection then of cases is vital, and do not include lists of cases for the same point when one will do.

The second problem concerns the ban on the grounds that the term 'yoghurt' cannot be used to describe frozen yoghurt. If not excused or justified, this will also be a breach of **Art 34 TFEU**. This time, however, the justification for the prohibition is not made on the basis of **Art 36 TFEU** but based on the new consumer protection law. As the rules appear to apply to both imports and domestic products and consumer protection lies outside the list of derogations in **Art 36 TFEU** the case law of the Court of Justice, notably the case of ***Cassis de Dijon (120/78)***, must be considered. The Court held that Member States are allowed to impose restrictive mandatory rules provided they apply to both imports and domestic products and providing certain criteria were met. This rule has become known as the rule of reason. The criteria are that the measure must not be covered by an EU system of rules, it must be proportionate, and it must not be an arbitrary restriction or a disguised discrimination.

Thus, the question that must be asked is whether the measure applies to national and imported frozen products equally and whether a more appropriate measure could protect the consumer. The ***German Beer Purity Law case, Commission v Germany (178/84)***, and the ***Italian Pasta Purity Law case, Drei Glocken GmnH v USL-Centro-sud (407/85)***, would be applicable here. It was held that protection would be equally, if not better, served by appropriate labelling together with an indication of the sell-by date, to guarantee consumer information. Hence, unless the measures meet the above, they will not be acceptable. There is a case concerned with deep-frozen yoghurt in which the insistence of the French authorities that it be given a different description from yoghurt was held to be capable of infringing **Art 34 TFEU**; see ***Smanor (298/87)***.[6]

[6] This is an actual case dealing with frozen yoghurts but you would not be required to know this or indeed to know it in order to answer the question effectively.

The aspects concerned with the muesli involve a consideration of both measures and charges having equivalent effect. Are these 'spot checks' for health reasons prohibited under **Art 34 TFEU** or permitted under **Art 36 TFEU**? Provided they are only random spot checks and they take place with the same frequency as checks on the equivalent domestic product, they will be acceptable. They must

not be an arbitrary discrimination or a disguised restriction on trade. They are also subject to the principle of proportionality; see ***Commission v France (Italian Table Wines) (42/82) and Commission v UK (UHT Milk) (124/81)***. The checks in this case appear disproportionate and discriminatory because they are systematic and excessive.

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The charges for the checks are argued to be an equivalent tax and it must first be considered whether they are. If not an acceptable tax, it then needs to be considered whether they are then an acceptable or unacceptable charge prohibited by **Arts 28–30 TFEU**.

Consideration of the internal tax argument[7]

[7] Furthermore, it must be considered whether the charges are in fact non-discriminatory taxation or charges contrary to the Treaty.

Article 110 TFEU allows internal taxes to be imposed on imports as long as it is the equivalent of an internal tax and is not discriminatory in its application. In ***Denkavit v France (132/78)***, it was held that the tax to which an imported product is subject must be imposed at the same rate on the same product, must be imposed at the same marketing stage, and the chargeable event giving rise to the duty must be the same for both products. The chargeable event here is different because, if a tax, it would be on distribution, whereas the domestic product would be taxed pre-production, and thus would not come within the provisions of **Art 110 TFEU**.

If not a tax, is it a charge?

It must now be considered whether the fee imposed is an unlawful charge. ***Commission v Italy (Statistical Levy) (24/68)*** defined a charge having equivalent effect to include 'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by virtue of the fact that they cross a frontier', and which is not a customs duty in the strict sense. The Court held that 'such a charge is a charge having equivalent effect even if it is not imposed for the benefit of the Member State concerned, even if it is not discriminatory or protective in effect and even if the product on which it is imposed is not in competition with any domestic product'.

Under certain conditions charges may be acceptable. If they are health checks with a legal basis in EU law, they may be charged for; see ***Commission v Germany (Health Inspections) (18/87)***. They cannot be regarded as charges having effect equivalent to customs duties if: the fees do not exceed the cost of the actual inspections in respect of which they are charged; the inspections in question are mandatory and uniform for all the products in question in the EU; the inspections are provided for by EU law in the interests of the EU; and the inspections promote the free movement of goods. It would seem

unlikely that EU law would be the basis of these inspections, particularly as the inspections appear to be breaching **Art 34 TFEU**, and therefore the charges in this case do not meet the criteria and thus would appear to breach **Art 28 TFEU**.

The parking fees will also be held to be charges having equivalent effect to customs duties, prohibited by **Art 28 TFEU**; see two cases concerned with customs warehouses, ***Commission v Belgium (314/82)*** and the ***Marimex case (29/72)***.

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Conclusion

In conclusion, none of the products could be restricted lawfully under EU law.

Looking for Extra Marks?

■ If there is time, a longer look at the ***German Beer Purity Law case***, ***Commission v Germany (178/84)*** would be beneficial.

■ Also if there is time, expand the conclusion to go through each of the issues and conclusions point by point.

Question 3

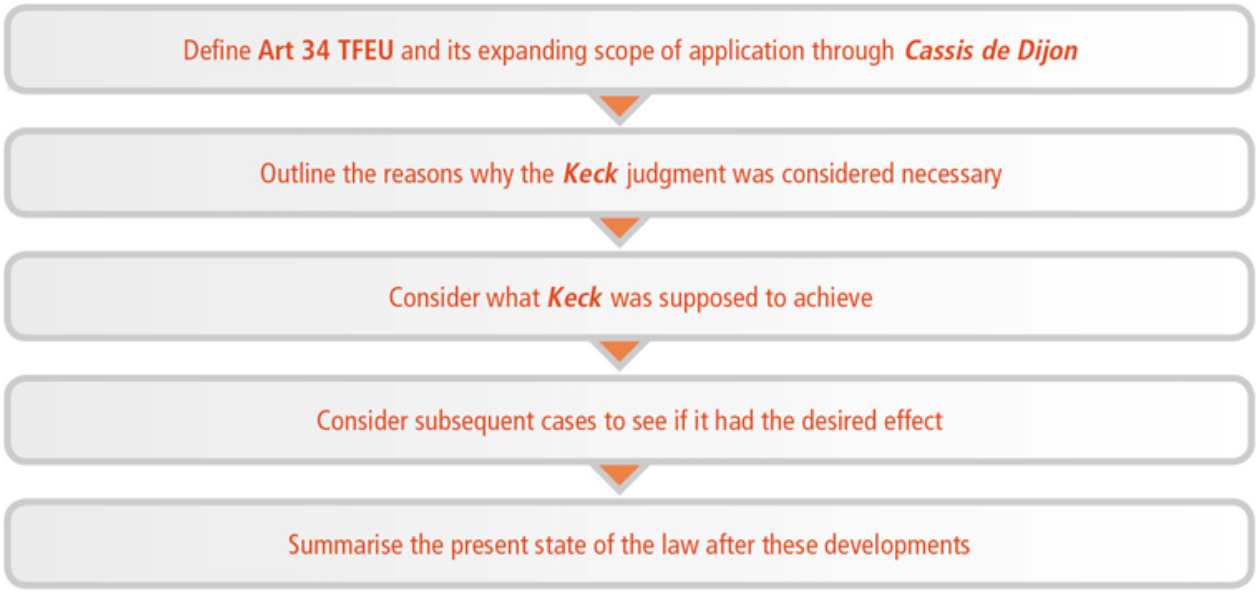
How, why, and with what success did the Court of Justice 'clarify' the scope of application of Art 34 TFEU in *Keck and Mithouard (267 and 8/91)* and subsequent cases?

Caution!

■ This is another question which might seem to invite you to write an 'all I know about Art 34 TFEU' answer. It is required but that is just one part of a more complex question and answer.

■ This question very much concerns the ***Cassis de Dijon*** case. It is not explicit but the clarification provided by ***Keck*** was to the ruling in ***Cassis***.

Diagram Answer Plan



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Suggested Answer

Free movement of goods and Art 34 TFEU[1]

[1] This question concerns the case law development of one of the central elements of the free movement of goods regime provided by the TFEU.

The free movement of goods has been declared to be one of the fundamental policies of the Common Market and hence the EU. As a result, the Court of Justice adopted a liberal interpretation of the freedoms to allow goods to circulate freely in the EU and at the same time adopted a restrictive approach to measures enacted by the Member State which impinge on these freedoms. **Article 34 TFEU** prohibits quantitative restrictions and all measures having the equivalent effect.[2] This prohibition has been progressively interpreted by the Court of Justice, most notably through the case of ***Procureur du Roi v Dassonville (8/74)***, to include essentially any measure which makes import or export unnecessarily difficult and which discriminates between domestic products and imported products.

[2] Start with an introduction to the free movement of goods and a definition of **Art 34 TFEU** then run through the development of the confusion over its scope and application.

However, **Art 34 TFEU** prohibits not only national rules that overtly discriminate against imported products; subject to the possibility of justification under **Art 36 TFEU**, it may also be used to challenge national rules which on their face make no distinction between domestic and imported goods and are termed equally or indistinctly applicable.[3]

[3] Look at the case law development after ***Cassis de Dijon (120/78)*** and consider the judgment in ***Keck*** and ***Mithouard (C-267 and 268/91)***, and subsequent cases.

The ***Cassis de Dijon*** *case* ***(120/78)*** took ***Dassonville*** further by showing that these indistinctly applicable rules could also breach **Art 34 TFEU** by their dual burden effect. This is where the imported product has to comply with two sets of product requirements in order to be marketed lawfully in the state of import—those operated by the state of origin and those of the state of importation, placing an additional burden on the import, e.g. the ***Rau Margarine*** *case* ***(261/81)*** requirement that margarine be marketed in a different shape container in the host state and the home state such that a separate production line would have to be set up for the Belgium market.

The *Cassis de Dijon* case[4]

[4] Any answer to this question must start with a consideration of the ***Cassis*** case as it is pivotal not only to this answer but the whole area of law and the development of **Article 34 TFEU**.

The case of ***Cassis de Dijon*** had started to cause the CJEU problems because it was seized on both by Member States to justify restrictions and by traders to attack virtually any nationally imposed restriction on trade practices or commercial freedom, particularly to get round national laws which were not just aimed directly at imports and which actually were serving another genuine purpose not connected with trying to restrict free movement of goods. Hence, **Art 34 TFEU** slowly extended through court action to cover so-called 'Equal Burden' measures which are neither directly nor indirectly discriminatory and where the same requirement applies to both without adding an additional burden on the imports. ↵

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See, as good examples of these, rules relating to Sunday trading in the UK:[5] ***Torfaen BC v B & Q plc*** **(Cases 145/88, [1989] ECR 3851, [1990] 3 CMLR 455)** and ***B & Q Ltd v Shrewsbury BC*** **([1990] 3 CMLR 535)**, and protecting the film industry in France: ***Cinéthèque (60–61/84)***.

[5] These cases demonstrate that perhaps the ruling from ***Cassis*** was being taken too far and being applied to matters which were not really intended to be prohibited by **Art 34 TFEU**.

The CJEU recognised that traders were using Community (now EU) law to challenge laws which were not aimed at restricting imports but in fact restricted the sales of all goods without regard to origin, e.g. the Sunday trading laws in the UK, many of which were enacted in Victorian times for then understandable reasons far from any consideration of the EU and free movement of goods.

The *Keck* case re-alignment[6]

[6] The ***Keck*** case was regarded as a correcting case to stop the abuses of **Art 34 TFEU** by traders seizing on any national rule and arguing that it prevented imports and was thus a breach of **Art 34 TFEU**.

When presented with a suitable occasion, the CJEU was able to reconsider the case development in this area.[7] In ***Cases C–267 & 268/91 Keck*** *and* ***Mithouard***, the French prohibition of goods sold at a loss was argued to be a restriction of sales and thus imports, and thus like the earlier Sunday trading and videos cases, contrary to **Art 34 TFEU**. The rule, though, affected all goods. Hence the CJEU singled out selling or marketing arrangements as not coming within the concept outlined in ***Dassonville*** or **Art 34 TFEU** and held that, providing national rules do not impede access to markets but merely regulate them without discrimination, either direct or indirect, they will be acceptable, i.e. such rules therefore fall outside the scope of **Art [34]** of the Treaty. However, there were problems with the ***Keck*** judgment and instead of clarifying the law as was hoped, it raised more questions than provided answers, including what was actually overruled and what are 'selling arrangements'?

[7] This is the 'why' part of the question. The 'how' simply relates to outlining the judgment in ***Keck*** itself.

The meaning of selling arrangements[8]

[8] This concept then becomes central to the development post-***Keck***.

Selling arrangements are broadly defined as rules relating to the market circumstances in which the goods are sold. They are measures dealing with where, when, how, and by whom goods may be sold, e.g. ***Cases C-401 and 402/92, Tankstation't Heustke***[9] accepting Dutch laws concerning the times and places at which petrol could be sold. There may be all sorts of good reasons behind this: making safety paramount, ensuring petrol supplies in country or remote areas by restricting sales outlets—i.e. guaranteeing a wider catchment area and thus sales. See ***Commission v Greece (C-391/92)*** in which the Greek prohibition of the sale of any processed milk for babies other than in pharmacies was accepted.

[9] This case and a number of other cases are certainly examples of selling arrangements but do they really clarify what was meant by it—which leads us up to the answering the final part of the question.

There appeared, however, cases which showed that some selling arrangements hindered market access or acted in a manner which favoured domestic or disadvantaged imports such as rules on marketing, advertising, and sales promotion which can be problematic.

p. 132 ↵ These difficulties have led slowly to the development of a test of market access discrimination.

Market access and differential impact[10]

[10] This is yet another development and consequence of the ***Cassis*** and ***Keck*** cases.

Selling arrangements are not automatically outside, but it is a rebuttable presumption and the question posed is whether the national selling arrangement prevents access to the market or impedes access any more than it impedes the access of domestic products.

See ***Cases C-34–36/95 Konsumenten–ombudsmannen v De Agostini*** in which TV advertising directed at children under 12 was prohibited; however, other ads were allowed. The measure was considered to be a selling arrangement which applied without discrimination, thus equal burden. However, it was held that that would seem to have a greater impact on products from other Member States because of the difficulties faced in trying to get access to the market, advertising being the only effective form of promotion. If the national court found that the impact of the prohibition was different it would therefore breach **Art 34 TFEU** unless justified by **Art 36 TFEU** or the mandatory requirements under ***Cassis***.

In the subsequent ***Case C-405/98 Gourmet International***, a ban on alcohol advertising was challenged under the same argument that it had a greater impact on imported products trying to gain access to the Swedish market because, without advertising, consumers would only be familiar with domestic

products. Thus it was held that the measure would be caught by **Art 28 EC Treaty (**now **34 TFEU)** if it prevents access to the market by products from another state, or impedes access any more than it impedes access of domestic products.

In the ***Heimdienst* case (C-254/98)**, a non-discriminatory Austrian law which applied to all operators trading in the national territory (Austrian and other EU) required goods sold on the doorstep to come from a locally established premises. It was held to be a selling arrangement but one which impeded access to the market of the Member State of importation for products from other Member States more than it impeded access for domestic products.

This has been termed a test of differential impact, i.e. affecting imports more than domestic products. Thus cases involving situations which, although classified as certain selling arrangements, have a different burden on imported goods, albeit that some domestic goods might also be affected, breach **Art 34 TFEU** and to be saved, must be justified. The 'Market Access' development was considered in the 2010 article by Snell.[11]

[11] This is cited in the 'Taking Things Further' section at the end of the chapter.

So, the first assumptions after ***Keck*** were that all selling arrangements fell outside **Art 34 TFEU**. There followed a correction to bring back into **Art 34 TFEU** any selling arrangements which were in fact discriminatory in either law or fact which, whilst not actually preventing imports, hindered or
p. 133 restricted them in some way and which ↵ would therefore be caught by **Art 34 TFEU** unless justified under ***Cassis***, such as the advertising cases. It means though that each case must be carefully assessed on its own facts for how, if at all, the market for the imported goods is disturbed by the national rule.

The clarification in ***Keck***, it seems, has led instead to further uncertainties in this complex and developing area of law.[12]

[12] The final part is concluding, from the cases subsequent to ***Keck***, whether the CJEU did in fact clarify the confused law in this area.

Looking for Extra Marks?

■ Not strictly necessary, but it would show you are up to date with developments if time would permit to add this following section before the final conclusion, which would remain the same:

Finally, or finally thus far in the post-***Keck*** case law, are cases of a further development dealing with so called 'residual rules' which concern the use of products. These have added yet another gloss on the free movement rules. They concern restrictions on the use of products, which have nevertheless been lawfully produced and marketed and which are known as 'residual rules'. Typical of these cases is ***Commission v Italy (Trailers) (C-110/05)***, in which a ban on mopeds towing trailers was held to have a significant impact on the marketing of such trailers and thus import of trailers and was therefore in breach of **Art 34 TFEU**. However, in this case the road safety argument could justify the measure, especially as there was no EU common rule on this activity. In ***Aklagaren v Mickelsson and Roos (C-142/05)***, the Swedish ban on the use of jet-skis was held to be a MHEE but justified on the grounds of the protection of health and life and environmental protection. However, as the ban was a general one and not confined to waterways where jet-ski use constituted a threat to humans, it was held to be disproportionate. Hence at the end of these developments post-***Keck***, any measures which either hinder access to the market via a differential (discriminatory) impact or residual rules which impact on market access without discrimination may also breach **Art 34 TFEU**, but equally may be justified. These cases were considered by Spaventa in a 2009 article.

Question 4

The Government of Spain has been concerned about the use of e-cigarettes and has introduced a ban on the use of them in all government and public buildings. Their use in non-public buildings has not been included in the ban as this would require a public statute, for which there is no parliamentary time. Instead it has issued Guidelines which advise the owners and occupiers of all buildings open to the public to decide whether to introduce their own ban. As a consequence the overall use of e-cigarettes has been significantly reduced. Their import, sale, and marketing are all permissible and have not been affected; 95 per cent of e-cigarettes are imported and only 5 per cent are manufactured in Spain.

The largest importer of e-cigarettes in Spain, Nico Teen (NT), has complained to the government ministry responsible for the ban and asked for an explanation for the measures. The minister has cited health grounds and that their unrestricted use may cause confusion amongst consumers. There is presently no EU ban on their use, although it has been discussed in the EP and considered by the Commission.

Nico Teen considers that the ban infringes the free movement of goods and asks your advice before deciding what action it may take.

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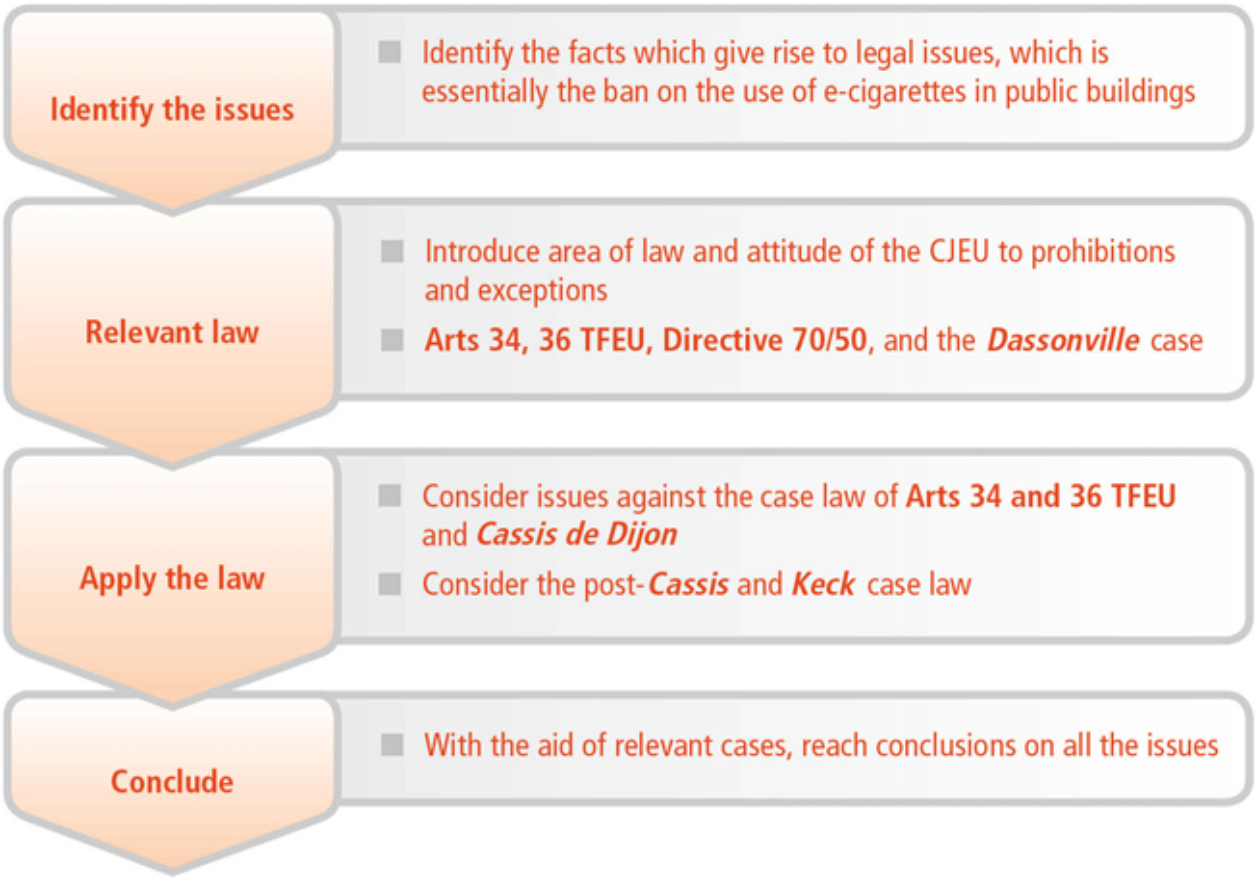
Caution!

■ This problem question focuses on the more recent series of cases concerned with use of product bans or restrictions, hence you must be confident that these have been covered adequately in your EU law course.

■ It is also quite cryptic in that it states your advice is sought before deciding what action the company may take, which invites you to advise them on the possible actions they might be able to take. Not to answer this part would miss valuable marks.

Diagram Answer Plan



Suggested Answer

Introduction[1]

[1] You are asked to comment on the ban on the use of e-cigarettes which may come under EU law provisions on the free movement of goods.

The free movement of goods has been declared to be one of the fundamental policies of the original Common Market and hence now the Union.[2] As a result, the Court of Justice has adopted a liberal interpretation of the freedoms to allow goods to circulate freely in the Union and at the same time adopted a restrictive approach to measures enacted by the Member States which impinge on these freedoms. ↵

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[2] Briefly outline the free movement of goods and that the Court of Justice, if it considered these bans, would interpret the provisions with the aims of the Union in mind, and any restrictions allowed the Member States, restrictively.

The facts[3] and issues

[3] Hence, you should identify the material facts, and outline the applicable law to discuss the issues that arise and the likely outcome of the case.

There is one major issue to be decided in this answer and some consequences which flow from this. This is the ban on the use of e-cigarettes in public buildings.[4] The ban is not on imports and it is not total so the issue is whether this amounts to a measure having equivalent effect of an import ban under **Art 34 TFEU**. If it does, it has then further to be considered if there are grounds by which the measure may be justified under **Art 36 TFEU**, which provides a number of grounds by which a Member State can lawfully hinder imports including the protection of life and health of humans and animals or be excused under reasons recognised by the Court of Justice in case law.

[4] Analysis of the facts is crucial here. The material facts are the ones which may alter the outcome of the case and here it is material that the ban is not discriminatory and not total. See answer for the details.

The law[5]

[5] The principal and initial provision to consider is **Art 34 TFEU** which prohibits quantitative restrictions on imports.

Article 34 is the starting point for this answer but **Art 36 TFEU**[6] and the case law of the Court of Justice, notably ***Dassonville*** and ***Cassis de Dijon***, are also crucial to the answer.

[6] **Art 36 TFEU** allows the Member States to restrict imports for specific reasons and these include the protection on health grounds of humans and animals.

The reasoning and application

The ban on the use of e-cigarettes is not a prohibition on imports so it is not certain it comes within the terms of **Art 34 TFEU**;[7] however, both **Directive 70/50** and the case of ***Dassonville (8/74)*** have made it clear that the scope of matters that may be caught by **Art 34 TFEU** is very wide. This issue comes within a set of rules which relate to the use of products and are known as 'residual rules'. These are rules which are indistinctly applicable; are not product requirements or selling arrangements; do appear to hinder access to markets but not in a discriminatory way; but may nevertheless still, potentially if not actually, hinder imports. In our case the ban affects both imports and domestically produced e-cigarettes. Such bans will therefore breach **Art 34 TFEU** unless justified either by **Art 36 TFEU** or the rule of reason from ***Cassis de Dijon***. See ***Commission v Portugal (C-265/06)***, which involved Portugal banning the fixing of tinted film on vehicle windows. It applied to both imports and domestic products so was indistinctly applicable. The Court of Justice found that the impact of the ban on potential purchasers would probably reduce imports. **Directive 70/50**, **Art 3**, provides that bans which apply both to imports and domestic products may also infringe **Art 34 TFEU**. The products would have a smaller and less attractive market. It was therefore considered a measure having equivalent effect (MHEE) and thus in breach of **Art 34** but could be justified.

[7] You should therefore consider whether the bans might come within **Art 34 TFEU**.

It does not matter that the ban on use is partial as from the facts it has had a significant impact in reducing the use of e-cigarettes and, as most of them are imported, this would probably actually rather than just potentially affect imports.

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↲ Can the ban be justified though on the grounds cited by the Spanish minister?[8] The measure can be argued to be justified on the grounds that it is protecting the health and life of humans[9] and animals included in **Art 36 TFEU**. However, the second sentence of **Art 36 TFEU** does not allow a health ban to be an arbitrary discrimination or a disguised restriction. To rely on this, it must be proved by those relying on the ban that a threat to life and health exists. This case is therefore similar to the bans of products on health grounds, most notably in the purity cases; see ***Commission v Germany (Beer and Sausage Purity) (178/84 and 274/87)*** which made it clear that where health was cited as a ground, there must be clear scientific evidence to support it. In our case, none is cited, so we must conclude that on that aspect the Member State fails. The measure must also be proportionate. It is not, though, a complete ban and one might argue that if e-cigarettes are a genuine threat to health, nothing less than a complete ban would be the correct measure to take.

[8] Then you should determine whether the reasons given by Spain will be held to be justified under **Art 36 TFEU** or under any other justification.

[9] Not all the grounds stated by the Spanish Government are mentioned in **Art 36 TFEU**, only the health grounds.

The ban appears not to conform with the second sentence of **Art 36 TFEU** and appears to be a breach of **Art 34 TFEU**.

Such bans can, however, also be justified on other grounds,[10] in the case stated to be consumer protection, which is not covered by **Art 36 TFEU**, but may nevertheless be excused if it meets criteria established by the Court of Justice in case law. The case of ***Cassis de Dijon (120/78)*** and subsequent case law have added to the grounds by which the Member States may lawfully restrict the free movement of goods. The measure taken must, however, apply on an equal footing with domestic products. In the case of ***Cassis de Dijon***, the Court of Justice stated that, in the absence of harmonising EU rules, obstacles to the free movement of goods may be allowed as far as these provisions are justified by an objective of public interest taking precedence over the free movement of goods. Mandatory requirements of the Member State could be imposed to relate in particular to:

[10] The protection against the confusion of consumers is not contained in **Art 36 TFEU** and the case of ***Cassis de Dijon (120/78)*** must therefore be considered.

- the effectiveness of fiscal supervision

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

However, the measures are subjected to further requirements:

- they must be justified and proportional, i.e. necessary to achieve results and not arbitrary
- there is no EU system of rules
- there must be neither an arbitrary discrimination nor a disguised restriction on trade.

p. 137 Thus, if measures which are adopted by a Member State satisfy either the provisions of **Art 36 TFEU** or the requirements laid down in the ↵ case of ***Cassis de Dijon*** for mandatory requirements, the Member State will be able, lawfully, to hinder the free movement of goods. It must therefore be established that the interest cited by the Member State as the ground for the ban on use comes within the reasons acceptable to the Court of Justice. The ground stated was recognised by the CJEU as an interest which comes within the scope of the ruling in the ***Cassis de Dijon*** *case (120/78)* and the principle of the rule of reason, but the measure is not mandatory and thus may not be acceptable to the CJEU.

It must, though, be established whether it satisfies the criteria established by the CJEU in the ***Cassis de Dijon*** case:

- It must apply to both imports and domestic products
- There must not be in force an applicable EU system
- The measure must not be a disguised restriction on trade or an arbitrary discrimination
- It must meet the requirements of proportionality.

In the limited case law on this, ***Commission v Italy (Trailers) (C-110/05)***, involving a ban on mopeds towing trailers, was held to have a significant impact on the marketing of such trailers and thus import of trailers and was therefore in breach of **Art 34 TFEU**. However, a road-safety argument was held to be able to justify the measure, especially as there was no EU common rule on this activity. In ***Aklagaren v Mickelsson and Roos (C-142/05)***, the Swedish ban on the use of jet-skis was held to be a MHEE but justified on the grounds of the protection of health and life and environmental protection. However, as the ban was a general one and not confined to waterways where jet-ski use constituted a threat to humans, it was held to be disproportionate. These cases were considered by Spaventa in a 2009 article.[11]

[11] Cited in the following sections and the 'Taking Things Further' Section at the end of the Chapter.

From the facts of the present case, it is not a mandatory requirement but it does apply to both imports and domestic products and it is stated that there is not an EU regime on the matter, therefore it is to be concluded that these aspects are satisfied. It does not appear to be an arbitrary discrimination but it might not meet the requirement of proportionality, thus it appears that the ban is acting as a disguised restriction on imports and thus contrary to **Art 34 TFEU**.

Conclusion

The overall conclusion is rather mixed. On the face of it, the ban would appear to infringe **Art 34 TFEU** and not be excused by either **Art 36 TFEU** or the rule of reason from ***Cassis de Dijon***. A comparison with real cigarettes and various bans on their use in public does not help because there is clear scientific evidence that they are seriously damaging to health. There is no similar body of scientific evidence for or against e-cigarettes. Thus Nico Teen would be best advised to encourage the Commission to consider the ban and possibly take action against Spain. ↵ It may also be possible, if it has suffered losses as a result, to take the Spanish Government before the national courts to see if it might obtain damages under the ***Francovich*** state liability principle.

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Looking for Extra Marks?

■ As this is a yet and still developing area of law and thus a bit uncertain, access to academic articles would help, such as Wenneras, P and Boe Moen, K, 'Selling Arrangements, Keeping *Keck*' (2010) 35 EL Rev 387 or Spaventa, E. 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Micklesson and Roos' (2009) 34 EL Rev 914. These confirm essentially that the law is still in flux, so if you are unable to reach firm conclusions, this is not your fault, it is where we presently are.

Taking Things Further

■ Barnard, C, *The Substantive Law of the EU: The Four Freedoms*, 4th edn (Oxford: Oxford University Press, 2013), chs 2–4.

These chapters provide a very good overview on the whole area of the free movement of goods.

■ Jansson, M and Kalimo, H, '*De Minimis* Meets "Market Access": Transformation in the Substance—and the Syntax—of EU Free Movement Law?' (2014) 51 CML Rev 523.

This article considers recent developments in this difficult area of law.

■ Snell, J, 'The Notion of Market Access: A Concept or Slogan?' (2010) 47 CML Rev 437.

Considers the development of the 'market access' group of cases.

■ Spaventa, E, 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Micklesson and Roos' (2009) 34 EL Rev 914.

Looks at the development of the 'use of' cases.

■ Wenneras, P and Boe Moen, K, 'Selling Arrangements, Keeping *Keck*' (2010) 35 EL Rev 387.

This article considers recent developments in this difficult area of law.

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

As identified in the 'Are you Ready' Feature, the ***Cassis de Dijon*** *case, and the development of the rule of reason from that case, continues to cause difficulties.*

Online Resources

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