CHAPTER 10A

Free Movement of Goods in the EU

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10.1 Goods: The Foundation of the EU Internal Market

When the EU internal market was established, goods accounted for more than 70% of the European economy. Consequently, goods formed the primary focus when the Treaty rules on free movement were drafted, and most of the early internal market cases concerned goods as well. Many of the most fundamental and groundbreaking judgments on the internal market, therefore, were made in the context of goods. As a result, the free movement of goods forms a useful starting point for any analysis of EU free movement law.

This Chapter provides an overview of EU rules on the free movement of goods. In light of the comparative aim of this book, the focus will lie on the main rules and doctrines of negative integration, which were gradually developed in the early days of EU integration and still form the foundation of EU free movement law today. In this discussion, pride of place will go to the case law of the CJEU, which was instrumental in developing the rather vague and general provisions in the Treaties, and turning them into effective rights.[1]

The Treaty framework for the free movement of goods, laid down in Articles 28–37 and Article 110 TFEU, distinguishes between financial and non-financial restrictions. Financial restrictions can either be customs duties or internal taxes that protect national products. Non-financial restrictions, on the other hand, are all national rules that impose quantitative limits on foreign goods or in any other way limit their access to the national market. The reason for removing both financial and non-financial restrictions is to allow goods to be traded freely throughout the entire territory of the EU, ensuring that, for example, the French cannot use their tax laws to block German beer, or the Germans their product standards to bar French wine.

This Chapter discusses the EU rules on financial obstacles before moving on to the rules on non-financial restrictions. Before doing so, however, it is

1 For more detailed discssions see *inter alia* P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union* (5th edn, Hart, 2010) or C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (4th edn., OUP 2013).

necessary to discuss some preliminary issues, including the concept of a good and the scope of the free movement of goods.

10.2 Goods Falling under EU Free Movement Law

The Treaties do not define 'goods', but the CJEU has defined them as: 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.'[2] This is a very broad definition that can even include electricity or waste that no longer has any commercial value.[3] Fishing rights, on the other hand, formed intangible rights that did not qualify as goods.[4]

The right to free movement applies to all goods that originate from a Member State or that that have been legally brought into free circulation somewhere in the EU.[5] Once a good has been imported into one EU Member State, therefore, it can move just as freely as any good produced in the EU, without requiring any certificate of origin.[6] Free movement rights only apply, however, in cross-border situations. A Czech car, built in the Czech Republic and sold in the Czech Republic, for example, has never crossed a border, and therefore does not fall under EU free movement law.[7] However, a cross-border effect may already be present where a national rule 'facilitates the marketing of goods of domestic origin to the detriment of imported goods', even if the rule only applies to national products.[8] In other words, even if a national rule does

2 Case 7/68 *Commission v. Italy* [1968] ECR 617 and Case C-65/05 *Commission v. Greece* [2006] ECR I-10341.

3 Case C-379/98 *Preussen Elektra* [2001] ECR I-2099 and Case C-2/90 *Wallonian Waste* [1992] ECR I-4431.

4 Case C-97/98 *Jägerskiöld* [1999]ECR I-7319.

5 See Article 29(2) TFEU and Case 2/69 *Sociaal fonds voor de Diamantarbeiders* [1969] ECR 211, paras. 24–26.

6 Case 41/76 *Donckerwolcke* [1976] ECR 1921, para. 17. To enter legally they have to comply with all rules in the EU Common Customs Code and pay the required duties. See Regulation 450/2008 on the Modernised EU Common Customs Code, OJ [2008] L145/1.

7 Note though that the CJEU has sometimes also applied free movement prohibitions against measures that differntiated between regions within a Member State. This apporach might be of particulr interest in the EAC, where some barriers may lie within Member States, for example in Tanzania. See for example Case C-363/93, *Lancry* [1994] ECR I-3957, par. 26 or Case C-72/03 *Carbonati Apuani* ECLI:EU:C:2004:506, par. 22.

8 Case C-321/94, *Pistre*, [1997] ECR I-2343.

not even apply to foreign products but grants a benefit to national products, a cross-border effect is present and EU law applies.

When they apply, the rules on the free movement of goods have direct effect. This means that they can be directly relied on before national courts or other public bodies to challenge any national rule or practise that restricts free movement.[9] Consequently, individuals and businesses do not have to wait for public enforcement against restrictions, but can directly attack them themselves on the basis of EU law.[10] So far, the Treaty provisions on goods, do not yet seem to have horizontal direct effect, even though they can be relied upon against private bodies that wield certain public authority.[11]

10.3 Financial Restrictions

The first category of prohibited restrictions concern financial restrictions, which can either be customs duties and charges having an equivalent effect (Article 30 TFEU), or internal taxation measures restricting free movement (Article 110 TFEU).

10.3.1 *Customs Duties and Charges Having an Equivalent Effect*

Customs duties include any form of payment that has to be made because a good crosses a border, also of a fiscal nature. All customs duties are prohibited under Article 30 TFEU, without exception. In practice, customs duties no longer occur in the EU, which attests to the effectiveness of this prohibition.

Article 30 TFEU, however, also prohibits 'charges having an equivalent effect to customs duties'. This means that Member States are not allowed to adopt other measures that are technically speaking not a customs duty, but in practice have the same effect. Consider, for example, Portugal imposing an obligatory veterinary check at the border and charging a mandatory fee of 10 euros per animal. Such a measure would not be a customs duty, but would have the same effect of increasing the price of imported live stock.

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9 The CJEU has even held that a statement by a public official can be a prohibited restriction under Article 34 TFEU. See Case C-470/03, *A.G.M.-COS.MET* [2007] ECR I-2749, par. 58.

10 See EU chapter 4 on the concept of direct effect and supremacy of EU law. For the direct effect of the free movement of goods provisions see inter alia Case 26/62 *Van Gend en Loos* [1963] ECR 1, and Case 74/76, *Iannelli* [1977] ECR 577.

11 See for example Case 311/85 *Vereniging voor Vlaamse reisbureaus* [1987] ECR 3801, paras. 11 and 30, and recently Case C-171/11, *Fra.bo* ECLI:EU:C:2012:453.

To make sure Member States do not develop creative alternative measures to circumvent the prohibition of Article 30 TFEU, the CJEU has given a very broad and effect-based interpretation to the concept of 'charges having an equivalent effect', which covers:

> 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.[12]

All charges having an equivalent effect are in principle prohibited, as the Treaty provides no possible justifications for them.[13] The CJEU, however, has allowed two very narrow exceptions. Firstly, a charge may be allowed where it covers the actual costs of an inspection required by EU law itself. Where the EU, for example as during the BSE crisis, imposes mandatory health inspections on beef at the border, Member States may recover the costs of these inspections from importers. The charges imposed, however, may never exceed the actual costs of the inspections.[14]

Secondly, charges are allowed where they only form compensation for services rendered to the importer on a voluntary basis. For example, an importer may voluntarily request to use a warehouse with cooling facilities owned by the state whilst awaiting further shipping of the goods. If so, the state may charge a reasonable fee for this service.[15] As soon as there is any form of obligation, directly or indirectly, to make use of a specific service, however, or if there is no real benefit to the individual importer, no charges may be imposed.[16]

10.3.2 *Internal Taxation as a Restriction on Free Movement of Goods*

Member States are also not allowed to effectively recreate customs duties via their internal taxes. Just imagine France imposing an additional VAT of 20% on German cars, which would undo the prohibition of Article 30 TFEU completely.

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12 Case 24/68 *Commission v Italy* [1969] ECR 193, par. 9. This remains the case 'even if the charge is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.' See Joined Cases 2/62 and 3/62, *Commission v Belgium and Luxemburg* ECLI:EU:C:1962:45.

13 Case 24/68 *Commission v Italy*, par 10.

14 Case 18/87 *Commission v Germany*, ECLI:EU:C:1988:453.

15 Case 132/82 *Commission v Belgium*, ECLI:EU:C:1983:135, par. 8.

16 See for the strict scrutiny of the CJEU on this point for example *Ford España v Spain* ECLI:EU:C:1989:306, or Case 87/75 Bresciani [1976] ECR 129.

Therefore, even though Member States retain the competence to organize their own tax system, they may not use their taxes to restrict free movement of goods.[17] For 'whenever a fiscal levy is likely to discourage imports of goods originating in other Member States to the benefit of domestic production', it is caught by the prohibition of Article 110 TFEU.[18]

To protect free movement, Article 110 TFEU prohibits both *discriminatory taxation* and more subtle measures that do not discriminate but still have the effect of *protecting national products*. Discriminatory taxes are prohibited in Article 110(1) TFEU, which determines that '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.'

For Article 110(1) TFEU to apply, one must first assess if a tax is imposed on 'similar' products. Here the CJEU primarily looks at the comparability of products from the perspective of the consumer. As the CJEU held in *Commission v France*, similarity must be assessed on the basis 'not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use.'[19] This may lead the CJEU into rather factual assessments involving substances as fruit wine, whiskey or that evergreen of EU law, bananas.[20]

If products are sufficiently similar, one must next assess if the tax at issue discriminates between them, either directly or indirectly. Direct discrimination means that imported products are taxed differently precisely *because* they originate from another Member State. Indirect discrimination, which is more common, means that taxation differs based on a criterion that seems neutral as to nationality, but in reality affects imported goods more than national goods. The case of *Humblot* provides a good example of indirect discrimination, and how Member States may use it to protect their own industries.[21] In *Humblot*, the French tax on cars with more than a 16 cylinder engine volume rose sharply from 1.100 French francs to 5000 francs. It just so happened that no car produced in France had a cylinder engine volume over 16, but many German cars did. The French tax measure, therefore, did not directly discriminate based on nationality, but the criterion of engine volume indirectly discriminated against

17 See inter alia Case 168/78 *Commission v France* [1980] ECR 347.

18 Case 252/86 *Bergandi* ECLI:EU:C:1988:112, par. 25.

19 Case 168/78 *Commission v France* [1980] ECR 347. See also already Case 45/75 *Rewe-Zentral* [1976] ECR 181.

20 Cf. Case 243/84 *Johnnie Walker* [1986] ECR 875 and Case 184/85 *Commission v Italy* [1987] ECR 2013.

21 Case C-112/84 *Humblot*, ECLI:EU:C:1985:185.

imported cars. The CJEU saw through this attempt to indirectly protect French car producers and found the measure to violate Article 110(1) TFEU.[22]

Article 110(2) TFEU may come in play where the products concerned are not similar, but the taxes nevertheless provide indirect protection to domestic products against *competing* importing products.[23] For a tax to be caught by Article 110(2) two conditions must be met. First, the relevant products must be in a competitive relationship. This logically is a lower threshold than the similarity that is required for Article 110(1) TFEU to apply.[24] A competitive relationship essentially concerns substitutability, i.e. the question if consumers might choose product A instead of product B, for example if A becomes 5% cheaper. The classic example of products that are not comparable but do compete is beer and (cheap) wine. In *Commission v. UK*, the tax imposed on wine was more than four times higher than the tax on beer, especially in the case of the lower segments of wine.[25] As in *Humblot*, it just so happens that the UK produces almost no wine, but does produce a lot of beer. Ultimately, the CJEU held that wine and beer were not similar enough to fall under Article 110(1) TFEU, but they were substitutable enough for consumers to be in competition with each other in the meaning of Article 110(2) TFEU, as consumers can switch from beer to wine.

Second, if products compete with each other, the tax may not protect the domestic product. Here the CJEU primarily looks at the effect of the tax on consumers. In *Commission v. UK*, for example, the CJEU found that the much higher taxes on wine did protect the domestic beer, and hence was prohibited under Article 110(2) TFEU, because the tax difference was so high that it affected consumer choices and the tax difference could not be objectively justified on any ground. Member States, therefore, do of course retain the freedom to differentiate their taxes on different products based on objective criteria. For Article 110(2) TFEU to apply, therefore, a real protective effect must be shown, the mere existence of a difference in tax rate is not enough.[26]

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22 For another example, see Case C-402/09, *Tatu* ECLI:EU:C:2011:219. Directly discriminatory taes can never be justified. Whether indirectly discriminory taxes can ever be justified, even though the Traety provides no exceptions, remains a contested question. See for a case that perhaps provides an opening Case 140/79 *Chemial Farmaceutici v DAF* [1981] ECR 1.

23 On the diffiicculties that may arise in distinguishing between 110(1) and 110(2) TFEU see for example Case 169/78 *Commission v Italy* [1980] ECR 385 or Case 171/78 *Commission v Denmark* [1980] ECR 447.

24 Case 27/67 *Fink-Frucht* [1968] ECR 223.

25 Case 170/78 *Commission v UK* [1983] ECR 2265.

26 Cf. on the leeway of Member States also Case 243/84 *Johnnie Walker* [1986] ECR 875.

Article 30 and 110 TFEU jointly aim to prevent financial obstacles to free movement, The two provisions are mutually exclusive. A case, therefore, can never fall under both provisions. A financial charge is either based on the product crossing the border, and hence a customs duty under Article 30 TFEU, or not, in which case it falls under Article 110 TFEU. For example, if an *identical* charge is levied from both imported and domestic products, this forms an internal tax, even if the tax for imported products just happens to be collected at the border.[27] For in such situations, the charge itself does not depend on the crossing of the border, only the time and place of collection does.

10.4 Non-Financial or Non-Tariff Barriers (NTBs)

As the EAC experience has also shown, real free movement of goods cannot be achieved by just removing financial or tariff barriers.[28] For in practice, trade in goods is obstructed at least as much by so called non-tariff barriers (NTBs) as it is by tariff barriers. For example, consider a producer of child-safety seats in a situation where each Member State has different safety standards for child-safety seats. Even if there are no tariffs and equivalent charges, he will still find it difficult to sell his child-safety seats in other Member States. Not only will he have to meet different standards in all Member States, the national producers he competes with only have to meet their own national safety standards, giving them a competitive advantage. Previous experiences have clearly shown, therefore, that NTBs create major obstacles to trade. A lesson, in reality, the UK will have to relearn the hard way if it chooses to fall back on WTO rules after Brexit, as these rules do not deal with NTBs.[29]

In the EU, non-tariff barriers are prohibited under articles 34 and 35 TFEU, unless they can be justified under Article 36 TFEU or a rule of reason exception. The next paragraphs will first set out how the CJEU developed these two

27 Case C-221/06 *Stadtgemeinde Frohnleiten* [2007] ECR I-9643, Case 29/87 *Denkavit* [1988] ECR 2965 or Joined Cases 441–442/98 *Mikhailidis* [2000] ECR I-7145. Of course difficulties may arise in practise to dinstinguish, but a choice must then be made. See for example Case 105/75 *Interzuccheri* [1977] ECR 1029 or Case C-28/96 *Fricarnes* [1997] ECR I-4939.

28 See also chapter 10 par. 4.on NTBs in the EAC.

29 Cf also S. Dhingra en T. Sampson, 'Life after Brexit: What are the UK's options outside the European Union?' Centre for Economic Performance, *London School of Economics Working PaperBrexit 01*, HM Government, 'Alternatives to membership: possible models for the United Kingdom outside the European Union' March 2016, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504604/Alternatives_to_membership_-_possible_models_for_the_UK_outside_the_EU.pdf>.

provisions into very broad prohibitions that are capable of capturing almost any national rule. Subsequently, they describe the exceptions EU law provides to Member States to defend NTBs that serve a public interest, and the way the CJEU balances restrictions to free movement and such public interests.

10.4.1 *The Prohibition on Quantitative Restrictions and Measures Having Equivalent Effect*

Article 34 TFEU forms the key prohibition behind the free movement of goods in the EU. It provides that:

> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.[30]

The concept of a 'quantitative restriction' thereby refers to measures that directly concern the quantity or the number of products that may be imported or exported.[31] This, of course, includes a total ban, that allows zero products to be imported or exported,[32] but also partial restrictions that allow only a certain number of products to be imported.[33] Like customs duties, however, quantitative restrictions are relatively rare in the EU. The main prohibition in Article 34 TFEU, therefore, concerns 'measures having an equivalent effect to quantitative restrictions' or MEQRs.

As MEQR is a rather vague concept, it was once again up to the CJEU to provide a definition. One route the CJEU could take, in line with Article 18 TFEU, was to interpret this concept narrowly as a prohibition on national measures that discriminated against imported goods. In *Dassonville*, its seminal judgment on the free movement of goods, however, the CJEU took a very different approach and provided a very wide definition of MEQRs as:

> All trading rules enacted by Member States which are *capable* of hindering, directly or *indirectly*, actually or *potentially*, intra-Community trade (…)[34]

30 Article 35 TFEU contains an almost identical prohibition for the, less common, restrictions on export, and wil not be discussed separately here.

31 Case 2/73, *Geddo* [1973] ECR 865.

32 Case 34/79, *R Henn and Darby,* [1979] ECR 3795.

33 See for example Case 13/68, *Salgoil* [1968] ECR 453 or Case 170/04, *Rosengren* [2007] ECR I-4701.

34 Case 8/74, *Dassonville*, [1974], ECR 837.

Under this definition, even measures that are *capable* of *potentially* hindering trade in an *indirect* fashion qualify as measures of equivalent effect, and hence are in principle prohibited under Article 34 TFEU. Crucially, the CJEU also did not require any form of (indirect) discrimination to be present, but only looked at the actual or possible effect of a measure on trade.

The broad *Dassonville* definition of MEQR was further developed in *Cassis de Dijon*, another seminal judgment on the free movement of goods. In this case, the applicant wanted to import the liqueur 'Cassis de Dijon' into Germany from France. Under an interesting German approach to consumer protection, however, the liqueur did not contain *enough* alcohol. German law required that liqueurs such as Cassis de Dijon had an alcohol content of at least 25%, whereas the French liqueur only contained 15–20% alcohol. The German authority, therefore, refused to allow the importation. The applicant claimed this constituted a prohibited MEQR. Germany contended, however, that the measure did not discriminate in any way as it applied equally to German and French drinks, and therefore also did not violate Article 34 TFEU. The CJEU was not convinced:

> In practice, the principal effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description
>
> It therefore appears that the unilateral requirement imposed by the rule of Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article [34] of the treaty.[35]

Even measures that in no way distinguish between national and foreign products, therefore, qualify as MEQRs if they in any way hinder foreign goods that want to enter the national market.

Cassis de Dijon also introduced another far reaching doctrine that continued to play an important role in EU free movement law: the principle of mutual recognition.[36] In principle, Member States should trust each other's regulations to be sufficient and adequate, and therefore recognize and allow products that have been legally produced according to the standards of another

35 Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwalting für Branntwein* (*Cassis de Dijon*) [1979], ECR 649.

36 See for the importance of this principle for free movement and its role in newer forms of harmonization EU Chapter 9.

Member State. In the case of *Cassis de Dijon*, the fact that the liqueur complied with French legislation should in principle suffice for the German authorities, unless they could prove why in this particular case French products should not be trusted.

It is difficult to exaggerate just how broad the definition of an MEQR under *Dassonville* and *Cassis de Dijon* is. The definition only requires that a national rule in some way makes it more difficult for a product to enter the market, not that the rule is harder on foreign products or imposes a dual burden.[37] In practice, however, almost any rule that is worth having will require something, and therefore make it more difficult to enter the market than if the rule did not exist. For example, any product standard such as requiring real cocoa in chocolate or prohibiting certain additives in baby milk will make it more difficult for foreign producers to enter the market than if these standards did not apply. All such national standards, therefore, qualify as MEQRs under Article 34 TFEU. In addition, the CJEU has also held that Member States have a *positive obligation* to prevent or stop any behaviour by private individuals that might interfere with the free movement of goods. In *Spanish Strawberries*, for example, the French government was found to have violated Article 34 TFEU by not stopping French farmers from attacking and destroying trucks with Spanish fruit that was outcompeting French fruit.[38] Such a general positive obligation to actively remove any restrictions to free movement caused by private individuals could also be a far reaching instrument in the EAC context.

Now as we will see, EU law does not just set aside such eminently desirable rules as health standards for baby milk, as these may often be justified.[39] The only point here is that the very broad definition developed by the Court does qualify all such rules as MEQRs (or NTBs) and therefore brings them under the scope of the prohibition in Article 34 TFEU, and under the scrutiny of EU and national courts.

The benefit of this very broad definition was that it covered all potential NTBs, and removed any space that Member States might have to develop creative NTBs that do protect national products fall outside a narrower definition. The main downside of this definition, however, was that almost all national

37 The MEQR, moreover, may even consist if some practises or factual behaviour of public officials. In one extreme case, even a negative statement by a government official on Italian car lifts was found to constitute an MEQR under Article 34 TFEU. See Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749.

38 Case C-265/95 *Commission / France* (*Spanish Strawberries*) [1997] ECR I-6959. See also Case C-112/00 *Schmidberger* [2003] ECR I-5659.

39 See paragraph 10.5 below.

rules now qualified as MEQRs and could therefore be challenged on the basis of EU law. After *Dassonville* and *Cassis de Dijon*, therefore, national courts and the CJEU were increasingly flooded with cases. Many of these challenged national rules that did technically qualify as MEQRs, but in reality were not concerned with restricting the free movements of goods. Symbolic in this regard became the Sunday Trading cases in which traders challenged national rules requiring shops to close on Sunday. As this meant traders could not sell their products on a Sunday, this indeed restricted their access to the market, but it was not the kind of restriction Article 34 TFEU was intended to capture.[40]

Consequently, the search was on for a way to limit the definition of an MEQR in a way that would prevent abuse of Article 34 TFEU but would not undermine the effectiveness of Article 34 TFEU in targeting real MEQRs. In the end, the CJEU opted for a less than convincing approach. In *Keck*, another landmark judgment, it introduced a problematic distinction between product norms and selling arrangements, holding that under certain conditions selling arrangements do not fall under the scope of Article 34 TFEU.[41]

Keck concerned two traders, Keck and Mithouard, which were being prosecuted in France for reselling goods at a loss, something that was prohibited under French law. The law, however, only prohibited resellers from doing so, as manufacturers were allowed to sell at a loss. Keck and Mithouard claimed this French rule violated, amongst other things, Article 34 TFEU. Considering its importance, and because it gives a good insight into the reasoning of the Court at this stage of the internal market development, the relevant paragraphs of the judgement are reproduced below:

> By virtue of Article [34], 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 trade constitutes a measure having equivalent effect to a quantitative restriction.

40 Case C-145/88 *Torfaen Borough* [1989] ECR I-3851 and Case C-169/91 *B & Q* [2002] ECR I-6635. See for a critical discussion for example A. Arnull, 'What Shall We Do on Sunday?', 26 *European Law Review* (1991), 112 or J. Steiner, 'Drawing the Line: Uses and Abuses of Article 30 EEC', 29 *Common Market Law Review* (1992), 749.

41 Case C-276/91, *Keck and Mithouard,* [1993], ECR 6097.

National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

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.

In view of the increasing tendency of traders to invoke Article [34] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to reexamine and clarify its case-law on this matter.

It is established by the case-law beginning with "Cassis de Dijon" 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 [34]. 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.

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, 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.

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 [34] of the Treaty.

> Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.[42]

The CJEU therefore proceeded to create a new category of regulations concerning 'selling arrangements'. Provided such selling arrangements 1) apply to all relevant traders operating within the national territory, and 2) affect the marketing of domestic products and of those from other Member States in the same manner, both in law and in fact, they do not constitute MEQRs under Article 34 TFEU and hence are not prohibited.[43] The concept of selling arrangements, however, was not really defined, but it includes those rules dealing with *how* a product is sold, rather than rules on how the product itself is made.[44]

Keck indeed reduced the scope of Article 34 TFEU, even if it did so in a rather construed and complicated way that has kept lawyers engaged for the past 25 years. One of the opportunities for EAC law, therefore might be to find a better way to delineate the scope of the EAC free movement clauses, even though the more urgent challenge might be to make the prohibitions themselves more coherent and effective first.[45]

One of the questions *Keck* left open concerned the qualification of rules that do not regulate the product itself or the way it is sold, but rather the way a product may be *used* in a Member State. A rule that caps the maximum speed on the highway to a 100 kilometres per hour, for example, does not regulate how a car must be made or how it must be sold. It may affect, however, the

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42 *Keck*, paras. 11–18.

43 One important application of this requirement concerns the internet. The CJEU has held that restricting sales via the internet will always affect the marketing of foreign prodcuts more negatively since the on-line sales are usually the only channel available to sell foreign products, whereas domestic products usually also have other outlets such as physicial shops. This application of the earlier *De Agostini* case law seriously curtails the application of *Keck* to the on-line market. See Case C-108/09 *Ker-Optika* ECLI:EU:C:2010:725 and Joined Cases C-34/95, C-35/95 and C-36/95, *De Agostini* ECLI:EU:C:1997:344.

44 The CJEU only provided a negative definition by indicating that measures that do *not* form selling arrangement would, inter alia, be those relating to designation, form, size, weight, composition, presentation, labelling and packaging.

45 In this context also see the complex case law of the CJEU on when the effect of a national measure on trade is too uncertain and indirect for the measure to qualifiy as a MEQR. Although not amounting to a real *de minimis* rule, this case law further limits the scope of Article 34 TFEU, although it is difficult to apply and predict in practise. See *inter alia* Case C-379/92, *Peralta* ECLI:EU:C:1994:296, Case 155/80 *Oebel,* [1981] ECR I-1993 as well as the Opinion of AG Kokott in Case C-142/05, *Mickelsson and Roos* ECLI:EU:C:2009:336.

market access of cars. An expensive hyper-car, for example, may become less attractive if you can never really put it to use.

In more recent case law, the CJEU has now confirmed that such rules on use do form MEQRs, and therefore fall under the scope of Article 34 TFEU. One such case concerned the Italian prohibition to use a trailer behind a motorcycle.[46] This rule affected the sale of trailers for motorcycles, as it prohibited their use, even though it did not regulate the product as such. The CJEU held that in addition to product rules, Article 34 TFEU also covers 'a*ny other measure which hinders access of products originating in other Member States to the market of a Member State*.'[47] This more recent case law, therefore, again widens the scope of Article 34 TFEU, and restricts the Keck exception to selling arrangements in the stricter sense.

10.5 Justifying MEQRs

Precisely because Article 34 TFEU captures so many national rules, the question of justification becomes essential. For without a proper doctrine of justification, the EU would run the risk of setting aside a great deal of very welcome national rules that for example protect public health, public security or the environment. The last part of this Chapter, therefore, briefly discusses the question of justification: how can a Member State justify a restriction on the free movement of goods? As the question of justification is often highly context dependent, and as a tremendous wealth of case law exists, this part focuses on the structure and main characteristics of the test used to see if national measures are justified, as understanding this test allows one to independently analyse specific cases on justification.

Restrictions on free movement may be justified if they 1) serve a *legitimate aim*, 2) in a *proportionate* manner.[48] There are two types of legitimate aims,

46 Case C-110/05, *Commission v Italy* ECLI:EU:C:2009:66. For another example see Case C-142/05, *Mickelsson and Roos* ECLI:EU:C:2009:336 on the use of jet skis.

47 Case C-110/05, *Commission v Italy*, ECLI:EU:C:2009:66 par. 37. See for further analysis P. Oliver, 'Of Trailers and Jetskis: Is the Case Law on Article 34 TFEU Hurtling in a new Direction?', 33 *Fordham International Law Journal* (2009–2010), 1423, or L. Gormley, 'Free Movement of Goods and their Use—What Is the Use of It?', 33 *Fordham International Law Journal* (2011), 1589–1628.

48 Also note that under the *Tedeschi* principle discussed in EU Chatper 9, Member States may only rely on justifications if the relevant area of law has not yet been harmonized. The moment that secondary EU law has been adopted, for instance on the safety of baby milk, that field is governed by the secondary legislation and no longer by the Treaty

namely Treaty based aims and the judge made aims under the rule of reason. Measures are proportionate, moreover, if they are *suitable* and *necessary* in relation to the legitimate aim they pursue. When applying any of these concepts, furthermore, it should be realized that in general all exceptions to free movement are construed narrowly by the CJEU, and that the Court usually is very strict in applying them.[49] Justifying a restriction, therefore, usually requires a convincing argument from the Member States, particularly demonstrating that the same objective could not have been reached by less restrictive means.

10.5.1 *Treaty Aims and the Rule of Reaon*

Article 36 TFEU provides that:

> 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.

The grounds enumerated in Article 36 TFEU, however, are limitative and interpreted very strictly by the CJEU.[50] Article 36 TFEU, therefore only provides very limited grounds to Member States to justify national measures, which became increasingly problematic after the very broad interpretation given to MEQRs by the CJEU. For where traders could now attack almost any national rule, Member States were severely restricted in their defences. For example, Article 36 TFEU does not even mention consumer protection or the environment, meaning Member States cannot justify any measures based on these clearly desirable and reasonable objectives under the Treaty.

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provisions on free movement. See for example Case C-309/02, *Radlberger v Land Baden-Württemberg,* [2004] ECR I-11763, Case C-265/06, *Commission v Portugal,* [2008] ECR I-2245 or Case 193/80, *Commission v Italy*, [1981] ECR 3019. For the basis principle see Case 5/77, *Tedeschi* [1977] ECR 1555.

49 See already Case 7/61, *Commission v Italy,* [1961] ECR 317 as well as Case 72/83, *Campus Oil* ECLI:EU:C:1984:256.

50 See amongst many others Case 288/83, *Commission v Ireland*, [1985] ECR 1761, Case C-265/95, *Commission v France*, [1997] ECR I-695 or Case 121/85, *Conegate* [1986] ECR 1007.

In the same *Cassis de Dijon* judgment that confirmed *Dassonville* and introduced mutual recognition, The CJEU recognized this problem and recognized a second, non-Treaty based category of justificatory grounds that Member States could rely on. This category of mandatory requirements has become known as the rule of reason exceptions:

> In the absence of common rules relating to the production and marketing of alcohol (…) it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.
>
> Obstacles to movement within the community 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.[51]

The Court gives the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer as examples of mandatory requirements that may justify restrictions on free movement. Crucially, however, the category of mandatory requirements is an open one. The CJEU is open to accept any reasonable public interest that a Member State may want to serve as a possible ground for justification. Later case law, for example, accepted grounds such as the protection of the environment and of biological resources,[52] consumer protection[53] or freedom of expression[54] as acceptable mandatory grounds.

The rule of reason, therefore, greatly expands the grounds a Member State may rely on to justify restrictions, thereby allowing for a better balancing of free movement and public interests. Some limits, however, do apply. Firstly, the CJEU does accept any purely economic grounds.[55] Secondly, under the

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51 *Cassis de Dijon*, par, 8–9.

52 Joined Cases 3/76, 4/76 and 6/76, *Kramer* [1976] ECR 1279, Case 240/83, *ADBHU*, [1985] ECR 531, or Case C-443/10 *Bonnarde* ECLI:EU:C:2011:641.

53 Case C-353/89, *Mediawet Nederland* [1999], ECR I-4069, Case C-161/09, *Kakavetsos-Fragkopoulos* ECLI:EU:C:2011:110, or Case C-481/12 *UAB* ECLI:EU:C:2014:11.

54 Case C-112/00, *Schmidberger*; Case C-71/02, *Karner v Troostwijk* ECLI:EU:C:2004:181.

55 See Case C-109/04 *Kranemann* [2005] ECR I-2421 or Case C-456/10, *ANETT* ECLI:EU:C:2012:241.

orthodox approach, rule of reason grounds may only be used to justify restrictions that are indirectly discriminatory or non-discriminatory. Restrictions that are directly discriminatory may only be justified under a ground listed in Article 36 TFEU, although the CJEU does not always seem to follow this rule religiously.[56]

The main challenge for Member States in justifying an MEQR, however, usually is not to find an acceptable ground under Article 36 TFEU or the rule of reason, but to satisfy the proportionality test that comes next.

10.5.2 *Proportionality of MEQRs*

An MEQR is only justified if it is proportionate in relation to its aim. For internal market cases, the proportionality test asks two questions, relating to the suitability and the necessity of the MEQR. Crucially, both have to be assessed not in abstract but in relation to the specific aim or aims provided as the legitimate aim.

The question of suitability essentially asks if a measure can actually achieve the objective it is supposed to serve. For instance, if the aim is to protect children against too much sugar in soft-drinks, a measure imposing a maximum sugar content is suitable to achieve this aim, a measure just prohibiting French soft-drinks is not. The CJEU has further developed the suitability test by introducing the criterion of consistency, even if the CJEU does not always apply this criterion or does not apply it as stringently as it could. The central idea is that a measure can only be suitable if it achieves its objective in a consistent and systematic manner.[57] This *inter alia* means that a measure should not undermine the very aim it is trying to achieve. An early application of this logic can be seen in *Conegate*, where the UK had seized a consignment consisting 'essentially of inflatable dolls which were clearly of a sexual nature' as these violated public morality.[58] At the same time, however, the UK did allow national production and sale of similar inflatable devices, which led the CJEU to find that:

56 Case 113/80, *Commission v Ireland* ECLI:EU:C:1981:139 or Case 274/87, *Commission v Germany* [1989] ECR 229 for the orthodoxy. For apparent deviations see *inter alia* Case C-573/12, *Ålands Vindkraft* ECLI:EU:C:2014:2037 or Case C-389/96 *Aher-Waggon* ECLI:EU:C:1998:357.

57 See for the introduction of this test in the context of services Case C-243/01 *Gambelli* [2003] ECR I-13031.

58 Case 121/85, *Conegate* ECLI:EU:C:1986:114.

> a Member State may not rely on grounds of public morality within the meaning of Article 36 of the Treaty in order to prohibit the importation of certain goods on the grounds that they are indecent or obscene, where the same goods may be manufactured freely on its territory and marketed on its territory subject only to an absolute prohibition on their transmission by post, a restriction on their public display and, in certain regions, a system of licensing of premises for the sale of those goods to customers aged 18 and over.[59]

If it wants to, a court could impose far reaching scrutiny via a consistency test, as many political measures will not be wholly consistent, either internally or compared to other measures.[60] In practice, however, the real scrutiny takes place in the context of necessity.

The necessity test asks if the same objective could not have been achieved with a less far reaching measure. In other words, is the MEQR the *least restrictive measure* that can be adopted to achive the public aim being pursued?[61] In our example on the requirement to have less sugar in soft-drinks, for example, the question could be asked if the same objective could not be reached by better labeling. Could a clear labeling requirement forcing producers to clearly indicate sugar content and calories perhaps achieve the same objective without needing to impose a maximum sugar content?

It is at this stage that the CJEU can be extremely strict, truly requiring the Member States to show that there was no real alternative.[62] At the same time, the application of the necessity test also gives the CJEU a certain flexibility. For example, in more morally or politically sensitive cases, it may apply a lighter touch and give some more leeway to the Member States, where in other cases it

59 Idem, par. 20.

60 See further on this point A. Cuyvers, Case note to: Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) 45 (2008) *Common Market Law Review*, 515.

61 See for example Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, or Case C-161/09, *Kakavetsos-Fragkopoulos* ECLI:EU:C:2011:110.

62 Also note that the burden of proof at this stage is on the Member State, so it has to proof that the measure is suitable and necessary. Of course the CJEU can differenitate in how much evidence it requires, sometimes requiring actual statistical evidence, sometimes allowing more general claims about certain effects. See for example Case C-14/02, *ATRAL SA* [2003] ECR I-4431, or Case C-254/05, *Commission v Belgium*, [2007] ECR I-4269.

may be very strict indeed.[63] Predicting the precise application of the necessity test in a particular case therefore requires an analysis of the courts case law in the particular field involved, as well as looking at the general principles and rules for the free movement of goods.

As we will see in Chapters 11, 12 and 13, the other freedoms have all followed the general development of goods, meaning the creation of a wide prohibition, followed by the creation of additional ground for justification and a large body of case law on whether specific national measures may be justified or not.

63 Compare for example Case C-434/04, *Anders Ahokainen* [2006] ECR I-9171 and Case C-141/07, *Commission v Germany*, [2008] ECR I-6935 with Case C-297/05, *Commission v the Netherlands*, [2007] ECR I-7467, or Case C-110/05, *Commission v Italy*, ECLI:EU:C:2009:66.