



Free Movement of Goods – Articles 34- 36 TFEU

Setting up the internal market

- Art. 18 TFEU: Prohibition of discrimination on grounds of nationality
- Arts. 26 and 27 TFEU: The internal market
- Art. 114 TFEU: Approximation of laws
- Arts. 28 and 29 TFEU: Free movement of goods
- Arts. 30 – 32 TFEU: The customs union
- Art. 33 TFEU: Customs cooperation
- Art 110 TFEU: Tax provisions
- Arts. 34 – 36: Prohibition of quantitative restrictions between MS
- Art. 37 TFEU: State monopolies of a commercial character
- Ps. Non-state measures see competition law rules.

Article 34 TFEU

- “**Quantitative restrictions** on imports and all **measures having equivalent effect** shall be prohibited between Member States”
- Similar provision re: exports Articles 35 TFEU
- Applicable in non-harmonised areas and in areas which are not covered by more specific provisions in the Treaty (e.g. taxation)
- “Direct Effect” of Article 34 TFEU
- Compulsory jurisdiction of the CJEU
 - any questions are referred to the CJEU (Art. 267 TFEU)
 - Infringement actions against MS (Art 258-260 TFEU)

Article 34 TFEU has “vertical direct effect”

- It therefore binds Member States
- Catches national measures and administrative practices
- However MS can be also responsible for actions of individuals that result in the disruption of the free flow of goods in the EU e.g. Case C-265/95 Commission v France

QR and MEQR

- Case 2/73 Geddo (re: QR)
“...measures which amount to a **total or partial** restraint of, according to the circumstances, imports, exports or goods in transit”
- Case 8/74 Dassonville (re: MEQR)
“[a]ll trading rules enacted by Member States which are capable of hindering, **directly or indirectly, actually or potentially**, intra-community trade”
(effect counts not intent)

Discriminatory Barriers to Trade

- Direct discrimination
- Import/export restrictions: Case 154/85, Commission v Italy
- Favouring/promoting domestic products: Case C-249/81, Commission v Ireland (“buy Irish” campaign) or Case 207/83, Commission v UK (marks of origin)

Justifying (Directly) Discriminatory Barriers to Trade

Article 36 TFEU

- “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 restrictions** on trade between Member States”

Application of Article 36 TFEU

- **Public Morality:** compare Case 34/79 R v Henn and Darby with Case C-121/85 Conegate Ltd v Commissioner of Customs and Exercise
- **Public Health:** must have a real health risk – see Case C-40/82 Commission v UK
- **Public Policy:** difficult to establish as a ground in itself – see Case 231/83 Cullet v Centre Leclerc
- **Public Security:** Case 72/83, Campus Oil

Justifying (Directly) Discriminatory Barriers to Trade : Article 36 TFEU

- Burden of proof rests with MS that is trying to rely on this provision
 - Additional **test proportionality**; Case 72/83, Campus Oil
- “Article [36], as an exception to a fundamental principle of the Treaty must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which is intended to secure and the measures taken pursuant to that Article must not create obstacles which are disproportionate to those objectives”

Indistinctly Applicable measures

- When the Court defined “measures having equivalent effect to a quantitative restriction” did not require that the measure was discriminatory
- Case 120/78, “Cassis de Dijon”
- Affirmed expressly that Article 34 TFEU applies to indistinctly applicable rules too and
- Introduced the **principle of mutual recognition** of products across the EU, EFTA countries which are contracting parties to the EEA Agreement and Turkey

Principle of Mutual Recognition

- **Cassis de Dijon PART I**: “there is no valid reason why, provided that [a product] has been lawfully produced [or] marketed in one of the Member States....should not be introduced into any other Member State”

Commission Communication on the application of mutual recognition (2003 C 265 / 02)

- “...the Commission asks Member States to include, in their national laws a mutual recognition clause...”
- **Example of a mutual recognition clause** – “The requirements of this law [i.e. national law] do not apply to products lawfully **manufactured and/or marketed** in another Member States of the EU or in Turkey or lawfully **manufactured** in an EFTA State that is a contracting party to the EEA agreement”

Classic Application of Cassis de Dijon

- Case 788/79, Gilli and Andres (national rules regulating the ingredients of vinegar)
- Case 261/81, Walter Rau v Smedt (national rules regulating the shape of margarine tubes)
- Case 178/84, Commission v Germany (national rules regulating the ingredients of beer)

Cassis de Dijon PART II

- “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 recognised as being necessary in order to satisfy **mandatory requirements** relating **in particular** to...defence of the consumer, public health...”
- Mand. Req. only apply to indistinctly applicable rules (eg. Env/al protection (case C 320/86 Commission v Denmark); press diversity (Familia press))

Principle of mutual recognition

THUS:

restrictions imposed by the MS of import are **possible**, provided that they are justified for the reasons given in Article **36 TFEU** or the **mandatory requirements** recognised by the ECJ

BUT:

if the product provides an **equivalent level of protection** of the legitimate interests involved (cf. Article 36, mandatory requirements), then the MS of import must allow the placing on its market of the product = principle of mutual recognition

Principle of Mutual Recognition

Mutual recognition does not apply automatically in all cases

MS of import has the right to verify equivalence of level of protection provided by the product compared with level of protection offered by its own national rules

The Limits of Articles 34 TFEU

- Rule of Remoteness
 - **Measure does not fall within the scope of Article 34 TFEU if its impact is “too remote and indirect” see cases: Case 69 / 88 Krantz; C-379 / 92 Peralta; C-291 / 09 Guarnieri**

The Limits of Articles 34 TFEU

- The ECJ in early applications of Cassis de Dijon suggested that certain types of national rules restricting the selling of goods did not fall within Article 34 TFEU e.g. Case 23/89 Quyetlynn (prohibiting the sale of lawful sex articles from unlicensed sex establishments) ECJ held these were “rules governing the marketing of products”; “no connection with intra-community trade”; “rules not intended to regulate trade in goods)
- Sunday trading cases

Case C-267-268 / 91 Keck

- “[C]ontrary to what has been previously 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...**provided** that those provisions apply to all affected traders operating within the national territory and provided that they **affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.**”

Mechanism of Keck –selling arrangements

- Measures relating to:
- the conditions and methods of marketing (C-412/93 Leclerc-siplec)
- Time of the sale of goods (C- 402/92 Tankstation)
- Place of the sale of goods or restrictions by whom goods may be sold (C-391/92 Commission v Greece)
- Price Controls (C-63/94 Belgapom)
- Certain obligations which do not relate to the product or its package (C159/00 Sapod Audic – a general obligation to identify the packaging collected for disposal by an approved undertaking)
- Advertising restrictions (C-36/95 De Agostini; C-412/93 Leclec-Siplec; C-405/98 Gourmet; C-292/92 Hunermund)

Mechanism of Keck - Discrimination

- In law
- In fact discrimination is more complex:
 - outright bans which could have discriminatory effects (C-239 / 02 *Douwe Egberts*; De Agostini C-405 / 98, *Gourmet*)
 - some milder restrictions (not outright bans) were found non-discriminatory (C-412 / 93, *Leclerc-Siplec*; *Hünermund*)
 - discrimination against economic operators and consequently in fact discrimination against goods (C-322 / 01 *DocMorris*; C-254 / 98 *Heimdienst*)
 - discrimination left to national courts (C-441 / 04 *A-Punkt*; C-20 / 03, *Burmanjer*).

Keck – Distinction between measures which concern the characteristics of goods and selling arrangements

- Case C-315/92 Clinique
- Case C-391/92 Commission v Greece (baby milk only sold in pharmacies)
- Case C-412/93 Leclerc Siplec
- Case C-470/93 Mars (the quantity of which was increased and the wrapping of which bears the marking "+ 10%")
- Case C-254/98 Heimdinest (Sale on rounds of baker's, butcher's and grocer's wares)
- Case C-405/98 Gourmet

More recently...Restrictions on Use

- Measures having equivalent effect are not restricted to classifications as either product-bound restrictions or selling arrangements; there may well be measures which are neither (Gormley, “Silver threats...” 2008).
- These measures still govern by Dassonville and hence discrimination not necessary to be caught by Art. 34 TFEU
- One category of restrictions highlighted in the ECJ’s case law recently
- Rules which allow the sale of the product but restrict its use to a certain extent
- Case C-265/06, Commission v Portugal
- Case C-110/05, Commission v Italy
- Case C-142/05, Mickelsson and Ross