

Filip Křepelka, *Masarykova univerzita* (krepelka@law.muni.cz)

Course: Law of the European Union

[5] Free movement of goods

Free movement of goods is certainly the most important basic economic freedom in the European Union (its first pillar, the European Community, respectively).

Key legal measures are customs union and the removal of almost all administrative obstacles.

The customs union includes uniform external trade policy towards importations and exportations from and to non-member states and suppression of all fiscal barriers related to interstate trade of goods.

Provisions of the Treaty establishing the European Community on free movement of goods enjoy direct effect. Therefore, incompatible national law shall not be applied by administrative authorities, or - at least - by courts of member states.

Definition of goods

All tangible objects which can be traded from both natural and legal points of view are goods. Together with services (another basic economic freedom in the European Community), goods are products of human activity.

There are several border cases. Due to their illegal nature, narcotics are not goods. Due to special channels of distribution and their legal status, some weapons and organs, tissues and blood for human use are not usually labelled as goods. Cash, stamps, mail and various legal documents are not regarded as goods if they serve their special purpose. Waste is regarded as goods. Electricity is often ranked to goods.

Customs, charges having equivalent effect and tax discrimination

The European Community law clearly prohibits (Art. 23 and art. 25) all custom duties and charges having equivalent effect.

Custom duties are charges imposed on goods due to their importation or exportation clearly labelled as customs.

Charges having equivalent effect are all other taxes, contributions, fees and other charges based on same construction.

There is no need for clear border between customs and charges having equivalent effect. Both practices of the Member States (including their territorial self-government) are absolutely prohibited. No exception is allowed. Only original version of the Treaty establishing European Economic Community and treaties of accession provided for temporary exceptions.

Banned customs duties are rare because they are obvious and because they need special administration. On the other hand, charges having equivalent effect were identified in many fiscal practices of the Member States.

Export customs duties and charges having equivalent effect are also excluded. They cannot be justified similarly as administrative restrictions.

Treaty establishing the European Community prohibits separately - Art. 90 - tax discrimination. Certainly, domestic taxes are generally allowed. Furthermore, key indirect taxes are even required by numerous directives of the European Community: value added tax and excises.

The Court of Justice had from time to time condemned or identified as tax discrimination the distribution of similar types of goods (which can be both for similar or same purpose and can compete each other) to different tax rates, if domestically produced goods were taxed with lower rate and imported ones with the higher one. For example, there were several cases of discriminatory taxation of imported alcoholic beverages or of imported vehicles.

Indirect tax harmonisation

The law of the European Community provides standards for detailed harmonisation of indirect taxes. The most important piece of legislation is Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. It is, however, based on previous legislation applicable for almost three decades.

Value added tax (VAT) shall be imposed uniformly. Other general indirect taxes are not allowed. There is basic tax rate (at least 15%) and list of goods allowed for lower rates (two rates, at least 5%) are also fixed by European law: food, drugs, books and newspaper, medicinal products and other goods perceived as necessary. Member states are not required to apply these reductions.

The law of the European Community requires member states to impose three excises (taxes on consumption of goods). There shall be a tax on fuel made from oil, a tax on alcoholic beverages and a tax on tobacco products excises. It sets minimum rates of these excises.

The law of the European Community sets competences of the Member States for indirect taxation of goods which are objects of interstate trade. Generally, the Member State of purchase to consumer is competent to impose value-added tax and excises. Exceptions cover vehicles or distance sales.

Administrative (non-fiscal) barriers

The Treaty establishing the European Community pays appropriate attention to administrative measures affecting adversely interstate commerce. Free movement of goods cannot be achieved with sole abolition or suppression of fiscal obstacles.

Therefore, the Treaty provides for general rule and exceptions. It entitles the European Community for far-reaching harmonisation or unification of standards

for production and distribution of goods. This harmonisation or unification enables significant reduction of restriction justified by exceptions (below).

General principle is the prohibition of quantitative restrictions (quotas) and measures having equivalent effect applied on both importations and exportations (Art. 28 and Art. 29). Nevertheless, the prohibition is not absolute, the Treaty establishing European Community includes exhaustive list of exceptions (Art 30).

The Court of Justice has repeatedly interpreted „a measure having equivalent effect“ broadly. It started with almost-all-reaching approach (judgement *Dassonville*: „Any measure of the Member State affection actually or potentially interstate trade in goods is measure having equivalent effect). Nevertheless, it later accepted that some generally applied reasonable measures for the protection of general interests are not covered (judgement *Cassis de Dijon*: „judicial quasi-exceptions“ are allowed if „rule of reason“ is respected). It also allowed various sale arrangements (judgement *Keck*).

Treaty establishing the European Community includes list of exceptions Art. 30). These exceptions confirm principal tasks of the Member States. Member states retain majority of state functions: protection of health, order, security, morality, culture and individual property rights. Therefore, their role must be acknowledged in by provisions on free trade in goods. Nevertheless, administrative restrictions shall not be used for discrimination of imported goods.

The Court of Justice uses objective test of measures justified by protection of human, animal and plant life and health. Many Member State practices have been disapproved as unnecessary, or discriminatory.

The number of legitimate use of the exception has been gradually reduced thanks to detailed harmonisation or unification of production and distribution standards by numerous directives and some regulations.

On the other hand, the case-law of the Court of Justice has repeatedly recognized different approaches of particular member states to protection of national security, public order and morality and protection of national treasures of historic and artistic value.

In general, the protection of intellectual property rights – i. e. patents, trademarks, copyright etc. - is limited to member states. Nevertheless, both universal and European international treaties and the law of the European Community provide for harmonisation of intellectual property rights and administrative cooperation in the matter. The Court of Justice has repeatedly refused misuse of intellectual property for separation of markets and use of price differences by producers.

Harmonised standards for manufacturing and distribution of goods

Treaty establishing the European Community gives to the European Community broad powers for harmonisation and unification of standards for production and distribution of goods. Harmonised or unified standards reduce legitimate use of above mentioned exceptions, especially as regard the protection of health and

life of humans, animals and plants. Real free movement of many goods cannot be achieved without such standardisation.

The instrument for harmonisation or unification are numerous directives for almost all branches of industry. Therefore, the European nature of the standards remains hidden. They are set directly by national law and usually enforced and enforced by national authorities. Regulations start to be used for this purpose in last years. Therefore, part of European standards are visible.

Both substantial – technical and hygienic – and procedural – certification – standards are harmonized and unified by numerous directives and regulations. Almost all goods can be exchanged among member states without administrative barriers

No controls of goods at internal borders

Since 1992, there are no custom controls of goods on borders between the member states.

New member states join this system instantly after the accession. Special controls (veterinary inspections, phytosanitary inspections, inspections aimed at controlled substances) can be carried out according to special legislation of both the European Community and member states.

Various measures for effective imposition of value and excises and for controlled goods were introduced. Continuous reporting of exchange of goods is expected.

Results of liberalization

Free movement of goods contributed to European integration of markets of majority of goods. Certainly, due to far-reaching liberalization of world trade in the World Trade Organization, markets are often larger.

Only goods for immediate consumption, goods whose prices increase sharply due to transportation costs or language-related and culture-related goods continue to be exchanged in separated national markets. Natural borders cannot be removed with law.

This integration, however, causes significant environmental damage, because majority of goods is transported on European roads.

External Trade in Goods

The European Community is customs union since 1968. There is single customs tariff, established for every year. Information about customs tariffs are distributed in special information system TARIC.

The European Community forms single customs area. There are no internal customs control – used for proper imposition of indirect taxes in other free trade areas and customs unions.

There is single Customs Code, i.e. regulation setting procedures and standards for administration of customs. Customs are imposed by authorities of member states. The Commission supervises administration of customs. Customs are revenue of the European Community.

There is far-reaching liberalization of trade in goods among 151 member states of the World Trade Organization (WTO). Tariffs (rates) are limited according to multilateral agreement. The European Community forms numerous free trade areas with other countries.

Exportation is free in general. There are controlled substances (weapons etc.).