12

Free movement of goods

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1 Introduction

The aim of the internal market is to enable European manufacturers to sell the same product in all the Member States, thereby achieving economies of scale similar to those in the US and creating greater prosperity throughout the region. It is as well to remember that the internal market was fostered not only by Europeans, but also by the *American* initiative known as the Marshall Plan. This plan to revive and enhance the European economies following the Second World War was realized by the Economic Cooperation Act 1948, which contains the following Declaration of Policy:

> Mindful of the advantages which the United States has enjoyed through the existence of a large domestic market with no internal trade barriers, and believing that similar advantages can accrue to the countries of Europe, it is declared to be the policy of the people of the United States to encourage these countries through a joint organization to exert sustained common efforts . . . which will speedily achieve that economic cooperation in Europe which is essential for lasting peace and prosperity.[1]

[1] This plan led to the establishment of the Organisation for European Economic Co-operation, which subsequently became the Organisation for Economic Co-operation and Development (OECD).

The Treaty of Rome of 1957 established the 'common market'. In its seminal judgment in *Gaston Schul*, the Court held:

> The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.[2]

In the current Treaties, the 'common market' has been replaced by the 'internal market', which probably has the same meaning.[3] Article 3(3) TEU provides: 'The Union shall establish an internal market'. The internal market is defined in Article 26(2) TFEU as follows:

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

This provision was first introduced into the Treaties, albeit in a slightly different form, by the Single European Act which came into force in 1987.

As a result, the Court frequently rules national measures to be contrary to the TFEU, even though they have of course been enacted by democratically elected governments. By signing and ratifying the various successive Treaties, the Member States have given their blessing to this. Nevertheless, it can sometimes raise the hackles of Member States or public opinion—as where the Germans were told that their centuries-old Purity Law was unlawful so that the sale of drinks as 'beer' must be allowed even if they contained such hitherto proscribed ingredients as rice or maize, which are commonly used for making beer in other Member States.[4] Italian national pride suffered a similar blow when the Court ruled that their country's ban on the sale of pasta containing soft wheat was in breach of Article 34 TFEU.[5] The Member States tolerate such occasional upsets for the simple reason that they are outweighed by the benefits, namely allowing goods made in their own Member States free access to the markets in the other Member States (and the three other European Economic Area (EEA) States).

This chapter will look at the EU provisions which ensure the free movement of goods: the so-called *non-fiscal* rules prohibiting quantitative restrictions on the free movement of goods, such as quotas, and measures having equivalent effect (like the national rules on the composition of beer and pasta, as well as the *fiscal* rules prohibiting customs duties, charges having equivalent effect), and discriminatory internal taxation. Together these rules form the basis of the EU's customs union.

[2] Case 15/81 *Gaston Schul* [1982] ECR 1409, para 33. See further chapter 11.
[3] According to one school of thought, the two concepts differ; see chapter 11.
[4] Case 178/84 *Commission v Germany* (*'Beer'*) [1987] ECR 1227.
[5] Case 90/86 *Zoni* [1988] ECR 4285.

2 The customs union

2.1 The concept of a customs union

By virtue of Article 28(1) TFEU, the EU constitutes a customs union covering all trade in goods. According to a widely received definition, a customs union, in contrast to a free trade area, does not merely involve liberalization of trade between the parties; it also entails the establishment of uniform rules for goods coming from third countries.[6] Consequently, a customs union has an *external* and an *internal* dimension.

The *external* dimension of the EU as a customs union is reflected in the adoption of uniform common rules which apply to products originating from third countries: a common customs tariff (Article 31 TFEU) and the common commercial policy in trade with third countries (Article 207 TFEU). These matters fall outside the scope of the present chapter, which focuses instead on the *internal* dimension of the customs union.

The establishment of the customs union has involved, and continues to involve, the abolition of internal barriers to trade in goods between Member States. Free movement of goods within the internal market is to be achieved through:

(a) the prohibition of customs duties and charges of equivalent effect or CEEs (Article 30 TFEU);

(b) the prohibition of quantitative restrictions and measures of equivalent effect or MEEs (Articles 34 to 36 TFEU); and

(c) the prohibition of discriminatory internal taxation (Article 110 TFEU).

Although the latter provision is not part of the Title of the TFEU relating to the internal market, it has in practice become assimilated to it, as will be explained in section 7. All these provisions are directly effective.[7]

Articles 30 and 110 apply to fiscal rules (ie an obligation to pay a sum of money), Articles 34 to 36 apply to non-fiscal rules (ie an obligation to comply with other types of requirement).

The counterpart to these prohibitions is a vast body of EU legislation harmonizing national laws so as to enable goods to flow more freely between Member States. That legislation will be considered in chapters 11, 20, and 22.

2.2 Goods originating in a Member State and goods in free circulation

By definition, the provisions on free movement apply to goods originating in any Member State. For good measure, this is stated explicitly in Article 28(2) TFEU. The same paragraph also establishes that those provisions extend to products coming from third countries which are in free circulation in Member States; that is the necessary consequence of the fact that the EU is a customs union. The same principle applies to Article 110 TFEU, although this is not spelt out anywhere in the Treaty.[8]

[6] Opinion of the Permanent Court of International Justice of 1931 in the 'customs system between Germany and Austria', Compendium of Consultative Decrees, Directives and Opinions, Series A–B, no 41, p 51, and Art XXIV(8)(A) of the GATT 1947. See also Case C-125/94 *Aprile* [1995] ECR I-2919, para 32 and Case C-126/94 *Cadi Surgelés* [1996] ECR I-5647, para 14.

[7] Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989, para 5 (Art 30); Case 74/76 *Iannelli v Meroni* [1977] ECR 557 (Art 34 TFEU); Case 83/78 *Redmond* [1978] ECR 2347 (Arts 34 and 35); and Case 7/65 *Lütticke* [1966] ECR 293 (Art 110).

[8] Case 193/85 *Co-Frutta* [1987] ECR 2085, paras 24–29.

Pursuant to Article 29 TFEU, products originating in a third country are considered to be in free circulation if the import formalities have been complied with and any customs duties or CEEs due have been levied in a Member State, unless they have benefited from a total or partial drawback. In practice, this simply means that the goods must have been cleared through customs, whether or not customs duties have actually been paid.[9]

In *Donckerwolcke*, it was held that goods originating in third countries and placed in free circulation 'are definitively and wholly assimilated to products originating in Member States'.[10] Consequently, the free movement rules are applicable without distinction to goods originating in the EU and to those which have been put in free circulation in one Member State.[11] Thus a consignment of widgets from the US which is cleared through customs in Antwerp (Belgium) is in free circulation in that Member State, and is assimilated to Belgian goods for the purposes of Articles 30, 34 to 36, and 110. These widgets can subsequently move freely to other Member States. A particularly clear illustration of this principle is to be found in *Commission v Ireland*, where it was held that the defendant State had infringed Article 34 TFEU by imposing an import licensing system for potatoes originating in Cyprus (which was then outside the EU) but in free circulation in the UK.[12]

3 The meaning of 'goods'

The English version of the TFEU uses the terms 'goods' (eg Article 28(1)) and 'products' (eg Articles 28(2) and 29). Although several other language versions also employ two different words, they plainly bear the same meaning in this context. What is more, Articles 34 and 35 TFEU speak of 'imports' and 'exports' respectively without referring to 'goods' or 'products'; but there is no doubt whatever that imports and exports of *goods* are meant.

The *locus classicus* is *Commission v Italy*, where the Court defined 'goods' to mean 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'.[13] On this basis, it held that works of art constituted goods, rejecting Italy's contention that 'goods' meant only 'ordinary merchandise'. Had the Court accepted Italy's position, restrictions on trade in works of art would have fallen outside the Treaty altogether, which would have been unthinkable. In any case, as will be explained in this chapter, the principle of free movement of goods does not prevent Member States from imposing restrictions under certain limited conditions.

The definition in *Commission v Italy* is not exhaustive.[14] In any event, waste is to be regarded as goods, whether or not it has any intrinsic commercial value.[15] Anomalously, electricity has also been held to constitute goods, even though it is not tangible.[16] Finally, human corpses and body parts no doubt fall within this concept as well.[17]

[9] The customs authorities may allow payment of customs duties to be deferred: Arts 105, 108–114, 195, and 201 of Regulation 952/2013 laying down the Union Customs Code (OJ [2013] L269/1).

[10] Case 41/76 *Donckerwolcke* [1976] ECR 1921, para 17. [11] Ibid, para 18.

[12] Case 288/83 *Commission v Ireland* [1985] ECR 1761; see also Case C-216/01 *Budejovický Budvar* [2003] ECR I-13617, para 95.

[13] Case 7/68 *Commission v Italy ('Works of art')* [1968] ECR 423, 428.

[14] AG Fennelly in Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, 7328.

[15] Case C-2/90 *Commission v Belgium ('Walloon waste')* [1992] ECR I-4431.

[16] Case C-393/92 *Almelo* [1994] ECR I-1477. See AG Fennelly's comment in *Jägerskiöld* (n 14) para 20: 'To my mind, electricity must be regarded as a specific case, perhaps justifiable by virtue of its function as an energy source and, therefore, in competition with gas and oil.'

[17] See generally Case C-203/99 *Veedfald* [2000] ECR I-3569.

On the other hand, transactions covered by the other three fundamental freedoms are not goods. Thus broadcasting is a service, not a product,[18] as is the operation of a lottery.[19] The same applies to intangibles other than electricity.[20] Similarly, coins and banknotes do not constitute goods, provided that they are still legal tender somewhere in the world.[21]

4 Nationality and residence

The Treaty provisions considered in this chapter apply regardless of the nationality of the trader,[22] or the purchaser. Similarly, the residence of the legal and natural persons involved is irrelevant. The only relevant criteria are the origin of the goods and, if they originate in a third country, whether they have been put into free circulation in the EU. In this regard, the free movement of goods differs from the other fundamental freedoms for which nationality and/or residence are crucial factors.

5 Customs duties and charges of equivalent effect

The prohibition of customs duties is set out in Article 30 TFEU:

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

5.1 Customs duties

The abolition of customs duties between Member States was an essential element in the establishment of the internal market since they are amongst the most blatant obstacles to trade. Customs duties are charges levied on goods by reason of the fact that they cross a frontier between Member States. Perhaps unsurprisingly, the Court has not had the opportunity to consider customs duties on many occasions due to the clear and unambiguous prohibition established by the Treaty. *Van Gend en Loos*[23]—the celebrated case where the Court first laid down the principle of direct effect[24]—is one of the few cases concerning customs duties. The Court took the opportunity to state that the prohibition of customs duties is an 'essential provision' and constitutes one of the foundations of the EU.

5.2 Charges of equivalent effect

Article 30 TFEU also prohibits CEEs, as otherwise it would be very easy for Member States to circumvent the prohibition on customs duties. The Treaty contains no definition of CEEs, so the task of defining this concept was left to the Court.

[18] Case 155/73 *Sacchi* [1974] ECR 409 and Case 52/79 *Debauve* [1980] ECR 833. See further chapter 14.

[19] Case C-124/97 *Läärä* [1999] ECR I-6067.

[20] See *Jägerskiöld* (n 14) (concerning fishing rights and permits).

[21] Case 7/78 *Thompson* [1978] ECR 2247 (coins) and Case C-358/93 *Bordessa* [1995] ECR I-361 (banknotes). See further chapter 15.

[22] Case 2/69 *Sociaal Fonds voor de Diamantarbeiders ('Diamonds')* [1969] ECR 211, paras 24–26 (Art 30 TFEU); Case C-402/09 *Tatu* [2011] ECR I-2711, para 36 (Art 110 TFEU).

[23] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

[24] See further chapter 6.

The landmark ruling on the definition of CEEs is the *Diamonds* case.[25] Belgium had established a Social Fund for Diamond Workers, the purpose of which was to award social benefits to those workers. All imports of unworked diamonds were subject to a contribution intended to enable the fund to fulfil its tasks. The amount of the contribution was 0.33 per cent of the value of the unworked diamonds imported. The Court ruled:

> . . . any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles [28] and [30] of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product.[26]

The following aspects of this definition should be highlighted. First, a CEE is a *pecuniary* charge, in other words an obligation to pay a sum of money.

Secondly, the charge must be imposed on domestic or foreign goods by reason of the fact that they cross a frontier.[27]

Thirdly, it is irrelevant that the amount of the charge is minimal, as was the case in the underlying dispute (0.33 per cent). As the Court indicated, the justification for this is that any charge, however small, constitutes an obstacle to the free movement of such goods. (As mentioned in section 6, Articles 34 and 35 TFEU are not subject to a *de minimis* rule either.)

Fourthly, the designation and mode of application are also irrelevant. This means that it does not matter how the charge is designated or applied, as otherwise it would be very easy for Member States to circumvent the prohibition.

Fifthly, the concept of CEEs is not confined to charges imposed for the benefit of the State (although this is probably the most frequent situation), but extends to those which finance another entity such as a social fund. Moreover, CEEs are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained. Thus, it is of no consequence that the charges are intended to finance certain benefits for a specific category of workers.

Sixthly, charges may constitute CEEs even if they are not discriminatory or protective. A charge imposed on both imports and exports (but not on domestic products sold on the market of the Member State concerned) can be a CEE. What is more, a charge may be caught by Article 30 TFEU even if there is no domestic production of the goods in question: although Antwerp is one of the world's major diamond trading centres, Belgium has no diamond mines.

Furthermore, in *Istanbul Lojistik* the Court held that 'a charge which is imposed not on a product as such, but on a necessary activity in connection with' it may be a CEE.[28] Accordingly, a Hungarian charge imposed on Turkish lorries each time they entered or left the country if their laden weight exceeded 12 tonnes, was held to be a CEE—even though the charge was not imposed on the cargo as such but on the vehicles.

[25] *Diamonds* (n 22); see also Joined Cases 2/62 and 3/62 *Commission v Luxembourg and Belgium* [1962] ECR 813.

[26] *Diamonds* (n 22) paras 15–18.

[27] Case C-402/14 *Viamar*, EU:C:2015:830 concerned a car registration tax, which is usually a form of internal taxation. However, the tax was not reimbursed even if vehicles were re-exported without ever being registered in the Member State concerned. Consequently, the Court found that the tax was imposed solely by virtue of the fact that the goods crossed the frontier and thus constituted a charge of equivalent effect prohibited by Article 30.

[28] Case C-65/16 *Istanbul Lojistik*, ECLI:EU:C:2017:770, para 43. The case concerned the provisions on the partial customs union with Turkey, but the Court applied Article 30 by analogy (para 44). The same principle applies to Article 110: see section 7.

Finally, the Court has consistently held that the prohibition of customs duties and CEEs constitutes a fundamental rule which does not permit of any exceptions.[29] The *Works of art* case is particularly interesting in relation to this issue.[30] The Court declared that the elimination of all obstacles to the free movement of goods by the abolition of customs duties and CEEs is a fundamental principle; and that exceptions to this fundamental rule must be strictly construed. Article 30 TFEU was therefore not subject to the exception provided in Article 36 TFEU, in the absence of any wording in the latter provision to that effect. If a Member State wishes to protect its artistic treasures, it may do so by adopting *MEEs* on exports provided that they are compatible with Article 36 TFEU.[31]

5.3 Permissible charges

Despite the strict approach adopted by the Court to customs duties and CEEs, there are two situations which may escape the prohibition contained in Article 30 TFEU, namely (a) where the payment is consideration for a service rendered, or (b) where it relates to inspections required by EU law. These are not exceptions to the prohibition on CEEs: such charges are not CEEs at all. However, attempts to show that a charge falls within one of these two situations rarely succeed.

5.3.1 Services rendered

According to the case law, the service must confer a specific advantage on the importer or exporter and the charge must be proportionate to the benefit conferred.[32] In *Statistical levies*,[33] Italy had imposed a small charge on imports and exports of goods. Italy argued, inter alia, that the charge constituted consideration for a service rendered, namely the availability of accurate statistics on imports and exports. The Court rejected this argument on the ground that the statistical information was beneficial to the economy as a whole, but not to the individual importer or exporter.[34]

5.3.2 Inspections required by EU law

Where health inspections are *required* by EU law, Member States are entitled to recover the costs, subject to certain conditions.[35] In *Commission v Germany*, the conditions were stated to be as follows:

(a) the charge must not exceed the actual cost of the inspection;

(b) the inspections in question must be obligatory and uniform for all products in the EU;

(c) the inspections must be required by EU law; and

(d) they promote the free movement of goods by eliminating obstacles which could arise from unilateral measures of inspection adopted by Member States in accordance with Article 36.[36]

In contrast, where EU law merely *permits* Member States to carry out the inspections, this exception does not apply.[37]

[29] eg *Diamonds* (n 22) paras 19–21.
[30] *Works of art* (n 13).
[31] Art 36 TFEU will be more fully considered in section 6.5.
[32] Case 132/82 *Commission v Belgium* [1983] ECR 1649, para 8.
[33] Case 24/68 *Commission v Italy* [1969] ECR 193.
[34] See also Case 87/75 *Bresciani* [1976] ECR 129.
[35] Case 46/76 *Bauhuis* [1977] ECR 5. The inspections themselves are MEEs; see section 6.
[36] Case 18/87 *Commission v Germany* [1988] ECR 5427, para 8.
[37] Case 314/82 *Commission v Belgium* [1984] ECR 1543.

5.4 Charges imposed at the internal boundaries of Member States

As already mentioned, the factor which triggers the imposition of a customs duty or CEE is crossing a border. According to the traditional approach, this meant a border *between* Member States.[38] That approach takes full account of what are now Articles 28(1) and 30 TFEU: both these provisions clearly state that customs duties and CEEs must be abolished only between Member States.

However, subsequent case law has made it clear that the imposition of a charge on the crossing of an internal border may also be regarded as a CEE. For instance, in *Lancry*[39] certain French overseas territories imposed charges on goods of whatever provenance, including the European part of France, by reason of their entry into the territory concerned. The Court held that a charge levied at a regional border undermines the unity of the customs union and creates an obstacle to free movement of goods at least as serious as a charge levied at a national border. The same thinking underpinned *Carbonati Apuani*,[40] where the local authorities of Carrara (Italy) imposed a charge on marble transported from the town towards any other part of Italy or the EU. The Court stated that the Treaty defines the internal market as an area without internal frontiers, without drawing any distinction between interstate frontiers and frontiers within a State.

Probably, it is no accident that *Lancry* was decided shortly after the end of 1992, the date set for the completion of the internal market under the Single European Act.[41] Nevertheless, the fact remains that *Lancry* and its progeny are very hard to reconcile with Articles 28(1) and 30 TFEU and the case law under Articles 45, 49, and 56 TFEU on the free movement of persons.[42]

5.5 Remedies

The consequence of breaching the prohibition is that the Member State concerned must eliminate the CEE. Furthermore, where charges have been unlawfully levied, the persons concerned have a right to repayment from the Member State in question.[43] Repayment will be subject to the conditions and procedures established by domestic law, which cannot be less favourable than those relating to similar claims regarding national charges and cannot render it virtually impossible or excessively difficult to obtain repayment.[44] However, in order to ensure that traders are not unjustly enriched, repayment may be excluded when the charges levied unlawfully have been incorporated into the price of the goods and passed on to consumers.[45]

6 Quantitative restrictions and measures of equivalent effect

According to Article 34 TFEU, quantitative restrictions (QRs) and MEEs on imports between Member States are prohibited. Article 35 TFEU lays down a corresponding prohibition as regards QRs and MEEs on exports. These provisions are intended to eliminate non-fiscal barriers (sometimes referred to as non-tariff barriers) to trade between Member States. Finally, Article 36 TFEU is an exception clause which provides that QRs

[38] See also section 6.4.
[39] Case C-363/93 *Lancry* [1994] ECR I-3957, paras 25 *et seq*.
[40] Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, para 23.
[41] See the Conclusion to this chapter.
[42] See further section 9 and chapter 13.
[43] Case 199/82 *San Giorgio* [1983] ECR 3595, para 12. Art 30 TFEU is directly effective; see n 7.
[44] *San Giorgio* (n 43).
[45] Ibid, para 13. This idea was further developed in Joined Cases C-192–218/95 *Comateb* [1997] ECR I-165.

or MEEs falling under Articles 34 or 35 may be justified in certain circumstances as being for the public good.

6.1 Quantitative restriction: imports and exports

The TFEU does not define the concept of QRs. However, the Court of Justice has held that 'the prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit'.[46] A 'total restraint' in this context is a total prohibition on imports or exports; a 'partial restraint' is a system of import or export quotas (eg a restriction on importing or exporting more than 10,000 widgets per year).

From this definition, it is plain that the concept of QRs is the same, whether imports or exports are at stake. In contrast, the definition of MEEs on imports is fundamentally different from that of MEEs on exports. These two concepts will now be considered in turn. A diagram showing which national measures are permitted is set out in Fig 12.1.

6.2 Measures of equivalent effect: imports

6.2.1 The definition

The definition of MEEs under Article 34 has caused a great deal of ink to flow and given rise to a considerable amount of case law over the years. The big question is: to what extent, if at all, does a measure have to *discriminate* against imports for this provision to be engaged? In other words, how far does the Treaty encroach on the decisions of the governments of the Member States?[47] Article 34 uses the word 'restrictions' but does not mention discrimination at all.

The best way to examine the case law is chronologically, considering in turn each of the four principal cases: *Dassonville*[48] (1974), *Cassis de Dijon*[49] (1979), *Keck*[50] (1993), and finally *Commission v Italy* ('*Trailers*')[51] (2009).

Dassonville

The classic definition of MEEs is to be found in *Dassonville*, where the Court held:

> All trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[52]

This definition has been repeated in nearly every subsequent case, albeit with certain variations.[53] In particular, the word 'trading' is usually omitted,[54] so no importance can be attached to this word.

[46] Case 2/73 *Geddo* [1973] ECR 865, 879.

[47] See the Introduction to this chapter.

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

[49] Case 120/78 *REWE-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.

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

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

[52] *Dassonville* (n 48) 852.

[53] eg the Court has been known to speak of 'a direct or indirect, real or potential hindrance to imports between Member States' (Case 4/75 *Rewe-Zentralfinanz* [1975] ECR 843, 858).

[54] eg Case C-368/95 *Familiapress* [1997] ECR I-3689, para 7 and Case C-67/97 *Bluhme* [1998] ECR I-8033, para 18.

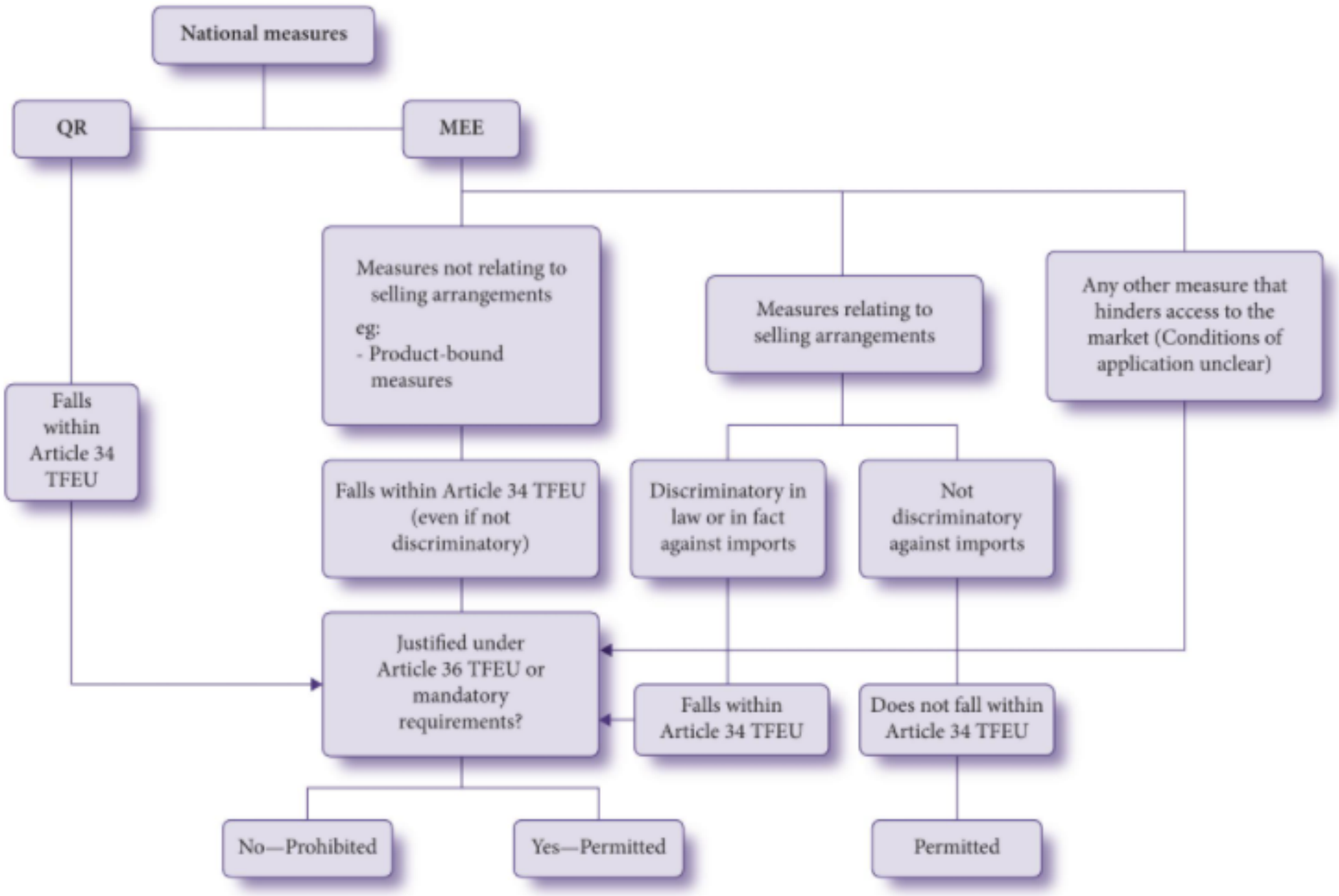

Fig 12.1 When national measures are permitted in relation to QRs and MEEs

On any view, the most striking feature of the *Dassonville* formula is its great breadth. Just how broad it is can be seen from the ruling in *Commission v France* ('*Foie gras*').[55] In that case, the Commission alleged that France had infringed Article 34 TFEU by laying down standards for goods sold under the trade description *foie gras*. The defendant argued that the infringement was purely hypothetical, since this product was only produced in very small quantities in other Member States and products from those States generally complied with the French standards in any event. The Court dismissed this argument in the following terms:

> Article [34] applies . . . not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State.[56]

Indeed, because the *Dassonville* formula involves an examination of the 'actual or potential, direct or indirect effect' of the measure in question, the Court considers the inherent nature of that measure without regard to any economic or statistical analysis.[57] This means that it is inappropriate to consider statistical evidence as to the volume of imports of products subject to the national measure in question. This is neatly illustrated by *Commission v Ireland* ('*Buy Irish*').[58] The defendant contended that the contested advertising campaign encouraging the public to buy domestic goods in preference to imports was not an MEE because imports had actually risen since the campaign began! The Court gave this argument short shrift, pointing out that imports might have increased even more in the absence of the campaign.[59] What is more, reliance on statistical data would lead to perverse results, as the legality of a measure might vary from year to year, or even from month to month.

Equally, it is inherent in the *Dassonville* formula that some measures do not constitute even potential or indirect hindrances to imports and therefore fall outside the *Dassonville* formula altogether. Thus, in a handful of cases the Court has held that measures fell outside Article 34 TFEU on the ground that the possibility of their affecting imports was too 'uncertain and indirect'.[60] In effect, this is a rule of remoteness.[61]

The first in this line of cases was *Krantz*.[62] The plaintiff in the main case was a German company which had sold a machine on instalment terms to a company established in the Netherlands. Before all the instalments had been paid, the purchaser went bankrupt. Under Dutch bankruptcy law, the seller's reservation of property pending the payment of the final instalment could not be invoked against the tax authorities of the Netherlands. The plaintiff claimed that the Dutch law infringed Article 34 TFEU, since it operated as a disincentive to traders in other Member States to sell goods by instalment to the Netherlands.

[55] Case C-184/96 *Commission v France ('Foie gras')* [1998] ECR I-6197.

[56] Ibid, para 17.

[57] Price restrictions have always constituted an exception: eg Case 65/75 *Tasca* [1976] ECR 291 and Case 13/77 *GB-Inno* [1977] ECR 2115.

[58] Case 249/81 [1982] ECR 4005.

[59] Ibid, paras 22 and 25; see also Case C-405/98 *Gourmet International* [2001] ECR I-1795, para 22 and Case C-463/01 *Commission v Germany* ('*Mineral water*') [2004] ECR I-11705, para 65.

[60] eg Case C-379/92 *Peralta* [1994] ECR I-3453; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883; Case C-140/94 *Bassano di Grappa* [1995] ECR I-3257; and Case C-134/94 *Esso Española* [1995] ECR I-4223. In all these cases, the facts were extreme (at least in the eyes of the Court).

[61] As AG Kokott pointed out, the criteria of 'uncertainty and indirectness' are 'difficult to clarify and thus do not contribute to legal certainty' (para 46 of her Opinion in Case C-142/05 *Mickelsson* [2009] ECR I-4273).

[62] Case C-69/88 *Krantz* [1990] ECR I-583.

The Court dismissed this argument on the ground that the effects of such a rule were 'too uncertain and indirect to warrant the conclusion' that it was 'liable to hinder trade between Member States'.[63]

Ever since its ruling in *van de Haar*,[64] the Court has steadfastly refused to apply a *de minimis* rule. A spectacular illustration of this principle can be seen in *Bluhme*, where a ban on keeping certain species of bee applicable to an island representing less than 1 per cent of Danish territory was held to fall under Article 34.[65]

Another consequence of the breadth of the concept of MEEs on imports is that Article 34 TFEU 'covers in general all barriers to imports which are not already specifically covered by other Treaty provisions'.[66] In relation to those articles, each of which constitutes a *lex specialis*, Article 34 TFEU has been described as a *lex generalis*.[67] We shall revisit this issue in section 8.

A further obvious characteristic of the *Dassonville* formula is that it refers exclusively to the *effects* of a measure, not its purpose; and the overwhelming thrust of the subsequent case law confirms this. That is scarcely surprising: Article 34 TFEU speaks of 'measures of equivalent effect' to quantitative restrictions, not 'measures of equivalent purpose' to quantitative restrictions. Although the Court has referred to the aim of a national measure in several instances,[68] it is not easy to find a single case in which a measure has been held to fall within the scope of Article 34 solely for this reason.

Cassis de Dijon

What the Court did not do in *Dassonville* was to give any indication as to whether discrimination is a necessary ingredient of an MEE.

The early cases all concerned so-called 'distinctly applicable' measures (those which discriminate against imports on their face).[69] The Court first encountered indistinctly applicable measures in the celebrated case of *Cassis de Dijon*.[70] The plaintiffs, who sought to import the French blackcurrant-based drink of that name, contested the validity of a provision of an indistinctly applicable German law requiring spirits to have a minimum alcohol content. Cassis de Dijon, which in France had a content of between 15 and 20 per cent, fell into the category of products required to have 25 per cent alcohol under the German provisions. The Court ruled that this measure constituted an MEE. That judgment was followed by a large number of similar rulings relating to other indistinctly applicable measures.[71]

In all these cases, the measures in issue did not discriminate against imports on their face; but a more subtle form of discrimination was at work. Thus the provision in issue in

[63] As J Stuyck has pointed out ('Is *Keck* Still Alive and Kicking?' in L Gormley, P Nihoul, and E van Nieuwenhuyze (eds), 'What Standard after *Keck*?' [2012] *European Journal of Consumer Law* 343, 345), cases in which the Court has followed this approach have frequently related to private law. See also Case C-93/92 *CMC Motorradcenter* [1993] ECR I-500 and Case C-44/98 *BASF* [1999] ECR I-6269.

[64] Joined Cases 177/82 and 178/82 *van de Haar* [1984] ECR 1797.

[65] Case C-67/97 *Bluhme* [1998] ECR I-8033. See also Case C-309/02 *Radlberger* [2004] ECR I-11763, para 68. As mentioned in section 5, Article 30 TFEU is not subject to a *de minimis* rule either.

[66] Case 252/86 *Bergandi* [1988] ECR 1343, para 33.

[67] Opinion of AG Tesauro in Joined Cases C-78–83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847, 1865.

[68] *Keck and Mithouard* (n 50) paras 12 and 14; Case C-379/92 *Peralta* [1994] ECR I-3453, para 24; and *Trailers* (n 51) para 37.

[69] This widely used term is not employed by the Court itself.

[70] *Cassis de Dijon* (n 49).

[71] eg Case 788/79 *Gilli* [1980] ECR 2071 (ban on sale of cider vinegar); *Beer* (n 4) (ban on use of generic name 'beer' for drinks made with rice or maize); Case 216/84 *Commission v France* [1988] ECR 793 (ban on sale of substitute milk powder); and *Zoni* (n 5) (ban on sale of pasta containing soft wheat).

Cassis de Dijon reflected the long-standing characteristics of German products, whereas producers in other Member States wishing to export to Germany needed to adapt their products specifically for the German market, with all the added costs which this entailed. This is referred to as discrimination in fact.

What about measures which do not discriminate against imports *at all*? This issue came to a head in *Torfaen v B & Q*,[72] a reference from a court in Wales concerning the legality of the then ban on Sunday trading. The restrictions in issue in that case did not involve any discrimination against imports in any shape or form; nor were they aimed at imports in any sense. Nevertheless, the Court held that Article 34 TFEU was engaged.[73] This was controversial, since B & Q's reliance on that provision could fairly be described as abusive. However, the Court's ruling was the consequence of the very broad definition of MEEs resulting from *Dassonville* and *Cassis de Dijon* and its desire to ensure the elimination of any barriers to the free movement of goods. But many commentators thought the Court had gone too far in *Torfaen*.

Keck

Four years after *Torfaen*, the Court took a dramatic and unusual step. In *Keck*, it reversed the Sunday trading cases and laid down a new test. It divided measures into two types:

(a) so-called 'product-bound' measures (sometimes referred to as 'product requirements'), which concern the inherent characteristics of a product such as designation, form, size, weight, composition, presentation, and labelling;[74] and

(b) measures relating to 'certain selling arrangements'.[75]

As to the former category, the Court confirmed its earlier case law. With respect to the latter category, a major change was announced: only those measures which discriminated against imports in law or in fact were to be regarded as MEEs.[76]

The judgment itself lacked clarity, but it was clarified by subsequent case law. Thus the concept of measures relating to 'selling arrangements', which the Court did not define in *Keck* itself, has been held to cover the following categories of measure:

- restrictions on when goods may be sold;[77]
- restrictions on where or by whom goods may be sold;[78]
- advertising restrictions;[79] and
- price restrictions.[80]

[72] Case 145/88 *Torfaen* [1989] ECR 3831.

[73] See also Case C-312/89 *CGT v Conforama* [1991] ECR I-997; Case C-332/89 *Marchandise* [1991] ECR I-1027; and Case C-169/91 *Stoke-on-Trent v B & Q* [1992] ECR I-6635—all Sunday trading cases.

[74] *Keck and Mithouard* (n 50) para 15. The term 'product-bound' is not used by the Court itself.

[75] This term is used by the Court in para 16.

[76] As to the concept of discrimination 'in fact' in this context, see Case C-391/92 *Commission v Greece* [1995] ECR I-1621 and Case C-322/01 *DocMorris* [2003] ECR I-14887; and see n 78.

[77] Joined Cases C-401/92 and 402/92 *'t Heukske* [1994] ECR I-2199 and Case C-69/93 *Punto Casa* [1994] ECR I-2355. The earlier Sunday trading cases such as *Torfaen* were thus reversed.

[78] *Commission v Greece* (n 76) (ban on selling processed milk for infants except in pharmacies) and *DocMorris* (n 76) (ban on selling pharmaceuticals on the internet). Case C-369/88 *Delattre* [1991] ECR I-1487 and Case C-60/89 *Monteil* [1991] ECR I-1547 were therefore reversed.

[79] Case C-292/92 *Hünermund* [1993] ECR I-6787; Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179; Case C-34/95 *De Agostini* [1997] ECR I-3843; and Case C-405/98 *Gourmet International* [2001] ECR I-1795. In the latter case, an 'outright ban' on advertising was held to be discriminatory in fact.

[80] *Keck* itself related to a prohibition on selling goods at a loss, which is a form of price control. See also Case C-531/07 *LIBRO* [2009] ECR I-3717.

When any doubt exists as to whether a measure is product-bound or relates to a selling arrangement, the Court inclines towards the former,[81] although this has never been formulated as a principle.

The rationale behind *Keck* is that, in the absence of discrimination, selling arrangements—such as the Sunday trading rules—are less restrictive of free trade than product-bound measures because they do not require traders in other Member States to produce goods to particular specifications just for the Member State in question.

Nevertheless, *Keck* has been widely criticized over the years both by Advocates General[82] and others, as it is said to create an artificial and largely unworkable distinction. For a long time, the Court remained impervious to such criticism except in one respect: the distinction between 'selling arrangements' and 'product-bound measures' gradually mutated into a distinction between 'selling arrangements' and *all* other measures, so that only the former were subject to a discrimination test;[83] but this was never spelt out by the Court. Measures which could not be categorized as either product-bound or as selling arrangements were therefore found to be MEEs whether they were discriminatory or not.

Trailers

In *Trailers*,[84] the Court finally succumbed to this criticism, but in an ambiguous way. It appeared to confirm the pre-existing law, but then added that 'any other measure which hinders access to the market' also constitutes an MEE[85]—language which broadly reflects the test proposed by many critics of *Keck*.

Trailers is a major turning-point in the case law. Or is it? The judgment has not brought greater clarity.

For a start, the term 'market access' could not be more nebulous. Snell has stated that 'the notion of market access obscures rather than illuminates',[86] while Gormley points out that this concept 'adds nothing at all to the basic *Dassonville* principle';[87] and Barnard[88] has demonstrated that 'market access' can bear a wide range of different meanings.

Second, it is not even quite clear whether *Keck* is still good law. Many judgments do not refer to it at all, even if they relate to what used to be known as 'selling arrangements',[89] and yet AG Szpunar has recently asserted that '*Keck* is still alive'.[90] Crucially, it is hard to identify a single case decided after *Trailers* in which the Court has reached a different *result*

[81] Case C-470/93 *Mars* [1995] ECR I-1923 and *Familiapress* (n 54).

[82] Especially AG Jacobs in *Leclerc-Siplec* (n 79); AG Poiares Maduro in Case C-158/04 *Alfa Vita* [2006] ECR I-8135; and AG Bot in *Trailers* (n 51).

[83] Case C-473/98 *Toolex* [2000] ECR I-5681 (restriction on use); Cases C-390/99 *Canal Satélite Digital* [2002] ECR I-607 and C-244/06 *Dynamic Medien* [2008] ECR I-505 (market authorization requirements).

[84] *Trailers* (n 51); see also *Mickelsson* (n 61).

[85] *Trailers* (n 51) para 37.

[86] J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437, 470.

[87] L Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925, 928.

[88] See C Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford: Oxford University Press, 2016) 21ff.

[89] Cases C-333/14 *Scotch Whisky Association*, EU:C:2015:845 and C-148/15 *Deutsche Parkinson Vereinigung*, EU:C:2016:776; both concerned price restrictions, measures traditionally regarded as relating to 'selling arrangements' (n 80). See also Case C-639/11 *Commission v Poland* (right-hand drive cars), EU:C:2014:173. In contrast, see Case C-198/14 *Visnapuu*, EU:C:2015:751, para 103.

[90] Opinion in *Deutsche Parkinson* (n 89) para 23.

from that which it would have reached prior to that judgment.[91] Gormley (no friend of *Keck*) has written that it 'survives, albeit inelegantly and ignobly'.[92]

One point is clear: students who ignore *Keck* do so at their peril!

6.2.2 A brief comparison with US constitutional law

Several authors have compared Article 34 TFEU with its US equivalent.[93] The US Constitution contains no provision equivalent to Article 34, as this was simply not at the forefront of the minds of the fathers of that instrument: they had more pressing concerns, namely the establishment of a vibrant federal State capable of withstanding internal tension and attacks from foreign powers. In stark contrast, the common market, and in particular the free movement of goods, was the very cornerstone of the venture which became the Treaty of Rome.

Nevertheless, the US Supreme Court has read a so-called 'dormant commerce clause' (ie an implicit prohibition) into Article 1, section 8, clause 3 of the Constitution, which provides: 'The Congress shall have power . . . to regulate commerce . . . among the several States'. The Supreme Court is very robust in its review of discriminatory state measures, but non-discriminatory measures are deemed to be lawful unless the burden imposed on trade from other states is 'clearly excessive in relation to the putative local benefit'.[94]

To some, it may come as a surprise to learn that in this field the fetters on the several US states are no greater than those binding the Member States of the EU. Set against the historical background just described, this is wholly understandable.

6.2.3 Some examples of MEEs

MEEs come in a very wide variety of forms. We can only give a few examples here. In addition to those mentioned previously,[95] the following deserve a particular mention:[96]

- import licences, even if they are granted automatically;[97]
- inspections and controls;[98]
- the obligation to produce a certificate;[99]
- prohibition on the sale of goods of a certain description;[100]

[91] In stark contrast, *Keck* itself reversed a number of earlier judgments (n 77).

[92] See Gormley, 'Inconsistencies and Misconceptions' (n 87) 926. Similarly, I Lianos has spoken of Keck's 'progressive demise': 'In Memoriam *Keck*: the Reformation of EU Law on the Free Movement of Goods' (2015) 40 *European Law Review* 225, 225.

[93] See C Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge Law Journal* 575; G Haibach, 'The Interpretation of Article 30 of the EC Treaty and the "Dormant" Commerce Clause by the European Court of Justice and the US Supreme Court' (1999) 48 *International and Comparative Law Quarterly* 155; and D Kommers and M Waelbroeck, 'Legal Integration and the Free Movement of Goods: The American and European Experience' in M Cappelletti et al (eds), *Integration through Law*, vol I (Berlin: Walter De Gruyter, 1985).

[94] *Pike v Bruce Church Inc* 397 US 137, 142 (1970). See D Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091 and L Tribe, *American Constitutional Law*, vol I (3rd edn, New York: Foundation Press, 2000) 1029 *et seq*.

[95] See in particular nn 77–80 and the accompanying text.

[96] For a more thorough account, see P Oliver et al, *Oliver on Free Movement of Goods in the European Union* (5th edn, Oxford: Hart Publishing, 2010) ch 7.

[97] Case 51/71 *International Fruit Co* [1971] ECR 1107 and Case 41/76 *Donckerwolcke* [1976] ECR 1921.

[98] *Rewe-Zentralfinanz* (n 53) and Case 35/76 *Simmenthal* [1976] ECR 1871.

[99] Case 251/78 *Denkavit* [1979] ECR 3369 and Case C-205/89 *Commission v Greece* [1991] ECR I-1361.

[100] *Cassis de Dijon* (n 49); Case 788/79 *Gilli* [1980] ECR 2071; and *Commission v France* (n 71).

- requirements as to the presentation[101] or labelling of products;[102]
- incitement to purchase domestic products in preference to imports;[103]
- restrictions on use;[104]
- restrictions on possession[105] or storage;[106] and
- restrictions on health-care coverage.[107]

The first category (import licences) is distinctly applicable by definition. The other categories of measure listed here constitute MEEs even if they are indistinctly applicable.

6.3 Measures of equivalent effect: exports

Export restrictions are rare, since Member States are usually motivated to promote exports: the Court has decided many hundreds of cases on Article 34 TFEU, but only a fraction of that number on Article 35 TFEU. However, there are several reasons why a State might take such a step:

- a desire to ensure supplies in times of shortage;[108]
- the protection of jobs in processing industries, in which case the export restriction will cover the raw material or component part, but not the finished product;[109]
- the prevention of parallel exports by downstream operators (so that manufacturers established in the Member State in question will be able to obtain higher profits on their export trade);
- the maintenance of the quality or reputation of exports;[110] or
- the preservation of works of art for the nation.[111]

The definition of MEEs under Article 35 is radically different from that under Article 34. The Court has consistently held that Article 35 only covers measures which discriminate against goods intended for export in favour of those destined for the domestic market.[112] However, the formulation of this definition is not consistent. The test which the Court actually applies is that set out in *Belgium v Spain* ('*Rioja*'), where Article 35 was held to apply to measures which

[101] Case 261/81 *Rau v De Smedt* [1982] ECR 3961 (requirement that margarine be sold in cubic packaging to distinguish it from butter) and C-366/04 *Schwarz* [2005] ECR I-10139 (prohibition on selling chewing gum from vending machines without a wrapper).

[102] Case 27/80 *Fietje* [1980] ECR 3839 (language requirement) and *Mars* (n 81).

[103] *Buy Irish* (n 58) and Case C-325/00 *Commission v Germany* ('*Quality label for domestic agricultural produce*') [2002] ECR I-9977.

[104] *Toolex* (n 83) and *Mickelsson* (n 61).

[105] Case C-293/94 *Brandsma* [1996] ECR I-3159 and Case C-400/96 *Harpegnies* [1998] ECR I-5121.

[106] Case 13/78 *Eggers* [1978] ECR 1935.

[107] Case C-120/95 *Decker* [1998] ECR I-1831.

[108] As in Case 68/76 *Commission v France* ('*Export licences for potatoes*') [1977] ECR 515. Similarly, when the Covid-19 pandemic broke, several Member States imposed export restrictions on medical equipment; see Communication from the Commission on a Coordinated economic response to the Covid-19 crisis, COM(2020) 112 final, pp 3–4.

[109] Case C-203/96 *Chemische Afvalstoffen Dusseldorp* [1998] ECR I-4075 (restriction on exporting waste for reprocessing in another Member State).

[110] Case 53/76 *Bouhelier* [1977] ECR 197 (obligation to supply quality certificates for exported watches only was in breach of Art 35 TFEU) and Case C-388/95 *Belgium v Spain* ('*Rioja*') [2000] ECR I-3123 (rule that wine could only be sold as 'Rioja' if it was produced and *bottled* in the eponymous region was an MEE).

[111] Measures adopted for this purpose may well be justified under Art 36.

[112] eg Case 15/79 *Groenveld* [1979] ECR 3409 and Case 155/80 *Oebel* [1981] ECR 1993 (prohibition on baking at night not an MEE).

have 'the effect of specifically restricting patterns of exports … and thereby of establishing a difference of treatment between trade within a Member State and its export trade'.[113] In *Groenveld*, the Court had stated that it was necessary to show that the measure provided 'a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States';[114] but in practice the final limb of that test ('at the expense of …') has always been redundant.

In at least two cases relating to restrictions on transit (which fall under both Articles 34 and 35), the Court has applied the same test to both provisions;[115] but the measures in issue in those cases discriminated against goods intended for export in any event.

In this respect, the rules on the free movement of goods differ markedly from those governing the other fundamental freedoms, where a unitary approach is followed: 'import' restrictions (barriers to incoming transactions) and 'export' restrictions (barriers to outgoing transactions) are subject to the same test.[116] The rationale behind the Court's narrow interpretation of Article 35 appears to be that that provision should not be extended to cover restrictions on production (eg planning constraints on the construction of factories).[117] Nevertheless, it is widely considered that the test is too narrow, at least as regards marketing restrictions.[118]

This prompted Advocate General Trjstenjak in *Gysbrechts*[119] to advise the Court to transpose its case law on Article 34 in its entirety to Article 35. The proceedings concerned a Belgian rule precluding vendors in a distance-selling contract from requesting the details of the purchaser's credit card before the expiry of the period during which the latter enjoyed a statutory right to withdraw from the contract (seven working days). In view of the obstacles to bringing legal proceedings in another Member State against defaulting consumers, this constituted de facto discrimination against goods intended for export. Despite the Advocate General's entreaties, the Court appears to have stood by its traditional approach.[120] True, this ruling does at least make it plain that de facto discrimination will suffice to bring a measure under Article 35 TFEU, but that was never in doubt.[121]

6.4 Purely national measures

According to the traditional approach, the rules on the free movement of goods do not cover situations which are internal to a Member State.[122] By the same token, reverse discrimination (which consists in a Member State treating its own domestic products less favourably than imports) was also thought to fall outside the scope of the Treaty. However, more recently, the Court has appeared to suggest that even traders in domestic products

[113] *Rioja* (n 110) para 41. [114] *Groenveld* (n 112) para 7.

[115] Case C-112/00 *Schmidberger* [2003] ECR I-5659 and Case C-320/03 *Commission v Austria* ('*Brenner*') [2005] ECR I-9871.

[116] Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-18/95 *Terhoeve* [1999] ECR I-345 (workers); and Case C-384/93 *Alpine Investments* [1995] ECR I-1141 (services).

[117] If planning laws discriminate against other EU nationals, they fall under Art 49 TFEU on the freedom of establishment; see chapter 14.

[118] AG Jacobs in *Alpine Investments* (n 116) 1157, and paras 42 *et seq* of the AG's Opinion in Case C-205/07 *Gysbrechts* [2008] ECR I-9947.

[119] *Gysbrechts* (n 118).

[120] For the view that the ruling in *Gysbrechts* did broaden the definition of MEEs on exports, see A Dawes, 'A Freedom Reborn? The New Yet Unclear Scope of Article 29 EC' (2009) 34 *European Law Review* 639.

[121] eg in Case C-350/97 *Monsees* [1999] ECR I-2921, a measure which discriminated de facto against goods intended for export had been held to fall foul of Art 35. See also Case C-15/15 *New Valmar*, EU:C:2016:464.

[122] See Case 314/81 *Waterkeyn* [1982] ECR 4337; Case 286/81 *Oosthoek* [1982] ECR 4575; and Case 355/85 *Cognet* [1986] ECR 3231.

may rely on a breach of Article 34.[123] This is very hard to square with the wording of Articles 28, 34, and 35 TFEU, which specifically refer to restrictions *between* Member States.[124]

6.5 Justification under Article 36 and the mandatory requirements

6.5.1 Justifications under Article 36

Since exceptions to the rules on free movement are the subject of chapter 16, there is no need to attempt an exhaustive discussion of Article 36 TFEU in this chapter. However, a brief overview of some key issues is set out here.

As its wording makes clear, Article 36 TFEU lays down exceptions to both Articles 34 and 35 TFEU. Article 36 does not constitute an exception to any other provisions of the Treaty.[125] Whether imports or exports are at stake, Article 36 applies in the same way.

As an exception to a fundamental principle, Article 36 is to be construed narrowly.[126] One manifestation of this is that the party seeking to show that a measure is justified bears the burden of proof[127]—although inexplicably the Court departed from this well-established rule in *Trailers*.[128]

6.5.2 The status of the mandatory requirements

The 'mandatory requirements' are grounds of justification not mentioned in Article 36 TFEU. They first made their appearance in *Cassis de Dijon*,[129] where the Court recognized three such public interest exceptions: the prevention of tax evasion,[130] the prevention of unfair competition, and consumer protection.[131] Others followed, including environmental protection,[132] the improvement of working conditions,[133] and fundamental rights.[134] On any view, the creation of the mandatory requirements has been a piece of judicial activism.

The mandatory requirements recognized in *Cassis* related to important policy concerns which were not relevant or prominent when the Treaty of Rome was drafted. So their introduction has not been the source of any controversy simply because it suits everyone. Nevertheless, it is in direct contradiction with the principle that Article 36 TFEU is to be construed narrowly. In an attempt to square this circle, the Court has traditionally held that only indistinctly applicable measures can be justified on the basis of the mandatory requirements.[135] However, this has led to various distortions.[136] In a number of more recent cases, no doubt in response to various calls from the Advocates General,[137] the Court has therefore begun to treat the mandatory requirements in precisely the same way as the grounds of justification spelt out in Article 36 TFEU.[138]

[123] Case C-321/94 *Pistre* [1997] ECR I-2343 and Case C-448/98 *Guimont* [2000] ECR I-10663.

[124] Similarly, see section 5.4 and chapter 13.

[125] *Works of art* (n 13). [126] Ibid.

[127] *Denkavit* (n 99) and Case C-265/06 *Commission v Portugal* [2008] ECR I-2245, para 39, plus literally hundreds of other cases.

[128] *Trailers* (n 51) paras 62 *et seq*.

[129] *Cassis de Dijon* (n 49). [130] See also *GB-Inno* (n 57).

[131] See also *Gilli* (n 71) and *Gysbrechts* (n 118).

[132] Case 302/86 *Commission v Denmark* ('*Returnable bottles*') [1988] ECR 4607; *Brenner* (n 115); and Case C-28/09 *Commission v Austria* ('*Brenner II*'), ECLI:EU:C:2011:854.

[133] *Oebel* (n 112). [134] *Schmidberger* (n 115).

[135] Case 113/80 *Commission v Ireland* [1982] ECR 1625 and Case C-1/90 *Aragonesa de Publicidad* [1991] ECR I-4151, para 13.

[136] The most obvious example occurred in *Walloon waste* (n 15).

[137] eg AG Jacobs in *Chemische Afvalstoffen Dusseldorp* (n 109) paras 89–90 and Case C-379/98 *Preussen Elektra v Schleswag* [2001] ECR I-2099, paras 225–226; AG Geelhoed in *Brenner* (n 115) paras 104–107.

[138] *Brenner* (n 115); Case C-54/05 *Commission v Finland* [2007] ECR I-2473; and *Gysbrechts* (n 118).

However, it has never formally renounced its traditional approach. The widespread view today is that the latter approach is clearly preferable:[139] the law should recognize that a measure may be objectively justified on (say) environmental grounds, even if it is distinctly applicable.[140]

Consequently, references in this chapter to Article 36 TFEU should be taken to include the mandatory requirements, unless otherwise indicated.

6.5.3 The general principles governing Article 36 TFEU

Proportionality

The principle of proportionality is a general principle of EU law.

The word 'justified' in the first sentence of Article 36 TFEU is understood to mean 'necessary':[141] measures are not justified if the same legitimate end could be achieved by less restrictive means.[142] Frequently, the Court identifies an alternative measure which would achieve the desired aim without affecting interstate trade to the same degree.[143] For instance, a requirement that products be adequately labelled has often been held to constitute a suitable substitute for a sales ban.[144]

To the extent that exhaustive guarantees are laid down in EU legislation for a specific matter (eg preventing the spread of a particular disease), reliance on Article 36 TFEU is no longer possible because national measures differing from that legislation are no longer necessary.[145] Had the Court decided otherwise, that would have defeated the purpose of the EU adopting the legislation.

A measure will not be regarded as proportionate unless it is appropriate. If the measure is not applied in a consistent and systematic manner, it is not appropriate. This rule is neatly illustrated by *Commission v Portugal*. The case concerned a ban on affixing tinted film to car windows, which the defendant claimed was justified for fighting crime and to enable the police to see whether seat belts were being worn. However, this argument was undermined when it emerged that there was no restriction in Portugal on marketing cars fitted with tinted windows from the outset.[146]

Unless the measure is applied in an inconsistent and/or unsystematic manner, it will rarely be held to be inappropriate. In *Commission v Spain*, AG Sharpston stated that the Court will uphold the measure as long as it is 'not inappropriate for that purpose'.[147] By definition, courts are not well placed to judge such issues. However, in a clear case, the Court will of course be prepared to find the measure unlawful on these grounds.[148]

Another aspect of proportionality is the principle of *mutual recognition*, which is also an application of the obligation of sincere cooperation under Article 4(3) TEU.

[139] This view has been expressed by two members of the Court: Judge Rosas, '*Dassonville* and *Cassis de Dijon*' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010) 444–445, and Judge Timmermans, 'Creative Homogeneity' in N Wahl and U Bernitz (eds), *Liber Amicorum in Honour of Sven Norberg* (Brussels: Bruylant, 2006) 472, 475 *et seq*. See also Oliver et al, *Oliver on Free Movement of Goods in the European Union* (n 96) paras 8.04–8.16; and see chapter 16, section 3.1 of this book.

[140] That was the situation in *Walloon waste* (n 15).

[141] *Eggers* (n 106), para 30 and Case C-141/07 *Commission v Germany* [2008] ECR I-6935, para 50.

[142] Case 104/75 *De Peijper* [1976] ECR 613, paras 16–17.

[143] eg Case C-387/99 *Commission v Germany* [2004] ECR I-3751, para 81.

[144] *Cassis de Dijon* (n 49) para 13 and *Gilli* (n 71) para 7.

[145] Case 148/78 *Ratti* [1979] ECR 1629 and *Toolex* (n 83) para 25.

[146] *Commission v Portugal* (n 127) para 43; similarly, see *New Valmar* (n 121), paras 58–59.

[147] Case C-400/08 *Commission v Spain* [2011] ECR I-1915, para 89 of the Opinion. Although this case concerned the freedom of establishment, her statement applies with equal force to Article 36 TFEU.

[148] eg Case C-421/09 *HumanPlasma* [2010] ECR I-12869, paras 33–35.

Mutual recognition made its first appearance in the case law in *Cassis de Dijon*: it was held there that the sale of goods lawfully produced and marketed in one Member State may not be restricted in another Member State without good cause.[149] In practice, this test must not be read narrowly: usually, it appears to suffice for the goods to have been lawfully produced *or* marketed in the first Member State;[150] and the principle extends to goods produced outside the EU, if it is lawful to produce and market them in the Member State where they were first put into free circulation.[151] In short, the importing Member State cannot prohibit the sale of goods meeting equivalent standards to its own; and it cannot unnecessarily duplicate controls carried out in the other Member State.[152]

Exceptionally, in *Dynamic Medien* the Court did not apply the principle of mutual recognition: the case concerned the approval of DVDs for viewing by children of different ages; the Court saw no need for the German authorities to have any regard to the classification chosen for each film by the exporting Member State (the UK), no doubt because there is no possible yardstick for moral decisions of this kind.[153]

Discrimination

Objective justification is much harder to prove when the measure is blatantly discriminatory; but it is not unknown.[154] So 'arbitrary discrimination' in the second sentence of Article 36 TFEU refers to disparate treatment which cannot be justified on an objective basis.[155]

6.5.4 The grounds of justification

Purely economic considerations cannot justify restrictions falling under Article 34 or 35 TFEU:[156] objectives such as the promotion of employment or investment, curbing inflation, and controlling the balance of payments fall outside Article 36 TFEU. Otherwise, the internal market would be wholly undermined. However, some legitimate grounds of justification do contain an economic element. Examples include intellectual property (called 'industrial and commercial property' in Article 36 TFEU) and the preservation of the financial balance of social security and health-care systems (a mandatory requirement).[157]

[149] *Cassis de Dijon* (n 49) para 14. See the Commission's Communications on mutual recognition, COM(1999) 299 and OJ [2003] C265/2. It has now become a general principle of Union law: M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 *Common Market Law Review* 405.

[150] *Canal Satélite Digital* (n 83), para 37; AG La Pergola in *Foie Gras* (n 55) para 28. See P Oliver 'Mutual Recognition: Addressing Some Outstanding Conundrums' in A Albors-Llorens, C Barnard and B Leucht (eds) *Cassis de Dijon: 40 Years On* (Oxford: Hart Publishing, forthcoming).

[151] Case C-525/14 *Commission v Czech Republic (hallmarking)*, EU:C:2016:714. See Oliver (n 150).

[152] *Canal Satélite Digital* (n 83) paras 36 and 37.

[153] *Dynamic Medien* (n 83) para 44. See also, in relation to the freedom of establishment relating to gambling which also involves issues of public morality, Case C-316/07 *Stoss* [2010] ECR I-8069, paras 112 and 113.

[154] *Rewe-Zentralfinanz* (n 53) and *Commission v Germany* (n 141). But this is still not completely settled as regards the mandatory requirements: section 6.5.2.

[155] For examples of arbitrary discrimination, see Case 121/85 *Conegate* [1986] ECR 1007 (imports) and *Bouhelier* (n 110) (exports).

[156] Case 7/61 *Commission v Italy* [1961] ECR 317, 329 and Case C-416/00 *Morellato (No 2)* [2003] ECR I-9343, paras 40–41. See P Oliver, 'When, if Ever, Can Restrictions on Free Movement be Justified on Economic Grounds?' 41 *European Law Review* 147 (2016).

[157] *Decker* (n 107).

Public (human) health deserves particular attention. As would be expected, it has been held to 'rank first among the interests protected by Article 36'.[158] It is also by far the most important ground of justification in terms of the number of cases decided by the Court.

Case study 12.1: How does the Court decide complex public health issues?

Many free movement cases before the Court raise complex public health issues. In infringement proceedings, the Court is required to decide these issues. In contrast, when delivering preliminary rulings, the Court is theoretically not meant to decide questions of fact, but in practice it frequently does so.[159]

Sometimes no assessment of scientific data is involved. For instance, *Commission v Germany* concerned a measure requiring each hospital to obtain all its supplies from the same pharmacy; since emergency supplies were included, it followed that the pharmacy had to be within a few kilometres of the hospital, thereby excluding pharmacies in other Member States and their products in nearly all cases.[160] Similarly, in *HumanPlasma* the Court was called upon to rule on whether Austrian legislation restricting the marketing of human blood was justified on public health grounds; under that legislation, blood could not be distributed in Austria if any money whatsoever had been paid to the donors, *even to cover their costs*.[161]

However, in many public health cases a profusion of scientific data is laid before the Court. For example, in countless cases it has had to rule on the legality of measures restricting, or fixing maximum thresholds for, certain vitamins, minerals, or additives in specific foodstuffs.[162]

Needless to say, the judges are lawyers who do not normally have any scientific training.[163] These cases place them in a difficult position: on the one hand, as mentioned earlier, the Court attaches the utmost importance to public health; but, on the other hand, the Court has encountered a large number of dubious arguments based on public health over the years. Sometimes this is blatant. For instance, in *Cassis de Dijon* the Court can have had no difficulty in rejecting Germany's argument that the *minimum* alcohol requirement for certain drinks which was in issue there was justified so as to prevent a proliferation of low-alcohol drinks on the market, which would induce a tolerance to alcohol.[164] But usually the questionable nature of public health arguments will not be nearly so obvious.

[158] *De Peijper* (n 142), para 15.

[159] On the difference between these types of proceedings, see chapter 10.

[160] *Commission v Germany* (n 141). This measure was held to be justified.

[161] *HumanPlasma* (n 148). On the basis of the factors discussed later, this measure was held not to be justified.

[162] eg Case C-192/01 *Commission v Denmark* [2003] ECR I-9693; Case C-95/01 *Greenham* [2004] ECR I-1333; and Case C-333/08 *Commission v France* [2010] ECR I-757.

[163] The Court can commission an expert's report: Art 70 of its Rules of Procedure (see https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf). But this procedure is very rarely used; and it would be unthinkable on a reference for a preliminary ruling where the Court is not *supposed* to rule on the facts anyway!

[164] *Cassis de Dijon* (n 49) paras 10 and 11. See also Case C-319/05 *Commission v Germany* [2007] ECR I-9811 where Germany had classified garlic capsules as medicinal products; this meant that a market authorization was required before they could be sold!

Of course, the Court will take full account of the results of scientific research,[165] but usually each party will be in a position to submit such evidence in its support. So, to cope with these complex issues, the Court has developed some rules of thumb; these are essentially the same whether scientific data is in issue or not.

The party seeking to show that a measure is justified on public health grounds bears the burden of proving this.[166] However, if that party makes out a reasonably convincing case on justification, then the burden shifts once again to the other party.[167]

Article 36 TFEU is purely permissive. Accordingly, it is up to Member States to decide how far they wish to go in protecting public health, as long as they remain within the limits of that provision.[168] It follows that a national measure may be justified even if no other Member State has adopted such a stringent rule.[169] Nevertheless, this circumstance may be an indication that the contested measure is disproportionate.[170]

The Court also attaches considerable importance to the position taken by other international organizations. For instance, in *Beer*,[171] the Court relied on recommendations of the World Health Organization as well as the UN's Food and Agriculture Organization; and in *HumanPlasma*, it did likewise with a recommendation of the Council of Europe.[172]

The judgment in *Deutsche Parkinson Vereinigung* is a good example of how these principles are applied.[173] The plaintiff was an organization of patients suffering from Parkinson's disease, which offered its members bonuses on prescription-only pharmaceuticals purchased from DocMorris, an online pharmacy based in the Netherlands.[174] These bonuses were found to be incompatible with the fixed prices imposed by German legislation, which applied both to products sold by pharmacies established in Germany and to those established in other Member States. After ruling that the price controls were caught by Article 34, the Court turned its attention to Article 36. First, it considered Germany's claim that this measure was justified in order to 'ensure a safe and high-quality supply of medicinal products', especially to remote areas. This contention was rejected by the Court on the grounds that it was unsubstantiated—and indeed the Commission had supplied evidence to the contrary. The Court went on to dismiss a number of other arguments advanced by the German Government, finding that there was no economic or scientific basis for them. On the contrary, it held that 'price competition could be capable of benefiting the patient in so far as it would allow, where relevant, for prescription-only medicines to be offered in Germany at more attractive prices'.[175] The Court concluded that the measure was not appropriate and therefore not justified.[176]

[165] *Greenham* (n 162) paras 40 and 42. [166] See n 127 and accompanying text.

[167] eg *Beer* (n 4) and Case C-55/99 *Commission v France* [2000] ECR I-11499, paras 34–36.

[168] *Commission v Germany* (n 141) para 51 and *HumanPlasma* (n 148) para 39. For instance, a particularly strict measure may be justified by the dietary habits of the population of a Member State. Case 53/80 *Eyssen* [1981] ECR 409 concerned a ban on the use of a particular additive in cheese in the Netherlands; the additive was harmless in small doses, but the ban was held to be justified, in part because of the high consumption of cheese in that Member State.

[169] *Eyssen* (n 168). [170] *Commission v France* (n 162) para 105 and *HumanPlasma* (n 148) para 41.

[171] eg Case C-178/84 (n 4) paras 44 and 52. [172] *HumanPlasma* (n 148) para 44.

[173] *Deutsche Parkinson Vereinigung* (n 89), paras 28 *et seq*. See also A Alemanno (2016) 53 *Common Market Law Review* 1037.

[174] Following the ruling in *DocMorris* (n 76), Germany had repealed its ban on the sale of pharmaceuticals on the internet. The earlier case concerned the same Dutch pharmacy.

[175] Para 43. [176] Only the salient points in the reasoning have been set out here.

Finally, evidence of protectionist intent will of course weigh against a Member State claiming that its measure is justified on public health grounds. Thus, in *Commission v UK* the defendant had abruptly changed its policy on combating the poultry infection known as Newcastle disease and banned imports of poultry products from countries which had not adopted its new policy. This measure had clearly been timed to exclude imports of turkeys for the lucrative Christmas season, and the Court therefore concluded that the measure was not justified.[177]

6.6 Remedies

As already mentioned, Articles 34 and 35 TFEU are directly effective.[178] Consequently, persons who suffer or have suffered damage by reason of a breach or a possible breach of one of those provisions are entitled to an effective remedy in the courts of the Member States. Occasionally, this has been spelt out in judgments relating to these provisions,[179] but in any case it follows from the general principle of effective judicial control, which is now enshrined in Article 19(1) TEU as well as Article 47 of the Charter of Fundamental Rights of the European Union.[180] In appropriate circumstances, the usual remedies should be available: annulment, injunctions (interim and final) as well as damages.

7 Discriminatory internal taxation

The purpose of Article 110 TFEU is to prevent Member States from circumventing the prohibitions in Articles 30 and 34 to 36 TFEU by introducing internal taxes which are liable to discourage imports of goods from other Member States in favour of domestic products.[181] As we saw in section 2.2, the Court held in *Co-Frutta*[182] that this provision extends to goods originating in third countries but in free circulation in the Member States.

Article 110 TFEU refers to 'products from other Member States', which may suggest that it only prohibits discrimination against imported products. Nevertheless, it is now clear that discrimination against exports in favour of products intended for domestic consumption is also contrary to this provision.[183] This makes perfect sense, since the Treaty also prohibits customs duties, CEEs, QRs, and MEEs on exports.

If Article 110 TFEU were confined to taxes on goods themselves, then many types of discriminatory tax would fall outside the Treaties altogether, even though they constitute serious barriers to the internal market. Accordingly, the Court has consistently held that this provision 'must be interpreted widely so as to cover all taxation procedures which, directly or indirectly, conflict with the principle of equality of treatment of domestic products and imported products'.[184] Thus in *Bergandi*[185] the legality of a tax on the *use* of automatic gaming machines was assessed under this Article. Similarly, discriminatory fees for

[177] Case 40/82 *Commission v UK* [1982] ECR 2793. This case concerned animal health, but the Court would certainly react in the same way if other grounds of justification were in issue.

[178] See n 7 and accompanying text. [179] eg *Greenham* (n 162) para 35.

[180] OJ [2007] C303/1. [181] *Tatu* (n 22) paras 52 and 53. [182] Case 193/85 (n 8).

[183] Case 142/77 *Larsen* [1978] ECR 1543, paras 24–26. For the sake of simplicity, the remainder of this chapter will simply refer to imported products.

[184] *Bergandi* (n 66) para 25 and Case C-221/06 *Frohnleiten* [2007] ECR I-2613, para 40.

[185] *Bergandi* (n 66).

health inspections[186] and port duties[187] were found to be in breach of Article 110 TFEU. Finally, in *Frohnleiten* the same was held to apply to a discriminatory levy on the depositing of imported waste on a landfill site.[188]

Two separate prohibitions are in issue: a prohibition on internal discriminatory taxation in favour of similar domestic products (Article 110(1)); and a prohibition on internal taxation affording protection to other domestic products in competition with imported products (Article 110(2)). In this respect, it should be noted that Article 110 TFEU is essentially permissive, unlike Articles 30, 34, and 35 TFEU which are prohibitive. Thus, Member States can impose taxes on products as long as they are not discriminatory or protective.[189]

7.1 Article 110(1) TFEU

The prohibition laid down in Article 110(1) applies if two cumulative conditions are met: first, the relevant imported product and the relevant domestic product must be similar; and, secondly, there must be discrimination (*unjustified* disparate treatment).

7.1.1 Similar products

In its early case law, the Court relied on a rather rudimentary criterion for determining whether products are similar, namely whether they were in the same fiscal, customs, or statistical classification.[190] However, probably due to the inherent limitations of this formalistic approach, the Court soon started to develop a test based on the products' characteristics and consumers' needs. According to the Court, a comparison must be made between products which, at the same stage of production, have similar characteristics and satisfy the same consumer needs.[191]

The Court followed this approach in the *Johnnie Walker* case, which concerned a Danish system of differential taxation of Scotch whisky and fruit wine of the liqueur type.[192] The Court stated that, in order to establish whether two products are similar, it is necessary to begin by considering certain objective characteristics of the beverages, such as their origin, method of manufacture, organoleptic properties (taste, smell, etc), and alcohol content. Then it must be established whether the two beverages are capable of satisfying the same consumer needs. In the case at hand, it was held that the two beverages had manifestly different characteristics (eg different manufacturing methods, different alcoholic strengths) and therefore could not be regarded as 'similar products'.[193]

Further examples of the interpretation of this concept may be found in *Commission v France* ('*Cigarettes*'), in which the Court held that light-tobacco cigarettes and dark-tobacco cigarettes should be regarded as similar[194] and in *X ('Cars')*, in which the Court set out detailed guidance as to the specific criteria to be taken into account in order to establish whether two motor vehicles can be regarded as similar.[195]

In conclusion, the concept of similarity has been interpreted broadly by the Court, but its precise boundaries remain somewhat unclear. Although it is usual to carry out a

[186] Case 29/87 *Dansk Denkavit* [1988] ECR 2965.
[187] Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085
[188] *Frohnleiten* (n 184). Waste constitutes goods for the purposes of the Treaty: *Walloon waste* (n 15); see section 3.
[189] *Bergandi* (n 66) para 24.
[190] Case 27/67 *Fink-Frucht* [1968] ECR 223, 232.
[191] Case 45/75 *Rewe-Zentrale* [1976] ECR 181, para 12.
[192] Case 243/84 *John Walker & Sons* [1986] ECR 875.
[193] Ibid, paras 11–14.
[194] Case C-302/00 *Commission v France* ('*Cigarettes*') [2002] ECR I-2055.
[195] Case C-437/12 *X* ('*Cars*'), EU:C:2013:857.

systematic and rigorous economic analysis to define the relevant product market in competition law, there has been no attempt to draw inspiration from this for the purposes of Article 110 TFEU.[196]

7.1.2 Discrimination

Article 110(1) does not oblige Member States to adopt any specific system of taxation, let alone to reduce or eliminate taxes. However, Member States must ensure that their taxation systems are 'neutral' between imported and domestic products and do not treat the latter more favourably.

As is clear from its wording, Article 110(1) prohibits both direct and indirect discrimination.

Direct discrimination arises when the tax scheme differentiates explicitly on the basis of the origin of products. The most obvious examples are where only imports are subject to the tax,[197] where the tax burden imposed on imported products is heavier than that imposed on domestic products,[198] or where only domestic products may benefit from a reduction.[199] The same applies where domestic products are subject to a flat tax and imports to a progressive tax[200]—or vice versa[201]—if that leads, at least in some cases, to a higher rate being levied on imports. Direct discrimination also occurs where domestic producers are given longer time limits for the payment of the tax[202] or where the penalties applied for infringing the tax legislation are more severe for imported products than for domestic products.[203]

Indirect discrimination arises where the tax scheme does not explicitly differentiate by reason of the origin of the products but in fact imposes a heavier tax burden on imported products. An illustrative example is *Humblot*, where an individual challenged the French annual road tax on cars.[204] Under the scheme, France imposed a progressive tax rated at 16 CV (fiscal horsepower) or less. In contrast, cars with a higher fiscal horsepower were subject to a flat-rate tax, which was considerably higher. The Court noted that Member States were free to establish a progressive tax system which increased the rate depending on an objective factor such as horsepower. However, they must ensure that the system does not have any discriminatory effect. Although the scheme did not formally differentiate on the basis of the origin of the products, it was deemed to be manifestly discriminatory because only imported cars were subject to the higher flat-rate tax. Moreover, the increase from the progressive tax to the flat-rate tax was much higher than any of the increases in the various steps existing within the progressive tax; indeed, the flat-rate tax was almost five times higher than the highest progressive tax rate.

[196] See chapter 17. Given the broad interpretation of the concept of similarity, it is arguable that two products may be regarded as similar for the purposes of Article 110 TFEU, even if they are not part of the same relevant product market for the purposes of competition law. Compare Case 112/84 *Humblot* [1985] ECR 1367, where the Court rejected the suggestion that luxury motor vehicles were not similar to their more humble counterparts for the purposes of Article 110(1), and the Commission's decision in Case No COMP/M.5518—Fiat/Chrysler, where the Commission indicated that it might be appropriate to segment the relevant market between luxury motor vehicles and others.

[197] Case 57/65 *Lütticke* [1966] ECR 205. [198] *Haahr Petroleum* (n 187).

[199] Case 148/77 *Hansen* [1978] ECR 1787 (tax reductions for certain fruit spirits and for spirits from small distilleries not available for imports) and Case 21/79 *Commission v Italy* ('*Regenerated oil*') [1980] ECR-1 (reduction to promote the recycling and regeneration of petroleum products not available for imports).

[200] Case 127/75 *Bobie* [1976] ECR 1079. [201] Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777.

[202] Case 55/79 *Commission v Ireland* [1980] ECR 481. [203] Case 299/86 *Drexl* [1988] ECR 1213.

[204] *Humblot* (n 196).

In *Cigarettes*,[205] the Court examined the French excise duty on cigarettes. The system did not differentiate on the basis of the origin of the cigarettes. However, the tax on light-tobacco cigarettes was higher than that on dark-tobacco cigarettes. The Court noted that the system was designed in such a way that the products falling within the most favourable tax category (dark-tobacco cigarettes) were almost all produced domestically, whereas almost all imported products came within the least favoured category (light-tobacco cigarettes). The scheme was therefore contrary to Article 110 TFEU. It was irrelevant that a very small fraction of imported cigarettes came within the most favoured category and that a certain proportion of domestic production were within the least favoured category.

Finally, in line with the traditional principle that the Treaty does not prohibit *reverse* discrimination,[206] Article 110(1) does not preclude Member States from imposing higher internal taxes on domestic products than on imported products.[207]

7.2 Article 110(2) TFEU: competing products

The prohibition enshrined in Article 110(2) TFEU applies if two cumulative conditions are met: first, the imported product and the domestic product must be in competition with one another; secondly, the tax must protect the domestic product. Both conditions are more easily satisfied than those in Article 110(1) TFEU.

In *Fink-Frucht*, the Court briefly indicated that Article 110(2) does not require the imported product and the domestic product to be in *direct* competition. However, their competitive relationship cannot be merely fortuitous, but must be lasting and characteristic.[208]

The leading case in this area is the *Commission v UK* ('*Wine and beer*') saga.[209] These proceedings, which concerned a differentiated tax scheme for beer (essentially a domestic product) and wine (all of which was imported), were brought by the Commission against the UK exclusively on the basis of Article 110(2). In its interlocutory judgment, the Court took the unusual step, in view of the significant uncertainties as to whether beer and wine were in competition and whether the tax scheme had protective effects, of ordering the parties to re-examine the case and to submit reports on that examination by a fixed date.

In its final judgment, the Court emphasized that Article 110(2) applies to products which, without being 'similar', were in partial or potential competition. To a certain extent, wine and beer were capable of meeting identical consumer needs and thus there was a degree of mutual substitution. On the other hand, the Court acknowledged the substantial differences between their manufacturing processes and their natural properties. Ultimately, in view of the substantial differences in quality and price of wines, the Court found that the products which should be regarded in competition were beer and the lightest and cheapest varieties of wine.[210]

Next, the Court considered whether the British tax scheme protected domestic beer. The parties disagreed as to the relevant method of comparison, namely the assessment of the tax burden by reference to (a) the volume of the beverage, (b) the alcoholic strength, and

[205] *Cigarettes* (n 194).

[206] See section 6.4 and Case 35/82 *Morson* [1982] ECR 3723. For a detailed discussion on reverse discrimination, see Barnard (n 88) 88–90 (goods) and 213–215 (persons).

[207] Case 86/78 *Peureux* [1979] ECR 897, paras 32 and 33.

[208] *Fink-Frucht* (n 190).

[209] Case 170/78 *Commission v UK* [1980] ECR 417 (interlocutory judgment) and [1983] ECR 2265 (final judgment).

[210] *Wine and beer* (n 209) final judgment, paras 7–12.

(c) the price of the products. The Court ruled that all three criteria were useful and led to the conclusion that cheaper wines were subject to a considerably higher tax burden (up to several times higher depending on the criterion used) than domestic beer. Thus the British tax system had the effect of stamping wine with the hallmarks of a luxury product, which would not constitute a genuine alternative to domestic beer in the eyes of consumers.[211] Consequently, the UK had infringed Article 110(2) TFEU.

The outcome of these proceedings stands in stark contrast to that in the much more recent Swedish case, which concerned the same products.[212] The Court stated that strong beers and intermediate wines were in competition. Although it recognized that the tax burden on wine by reference to alcoholic strength was between 20 and 50 per cent higher than that on beer, it went on to analyse whether this had the effect of reducing potential consumption of imported wine to the advantage of domestic beer. Taking into account the fact that the relationship between the price of 1 litre of strong beer and that of 1 litre of competing wine was virtually the same before and after taxation (a ratio of 1:2), the Court concluded that the differential tax treatment was not likely to influence consumer behaviour in the long term and that Article 110(2) was not infringed.[213] It has been suggested that the diverging outcomes in the UK and Swedish *Wine and beer* cases are the result of the more sophisticated analysis carried out in the latter case and the Commission's failure to prove actual or likely protective effects.[214]

7.3 The holistic approach to Article 110 TFEU

The determination as to whether two products are 'similar' within the meaning of Article 110(1) TFEU may often be difficult in practice, since the precise boundaries of this concept remain blurred. Accordingly, in certain cases the Court has followed what might be called a 'holistic' approach to Article 110, namely an approach which does not distinguish between the first and the second paragraphs.

This can be observed in the *Spirits* cases.[215] The French *Spirits* case concerned a tax scheme which differentiated between spirits obtained from wine or fruit (eg cognac, armagnac, and calvados) and those based on cereals (eg whisky, gin, and vodka). The former category was predominantly French, whereas spirits in the latter category were overwhelmingly imported. After indicating that it was necessary to interpret the concept of 'similar products' with sufficient flexibility, the Court emphasized that the relevant criterion should not be the strictly identical nature of the products but that of their 'similar and comparable use'. The Court noted that it was impossible to disregard the fact that all the relevant products had certain common features (eg they were distilled and contained alcohol), but also had their own characteristics (the raw materials used, flavourings, or manufacturing processes). It found that some spirits were 'similar' to one another within the meaning of Article 110(1) TFEU, although it might be difficult to decide this in specific cases. At all events, spirits had sufficiently common characteristics to consider that they were at least in partial competition for the purposes of Article 110(2) TFEU.[216] Accordingly, in view of the difficulties of establishing whether certain products should be regarded as 'similar', the Court found that France had infringed Article 110 taken as a whole.

[211] Ibid, paras 13–28.

[212] Case C-167/05 *Commission v Sweden ('Wine and beer')* [2008] ECR I-2127.

[213] Ibid, paras 40 *et seq*.

[214] See C Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford: Oxford University Press, 2016) 64 *et seq*.

[215] Case 168/78 *Commission v France* [1980] ECR 347; Case 169/78 *Commission v Italy* [1980] ECR 385; and Case 171/68 *Commission v Denmark* [1980] ECR 447.

[216] *Commission v France* (n 215) paras 11–13.

It is submitted, however, that this approach can be problematic, due to the fact that Article 110(1) prohibits discrimination, while Article 110(2) prohibits protectionism. The consequence will be discussed in section 7.5. In any case, the Court has subsequently avoided applying the two paragraphs cumulatively.

7.4 Justification

Article 110 TFEU does not oblige Member States to impose uniform taxes on products. Systems of differentiated taxation are common. Such systems will not be deemed contrary to Article 110 TFEU if they are justified by an objective and legitimate policy reason (eg environmental protection, social policy, or economic policy). A variety of cases illustrate this point of principle, although in many of them the scheme was found to have discriminatory or protective effects.[217]

An interesting example is *Chemial Farmaceutici*, in which Italy had adopted a differentiated tax scheme applicable to ethyl alcohol obtained from fermentation (derived from agricultural products) and to synthetic ethyl alcohol (derived from oil).[218] In its judgment, the Court indicated that differentiated tax schemes may be permissible if three conditions are met. First, the criteria must be objective (eg the raw materials used or the production processes). Secondly, the differentiation must pursue legitimate economic objectives. Thirdly, the detailed rules must avoid any form of direct or indirect discrimination against imported products and any form of protection of competing domestic products.[219] The Court suggested that all three conditions were fulfilled in that case.

7.5 Remedies

The consequences of infringing Article 110(1) TFEU are different from the consequences of a breach of Article 110(2) TFEU: in the case of a discriminatory tax (Article 110(1)) the Member State must equalize the taxes imposed on similar products; but with a protective tax (Article 110(2)) it is required to eliminate the protectionist effect, without necessarily equalizing the tax.[220]

Persons who have paid undue tax by reason of a breach of either paragraph of Article 110 may recover the sums concerned according to the same principles as those applying to infringements of Article 30.[221]

8 The boundary between the provisions on free movement of goods

In *Iannelli v Meroni*, the Court held: 'However wide the field of application of Article [34] may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty.'[222] Consequently, it ruled that Articles 30 and 34 TFEU are mutually

[217] See *Hansen* (n 199) (tax differentiation to promote the use of certain raw materials, the production of spirits of high quality, or the continuance of certain classes of undertakings); *Regenerated oil* (n 199) (tax scheme promoting environmental protection); and Case C-132/88 *Commission v Greece* [1990] ECR I-1567.

[218] Case 140/79 *Chemial Farmaceutici* [1981] ECR 1. [219] Ibid, para 14.

[220] That is how the UK put an end to the infringement in *Wine and beer* (n 209).

[221] Case 68/79 *Hans Just* [1980] ECR 501; see section 5.5.

[222] Case 74/76 *Iannelli v Meroni* [1977] ECR 557, para 9. See also Case C-228/98 *Dounias* [2000] ECR I-577, para 39.

exclusive.[223] For the same reason, Articles 34 and 110 TFEU are also mutually exclusive.[224] It follows that Article 34 never applies to taxes.[225] Beyond any doubt, Article 35 TFEU cannot be applied cumulatively with Article 30 or 110 TFEU either. Equally, a tax or charge can be caught either by Article 30 or 110 TFEU, but not both.[226]

The rationale behind these principles is spelt out in the following passage of Advocate General Jacobs's Opinion in *De Danske Bilimportører*:

> If a charge is caught by Article [30] it must be abolished, whereas if it is caught by Article [110] then only the discriminatory or protective element need be removed. A measure caught by Article [34] may be permitted if it pursues one or more justified aims in a manner proportionate to their achievement, whereas the scope for justification under Articles [30] or [110] is very much more limited. On the other hand, those two articles apply only in a limited set of circumstances, always involving a charge or tax, whereas Article [34] is capable of applying to a very wide variety of measures which may hinder trade.[227]

8.1 The two *Danish cars* judgments

In *Commission v Denmark* ('*Cars*'),[228] the Commission sought a ruling from the Court that Denmark had infringed Article 110 TFEU with its very high registration taxes for new vehicles. The Court ruled that that provision could not be infringed because there was no domestic production of new motor vehicles in Denmark. This Article, it was held, cannot be relied on to challenge the excessive level of national taxes unless they can be regarded as discriminatory or protective.[229] However, the Court further suggested that, although the Commission's action must fail because it was based exclusively on Article 110 TFEU, it might be possible to challenge the tax on the basis of Article 34 TFEU.[230]

A decade later, this rather unusual assertion led an association of importers of motor vehicles to contest the high registration tax imposed on new motor vehicles (frequently exceeding 200 per cent!) on the basis of Article 34.[231] However, the Court found that the only relevant provision was Article 110 because the measure was of a fiscal nature and was part of a scheme of internal taxation. Nevertheless, it appeared to suggest that, if the tax was so high as to render imports of cars prohibitive (which was not the case, the Court found), then it might be contrary to some other provision of the Treaty;[232] but the Court did not mention a specific provision.

8.2 CEEs and discriminatory internal taxation

The dividing line between Articles 30 and 110 TFEU is as follows: the former applies to charges imposed due to the fact that products cross a frontier, whereas the latter applies

[223] See also Joined Cases C-78–93/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847 and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, para 32.

[224] *Fink-Frucht* (n 190) and *Iannelli* (n 222).

[225] Accordingly, the ruling in Case C-591/17 *Austria v Germany*, ECLI:EU:C:2019:504 is highly anomalous: it was held that there a discriminatory road tax on passenger vehicles was a breach of, inter alia, Article 34, although taxes cannot fall under that provision but under Article 30 or Article 110, as the case may be; but the latter two provisions were not even mentioned in the ruling, because Austria had not relied on them.

[226] Case C-234/99 *Nygård* [2002] ECR I-3657, para 17 and *De Danske Bilimportører* (n 223) para 33.

[227] *De Danske Bilimportører* (n 223) para 31 of the Opinion.

[228] Case C-47/88 *Commission v Denmark ('Cars')* [1990] ECR I-4509.

[229] Ibid, para 10. [230] Ibid, paras 12 and 13. [231] *De Danske Bilimportører* (n 223).

[232] *De Danske Bilimportører* (n 223), para 40.

to taxes imposed within a Member State.[233] Thus, the chargeable event for taxes caught by Article 110 is an internal transaction, unconnected as such with the importation or exportation of the goods.[234]

Two types of situation deserve to be briefly mentioned here: the cases in which the charge is imposed on goods of a kind which is not produced in the Member State in question; and so-called 'parafiscal' charges.

As regards the cases in which there is no domestic production of the relevant goods, this fact is irrelevant for the characterization of the charge.[235] The charge may be a CEE[236] or an internal tax[237] depending on the chargeable event. If it is imposed by reason of the fact that goods cross a frontier (for instance by reference to the origin or destination of the goods), it will be a CEE; but it will constitute internal taxation if it is part of a general system of internal dues, even if there is no domestic production.

The phenomenon of 'parafiscal' charges relates to situations in which the proceeds are used to provide a benefit to the domestic industry. Usually, the charge is imposed both on imported and domestic products. Parafiscal charges may fall within the scope of Article 30 or Article 110 depending on whether the advantage granted to the domestic production wholly or partly offsets the burden of the charge. In the first case, the parafiscal charge will be regarded as a CEE, whereas the second case will be analysed from the perspective of discriminatory internal taxation.[238]

For instance, in *Koornstra*[239] the Dutch authorities imposed a charge on traders who transported shrimp in a Dutch fishing vessel. The charge was based on the quantities of shrimp landed. The revenue obtained from the charge was used to finance the purchase, installation, and maintenance of shrimp sieves and peelers. Koornstra was subject to the charge for shrimp landed in the Netherlands (which could benefit from the equipment in question) and also shrimp directly landed in other Member States (which could not benefit from the equipment). The Court held that, if the burden of the charge on shrimp landed in the Netherlands was fully offset by the advantage deriving from the use of the equipment, the charge should be regarded as a CEE on exports. In contrast, if the burden was only partially offset, then the charge should be regarded as internal taxation which discriminated against exported products.

8.3 What if there are two distinct, but closely linked measures?

Finally, there are situations in which two distinct measures may nevertheless be closely linked. This is clearly illustrated by the cases in which imports and/or exports are subject to health inspections, and a charge is imposed for those inspections. The inspections

[233] *Commission v Denmark* ('*Cars*') (n 228). If a charge is imposed on domestic and imported goods at the same marketing stage and the chargeable event is identical in both cases, it will be regarded as part of the internal taxation system and will be analysed under Article 110. In contrast, if a charge is imposed on products intended for export on the grounds that products consumed domestically are subject to a similar charge, it will be treated as a CEE under Article 30. See Case C-305/17 *FENS*, ECLI:EU:C:2018:986, paras 36–41.

[234] For an unusual case, see *Viamar* (n 27).

[235] Otherwise the same type of measure applied in two different Member States would be characterized differently, depending on whether there is domestic production of the goods in question. Moreover, the existence or otherwise of domestic production may change over time, which would create legal uncertainty.

[236] See *Diamonds* (n 22); see section 5.2.

[237] See *Co-Frutta* (n 8), in which Italy applied a tax on the consumption of bananas. Although the production of bananas was almost non-existent in Italy, the Court considered that the tax should be assessed under Art 110.

[238] Case 77/72 *Capolongo* [1973] ECR 611; Case 77/76 *Cucchi* [1977] ECR 987; *Compagnie Commerciale de l'Ouest* (n 67); Case C-28/96 *Fazenda Pública* [1997] ECR I-4939; *Nygård* (n 226); and Case C-517/04 *Koornstra* [2006] ECR I-5015.

[239] *Koornstra* (n 238).

constitute MEEs under Articles 34 and 35 TFEU (which may well be justified), while the charges are CEEs under Article 30 TFEU.[240]

9 Conclusion

As the reader will be aware, the Treaty of Rome which established the EEC came into force on 1 January 1958. All the provisions discussed in this chapter became effective by the end of 1969, but some had already done so before then.

In 1985, the Commission published a White Paper on 'Completing the internal market,'[241] which set as its goal the creation of a fully unified internal market for goods, persons, services, and capital by 1992. This created the political impetus for the adoption of the Single European Act of 1987, which amended the Treaties so as to attain that goal.[242] As regards the free movement of goods, the objective set in the Single European Act was achieved to a very considerable extent, thanks to the adoption of a vast body of EU legislation. In particular, as from 1 January 1993, it became unlawful for a Member State to carry out systematic customs or other controls at its borders with the other Member States; it may only carry out such controls to the extent that it does so *within* its own territory.

Of course, that does not mean that the internal market for goods has been 100 per cent complete since the end of 1992. That is not even intended by the Treaties. Let us return to the quotation from the *Gaston Schul* judgment[243] set out at the very beginning of this chapter. To paraphrase that passage, the Court stated that the common market (now the internal market) involves the creation of a single market in conditions 'as close as possible' to those of a genuine internal market. In the same vein, Article 26(2) TFEU states that the internal market shall comprise an area without internal frontiers in which free movement is ensured 'in accordance with the provisions of the Treaties'. The Treaties include Article 36 TFEU (and its counterparts relating to the other fundamental freedoms). Thus the Treaties recognize that Member States can impose quantitative restrictions and MEEs for the public good in certain limited circumstances. That will always be the case, because it is not possible for the Union legislator to harmonize absolutely everything—even supposing that that is desirable! But until recently, as regards goods, the internal market appeared to be as near completion as it was ever likely to be, although the export bans imposed by several Member States at the onset of the Covid-19 pandemic were disappointing.[244]

Further reading

C Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford: Oxford University Press, 2016) chs 1–6

L Gormley 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925

L Gormley, P Nihoul, and E van Nieuwenhuyze (eds), 'What Standard after *Keck*?' [2012] *European Journal of Consumer Law* 193

P Oliver, 'Mutual Recognition: Addressing Some Outstanding Conundrums' in A Albors-Llorens, C Barnard, and B Leucht (eds) *Cassis de Dijon: 40 Years On* (Oxford: Hart Publishing, forthcoming).

[240] *Bauhuis* (n 35) paras 12 and 13. [241] COM(85) 310.
[242] For a brief historical overview, see chapter 11. [243] *Gaston Schul* (n 2). [244] n 108.

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

R Schütze, *From International to Federal Market* (Oxford: Oxford University Press, 2017) chs 3-4

J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437

E Spaventa, 'Leaving *Keck* Behind? The Free Movement of Goods after the Rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) 34 *European Law Review* 914

Chapter acknowledgements

The authors write here in their personal capacity.

13

Free movement of natural persons and citizenship of the Union

Catherine Barnard

1 Introduction

Any reader of this book, who is an EU national, is likely to have exercised rights of free movement within the EU: as a tourist on holiday in Italy, as a student studying on an Erasmus programme in Germany, as a chalet attendant working in the French Alps, as a ski instructor there, or as a recipient of services provided by Amazon in Luxembourg. All of these situations are covered by one of the following provisions of EU law:

- Article 45 TFEU on the free movement of workers, which allows EU nationals to work in another Member State in an employed capacity;
- Article 49 TFEU on freedom of establishment, which allows EU nationals to work in another Member State in a self-employed capacity;
- Articles 56 and 57 TFEU on the free movement of services, which allow EU nationals to provide or receive services in another Member State.

These three types of movement, all included in the Treaty of Rome, presuppose that the migrant EU nationals are 'economically active' (as a worker, a self-employed person, or as a provider/receiver of services). They contribute to the economy of the host State (ie the State in which they work), through their labour and by paying taxes. They were thus seen by the Treaty drafters as a benefit to the host State. However, since the Maastricht Treaty in 1992, 'Every person holding the nationality of a Member State shall be a citizen of the

Union' (now Article 20 TFEU),[1] which, according to Article 21 TFEU, gives them certain rights to free movement, whether they are economically active or not. While EU citizenship was introduced to give a greater sense of EU identity to EU nationals, increasingly receiving States were concerned about benefit tourism, namely individuals moving with a view to obtaining (better) social welfare benefits in other States.

The Treaty rights on free movement of persons (Articles 45, 49, 56, and 21 TFEU) have been elaborated by the EU legislature, notably by the Citizens' Rights Directive (CRD) 2004/38[2] and, for workers, by Regulation 492/11[3] and the Enforcement Directive 2014/54.[4] The advent of EU citizenship has produced some surprise twists and turns in the case law[5] and has, at least in the past, helped to shape the Court's interpretation of the secondary legislation.

The aim of this chapter is to give an overview of the EU rules on free movement of natural persons; chapter 14 considers the free movement rules in respect of legal persons. The rules on free movement of persons cover a vast area of law, so this chapter is inevitably selective both in its choice of subject matter and the cases discussed.

The free movement of persons has proved the most controversial of the four freedoms. For some it is an article of faith, the defining feature of the EU. For others it is a destructive force, with migrants competing with nationals for jobs and other limited resources (housing, maternity services, schooling), ultimately leading to a hollowing out of national identity. This fear of immigration was exacerbated by the 2004 and subsequent enlargements which brought countries into the EU where wages were significantly lower than those in Northern European states, thus creating the incentive for significant movement. Transitional arrangements were put in place by a number of countries to stop the sudden arrival of a large number of migrants from the Eastern European countries; these arrangements expired seven years after the enlargement.

The UK (together with Ireland and Sweden) did not impose transitional arrangements in 2004. It proved a magnet for migrant workers. The economy benefitted but, for many voters, especially in small, economically deprived towns, the arrival of many Eastern European workers was a threat. As the *Economist* noted, where foreign-born populations increased by more than 200 per cent between 2001 and 2014, a Leave vote followed in 94 per cent of cases.[6]

With this context in mind, four themes/questions will shape this chapter. First, one of the indicators of national sovereignty is the ability for a State to 'control its own borders' or rather control who comes into its country and for what purposes. The EU rules on the four freedoms pose a direct challenge to this. Some say that if the EU is becoming more like the United States of Europe then people should be able to move as freely between Bucharest and Berlin as they do between New York and Florida. Others say that the EU is far from (and should never become a United States of Europe) and so controls are needed. This raises the question of whether economic migration is beneficial for the host State and its (non-migrant) citizens? If not, should States be able to control the number of economic migrants coming into their country or ban them altogether?

Secondly, judicial decisions, together with the CRD, have broadened the net of beneficiaries of free movement to include those who are not (so) economically active (work-seekers,

[1] Art 20 TFEU continues 'Citizenship of the Union shall be additional to and not replace national citizenship.'

[2] OJ [2004] L8/17. [3] OJ [2011] L141/1. [4] OJ [2014] L128/8.

[5] See eg Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[6] http://www.economist.com/news/britain/21701950-areas-lots-migrants-voted-mainly-remain-or-did-they-britains-immigration-paradox.

students, persons of independent means—the 'semi-economically active') as well as the economically inactive (eg the homeless). Why should the non-economically active be able to migrate? Does a shared EU citizenship entitle them to move and if so enjoy social security benefits in the host State? Might this serve to undermine, rather than strengthen, any nascent solidarity upon which EU citizenship is based? At what price does this come to already overburdened social welfare systems in the host States? And at what moment can Member States say that the question of who is admitted to their territory, and on what terms, is a matter for national law over which EU law has no say?

Thirdly, the extension of the rights of free movement to the semi- and non-economically active is an illustration of a broader dynamic witnessed elsewhere in EU law: an increasing reference to, and reliance on, human rights.[7] Migrants are no longer seen simply as factors of production contributing to the economy of the host State but also as the bearers of human rights. This means that, in principle, they should enjoy a certain standard of living in the host State, as should their family members, irrespective of the nationality of those family members. The Court has used the advent of European Union citizenship to reinforce the link between migration and human rights—whether derived from the European Convention on Human Rights (ECHR) or from the EU Charter (see section 8).[8] What are the implications of this development? Does it mean that the right to free movement, itself a fundamental right in the Treaty and the Charter, applies not only to the young, fit, and well educated but also to groups viewed less favourably by society, including the Roma from Hungary and Romania[9] and travelling football fans?[10] Further, do third-country nationals (TCNs), also human beings but not EU citizens, benefit from these rights?

Fourthly, should a single set of rules apply across the free movement of persons provisions? At first sight, the answer to this question is yes: Articles 45, 49, 56, and 21 TFEU all concern natural persons who move from one EU State to another. Often it is difficult to police the boundaries between one provision and another (see section 4). It therefore makes sense to apply common principles. However, if this analysis is correct, why have separate Treaty provisions at all? This suggests that there are differences between the Treaty provisions, but, if so, what might they be?

The analysis that follows will be structured round seven questions which are considered in some form in most free movement of persons cases:

(a) Does EU law apply at all (section 2)? If yes,

(b) Which provision of the Treaty is engaged (section 3)?

(c) Does EU law apply to this particular person or entity (section 4)? If yes,

(d) What rights do migrants enjoy under the secondary legislation (section 5)?

(e) Has national law infringed EU law in any other way (section 6)? If yes,

(f) Can that breach be justified (section 7)? If yes,

(g) Is the breach compatible with human rights and proportionate (section 8)?

We begin with the most fundamental question: does EU law apply at all?

[7] See further chapter 9.

[8] C Barnard, 'Citizenship of the Union and the Area of Justice: (Almost) The Court's Moment of Glory' in A Rosas, E Levits, and Y Bot, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (The Hague: Asser Press, 2012).

[9] M Dawson and E Muir, 'Individual Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 *Common Market Law Review* 751.

[10] *Gough and Smith v Chief Constable of Derbyshire* [2002] 2 CMLR 11 and E Deards, 'Human Rights for Football Hooligans?' (2002) 27 *European Law Review* 206.

2 Does EU law apply at all?

2.1 Introduction

Various attempts have been made by the parties to argue that their case falls outside the scope of EU law and so should be judged by the standards of *national* law only, which they consider to be more favourable. The leading case of *Viking* provides a good example of this.[11] Viking Line, the Finnish owners of a passenger ferry which plied the route between Helsinki in Finland and Tallinn in Estonia, wanted to reflag the vessel as Estonian. The Finnish Seamen's Union (FSU), fearing that Finnish seamen's jobs were at stake, threatened strike action, strike action which would have been lawful under Finnish law. The International Transport Federation (ITF) also told its members to black (ie not service) any Viking vessel. Viking Line argued that the action by FSU and ITF breached Article 49 TFEU on the freedom of establishment.

The first question for the Court of Justice was whether EU law applied at all. The trade unions and some governments argued not. For example, the Danish government argued that the right of freedom of association, the right to strike, and the right to impose lock-outs fell outside the scope of the fundamental freedom laid down in Article 49 TFEU since, in accordance with Article 153(5) TFEU, the EU does not have competence to regulate those matters.

The Court disagreed:[12]

> even if, in the areas which fall outside the scope of the Union's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with [Union] law (see, by analogy, in relation to social security (*Decker and Kohll*);[13] in relation to direct taxation (*Commission v France* and *Marks & Spencer*)).[14]

In other words, even in areas such as social security, taxation, and strike action, where the EU has no—or highly circumscribed—competence to legislate, the Treaty provisions on the four freedoms will still apply.

That said, there are three significant limitations on the application of the free movement provisions which the Court has, more or less consistently, upheld. The Treaty provisions apply only to those who:

(a) hold the nationality of a Member State;

(b) have moved to another Member State; and

(c) (in the case of Articles 45, 49, and 56 TFEU) have been, or are, engaged in some economic activity in the Member State they have moved to.

If one of these conditions is not satisfied EU law will not apply. We shall consider these conditions in turn.

[11] Case C-438/05 *International Transport Workers' Union Federation et al v Viking Line ABP* [2007] ECR I-7779. See also chapter 19.

[12] *Viking Line* (n 11) para 40, case references put into footnotes.

[13] Case C-120/95 *Decker* [1998] ECR I-1831, paras 22 and 23 and Case C-158/96 *Kohll* [1998] ECR I-1931, paras 18 and 19.

[14] Case C-334/02 *Commission v France* [2004] ECR I-2229, para 21 and Case C-446/03 *Marks & Spencer v Halsey* [2005] ECR I-10837, para 29.