



UNIVERSITÀ
DEGLI STUDI DI TRIESTE



Free Movement of Goods

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The 'Four Freedoms' of the Internal Market

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graph TD; A["The 'Four Freedoms' of the Internal Market"] --> B["Free movement of goods"]; A --> C["Free movement of persons"]; A --> D["Free movement of capital"]; A --> E["Free movement of services & freedom of establishment"];
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**Free movement
of goods**

**Free movement
of persons**

**Free movement
of capital**

**Free movement of services
& freedom of establishment**



FINANCIAL TIMES

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The EU single market: How it works and the benefits it offers

Brexit vote has thrown up big questions about future trading



NEWS 09:29

EU leaders fail to agree on coronavirus economic rescue



NEWS > WORLD

EU marks 25th anniversary of open-border Schengen pact with closed frontiers

News Desk

Reuters

Brussels, Belgium / Thu, March 26, 2020 / 08:44 pm





EU internal market - form of economic cooperation between the MSs **‘core of the current EU’**

https://ec.europa.eu/info/topics/single-market_en





International economic integration

Economic policy dilemma:

protectionism v. economic liberalisation

How can states protect domestic production?

What instruments can they adopt to restrict smoking?



Economic liberalisation

- What are its advantages?
- What are its disadvantages?



London School of Economics and Political Science 2007 Coll Misc 0519-32



Forms of economic cooperation between states

	FTA	Customs union	Common market	Econ and monetary union	Full econ. integration
Removal of customs and quota	X	X	X	X	X
Common customs tariff		X	X	X	X
Free movement of factors of production			X	X	X
Coordination of economic policies				X	X
Full unification of economic policies					X



EU – Largest economy in the world

- EU – 27 MSs;
- EEA – Norway, Iceland and Liechtenstein;
- Bilateral treaties with Switzerland;
- UK post Brexit? (the Trade and Cooperation Agreement signed on 30 December 2020)



European Economic Area

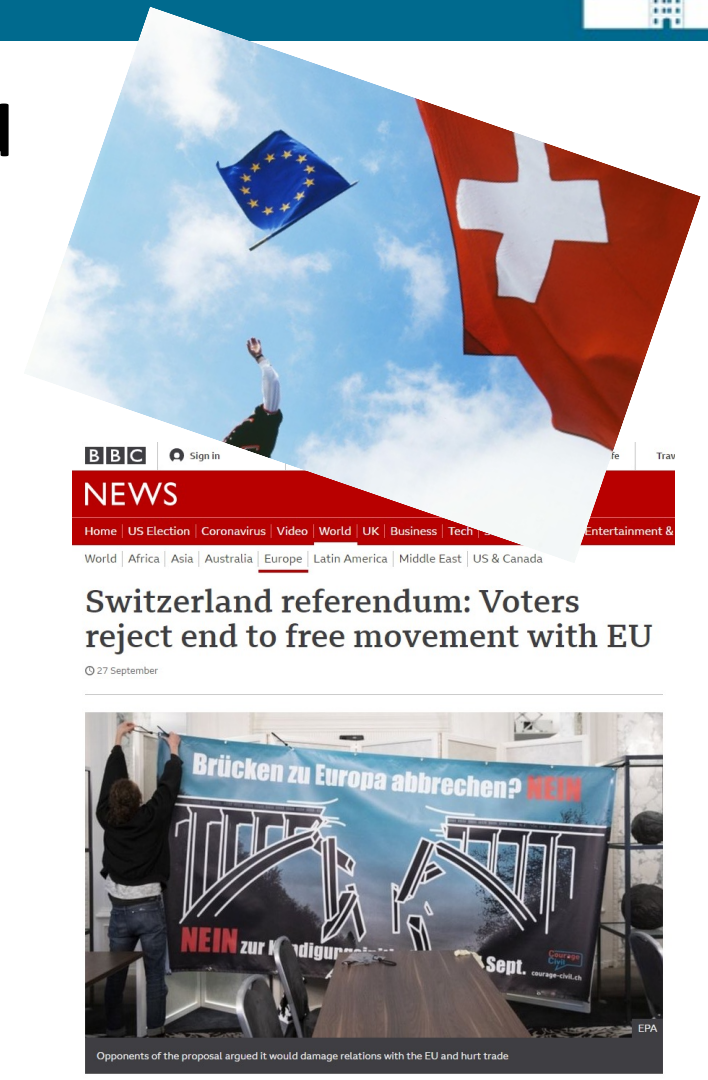
- EU + Norway, Iceland, Liechtenstein
- Application of EU rules on FM of goods, persons, services and capital;
- Exclusion of common agricultural policy and fisheries;
- No mention of „increasingly closer Union“.





EU - Switzerland

- The cornerstone of EU-Swiss relations: Free Trade Agreement of 1972;
- In 1992 Switzerland rejected the EEA membership;
- 7 bilateral agreements signed in 1999 ("Bilaterals I"): free movement of persons, technical trade barriers, public procurement, agriculture and air and land transport;
- Bilaterals II (2004): Schengen and Dublin, agreements on taxation of savings, processed agricultural products, statistics, combating fraud, participation in the EU Media Programme and the Environment Agency;
- 2010: Swiss participation in EU education, professional training and youth programmes.





Internal Market

Article 3(3) of the Treaty on the European Union:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

(a mission statement)



The Foundations:

Non-discrimination and Internal Market

■ Article 18 TFEU

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. [...]”

■ Article 26 TFEU

“1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. 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. ...”



Fundamental Principles

1. The principle of non-discrimination:

- Art 18 TFEU prohibits "any discrimination on grounds of nationality"; it is prohibited to treat imported goods differently to domestic goods etc.
- **Discrimination** is understood as meaning **different treatment, on the basis of nationality, under the same circumstances** and vice versa;

2. Mutual recognition (derives from the case law)

- The principle claims that **the legislation of another Member State is equivalent in its effects to domestic legislation**
- This principle was laid down by the Court of Justice in the *Cassis de Dijon* judgment.
- Although this principle of mutual recognition applies chiefly to products, it has also had an impact on the other freedoms, particularly those involving the performance of services, where it underlies the concept of the recognition of diplomas.

3. EU legislation (in addition to the principle of mutual recognition):

- Treaty provisions, regulations and directives.



FREE MOVEMENT OF GOODS



Internal market for goods:

- ❑ CUSTOMS UNION
- ❑ PROHIBITION OF DISCRIMINATORY INTERNAL TAXATION
- ❑ PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT



Concept of „goods“

“products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.” – *Comm v Italy* (7/68)

Are medical products based on human blood goods? *Medisanus v. SB MS*)

What about marihuana (*Josemans, C-137/09*)?

Waste (*Wallonie Waste, C-129/96*)? Coins (*Thompson, 7/78*)? Lottery tickets?





A customs union...

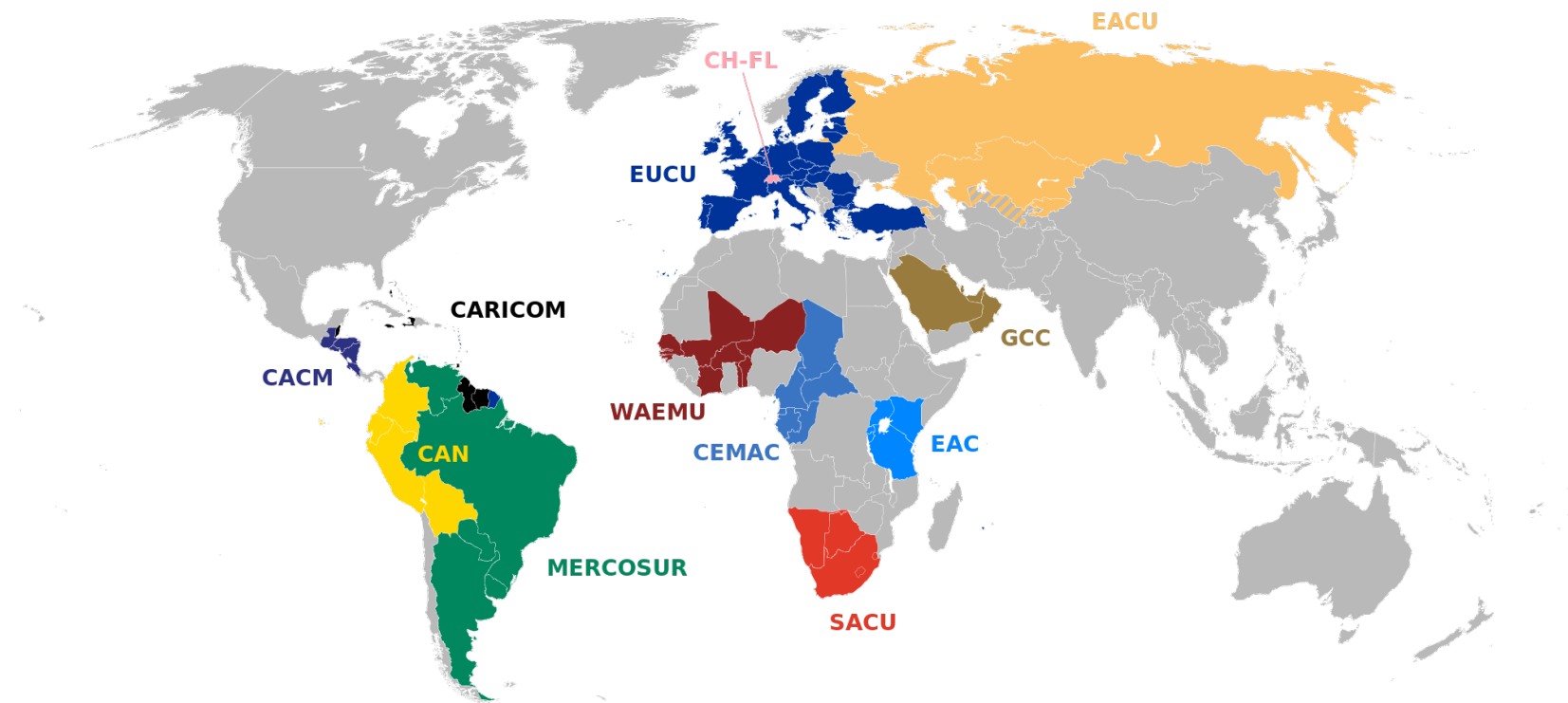
Article 28 TFEU

1. The Union shall comprise **a customs union** which shall cover all trade in goods and which shall involve **the prohibition between Member States of customs duties** on imports and exports and of all charges having equivalent effect, and the adoption of **a common customs tariff in their relations with third countries**.
2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.





Customs unions across the world





Prohibition of Customs Duties

2 dimensions:

- Elimination of customs duties and charges having equivalent effect
- Adoption of a common customs tariff (CCT)





Origin of goods

- ❑ GOODS OF EUROPEAN ORIGIN
- ❑ GOODS IN FREE CIRCULATION
- Article 28/2 TFEU: The provisions (on free movement of goods) shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.



Prohibition of Customs Duties

Goods in “free circulation”

Article 29 TFEU

“products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any custom duties or charges having equivalent effect which are payable have been levied in that Member State and if they have not benefited from total or partial drawback of such duties or charges.”



Internal dimension of the CU

Article 30 TFEU

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States.

Direct effect: *Van Gend*, 26/62



Charges having equivalent effect - absolute prohibition

*"Customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. **Any pecuniary charge**, however small and whatever designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense, constitutes **a charge having equivalent effect** (...), even if it is not imposed for the benefit of the state, (...) or if the product on which the charge is imposed is not in competition with any domestic product ."*

Comm v Italy (re stat. Levy), 24/68



Charges having equivalent effect – quasi customs duties (absolute prohibition)

- Any pecuniary charge, however small (no de minimis): Comm v Italy, 24/68,
- May result from a contract: Dubois v Garonor, C-16/94
- Purpose irrelevant: Social Fonds voor de Diamantarbeidersv 2&3/69; Michailidis, C-441/98
- Time and place, where customs were imposed are irrelevant: Firma Steinike, 78/76, Lancy, C-363&407-411/93, Smitzi v Kos, C-485&486/93
- Irrelevant if competitive domestic product exists,
- That is imposed on a product and affects its price: Frohnleiten, C-221/06
- That is imposed by reason of the fact that they cross a frontier (distinction between Articles 28 and 110 PDEU!)



What does not amount to a quasi customs duty under Article 30 TFEU?

The following charges are NOT PROHIBITED, provided that certain conditions are met:

- Charges imposed on domestic and imported goods
- Charges for services provided for importers/exporters
- Charges for inspections imposed by EU law
- Taxes



1) Charges imposed on domestic and imported goods

A duty falling within a general system of internal taxation applying to domestic products as well as to imported products according to the same criteria **can constitute a charge having an effect equivalent to a customs duty** on imports only if:

- It has the sole purpose of financing activities for the specific advantage of the taxed domestic product,
- if the taxed product and the domestic product benefiting from it are the same, and
- if the charges imposed on the domestic product are made good in full.



2) Charges for services provided for importers/exporters

2 conditions to fall out of Article 30 TFEU:

- Specific service actually and individually rendered for an individual**

Cadsky, 63/74 – obligatory vegetables inspection

„It cannot represent consideration for a service actually provided for the exporter when this service consists in a quality control of products for export, coupled with a prohibition on the export of products which do not meet the standards of quality provided for by national law“.

- Proportionality of the charge to the value of the service rendered (not ad valorem of the goods!): *Ford España, 170/88***



3) Mandatory charges under EU and international law

Not considered as charges under Article 30 TFEU provided that:

- . do not exceed the actual cost
- . mandatory for all products in the EU
- . determined by the EU in the general interest of the EU
- . promote the free movement of goods;

Commission v Germany, 18/87 – veterinary inspection based on an EU directive.



4) Discriminatory internal taxation

taxes – customs

Treaty provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system of the Treaty the same measure cannot belong to both categories at the same time.

(Lütticke, 57/65)

DISTINCTION: customs are completely prohibited; taxes only in discriminatory part



Internal market for goods:

- ❑ CUSTOMS UNION
- ❑ PROHIBITION OF DISCRIMINATORY INTERNAL TAXATION
- ❑ PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT



Fundamental TFEU provisions

PRINCIPLES

Article 34

Quantitative restrictions on **imports** and all measures having equivalent effect shall be prohibited between Member States.

Article 35

Quantitative restrictions on **exports**, and all measures having equivalent effect, shall be prohibited between Member States.

DEROGATIONS

Article 36

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.



3-stage analysis

- Which freedom is at stake?
- Is the freedom restricted?
 - Direct discrimination
 - Indirect discrimination
 - Restriction of access to the market?
- Is the restriction justifiable?
 - Legitimate aim
 - Suitable
 - Proportional (urgent, no alternative means).





Quantitative restrictions

“Any total or partial prohibition on imports, exports or goods in transit”

Geddo v Ente Nazionale Risi, 2/73; R v Henn & Darby, 34/79





Prohibition of the import of alcoholic beverages

- ❑ Rosengren, C-170/04
- ❑ Only Systembolaget and wholesalers authorised by the State may import alcoholic beverages. Private individuals are prohibited from importing booze. If a person wants to import alcohol from another MS, that person must do so exclusively through Systembolaget.
- ❑ Mr Rosengren and the others were charged with the criminal offense of unlawful importation of alcoholic beverages.





Court of Justice in Rosengren, C-170/04

- the Swedish rules on importation constituted **a clear quantitative restriction** on the FMG: the law imposed on consumers **a variety of inconveniences** with which they would not be faced if they imported the beverages themselves and **the price** charged by the Systembolaget to consumers included all manner of extras which would not have been charged in the event of a direct import.
- Whether the restriction could be justified? The CJEU held that it **could not be justified**. In particular, it held that the prohibition of importation must be considered **unsuitable** for attaining the objective of protecting the health and life of persons and was **clearly disproportionate** to the goal of protecting young people because it applied to all, regardless of age.



Prohibition of Quantitative Restrictions and MEE

Case 8/74 *Dassonville*

Measure having equivalent effect to a quota

- Belgium required a UK certificate of authenticity from importers of Scotch whiskey – more difficult for importers who bought the whiskey from another Member State and not directly from the UK
- ***Dassonville* formula:** *All trading rules enacted by MS which are **capable of hindering, directly or indirectly, actually or potentially**, intra-Union trade are to be considered as measures having an effect equivalent to quantitative restrictions*





Actually or potentially

- Bluhme, C-67/97; Buy Irish, 249/81

Directly or indirectly

Direct discrimination

(distinctly applicable) – CJEU:
'measure applies solely to
the foreign products'

Indirect discrimination

(indistinctly applicable) –
CJEU: 'impose additional costs
on the importer'

- What does it mean to discriminate?
- Directive 70/50: discriminatory and non-discriminatory measures;
- Reversed discrimination is not prohibited (wholly internal rules)



DIRECTLY DISCRIMINATORY MEASURES

- ❑ Legal/direct discrimination, distinction between domestic and imported goods;
- ❑ Distinguishing factor: WHERE are the goods FROM?
- ❑ **Import licenses and inspections:** *Denkavit*, 251/78; *Int Fruit Co.*, 21/72; *Rewe Zentralfinanz*, 33/76;
- ❑ **Obligatory certification:** *Dassonville*, 8/74;
- ❑ **Promoting domestic products:** *Buy Irish*, 249/81;
- ❑ **Requirement to use domestic products,** *Campus Oil*, 72/83
- ❑ **Discriminatory public procurement,** *Dundalk Water Supply*, 45/87; *Medisanus*, C-296/15.





Priority to medicinal products from national plasma

■ Medisanus, C-296/15 (CJEU, 2017):

Slovenian law requiring that hospitals are to be supplied as a matter of priority with medicinal products obtained from national plasma;

ECJ rules that Slovenian procurement of medicinal products is unlawful

by *Practical Law Public Sector*

On 8 June 2017, the ECJ handed down its ruling in the case of *Medisanus d.o.o. v Splosna Bolnisnica Murska Sobota* (Case C- 296/15).

Published on 14-Jul

Resource Type

Legal update: case 1



Campaigns „kupujmo slovensko“





Buy Austrian!



- „Das in rot gehaltene Zeichen (...) steht für ein Bioprodukt, dessen Rohstoffe zu 100 Prozent aus Österreich kommen...“





Sponsor's role

- Vertical direct effect of Art 34 TFEU;
- motions of private entities are also caught by Art 34 TFEU, provided they can be attributed to the state – be it because:
 - they were established by the state,
 - largely financed by the government or
 - through obligatory contribution of companies in certain sectors, and/or
 - have members that are appointed or controlled by public authorities



A barrier to FMG?

Buy Irish case (249/81)

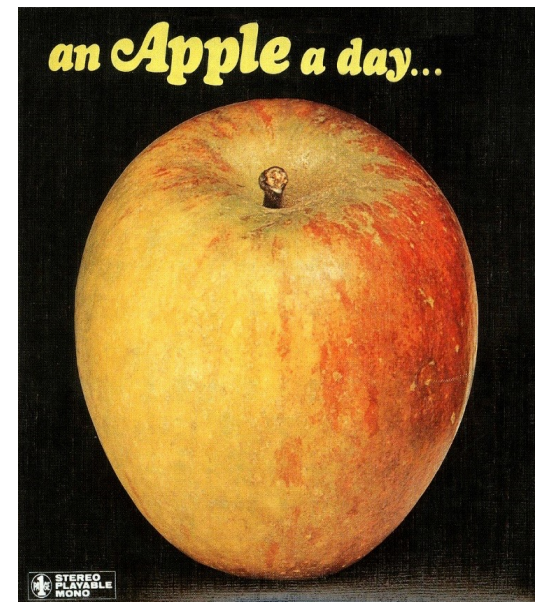
- The Court condemned the campaign because it reflected the Irish government's desire to achieve *“the substitution of domestic products for imported products and was liable to affect the volume of trade between Member States”*





Apple&Pear (222/82)

- state-sponsored promotion of national goods is not legal if only the national origin of the goods is emphasized;
- the promotion of specific goods which have special characteristics, not only that of domestic production, is lawful.





INDIRECTLY DISCRIMINATORY MEASURES

Rules and practices that legally apply to domestic and imported goods, but in effect cause higher burden for imported goods (DUAL BURDEN)

□ shape, size, weight, composition, appearance of the goods...





Prohibition of Quantitative Restrictions and MEE

Case 120/78 *Cassis de Dijon*

- *Cassis de Dijon* – Germany imposed a rule on what can be
- imported as a liqueur (above 25% alcohol)



1. Mutual Recognition:

There is no valid reason why, provided that goods have been lawfully produced and marketed in one MS, they should not be introduced into any other MS.

2. The Rule of Reason:

Certain measures, even if within *Dassonville* formula, will not breach Art. 28 if they are necessary (proportionality) to satisfy mandatory requirement (objective justification) relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.



Cassis de Dijon

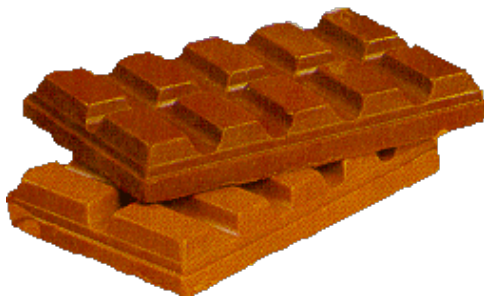
The Court:

- 1. Introduced the concept of mutual recognition**
- 2. Introduced the concept of mandatory requirements (rule of reason)**



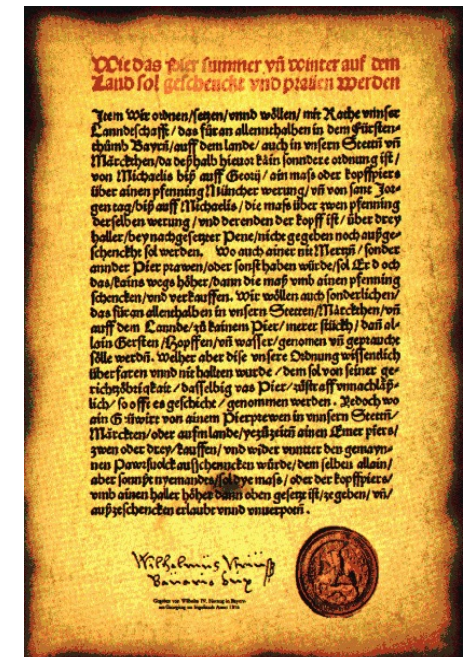
Indirectly discriminatory measures post Cassis

- Gilli and Andres, 788/79 – apple vinegar
- Walter Rau, 261/81 – shape of margarine & butter
- Drei Glocken, 407/85 – pasta from grano duro
- Comm v Italy, C-14/00 – ‘chocolate’ only with cocoa butter



German pure beer law

- Biersteuergesetz (often referred to as the Reinheitsgebot) adopted by Duke Wilhelm IV of Bavaria in 1516;
- reserved the name 'Bier' for malted barley, hops, yeast and water only;
- 2 reasons:
 - Beer as a contribution against dehydration of the population;
 - Protection of the barley sector.





German pure beer law

- Case 178/84, Commission v Germany;
- CJEU: Reinheitsgebot is protectionist and breaches Article 34 TFEU;

IT MUST BE HELD THAT BY PROHIBITING THE MARKETING OF BEERS LAWFULLY MANUFACTURED AND MARKETING IN ANOTHER MEMBER STATE IF THEY DO NOT COMPLY WITH ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ, THE FEDERAL REPUBLIC OF GERMANY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY .





Categories of Measures Possibly Caught in Violation of Art. 34 by the *Dassonville* Formula

1. **Discriminatory measures** on the ground of nationality – applying only to imports or differently than to national products (**distinctly applicable measures**)
2. **Non-discriminatory measures**: so-called **product requirements**, related to the production and marketing of goods that **apply without distinction** to both foreign and domestic goods but it is usually **more burdensome** for foreign companies/goods (*Cassis de Dijon* Case 120/78) (**indistinctly applicable measures**) **dual burden**
3. **Selling arrangements**: category created by **Keck Case C-267/91** related to measures as to how goods should be sold (manner of sale) – WHERE; WHEN; HOW



Case C-267/91 *Keck and Mithouard*

- Keck and Mithouard sold coffee and beer in France at a retail price below the wholesale price
- French law prohibited re-sale at a loss
- Court:
 - In view of the increasing tendency of traders to invoke Art. 34 as a means of challenging any rules whose effect is to limit their commercial freedom, even where such rules are not aimed at products from other MS, it is necessary to re-examine the Court's case law on this matter
- Did not entirely overturn *Dassonville* and *Cassis*, but it introduced a new distinction between rules concerning “**product requirements**” and what it called “**certain selling arrangements**”



■ 1. Product requirements

- e.g., form, size, weight, composition, presentation, labeling, or packaging
- With regard to product requirements, nothing changes: the prior case law applies just as before

■ 2. Certain selling arrangements

- Court: Contrary to what has previously been decided, national rules that do not regulate trade but restrict certain selling arrangements do not hinder trade between MS within the meaning of *Dassonville* if two conditions are satisfied...



1. the national provisions must apply to all affected traders operating in the territory
 2. the provisions must be non-discriminatory in law and in fact
- Court: if those conditions are satisfied, then the restrictions do not impede market access for foreign goods any more than they do for domestic goods

Advertising restrictions

- Is advertising on the product a selling arrangement? CJEU: NO!
- MARS, C-470/93;
- *Article 34 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another MS, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+ 10%" on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation.*





Are advertising bans in line with Art 34?

Gourmet Int, C-405/98 – ACCESS TO THE MARKET TEST, BUT related to the discrimination test:

Swedish law prevented alcohol advertising;

CJEU: the marketing laws would be lawful if they did not prevent **access** for products from other Member States or did not **impede access any more than for domestic products**.

The absence of advertising prevented foreign products from achieving recognition/brand awareness when **compared** to domestic products, and thus constituted obstacle to the FMG – and needed to be justified.





Rules on use of products

- national rules governing HOW AND WHERE PRODUCTS MAY BE USED – are these MEQRs?
- An Italian rule prohibited motorcycles, mopeds, bicycles etc. from pulling trailers.
- Comm v Italy (C-110/05), Grand Chamber, 10 Feb 2009
- 2 AGs issued their opinions (Leger – disc. test and Bot – access to the market test).
- CJEU: the rule does not discriminate with regard to origin but in fact only imports were affected as no trailers were manufactured in Italy.
 - Prohibition has an impact on consumer behaviour which will have an affect on the product demand – this made it an MEQR.
 - The rule could be justifiable under the mandatory requirement of road safety.



CJEU in Mickelsson, 4 June 2009

- Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States **less favourably**, the restriction which they impose on the use of a product in the territory of a MS may have a considerable **influence on the behaviour of consumers**, which may, in turn, affect the **access of that product to the market of that Member State**.
- Could be justified by the protection of environment.



Exceptions to Free Movement of Goods

■ Article 36 TFEU:

The provisions of Articles 34 and 35 **shall not preclude prohibitions or restrictions** on imports, exports or goods in transit justified on grounds of

- public morality, public policy or public security;
- the protection of health and life of humans, animals or plants;
- the protection of national treasures possessing artistic, historic or archaeological value; or
- the protection of industrial and commercial property.

■ Cassis: Mandatory requirements

- excuses non-discriminatory rules as long as they are proportionate and justified;
non-exhaustive list of justifications (consumer protection...)



Article 36 exceptions



Public Morality

■ Case 34/79 *R v Henn & Darby*

- Ban on import of pornographic material into UK
- Ban was justified
- “..it is for each Member State to determine in accordance with its own scale of values ...of public morality in its territory”



Protection of health and life of humans animals or plants

- Most frequently cited defence
- Ranks high as a fundamental interest of all Member States
- Court will carefully consider whether
 - there is a real health risk (*Commission v UK Case 40/82* - the UK banned poultry meat imports)
 - there is a seriously considered health policy



Mandatory Requirements



Walter Rau de Smedt

- Case 261/81
- Legislation governing shape of margarine packaging
- Introduced to 'aid' consumers distinguish products
- Court accepts that the aim of protecting consumers is justified
- BUT the requirement to use only one specified type of packaging was too restrictive (disproportionate)
- Court - labelling could achieve the same ends



Consumer protection

■ Case C-470/93 Mars

■ + 10% flash on the packaging

“reasonably circumspect consumers could be deemed to know that there was not necessarily a link between the size of the publicity markings relating to an increase in a product’s quantity and the size of that increase”



Questions for discussion:

- Is FMG breached in case a Member State prohibits importation of pornographic magazines?
- Is FMG breached in case a state trade association promotes buying national products?
- Is FMG breached in case a Member State prohibits Sunday trading?
- Is FMG breached in case a Member State prohibits advertisements of alcohol?
- Is FMG breached in case a Dutch mayor prohibits other EU-nationals from attending coffee-shops?