MATERIALS ON THE LAW OF THE EUROPEAN UNION

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Free Movement of Goods

EU Materials 2010: Free Movement of Goods

Introduction

We have discussed the ways in which EU law promotes integration in positive (harmonization) and negative ways. The Treaty contains three sets of provisions which restrict the Member States' ability to interfere with the free movement of goods. Member States are not allowed to impose customs duties or charges having equivalent effect to customs duties when good cross borders (see p. 4); they are not allowed to have internal tax systems which discriminate against imported goods or protect domestic goods (see p. 9); and they are not allowed to impose quotas on imports or have rules which have an equivalent effect to a quota (quantitative restriction). Article 34 TFEU provides:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.[2]

The Treaty allows Member States to apply some measures which might restrict the freedoms guaranteed by the Treaty, including the free movement of goods, and which would be caught by **Art. 34**, if they are justified by the need to protect critical interests. **Article 36** lists some possible justifications:

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.

Cassis de Dijon (see p. 16) recognized that Member States could justify rules which might impede the free movement of goods but which applied to both domestic and imported goods by invoking a broader range of public interest justifications (mandatory requirements). However, where the EU has adopted harmonization measures to address the public interest concerns, the Member States lose their freedom to act independently. Over time there is more and more harmonization and less scope for the application of national rules.

[2] Art. 35 provides: Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

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A Commission Staff Working Document published in 2009[3] states:

The free movement of goods is one of the success stories of the European project. It has helped to build the internal market from which European citizens and businesses are now benefiting and which is at the heart of EU policies. Today's internal market makes it easy to buy and sell products in 27 Member States with a total population of more than 490 million. It gives consumers a wide choice of products and allows them to shop around for the best available offer. At the same time the free movement of goods is good for business. Around 75% of intra-Community trade is in goods. The single European marketplace that was created in past decades helps EU businesses to build a strong platform in an open, diverse and competitive environment. This internal strength fosters growth and job creation in the European Union and gives EU businesses the resources they need in order to be successful in other world markets. A properly functioning internal market for goods is thus a critical element for the current and future prosperity of the EU in a globalised economy....

Harmonised legislation in many areas has specified the meaning of the internal market and has thereby framed the principle of the free movement of goods in concrete terms for specific products. Nevertheless, the fundamental function of the Treaty principle as a key anchor and a safety net for the internal market remains unaltered.

Many of the major restrictions on the free movement of goods have now been removed. The groundwork was done, along with the introduction of the single European market in 1993, but the continuous stream of complaints from citizens and businesses to the Commission underlines the fact that even the best efforts in the past have not removed all trade barriers. Small and medium-sized companies in particular still suffer from them. That is why these companies often prefer to concentrate their activities on a few individual Member States instead of the whole single market, as they have difficulties in coping with different national rules on technical requirements for products that are not yet harmonised. Additionally, market access may be complicated by differences in retail or price regulations, with which businesses in other Member States are not familiar.

At the same time, innovative new products and technological advances pose new challenges. A national regulatory environment which does not keep pace with such developments can soon hamper cross-border trade. Moreover, modern information technology, such as the internet, facilitates cross-border shopping and increases the demand for quick and easy transfer of goods from one Member State to another. As a result, trade restrictions in certain areas that were not apparent in the past are now coming to light.

However, free movement of goods is not an absolute value. In specific circumstances certain overriding political aims may necessitate restrictions or even prohibitions which, while hampering free trade, serve important purposes such as protection of the environment or human health. Against a background of major global developments it comes as no surprise that

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[3] Commission Staff Working Document, Guide to the Application of Treaty Provisions Governing Free Movement of Goods, 2nd. Ed (2009) at http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art2830/new_guide_en.pdf.

a “greening” of free movement of goods has taken place in recent years, underlining the fact that certain grounds for justification may be viewed differently over time. It is thus a constant task, when applying Community law, to reconcile different, sometimes competing, goals and to ensure that a balanced, proportionate approach is taken.

The Member States do not have any ability to justify customs duties or charges having equivalent effect - these charges are completely prohibited by the Treaty. And internal tax regimes which discriminate against imports or protect domestic production are also prohibited. (See the table at p. 45).

Customs Duties and Charges Having Equivalent Effect

Article 34 prohibits quantitative restrictions (quotas/qrs) and measures having equivalent effect. But the Treaty also prohibits Member states from imposing customs duties on the movement of goods across borders within the EU under **Articles 28 and 30**:

Article 28
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 2 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.[4]

Article 30
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.

A charge having equivalent effect to a customs duty (cee) is a charge imposed because goods cross a frontier. So, if a Member State were to require products to be inspected at the border to ensure that they were not dangerous and were to require the importer to pay a charge to cover the cost of the inspection this would be a cee and the Member State would not be allowed to impose the charge. In relation to customs duties

[4] Art. 29 states: “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 customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.”

and cee there is no equivalent to Art 36 for qrs. The Member States are prohibited from imposing customs duties and cees with no possibility for justification. So the idea of protecting consumers from dangerous products would not justify the charge.

The inspection itself would fall under Art 34 as a qr/mee. Some specific EU measures limit the ability of Member States to inspect goods imported from other Member States. For example, as a general matter plants are inspected in the EU where they are produced and only plants imported into the EU from third countries should be inspected on importation. The EU also regulates the safety of other products, including toys and cosmetics. National enforcement authorities should co-operate to enforce compliance with EU directives and protect consumers.

Member States may require importers to pay charges in respect of services which benefit the importers (rather than charges which benefit, for example citizens generally in the state into which the goods are imported).

In **Jersey Produce Marketing Organisation Ltd v Jersey (Jersey Potatoes Case)**[5] Jersey required exporters of potatoes from Jersey to the UK to register with the Jersey Potato Export Marketing Board (JPEMB) and enter into a potato marketing agreement with the Board. The ECJ said that the Jersey statute was adopted "as a result of growers' complaints regarding their low profit margins on the sale of Jersey Royal potatoes, the island's main outdoor crop which is, for the most part, marketed in the United Kingdom." Registered producers of potatoes were required to contribute to a fund to cover the costs of the scheme. The ECJ held that Arts. 28 and 30 of the Treaty did apply in the context of goods moving between Jersey and the UK and addressed the issue of how the Treaty applied to these circumstances as follows:

55 It is settled case-law that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on 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], even though such pecuniary charge is not levied for the benefit of the State..
56 It is otherwise only if the charge in question constitutes payment for a service actually rendered in an amount proportionate to that service or if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported and exported products alike, or again, subject to certain conditions, if it

[5] Case C-293/02, http://www.bailii.org/eu/cases/EUECJ/2005/C29302.html (Preliminary reference).

is levied on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law..
59 It is appropriate to observe, at the outset, that the obligation to register with the PEMB under the scheme established by the 2001 Act and, therefore, the obligation to pay any contributions decided upon by that body, are imposed on all Jersey potato producers who export their produce or have it exported to the United Kingdom.
60 A contribution imposed on the producers thus registered which is calculated by the PEMB by reference to the quantities of potatoes produced by the party concerned and exported from Jersey to the United Kingdom certainly constitutes a pecuniary charge levied by reason of such exports, which applies to them exclusively without relating to a general system of internal dues applied systematically and in accordance with the same criteria, irrespective of the origin, exporting country or destination of the goods subject to it, and which does not represent consideration for a specific or individual benefit provided to the trader, in an amount proportionate to that service...
61 The States of Jersey, however, argued that since the 2001 Act governs only 'exports' of potatoes from Jersey to the United Kingdom for consumption in that Member State and that it therefore applies only to situations forming part of a Member State's internal trade, Articles [28]and [30] are not applicable to this case.
62 In that regard, it is appropriate to point out that, in.. Lancry.. the Court ruled that a charge proportional to their customs value, levied by a Member State on all goods entering a region within that State, constitutes a charge having equivalent effect to a customs duty on imports not only in so far as it is levied on goods entering that region from other Member States, but also in so far as it is levied on goods entering that region from another part of the same State.
63 In..in Simitzi.. the Court held, moreover, that the same reasoning had to apply in the case of a charge levied on goods despatched from one region to other regions of the same State, before concluding that ad valorem charges levied by a Member State on goods despatched from one region solely to other regions of the same State constituted charges having an effect equivalent to customs duties on exports.
64 The Treaty sought, in that regard, to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect in order to ensure the free movement of goods. The customs union necessarily implies that the free movement of goods should be ensured between Member States and, in more general terms, within the customs union...
65 In this case, it must be observed, first, that... a contribution such as that in issue in this case which is calculated by the PEMB by reference to the quantities of potatoes produced by the party concerned and exported from Jersey to the United Kingdom certainly constitutes a charge imposed on goods despatched from one region to another in the same Member State. Second, it must be added that even though the 2001 Act covers, according to its wording, only potatoes despatched to the United Kingdom for consumption there, that does not rule out the possibility that such potatoes, once within the United Kingdom, might then be re-exported to other Member States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member

States.
66 In this case, the possible development of such a pattern of re-exports from the United Kingdom to the other Member States is certainly conceivable given that, as appears from the information provided to the Court, almost all the Jersey Royal potatoes grown on Jersey are traditionally exported to the United Kingdom.
67 It follows from all the foregoing that a contribution such as that at issue in this case, calculated by the PEMB by reference to the quantities of potatoes produced by the party concerned and exported to the United Kingdom, contravenes Articles [28] and [30].
68 By contrast, if the PEMB chooses to impose a contribution calculated by reference to the areas used for the cultivation of potatoes, without distinguishing between potatoes consumed on the Island and those exported, it would not appear, in principle, that such a payment can constitute a pecuniary charge levied by reason of the fact that the potatoes are exported.
69 The Commission has, it is true, contended that such contributions are intended to finance, in general, the PEMB's various activities, which are themselves primarily aimed at the arrangements governing potato exports from Jersey to the United Kingdom. Such a circumstance does not, however, warrant the conclusion that those contributions must be characterised as charges having an effect equivalent to a customs duty prohibited by Article [30].

In contrast to the situation in the EU, in the US, marketing schemes such as the Jersey potatoes scheme tend to be analyzed by reference to the First Amendment. In 2005, the US Supreme Court held in the **Livestock Marketing**[6] case that generic advertising which was Governmental speech was exempt from first amendment scrutiny:

In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the Government itself... Our compelled-subsidy cases have consistently respected the principle that "compelled support of a private association is fundamentally different from compelled support of Government."... "Compelled support of Government" -- even those programs of Government one does not approve -- is of course perfectly constitutional, as every taxpayer must attest. And some Government programs involve, or entirely consist of, advocating a position. "The Government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the Government will be spent for speech and other expression to advocate and defend its own policies."...We have generally assumed, though not yet squarely held, that compelled funding of Government speech does not alone raise First Amendment concerns...
Respondents do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars

[6] Johanns v Livestock Marketing Association 544 U.S. 550 (2005).

pay for speech with which they disagree. Rather, they assert that the challenged promotional campaigns differ dispositively from the type of Government speech that, our cases suggest, is not susceptible to First Amendment challenge. They point to the role of the Beef Board and its Operating Committee in designing the promotional campaigns, and to the use of a mandatory assessment on beef producers to fund the advertising...

The Secretary of Agriculture does not write ad copy himself. Rather, the Beef Board's promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. (All members of the Operating Committee are subject to removal by the Secretary....) Respondents contend that speech whose content is effectively controlled by a nonGovernmental entity -- the Operating Committee -- cannot be considered "Government speech." We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself..

The message set out in the beef promotions is from beginning to end the message established by the Federal Government. Congress has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products."... Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain..and what they shall not..Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).

Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department...Nor is the Secretary's role limited to final approval or rejection: officials of the Department also attend and participate in the open meetings at which proposals are developed..

...When, as here, the Government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the Government-speech doctrine merely because it solicits assistance from non Governmental sources in developing specific messages

Respondents also contend that the beef program does not qualify as "Government speech" because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: it gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents' dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-subsidy analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund Government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed

citizens object.
Some of our cases have justified compelled funding of Government speech by pointing out that Government speech is subject to democratic accountability... But our references to "traditional political controls,"..do not signify that the First Amendment duplicates the Appropriations Clause..or that every instance of Government speech must be funded by a line item in an appropriations bill. Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required..

Discriminatory and Protective Taxation

Article 110 of the EC Treaty provides:

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

This is another aspect of free movement of goods. If Member States could avoid the application of Arts 28 and 30 by characterising the charges they imposed on imports as internal taxes (which just happened to fall more heavily on imports than on domestic products) this could undermine the Treaty provisions prohibiting customs duties. Therefore Art. 110 prohibits internal taxes which have the effect of discriminating against imported products or of making domestic products more attractive to consumers. The cases focus on the treatment of “similar” products or on products which, although not “similar” are nevertheless in at least partial competition with each other.

In **Commission v UK (Wine and Beer)** the Commission challenged UK rules which taxed wine (which was almost all imported into the UK) at a higher rate than beer (which has traditionally been produced in the UK):[7]

[7] Case C-170/78, http://www.bailii.org/eu/cases/EUECJ/1983/C17078_rev.html (Enforcement proceedings)

11 The Italian Government contended in that connection that it was inappropriate to compare beer with wines of average alcoholic strength or, a fortiori, with wines of greater alcoholic strength. In its opinion, it was the lightest wines with an alcoholic strength in the region of 9%, that is to say the most popular and cheapest wines, which were genuinely in competition with beer. It therefore took the view that those wines should be chosen for purposes of comparison where it was a question of measuring the incidence of taxation on the basis of either alcoholic strength or the price of the products.
12 The Court considers that observation by the Italian Government to be pertinent. in view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question...
13 As regards the selection of a method of comparison with a view to determining an appropriate tax ratio, the Commission considers that the safest method is to use a criterion which is linked both to the volume of the beverages in question and to their alcoholic strength. The Commission considers that taxation in excess of the ratio 1 : 2.8 by reference to volume (which therefore represents a tax ratio of 1 : 1 by reference to alcoholic strength alone) raises a “ presumption “ that indirect protection is afforded to beer.
14 The Government of the United Kingdom referred to the conclusions of the Report submitted to the Commission in 1963 by the Fiscal and Financial Committee (the Neumark Report) and emphasized once again that a proper comparison should be based on the incidence of taxation on the prices net of tax of the two products in question. In its opinion, a comparison based on average prices is preferable to a comparison based on average alcoholic strength. There is no question of a discriminatory or protective commercial practice where it is established that the taxes charged on two competing products represent the same proportion of the average prices of those products. the Government of the United Kingdom considers that, according to that criterion, its tax system has no protective effect.
15 On that point, the Italian Government challenges the arguments put forward by the United Kingdom and by the Commission. It emphasizes the importance, for the settlement of the dispute, of the fact that wine is an agricultural product and beer an industrial product. In its opinion, the requirements of the common agricultural policy should lead to the introduction of a rate of taxation favouring the agricultural product and it would therefore be inconsistent with that policy to eliminate altogether, under a national tax system, the effects of Community intervention in support of wine production.
16 The Italian Government also contests the importance which the Commission attaches to the question of the alcoholic strength of the two beverages in question. In its opinion, the decisive criterion is the assessment of the incidence of taxation in relation to the volume of the two beverages. There are two reasons for this : in the first place, the United Kingdom ' s system of taxation is based on the volume of the products ; secondly, since in both cases the beverages have a low alcohol content and are suitable for accompanying meals or for quenching thirst, the

consumer ' s choice is influenced not by the alcoholic strength of the two products but by their general characteristics such as taste and flavour, with the result that they are consumed for the same purposes and in more or less the same quantities. Experience shows that the consumption ratio between beer and wine, if not exactly equal, is in any event no higher than 1.5 : 1.

17 The Italian Government concludes that the two criteria relating to volume and alcoholic strength should be combined in the sense that, although, in principle, there must be equal taxation by reference to the volume of the two beverages, the existence of higher taxation of wine by reference to alcoholic strength alone would be a reliable indication that there was discrimination and that the tax system in question had a protective effect....

19 It is not disputed that comparison of the taxation of beer and wine by reference to the volume of the two beverages reveals that wine is taxed more heavily than beer in both relative and absolute terms. Not only was the taxation of wine increased substantially in relation to the taxation of beer when the United Kingdom replaced customs duty with excise duty, as the Court has already stated in its judgment of 27 february 1980, but it is also clear that during the years to which these proceedings relate, namely 1976 and 1977, the taxation of wine was, on average, five times higher, by reference to volume, than the taxation of beer ; in other words, wine was subject to an additional tax burden of 400% in round figures.

20 As regards the criterion for comparison based on alcoholic strength, the Court has already stated...that, even though it is true that alcoholic strength is only a secondary factor in the consumer ' s choice between the two beverages in question, it none the less constitutes a relatively reliable criterion for comparison. it should be noted that the relevance of that criterion was recognized by the Council in the course of its work which is still in progress on the harmonization of the taxation of alcohol and various types of alcoholic beverages.

21 In the light of the indices which the Court has already accepted, it is clear that in the United Kingdom during the period in question wine bore a tax burden which, by reference to alcoholic strength, was more than twice as heavy as that borne by beer, that is to say an additional tax burden of at least 100%.

22 As regards the criterion of the incidence of taxation on the price net of tax, the Court experienced considerable difficulty in forming an opinion, in view of the disparate nature of the information provided by the parties. in particular, the incomplete nature of the information supplied by the Commission, which consisted of lists of selling prices without parallel information revealing, within those prices, the incidence of excise duty, value-added tax and the price net of tax, rendered assessment of that criterion, which the United Kingdom Government considered to be of paramount importance, particularly difficult.

23 In reply to the order of 15 July 1982, in which the Court requested the parties to provide information on consumer prices and the prices net of tax for the types of wines and beer most commonly sold and consumed in the United Kingdom, the United Kingdom Government merely provided information relating to two German wines (Goldener Oktober and Blue Nun) which are undoubtedly widely consumed but are scarcely representative of the state of the wine market within the Community.

24 The Commission and the Italian Government disputed the relevance of the wines selected

by the United Kingdom Government and submitted detailed information relating to Italian wines ; the Commission attempted to establish average prices whilst the Italian Government, in accordance with the approach referred to above, compared the incidence of taxation on the price of a typical British beer with the incidence of taxation on the cheapest Italian wine which was available in significant quantities on the United Kingdom market.
25 The Commission ' s calculations, which relate to the United Kingdom market in its present state and the relevance of which is not challenged by the United Kingdom Government, show that wine is subject to an additional tax burden of around 58% and 77%, whereas the Italian Government ' s calculations relating to the cheapest wine show that wine is subject to an additional tax burden of up to 286%. Those findings are indirectly confirmed by the United Kingdom Government ' s analysis of the selling prices of the two German wines. indeed, one of those two wines represents almost exactly the point of parity between beer and wine, from the point of view of the incidence of taxation on the price. that example shows that all cheaper wines marketed in the United Kingdom are taxed, by reference to price, more heavily in relative terms than beer. It appears from the price lists provided by the Commission that on the United Kingdom market there are an appreciable number of wines falling within that definition, and among them practically all the Italian wines, which are therefore subject to an additional tax burden which increases in inverse proportion to their price.
26 After considering the information provided by the parties, the Court has come to the conclusion that, if a comparison is made on the basis of those wines which are cheaper than the types of wine selected by the United Kingdom and of which several varieties are sold in significant quantities on the United Kingdom market, it becomes apparent that precisely those wines which, in view of their price, are most directly in competition with domestic beer production are subject to a considerably higher tax burden.
27 It is clear, therefore, following the detailed inquiry conducted by the Court - whatever criterion for comparison is used, there being no need to express a preference for one or the other - that the United Kingdom ' s tax system has the effect of subjecting wine imported from other member states to an additional tax burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.
28 It follows from the foregoing considerations that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom has failed to fulfil its obligations under the second paragraph of Article [110] of the.. Treaty.

Are wine and beer substitutes for each other? Under what conditions? Is it really the case that light, cheap wine is the sort of wine most likely to be substitutable for beer? Does it seem to matter whether the UK intended to favour the domestic beer?

Justifications of Barriers to the Free Movement of Goods

If a Member State's rules are treated as impeding the free movement of goods under Art 34, the Member State may seek to justify those rules based on the need to protect the interests listed in **Art. 36.** If the ECJ accepts that the concern is legitimate and the national rules are not more restrictive than is necessary to protect the relevant interest, the rules may be valid under the Treaty. The ECJ has acknowledged the validity of some national rules. For example, in **Schwarz v Burgermeister der Landeshauptstadt Salzburg (Chewing Gum Case)**[8] the ECJ held that an Austrian prohibition of the sale of unwrapped chewing gum from vending machines was valid:

29 It is established that Paragraph 2 of the Confectionery Hygiene Regulation requires chewing gum which is put up for sale in vending machines in Austria to be packaged, although it is apparent from the file submitted to the Court by the national Court that those same goods can be marketed abroad, in particular in Germany, without packaging. It follows from this that importers wishing to put those goods up for sale in Austria have to package them, which makes their importation into that Member State more expensive. It is also apparent from the file that vending machines designed for non-packaged goods cannot be used for packaged goods. It follows from this that, in principle, the aforementioned national provision constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article [34].
30 However, the Court has consistently held that a national rule which hinders the free movement of goods is not necessarily contrary to Community law if it may be justified by one of the public-interest grounds set out in Article [36] or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction (see, to this effect...Cassis de Dijon[9]...paragraph 8...).
31 Given that, according to the national Court, the justification for Paragraph 2 of the Confectionery Hygiene Regulation is to be found primarily in the requirement for the protection of public health, which is expressly provided for in Article [36], it is in the light of that provision of Community law that it is appropriate to examine whether the latter does not preclude a national rule such as Paragraph 2.
32 As regards the placing of foodstuffs on the market, the Court has held that it is for the Member States, in the absence of harmonisation, to decide on their intended level of protection of human health and life, always taking into account the requirements of the free movement of goods within the Community...
33 However, the measures taken must be such as to attain one or more objectives referred to in Article [36], in the present case the protection of public health, and they must be proportionate, namely, not go beyond what is necessary to attain the objective pursued...
34 It is apparent from the order for reference that... the prohibition referred to in Paragraph 2 of

[8] Case C-366/04 http://www.bailii.org/eu/cases/EUECJ/2005/C36604.html, The case came to the ECJ via a preliminary reference.

[9] See below at page 16

the Confectionery Hygiene Regulation is justified on the grounds of the protection of public health, given that, in the past, non-packaged goods were impaired by moisture or insects, in particular ants, within vending machine containers.
35 The national Court also maintains that that prohibition considerably increases the safety of the foodstuffs at issue. In this respect it states that consumers who buy non-packaged confectionery from vending machines must necessarily touch the goods and the delivery tray with their bare hands without having washed them beforehand. That Court considers that contamination of the delivery tray by pathogenic germs and their transmission onto the goods removed by the customer is by no means merely theoretical.
36 Thus it must be stated that, for the reasons pertinently set out by the Osterreichische Agentur für Gesundheit und Ernährungssicherheit GmbH and also by the national Court, the prohibition laid down in Paragraph 2 of the Confectionery Hygiene Regulation constitutes an adequate and proportionate measure for the protection of public health.
37 Moreover, it must be noted that nothing in the file leads to the conclusion that the public health grounds relied on to justify Paragraph 2 of the Confectionery Hygiene Regulation have been diverted from their proper purpose and used in such a way as to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products...
38 In view of all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that it is not contrary to Article[34], Article [36] and Article 7 of the Directive[10] for a provision of national law, adopted before the entry into force of that directive, to prohibit the offer for sale from vending machines of sugar confectionery or products made using sugar substitutes, without wrapping.

Why should a prohibition of the sale of unwrapped candy be caught by Art. 34 in the first place? Isn't this the sort of internal regulation that should not be affected by the EC Treaty at all? The public health justification applied here because the national rules satisfied the proportionality requirement (para 36) and did not discriminate against imports or indirectly protect domestic products (para 37). So, a rule which required imported candy (but not domestically produced candy) to be wrapped would not be justified.

In another case also decided in November 2005, **Commission v Austria (Trucks Case)**,[11] the ECJ found that an Austrian night traffic ban on the transportation of goods by trucks over 7.5 tonnes on a particular motorway was not justified because it

[10] The directive was Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs OJ 1993 L 175/1.

[11] Case C-320/03, http://www.bailii.org/eu/cases/EUECJ/2005/C32003.html (Enforcement proceedings under Art 258).

did not satisfy the principle of proportionality:

84... the obstacle to the free movement of goods arising from the traffic ban laid down by the contested regulation might be justified by one of the imperative requirements in the public interest endorsed by the case-law of the Court of Justice.
85 In order to establish whether such a restriction is proportionate having regard to the legitimate aim pursued in this case, namely the protection of the environment, it needs to be determined whether it is necessary and appropriate in order to secure the authorised objective.
86 On that point, the Commission and the intervening Member States stress both the lack of any genuine alternative means of transporting the goods in question and the existence of many other measures, such as speed limits, or toll systems linked to different classes of heavy vehicles, or the ecopoints system, which would have been capable of reducing nitrogen dioxide emissions to acceptable levels.
87 Without the need for the Court itself to give a ruling on the existence of alternative means, by rail or road, of transporting the goods covered by the contested regulation under economically acceptable conditions, or to determine whether other measures, combined or not, could have been adopted in order to attain the objective of reducing emissions of pollutants in the zone concerned, it suffices to say in this respect that, before adopting a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established.
88 More particularly, given the declared objective of transferring transportation of the goods concerned from road to rail, those authorities were required to ensure that there was sufficient and appropriate rail capacity to allow such a transfer before deciding to implement a measure such as that laid down by the contested regulation.
89 As the Advocate General has pointed out... it has not been conclusively established in this case that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes.
90 Moreover, a transition period of only two months between the date on which the contested regulation was adopted and the date fixed by the Austrian authorities for implementation of the sectoral traffic ban was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances...
91 In the light of the above, it must be concluded that, because it infringes the principle of proportionality, the contested regulation cannot validly be justified by reasons concerning the protection of air quality. Therefore, that regulation is incompatible with Articles [34] and [35].

Indistinctly Applicable Rules

Article 34 applies to indistinctly applicable rules as well as to rules which are on their face discriminatory. The **Dassonville** formula is very broad:

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.

The classic case on indistinctly applicable rules is **Cassis de Dijon**, decided in 1979.[12] The Plaintiff applied to German authorities to import Cassis de Dijon into Germany and was informed that this would not be possible because German rules required alcohol products to comply with minimum alcohol content requirements. Cassis de Dijon typically has an alcohol content of 15-20% and the German rules required fruit liqueurs to have a minimum alcohol content of 25%. Thus a product validly produced in France under French rules would not be able to be sold in Germany because the rules there were different. The plaintiff challenged the German rules in Court in Germany and on a preliminary reference to the ECJ the ECJ stated:

8 In the absence of common rules relating to the production and marketing of alcohol... it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.
Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

There are two important things to notice about this paragraph. First, obstacles to free movement which result from disparities in the national rules and which are not justified by "mandatory requirements" are prohibited by Art. 34. Second, these "mandatory requirements" (which seems to mean measures adopted in the public interest) are different from the justifications listed in Art 36. Art. 36 does not refer, for example to the "defence of the consumer". Thus, in relation to indistinctly applicable rules we ask:

1. Is this the sort of indistinctly applicable rule which is caught by Art. 34? And
2. Is it justified by a "mandatory requirement"?

[12] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78.

Germany sought to justify the imposition of its rules to Cassis de Dijon:

9 The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.
10 As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.
11 Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.
12 The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.
This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.
Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the member states, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.
13 As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.
However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.
14 It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other member states which do not answer that description.
It therefore appears that the unilateral requirement imposed by the rules of a member state of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of article [36] of the treaty.
There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the member states, alcoholic beverages should not be introduced into any other member state ; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

Do you think that the health argument or the consumer protection argument was stronger here?
Was the rule in the Chewing Gum case (at page 13 above) an indistinctly applicable rule or not?
For indistinctly applicable rules a Member State has a wider range of possible justifications than those which apply to rules targeted at imports (i.e. not just those listed in Art 36).

Rules which regulate the use of products may be treated as interfering with the free movement of goods and therefore subject to Art. 34. **Mickelsson & Roos**[13] involved a challenge to Swedish rules restricting the use of Jet-skis to certain waterways. The Court said:

24 It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as 'measures having equivalent effect to quantitative restrictions on imports' for the purposes of Article [34] ... Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept ...
25 It is apparent from the file sent to the Court that, at the material time ... the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European Communities maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden

[13] Case C-42/05, http://www.bailii.org/eu/cases/EUECJ/2009/C14205.html (preliminary reference).

are, therefore, merely marginal.
26 Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, 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 ...
27 Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product ...
28 In that regard, where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article [36] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34].
29 Moreover, in either case, the national provision must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it ...
30 The Swedish Government maintains that the national regulations are justified by the objective of environmental protection and by the objectives referred to in Article [36]. The restriction on the use of personal watercraft to particular waters makes it possible, inter alia, to prevent unacceptable environmental disturbances. The use of personal watercraft has negative consequences for fauna, in particular where such a craft is used for a lengthy period on a small area or driven at great speed. The noise as a whole disturbs people and animals and above all certain protected species of birds. Furthermore, the easy transport of personal watercraft facilitates the spread of animal diseases.
31 It must be pointed out, in that regard, that, according to Article [36], Article [34] does not preclude prohibitions or restrictions on imports justified inter alia on grounds of the protection of health and life of humans, animals or plants.
32 Furthermore, according to settled case-law, national measures capable of hindering intra-Community trade may be justified by the objective of protection of the environment provided that the measures in question are proportionate to the aim pursued ...
33 As the protection of the environment, on the one hand, and the protection of health and life of humans, animals and plants, on the other hand, are, in the present case, closely related objectives, they should be examined together in order to assess whether regulations such as those at issue in the main proceedings are justified.
34 It is not open to dispute that a restriction or a prohibition on the use of personal watercraft are appropriate means for the purpose of ensuring that the environment is protected. However, for the national regulations to be capable of being regarded as justified, it is also incumbent on the national authorities to show that their restrictive effects on the free movement of goods do not go beyond what is necessary to achieve that aim.
35 The Swedish Government maintains that the prohibition on the use of personal watercraft leaves users of those craft with not less than 300 general navigable waterways on the Swedish

coast and on the large lakes, which constitutes a very extensive area. Furthermore, the geographical position of those aquatic areas in Sweden precludes measures of a scope different from that of the provisions in the national regulations at issue in the main proceedings.
36 In that regard, although it is possible, in the present case, to envisage that measures other than the prohibition laid down in .. the national regulations could guarantee a certain level of protection of the environment, the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities...
37 The national regulations provide for a general prohibition of the use of personal watercraft on waters other than general navigable waterways save where the länsstyrelsen designates waters, other than general navigable waterways, on which personal watercraft may be used. In that regard, the länsstyrelsen ... must in any event issue such rules ...
38 As regards the allegedly necessary nature of the measure in question, it must therefore be held that the wording of the national regulations themselves suggests that, on waters which must be designated by implementing measures, personal watercraft may be used without giving rise to risks or pollution deemed unacceptable for the environment. It follows that a general prohibition on using such goods on waters other than general navigable waterways constitutes a measure going beyond what is necessary to achieve the aim of protection of the environment.
39 Regulations such as those at issue in the main proceedings may, in principle, be regarded as proportionate provided that, first, the competent national authorities are required to adopt such implementing measures, secondly, those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions provided for by the national regulations and, lastly, such measures have been adopted within a reasonable period after the entry into force of those regulations.
40 It follows that national regulations such as those at issue in the main proceedings may be justified by the aim of the protection of the environment provided that the above conditions are complied with. It is for the national court to ascertain whether those conditions have been satisfied in the main proceedings.
41 In that regard, it must be observed that, in proceedings under Article [267], which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court... However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary...
42 In the main proceedings, the national regulations had been in force only for about three weeks at the material time in those proceedings. The fact that measures to implement those regulations had not been adopted at a time when those regulations had only just entered into force ought not necessarily to affect the proportionality of those regulations in so far as the competent authority may not have had the necessary time to prepare the measures in question, a matter which falls to be determined by the national court.
43 Furthermore, if the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and

that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community law of the retroactive application of the most favourable criminal law and the most lenient penalty ...
44 In the light of the foregoing, the answer to the questions referred is that Directive 94/25, as amended by Directive 2003/44, does not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of personal watercraft on waters other than designated waterways. Articles [34] and [36] do not preclude such national regulations, provided that:
the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which personal watercraft may be used;
those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations, and such measures have been adopted within a reasonable period after the entry into force of those regulations.
It is for the national court to ascertain whether those conditions have been satisfied in the main proceedings.

Selling Arrangements

In a number of cases involving national rules regulating store opening hours (e.g. Sunday trading cases) the ECJ suggested that this type of rule would be considered to be an indistinctly applicable rule caught by Art. 34, which would need to be justified on the basis of manadtory requirements in order to be valid. In **Keck and Mithouard**[14] in 1993, in a case involving French rules about resale price maintenance, the ECJ reversed this position. The case is unusual because it is an example of the ECJ explicitly over-ruling its previous decisions. It also introduces significant uncertainty about what rules are caught by Art. 34:

11 By virtue of Article [34], quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.
12 National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

[14] Case C-267/91, http://www.bailii.org/eu/cases/EUECJ/1993/C26791.html (preliminary reference).

13 Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.
14 In view of the increasing tendency of traders to invoke Article [34] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.
15 It is established by the case-law beginning with "Cassis de Dijon".. that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article [34]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.
16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment...so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article [34] of the Treaty.

Why did the ECJ change its mind? What are “national provisions restricting or prohibiting certain selling arrangements” for the purposes of para. 16? Note the conditions set out in para 16.

In **Marcel Burmanjer** the ECJ said that national rules requiring itinerant salespeople to be licensed were rules relating to selling arrangements under Keck:[15]

29 It should be noted that the national rules on itinerant sales do not impose a total prohibition of a selling arrangement, in a Member State, of a product which is lawfully marketed there. The

[15] Case C-20/03 http://www.bailii.org/eu/cases/EUECJ/2005/C2003.html

rules confine themselves to making the itinerant sale, without prior authorisation, of subscriptions to periodicals an offence, and that, according to the Belgian Government, for reasons relating in particular to consumer protection. Furthermore, not all itinerant sales of subscriptions are covered. That Government submits that the need for special protection does not operate either for sales of subscriptions to periodicals, in particular at annual fairs and exhibitions, or for the conclusion of contracts for subscriptions to newspapers as part of a regular service for an established local clientele.
30 It is common ground that a national system such as the rules on itinerant sales is, in principle, likely to limit the total volume of sales of the goods in question in the Member State concerned and, consequently, also to reduce the volume of sales of goods from other Member States. It is also indisputable that the itinerant sale of subscriptions may be a good way of bringing to consumers' knowledge periodicals from all sources. The Commission submits in that regard that the latter statement is true, in particular, as regards periodicals of foreign origin.
31 However, the information available to the Court does not enable it to establish with certainty whether the national rules on itinerant sales affect the marketing of products from Member States other than the Kingdom of Belgium to any greater degree than that of products from that State. Nevertheless, it seems to follow from the information in the file transmitted to the Court that, if those rules did have such an effect, it would be too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States.
32 In such circumstances, it is for the referring court, before which the main proceedings have been brought and which must assume responsibility for the subsequent judicial decision, to determine, having regard to the facts of the main proceedings and, particularly, in the light of the considerations set forth in paragraphs 29 to 31 of this judgment, whether the application of national law is such as to ensure that the national rules on itinerant sales affect in the same manner, in law and in fact, the marketing of Belgian products and that of products from other Member States. If that is not the case, it is for that court to establish whether such rules are justified by an objective in the general interest within the meaning of the line of authority initiated by the Cassis de Dijon judgment, and whether they are proportional to that objective.

In **Gourmet International Products**[16] where the publisher of a magazine challenged Swedish rules restricting the advertising of alcohol, the ECJ said that such rules could make it harder for importers of alcoholic drinks to compete with domestically produced beverages:

13. By the questions referred to the court, which can be considered together, the national court is asking essentially, first, whether the provisions of the Treaty on the free movement of goods preclude a prohibition on advertisements for alcoholic beverages such as that laid down in.. the alcohol advertising law.
14. The consumer ombudsman and the intervening governments accept that the prohibition on

[16] Case C-405/98, http://www.bailii.org/eu/cases/EUECJ/2001/C40598.html (Preliminary reference)

advertising in Sweden affects sales of alcoholic beverages there, including those imported from other member states, since the specific purpose of the Swedish legislation is to reduce the consumption of alcohol.
15. However, observing that the court held in para 16 of its judgment in.. Keck .. that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other member states, the consumer ombudsman and the intervening governments contend that the prohibition on advertising in issue in the main proceedings does not constitute an obstacle to trade between member states, since it satisfies the criteria laid down by the court in that judgment.
16. GIP contends that an outright prohibition such as that at issue in the main proceedings does not satisfy those criteria. It argues that such a prohibition is, in particular, liable to have a greater effect on imported goods than on those produced in the member state concerned.
17. Although the Commission of the European Communities takes the view that the decision as to whether, on the facts of the case, the prohibition does or does not constitute an obstacle to intra-Community trade is a matter for the national court, the Commission expresses similar doubts as to the application in the present case of the criteria referred to in para 15, above.
18. It should be pointed out that, according to para 17 of its judgment in Keck .. if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by art [34] of the Treaty, they must not be of such a kind as to prevent access to the market by products from another member state or to impede access any more than they impede the access of domestic products.
19. The court has also held ..that it cannot be excluded that an outright prohibition, applying in one member state, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other member states.
20. It is apparent that a prohibition on advertising, such as that at issue in the main proceedings, not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.
21. Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material, or the placing of posters on the public highway, is liable to impede access to the market by products from other member states more than it impedes access by domestic products, with which consumers are instantly more familiar.
22. The information provided by the consumer ombudsman and the Swedish government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported, in comparison with other products such as vodka, which is mainly of Swedish origin, does not alter that conclusion. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have been greater;

second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption.
23. Furthermore, although publications containing advertisements may be distributed at points of sale, Systembolaget AB, the company wholly owned by the Swedish state which has a monopoly of retail sales in Sweden, in fact only distributes its own magazine at those points of sale.
24. Last, Swedish legislation does not prohibit 'editorial advertising', that is to say, the promotion, in articles forming part of the editorial content of the publication, of products in relation to which the insertion of direct advertisements is prohibited. The Commission correctly observes that, for various, principally cultural, reasons, domestic producers have easier access to that means of advertising than their competitors established in other member states. That circumstance is liable to increase the imbalance inherent in the absolute prohibition on direct advertising.
25. A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other member states more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between member states caught by art [34] of the Treaty.
26. However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by art [36] of the Treaty.
27. In that regard, it is accepted that rules restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflects public health concerns..
28. In order for public health concerns to be capable of justifying an obstacle to trade such as that inherent in the prohibition on advertising at issue in the main proceedings, the measure concerned must also be proportionate to the objective to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between member states.
29. The consumer ombudsman and the intervening governments claim that the derogation provided for in art [36] of the Treaty can cover the prohibition on advertising at issue in the main proceedings. The consumer ombudsman and the Swedish government emphasise in particular that the prohibition is not absolute and does not prevent members of the public from obtaining information, if they wish, in particular in restaurants, on the Internet, in an 'editorial context', or by asking the producer or importer to send advertising material. Furthermore, the Swedish government observes that the Court of Justice has acknowledged that, in the present state of Community law, member states are at liberty, within the limits set by the Treaty, to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved... The Swedish government maintains that the legislation at issue in the main proceedings constitutes an essential component of its alcohol policy.
30. GIP claims that the outright prohibition on advertising laid down by the legislation at issue in the main proceedings is disproportionate, since the protection sought could be obtained by prohibitions of a more limited nature, concerning, for example, certain public places or the press aimed at children and adolescents. It must be borne in mind that the Swedish policy on alcoholism is already catered for by the existence of the monopoly on retail sales, by the prohibition on sales to persons under the age of 20 years and by information campaigns.

31. The Commission submits that the decision as to whether the prohibition on advertising at issue in the main proceedings is or is not proportionate is a matter for the national court. However, it also states that the prohibition does not appear to be particularly effective, owing in particular to the existence of 'editorial publicity' and the abundance of indirect advertising on the Internet, and that requirements as to the form of advertising, such as the obligation to exercise moderation already found in the alcohol advertising law, may suffice to protect the interest in question.
32. It should be pointed out, first, that there is no evidence before the court to suggest that the public health grounds on which the Swedish authorities rely have been diverted from their purpose and used in such a way as to discriminate against goods originating in other member states or to protect certain national products indirectly...
33. Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the member state concerned, which the national court is in a better position than the Court of Justice to carry out.

Origin of Products and Promoting or Protecting Domestic Goods

Member States may not require products imported from other Member States to be marked to show their origin. At one point Ireland required souvenirs and jewellery imported from outside Ireland to be marked as foreign. The ECJ held in **Commission v Ireland (Irish Souvenirs)** that the requirement contravened the Treaty:[17]

5 The Irish Government does not dispute the restrictive effects of these orders on the free movement of goods. however, it contends that the disputed measures are justified in the interests of consumer protection and of fairness in commercial transactions between producers. in this regard, it relies upon article [36] of the treaty which provides that article [34] shall not preclude prohibitions or restrictions on imports justified on grounds of public policy or the protection of industrial and commercial property.
6 The defendant is, however, mistaken in placing reliance on article [36] of the treaty as the legal basis for its contention.
7 In fact, since the Court stated in its judgment..in Bauhuis..that article [36] of the treaty "constitutes a derogation from the basic rule that all obstacles to the free movement of goods between member states shall be eliminated and must be interpreted strictly", the exceptions listed therein cannot be extended to cases other than those specifically laid down.

[17] Case 113/80, http://www.bailii.org/eu/cases/EUECJ/1981/C11380.html (Enforcement proceedings)

8 In view of the fact that neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in article [36], those grounds cannot be relied upon as such in connexion with that article.
9 However, since the Irish Government describes its recourse to these concepts as 'the central issue in the case', it is necessary to study this argument in connexion with article [34] and to consider whether it is possible, in reliance on those concepts, to say that the Irish orders are not measures having an effect equivalent to quantitative restrictions on imports within the meaning of that article, bearing in mind that, according to the established case-law of the Court, such measures include "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"
10 In this respect, the Court has repeatedly affirmed...that "in the absence of common rules relating to the production and marketing of the product in question it is for member states to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle... to intra-Community trade" and that "it is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to... the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under article [34]".
11 The orders concerned in the present case are not measures which are applicable to domestic products and to imported products without distinction but rather a set of rules which apply only to imported products and are therefore discriminatory in nature, with the result that the measures in issue are not covered by the decisions cited above which relate exclusively to provisions that regulate in a uniform manner the marketing of domestic products and imported products.
12 The Irish Government recognizes that the contested measures apply solely to imported articles and render their importation and sale more difficult than the sale of domestic products. however, it maintains that this difference in the treatment awarded to home-produced articles and to imported articles does not constitute discrimination on the ground that the articles referred to in the contested orders consist mainly of souvenirs; the appeal of such articles lies essentially in the fact of their being manufactured in the place where they are purchased and they bear in themselves an implied indication of their Irish origin, with the result that the purchaser would be misled if the souvenir bought in Ireland was manufactured elsewhere. consequently, the requirement that all imported "souvenirs " covered by the two orders must bear an indication of origin is justified and in no way constitutes discrimination because the articles concerned are different on account of the differences between their essential characteristics.
13 The Commission rejects this reasoning...it submits that it is unnecessary for a purchaser to know whether or not a product is of a particular origin, unless such origin implies a certain quality, basic materials or process of manufacture or a particular place in the folklore or tradition of the region in question ; since none of the articles referred to in the orders display these features, the measures in question cannot be justified and are therefore "overtly discriminatory".
14 It is therefore necessary to consider whether the contested measures are indeed

discriminatory or whether they constitute discrimination in appearance only.
15 The souvenirs referred to in the sale order and in the importation order are generally articles of ornamentation of little commercial value representing or incorporating a motif or emblem which is reminiscent of an Irish place, object, character or historical event or suggestive of an Irish symbol and their value stems from the fact that the purchaser, more often than not a tourist, buys them on the spot. the essential characteristic of the souvenirs in question is that they constitute a pictorial reminder of the place visited, which does not by itself mean that a souvenir, as defined in the orders, must necessarily be manufactured in the country of origin.
16 Furthermore, leaving aside the point argued by the Commission - with regard to the articles covered by the contested orders - that it would not be enough to require a statement of origin to be affixed to domestic products also, it is important to note that the interests of consumers and fair trading would be adequately safeguarded if it were left to domestic manufacturers to take appropriate steps such as affixing, if they so wished, their mark of origin to their own products or packaging.
17 Thus by granting souvenirs imported from other member states access to the domestic market solely on condition that they bear a statement of origin, whilst no such statement is required in the case of domestic products, the provisions contained in the sale order and the importation order indisputably constitute a discriminatory measure.
18 The conclusion to be drawn therefore is that by requiring all souvenirs and articles of jewellery imported from other member states which are covered by the sale order and the importation order to bear an indication of origin or the word “foreign”, the Irish rules constitute a measure having equivalent effect within the meaning of article [34] of the Treaty. Ireland has consequently failed to fulfil its obligations under the article.

Note that discriminatory rules cannot be justified by reference to the need to protect consumers. Should Ireland have been allowed to make and enforce this rule? Note the Court’s reference to the market in para. 16: if consumers care about the origin of the souvenirs then manufacturers in Ireland can mark their products as being “made in Ireland”. Ireland could have and enforce rules to ensure that goods marked “Made in Ireland” were in fact made there.

Member States are also constrained in what they can do to promote domestic products at home (they are allowed to promote their own products in other Member States). In another case involving Ireland, **Commission v Ireland (Buy Irish)**[18] the ECJ held that an Irish plan to promote Irish goods contravened the Treaty:

10 The Irish Goods Council was created on 25 August 1978, a few months after the disputed campaign was launched, in the form of a company limited by guarantee and not having a share

[18] Case 249/81, http://www.bailii.org/eu/cases/EUECJ/1982/C24981.html (Enforcement proceedings)

capital ; it was registered in accordance with Irish company law.. The Council is in fact the result of the amalgamation of two bodies, the National Development Council, a company limited by guarantee and registered under the companies act, and the Working Group on the Promotion and Sale of Irish Goods.
11 the Irish Government maintains that the Irish Goods Council was created under the sponsorship of the Government in order to encourage Irish industry to overcome its own difficulties. The Council was established for the purpose of creating a framework within which the various industries could come together in order to cooperate for their common good.
12 The Management Committee of the Irish Goods Council consists, according to the articles of association of that institution, of 10 persons appointed in their individual capacities by the Minister for Industry, Commerce and Energy ; the same Minister appoints the Chairman from among the members of the management committee. the members and the Chairman are appointed for a period of three years, and their appointments may be renewed. in practice, the members of the management committee are selected by the Minister in such a manner as to represent the appropriate sectors of the Irish economy.
13 It appears from the information supplied by the Irish Government at the request of the Court that the activities of the Irish Goods Council are financed by subsidies paid by the Irish Government and by private industry. the subsidies from the state and from the private sector amounted, respectively to irl 1 005 000 and irl 175 000 for the period between August 1978 and December 1979 ; irl 940 000 and irl 194 000 for 1980 ; and irl 922 000 and irl 238 000 for 1981.
14 The Irish Government has not denied that the activities of the Irish Goods Council consist in particular, after the abandonment of the shoplink service and the exhibition facilities offered to Irish manufacturers in dublin, in the organization of an advertising campaign in favour of the sale and purchase of Irish products, and in promoting the use of the “Guaranteed Irish“ symbol.
15 It is thus apparent that the Irish Government appoints the members of the management committee of the Irish Goods Council, grants it public subsidies which cover the greater part of its expenses and, finally, defines the aims and the broad outline of the campaign conducted by that institution to promote the sale and purchase of Irish products. In the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the treaty...
20 The Commission maintains that the “Buy Irish“ campaign and the measures taken to prosecute the campaign must be regarded, as a whole, as measures encouraging the purchase of domestic products only. Such measures are said to be contrary to the obligations imposed on the member states by article [34]...
21 The Irish Government maintains that the prohibition against measures having an effect equivalent to quantitative restrictions in article [34] is concerned only with “measures“, that is to say, binding provisions emanating from a public authority. however, no such provision has been adopted by the Irish Government, which has confined itself to giving moral support and financial aid to the activities pursued by the Irish industries.
22 The Irish Government goes on to emphasize that the campaign has had no restrictive effect on imports since the proportion of Irish goods to all goods sold on the Irish market fell from 49.2% in 1977 to 43.4% in 1980.
23 The first observation to be made is that the campaign cannot be likened to advertising by

private or public undertakings, or by a group of undertakings, to encourage people to buy goods produced by those undertakings. regardless of the means used to implement it, the campaign is a reflection of the Irish Government ' s considered intention to substitute domestic products for imported products on the Irish market and thereby to check the flow of imports from other member states.

24 It must be remembered here that a representative of the Irish Government stated when the campaign was launched that it was a carefully thought-out set of initiatives constituting an integrated programme for promoting domestic products; that the Irish Goods Council was set up at the initiative of the Irish Government a few months later ; and that the task of implementing the integrated programme as it was envisaged by the Government was entrusted, or left, to that Council.

25 Whilst it may be true that the two elements of the programme which have continued in effect, namely the advertising campaign and the use of the “Guaranteed Irish“ symbol, have not had any significant success in winning over the Irish market to domestic products, it is not possible to overlook the fact that, regardless of their efficacity, those two activities form part of a Government programme which is designed to achieve the substitution of domestic products for imported products and is liable to affect the volume of trade between member states.

26 The advertising campaign to encourage the sale and purchase of Irish products cannot be divorced from its origin as part of the Government programme, or from its connection with the introduction of the “Guaranteed Irish“ symbol and with the organization of a special system for investigating complaints about products bearing that symbol. the establishment of the system for investigating complaints about Irish products provides adequate confirmation of the degree of organization surrounding the “Buy Irish“ campaign and of the discriminatory nature of the campaign.

27 In the circumstances the two activities in question amount to the establishment of a national practice, introduced by the Irish Government and prosecuted with its assistance, the potential effect of which on imports from other member states is comparable to that resulting from Government measures of a binding nature.

28 Such a practice cannot escape the prohibition laid down by article [34] of the Treaty solely because it is not based on decisions which are binding upon undertakings. even measures adopted by the Government of a member state which do not have binding effect may be capable of influencing the conduct of traders and consumers in that state and thus of frustrating the aims of the Community as set out in article 2 and enlarged upon in article 3 of the treaty.

29 That is the case where, as in this instance, such a restrictive practice represents the implementation of a programme defined by the Government which affects the national economy as a whole and which is intended to check the flow of trade between member states by encouraging the purchase of domestic products, by means of an advertising campaign on a national scale and the organization of special procedures applicable solely to domestic products, and where those activities are attributable as a whole to the Government and are pursued in an organized fashion throughout the national territory.

30 Ireland has therefore failed to fulfil its obligations under the treaty by organizing a campaign to promote the sale and purchase of Irish goods within its territory.

In this case it is state action which is problematic. Could non-state entities encourage the purchase of domestic goods without infringing the Treaty? Or, in other words, should Article 34 be considered to produce horizontal direct effect ?

A failure by a Member State's authorities to prevent private actors from impeding the free movement of goods can constitute a breach of the Treaty. The Commission brought enforcement proceedings against France in respect of the French police's failure to ensure free movement of goods over a period of more than 10 years when French farmers took measures to stop the importation of fruits and vegetables from Spain into France including intercepting trucks and destroying their loads, being violent to the drivers, threatening supermarkets which carried the imported produce and destroying produce in the shops. The ECJ found that France had breached its obligations under the Treaty in **Commission v France (Spanish Fruits and Vegetables)**:[19]

30 As an indispensable instrument for the realization of a market without internal frontiers, Article [34] therefore does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.
31 The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.
32 Article [34] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article [10] of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.
33 In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.
34 It is therefore not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories.
35 However, it falls to the Court, taking due account of the discretion referred to above, to verify, in cases brought before it, whether the Member State concerned has adopted

[19] Case C-265/95, http://www.bailii.org/eu/cases/EUECJ/1997/C26595.html (Enforcement proceedings).

appropriate measures for ensuring the free movement of goods...
38The acts of violence committed in France and directed against agricultural products originating in other Member States, such as the interception of lorries transporting those products, the destruction of their loads and violence towards drivers, as well as threats to wholesalers and retailers and the damaging of goods on display, unquestionably create obstacles to intra-Community trade in those products.
39 It is therefore necessary to consider whether in the present case the French Government complied with its obligations under Article [34], in conjunction with Article[10], of the Treaty, by adopting adequate and appropriate measures to deal with actions by private individuals which create obstacles to the free movement of certain agricultural products.
40 It should be stressed that the Commission's written pleadings show that the incidents to which it objects in the present proceedings have taken place regularly for more than 10 years.
41 It was as long ago as 8 May 1985 that the Commission first sent a formal letter to the French Republic calling on it to adopt the preventive and penal measures necessary to put an end to acts of that kind.
42 Moreover, in the present case the Commission reminded the French Government on numerous occasions that Community law imposes an obligation to ensure de facto compliance with the principle of the free movement of goods by eliminating all restrictions on the freedom to trade in agricultural products from other Member States.
43 In the present case the French authorities therefore had ample time to adopt the measures necessary to ensure compliance with their obligations under Community law.
44 Moreover, notwithstanding the explanations given by the French Government, which claims that all possible measures were adopted in order to prevent the continuation of the violence and to prosecute and punish those responsible, it is a fact that, year after year, serious incidents have gravely jeopardized trade in agricultural products in France.
45 According to the summary of the facts submitted by the Commission, which is not contested by the French Government, there are particular periods of the year which are primarily concerned and there are places which are particularly vulnerable where incidents have occurred on several occasions during one and the same year.
46 Since 1993 acts of violence and vandalism have not been directed solely at the means of transport of agricultural products but have extended to the wholesale and retail sector for those products.
47 Further serious incidents of the same type also occurred in 1996 and 1997.
48 Moreover, it is not denied that when such incidents occurred the French police were either not present on the spot, despite the fact that in certain cases the competent authorities had been warned of the imminence of demonstrations by farmers, or did not intervene, even where they far outnumbered the perpetrators of the disturbances. Furthermore, the actions in question were not always rapid, surprise actions by demonstrators who then immediately took flight, since in certain cases the disruption continued for several hours.
49 Furthermore, it is undisputed that a number of acts of vandalism were filmed by television cameras, that the demonstrators' faces were often not covered and that the groups of farmers responsible for the violent demonstrations are known to the police.
50 Notwithstanding this, it is common ground that only a very small number of the persons who

participated in those serious breaches of public order has been identified and prosecuted.
51 Thus, as regards the numerous acts of vandalism committed between April and August 1993, the French authorities have been able to cite only a single case of criminal prosecution.
52 In the light of all the foregoing factors, the Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in this case, cannot but find that, having regard to the frequency and seriousness of the incidents cited by the Commission, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them.
53 That finding is all the more compelling since the damage and threats to which the Commission refers not only affect the importation into or transit in France of the products directly affected by the violent acts, but are also such as to create a climate of insecurity which has a deterrent effect on trade flows as a whole.
54 The above finding is in no way affected by the French Government's argument that the situation of French farmers was so difficult that there were reasonable grounds for fearing that more determined action by the competent authorities might provoke violent reactions by those concerned, which would lead to still more serious breaches of public order or even to social conflict.
55 Apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly...
56 It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators.
57 In the present case the French Government has adduced no concrete evidence proving the existence of a danger to public order with which it could not cope.
58 Moreover, although it is not impossible that the threat of serious disruption to public order may, in appropriate cases, justify non-intervention by the police, that argument can, on any view, be put forward only with respect to a specific incident and not, as in this case, in a general way covering all the incidents cited by the Commission.
59 As regards the fact that the French Republic has assumed responsibility for the losses caused to the victims, this cannot be put forward as an argument by the French Government in order to escape its obligations under Community law.
60 Even though compensation can provide reparation for at least part of the loss or damage sustained by the economic operators concerned, the provision of such compensation does not mean that the Member State has fulfilled its obligations.
61 Nor is it possible to accept the arguments based on the very difficult socio-economic context of the French market in fruit and vegetables after the accession of the Kingdom of Spain.
62 It is settled case-law that economic grounds can never serve as justification for barriers prohibited by Article [34] of the Treaty ...
63 As regards the suggestion by the French Government, in support of those arguments, that the destabilization of the French market for fruit and vegetables was brought about by unfair

practices, and even infringements of Community law, by Spanish producers, it must be remembered that a Member State may not unilaterally adopt protective measures or conduct itself in such a way as to obviate any breach by another Member State of rules of Community law ...
64 This must be so a fortiori in the sphere of the common agricultural policy, where it is for the Community alone to adopt, if necessary, the measures required in order to deal with difficulties which some economic operators may be experiencing, in particular following a new accession.
65 Having regard to all the foregoing considerations, it must be concluded that in the present case the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.

In para. 59 the ECJ says that the fact that France had assumed responsibility for losses caused by the French farmers' acts did not allow France to escape its obligations under Community law. What does this mean? Why do you think the Court says this?

In this case the actions of the French farmers were clearly illegal under French law. What if a group of people were to take action that was clearly legal under national law but which had the effect of impeding free movement of goods, such as a strike by long distance truck drivers or by port or airport workers? Should this be regarded as violating Art. 34?

In **International Trader's Ferry**[20] UK police authorities had decided to cut back on the protection they provided to a ferry operator importing livestock into the UK in respect of demonstrations by animal rights activists because of the cost of protection. The House of Lords held that this decision was within the discretion of the Chief Constable to decide how and when to commit resources. In considering the implications of the Spanish Fruits and Vegetables decision, Lord Slynn of Hadley (who had been an Advocate General at the ECJ) said:

I do not accept that the court is here saying that in every case where steps have to be taken by a member state a court must consider whether, somehow, the member state could have found, somewhere, the money necessary to take steps which could theoretically have been taken. If that were so the state could always in theory call upon moneys allocated for education or health or defence and use them for this kind of purpose. That cannot have been intended. It would in any event require an investigation as to whether other competing claims for money allocated allowed moneys to be taken away from other areas of government. That is an impossible

[20] [1999] 2 AC 418, http://www.bailii.org/uk/cases/UKHL/1998/40.html

inquiry for the court to undertake and I think is an unreasonable exercise for the member state itself to be required to undertake.
What is required in a case like the present where the Chief Constable has statutory and common law duties to perform is to ask whether he did all that proportionately and reasonably he could be expected to do with the resources available to him. He is after all dealing with an emergency situation and there is no question of funds being deliberately withheld by the state to hamper his work. The budget for the authority was a very large one and it was for him to decide how he would use the moneys apportioned to him. These decisions have to be taken on the information available at the time. It is not right, in my view, that there should be an ex post facto examination of accounts to see whether, in some way or another, in the event moneys did prove to be available which perhaps could have been used. .... It seems to me that at the end of the day it is all a question of considering whether "appropriate measures" have been taken. That in turn involves an inquiry as to whether the steps taken were proportionate.
I am satisfied, as was the Court of Appeal, that the Chief Constable has shown here that what he did in providing police assistance was proportionate to what was required. To protect the lorries, in the way he did, was a suitable and necessary way of dealing with potentially violent demonstrators. To limit the occasions when sufficient police could be made available was, in the light of the resources available to him to deal with immediate and foreseeable events at the port, and at the same time to carry out all his other police duties, necessary and in no way disproportionate to the restrictions which were involved. Unlike the authorities in Commission of the European Communities v. French Republic ... he was controlling and arresting violent offenders. He was, moreover, not dealing with a situation where no other way of exporting the animals was available. Dover was available and there were, and might be, other occasions when the lorries could get through. Far from failing to protect the applicant's trade he was seeking to do it in the most effective way available to him with his finite resources. It was only on rare and necessary, even dangerous, occasions that lorries were turned back. In the light of article [36] it is not open to I.T.F. to say, as they at times seem to be saying, that they had an absolute right to export animals on seven days a week and there is no suggestion that with such a short Channel crossing their claim was necessarily limited to one sailing a day. This case is quite different from Commission of the European Communities v. French Republic where "manifest and persistent failure" to control those interfering with imports was shown and where there was no evidence to show that those responsible could have acted. Since this case involves the application of the principles laid down in the French Republic case, where clearly the European Court left a considerable discretion to national authorities in dealing with issues of this sort, I do not find it necessary, nor are your Lordships obliged, to refer a question concerning article [36] to the European Court of Justice under article [267] of the E.C. Treaty.

Should the House of Lords have referred the question of the obligations of the UK police authorities under Art. 34 to the ECJ ?

Question:
The UK Government’s Department for Culture, Media and Sport commissioned a

project to collect nominations for British "Icons".[21] One of the most popular nominations was for the British Pub, described as follows:

The English public house, the local, the boozer: whatever we call it, the pub is an indispensable part of the national landscape, whether in town, city or countryside. The smaller the location, the more likely it is that the pub will be a focal point of the local Community, a place for exchanging news and gossip. There are over 60,000 such premises licensed to serve alcohol in the UK. Country pubs generally retain the most traditional, air with cask-conditioned ales served by hand-pump, a range of home-cooked food on offer, and a cheery, convivial ambience. But many people feel that the English pub has lost some of its character, now that premises are often controlled by chains and big brewing companies. Join the debate - what kind of atmosphere you look for in a pub?

The Campaign for Real Ale (CAMRA)[22] encouraged people to vote for the Pub as a British Icon:

CAMRA Press Officer Owen Morris said: ""The brewing industry in England is a proud and vital part of our heritage and it would be extremely surprising if a pint of real ale or the traditional English pub did not make this list. Pubs have been regarded as the focal point for the Community for centuries and it is hard to imagine an England without them.

"Pubs themselves are associated with any number of iconic images. The swaying pub sign, the hand-pump from which your favourite real ale is poured, but very little can compare with the pint of beer itself. CAMRA was founded by people with a passion for traditional brewing, beer, and pubs, and today boast around 80,000 members who believe in the same thing. When that many people can be so passionate about something they wish to see preserved for the future how can it be thought of as anything but iconic?

Is it problematic under the Treaty for the Government to be involved in this way in suggesting that pubs selling beer are a British icon?

Consequences of Member State Breaches of Treaty Obligations

We have seen that a person who claims a right under Community law may be able to enforce that right using the doctrines of direct effect and indirect effect, and that In other cases a remedy in damages under **Francovich v Republic of Italy**[23] may be

[21] http://www.icons.org.uk. This is a non-profit organisation Commissioned by the Government.

[22] http://www.camra.org.uk/SHWebClass.ASP?WCI=ShowDoc&DocID=12895

[23] Joined cases C-6/90 and C-9/90 at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=6

available. The application of the Francovich damages remedy in the context of free movement of goods was addressed by the Court of Justice in **Danske Slagterier v Germany.**[24] A directive required Member States to ensure that meat which gave off a 'pronounced sexual odour' (or 'boar taint') was pronounced unfit for human consumption. The Danish and German Authorities took different views about which chemical caused the odour. Danish researchers attributed the odour to skatol and German researchers attributed it to androstenone. In Denmark, slaughtering houses checked for skatol, but the German authorities tested for androstenone. Large quantities of Danish pigmeat were rejected by the German authorities because of high levels of androstenone. A Danish industry association of slaughterhouses claimed compensation for the loss suffered as a result of the German approach. The German court referred a number of questions to the ECJ:

18 By the first two questions ... the referring court essentially asks whether ... Directive 64/433 in conjunction with ... Directive 89/662 place producers and distributors of pigmeat, in the event of incorrect transposition or application of those directives, in a legal position which can give rise to a claim seeking reparation on account of State liability for the breach of Community law and whether, in those circumstances, they can rely on a breach of Article [34] in order to substantiate a claim seeking reparation on account of such State liability.
19 It is to be recalled first of all that, in accordance with settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the EC Treaty...
20 The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of Community law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals ...
21 With regard to the first condition, the Court has had the opportunity to examine Member State liability for breach of Community law in the case of failure to transpose directives designed to complete the internal market ... However, unlike the cases giving rise to those two judgments, where only secondary law had created a legal framework according rights to individuals, the main proceedings concern an instance in which one of the parties thereto, namely Danske Slagterier, submits that Article [34] already confers upon it the rights which it invokes.
22 It should be recalled that it is undisputed that Article [34] has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and that breach of that provision may give rise to reparation ...
23 Danske Slagterier also relies on the provisions of Directives 64/433 and 89/662. As is

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[24] http://www.bailii.org/eu/cases/EUECJ/2009/C44506.html

apparent from the wording of the title of Directive 89/662 and of the first recital in its preamble, that directive was adopted with a view to the completion of the internal market, and so was Directive 91/497 amending Directive 64/433, as made clear by the third recital in the preamble to Directive 91/497. The free movement of goods is thus one of the objectives of those directives, which, through the elimination of the differences existing between the Member States with regard to health requirements for fresh meat, are designed to encourage intra-Community trade. The right conferred by Article [34] is thus defined and given concrete expression by those directives.

24 Regarding the content of Directives 64/433 and 89/662, it should be noted that they govern, amongst other matters, health controls for, and certification of, fresh meat produced in one Member State and delivered to another. As is apparent in particular from Article 7(1)(b) of Directive 89/662, the Member States can prevent imports of fresh meat only where the goods do not meet the conditions laid down by Community directives or in certain very specific circumstances such as in the event of epidemics. The prohibition on the Member States' preventing importation gives individuals the right to market in another Member State fresh meat that complies with the Community requirements.

25 It is, moreover, apparent from Directive 64/433 in conjunction with Directive 89/662 that measures for the detection of a pronounced sexual odour from uncastrated male pigs have been harmonised at Community level ... This harmonisation consequently prevents the Member States, in the field harmonised exhaustively, from justifying an obstacle to the free movement of goods on grounds other than those envisaged by Directives 64/433 and 89/662.

26 Accordingly, the answer to the first two questions is that individuals who have been harmed by the incorrect transposition and application of Directives 64/433 and 89/662 may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.

27 By its third question, the referring court essentially asks whether, where the Commission of the European Communities has brought infringement proceedings under Article [258], Community law requires the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings, if there is no effective legal remedy in the State in question to compel it to transpose a directive.

28 Light can be shed on this question by setting out the chronology of the facts in the main proceedings. It is apparent from the order for reference that the infringement proceedings against the Federal Republic of Germany which gave rise to the judgment in Case C-102/96 .. were brought on 27 March 1996. The first harmful effects were sustained by the injured parties in 1993, but it was not until December 1999 that they brought an action for damages against that State. If, as the referring court envisages, the three-year limitation period laid down in Paragraph 852(1) of the BGB is applied,[25] that period would begin to run in the middle of 1996,

[25] Para 10 of the judgement states: “Paragraph 852 of the BGB provided:(1) The limitation period in respect of a claim for compensation for damage that has arisen from an unlawful act shall expire three years from the date on which the injured party became aware of the damage and of the identity of the

when, according to the referring court, the injured parties became aware of the damage and the identity of the person liable to pay compensation. Consequently, in the main proceedings, the action against the State for damages is liable to be time-barred. For that reason, it is relevant for deciding the main proceedings to know whether the institution of infringement proceedings by the Commission had effects on that limitation period.

29 However, in order to give an answer that is helpful for the referring court, it is appropriate to examine first of all the question implicitly raised by it, namely whether Community law precludes the application by analogy of the three-year limitation period laid down by Paragraph 852(1) of the BGB in the main proceedings.

30 Regarding the application of Paragraph 852(1) of the BGB, Danske Slagterier has bemoaned the lack of clarity in the legal position in Germany as to the national limitation rule applicable to claims seeking reparation on account of State liability for breach of Community law, stating that this question has not yet been dealt with by any legislative measure or any decision of the highest court, while academic legal writers are also divided on the issue as several legal bases are possible. In its view, application, for the first time and by analogy, of the time-limit laid down in Paragraph 852 of the BGB to actions for damages against a State for breach of Community law would infringe the principles of legal certainty and legal clarity as well as the principles of effectiveness and equivalence.

31 In that regard, it is settled case-law that, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. It is thus on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions, including time-limits, for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness)...

32 As regards the latter principle, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned ... Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law. In that regard, a national limitation period of three years appears to be reasonable ...

33 However, it is also apparent ... that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal

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person liable to pay compensation and, irrespective of any such awareness, 30 years from the date on which the unlawful act was committed.(2) If negotiations on the amount of compensation payable have commenced between the person liable to pay the compensation and the person entitled to it, the limitation period shall be suspended until one or other of the parties refuses to continue the negotiations.(3) If through his unlawful act the person liable to pay compensation has acquired anything to the injured party's detriment, he shall be required even after the expiry of the limitation period to make restitution in accordance with the provisions on restitution in the case of unjust enrichment.

uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty.
34 It is for the national court, taking account of all the features of the legal and factual situation at the time material to the main proceedings, to determine, in light of the principle of effectiveness, whether the application by analogy of the time-limit laid down in Paragraph 852(1) of the BGB to claims for reparation of loss or damage caused as a result of the breach of Community law by the Member State concerned was sufficiently foreseeable for individuals.
35 In addition, so far as concerns whether the application by analogy of that time-limit is compatible with the principle of equivalence, it is likewise for the national court to determine whether, as a result of its application, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by that Member State would have been less favourable than those applicable to the reparation of similar domestic loss or damage.
36 As regards interruption or suspension of the limitation period when infringement proceedings are brought, it follows from the foregoing considerations that it is for the Member States to determine detailed procedural matters of this type in so far as the principles of equivalence and effectiveness are observed.
37 It should be observed that reparation of loss or damage cannot be made conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the State..
38 The finding of an infringement is admittedly an important factor, but is not indispensable when verifying that the condition that the breach of Community law must be sufficiently serious is met. Nor can rights for individuals depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article [258] or on the delivery by the Court of any judgment finding an infringement ...
39 An individual may therefore bring an action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until a judgment finding that the Member State has infringed Community law has been delivered. Consequently, the fact that institution of infringement proceedings does not have the effect of interrupting or suspending the limitation period does not make it impossible or excessively difficult for individuals to exercise the rights which they derive from Community law.
40 In addition, Danske Slagterier pleads a breach of the principle of equivalence since German law provides for interruption of the limitation period when a domestic action under Paragraph 839 of the BGB is brought in parallel and proceedings under Article [258] must be treated in the same way as such an action.
41 As to those submissions, in order to decide whether procedural rules are equivalent, it is necessary to verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by them in the procedure as a whole, as well as the operation of that procedure and any special features of the rules...
42 When assessing whether the rules at issue here are similar, account must be taken of the specific features of proceedings under Article [258].
43 In exercising its powers under Article [258] the Commission does not have to show that

there is a specific interest in bringing an action ...The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end..
43 Article [258] is not therefore intended to protect the Commission's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations and, as the case may be, because of what conduct or omission those proceedings should be brought ... The Commission consequently has a discretion in this regard which excludes the right for individuals to require it to adopt a specific position...
44 It must accordingly be concluded that the principle of equivalence is observed by national legislation which does not provide that the limitation period for a claim seeking reparation on account of State liability for breach of Community law is interrupted or suspended when proceedings under Article [258] have been brought by the Commission.
45 In view of all the foregoing considerations, the answer to the third question is that, where the Commission has brought infringement proceedings under Article [258], Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.
46 By its fourth question, the referring court essentially asks whether the limitation period applicable to an action for damages against the State for incorrect transposition of a directive begins to run, irrespective of the applicable national law, only when the directive has been fully transposed, or whether that period begins to run, in accordance with national law, on the date on which the first injurious effects of the incorrect transposition have been produced and further injurious effects thereof are foreseeable. If full transposition has a bearing on the course of the limitation period, the referring court asks whether that is true generally or whether it applies only where the directive confers a right on individuals.
47 It should be recalled that, as is apparent from paragraphs 31 and 32 of the present judgment, in the absence of Community legislation, it is for the Member States to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, including the provisions governing limitation, in so far as those rules observe the principles of equivalence and effectiveness. It should further be recalled that the setting of reasonable time-limits for bringing proceedings observes those principles and cannot, in particular, be considered to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.
48 The fact that the limitation period laid down by national law begins to run when the first injurious effects have been produced, although other effects of that kind are foreseeable, is likewise not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.
49 The judgment in ... Manfredi .. to which Danske Slagterier refers, cannot cast doubt on that conclusion.
50 In paragraphs 78 and 79 of that judgment, the Court held that it is conceivable that a short limitation period for bringing an action for damages that runs from the day on which an

agreement or concerted practice has been adopted could make it impossible in practice to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice. The Court stated that, where there are continuous or repeated infringements, it is thus possible for the limitation period to expire even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.
51 However, that is not the situation in the main proceedings. It is clear from the order for reference that the limitation period at issue in the main proceedings cannot begin to run until the injured party has become aware of the loss or damage and of the identity of the person required to pay compensation. In such circumstances, it is thus impossible for a person who has sustained loss or damage to find himself in a situation in which the limitation period begins to run, or indeed expires, without his even knowing that he has been harmed, as could have been the position in the context of the case which gave rise to the judgment in Manfredi and Others, where the limitation period began to run on the adoption of the agreement or concerted practice, of which certain persons concerned may not have been aware until much later.
52 As regards the possibility of setting the point at which a limitation period begins to run as being before the directive in question has been fully transposed, it is true that the Court held in ... Emmott ... that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.
53 However.. the solution adopted in Emmott was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant in the main proceedings of any opportunity whatsoever to rely on her right to equal treatment under a directive...
54 It is not apparent either from the documents before the court or from the hearing which took place in the oral procedure that, in the main proceedings, the existence of the time-limit at issue had the result, as in the proceedings which gave rise to the judgment in Emmott, of depriving the injured parties of any opportunity whatsoever to rely on their rights before the national courts.
55 Accordingly, the answer to the fourth question is that Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive...
57 By its fifth question, the referring court essentially asks whether Community law precludes a rule such as that laid down in Paragraph 839(3) of the BGB which provides that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy. The referring court elaborates upon its question by asking whether such a national rule would be contrary to Community law in so far as it were applied subject to the proviso that recourse to that remedy be reasonable for the person concerned. The referring court would like, finally, to ascertain whether recourse to a legal remedy may be regarded as reasonable when it is likely that the court before which a case is brought will make a reference for a preliminary ruling under Article [267] or when infringement proceedings under Article[258]

EC have been brought.
58 As has been recalled when answering the previous two questions, it is for the Member States, in the absence of Community legislation, to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, in so far as those rules observe the principles of equivalence and effectiveness.
59 As regards utilisation of the available legal remedies, the Court held in Brasserie du pêcheur and Factortame ... in relation to liability of a Member State for breach of Community law, that the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.
60 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself ...
61 It would, however, be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them.
62 In ... Metallgesellschaft ...the Court indeed held that the exercise of rights conferred on private persons by directly applicable provisions of Community law would be rendered impossible or excessively difficult if their claims for compensation based on Community law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by Community provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. In a case of that kind, it would not have been reasonable to require the injured parties to utilise the legal remedies available to them, since they would in any event have had to make the payment at issue in advance, and even if the national court had held the fact that payment had to be made in advance incompatible with Community law, the persons in question would not have been able to obtain interest on that sum and they would have laid themselves open to the possibility of penalties ...
63 Consequently, it is to be concluded that Community law does not preclude the application of a national rule such as that laid down in Paragraph 839(3) of the BGB, provided that utilisation of the legal remedy in question can reasonably be required of the injured party. It is for the referring court to determine in light of all the circumstances of the main proceedings whether that is so.
64 As regards the possibility that the legal remedy utilised will give rise to a reference for a preliminary ruling, and the effect which that would have on the reasonableness of that legal remedy, it should be recalled that, in accordance with settled case-law, the procedure provided for by Article [267] is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them ... The guidance thus obtained by the national court therefore facilitates its application of Community law, so that utilisation of that instrument of cooperation does not in any way contribute to making it excessively difficult for individuals to exercise the rights which they

derive from Community law. Accordingly, it would not be reasonable not to utilise a legal remedy solely because that remedy would be likely to give rise to a reference for a preliminary ruling.

65 It follows that a strong likelihood that recourse to a legal remedy will give rise to a reference for a preliminary ruling is not in itself a reason for concluding that utilisation of that remedy is not reasonable.

66 As regards the reasonableness of the obligation to utilise the available legal remedies when infringement proceedings are pending before the Court, suffice it to state that the procedure under Article [258] is entirely independent of national procedures and does not replace them. As was stated when answering the third question, infringement proceedings amount in fact to an objective review of legality in the general interest. Although the result of such proceedings may serve an individual's interests, it none the less remains reasonable for him to avert the loss or damage by applying all the means available to him, that is to say utilising the available legal remedies.

67 It follows that the existence of infringement proceedings pending before the Court of Justice or the likelihood that the national court will make a reference to the Court of Justice for a preliminary ruling cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

68 The answer to the fifth question therefore is that Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article [267] or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

CUSTOMS DUTIES, CEE	**INTERNAL TAXATION**	**QUANTITATIVE RESTRICTIONS, MEE** (quotas)
Article 30	**Article 110**	**Articles 34-36**
How to identify: ♢ any pecuniary charge ♢ by reason goods cross frontier A charge can be a cee whether or not paid to state	**How to identify:** ♢ part of system of internal tax ♢ discriminatory/protective effect	**How to identify:** ♢ trading rules capable of hindering, directly or indirectly, actually or potentially, intra-Community trade eg labelling rules, content rules, measures to promote domestic products
Justifications available: ♢ none - see Art 30 BUT: charge may be allowed if there is benefit to the payer	**Justifications available:** no “justifications” but Art 110 only prohibits internal tax rules if they are discriminatory/protective, thus a Member State can argue about this - there is much less scope to argue about the test for charges equivalent to customs duties	**Justifications available:** ♢ does not fall within Art 34 - eg selling restrictions (Keck), Cassis de Dijon “mandatory requirements” ♢ Art 36