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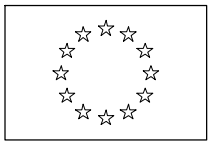

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION STAFF WORKING DOCUMENT

Free Movement of Goods - Guide to the application of Treaty provisions governing Free Movement of Goods (Articles 28-30 EC)

European Commission
Enterprise and Industry Directorate-General

FREE MOVEMENT OF GOODS

GUIDE TO THE APPLICATION OF TREATY PROVISIONS GOVERNING FREE MOVEMENT OF GOODS (ARTICLES 28–30 EC)

2nd edition

Commission Staff Working Document

Prepared and drafted by Directorate C, Regulatory Policy, of DG Enterprise and Industry

Preface

This guide to the application of Treaty provisions governing free movement of goods is intended to provide an insight into past developments and new challenges from a legal practitioner's point of view in an area that is fundamental to European Integration. The internal market for goods has become one of the success stories of the European project and remains a major catalyst for growth in the European Union.

While the guide is not the first of its kind, previous editions were primarily drafted as a practical means for candidate countries and/or national authorities to familiarise themselves with the concept of Articles 28 to 30 of the EC Treaty (hereinafter: "Articles 28-30 EC"). The present version is more detailed. It reflects the working experience of the Commission service responsible for the application of Articles 28-30 EC[1] and provides a picture of the trade barriers that were and still are encountered in practice. The guide summarises the relevant case law and supplements it with comments, although it does not claim to provide exhaustive coverage of the topic. It is intended more as a workbook highlighting questions that have emerged in the course of the practical application of Articles 28-30 EC and providing answers.

The guide may prove useful for the national administrations of the Member States, both in respect to the existing regulatory environment and also when drafting new national legislation. Legal practitioners counselling clients on internal market questions may also benefit from some guidance in the non-harmonised area. Finally, the internal market has always generated interest from third countries that were keen to understand the legal framework of the European market and learn from the European experience in the past 50 years. This guide may provide some useful insights in this respect.

The guide reflects the law and case-law as it stood on 1 April 2009. Community legislation and judgments of the Court can be found in *Eurlex*[2]. Judgments issued since 17 June 1997 are also available on the webpage of the Court of Justice[3].

The guide is not a legally binding document and does not necessarily represent the official position of the Commission.

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1 This second edition of the guide was prepared and drafted by Santiago Barón Escámez, Sylvia Ferretti, Juliana Frendo, Octavien Ginalski, Maciej Górka, Hans Ingels, Christos Kyriatzis, Florian Schmidt, Carolina Stege, Laura Stočkutė and Yiannos Tolias.

2 http://eur-lex.europa.eu/en/index.htm.

3 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

TABLE OF CONTENTS

1. The role and importance of the free movement of goods in the single market of the 21st century

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[4].

From a legal perspective the principle of the free movement of goods has been a key element in creating and developing the internal market. It is one of the economic freedoms established by the EC Treaty. Articles 28 to 30 define the scope and content of the principle by prohibiting unjustified restrictions on intra-Community trade. Nowadays the internal market goes beyond these three Treaty articles. 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

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[4] Cf. Communication from the Commission, The Internal Market for Goods: a cornerstone for Europe's competiveness, COM (2007)35final.

human health. Against a background of major global developments it comes as no surprise that 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.

Today's free movement of goods incorporates many policies and fits smoothly into a responsible single market which guarantees easy access to high-quality products, combined with a high degree of protection of other public interests.

2. The Treaty provisions

The main Treaty provisions governing the free movement of goods are:

- Article 28 EC, which relates to intra-Community imports and prohibits "quantitative restrictions and all measures having equivalent effect" between Member States;

- Article 29 EC, which relates to exports from one Member State to another and similarly prohibits "quantitative restrictions and all measures having equivalent effect"; and

- Article 30 EC, which provides for derogations to the internal market freedoms of Articles 28 and 29 EC that are justified on certain specific grounds.

The Treaty chapter on the prohibition of quantitative restrictions between Member States contains, also in Article 31 EC, rules on the adjustment of State monopolies of a commercial character. Its role and relation to Articles 28-30 EC will be briefly described in chapter 7 of this guide.

The Treaty of Lisbon does not introduce any change to the wording and content of Articles 28-30 EC, although there are plans to introduce a new numbering system. All three provisions would form part of the Treaty on the Functioning of the European Union as Articles 34, 35 and 36.

3. The Scope of Article 28 EC

3.1. General conditions

3.1.1. Non-harmonised area

While Articles 28-30 EC laid the groundwork for the general principle of free movement of goods, they are not the only legal yardstick for measuring the compatibility of national measures with internal market rules. These Treaty articles do not apply when the free movement of a given product is fully harmonised by more specific Community legislation, i.e. especially where the technical specifications of a given product or its conditions of sale are subject to harmonisation by means of directives or regulations adopted by the European Community. In some other cases more specific Treaty rules, such as Article 90 EC on tax-related provisions that may hamper the internal market, prevail over the general provisions of Articles 28-30 EC.

Where secondary legislation is relevant, any national measure relating thereto must be assessed in the light of the harmonising provisions and not of those of the Treaty[5].

This is due to the fact that harmonising legislation can be understood as substantiating the free movement of goods principle by establishing actual rights and duties to be observed in the case of specific products. Therefore, any problem that is covered by harmonising legislation would have to be analysed in the light of such concrete terms and not according to the broad principles enshrined in the Treaty.

Nevertheless, even after 50 years of dedicated activity on the part of the Community legislator in providing harmonised rules, the Treaty provisions on free movement of goods have not become redundant; their scope is still remarkable. Either certain circumstances and/or products are not harmonised at all or they are only subject to partial harmonisation. In every instance in which harmonising legislation cannot be identified, Articles 28-30 EC can be relied on. In this respect the Treaty articles act as a safety net, which guarantees that any obstacle to trade within the internal market can be scrutinised as to its compatibility with Community law.

3.1.2. Meaning of "goods"

Articles 28 and 29 EC cover all types of imports and exports of goods and products. The range of goods covered is as wide as the range of goods in existence, so long as they have economic value: "by goods, within the meaning of the …Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions"[6].

In its rulings the Court of Justice has clarified on several occasions the proper designation of a particular product. Works of art must be seen as goods[7]. Coins which are no longer in circulation as currency would equally fall under the definition of goods, as would bank notes and bearer cheques[8], although donations in kind would not[9]. Waste is to be regarded as goods even when it is non-recyclable, but the subject of a commercial transaction. Electricity[10] and natural gas[11] count as goods, but television signals[12] do not.

The latter example underlines the fact that it can be legally important to draw a distinction between goods and services. While fish are certainly goods, fishing rights and angling permits are not covered by the free movement of goods principle, but constitute the 'provision of a service' within the meaning of the Treaty provisions relating to the freedom to provide services[13].

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5 Case C-309/02 *Radlberger Spitz* [2004] ECR I-11763, para. 53.
6 Case 7/68 *Commission* v *Italy* [1968] ECR 425.
7 Case 7/78 *R.* v *Thompson, Johnson and Woodiwiss* [1978] ECR 2247.
8 Case C-358/93 *Bordessa* [1995] ECR I-361.
9 Case C-318/07 *Persche*, not yet published, para. 29.
10 Case C-393/92 *Almelo* v *Energiebedrijf Ijsselmij* [1994] ECR I-1477.
11 Case C-159/94 *Commission* v *France* [1997] ECR I-5815.
12 Case 155/73 *Sacchi* [1974] ECR 423.
13 Case C-97/98 *Peter Jägerskiöld* v *Torolf Gustafsson* [1999] ECR I-7319.

3.1.3. Cross-border/transit trade

According to its wording Article 28 EC applies to obstacles in trade "between Member States". A cross-border element is therefore a prerequisite for evaluating a case under this provision. Purely national measures, affecting only domestic goods, fall outside the scope of Articles 28-30 EC. The conditions for meeting the cross-border requirement are straightforward. It is sufficient that the measure in question is capable of indirectly or potentially hindering intra-Community trade[14].

By implication the need for a cross-border element means that Community law does not prevent Member States from treating their domestic products less favourably than imports ("reverse discrimination"). In practice, though, this problem will rarely occur, as Member States normally have no interest in adversely affecting goods manufactured in their own territory. Although Article 28 EC is applicable where a domestic product leaves the Member State but is imported back, i.e. re-import[15], it does not apply in cases where the sole purpose of re-import is to circumvent the domestic rules[16].

The cross-border requirement may also be fulfilled if the product is merely transiting the Member State in question. The Court has made it clear that the free movement of goods entails the existence of a general principle of free transit of goods within the Community[17].

Irrespective of the place where they are originally manufactured inside or outside the internal market, all goods, once they are in free circulation in the single market, benefit from the principle of free movement.

3.1.4. Addressees

Articles 28-30 EC deal with measures taken by the Member States. In this context, however, 'Member States' has been interpreted broadly to include all the authorities of a country, be they central authorities, the authorities of a federal State, or any other territorial authorities[18]. The requirements laid down by these articles apply equally to law-making, judicial or administrative bodies of a Member State[19]. This evidently covers measures taken by all bodies established under public law as "public bodies". The mere fact that a body is established under private law does not prevent the measures it takes from being attributable to the State. Indeed, the Court held that:

- measures taken by a professional body which has been granted regulatory and disciplinary powers by national legislation in relation to its profession may fall within the scope of Article 28 EC[20];

- the activities of bodies established under private law but which are set up by law, mainly financed by the Government or compulsory contribution from undertakings in a certain

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14 Case 8/74 *Dassonville* [1974] ECR 837, para. 5.

15 Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487.

16 Case 229/83 *Leclerc* v *Au Ble Vert* [1985] ECR 1.

17 Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, para. 65.

18 Case C-1/90 *Aragonesa de Publicidad* v *Departamento de sanidad* [1991] ECR I-4151.

19 Case C-434/85 *Allen & Hanburys* [1988] ECR 1245, para. 25; Case C-227/06 *Commission* v *Belgium* not yet published, para. 37.

20 See Case 266-267/87 *R* v *Royal Pharmaceutical Society of Great Britain* [1989] ECR 1295; Case C-292/92 *Hünermund* [1993] ECR I-6787.

sector and/or from which Members are appointed by the public authorities or supervised by them can be attributed to the State[21].

In a recent case, the Court even seemed to acknowledge that statements made publicly by an official, even though having no legal force, can be attributed to a Member State and constitute an obstacle to the free movement of goods if the addressees of the statements can reasonably suppose, in the given context, that these are positions taken by the official with the authority of his office[22].

Although the term 'Member State' has been given a broad meaning, it does in general not apply to "purely" private measures, i.e. measures taken by private individuals or companies.

Finally, by virtue of settled case law, Article 28 EC applies also to measures adopted by the Community institutions. With regard to judicial review the Community legislature must, however, be allowed broad discretion. Consequently, the legality of a measure adopted can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue[23].

3.1.5. Active and passive measures

Article 28 EC is often characterised as a defence right which can be invoked against national measures creating unjustified obstacles to cross-border trade. Accordingly, infringements of Article 28 EC seem to presuppose activity on the part of a State. In this sense, the measures falling within the scope of Article 28 EC consist primarily of binding provisions of Member States' legislation, but non-binding measures can also constitute a breach of Article 28 EC[24]. An administrative practice can amount to a prohibited obstacle to the free movement of goods provided that this practice is, to some degree, of a consistent and general nature[25].

In view of Member States' obligations under Article 10 EC, which require them to take all appropriate measures to ensure fulfilment of Treaty obligations and the "*effet utile*" of Community law, Article 28 EC may under certain circumstances also be infringed by inactivity of a Member State, i.e. in a situation where a Member State refrains from adopting the measures required in order to deal with obstacles to the free movement of goods. The specific obstacle may even emanate from action by private individuals. In Case C-265/95, France was held responsible for actions of national farmers seeking to restrict the import of agricultural goods from neighbouring Member States by intercepting lorries transporting these goods and/or by destroying their loads. The non-intervention of national authorities against these acts was considered as infringing Article 28 EC, as Member States are obliged to ensure the free movement of products in their territory by taking the measures necessary and

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21 See Case 249/81 *Commission* v *Ireland* (Buy Irish) [1982] ECR 4005; Case C-325/00 *Commission* v *Germany* [2002] ECR I-9977; Case C-227/06 *Commission* v *Belgium* [2008] not yet published.

22 Case C-470/03 *AGM-Cosmet SRl* [2007] ECR I-2749.

23 Joined Cases C-154/04 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451, para. 47 and 52.

24 Case 249/81 *Commission* v *Ireland* (Buy Irish) [1982] ECR 4005; Case C-227/06 *Commission* v *Belgium* [2008] not yet published.

25 Case 21/84 *Commission* v *France* [1985] ECR 1355; Case C-387/99 *Commission* v *Germany* [2004] ECR I-3751, para. 42 and case-law cited; Case C-88/07 *Commission* v *Spain* [2009] not yet published.

appropriate for the purposes of preventing any restriction due to the acts of private individuals[26].

Moreover, Article 28 EC may create an obligation of result. This obligation is infringed if a Member State falls short of the objectives due to its inactivity or insufficient activity. In Case C-309/02 that dealt with a German mandatory take-back system for one-way beverage packaging, the Court made the compliance of the deposit system with the free movement of goods principle dependent upon the existence of an operational system in which every producer or distributor can actually participate. Even though the task of setting up the take-back system was left to private undertakings, the Member State was held responsible for the result achieved or not achieved[27].

3.1.6. No explicit de-minimis rule

There is no de-minimis principle in relation to the articles concerning the free movement of goods. According to long-established case law, a national measure does not fall outside the scope of the prohibition in Articles 28-29 EC merely because the hindrance which it creates is slight and because it is possible for products to be marketed in other ways[28]. Therefore a State measure can constitute a prohibited measure having equivalent effect even if:

- it is of relatively minor economic significance;
- it is only applicable on a very limited geographical part of the national territory[29];
- it only affects a limited number of imports/exports or a limited number of economic operators.

Nevertheless, certain national rules have been held to fall outside the scope of Article 28 EC if their restrictive effect on trade between Member States is too uncertain and indirect[30].

3.1.7. Territorial application

The obligation to respect the provisions of Article 28 EC applies to all Member States of the EU and in certain cases it may also apply to European territories for whose external relations a Member State is responsible and to overseas territories dependent upon or otherwise associated with a Member State.

With regard to some other countries, the provisions of specific agreements and not those of the EC Treaty govern trade in goods between these countries and the EU's Member States.

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26 Case C-265/95 *Commission* v *France* [1997] ECR I-6959, para. 31; see also Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 60 especially on possible justifications (freedom of expression and freedom of assembly).

27 Case C-309/02 *Radlberger Spitz* [2004] ECR I-11763 para. 80.

28 See cases: 177/82 *Van de Haar* [1984] ECR 1797; 269/83 *Commission* v *France* [1985] ECR 837; 103/84 *Commission* v *Italy* [1986] ECR 1759.

29 Case C-67/97 *Blühme* [1998] ECR I-8033.

30 Case C-69/88 *Krantz* [1990] ECR I-583; Case C-93/92 *Motorradcenter* [1993] ECR I-5009; Case C-379/92 *Peralta* [1994] ECR I-4353; Case C-44/98 *BASF* [1999] ECR I-6269. Cf. also C-20/03 *Burmanjer* [2005] ECR I-4133 where the Court held that the national rules at issue, which made the itinerant sale of subscriptions to periodicals subject to prior authorisation, in any event have an effect over the marketing of products from other Member States that is too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States.

For example, products originating in Iceland, Liechtenstein and Norway enjoy free movement in the EU by virtue of Article 11 of the EEA Agreement, and industrial products originating in Turkey enjoy free movement in the EU by virtue of Articles 5 to 7 of Decision 1/95 of the EC-Turkey Association Council on the final phase of the customs union[31].

For a detailed account of the territories to which Article 28 EC applies, see Annex B to this guide.

3.1.8. Quantitative restrictions

Quantitative restrictions have been defined as measures which amount to a total or partial restraint on imports or goods in transit[32]. Examples would include an outright ban or a quota system[33], i.e. quantitative restrictions apply when certain import or export ceilings have been reached. However, only non-tariff quotas are caught by this Article, since tariff quotas are covered by Article 25 EC.

A quantitative restriction may be based on statutory provisions or may just be an administrative practice. Thus, even a covert or hidden quota system will be caught by Article 28 EC.

3.1.9. Measures of equivalent effect

The term "measure having equivalent effect" is much broader in scope than a quantitative restriction. While it is not easy to draw an exact dividing line between quantitative restrictions and measures of equivalent effect, this is not of much practical importance given that the rules apply in the same way to quantitative restrictions as to measures of equivalent effect.

In *Dassonville*, the Court of Justice set out an interpretation on the meaning and scope of measures of equivalent effect[34]:

"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."

This definition has been confirmed in the Court's case law with minor variations. The term 'trading rules' does not usually appear nowadays, as the Dassonville formula is actually not limited to trading rules but also embraces, for instance, technical regulations.

Directive 70/50/EEC[35], which formally applied during the Community's transitional period, stated the Commission's intention to catch not only measures which clearly accorded different treatment to domestic and imported goods, but also those which applied to them equally. Subsequently, in the *Dassonville* case, the Court stressed that the most important element determining whether a national measure is caught under Article 28 EC is its effect (*…capable of hindering, directly or indirectly, actually or potentially…),* therefore the discriminatory

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31 OJ L 35, 13.02.1996, p.1.

32 Case 2/73 *Riseria Luigi Geddo* v *Ente Nationale Risi* [1973] ECR 865.

33 Case 13/68 *Salgoil SpA* v *Italian Ministry of Foreign Trade* [1968] ECR 423.

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

35 Directive 70/50, [1970] OJ L 13/29 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

aspect of a measure is no longer the deciding factor for Article 28 EC. It seemed clear to the Court that not only overtly discriminatory measures could create barriers to trade in products between Member States.

The ruling by the Court in the *Cassis de Dijon*[36] case affirmed the previous statements in Directive 70/50/EEC and *Dassonville*. By acknowledging that there might be differences between the national rules of the Member States and that this could inhibit trade in goods, the Court confirmed that Article 28 EC could also catch national measures which applied equally to domestic and imported goods. In this case, Member States could derogate by having recourse not only to Article 30 EC but also to the mandatory requirements, a concept which was first enshrined in this ruling.

Therefore, it can be concluded that Article 28 EC will apply not only to national measures which discriminate against imported goods, but also to those which in law seem to apply equally to both domestic and imported goods, but in practice are more burdensome for imports (this particular burden stems from the fact that the imported goods are in fact required to comply with two sets of rules - one laid down by the Member State of manufacture, and the other by the Member State of importation). These rules are sometimes referred to as "indistinctly applicable" (see the case of *Commission* v *Italy*[37]).

In consequence, and following the Court's ruling in *Dassonville* and subsequently in *Cassis de Dijon*, there is no need for any discriminatory element in order for a national measure to be caught under Article 28 EC.

3.1.10. Selling arrangements

Almost twenty years[38] after *Dassonville*, the Court found it necessary to point out some limitations to the scope of the term "measures having equivalent effect" in Article 28 EC.

The Court held in *Keck*[39] that "[i]n view of the increasing tendency of traders to invoke Article [28] 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." In other words, the origin and intention of re-examining the case law seems inter alia to have been the need to limit the flow of cases aimed at challenging key pillars of national welfare and social provisions internal to the Member States which were never intended to interfere with free movement[40].

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36 Case 120/78 *Rewe Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

37 Case C-110/05 *Commission* v *Italy* [2009] not yet published, para. 35.

38 The reasoning of *Keck* (Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097) seems to be also present in the preceding cases 155/80 *Oebel* [1981] ECR 3147, 75/81 *Blesgen* [1982] ECR 1211; C-23/89 *Quietlynn* [1990] ECR I-3059 and 148/85 *Forest* [1986] ECR 3349. In contrast to this reasoning see (pre-*Keck*) cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605 and 145/88 *Torfaen* [1989] ECR 3851 (first case on Sunday trading legislation). The difficulty in applying the test in Torfaen was evident in case law within the UK: example *B&Q plc v Shrewsbury BC* [1990] 3 CMLR 535 and *Stoke City Council v B&Q* [1990] 3 CMLR 31. For an outline of the case law on Article 28 EC before the *Keck* judgment see Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, para. 23-33.

39 Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097, para. 14

40 C. Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) EL Rev. 35 at 50; J. Schwarze, *Europäisches Wirtschaftsrecht*, 2007, para.72.

The court in Keck referring to *Cassis de Dijon* held that "rules that lay down requirements to be met by such goods…constitute measures of equivalent effect prohibited by Article [28]."[41] Immediately afterwards it held that "[b]y 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."[42]

Indeed, rules that lay down requirements to be met by goods continue to be treated under *Cassis de Dijon* and are therefore considered to fall *per se* within the scope of Article 28 EC regardless of whether they also introduce discrimination on the basis of the origin of the products[43]. By contrast, selling arrangements fall within the scope of Article 28 EC only under the condition that the party invoking a violation can prove that they introduce discrimination on the basis of the origin of products, either in law or in fact. Discrimination in law occurs when measures are manifestly discriminatory[44]. Discrimination in fact, however, is more complex.

It is relatively easier to comprehend what types of measures are concerned with the characteristics of the products than what types of measures constitute selling arrangements. Measures which concern the characteristics of the product could be, for example, measures concerning shape, size, weight, composition, presentation, identification or putting up. Having said that, there are some instances where some measures do not appear at first sight to be concerned with the characteristics of the product, but where the Court holds that they are[45].

In *Canal Satélite*[46] the question that was referred to the Court was whether the registration procedure in question, which involved the obligation to enter both the operators and their products in an official register, was in breach of Article 28 EC. In order to obtain that registration, operators should have undertaken to comply with the technical specifications and obtained a prior technical report drawn up by the national authorities and prior administrative certification, stating that the technical and other requirements have been complied with. The Court concluded that these requirements were in breach of Article 28 EC. It pointed out that the need to adapt the products in question to the national rules prevented the abovementioned requirement from being treated as a selling arrangement.

The Court held in *Alfa Vita*[47] and *Commission* v *Greece*[48] that national legislation which makes the sale of "bake-off" products subject to the same requirements as those applicable to the full manufacturing and marketing procedure for traditional bread and bakery products is in breach of Article 28 EC. The Court reached this conclusion on the basis that the provisions of the national law aim to specify the *production conditions* for bakery products including

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41 Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097, para. 15.

42 Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097, para. 16.

43 P. Oliver, *Free Movement of Goods in the European Community*, 2003, at 124.

44 P. Oliver, *Free Movement of Goods in the European Community*, 2003, at 127; Case C-320/93 *Lucien Ortscheit* v *Eurim-Pharm* [1994] ECR I-5243 was arguably such a case.

45 See for example Case C-470/93 *Mars* [1995] ECR I-1923 and Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 11.

46 Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para. 29; see also Case C-389/96 *Aher-Wagon* [1998] ECR I-4473, para. 18.

47 Cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135.

48 Case C-82/05 *Commission* v *Greece* [2006] ECR I-93 (summ. pub).

"bake-off" products[49]. The principal characteristic of "bake-off" products is that they are delivered to sales outlets after the main stages of preparation have been completed. Therefore the requirement of having a flour store, an area for kneading equipment and a solid-fuel store does not take into account the specific nature of these products and entails additional costs. The Court concluded that the legislation in question therefore constitutes a barrier to imports which cannot be regarded as establishing a selling arrangement. Indeed, the Court seems to follow the position of the Advocate General, holding that rules imposing conditions which are part of the production process concern the inherent characteristics of the goods[50].

Another recent ruling of the Court which could be mentioned in this connection is *Commission* v *Greece* on amusement machines[51]. This case concerned Greek law, which prohibited the installation and operation of electrical, electromechanical and electronic games, including recreational games of skill and all computer games, on all public or private premises apart from casinos. The Court's view was that this Greek law must be held to constitute a breach of Article 28 EC. The Court went on to say that this is true even if that law does not prohibit the importation of the products concerned or their placing on the market[52]. The Court pointed out that since the law's entry into force there had been a reduction in the volume of imports of such games from other Member States. However, the Court also held that the importation of games machines actually stopped when that statutory prohibition came into force. This last remark by the Court could be a determining factor as to why the measure fell within the scope of Article 28 EC.

In the list of selling arrangements the Court includes measures relating to the conditions and methods of marketing,[53] measures which relate to the time of the sale of goods,[54] measures which relate to the place of the sale of goods or restrictions regarding by whom goods may be sold[55] and measures which relate to price controls[56].

Furthermore, certain procedures/obligations which do not relate to the product or its packaging could be considered as selling arrangements as shown in *Sapod Audic and Eco-Emballages.*[57]. The national measure at issue in *Sapod Audic* provided that any producer or importer was required to contribute to or organise the disposal of all of their packaging waste. The Court examined the compatibility of this measure with Article 28 EC in the case where it only imposed "a *general obligation to identify the packaging collected* for disposal by an approved undertaking"[58]. Under this interpretation the Court held that the "obligation imposed by that provision did not relate as such to the product or its packaging and therefore did not,

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49 Cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135, para. 18.

50 Advocate General Maduro's opinion at para. 16.

51 Case C- 65/05 *Commission* v *Greece* [2006] ECR I-10341.

52 Case C- 65/05 *Commission* v *Greece* [2006] ECR I-10341, para. 28.

53 See C-412/93 *Leclerc-Siplec* [1995] ECR I-179 para. 22 and Case C-6/98 *ARD* [1999] ECR I-7599, para. 46.

54 See Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, para. 14; Case C-69 and 258/93 *Punto Casa* [1994] ECR I-2355 and Cases C-418-421, 460-462 and 464/93, para. 9-11, 14-15, 23-24, and C-332/94 *Semeraro* [1996] ECR I-2975.

55 See Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, para. 15; Case C-69 and 258/93 *Punto Casa* [1994] ECR I-2355.

56 See Case C-63/94 *Belgapom* [1995] ECR I-2467.

57 Case C-159/00 *Sapod Audic and Eco-Emballages* [2002] ECR I-5031.

58 Ibid. para. 71 (emphasis added). If it were to be interpreted as imposing an obligation to apply a mark or label, then the measure would constitute a technical regulation within the meaning of Directive [98/34]. In such a case the individual may invoke the failure to make notification of that national provision. It is then for the national court to refuse to apply that provision.

of itself, constitute a rule laying down requirements to be met by goods, such as requirements concerning their labelling or packaging"[59]. As a result it reached the conclusion that the provision may be regarded as a selling arrangement.

Measures concerning advertising restrictions are slightly more complicated. The important role of advertising in enabling a product from one Member State to penetrate a new market in another Member State has been recognised by Advocates General[60] and the Court of Justice[61]. Since *Keck* the Court treats advertising restrictions as selling arrangements[62]. It is interesting to note that in certain cases the Court seems to link the scope of the advertising restriction with discrimination. More specifically, it holds that an "absolute prohibition of advertising the characteristics of a product"[63] could impede market access of products from other Member States more than it impedes access by domestic products, with which the consumers are more familiar[64].

To recapitulate, the Court seems to consider that selling arrangements are measures which are associated with the marketing of the good rather than with the characteristics of the good[65]. However, the Court had to qualify the simplicity of the distinction laid down in the *Keck* judgment.[66] Consequently, certain rules which appear to fall into the category of selling arrangements are treated as rules relating to products. Conversely, rules concerning the packaging of products which, following Keck, are *prima facie* included among the rules which relate to products have, after examining the particularities of the specific case, been categorised as selling arrangements[67]. Indeed these solutions demonstrate a certain pragmatism that the Court has adopted in this field.

3.1.11. Use restrictions

A new category of restrictions seems to have been brought to the Court's attention recently: namely, restrictions on use. Such restrictions are characterised as national rules which allow the sale of a product while restricting its use to a certain extent.

Use requirements usually lay down the specific conditions under which an item may or may not be used. Such requirements can include restrictions relating to the purpose or the method

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59 Ibid. para. 72.

60 See for example Advocate General Jacobs in C-412/93 *Leclerc-Siplec* [1995] ECR I-179 and Advocate General Geelhoed in Case C-239/02 *Douwe Egberts* [2004] ECR I-7007.

61 See for example joined Cases C-34/95 and C-36/95 *De Agostini* [1997] ECR I-03843.

62 Cf. Cases C-412/93 *Leclerc-Siplec* [1995] ECR I-179; joined Cases C-34/95 and C-36/95 *De Agostini* [1997] ECR I-3843; Cases C-405/98 *Gourmet* [2001] ECR I-1795; Case C-292/92 *Hünermund* [1993] ECR I-6787.

63 Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, para. 53.

64 As to discrimination between the domestic economic operators and other Member States' economic operators see Case C-322/01 *DocMorris* [2003] ECR I-14887, para. 74 and Case C-254/98 *Heimdienst* [2000] ECR I-151, para. 26. See also Cases 87/85 and 88/85 *Legia and Gyselinx* [1986] ECR 1707, para. 15 and Case C-189/95 *Franzén* [1997] ECR I-5909, para. 71.

65 See Case C-71/02 *Karner* [2004] ECR I-3025 (prohibition of reference indicating that goods come from an insolvent estate); Case C-441/04 *A-Punkt* [2006] ECR I-2093 (door-stepping situation) and also the similar reasoning in Case C-20/03 *Burmanjer* [2005] ECR I-4133.

66 Opinion of Advocate General in Cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135, para. 27-29.

67 Case C-416/00 *Morellato*, para. 36 (Advocate General Maduro states that it seems that the requirement to alter the product was imposed only at the last stage of the marketing of the product. As a result the access of the imported product to the national market was not itself an issue.)

of the particular use, the context or time of use, the extent of the use or the types of use. While such use requirements will often fall outside the scope of Article 28 EC, they may in certain circumstances be considered as a measure having equivalent effect.

There are two recent cases which could be brought under this area of complaint. The Advocates General have given their opinions in both of these cases and the Court of Justice has delivered its decision in one of these two cases.

The first case, Case C-142/05[68], concerns a reference for a preliminary ruling which raised the question of whether Articles 28 and 30 EC preclude Swedish rules on the use of personal watercraft. Under Swedish regulations the use of personal watercraft other than on general navigable waterways and on waters on which the county administrative board has permitted the use of personal watercraft is prohibited and punishable by a fine.

Advocate General Kokott[69], who gave her Opinion in this case, proposed in principle to exclude arrangements for use from the scope of Article 28 EC in the same way that selling arrangements under *Keck* are excluded.

Two important points emerge from Advocate General Kokott's analysis on the application of Keck in the case under consideration. First, not only national provisions which completely prevent access to the market of a product should be covered by Article 28 EC, but also national provisions allowing only marginal access of a product to the market[70]. Secondly, the Advocate General interprets the concept of discrimination by using the terms *similar products* and *products in competition*[71], used in the examination of a measure under Article 90 EC, to determine whether a selling arrangement is discriminatory and hence in breach of Article 28 EC.

The second case is *Commission* v *Italy*[72] where the Commission asked the Court to find that Italy, by maintaining rules which prohibit motorcycles from towing trailers, has failed to fulfil its obligations under Article 28 EC. The issue of this action against Italy seems to possess some elements similar to those arising in the Swedish preliminary reference concerning the use of personal watercraft.

As regards trailers which were specifically designed to be towed by motorcycles the Court held that the possibility for their use other than with motorcycles was very limited[73]. Consumers knowing that they were not allowed to use their motorcycle with a trailer specifically designed for it had practically no interest in buying such a trailer. As a result the prohibition in question, to the extent that its effect was to hinder access to the Italian market, constituted a breach of Article 28 EC. In the specific case, the Court found that the measure was justified on the basis of considerations of road safety as a mandatory requirement.

In short, it appears from this judgment that national measures which prohibit the specific use of a product for which it was designed can raise an issue as to their compatibility with Article 28 EC.

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68 Case C-142/05 *Mickelsson and Ross* (pending).

69 Opinion of Advocate General in Case C-142/05 *Mickelsson and Ross* (14 Dec 2006), para. 47.

70 Para. 67.

71 Similar terms were used by the Court in Case C-391/92 *Commission* v *Greece* (infant milk) para. 18.

72 Case C-110/05 *Commission v Italy* [2009] not yet published.

73 Case C-110/05 *Commission v Italy* [2009] not yet published, para. 51+55.

3.2. The Mutual Recognition principle

Technical obstacles to the free movement of goods within the EU are still widespread. They occur when national authorities apply national rules that lay down requirements to be met by such products (e.g. relating to designation, form, size, weight, composition, presentation, labelling and packaging) to products coming from other Member States where they are lawfully produced or marketed. If those rules do not implement secondary EU legislation, they constitute technical obstacles to which Articles 28 and 30 EC apply. This is so even if those rules apply without distinction to all products.

Under the "principle of mutual recognition"[74], different national technical rules continue to co-exist within the internal market. The principle means that, notwithstanding technical differences between the various national rules that apply throughout the EU, Member States of destination cannot forbid the sale on their territories of products which are not subject to Community harmonisation and which are lawfully marketed in another Member State, even if they were manufactured according to technical and quality rules different from those that must be met by domestic products. The only exceptions to this principle are restrictions that are justified on the grounds described in Article 30 EC (protection of public morality or public security, protection of the health and life of humans, animals or plants, etc.) or on the basis of overriding requirements of general public importance recognised by the case law of the Court of Justice, and are proportionate to the aim pursued.

Thus, the mutual recognition principle in the non-harmonised area consists of a rule and an exception:

(1) The general rule that, notwithstanding the existence of a national technical rule in the Member State of destination, products lawfully produced or marketed in another Member State enjoy a basic right to free movement, guaranteed by the EC Treaty; and

(2) The exception that products lawfully produced or marketed in another Member State do not enjoy this right if the Member State of destination can prove that it is essential to impose its own technical rule on the products concerned based on the reasons outlined in Article 30 EC or in the mandatory requirements developed in the Court's jurisprudence and subject to the compliance with the principle of proportionality.

Until very recently, the most important problem for implementation of the mutual recognition principle was without any doubt the general legal uncertainty about the burden of proof. Therefore, the EU has adopted Regulation (EC) No 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC[75].

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[74] The principle originated in the famous *Cassis de Dijon* judgment of the Court of Justice of 20 February 1979 (Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) and was the basis for a new development in the internal market for goods. While at the beginning not expressly mentioned in the case law of the Court of Justice, it is now fully recognised (see e.g. Case C-110/05 *Commission* v *Italy* [2009] not yet published, para. 34.)

[75] OJ L 218, 13.08.2008, p. 21. For details see point 8.3 of this guide.

3.3. Typical trade barriers

Trade barriers take quite different forms and shapes. Sometimes they are very blunt measures specifically targeting imports or allowing preferential treatment of domestic goods, and sometimes they are an unexpected side-effect of general policy decisions. Over past decades some typical categories have emerged from the jurisdiction and the practical application of Articles 28-30 EC in infringement procedures. A number of them are described below.

3.3.1. National provisions related to the act of import (import licences, inspections and controls)

National measures which relate directly to the act of import of products from other Member States make imports more cumbersome and are therefore regularly considered as measures having equivalent effect contrary to Article 28 EC. The obligation to obtain an import licence before importing goods is a clear example in this respect. Because formal processes of this kind can cause delays, such an obligation infringes Article 28 EC even where licences are granted automatically and the Member State concerned does not purport to reserve the right to withhold a licence[76].

Inspections and controls, such as veterinary, sanitary, phytosanitary and other controls, including customs checks on imports (and exports), are considered to be measures having equivalent effect within the meaning of Articles 28 and 29 respectively[77]. Such inspections are likely to make imports or exports more difficult or more costly, as a result of the delays inherent in the inspections and the additional transport costs which the trader may thereby incur.

When the internal market came into being on 1 January 1993, recurrent border controls for the transfer of goods became a thing of the past. Nowadays, Member States may not carry out controls at their borders unless they are part of a general control system that takes place to a similar extent inside the national territory and/or unless they are performed as spot-checks. If, however, such controls irrespective of where they take place amount to a systematic inspection of imported products, they are still considered as measures of equivalent effect[78], which may be justified only exceptionally, if strict conditions are fulfilled.

3.3.2. Obligations to appoint a representative or to provide storage facilities in the importing Member State

The obligation for an importer to have a **place of business** in the Member State of destination was declared by the Court to directly negate the free movement of goods within the internal market. It found, in fact, that by compelling undertakings established in other Member States to incur the cost of establishing a representative in the Member State of import, it makes it difficult, if not impossible, for certain undertakings, in particular small or medium-sized businesses, to enter that Member State's market[79]. The obligation to **appoint a representative or agent,** a secondary establishment or office or storage facilities in the importing Member State would likewise in general be contrary to Article 28 EC.

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[76] Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473, para. 31 or Case 51-54/71 *International Fruit Company* v *Produktschap voor Groenten en Fruit* [1971] ECR 3369.

[77] Case 4/75 *Rewe Zentralfinanz* v *Landwirschaftskammer* [1975] ECR 843.

[78] Case C-272/95 *Dt. Milchkontor II* [1997] ECR I-1905.

[79] Case 155/82 *Commission* v *Belgium* [1983] ECR 531, para. 7.

Some Member States have tried to justify those requirements by arguing that they are necessary to ensure proper enforcement of national provisions of public interest, including in some cases criminal liability. The Court has rejected this argument. It held that although each Member State is entitled to take within its territory appropriate measures in order to ensure the protection of public policy, such measures are justified only if it is established that they are necessary in order to attain legitimate reasons of general interest and that such protection cannot be achieved by means which place less of a restriction on the free movement of goods[80]. Thus, the Court held that "[e]ven though criminal penalties may have a deterrent effect as regards the conduct which they sanction, that effect is not guaranteed and, in any event, is not strengthened…solely by the presence on national territory of a person who may legally represent the manufacturer"[81]. Therefore it was held that the requirement that a representative be established on national territory is not such as to provide, from the point of view of public interest objectives, sufficient additional safeguards to justify an exception to the prohibition contained in Article 28 EC.

National requirements regulating the stocking or storage of imported goods may also amount to a violation of Article 28 EC if these national measures affect imported goods in a discriminatory manner compared to domestic products. This would include any rules which prohibit, limit or require **stocking** of imported goods only. A national measure requiring that imported wine-based spirits be stored for at least six months in order to qualify for certain quality designations was held by the Court to constitute a measure of equivalent effect to a quantitative restriction[82].

Similar obstacles to trade in goods could be created by any national rules which totally or partially confine the use of stocking facilities to domestic products only, or make the stocking of imported products subject to conditions which are different from those required for domestic products and are more difficult to satisfy. Consequently, a national measure which encouraged the stocking of domestically produced products could create obstacles to the free movement of goods under Article 28 EC.

3.3.3. National price controls and reimbursement

Although the Treaty does not contain any specific provision with regard to **national regulations on price controls,** the Court of Justice has, on a number of occasions, confirmed in its case law that Article 28 EC applies to national price control regulations.

Such regulations cover a number of measures: minimum and maximum prices, price freezes, minimum and maximum profit margins and resale price maintenance.

Minimum prices: A minimum price fixed at a specific amount which, although applicable without distinction to domestic and imported products, can restrict imports by preventing their lower cost price from being reflected in the retail selling price and thus impeding importers from using their competitive advantage, is a measure of equivalent effect contrary to Article 28 EC. The consumer cannot take advantage of this price[83]. This area is, however,

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80 Case 155/82 *Commission* v *Belgium* [1983] ECR 531, para. 12. See also Case C-12/02 *Grilli* [2003] ECR I-11585, para. 48 and 49; C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, para. 36 to 38.

81 Case 155/82 *Commission* v *Belgium* [1983] ECR 531, para. 15.

82 Case 13/78 *Eggers* v *Freie Hansestadt Bremen* [1978] ECR 1935.

83 Case 231/83 *Cullet* [1985] ECR 305, Case 82/77 *Van Tiggele* [1978] ECR 25.

now partly harmonised, and national legislation setting minimum prices for tobacco should for example be assessed in the light of Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco. According to the case law of the Court of Justice, the setting of such minimum selling prices is contrary to Article 9(1) of the Directive[84].

Maximum prices: Although a maximum price applicable without distinction to domestic products and imported products does not in itself constitute a measure having equivalent effect to a quantitative restriction, it may have such an effect if it is fixed at a level which makes the sale of the imported product either impossible or more difficult than that of the domestic product[85].

Price freezes: In a case relating to a national regulation requiring all price increases to be notified to the authorities at least two months before they take effect, the Court has confirmed that price freezes which are applicable equally to national products and to imported products do not amount in themselves to a measure having an equivalent effect to a quantitative restriction. They may, however, produce such an effect *de facto* if prices are at such a level that the marketing of imported products becomes either impossible or more difficult than the marketing of domestic products[86]. This will be the case if importers can market imported products only at a loss.

Minimum and maximum profit margins set at a specific amount rather than as a percentage of the cost price do not constitute a measure of equivalent effect within the meaning of Article 28 EC. The same applies to a fixed retail profit margin, which is a proportion of the retail price freely determined by the manufacturer, at least when it constitutes adequate remuneration for the retailer. In contrast, a maximum profit margin which is fixed at a single amount applicable both to domestic products and to imports and which fails to make allowance for the cost of importation is caught by Article 28 EC[87].

Since the judgment of the Court in *Keck*, which concerned French legislation prohibiting resale at a loss, it appears that national price control regulations come within the concept of "selling arrangements". In this respect, they fall outside the scope of Article 28 EC if they apply to all relevant traders operating within the national territory and if they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. The fact that "price controls" constitute "selling arrangements" is confirmed in the Judgment of the Court in the *Belgapom* case, where the Belgian legislation prohibiting sales at a loss and sales yielding only a very low profit margin was held to fall outside the scope of Article 28 EC.

Reimbursement of medicinal products: According to the general rule, Community law does not detract from the power of the Member States to organise their social security systems[88]; and, in the absence of harmonisation at Community level, the laws of each Member State determine the circumstances in which social security benefits are granted. However, those

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84 Case C-216/98 *Commision* v *Greece* [2000] ECR I-8921 and Case C-302/00 *Commission* v *France* [2002] ECR I-2055.

85 Case 65/75 *Tasca* [1976] ECR 291; Cases 88-90/75 *SADAM* [1976] ECR 323; Case 181/82 *Roussel* [1983] ECR 3849; Case 13/77 *GB-Inno* v *ATAB* [1977] ECR 2115.

86 Cases 16-20/79 *Danis* [1979] ECR 3327.

87 Case 116/84 *Roelstrate* [1985] ECR 1705; Case 188/86 *Lefevre* [1987] ECR 2963.

88 See Case 238/82 *Duphar* [1984] ECR 523 and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395.

laws may affect the marketing possibilities and in turn may influence the scope for importation. It follows that a national decision on reimbursement of pharmaceuticals may have a negative impact on their importation and may constitute an obstacle to the free movement of goods.

Furthermore, it follows from the *Duphar* judgment that provisions of national legislation governing the reimbursement of medical devices within the framework of the national health-care scheme are compatible with Article 28 EC if determination of the products subject to reimbursement and those which are excluded involves no discrimination regarding the origin of the products and is carried out on the basis of objective and verifiable criteria. It should, moreover, be possible to amend the list of reimbursed products whenever compliance with the specified criteria so requires. The "objective and verifiable criteria" referred to by the Court may concern the existence on the market of other, less expensive products having the same therapeutic effect, the fact that the items in question are freely marketed without the need for any medical prescription, or the fact that products are excluded from reimbursement for reasons of a pharmaco-therapeutic nature justified by the protection of public health.

Procedural rules for establishing national reimbursement decisions were specified by Directive 89/105/EC relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems.

In the *Decker*[89] case, the Court found that national rules under which reimbursement of the cost of medical products is subject to prior authorisation by the competent institution of a Member State when products are purchased in another Member State, constitute a restriction on the free movement of goods within the meaning of Article 28 EC, since they encourage insured persons to purchase those products in their home Member State rather than in another Member State, and are thus liable to curb the import of products in other Member States.

3.3.4. National bans on specific products/substances

A ban on the marketing of a specific product or substance is the most restrictive measure a Member State can adopt from a free movement of goods perspective. The majority of goods targeted by national bans are foodstuffs[90], including vitamins and other food supplements, and chemical substances[91].

The justifications most often invoked by Member States for these stringent measures are the protection of health and life of humans, animals and plants according to Article 30 EC, and the mandatory requirements developed by the Court case law, such as the protection of the environment. These justificatory grounds are often combined. The Member State imposing a national ban on a product/substance has to show that the measure is necessary and, where appropriate, that the marketing of the products in question poses a serious risk to public health and that those rules are in conformity with the principle of proportionality. This includes

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

90 Cases: 174/82 *Officier van Justitie* v *Sandoz* [1983] ECR 2445; C-24/00 *Commission* v *France* [2004] ECR I-1277; C-420/01 *Commission* v *Italy* [2003] ECR I-6445; C-192/01 *Commission* v *Denmark* [2003] ECR I-9693; C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375; C-319/05 *Commission* v *Germany* [2007] ECR I-9811.

91 Case C-473/98 *Kemikalieinspektionen* v *Toolex-Alpha AB* [2000] ECR I-5681.

providing the relevant evidence, such as technical, scientific, statistical and nutritional data, and all other relevant information[92].

Moreover, a Member State bears the burden of proof that the stated aim cannot be achieved by any other means that has a less restrictive effect on intra-Community trade between the Member States[93]. For example, in relation to a French ban on the addition to beverages of caffeine above a certain limit, the Court held that "appropriate labelling, informing consumers about the nature, the ingredients and the characteristics of fortified products, can enable consumers who risk excessive consumption of a nutrient added to those products to decide for themselves whether to use them"[94]. Hence, the Court found that the ban on the addition of caffeine above a certain limit was not necessary in order to achieve the aim of consumer protection.

The *Danish vitamins* case[95] concerned the Danish administrative practice of prohibiting the enrichment of foodstuffs with vitamins and minerals if it could not be shown that such enrichment met a need of Denmark's population. The Court initially agreed that it was for Denmark itself to decide on its intended level of protection of human health and life, bearing in mind the principle of proportionality. The Court remarked, however, that Denmark's authorities had the burden of proof "to show in each case, in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary to give effective protection to the interests referred to in that provision and, in particular, that the marketing of the products in question poses a real risk to public health"[96]. After having assessed the Danish administrative practice at issue, the Court concluded that the measure "does not enable Community law to be observed in regard to the identification and assessment of a real risk to public health, which requires a detailed assessment, case-by-case, of the effects which the addition of the minerals and vitamins in question could entail"[97].

In general, the Court has taken a restrictive approach to measures of this kind. However, in areas where there is no scientific certainty of a specific product's or substance's impact on, for example, public health or the environment, it has proved more difficult for the Court to reject such bans[98]. In these cases, the so-called precautionary principle[99] also plays an important role in the Court's overall assessment of the case.

It may also happen that Member States, instead of an outright ban, simply require a prior authorisation, in the interest of public health, for the addition of substances which have been authorised in another Member State. In this case, Member States only comply with their obligations under Community law if those procedures are accessible and can be completed within a reasonable time and if the banning of a product can be challenged before the courts. This procedure must be expressly provided for in a measure of general application which is

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92 Case C-270/02 *Commission* v *Italy* [2004] ECR I-1599.

93 Case 104/75 *De Peijper* [1976] ECR 613.

94 Case C-24/00 *Commission* v *France* [2004] ECR I-1277, para. 75.

95 Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693.

96 Ibid. para. 46.

97 Ibid. para. 56.

98 Cases C-473/98 *Kemikalieinspektionen* v *Toolex-Alpha AB* [2000] ECR I-5681; C-24/00 *Commission* v *France* [2004] ECR I-1277.

99 See further, point 6.1.2.

binding on the national authorities. The characteristics of this "simplified procedure" were established by the Court in Case C-344/90[100].

3.3.5. Type approval

Type-approval requirements predefine the regulatory, technical and safety conditions a product has to fulfil. Accordingly, type approval is not confined to a particular industry, since such requirements exist for products as diverse as marine equipment, mobile phones, passenger cars and medical equipment.

Generally, type approval is required before a product is allowed to be placed on the market. Compliance with type-approval requirements is often denoted by a marking on the product. The CE marking, for example, confirms compliance with such requirements either by means of a manufacturer's self-declaration or a third-party certification.

While common Europe-wide type-approval requirements normally facilitate the marketing of products in the internal market, national type approval in non-harmonised areas tends to create barriers to trade in goods. Diverging product standards make it difficult for manufacturers to market the same product in different Member States or may well lead to higher compliance costs. Obligations requiring national type approval prior to the placing of products on the market are therefore to be seen as measures having equivalent effect[101].

Whilst a Member State may for health or safety reasons be entitled to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, the Member State of import must take account of tests or controls carried out in the exporting Member State(s) providing equivalent guarantees[102].

In *Commission* v *Portugal*[103] an undertaking had been refused the required authorisation by the supervising body for the installation of imported polyethylene pipes, on the grounds that such pipes had not been approved by the national testing body. The certificates the undertaking held, which were issued by an Italian testing institute, were not recognised. The Court held that authorities (in this case, Portuguese) are required to take account of certificates issued by the certification bodies of another Member State, especially if those bodies are authorised by the Member State for this purpose. In so far as the Portuguese authorities did not have sufficient information to verify the certificates in question, they could have obtained that information from the exporting Member State's authorities. A pro-active approach on the part of the national body to which an application is made for approval of a product or recognition is required.

3.3.6. Authorisation procedure

National systems subjecting the marketing of goods to prior authorisation restrict access to the market of the importing Member State and must therefore be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28

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100 Case C-344/90 *Commission* v *France* [1992] ECR I-4719.
101 Case 21/84 *Commission* v *France* [1985] 1355.
102 Case C-455/01 *Commission* v *Italy* [2003] ECR I-12023.
103 Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665.

EC[104]. The Court of Justice has set a number of conditions under which such prior authorisation might be justified[105]:

- it must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;

- it should not essentially duplicate controls which have already been carried out in the context of other procedures, either in the same State or in another Member State;

- a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;

- the procedure should not, on account of its duration and the disproportionate costs to which it gives rise, be such as to deter the operators concerned from pursuing their business plan.

3.3.7. Technical regulations containing requirements as to the presentation of goods (weight, composition, presentation, labelling, form, size, packaging)

Requirements to be met by imported products as regards shape, size, weight composition, presentation, identification or putting up may force manufacturers and importers to adapt the products in question to the rules in force in the Member State in which they are marketed, for example by altering the labelling of imported products[106]. Given that such requirements as to the presentation of the goods are directly interlinked with the product itself, they are not considered to be selling arrangements, but as measures having equivalent effect according to Article 28 EC.

The following measures, for example, have been deemed contrary to Article 28 EC:

- a requirement for margarine to be sold in cubic packaging to distinguish it from butter[107];

- a prohibition by a Member State on marketing of articles made from precious metals without the requisite (official national) hallmarks[108];

- a prohibition on marketing of videos and DVDs sold by mail order and over the internet which do not bear an age-limit label corresponding to a classification decision from a higher regional authority or a national self-regulation body[109].

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104 See for instance Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269; Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, para. 41; Case C-249/07 *Commission* v *Netherlands* [2008] not yet published, para. 26.

105 See Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607.

106 Case C-33/97 *Colim* [1999] ECR I-3175, para. 37 and Case C-416/00 *Morellato* [2003] ECR I-9343, para. 29 and 30.

107 Case 261/81 *Rau* v *De Smedt* [1982] ECR 3961.

108 Case C-30/99 *Commission* v *Ireland* [2001] ECR I-4619.

109 Case C-244/06 *Dynamic Medien Vertriebs GmbH* v *Avides Media AG* [2008] ECR I-505, in this judgment the trade barriers was however considered justified for reasons of the protection of minors.

3.3.8. Advertising restrictions

On many occasions before *Keck,* the Court held that national measures imposing advertising restrictions were covered by Article 28 EC. One such case was *Oosthoek* (Case 286/81) concerning a ban on offering or giving free gifts, for sales promotion purposes. It held that "legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products"[110].

Since *Keck,* the Court has in some respects appeared to adopt a different approach (re: treating advertising restrictions as selling arrangements), but in other respects both Advocates General and the Court follow and elaborate on the same approach (re: intrinsic importance of advertising to the free movement of goods). As explained above under *Keck,* "rules that lay down requirements to be met by goods" continue to be treated under *Cassis de Dijon* and are therefore considered to fall *per se* within the scope of Article 28 EC without any need to determine whether they are also discriminatory[111], whereas selling arrangements are subject to a discrimination test. However, as Advocate General Maduro pointed out, the Court had to qualify the simplicity of the distinction laid down in the *Keck* judgment[112]. Consequently, certain rules which appear to fall into the category of selling arrangements are treated as rules relating to products. This is true in particular of measures relating to advertising where it appears that they affect the conditions which the goods must meet[113]. However, the more usual approach followed by the Court since *Keck* has been based on the foundation that restrictions to advertising and promotion are to be considered as "selling arrangements"[114] and, if non-discriminatory, would fall outside the scope of Article 28 EC.

The approach of the Court in advertising cases seems to be based on three main steps. First, it holds that certain methods of promoting the sale of a product are selling arrangements. Secondly, it proceeds to examine the scope of the advertising restriction (whether outright prohibition or not). Thirdly, it proceeds to examine discrimination (whether the national restriction in question affects the marketing of goods from other Member States differently from that of domestic goods). In a number of cases the Court seems to link the scope of the restriction (total or partial) with discrimination. In other words, if the restriction is total, it is presumed that it could have a greater impact on imported products[115] and, if partial, that it could be affecting domestic and imported products in the same way[116]. However, it should be

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110 Para. 15. See also pre-*Keck* cases: Case 362/88 *GB-INNO* [1990] ECR I-667 and C-1/90 *Aragonesa* [1991] ECR I-4151.

111 P. Oliver, *Free Movement of Goods in the European Community*, 2003 at 124.

112 Opinion in Cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135 para. 26-29.

113 Case C-470/93 *Mars* [1995] ECR I-1923, para. 13 (measure requires additional packaging and advertising costs). See also Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 11.

114 See C-292/92 *Hünermund* [1993] ECR I-6787 (ban on advertising "parapharmaceutical" products outside the confines of pharmacies) and Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 (restriction of television advertising); P. Oliver, *Free Movement of Goods in the European Community*, 2003 at 7.43.

115 In this context see Case C-405/98 *Gourmet* [2001] ECR I-1795; Cases C-34/95 and C-36/95 *De Agostini* [1997] ECR I-3843 and Case C-239/02 *Douwe Egberts* [2004] ECR I-7007 (prohibiting references to "slimming" and "medical recommendations, attestations, declarations or statements of approval").

116 In this context see Case C-292/92 *Hünermund* [1993] ECR I-6787 and Case C-71/02 *Karner* [2004] ECR I-3025 (prohibiting references to the fact that goods come from an insolvent estate).

stressed that the Court in *Dior*[117] and *Gourmet*[118] indicated that some *advertising bans* might not necessarily impact more strongly on imports[119].

3.3.9. Deposit obligations

Deposit and return systems, especially in the beverages sector, have given rise to continued discussions in the light of environmental legislation and internal market rules in past years. For market operators engaged in several Member States such systems often make it impossible to sell the same product in the same packaging in several Member States. Instead, producers or importers are required to adapt the packaging to the needs of each individual Member State, which usually leads to additional costs. Accordingly, these measures have an impact on the product itself and not only on the specific selling arrangement. The effect of such systems, i.e. the partition of markets, often runs counter to the idea of a truly internal market. Therefore, national requirements in this sense may be considered as a barrier to trade under Article 28 EC.

Despite being qualified as a trade barrier, they may be justified e.g. by reasons relating to protection of the environment. In two judgments on the German mandatory deposit system for non-reusable beverage packaging, the Court of Justice confirmed that, as Community law stands, Member States are entitled to choose between a deposit and return system, a global packaging-collection system or a combination of the two systems[120]. Where a Member State opts for a deposit and return system, certain conditions have to be met in order for the system to comply with the provisions of Directive 94/62/EC on packaging and packaging waste and with Articles 28-30 EC. The Member State must, for example, ensure that the system is fully operational, covers the whole territory and is open to every producer or distributor in a non-discriminatory manner. In addition, a sufficient transitional period must be granted to allow producers and distributors to adapt to new requirements, so that smooth functioning of the system can be guaranteed.

In Case C-302/86[121], the Court analysed a deposit-and-return system for beer and soft drink containers introduced by Denmark, whereby in principle only the authorised standardised containers could be used. While the Court upheld the deposit-and-return system as it was deemed to be an indispensable element of a system intended to ensure the reuse of containers and therefore necessary to achieve the environmental objectives, it considered both the limitation to standardised containers and the authorisation requirement as disproportionate.

3.3.10. Indications of origin, quality marks, incitement to buy national products

As a general rule, a State-imposed obligation to make a declaration of origin constitutes a measure of equivalent effect contrary to Article 28 EC. In cases where Member States themselves run or support a promotional campaign involving quality/origin labelling, the Court has ruled that such schemes have, at least potentially, restrictive effects on the free movement of goods between Member States. Such a scheme, set up in order to promote the

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117 Case C-337/95 *Dior* [1997] ECR I-6013.

118 Case C-405/98 *Gourmet* [2001] ECR I-1795.

119 P. Oliver and S. Enchelmaier, "Free Movement of Goods: Recent Developments in the Case Law" (2007) CML Rev. 649 at 675.

120 Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705; Case C-309/02 *Radlberger Spitz* [2004] ECR I-11763.

121 Case C-302/86 *Commission* v *Denmark* [1988] ECR 4607.

distribution of some products made in a certain country or region and for which the advertising message underlines the origin of the relevant products, may encourage consumers to buy such products to the exclusion of imported products[122]. The same rule applies in the case of markings which establish not the country of production but the conformity of the product with national standards[123].

A Member State's rules on origin/quality marking might be acceptable if the product concerned does in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area[124], or if the origin indicates a special place in the tradition of the region in question[125]. Also, such an obligation may be justified in a case where otherwise consumers might be misled by, for example, the packaging or labelling of the product.

Measures which encourage or give preference to the purchase of domestic products only are measures of equivalent effect under Article 28 EC. The most famous case of such incitement to buy national products was *Buy Irish*[126], which involved a large-scale campaign encouraging the purchase of domestic goods rather than imported products. The Court decided that, as the campaign was a clear attempt to reduce the flow of imports, it infringed Article 28 EC.

Member States can permit organisations to encourage the purchase of specific types of fruit and vegetables, for example, by mentioning their particular properties, even if the varieties are typical of national products, so long as consumers are not being advised to buy domestic goods solely by virtue of their national origin[127].

3.3.11. Obligation to use the national language

Language requirements imposed in non-harmonised areas constitute a barrier to intra-Community trade prohibited by Article 28 EC in so far as products coming from other Member States have to be given different labelling involving additional packaging costs[128]. This obligation may take many forms in relation to goods: declarations, advertising messages, warranties, technical instructions, instructions on use, etc.

The obligation to use a given language at stages prior to sale to the final consumer cannot be justified on consumer protection grounds, since this type of requirement is not necessary; producers, importers, wholesalers and retailers who are the only persons involved in the handling of the goods will conduct their business in the language which they know well, or in which they will be able to obtain the particular information they need.

Sales to the final consumer are a different matter. The difference in approach is understandable, given that - unlike operators, for whom such knowledge goes with their business or who are in a position to obtain the information needed - the consumer cannot be assumed to easily understand the languages of the other Member States.

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122 Case C-325/00 *Commission* v *Germany* [2002] ECR I-9977 ("aus deutschen Landen frisch auf den Tisch"); Case C-6/02 *Commission* v *France* [2003] ECR I-2398; Case C-255/03 *Commission* v *Belgium*, unpublished.

123 Case C-227/06 *Commission* v *Belgium* [2008] not yet published.

124 Case 12/74 *Commission* v *Germany* [1975] ECR 181.

125 Case 113/80 *Commission* v *Ireland* [1981] ECR 1625.

126 Case 249/81 *Commission* v *Ireland* [1982] ECR 4005.

127 Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083.

128 Case C-33/97 *Colim* v *Bigg's Continent Noord* [1999] ECR I-3175.

In its judgment in Case C-366/98 *Yannick Geffroy*[129], the Court ruled that Article 28 EC "must be interpreted as precluding a national rule [...] from requiring the use of a specific language for the labelling of foodstuffs, without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other means".

The Court stated in Case C-85/94 *Piageme*[130], concerning determination of a language easily understood by consumers, that various factors may be taken into account, such as "the possible similarity of words in different languages, the widespread knowledge amongst the population concerned of more than one language, or the existence of special circumstances such as a wide-ranging advertising campaign or widespread distribution of the product, provided that it can be established that the consumer is given sufficient information".

It follows from the general principle of proportionality that the Member States may adopt national measures requiring that certain particulars of domestic or imported products be given in a language that is easily understood by the consumer. Furthermore, this national measure must not exclude the possible use of other means of informing consumers, such as designs, symbols and pictograms[131]. Finally, and in all circumstances, a measure of that kind must be restricted to the information made mandatory by the Member State concerned and for which the use of means other than translation would not be suitable for providing consumers with the appropriate information. Nevertheless, this principle of proportionality requires a case-by-case approach.

3.3.12. Restrictions on distance selling (internet sales, mail order, etc.)

With the advancement of information and communication technologies, goods are now increasingly being traded within the internal market through these channels. Thus, it is not surprising that the role of Article 28 EC in internet transactions involving the transfer of goods from one Member State to another has led to cases before the Court of Justice.

The questions referred to the Court in *DocMorris* arose in national proceedings concerning internet sales of medicinal products for human use in a Member State other than that in which DocMorris was established. German law at that time prohibited the sale by mail order of medicinal products which may be sold only in pharmacies.

The first question referred by the national court was whether Article 28 EC is infringed in the event that authorised medicinal products, the sale of which is restricted to pharmacies in the Member State concerned, may not be imported commercially by mail order through pharmacies approved in other Member States in response to an individual order over the internet.

The Court started by treating this national restriction as a selling arrangement. Under *Keck*, a selling arrangement would be caught by Article 28 EC if it is discriminatory. In determining discrimination the Court points to a connection between the scope of the restrictive measure and discrimination. First, along the lines of *De Agostini* (re: the importance of advertisement

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129 Case C-366/98 *Yannick Geffroy* [2000] ECR I-6579.

130 Case C-85/94 *Piageme* v *Peeters* [1995] ECR I-2955.

131 Case C-33/97 *Colim* v *Bigg's Continent Noord* [1999] ECR I-3175, para. 41-43.

to the sale of the product in question)[132], the Court *mutatis mutandis* emphasised the importance of the internet to the sale of a product. Then it explained how such an outright ban is more of an obstacle to pharmacies outside Germany than those within it and hence the measure is in breach of Article 28 EC.

More specifically, the Court held that for pharmacies not established in Germany the internet provides a more significant way to gain "direct access" to the German market[133]. The Court explained that a prohibition which has a greater impact on pharmacies established outside Germany could impede access to the market for products from other Member States more than it impedes access for domestic products.

The Court then examined possible justifications. As regards justifications in relation to non-prescription medicines, the Court held that none of the reasons advanced could provide a valid basis for an absolute prohibition on the sale by mail order of non-prescription medicines.

As regards prescription medicines, the Court first pointed out that the supply of such medicines to the public needs to be more strictly controlled. The Court held that given the risks attached to the use of these medicines, the need to be able to check effectively the authenticity of doctors' prescriptions and to ensure that the medicine is handed over to the customer himself, or to a person to whom its collection has been entrusted by the customer, is such as to justify a prohibition on mail-order sales[134]. Furthermore, the Court held that prohibitions may be justified on grounds of the financial balance of the social security system or the integrity of the national health system[135].

3.3.13. Restrictions on the importation of goods for personal use

Article 28 EC not only gives enterprises the right to import goods for commercial purposes but also entitles individuals to import goods for personal use as shown in *Schumacher*[136]. A private individual in this case ordered for his own personal use a medicinal preparation from France. However, the customs authorities in Germany, where the individual was residing, refused to grant clearance of the product in question. In a referral to the Court of Justice, the national court asked whether legislation which prohibited a private individual from importing for his personal use a medicinal preparation that was authorised in the Member State of importation, was available there without prescription and had been purchased at a pharmacy in another Member State, was contrary to Articles 28 and 30 EC. The Court first pointed out that such legislation constituted a breach of Article 28 EC. Examining any possible justifications, it held that the measure could not be justified by the protection of public health. It explained that the purchase of medicinal preparations at a pharmacy in another Member State provided a guarantee equivalent to that of a domestic pharmacy. This conclusion was

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132 Para. 43 and 44. Advocate General Geelhoed (Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, para. 68) contrasts this reasoning with the reasoning of the Court in C-292/92 *Hünermund* ([1993] ECR I-6787) and C-412/93 *Leclerc-Siplec* ([1995] ECR I-179). He argued that the advertising prohibitions in the last two cases were limited in scale. He pointed out that the Court in the last two cases attached importance to the fact that the restrictions in question did not affect the opportunities for other traders to advertise the products concerned by other means. In other words, "the function which advertising performed in relation to gaining access to the market for the products concerned remained intact."

133 Para. 74.

134 Para. 119.

135 Para. 123.

136 Case 218/87 *Schumacher* [1989] ECR 617.

also supported by the fact that the conditions for access to the profession of pharmacist and for the exercise of that profession are regulated by secondary Community law.

However, as shown in *Escalier Bonnarel*[137], private individuals who import goods for use on their own property may also be subject to certain obligations also applicable to importers for commercial purposes. In this case criminal proceedings were brought against two individuals who were accused of having in their possession, and intending to use, pesticidal products designed for agricultural use not having a marketing authorisation. The accused submitted that the national authorisation requirements could not be applied to farmers who were importing products not for commercial purposes but for their own purposes. The Court held that Member States are obliged to submit imports of plant protection products into their territory to a procedure of examination, which can take the form of a "simplified" procedure, the purpose of which is to verify whether a product requires a marketing authorisation or whether it should be treated as already having been authorised in the Member State of importation[138]. The Court pointed out that the above principles hold good irrespective of the purpose of importation and, consequently, they are equally applicable to farmers who import products solely for the needs of their farms.

4. Other specific issues under Article 28 EC

4.1. Parallel imports of Medicinal and Plant Protection Products

Parallel trade in products is a lawful form of trade within the internal market. It is 'parallel' in the sense that it involves products that are essentially similar to products marketed through manufacturers' or original suppliers' distribution networks, but takes place outside (often alongside) those networks. Parallel trade comes about as a result of price divergence of pharmaceuticals[139] or pesticides[140], when e.g. Member States set or by other means control the price of products sold within their respective markets. Parallel trade creates in principle healthy competition and price reductions for consumers and is a direct consequence of the development of the internal market, which guarantees the free movement of goods.

Although the safety and initial marketing of medicinal products and plant protection products are regulated by Community legislation, the principles surrounding the legality of parallel trade in these products have emerged from judgments of the Court based on the EC Treaty provisions on the free movement of goods.

With regard to medicinal products and pesticides, when the information necessary for the purposes of public health protection or environmental safety is already available to the competent authorities of the Member State of destination as a result of the first marketing of a product in this Member State, a parallel imported product is subject to a licence granted on the basis of a proportionally "simplified" procedure (compared to a marketing authorisation procedure), provided:

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137 Cases C-260/06 and C-261/06 *Escalier Bonnarel* [2007] ECR I-9717.

138 Para. 32.

139 Case C-201/94 *Smith & Nephew* [1996] ECR 5819.

140 Case C-100/96 *British Agrochemicals* [1999] ECR 1499, Case C-201/06 *Commission* v *France* [2008] ECR I-735, para. 33.

- the imported product has been granted a marketing authorisation in the Member State of origin; and

- the imported product is essentially similar to a product that has already received marketing authorisation in the Member State of destination.

Seeking to balance the rights of parallel traders with the need to preserve certain public interest objectives, such as public health and environmental protection, the Commission has produced guidance on parallel imports in the following texts:

- Guideline developed within the Standing Committee on Plant Health concerning parallel trade of plant protection products within the EU and the EEA (2001)[141];

- Commission Communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted (2003)[142].

In the course of a legislative exercise amending Community legislation on **plant protection products**[143], it was proposed in 2007 to include express provisions governing parallel trade in these products. The entry into force of the proposed *'Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market'* will mean that the parallel importation of plant protection products will become harmonised at Community level and will no longer be governed by Article 28 EC.

Parallel trade needs moreover to be distinguished from re-importation. In the case of pharmaceuticals, for example, this means transactions where medicinal products are imported into a Member State in which they are authorised, having been previously obtained by a pharmacy in another Member State from a wholesaler in the importing Member State. In this respect the Court held that a product manufactured in a Member State which is exported and then re-imported into this Member State constitutes an imported product in the same way as a product manufactured in another Member State[144]. However, the Court pointed out that these findings do not apply if it is established that the products concerned were exported for the sole purpose of re-importation in order to circumvent legislation such as that under consideration[145].

4.2. Car registration

Current national laws provide in general for three different steps to obtain the registration of a motor vehicle. Firstly, approval of the technical characteristics of the motor vehicle, which in many cases will be the EC-type approval. Some types of motor vehicles, however, are still subject to national approval procedures. Secondly, roadworthiness testing of used vehicles, the objective of which is to verify, for the purposes of protecting the health and life of humans, that the specific motor vehicle is actually in a good state of repair at the time of registration. Finally, the registration of the motor vehicle authorising its entry into service in

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141 6.12.2001, Sanco/223/2000 rev.9.

142 COM(2003)839 final: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0839en01.pdf.

143 Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market, COM (2006)388final.

144 C-322/01 *DocMorris* [2003] ECR I-14887, para. 127. See to this effect Case 229/83 *Leclerc and others* [1985] ECR 1, para. 26 and Case C-240/95 *Schmit* [1996] ECR I-3179, para. 10.

145 C-322/01 *DocMorris* [2003] ECR I-14887, para. 129.

road traffic, involving identification of the motor vehicle and the issuing to it of a registration number.

In 2007 the Commission updated the interpretative communication on procedures for the registration of motor vehicles originating in another Member State[146]. This communication sets out, in detail, the minimum conditions that car registration procedures must fulfil.

For motor vehicles previously registered in another Member State, the Member State of registration may request submission of the following documents only:

(1) The original or a copy of the **registration certificate** issued in another Member State: The harmonised registration certificate issued by a Member State must be recognised by the other Member States for the vehicle's re-registration in its territory[147]. However, many vehicles registered before 2004 still carry the non-harmonised registration certificate.

(2) The EC or national **certificate of conformity:** All series-built passenger cars approved since 1996 are in principle subject to EC type-approval[148]. This is a procedure whereby it is certified that a type of vehicle satisfies all applicable European safety and environmental protection requirements. The EC type-approval is valid in all Member States. The manufacturer, in his capacity as the holder of the EC type-approval, issues an EC certificate of conformity which shows that the vehicle has been manufactured in conformity with the approved type. New EC type-approved vehicles accompanied by a valid certificate of conformity may not be required to undergo a new approval of their technical characteristics or to comply with additional technical requirements concerning their construction and functioning, unless they have been modified after leaving the manufacturer's factory.

(3) Motor vehicles which are not EC type-approved benefit from national type-approval or national individual approval procedures. Previously, national approval procedures for motor vehicles which have already obtained a national approval in another Member State and for motor vehicles that were already registered in another Member State fell within the scope of Articles 28 and 30 EC[149]. Now, under the new type-approval Directive 2007/46/EC, national and individual approval procedures are harmonised. While the validity of the approval is restricted to the Member State that granted the approval, another Member State must permit the sale, registration or entry into service of the vehicle unless it has reasonable grounds for believing that the technical provisions used for granting the approval are not equivalent to its own.

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146 Commission interpretative communication on procedures for the registration of motor vehicles originating in another Member State (OJ C 68, 24.3.2007, p. 15).

147 Pursuant to Article 4 of Council Directive 1999/37/EC of 29 April 1999 on the registration documents for vehicles (OJ L 138, 1.6.1999, p. 57).

148 The subject-matter is governed by Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (OJ L 263, 9.10.2007, p. 1). Directive 2007/46/EC replaces the Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers.

149 Case 406/85 *Procureur de la République* v *Daniel Gofette and Alfred Gilliard* [1987] ECR 2525.

(4) National authorities may not request the submission of an EC certificate of conformity for a vehicle previously registered in another Member State if the previous registration certificate of the vehicle fully complies with the model in Directive 1999/37/EC. However, national authorities may request the EC certificate of conformity for a vehicle previously registered in another Member State when the non-harmonised registration certificate of the other Member State does not allow them to identify the motor vehicle with sufficient precision. If the motor vehicle has no EC certificate of conformity, the national authorities may request a national certificate of conformity.

(5) Proof of payment of VAT, if the vehicle is new for VAT purposes;

(6) A certificate of insurance;

(7) A roadworthiness certificate if roadworthiness testing is obligatory for all re-registrations of motor vehicles previously registered in the same or another Member State. Roadworthiness testing prior to registration must at least fulfil the same procedural conditions as the approval of the technical characteristics of the motor vehicle[150].

In a recent judgment the Court confirmed that general prohibitions to register imported used vehicles infringe Article 28 EC[151].

5. Export barriers (Article 29 EC)

Article 29 EC states that: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".

5.1. 'Exports'

In the context of Article 29 EC, the term 'exports' refers to trade between Member States, i.e. exports from one Member State to other Member States. It does not apply to exports to a country outside the EU.

5.2. Quantitative restrictions and measures having equivalent effect

Although Article 29 EC and Article 28 EC have very similar wording, there is a distinct difference between the two in that Article 29 EC basically applies only to measures which discriminate against goods. This principle was established in the *Groenveld* case[152], in which the Court stated that Article 29 EC "concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States."

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150 Case 50/85 Bernhard Schloh v Auto contrôle technique [1986] ECR 1855; Case C-451/99 Cura Anlagen GmbH and Auto Service Leasing [2002] ECR I-3193.

151 Case C-524/07 *Commission* v *Austria* [2008] not yet published.

152 Case 15/79 *P. B. Groenveld BV* v *Produktschap voor Vee en Vlees* [1979] ECR 3409; see also Case C-12/02 *Marco Grilli* [2003] ECR I-11585, para. 41.

There are several reasons for this narrow interpretation of Article 29 EC. Firstly, in the case of imports non-discriminatory measures may put a dual burden on importers since they have to comply with the rules in their own country and in the country of importation. Thus, such measures are perceived to be rightly caught by Community law protecting the internal market. This is not the case for exporters, who merely have to follow the same rules laid down for the domestic market and the export market. Secondly, if the scope of Article 29 EC were too wide, it would encompass restrictions which have no bearing on intra-Community trade[153].

In the *Rioja* case the difference in treatment came as a consequence of better manufacturing or trading conditions for domestic companies[154]. In the *Parma* case this was effectuated by procuring a special advantage for undertakings situated in the region of production as the use of the protected designation 'Prosciutto di Parma' for ham marketed in slices was made subject to the condition that slicing and packaging operations be carried out in the region of production[155]. Such benefits for the domestic market lead to competitive disadvantages for businesses established in other Member States due to additional costs that may occur or due to the difficulties of procuring certain products, which are necessary in order to enter into competition with the domestic market.

In some of its Article 29 EC decisions the Court omitted the last requirement of the *Groenveld* principle ("at the expense of the production or of the trade of other Member States")[156]. Such test, which has been applied in a series of judgments by the Court[157], is in line with developments in the area of free movement of workers[158] and of services[159].

Furthermore, in some cases the Court did not refer to the requirement for providing particular advantage for national production[160]. In a recent preliminary ruling[161], the Court dealt with Belgian legislation prohibiting the seller from requesting any advance payment or payment during the 7 days "withdrawal" period during which a consumer can withdraw from a distance contract. Although the prohibition on receiving advance payments is applicable to all traders active in the national territory, the Court considers that its actual effect is nonetheless greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State. Interestingly enough, in this case the effects of the barrier primarily hamper the trading activities of companies established in the Member State of export and not in the Member State of destination.

Overall, the general approach followed by the Court seems to be that Article 29 EC catches trade barriers that have an actual and specific effect on exports and that create a difference in treatment between trade within a Member State and exports.

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153 P. Oliver and S. Enchelmaier: "Free movement of goods: Recent developments in the case law", 44 CML Rev. (2007), 686.

154 Cases C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669 (in this case the Court omitted the requirement of providing a particular advantage for national production in its reasoning, even if it was manifestly present in the facts).

155 Case C-108/01 *Consorzio del Prosciutto di Parma* [2003] I-5121.

156 Case 155/80 *Oebel* [1981] ECR I-3147.

157 Cases C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669, para. 12; C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, para. 24; C-203/96 *Dusseldorp* v *Minister van Milieubeheer* [1998] ECR I-4075; C-209/98 *FFAD* v *Københavns Kommune* [2000] ECR I-3743, para. 34.

158 Cases C-415/93 *Bosman* [1995] ECR I-4921; C-18/95 *Terhoeve* [1999] ECR I-345.

159 Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

160 Case C-388/95 *Kingdom of Belgium* v *Kingdom of Spain* [2000] ECR I-3123, para. 41.

161 Case C-205/07 *Gysbrechts and Santurel Inter* [2008] not yet published.

6. Justifications for barriers to trade

6.1. Article 30 EC

Article 30 EC lists the defences that could be used by Member States to justify national measures that impede cross-border trade: "The provisions of Articles 28 to 29 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."

The case law of the Court additionally provides for so-called mandatory requirements (e.g. environmental protection) on which a Member State may also rely to defend national measures.

The Court of Justice interprets narrowly the list of derogations in Article 30 EC, which all relate to non-economic interests[162]. Moreover, any measure must respect the principle of proportionality. The burden of proof in justifying the measures adopted according to Article 30 EC lies with the Member State[163], but when a Member State provides convincing justifications it is then for the Commission to show that the measures taken are not appropriate in that particular case[164].

Article 30 EC cannot be relied on to justify deviations from harmonised EU legislation[165]. On the other hand, where there is no Community harmonisation, it is up to Member States to define their own levels of protection. In the case of partial harmonisation, the harmonising legislation itself quite often explicitly authorises Member States to maintain or adopt stricter measures provided they are compatible with the Treaty. In such cases the Court will have to evaluate the provisions in question under Article 30 EC.

Even if a measure is justifiable under one of the Article 30 EC derogations, it must not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". The second part of Article 30 EC is designed to avoid abuse on the part of Member States. As the Court has stated, "the function of the second sentence of Article [30] is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being 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"[166], i.e. to adopt protectionist measures.

6.1.1. Public morality, policy and security

Member States may decide to ban a product on **morality** grounds. While it is up to each Member State to set the standards enabling goods to comply with national provisions concerning morality, the fact remains that that discretion must be exercised in conformity with the obligations arising under Community law. For example, any prohibition on imports

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162 Case C-120/95 *Decker* [1998] ECR I-1831; Case 72/83 *Campus Oil* [1984] ECR 2727.

163 Case 251/78 *Denkavit Futtermittel* v *Minister of agriculture* [1979] ECR 3369.

164 Case C-55/99 *Commission* v *France* [2000] ECR I-11499.

165 Case C-473/98 *Kemikalieinspektionen* v *Toolex Alpha* [2000] ECR I-5681; Case 5/77 *Tadeschi* v *Denkavit* [1977] ECR 1555.

166 Case 34/79 *Henn and Darby* [1979] ECR 3795, para. 21, as well as Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, para. 20.

of products the marketing of which is restricted but not prohibited will be discriminatory and in breach of the "free movement of goods" provisions. Most of the cases where the Court has directly admitted the public morality justification have concerned obscene, indecent articles[167], while in other cases where public morality was also invoked, other interlinked justifications were found (public interest in gambling cases[168], protection of minors in the case of marking of videos and DVDs[169]).

Public policy is interpreted very strictly by the Court of Justice and has rarely succeeded as grounds for a derogation under Article 30 EC. For example, it will not succeed if it is intended as a general safeguard clause or only to serve protectionist economic ends. Where an alternative Article 30 EC derogation would apply, the Court of Justice tends to use the alternative or public policy justification in conjunction with other possible justifications[170]. The public policy justification alone was accepted in one exceptional case, where a Member State was restricting the import and export of gold-collectors' coins. The Court held that it was justified on grounds of public policy because it stemmed from the need to protect the right to mint coinage, which is traditionally regarded as involving the fundamental interests of the state[171].

Public security justification has been advanced in a specific area, namely the EU energy market, but the decision should be limited to the precise facts and is not of wide applicability. In one such case a Member State ordered petrol importers to purchase up to 35% of their petrol requirements from a national petrol company at prices fixed by the government. The Court of Justice held that the measure was clearly protectionist and constituted a breach of Article 28 EC. However, it was held to be justified on the grounds of public security, i.e. for maintaining a viable oil refinery to meet supply in times of crisis[172].

The Court has also accepted the justification on the grounds of public security in cases involving trade in strategically sensitive goods[173] and dual use goods[174], as "…the risk of serious disturbance in foreign relations or to peaceful coexistence of nations may affect the security of a Member State". In these cases the Court stated that the scope of Article 30 EC covers both internal security (e.g. crime detection and prevention and regulation of traffic) and external security[175].

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167 Case 121/85 *Conegate* v *Customs and Excise Commissioners* [1986] ECR 1007; Case 34/79 *R* v *Henn and Darby* [1979] ECR 3795.

168 Case C-275/92 *Schindler* [1994] ECR I-1039, para. 58, and the case-law cited, and Case C-124/97 *Läärä and Others* [1999] ECR I-6067, para. 33.

169 Case C-244/06 *Dynamic Medien Vertriebs* v *Avides Media* [2008] ECR I-505.

170 It has been admitted by the Court that legislation "which has as its objective the control of the consumption of alcohol so as to prevent the harmful effects caused to health and society by alcoholic substances, and thus seeks to combat alcohol abuse, reflects health and public policy concerns recognised by Article 30 EC"- Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, para. 28.

171 Case 7/78 *R* v *Thompson* [1978] ECR 2247.

172 Case 72/83 *Campus Oil* [1984] ECR 2727.

173 Case C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621.

174 Case C-83/94 *Leifer* [1995] ECR I-3231; Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH* v *Federal Republic of Germany* [1995] ECR I-3189.

175 Case C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621.

6.1.2. Protection of the health and life of humans, animals and plants (precautionary principle)

The Court of Justice has ruled that "the health and life of humans rank first among the property or interests protected by Article [30] and it is for Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure, and in particular how strict the checks to be carried out are to be" [176]. In the same ruling the Court stated that national rules or practices do not fall within the exception specified in Article 30 EC if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much.

Protection of health and life of humans, animals and plants is the most popular justification under which Member States usually try to justify obstacles to the free movement of goods. While the Court's case law is very extensive in this area, there are some principal rules that have to be observed: the protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market, even though in the absence of harmonisation it is for a Member State to decide on the level of protection; the measures adopted have to be proportionate, i.e. restricted to what is necessary to attain the legitimate aim of protecting public health. Furthermore, measures at issue have to be well-founded - providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information[177].

Application of the "precautionary principle": The precautionary principle was first used by the Court of Justice in the *National Farmers Union* case[178], even if it was implicitly present in earlier case law. The Court stated: "where there is uncertainty as to the existence or extent of rights to human health, the institution may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent". The principle defines the circumstances under which a legislator, whether national, Community or international, can adopt measures to protect consumers against health risks which, given uncertainties at the present state of scientific research, are possibly associated with a product or service.

The Court of Justice has consistently stated that the Member States have to perform a risk assessment before taking precautionary measures under Articles 28 and 30 EC[179]. It appears that the Court in general is content with finding that scientific uncertainty is at hand and, once this has been established, it leaves the Member States or the institutions considerable leeway in deciding on what measures to take[180]. However, the measures cannot be based on "purely hypothetical considerations"[181].

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176 Case 104/75 *De Peijper* [1976] ECR 613.

177 Case C-270/02 *Commission* v *Italy* [2004] ECR 1559; Case C-319/05 *Commission* v *Germany* [2007] ECR I-9811.

178 Case C-157/96 *National Farmers Union* [1998] ECR 224.

179 Case C-249/07 *Commission* v *Netherlands* [2008] not yet published, para. 50-51; Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693; Case C-24/00 *Commission* v *France* [2004] ECR I-1277.

180 Cf. Case C-132/03 *Codacons and Federconsumatori* [2005] ECR I-4167, para. 61 and Case C-236/01 *Monsanto Agricoltura* [2003] ECR I-8105, para. 111.

181 Case C-236/01 *Monsanto Agricoltura* [2003] ECR I-8105, para. 106; Case C-41/02 *Commission* v *Netherlands* [2004] ECR 11375, para. 52; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, para. 49; Case C-24/00 *Commission* v *France* [2004] ECR I-1277, para. 56.

Generally, when Member States wish to maintain or introduce measures to protect health under Article 30 EC, the burden of proving the necessity of such measures rests with them[182]. That this is also the case in situations where the precautionary principle is concerned has been confirmed by the Court of Justice in a number of recent cases[183]. In its rulings the Court has emphasised that real risks need to be demonstrated in the light of the most recent results of international scientific research. Thus, Member States bear the initial burden of showing that precautionary measures can be taken under Article 30 EC. However, Member States do not need to show a definite link between the evidence and the risk; instead it is enough to show that the area in question is surrounded by scientific uncertainty. The Community institutions will then evaluate the case brought by the Member State[184].

6.1.3. Protection of national treasures possessing artistic, historic or archaeological value

A Member State's duty to protect its national treasures and patrimony may justify measures which create obstacles to imports or exports.

The exact definition of a "national treasure" is open to interpretation and although it is clear that such items must possess real "artistic, historic or archaeological value", it is up to the Member States to determine which items fall within this category. Nevertheless a useful interpretative tool could be Directive 93/7/EEC[185], which regulates the return of cultural objects unlawfully removed from the territory of a Member State. Although it confirms that it is for Member States to define their national treasures, its provisions and annex may be an interpretative aid where doubt exists. The Directive mentions that national treasures could include:

- items listed in the inventories of museums or libraries' conservation collections;
- pictures, paintings, sculptures;
- books;
- means of transport; and
- archives.

The Directive attempts to define which items fall within its scope by referring, in its annex, to characteristics such as the ownership, age and value of the item, but it is clear that there are some more factors which should be taken into consideration when defining a 'national treasure', such as an assessment of a contextual nature which takes into consideration the patrimony of the individual Member State. Presumably for this reason, it is made clear that the Annex to this Directive is "not intended to define objects which rank as 'national treasures' within the meaning of Article 30 EC, but merely categories of object which may be classified as such".

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182 See for example Case 227/82 *Van Bennekom* [1983] ECR 3883, para. 40 and Case 178/84 *Commission* v *Germany (Reinheitsgebot)* [1987] ECR 1227, para. 46.

183 Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, para. 47; Case 192/01 *Commission* v *Denmark* [2003] ECR I-9693, para. 46 and Case C-24/00 *Commission* v *France* [2004] ECR I-1277, para. 53.

184 The Commission has adopted a communication on the precautionary principle, COM (2000)1final.

185 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

Directive 93/7/EEC was introduced in conjunction with the abolition of controls at national borders, although it only covers the restitution of goods already unlawfully exported and does not lay down any control measures intended to prevent such unlawful exports. Regulation (EEC) No 3911/92 on exports of cultural goods goes a step further by imposing uniform controls on the export of protected goods; however, these only apply to exports to non-Member States[186].

Member States consequently impose different restrictions on the export of antiques and other cultural artefacts, and those restrictions - as well as related administrative procedures, such as the completion of declaration forms and the provision of supporting documents - are generally considered to be justified under Article 30 EC. Attempts by Member States to discourage the export of art treasures by the imposition of a tax have, however, not been deemed justifiable since such action constitutes a measure equivalent to a customs tax (Article 25 EC) in regard to which Article 30 EC cannot be invoked as a justification[187].

6.1.4. Protection of industrial and commercial property

The most important types of industrial and commercial property are patents, trade marks, and copyright. Two principles can be deduced from the case law on the compatibility with Articles 28 to 30 EC of the exercise of industrial property rights.

The first principle is that the Treaty does not affect the existence of industrial property rights granted pursuant to the legislation of the Member States. Accordingly, national legislation on the acquisition, transfer and extinction of such rights is lawful. This principle does not apply, however, where there is an element of discrimination in the national rules[188].

The second principle is that an industrial property right is exhausted when a product has been lawfully distributed in the market of a Member State by the owner of the right or with his consent. Thereafter the owner of the right may not oppose the importation of the product into any Member State where it was first marketed. This is known as the principle of exhaustion of rights. This principle does not preclude the holders of performing or lending rights from recovering royalties for each performance or rental[189].

Nowadays, however, both of these aspects are mainly covered by harmonised legislation, such as Directive 89/104/EC on trade marks.

It should be noted that, apart from patents, trademarks, copyright and design rights, geographical denominations also constitute industrial and commercial property for the purposes of Article 30 EC[190].

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186 Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1-5.

187 Case 7/68 *Commission* v *Italy* [1968] ECR 423.

188 Case C-235/89 *Commission* v *Italy* [1992] I-777.

189 Case 187/80 *Merck* v *Stephar* [1981] ECR 2063, joined Cases C-267/95 and 268/95 *Merck* v *Primecrown* [1996] ECR I-6285, Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487.

190 Case C-3/91 *Exportur* v *LOR* [1992] ECR I-5529 and Case C-388/95 *Belgium* v *Spain* [2000] ECR I-3123.

6.2. Mandatory requirements

In its *Cassis de Dijon* judgment, the Court of Justice laid down the concept of mandatory requirements as a non-exhaustive list of protected interests in the framework of Article 28 EC. In this judgment, the Court stated that these mandatory requirements relate in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

Mandatory requirements, as developed by the Court in the *Cassis* case, could be invoked only to justify the indistinctly applicable rules. Therefore, grounds other than those covered by Article 30 EC may theoretically not be used to justify discriminatory measures. While the Court has found ways to overcome this separation without renouncing its earlier practice[191], it is argued that such separation is artificial and the Court is moving towards simplification and treating mandatory requirements in the same way as Article 30 justifications[192].

6.2.1. Protection of the environment

Although protection of the environment is not expressly mentioned in Article 30 EC, it has been recognised by the Court as constituting an overriding mandatory requirement. The Court takes the view that "…the protection of the environment is 'one of the Community's essential objectives', which may as such justify certain limitations of the principle of free movement of goods"[193].

On grounds of protection of the environment the Court has justified a variety of national measures:

- prohibiting the importation of waste from other Member States[194];
- a deposit-and-return system for containers[195];
- an outright ban on certain chemical substances but which also provides for exceptions when no safer replacement is available[196];
- obliging electricity suppliers to buy all electricity produced from renewable energy sources from within a limited supply area[197].

Protection of the environment is also closely linked to the protection of human life and health[198] and, with advances in science and greater public awareness, is being invoked by Member States with increasing frequency. However, the fact that environmental justifications

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191 In Case C-2/90 *Commission* v *Belgium* ([1992] ECR I-4431) the Court decided that the measure which could be seen as discriminatory was not discriminatory because of the special nature of the subject matter of the case and then allowed the environmental justification. In Case 320/03 *Commission* v *Austria* ([2005] ECR 9871) the Court chose to regard a measure as indistinctly applicable instead of indirectly discriminatory.

192 P. Oliver, *Free movement of goods in the European Community*, 2003, 8.3-8.10.

193 Case 302/86 *Commission* v *Denmark* [1988], ECR 4607, para 8.

194 Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431.

195 Case 302/86 *Commission* v *Denmark* [1988] ECR 4607.

196 Case C-473/98 *Toolex Alpha* [2000] ECR I-5681.

197 Case C-379/98 *PreussenElektra* v *Schleswag* [2001] ECR I-2099.

198 In some cases the Court seems to have treated environmental protection as part of public health and Article 30 EC: see for example Case C-67/97 *Bluhme* [1998] ECR I-8033.

are invoked more frequently does not signify that the Court always considers this ground to be sufficient to justify any measure whatsoever. Indeed in recent years the Court has confirmed several times that public health and environmental justifications are not always sufficient to inhibit the free movement of goods. In several cases the Court has upheld the Commission's arguments that the national measures were disproportionate to the aim to be achieved or that there was a lack of evidence to prove the risk claimed[199].

6.2.2. Consumer protection

Certain obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions are applicable to domestic and imported products without distinction and may be justified as being necessary in order to satisfy overriding requirements relating to consumer protection or fair trading. In order to be permissible, such provisions must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade[200]. The guiding line in the case law of the Court is that, where imported products are similar to domestic ones, adequate labelling, which may be required under national legislation, will be sufficient to provide the consumer with the necessary information on the nature of the product. No justification on the grounds of consumer protection is admissible for unnecessarily restrictive measures[201].

6.2.3. Other mandatory requirements

The Court has from time to time recognised other "mandatory requirements" capable of justifying obstacles to the free movement of goods:

Improvement of working conditions: While health and safety at work fall under the heading of public health in Article 30 EC, the improvement of working conditions constitutes "a mandatory requirement" even in the absence of any health consideration[202].

Cultural aims[203]: In a case relating to French legislation aimed at encouraging the creation of cinematographic works, the Court seemed to acknowledge that the protection of culture may

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199 See for example: (1) Cases C-319/05 *Commission* v *Germany* [2007] ECR I-9811; (2) C-186/05 *Commission* v *Sweden* [2007] ECR I-129; (3) C-297/05 *Commission* v *Netherlands* [2007] ECR I-7467; (4) C-254/05 *Commission* v *Belgium* [2007] ECR I-4269; (5) C-432/03 *Commission* v *Portugal* [2005] ECR I-9665; (6) C-114/04 *Commission* v *Germany*, not published; (7) C-212/03 *Commission* v *France* [2005] ECR I-4213; (8) C-463/01 *Commission* v *Germany* [2004] ECR I-11705; (9) C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375; (10) C-497/03 *Commission* v *Austria*, not published; (11) C-150/00 *Commission* v *Austria* [2004] ECR I-3887; (12) C-387/99 *Commission* v *Germany* [2004] ECR I-3751; (13) C-24/00 *Commission* v *France* [2004] ECR I-1277; (14) C-270/02 *Commission* v *Italy* [2004] ECR I-1559; (15) C-122/03 *Commission* v *France* [2003] ECR I-15093; (16) C-358/01 *Commission* v *Spain* [2003] ECR I-13145; (17) C-455/01 *Commission* v *Italy* [2003] ECR I-12023; (18) C-192/01 *Commission* v *Denmark* [2003] ECR I-9693; (19) C-420/01 *Commission* v *Italy* [2003] ECR I-6445.

200 Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 8, Case C-313/94 *Graffione* [1996] ECR I-6039, para. 17, Case C-3/99 *Ruwet* [2000] ECR I-8749, para. 50.

201 Case C-448/98 *Guimont* [2000] ECR I-10663 concerning the French legislation reserving the designation Emmenthal to a certain category of cheese with rind, Case 261/81 *Rau* v *De Schmedt* [1982] ECR 3961 concerning the Belgian requirement that margarine be sold in cubes.

202 In Case 155/80 *Oebel* [1981] ECR 1993, the Court of Justice stated that the prohibition on night baking was a legitimate economic and social policy decision in a manifestly sensitive sector.

203 Cases 60-61/84 *Cinéthèque SA* v *Fédération nationale des cinémas français* [1985] ECR 2605.

under specific conditions constitute a "mandatory requirement" capable of justifying restrictions on imports or exports.

Maintenance of press diversity[204]: Following a preliminary ruling concerning the Austrian ban on publications offering readers the chance to take part in games for prizes, the Court held that maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. It noted that such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order.

Financial balance of the social security system: Purely economic aims cannot justify an obstacle to the free movement of goods. However, in Case C-120/95 *Decker*, concerning the refusal by a Member State to reimburse the cost of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, the Court acknowledged that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier to the free movement of goods.

Road safety: In several cases, the Court has also acknowledged that road safety constitutes an overriding reason in the public interest capable of justifying a hindrance to the free movement of goods[205].

Fight against crime: In a case concerning a Portuguese ban on the affixing of tinted window film on cars[206], the Court found that the fight against crime may constitute an overriding reason in the public interest capable of justifying a hindrance to the free movement of goods.

Protection of animal welfare: In Case C-219/07, the Court noted that the protection of animal welfare is a legitimate objective in the public interest. It also stated that the importance of this objective was reflected, in particular, in the adoption by the Member States of the Protocol on the protection and welfare of animals, annexed to the Treaty establishing the European Community[207].

As mentioned above, the list of mandatory requirements is not exhaustive and the Court might find that other "mandatory requirements" are capable of justifying a hindrance to the free movement of goods.

6.3. Proportionality test

In order to be justified under Article 30 EC or one of the mandatory requirements established in the case law of the Court of Justice, a State measure has to comply with the principle of proportionality[208]. The measure in question has to be necessary in order to achieve the declared objective; the objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade.

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204 Case C-368/95 *Familiapress* [1997] ECR I-3689.

205 Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473, para. 40 and case law cited.

206 Case C-265/06 *Commission* v *Portugal* [2008] ECR I-2245, para. 38.

207 Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* [2008] I-4475, para. 27.

208 Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para. 33; Case C-254/05 *Commission* v *Belgium* [2007] ECR 4269, para. 33 and case-law cited; Case C-286/07 *Commission* v *Luxembourg* [2008] not yet published, para. 36.

In other words, the means chosen by the Member States must be confined to what is actually appropriate to safeguard the objective pursued, and must be proportional to the said objective[209].

It should be noted that, in the absence of harmonising rules at European level, the Member States are free to decide on the level of protection which they intend to provide for the legitimate interest pursued. In certain areas[210], the Court has allowed Member States a certain "margin of discretion" regarding the measures adopted and the level of protection pursued, which may vary from one Member State to another.

Notwithstanding this relative freedom to fix the level of protection pursued, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide[211].

An important element in the analysis of the justification provided by a Member State will therefore be the existence of alternative measures hindering trade less. The Member State has an obligation to opt for the "less restrictive alternative" and failure to do so will constitute a breach of the proportionality principle. On several occasions, the Court has found that State measures were not proportionate because alternatives were available[212]. In this respect, the Member State is also obliged to pursue the stated objectives in a consistent and systematic manner and to avoid any inconsistency between the measures chosen and the measures not chosen[213]. In Case C-249/07 the Court detailed, for example, some inconsistencies in the exemption system, which showed the lack of objectivity and the discriminatory nature of the system[214]. If a Member State can demonstrate that adopting the alternative measure would have a detrimental effect on other legitimate interests, then this would have to be taken into consideration in the assessment of proportionality[215].

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209 Case C-319/05 *Commission* v *Germany* (Garlic) [2007] ECR I-9811, para. 87 and case law cited.

210 It is in particular the case for the objective of protection of health and life of humans, which rank foremost among the assets or interests protected by Article 30 EC. This "margin of discretion" has also been recognised for measures motivated by the necessity to ensure public order, public morality and public security. For examples relating to the public health justification, see Case C-322/01 *DocMorris* [2003] ECR I-14887, para. 103 and case law cited; regarding the public morality justification see cases 34/79 *Henn and Darby* [1979] ECR 3795 and C-244/06 *Dynamic Medien* [2008] I-505; regarding measures in relation to alcohol and justification on grounds of public health and public order see Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171; regarding measures against gambling and justification on grounds of public morality, policy and security, see Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341; regarding measures relating to animal protection, see Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* [2008] I-4475.

211 Case C-124/97 *Läärä and others* [1999] ECR I-6067, para. 36.

212 See Case 104/75 *De Peijper* [1976] ECR 613*;* Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473, para. 46 and C-297/05 *Commission* v *Netherlands* [2007] ECR I-7467, para. 79 where the Court details available alternatives to the contested measures.

213 See Case C-500/06 *Corporación Dermostética* [2008] not yet published, para. 39; Case C-169/07 *Hartlauer* [2009] not yet published, point 55.

214 Case C-249/07 *Commission* v *Netherlands* [2008] not yet published, para. 47-50.

215 See Opinion of AG Maduro in Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, para. 25.

6.4. Burden of proof

It is for the Member State which claims to have a reason justifying a restriction on the free movement of goods to demonstrate specifically the existence of a reason relating to the public interest, the need for the restriction in question and the proportionality of the restriction in relation to the objective pursued. The justification provided by the Member State must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated[216]. In this respect, a mere statement that the measure is justified on one of the accepted grounds or the absence of analysis of possible alternatives will be deemed not satisfactory[217]. However, the Court has recently noted that the burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions[218].

7. Relationship to other Freedoms and Articles of the EC Treaty related to the free movement of goods

7.1. Article 39 EC – Freedom of movement of workers

Article 39 EC provides for the freedom of movement for workers within the Community. This freedom entails the abolition of any discrimination based on nationality between EU migrant workers and national workers as regards access to work and working conditions, as well as to tax and social advantages. Article 39 EC prohibits not only discrimination based on nationality, but also national rules, which are applicable irrespective of the nationality of the worker concerned but impede their freedom of movement.

Problems related to the movement of workers' personal belongings could theoretically be assessed under Article 28 EC or Article 39 EC. The Court dealt with this issue in the *Weigel* case[219], which concerned the transfer of a married couple's motor vehicles from their own country (Germany) to the Member State where the husband had taken up employment (Austria). When registering their motor vehicles in Austria, the couple were charged an excessive amount of tax. The couple argued that the tax would deter them from exercising their rights under Article 39 EC.

In principle, the Court agreed when it held that "[the tax] is likely to have a negative bearing on the decision of migrant workers to exercise their right to freedom of movement"[220]. For other reasons, however, the Court rejected the couple's argument that the tax violated Article 39 EC. It is worth noting that the Court did not pronounce on the question of whether restrictions of such a kind should be treated exclusively under Article 28 EC[221]. Moreover, there is still uncertainty over the situations in which it would be more advantageous to apply Article 39 EC instead of Article 28 EC, bearing in mind that the former provision only applies to nationals of a Member State.

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216 Case C-14/02 *ATRAL* [2004] ECR I-4431, para. 69; Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, para. 36.

217 Case C-265/06 *Commission* v *Portugal* [2008] I-2245, para. 40 to 47.

218 Case C-110/05 *Commission* v *Italy* [2009] not yet published, para. 66.

219 Case C-387/01 *Weigel* [2004] ECR I-4981.

220 Ibid. para. 54.

221 P. Oliver and S. Enchelmaier: "Free movement of goods: Recent developments in the case law", 44 CML Rev. (2007), 669.

It should be noted that, according to the case law of the Court, national rules which require the registration and/or taxation of a company vehicle in the Member State where the worker using the vehicle is domiciled, even if the employer who made the vehicle available to the worker is established in another Member State and even if the vehicle is essentially used in the Member State of the employer's establishment constitute a breach of Article 39 EC[222], as such provisions may have the effect of preventing a worker from benefiting from certain advantages, such as the provision of a vehicle and ultimately may deter him from working in another Member State at all.

7.2. Article 49 EC – Freedom to provide services

The freedom to provide services (Article 49 EC), as one of the other fundamental freedoms enshrined in the EC Treaty, is closely related to the free movement of goods. Both freedoms relate to economic transactions, mainly of a commercial nature, between Member States. Because of this close proximity it is sometimes the case that a specific national measure restricts both the circulation of goods (Article 28 EC) and the freedom to provide services (Article 49 EC).

Indeed, a given requirement relating to the distribution, wholesale or retail of goods may restrict at the same time both the free movement of goods and the freedom to provide distributive trade services. As the Court recognized in *Praktiker Bau*, "the objective of retail trade is the sale of goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor."[223]

Thus, for example, restrictions on advertising (e.g. alcohol advertisements[224]) may on the one hand affect the promotion sector as service providers, and on the other hand the effect of such restrictions may relate to specific goods and the market penetration possibilities, and thus may create obstacles to trade in products. Also, national provisions which prohibit the auction of goods under certain circumstances may, for example, on the one hand be considered as hampering the service activity of an auctioneer, while on the other hand they may create obstacles to the sale of goods[225].

The Court considered that Article 50 EC does not establish any order of priority between the freedom to provide services and the other fundamental freedoms[226]. Probably for reasons of procedural economy, when a national measure may affect more than one fundamental freedom, the Court usually examines that measure in the light of one fundamental freedom only. For this purpose, it decides which of the fundamental freedoms prevails[227]. In most cases, therefore, it is essential to identify the main focal point of the national measure: if it is goods-related, then Article 28 EC applies; if it is services-related then Article 49 EC applies. For example, in the case of auctions or itinerant sales, the Court considered the service aspect

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222 Case C-232/01 *Van Lent* [2003] ECR I-11525, C-464/02 *Commission* v *Denmark* [2005] ECR I-7929.
223 Case C-418/02 *Praktiker Bau- und Heimwerkermärkte* [2005] ECR I-5873, para. 34.
224 Cf. Case C-405/98 *Gourmet International* [2001] ECR I-1795.
225 Cf. Case C-239/90 *SCP Boscher* [1991] ECR I-2023.
226 Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, para. 32.
227 Case C-20/03 *Burmanjer* [2005] ECR I-4133, para. 34 et sqq.

to be secondary and thus did not take it into consideration for the legal assessment in that case.

However, the focal point approach does not always work. In a telecommunication case the Court held that the service aspect and the goods aspect are intimately linked, given that the telecom equipment used and the service provided often belong together. Therefore, the question as to whether a restriction for distributors of digital television and equipment thereof would infringe Community law was analysed simultaneously in the light of both Articles[228].

7.3. Article 56 EC – Free movement of capital

Article 56 EC concerns the free movement of capital between Member States. It protects financial operations within the internal market. While such transactions may regularly involve the investment of funds[229], it cannot be ruled out that under specific circumstances they may also concern transfers that are made in kind. In a recent judgment the Court has held that, where a taxpayer claims the deduction for tax purposes of gifts to charities in other Member States, such gifts come within the compass of Article 56 EC, even if they are made in kind in the form of everyday consumer goods[230].

7.4. Article 31 EC – State monopolies

According to the first paragraph of Article 31 EC: "Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States".

This does not mean that the monopolies have to be lifted, but it means that they have to be adjusted in such a way as to eliminate every possibility to discriminate. Generally speaking, Article 31 EC applies in circumstances where an action by the State: (1) grants exclusive purchase or sales rights and thus makes possible the control of imports or exports, and (2) grants rights to a state enterprise, a state institution or, through delegation, a private organisation.

Article 31 EC has direct effect and only applies to goods (hence, it does not cover the free movement of services or capital[231]). Moreover, the Treaty provision concerns activities intrinsically connected with the specific business of the monopoly and it is thus irrelevant to national provisions which do not have this connection.

It may be argued, on the one hand, that these national provisions are instead covered by other Treaty provisions such as, for example, Article 28 EC. This approach suggests that Article 31 EC constitutes a *lex specialis* vis-à-vis the general provision of Article 28 EC. In the *Franzén* case concerning the Swedish alcohol retail monopoly, the Court held that "rules relating to the existence and operation of the monopoly"[232] fall under Article 31 EC, whereas "other

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228 Case C-390/99 *Canal Satélite* [2002] ECR I-607, para. 32-33. See also C-34/95 *De Agostini* [1997] I-3843; C-405/98 *Gourmet International* [2001] ECR I-1795; C-452/04 *Fidium Finanz* [2006] ECR I-9521.

229 As regards the definition of "movement of capital", see e.g. Case C-513/03 *van Hilten* [2006] ECR I-1957, para. 39.

230 Case C-318/07 *Persche* [2009] not yet published, para. 30.

231 Case 155/73 *Sacchi* [1974] ECR 409.

232 Case C-189/95 *Franzén* [1997] ECR I-5909, para. 35.

provisions of the domestic legislation which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to [Article 28 EC]"[233]. This opinion seems to have been upheld in the *Hanner* case relating to the Swedish pharmaceuticals retail monopoly, where the Court argued that Article 31 EC "aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question"[234]. More recently, the Court explained in the *Rosengren* case that "While […] the measure at issue in the main proceedings affects the free movement of goods within the European Community, it does not, as such, govern the [Swedish alcohol retail] monopoly's exercise of its exclusive right of retail sale of alcoholic beverages on Swedish territory. That measure, which does not, therefore, concern the monopoly's exercise of its specific function, accordingly cannot be considered to relate to the very existence of that monopoly" [235].

On the other hand, it may also be argued that there appears to be an overlap between Article 31 EC and other Treaty articles. The Court held in the infringement cases concerning different national electricity and gas monopolies[236] that a joint application of Article 31 EC and Article 28 EC is indeed possible. Such an approach would mean that a measure related to a state monopoly would first have to be examined under Article 31 EC. If the measure at issue is considered discriminatory, examination under Articles 28 and 29 EC will no longer be necessary. Conversely, if it is concluded that the measure is not discriminatory according to Article 31 EC, it will be necessary to examine the measure under the general provisions on the free movement of goods.

7.5. Article 87 EC – State Aids

Article 87 EC provides that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

In this respect the state aid rules and Articles 28-30 EC serve a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition[237]. However, as their focal point is different, the qualification of a State measure as state aid does not automatically preclude the scrutiny of an aid scheme in relation to other Community rules, such as Articles 28-30 EC[238]. At the same time, the mere fact that a state aid measure as such affects intra-Community trade is in itself not sufficient to qualify the measure simultaneously as a measure having equivalent effect under Article 28 EC. Instead, the Court differentiates between aspects that are indissolubly linked to the objective of the aid and aspects that can be separated from conditions and actions which, even though they form part of the aid scheme, may be regarded as not being necessary for the attainment of the

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233 Ibid. para. 36.

234 Case C-438/02 *Hanner* [2005] ECR I-4551, para. 35.

235 Case C-170/04 *Rosengren* [2007] ECR I-4071, para. 21-22; see also Case C-186/05 *Commission* v *Sweden* [2007] ECR I-129.

236 Cases C-159/94 *Commission* v *France* [1997] ECR I-5815, para. 41; C-158/94 *Commission* v *Italy* [1997] ECR I-5789, para. 33; C-157/94 *Commission* v *The Netherlands* [1997] ECR I-5699, para. 24.

237 Case 103/84 *Commission* v *Italy* [1986] ECR 1759, para. 19.

238 Case C-234/99 *Nygård* [2002] ECR I-3657, para. 56; Case C-351/88 *Laboratori Bruneau* [1991] ECR I-3641, para. 7.

purpose of the aid or its proper functioning[239]. Only the latter aspects are covered by Articles 28-30 EC.

7.6. Article 25 EC – The Customs Union

While Article 28 EC covers non-tariff trade barriers, all customs duties and charges having equivalent effect are prohibited under Article 25 EC.

According to constant case law, any pecuniary charge, however small and 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 under Article 25 EC[240]. However, a charge escapes classification as a charge having equivalent effect to a customs duty if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported or exported products alike[241].

Even when a charge is levied without distinction on domestic and imported products, but the taxation imposed on domestic products is directly or indirectly completely compensated, e.g. if the revenue from it is intended to finance activities benefiting only the taxed domestic products, while imported products do not benefit from such return flow, the tax may be re-classified as a customs duty or charge having equivalent effect, given that in practice the "tax" is only paid by importers[242].

The Court of Justice has paid particular attention to the question of so-called "hidden charges", i.e. to national arrangements that are not obvious but are effectively a charge having equivalent effect. For instance, it found that charges were to be considered as having equivalent effect in one case where German legislation made shipments of waste to another Member State subject to a mandatory contribution to the solidarity fund for the return of waste[243], and in another case where Belgian legislation imposed taxes on imported diamonds[244] in order to provide social insurance for Belgian miners. As a general rule, any charge connected to the act of crossing a frontier – irrespective of its aim, amount, or discriminatory or protectionist character – will be seen as a charge having equivalent effect.

7.7. Article 90 EC – Tax provisions

Article 90 EC supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by eliminating all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States[245]. In relation to Article 28 EC, Article 90 is considered as *lex specialis*, which means that cases covered by Article 90 exclude the application of Article 28 EC. This was the

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239 Case 74/76 *Ianelli* [1977] ECR 557, para. 17.

240 Case 24/68 *Commission* v *Italy* [1969] ECR 193; C-441/98 *Michailidis* [2000] ECR I-7145, para. 15.

241 Case C-389/00 *Commission* v *Germany* [2003] ECR I-2001.

242 Case C-28/96 *Fricarnes* [1997] ECR I-4939.

243 Case C-389/00 *Commission* v *Germany* [2003] ECR I-2001.

244 Case 2-3/69 *Social Fonds voor Diamantarbeiders* [1969] ECR 211.

245 Joined Cases C-290/05 and C-333/05 *Ákos Nádasdi* v *Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága* (C-290/05) and *Ilona Németh* v *Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága* (C-333/05) [2006] ECR I-10115, para. 45.

case in the *Kawala*[246] judgment, where the Court decided that a registration fee for imported second-hand vehicles, being of a fiscal nature, falls under Article 90 and that therefore Article 28 EC is not applicable.

The first paragraph of Article 90 EC is infringed where the tax charged on an imported product and that charged on a similar domestic product are calculated differently on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product.

The Court defined similar products as those which have similar characteristics and meet the same needs from the point of view of consumers. In *Commission* v *France*[247], according to the Court's reasoning, spirits based on grain, such as whisky, rum, gin and vodka, are similar to spirits based on wine and fruit, such as cognac, calvados and armagnac.

If the conditions for direct discrimination are not met, taxation might be indirectly discriminatory as a result of its effects. Practical difficulties cannot be used to justify the application of internal taxation which discriminates against products from other Member States[248].

Article 90(2) is designed to catch national tax provisions that seek to indirectly protect domestic products by applying unequal tax ratings to foreign goods which may not be exactly similar to domestic goods, but which may nonetheless be in competition with them. In *Commission* v *United Kingdom*[249], the UK levied an excise tax on certain wines which was roughly five times the tax levied on beer. The UK produces considerable amounts of beer, but very little wine. After establishing that light wines were genuinely in competition with beer, the Court of Justice found that by levying excise duty on light wines from fresh grapes at a higher rate, in relative terms, than on beer, the UK had failed to fulfil its obligations under the second paragraph of Article 90 EC.

In cases where a charge is levied on domestic and imported products and the receipts are intended to finance activities which benefit only the domestic products, thus partially offsetting the tax burden borne by the latter goods, such a charge constitutes discriminatory taxation prohibited by Article 90 EC[250].

7.8. Article 95 EC – Harmonisation of the internal market

Article 95 EC (ex-Article 100a) was originally inserted into the Treaty by the Single European Act. This Article grants powers to the Community legislature to "adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". The scope of this provision has been interpreted widely by the Court[251]. Indeed, one

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246 Case C-134/07 *Piotr Kawala* v *Gmina Miasta Jaworzna* [2007] ECR I-10703.

247 Case 168/78 *Commission* v *France* [1980] ECR 347.

248 Case C-221/06 *Stadtgemeinde Frohnleiten* [2007] ECR I-9643.

249 Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265.

250 Case C-28/96 *Fricarnes* [1997] ECR I-4939; Case C-206/06 *Essent Network Noord* [2008] not yet published.

251 See for example Case C-350/92 *Spain* v *Council* [1995] ECR I-1985 and Case C-300/89 *Commission* v *Council* (titanium dioxide) [1991] ECR I-2867.

might say that the *tobacco advertising* judgment[252] was groundbreaking with the Court's finding that the Community legislature had adopted legislation which was inadmissible at Community level[253]. The Court, in examining the validity of the challenged Directive, pointed out that measures referred to in Article 95 EC are intended to improve the conditions for the establishment and functioning of the internal market. Furthermore, provided that the conditions for recourse to Article 95 EC are fulfilled, "the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made"[254]. The Court examined the validity of the Directive in question under two heads. First, it verified whether the Directive actually contributed to eliminating obstacles to the free movement of goods and to the freedom to provide services. Secondly, it examined whether the Directive contributed to the removal of distortions of competition.

The above judgment raises some interesting questions concerning *inter alia* the relationship between Articles 28 and 95 EC. On this relationship, J. Usher points out that if "as was held in *Gourmet*, a national advertising ban may be justifiable under Article 30 EC, the question arises as to whether Article 95 EC is drafted so as to achieve this aim, and in particular whether it can be used to replace such a national ban with a Community-wide ban?"[255]. It remains to be seen exactly how this relationship between these two provisions would evolve in a more integrated, global competitive internal market.

Be that as it may, once the Community legislature adopts legislation on the basis of Article 95 EC, then a Member State can exceptionally, on grounds of specific problems, derogate from fully harmonised provisions on the basis of Articles 95(4) to 95(9) EC. The Member State must notify the Commission of the measure envisaged and prove that it is both necessary and specific to its territory. The Commission will then, within six months of the notification, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States. Furthermore, the Commission checks whether or not the national provisions constitute an obstacle to the functioning of the internal market[256]. The Court has provided some guidelines on the application of these provisions, adopting a narrow approach to the interpretation of these derogations provided therein[257].

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252 Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419. This case was concerned with the validity of Directive 98/43 banning all forms of advertising and sponsorship in the Community of tobacco products.

253 Having said that, it is of course unknown whether the challenged Directive could have been adopted under Article 308 EC.

254 Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, para. 88.

255 J. Usher, case note on C-376/98 [2001] CML Rev. 1519 at 1538. In this respect see also G. Davies ("Can Selling Arrangements be harmonised?" [2005] EL Rev. 370), who argues for a wide interpretation to the scope of Article 95 EC, arguing that positive harmonisation should not be a mere reflection of negative harmonisation. The Treaty makes clear, he notes, that the internal market is to be a market which respects non-trade values as well.

256 See for example Commission Decision of 18 July 2001 on the national provisions notified by Germany in the field of pharmacovigilance, OJ L 202, 2001, p. 46. Commission Decision of 14.09.1994, OJ L 316 of 9.12.94, p. 43, Commission Decision of 26.02.1996, OJ L 69, 19.03.1996, p 32, Commission Decision of 21.12.1998, OJ L 3, 7.01.1999, p. 13, and seven Commission Decisions of 26.10.1999, OJ L 329, 22.12.1999.

257 See Case 41/93 *France* v *Commission* [1994] ECR I-1829, and Case C-319/97 *Kortas* [1999] ECR I-3143. In this respect see also Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643 where the Court annulled the Commission's Decision.

7.9. Articles 296, 297 and 298 EC

Article 296 EC permits Member States to protect their essential security interests in connection with the production of or trade in arms, munitions and war material, as long as the measures taken do not adversely affect trade within the internal market regarding products not intended for specifically military purposes. If the Commission or a Member State believes that a Member State is making improper use of its powers, the Member State in question can be investigated by the Commission and can, if necessary, be brought before the Court of Justice.

It is important to stress that, in general, derogations from Community rules should be interpreted strictly. More specifically such exceptions should have to respect the principle of proportionality.[258] Although Article 296 EC provides under certain conditions for an exemption from the strict application of the rules of the Treaty, the supremacy of Community law and the effectiveness of its rules restrict the recourse to this provision.[259] The Court can examine the limits of Member States' underlying discretion on the basis of proportionality[260] and the respect of the general principles[261].

Article 297 EC permits Member States to take measures in the event of serious internal disturbances affecting the maintenance of law and order, war or international tension. Under this Article, Member States must consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by such measures. As with regard to Article 296 EC, the measures taken must respect the principle of proportionality.

Article 298 gives the Commission the power to intervene if the use of Articles 296 or 297 distorts the conditions of competition.

7.10. Article 307 EC

Article 307 EC refers to the rights and obligations under international law entered into by the Member States before 1958, or before the date of their accession. The general rule is that these shall not be affected by the provisions of the Treaty.

In relation to Article 28 EC the Court, in Case C-324/93[262], mapped the boundaries of the Member States' possibilities for adopting measures which contravene their obligations under that article. The problem concerned refusal to grant a licence to import diamorphine (a narcotic drug subject to the 1961 Single Convention on Narcotic Drugs) into the United Kingdom. The Court ruled that measures "adopted under an international agreement predating the Treaty or accession by a Member State and the fact that the Member State maintains the measure pursuant to Article [307], despite the fact that it constitutes a barrier, does not

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258 See most recently Opinion of Advocate General Colomer *of* 10 February 2009 in cases C-284/05, *Commission* v *Finland*; C-294/05, *Commission* v *Sweden*; C-372/05 *Commission* v *Germany*; C-387/05 and C-409/05 *Commission* v *Greece* [2009], para. 124, not yet published. In this respect see also Interpretative Communication in the application of Article 296 of the Treaty in the filed of defence procurement COM(2006)779.

259 Para. 125.

260 In this respect see Case 222/84 *Johnston* [1986] ECR 1651.

261 AG Colomer in Cases C-284/05 et al., para. 141.

262 Case C-324/93 *The Queen* v *Secretary of State for Home Department, ex parte Evans Medical and Macfarlan Smith* [1995] ECR I-563.

remove it from the scope of Article [28], since Article [307] takes effect only if the agreement imposes on a Member State an obligation that is incompatible with the Treaty".

The conclusion is that Member States must refrain from adopting measures which contravene Community law, in particular the rules on the free movement of goods, when the international agreements to which they are signatory do not require them to adopt such measures.

8. Related instruments of secondary law

8.1. Directive 98/34/EC – laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services

Since 1984, Directive 83/189/EEC, which has since become Directive 98/34/EC following codification, obliges the Member States of the European Union to notify the Commission and their counterparts of any draft technical regulation relating to products and, since 1999, to information society services before they are adopted in their national laws.

The Commission and the Member States operate via a system of preventive control. During standstill periods, the Member States must refrain from adopting their notified draft regulations for at least three months while they are being examined. This period can be extended to up to 18 months where the measure in question is likely to create unjustified barriers to trade or where harmonisation work is in progress at Community level in the area covered by the notified draft.

The procedure therefore eliminates any obstacles to the smooth functioning of the internal market before they even appear, thus avoiding retroactive action, which is always more burdensome. The national drafts are adapted to Community law before being adopted and can even be put on ice for a certain period in order to facilitate discussion at Community level.

According to the case law of the Court of Justice (see judgments *CIA Security* and *Unilever*[263]), any technical regulation which has not been notified at the draft stage or has been adopted during the mandatory standstill periods cannot be applied and thus enforced by national tribunals against individuals. This constant case law has been confirmed again very recently[264].

8.2. Regulation (EC) No 2679/98 – The 'strawberry' Regulation

Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States provides for special procedures to cope with serious obstacles to the free movement of goods among Member States which cause heavy loss to the individuals affected and require immediate action. Those obstacles may, for example, be the result of passivity of national authorities in the face of violent action by individuals or non-violent blockages of borders, or of action by a Member State, such as an institutionalised boycott of imported products.

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263 Cases C-194/94 *CIA Security* [1996] ECR I-2201 and C-443/98 *Unilever* [2000] ECR I-7535.

264 Case C-20/05 *Schwibbert* [2007] ECR I-9447.

The Regulation provides for an alert procedure and for the exchange of information between Member States and the Commission. It also reminds Member States of their obligation to adopt necessary and proportionate measures to ensure the free movement of goods and to inform the Commission thereof, and it empowers the Commission to send a notification to the Member State concerned requesting that those measures be adopted within a very tight deadline[265].

8.3. Regulation (EC) No 764/2008 – The 'mutual recognition' Regulation

In 2008 the Community legislator adopted a Regulation laying down the procedure relating to the application of certain technical rules to products lawfully marketed in another Member State. The main objective of this Regulation is to define the rights and obligations of national authorities and businesses when the former intend to deny mutual recognition and to refuse market access of a product lawfully marketed in another Member State. The Regulation places the burden of proof on the national authorities that intend to deny market access. They must set out in writing the precise technical or scientific reason for their intention to deny the product access to the national market. The economic operator is given the opportunity to defend his case and to submit solid arguments to the competent authorities.

The Regulation also establishes "Product Contact Points" in each Member State, which provide information about technical rules on products and the implementation of the mutual recognition principle to enterprises and competent authorities in other Member States.

9. Enforcement of Articles 28 and 29 EC

9.1. Direct effect – private enforcement

The Court of Justice has recognised that the prohibition laid down in Article 28 EC is "mandatory and explicit and its implementation does not require any subsequent intervention of the Member States or Community institutions". Therefore Article 28 EC has "direct effect and creates individual rights which national courts must protect"[266].

Later the Court ruled that Article 29 EC also has direct effect and that its provisions are also "directly applicable" and "confer on individuals rights which courts of Member States must protect"[267].

Individuals can invoke the principle of and right to the free movement of goods by bringing a case before a national court. The latter may refuse to apply any national rule which it considers to be contrary to Articles 28 and 29 EC. National courts may also have to evaluate to what extent an obstacle to imports or exports may be justified in terms of mandatory requirements or public interest objectives listed in Article 30 EC.

9.2. SOLVIT

SOLVIT is a network (www.europa.eu/solvit) that aims at solving problems caused by the misapplication of internal market law by public authorities. For this purpose, all EEA Member

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265 For further info, see http://ec.europa.eu/enterprise/regulation/goods/reg267998_en.htm.

266 Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557.

267 Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347.

States have set up their own SOLVIT centres, which communicate directly via an on-line database. The SOLVIT centres are part of the national administration and they are devoted to providing solutions to problems for both citizens and businesses within a time period of ten weeks. A 2001 Commission recommendation[268] approved by the Council sets out the rules of procedure within SOLVIT. The European Commission supervises the network and, if needed, assists in speeding up the resolution of complaints. In 2008, SOLVIT case flow grew by a further 22% and for the first time the milestone of 1000 cases within a year was reached. The resolution rates are high, at 83%.

9.3. Infringement proceedings under Articles 226 and 228 EC

9.3.1. Article 226/228 procedure

In its role as "guardian of the Treaty", the Commission might, acting upon a complaint or on its own initiative, start infringement proceedings against a Member State which is deemed to have failed to comply with its obligations in relation to Community law.

Article 226 EC provides for the formal steps of the "infringement procedure". The first stage is the sending to the Member State concerned of a Letter of Formal Notice requesting it to submit its observations by a specified date, usually within two months.

In the light of the reply or absence of a reply from the Member State concerned, the Commission may decide to address a Reasoned Opinion to the Member State. This document clearly and definitively sets out the reasons why it is believed that there has been an infringement of Community law, and calls upon the Member State to comply within a specified period, usually two months.

If the Member State fails to comply with the Reasoned Opinion, the Commission may decide to refer the case to the Court of Justice in order to obtain a declaration that the free movement of goods has been infringed. Where the Court finds in its final ruling on the issue that this is the case, the Member State concerned is required to take the measures necessary to comply with the judgment.

If this is not the case, the Commission might again refer the case to the Court. The procedure for second referral to the Court is laid down by Article 228 EC. In the framework of the proceedings under Article 228 EC, the same pre-litigation steps as those provided for by Article 226 EC have to be used (that is to say: letter of formal notice, reasoned opinion and referral to the Court). If the Court of Justice finds that the Member State concerned has not complied with its first judgment, it may impose financial sanctions. These financial sanctions are intended to have a deterrent effect and to encourage Member States to comply with EC law as rapidly as possible[269].

Following the entry into force of the Lisbon Treaty, Articles 226 and 228 EC will become Articles 258 and 260 of the Treaty on the Functioning of the European Union. While the procedural steps for the pre-litigation procedure remain basically unchanged, the Commission

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268 Commission Recommendation of 7 December 2001 on principles for using "SOLVIT" – the Internal Market Problem Solving Network, C(2001)3901, OJ L 331, 15.12.2001, p. 79-82.

269 For more information on the procedure under Articles 226/228 EC and the method for calculating financial sanctions, see: http://ec.europa.eu/community_law/infringements/infringements_en.htm and http://ec.europa.eu/community_law/infringements/infringements_228_en.htm.

does not have to issue a Reasoned Opinion under the new Article 260 procedure (i.e. failure to comply with a previous judgment by the Court). Thus, the new provision allows for fast-track action against Member States that did not comply with a previous Court judgment.

9.3.2. Complaints

Anyone considering that a measure attributable to a Member State is contrary to Articles 28-30 EC may file a complaint with the European Commission. As a matter of fact, a large proportion of infringement procedures relating to the free movement of goods are initiated by the Commission following a complaint. A 2002 Commission communication on relations with the complainant in respect of infringements of Community law[270] lays down the rules and guarantees relating to the handling of complaints.

The complaint must be submitted in writing, by letter, fax or e-mail in any of the official languages of the EU. Though it is not compulsory, use of the "standard complaint form"[271] is recommended as it ensures that all the necessary information is forwarded to the Commission, and therefore speeds up processing of the complaint.

An initial acknowledgement of receipt will be sent to the complainant by the Secretariat-General of the Commission within 15 working days. Within one month of this acknowledgement, the Commission will decide whether the correspondence should be registered.

While the complainant is not a formal party to any procedure initiated against a Member State, it is worth noting that he/she enjoys some important administrative guarantees:

- The Commission will not disclose his/her identity unless he/she has expressly agreed to the disclosure.

- The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint.

- The Commission's services will keep the complainant informed of the course of any infringement procedure and he/she will be notified in advance by the relevant department if it plans to propose that the Commission closes the case.

If, after investigation, the Commission considers that there may indeed be an infringement of Community law, it may decide to initiate infringement proceedings under Article 226 EC.

In addition, it should be noted that the Commission has recently agreed with a number of Member States to work to improve the speed and efficiency of problem-resolution processes through a pilot project, 'EU Pilot'[272]. One of the objectives of this pilot project is to find quicker and better responses to complaints through contacts with the Member States rather than the formal infringement procedure. If the responsible service considers that a complaint should be treated through 'EU Pilot', the complainant will be informed and requested to agree

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270 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0141:EN:HTML.

271 http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm.

272 See "A Europe of results – applying Community law", COM(2007)502 final, page 9 and http://ec.europa.eu/community_law/infringements/application_monitoring_en.htm.

to the disclosure of his/her identity and of the content of the complaint. The file will then be transferred to the Member State concerned, which will have 10 weeks to propose a suitable solution to the complaint.

9.3.3. Priorities and Discretion of the Commission to act

As guardian of the Treaty, the Commission is very vigilant in ensuring overall compliance with Community law and in monitoring Member States' adherence to the rules and obligations set out in the Treaty or secondary legislation. However, for different reasons, legal procedures such as infringement proceedings under Article 226 EC may not always provide the best available means to address a particular issue.

It is therefore important to emphasise that the Commission, even if it is fully committed to its role of supervising the observance of Community law by Member States, enjoys a wide margin of discretion on whether or not to open infringement proceedings[273].

Moreover, in its 2007 Communication on the application of Community law[274] the Commission outlined several ways to improve application and enforcement of Community law. Besides a stronger partnership between the Commission and the Member States and more preventive action, the Communication envisaged prioritisation and acceleration in infringement management. Under these rules priority will be attached in particular to infringements that raise issues of principle or those that have a particular far-reaching negative impact for citizens and businesses concerned.

While these improvements are well underway and experience with the new measures, such as preventive action and enhanced partnership, is showing some early success, all their benefits will only become evident with time. They must also be accompanied by continued monitoring efforts, wherever further progress is required.

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273 Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299; Order in Case T-47/96 [1996] ECR II-1559 para. 42; see as well order in case T-177/05 order of 9 January 2006, para. 37-40.

274 "A Europe of results – applying Community law", COM(2007)502 final.

ANNEXES

A.) Important Communications in the area of Article 28 EC

- Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (OJ C 265, 4.11.2003, p.2)

- Commission Communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted (COM 2003, 839final)

- Commission interpretative communication on procedures for the registration of motor vehicles originating in another Member State (OJ C 68, 24.3.2007, p.15)

- Communication from the Commission: The Internal Market for goods (COM 2007, 35final)

- Communication from the Commission: Beverage packaging, deposit systems and free movement of goods (2009)

B.) Territorial Application

TERRITORIES TO WHICH ARTICLE 28 EC APPLIES

Åland Islands (autonomous province of Finland).

Legal Basis: Article 299(5) EC.

Azores Islands (autonomous region of Portugal). Consisting of *São Miguel, Pico, Terceira, São Jorge, Faial, Flores, Santa Maria, Graciosa, Corvo*.

Legal Basis: Article 299(2) EC.

Canary Islands (autonomous community of Spain). Comprising *Tenerife, Fuerteventura, Gran Canaria, Lanzarote, La Palma, La Gomera, El Hierro*.

Legal Basis: Article 299(2) EC.

Channel Islands (Crown dependency of the UK). Composed of *Guernsey* (including Alderney, Sark, Herm, Jethou, Lihou, and Brecqhou); and *Jersey* (including Ecrehous rocks and Les Minquiers).

Legal Basis: Article 299(6)(c) EC & Article 1(1) of Protocol N° 3 to the UK's Treaty of Accession to the EU[275].

French Guiana (overseas region of France)

Legal Basis: Article 299(2) EC

Guadeloupe (overseas region of France)

Legal Basis: Article 299(2) EC

Isle of Man (Crown dependency of the UK). The Isle of Man is a self-governing Crown dependency which (like the Channel Islands) is not a part of the EU, but has a limited relationship relating to the free movement of goods.

Legal Basis: Article 299(6) (c) EC Treaty & Article 1(1) of Protocol N° 3 to the UK's EU Treaty of Accession.

Madeira (autonomous region of Portugal). Composed of *Madeira, Porto Santo, Desertas Islands, Savage Islands.*

Legal Basis: Article 299(2) EC

Martinique (overseas region of France)

Legal Basis: Article 299(2) EC

Réunion (overseas region of France)

Legal Basis: Article 299(2) EC

TERRITORIES TO WHICH ARTICLE 28 EC DOES NOT APPLY

Akrotiri and Dhekelia (The Sovereign Base Areas of UK)

Legal Basis: Article 299(6) (b) EC.

Andorra

Legal Basis: In 1990 Andorra approved a customs union treaty with the EU permitting free movement of industrial goods between the two.

Anguilla (Overseas Territory of the UK)

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275 Article 299(6) (c) EC provides that the EC Treaty shall apply to the Channel Islands (and the Isle of Man) to the extent necessary to ensure the implementation of the arrangements for these islands set in the Treaty marking the UK's Accession to the EU. Protocol N° 3 to that Accession Treaty states that the Community rules on quantitative restrictions and the free movement of goods shall apply to the Channel Islands (and to the Isle of Man) under the same conditions as they apply to the UK.

Legal Basis: Article 299(3) EC.

Aruba (Constituent Country of the Netherlands)

Legal Basis: Article 299(3) EC.

Bermuda (Overseas Territory of the UK)

Legal Basis: In accordance with the wishes of the Government of Bermuda it is the only Overseas Territory of the UK not included in the Overseas Association Decision of 27 November 2001[276], implementing part IV of the EC Treaty[277].

British Antarctic Territory (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC

British Indian Ocean Territory (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC

British Virgin Islands (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC

Cayman Islands (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC

Ceuta and Melilla (Autonomous Cities under Spanish Sovereignty)**.**

Legal Basis: Due to the wording of Articles 24 and 25 of the Act of Accession of Spain to the EU[278] although Article 28 EC probably applies to goods entering these territories from the rest of the Community, they do not seem to apply to goods originating in Ceuta and Melilla entering the rest of the Community. Therefore it does not appear that Article 28 EC Treaty extends to goods originating in Ceuta and Melilla.

Chafarinas Islands (Place of Spanish Sovereignty). The Islas Chafarinas are composed of three small islets including Isla del Congreso, Isla Isabel II and Isla del Rey.

Legal Basis: In the absence of any specific reference in the EC Treaty or its Annex, the EC Treaty does not seem to apply to this territory.

Faeroe Islands (autonomous province of Denmark)

Although Denmark is responsible for the external relations of the 18 islands forming this territory, it retains a high degree of self-governance and the EC Treaty expressly states that these islands fall outside the scope of its territorial application.

Legal Basis: Article 299(6)(a) EC.

Falkland Islands (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC

French Polynesia (Overseas Collectivity of France)

Legal Basis: Article 299(3) EC

French Southern and Antarctic Territories (Overseas Territory of France)

Legal Basis: Article 299(3) EC

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276 2001/822/EC: Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community, OJ L 314, 30.11.2001, p. 1-77.

277 Bermuda's relationship with the EU is therefore even more remote than that of the other OCTs listed in Annex II to the EC Treaty.

278 OJ L 302, 1985.

Gibraltar (Overseas Territory of the UK). Even though the UK is responsible for the external relations of Gibraltar, Gibraltar is treated as a third country for the purposes of trade in all goods. Article 299(3) provides that the Treaty shall not apply to those overseas territories having special relations with the UK which, like Gibraltar, are not included in Annex II to the EC Treaty[279].

Legal Basis: Article 299(3) EC.

Greenland (self-governing province of Denmark)

Originally part of the Community by virtue of the accession of Denmark thereto, the status of Greenland was altered to that of OCT by special Treaty. In 1985 Greenlandic voters chose to leave the European Economic Community upon achieving self-rule. As a result Greenland's relationship with the EU seems (like that of Bermuda) even more remote than that of the other OCTs listed in Annex II to the EC Treaty.

Iceland

Legal Basis: Member States of the European Economic Area (EEA) benefit from free movement of goods in the EU under the EEA Agreement and not under Article 28 EC.

Lichtenstein

Legal Basis: Member States of the European Economic Area (EEA) benefit from free movement of goods in the EU under the EEA Agreement and not under Article 28 EC.

Mayotte (Overseas Collectivity of France)

Legal Basis: Article 299(3) EC.

Monaco

Legal Basis: Monaco is an independent State which, in principle, determines its external relations itself, so the Treaty provisions do not automatically apply in terms of Article 299(4) EC.

Montserrat (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC.

Netherlands Antilles (Constituent Country of the Netherlands). Consisting of Bonaire, Curacao, Saba, Sint Eustatius and Sint Maarten

Legal Basis: Article 299(3) EC.

New Caledonia and its Dependencies (A *sui generis* collectivity of France). Including a main island (*Grande Terre*), the Loyalty Islands, and several smaller islands.

Legal Basis: Article 299(3) EC.

Norway

Legal Basis: Member States of the European Economic Area (EEA) benefit from free movement of goods in the EU under the EEA Agreement and not under Article 28 EC.

Penon de Alhucemas, and Penon de Velez de la Gomera (Places of Spanish Sovereignty)

Legal Basis: In the absence of any specific reference, in the EC Treaty or its Annex, the EC Treaty does not seem to apply to these territories.

Pitcairn (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC.

Saint Helena and Dependencies (Overseas Territory of the UK). Including Ascension and Tristan da Cunha.

Legal Basis: Article 299(3) EC.

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279 In Case C-30/01 *Commission* v *United Kingdom* the Court of Justice held that Gibraltar ought to remain in the same position with regard to the EC's import liberalisation system as it was prior to the accession of the UK. So, products originating in Gibraltar are not deemed to be Community products to which free movement rules apply. Since, similarly, they do not attract customs duties under the common customs tariff, they cannot be regarded as goods in free circulation either.

Saint Pierre and Miquelon (Overseas Collectivity of France)

Legal Basis: Article 299(3) EC.

San Marino

Legal Basis: San Marino is an independent State which, in principle, determines its external relations itself, so the Treaty provisions do not automatically apply in terms of Article 299(4) EC.

South Georgia and the South Sandwich Islands (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC.

Switzerland

Legal Basis: Member State of the European Free Trade Association (EFTA), but does not form part of the European Economic Area (EEA).

Turks and Caicos Islands (Overseas Territory of the UK)

Legal Basis: Article 299(3) EC.

The **Vatican City**

Legal Basis: The Vatican is an independent State which, in principle, determines its external relations itself, so the Treaty provisions do not automatically apply in terms of Article 299(4) EC.

Wallis and Futuna Islands (French Overseas Collectivity)

Legal Basis: Article 299(3) EC.