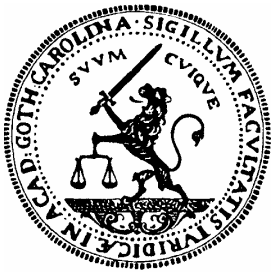

FACULTY OF LAW
University of Lund

Master of European Affairs programme, Law

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Restrictions to the free movement of goods

The protection of the environment as a mandatory requirement in the ECJ case law

Master thesis
10 points

Supervisor
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Field of study
European Law. Internal Market

Semester
Spring 2006

Contents

Summary

Since the ‘Danish bottles case’, where the protection of the environment was recognized as a mandatory requirement that could derogate from the free movement of goods, the ECJ has taken over an interesting role to map the boundaries of its application. The rank of Community policy and the need of integration explicitly envisaged in the EC, have had a major influence in its judicial interpretation. Perhaps this is why the characteristics that depict the mandatory requirements’ theory, elaborated in ‘Cassis de Dijon’ and further case law, have not been strictly applied in the case of environmental protection. The ECJ has been very flexible to favour its application in cases where the national measures were objectively distinctly applicable (against its own line of reasoning and the doctrine, that only uphold the mandatory requirements in the case of indistinctly applicable measures); even it has served to support, though in a subtle way, measures that restricted exports, once again challenging the majority opinion that holds that breaches of art. 29 EC can be justified only by art. 30 EC. The ECJ has also taken a disputable weak position in the question regarding the assimilation of this mandatory requirement with that of protection of health and life of humans, animals or plants, included in art. 30 EC. It has not ruled out this possibility, nor has accepted it: it has simply obviated to give a clear indication. Finally the Court has, in other cases, avoided to analyze the test of proportionality, one of the fundamental requisites to uphold a derogation from a fundamental principle.

It all indicates that the ECJ is willing to accord a different treatment to this mandatory requirement. The balance trade-environment is a difficult one not only in the Community legal system, but also in the GATT/WTO system: nonetheless, in the latter the commercial aspects still prevail over the environmental ones more than in the EC. The principle of integration, included in art. 6 EC, can explain that difference as well as the intentions of the Court. Some have argued that the ECJ wants to amend the EC via judicial interpretation, although it collides with its lack of legitimacy; others maintain that since the environmental protective measures must discriminate in order to be really effective, this derogation should be interpreted differently. However, the ECJ case law in this area is quite confusing, and is still soon to draw any clear conclusion of the Court’s intentions.

Preface

This thesis represents the end of an intense, unforgettable, highly challenging year in Lund. The general environment in the Faculty of Law has been favourable for a successful year, not only academically, but also personally. The Master of European Affairs has fulfilled all the expectations I had before coming to Lund. The method of teaching, based mainly on the analysis and study of case law, has been very effective to understand the peculiarities of the European legal system; the courses have been interesting and didactic; last but not least, the lecturers have been helpful and motivating. In general, I can say that the interest that I always had for the European Law has been satisfied, and I hope it is simply the beginning of a career devoted to it.

On the personal side, I feel that this year has been very rewarding. Especially for the good friends that I have made, with whom I have shared hours and hours studying in the library at Juridicum. But also enjoying the countless parties and good times we had both in Lund and Brussels.

I want to thank my family for their understanding, for giving me their support to come to Lund and attend this Master. A special mention for my father who, since his departure but always in my heart, has been guiding my most difficult decisions in the last two years. I know he would be very proud of me for having done something I always wanted. And I know that he will always be there, by my side. My gratitude to my friends, who encouraged me to take this decision, and whose support was also decisive.

Thank you!

Abbreviations

AG	Advocate General
art.	article
CMLR	Common Market Law Review
Commission	European Commission
DG	Directorate General
e.g.	exemplum gratia
EC	European Community/Treaty establishing the European Community (after May 1999)
EC Treaty	Treaty establishing the European Community (before May 1999)
ECJ	European Court of Justice
ECR	European Court Reports
EU	European Union
GATT	General Agreement on Tariffs and Trade
i.e.	id est
ibid	ibidem
MEA	Multilateral Environmental Agreements
MEQR	measures having equivalent effect
OJ	Official Journal of the European Community
p.	page
para.	paragraph(s)
pp	pages
QR	quantitative restrictions
SEA	Single European Act
supra	ut supra
TEU	Treaty of the European Union
WTO	World Trade Organization

1 Introduction

The topic that I have chosen for the thesis touches upon the protection of the environment as a ground of derogation from the free movement of goods among Member States of the EC.

The freedom of movement of goods is a fundamental principle that underpins the European internal market. Despite the development of the EC into areas unintended at its inception (i.e. social issues, citizenship, etc.) the 'four freedoms' (goods, workers, services and capital) still remain as the core of the Community action. It is enshrined in arts. 23-31 EC. Art. 28 EC states that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States', whereas art. 29 EC refers to exports. This fundamental rule can be only restricted by any of the justifications included in art. 30 EC, as far as several conditions apply: 1) there is no Community measure harmonizing the field that the Member State has decided to regulate; 2) the measure is neither arbitrarily discriminatory nor a disguised restriction to trade, and 3) it fulfils the proportionality test.

Nevertheless, the ECJ also acknowledged in its landmark judgement 'Cassis de Dijon'[1] that there might be other reasons not included in art. 30 EC that could be used by the Member States to derogate from art. 28 EC: the so-called 'rule of reason'[2]. In 'Cassis de Dijon', that dealt with a German sale's restriction of fruit liqueurs with alcohol content below 25%, and which affected a French blackcurrant fruit liqueur, it was stated that:

'In the absence of common rules it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory'[3]

And it continued:

'Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'[4]

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[1] C-120/78 Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.
[2] They might also be referred to as 'mandatory requirements' or 'imperative requirements'.
[3] Ibid, note 1, para. 8.
[4] Ibid, note 1, para. 8.

Expressly, the 'Cassis de Dijon' wording did not contain the protection of the environment as one of those mandatory requirements, but this formula prompted its inclusion in a further elaboration by the ECJ in the 'Danish bottles case'[5]. The deposit and return system for beverage containers at issue was deemed to comply with the EC Treaty since it was an indispensable element of a system that ensured a maximum rate of re-use and therefore a very considerable degree of protection of the environment.[6]

Since this judgement, there have been an increasing number of cases where the environmental protection[7] has played a fundamental role to support national measures that restricted the free movement of goods.

The protection of the environment was first enshrined in the SEA; since then, it has gained more and more weight in the design of Community law and a special chapter is now included in the EC (Title XIX, articles 174 to 176 EC) Furthermore, its integration in other Community policies is expressly included in art. 6 EC, thus being acknowledged as an important principle of Community Law.

All this helps us to stress the far-reaching consequences that it has gained in the last 20 years. Not only the policy-makers have acknowledged its importance, but the European judiciary has considered the environmental protection as a consistent reason to restrict the free movement of goods. It will be seen that this derogation has posed challenges to the ECJ and to the doctrine. The former has issued several judgements where the special features of the mandatory requirement's doctrine were not followed; the later has started to discuss about the possible ways of amending its status, either by relaxing its interpretation or by including it in the express list of EC derogations. Definitely, the protection of the environment is a derogation with own characteristics that seems to differ from other mandatory requirements. Somewhat in between art. 30 EC and the rule of reason? Undoubtfully, the environment is a high value whose protection is a duty of the European institutions, either by policy instruments or by judicial decisions. Hence the need of tackling it in a detailed, comprehensive way.

1.1 Purpose

The purpose of the thesis is to make an approach to, first, the conditions of application of the rule of reason and, second and most important, analyze some case law where the protection of the environment has played a key role to uphold national measures that derogate from the free movement of goods.

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[5] C- 302/86, Commission v. Denmark, [1988] ECR 4607.
[6] Ibid, note 5, para. 13.
[7] To refer to this mandatory requirement, I have used indistinctly either 'protection of the environment' or 'environmental protection', as it has been the case in the case law.

After making this double analysis, it will be concluded whether the ECJ has interpreted the protection of the environment in a wide sense, taking into consideration that it has become now a Community policy with its own status in the EC, or has simply circumscribed its application to the conditions that generally apply to the mandatory requirements.

1.2 Delimitation

Two important delimitations have been placed in this thesis. First, it has basically relied on the study of case law, obviating the legislative measures adopted by the EC in the field of environmental protection with consequences in the internal market. For the sake of brevity, I have limited the scope of analysis to the judicial action, leaving aside the harmonization measures adopted. I am aware that when tackling the topic of environment and trade a look into the legislation should be taken in order to have the overall picture of the subject matter; however, the main purpose of the thesis is to present its rise and evolvement as a creation by the ECJ.

The second limitation imposed in the present analysis, although definitely more subtle and flawed, is the analysis of the main provisions of the free movement of goods. Art. 28 EC concerns measures that aim at restricting the imports, whereas art. 29 EC concerns those that restrict exports. The main analysis made in this thesis has been that concerning the former. Although continuous references are made to art. 29 EC, and even some cases dealing with this provision are analyzed, no much importance has been placed on art. 29 EC since the leading doctrine maintains that the mandatory requirements do not serve to justify restrictions to exports. Therefore the analysis in Chapter 2 departs basically from art. 28 EC. A brief conclusion on art. 29 EC, nevertheless, is made.

1.3 Method and material

The method that I have made use of is the legal dogmatic one, that has enabled me to describe, examine and interpret case law, principles and doctrine in the field of study concerned.

I have taken a legal approach to all the materials that I touch upon. Despite it will be seen that, unarguably, a political approach has been taken when elaborating the subject-matter of discussion, my analysis will avoid it, since the main purpose of the thesis is to depict its inception and evolution through case law.

I have made personal comments when required but, in that case, there is an express separation between descriptive elements and personal reflections.

Finally, the materials that I have used to make the present analysis and draw conclusions are mainly case law and doctrine, as well as some legislation, namely the EC and GATT/WTO provisions. To note here that the numbering of the EC changed after the Treaty of Amsterdam: many of the case law was drafted according to the former numbering, but for the sake of clarity, I have adapted it to the current in force, whereby: art. 28 EC is art. 30 of the EC Treaty; art. 29 EC is art. 34 of the EC Treaty; and art. 30 is art. 36 of the EC Treaty.

Likewise, the European Court of Justice is referred to indistinctly as the ECJ or the Court.

1.4 Disposition

In Chapter 2, a first approach to the free movement of goods is made, with an analysis of the main provisions that underpin it. Three different topics are touched: first, the scope and applicability conditions of art. 28 EC, as well as a short reference to art. 29 EC; second, the derogations of art. 30 EC are studied, and a brief introduction to the rule of reason is made; finally, the legal basis for harmonization in the environmental and internal market area, as a limit to make recourse to the free movement's derogations, is presented.

Chapter 3 introduces the rule of reason doctrine. 'Cassis de Dijon', as the landmark judgement that gave rise to it, is presented, as well as the Commission's reaction; then, two aspects of the rule of reason are introduced: first, the test of proportionality and second, the limits that the Member States must observe when resorting to them.

Chapter 4 is the core of the thesis. An analysis of the main cases delivered by the Court is made, some of them tackling directly on the environmental protection as a justification for trade restrictions, and other cases where the reasoning is quite flawed. This chapter is the basis for the final conclusions.

A brief introduction to the main international instruments on trade and environment is presented in Chapter 5. A presentation of the dichotomy trade-environment at the international level is introduced in the first part, then the main GATT/WTO provisions and instruments are presented, and finally some of the most remarkable cases are commented.

Finally, Chapter 6 is devoted to draw the conclusions of the previous analysis. Four different attempts of conclusions are intended in this section, plus a final general remark.

2 The free movement of goods

The free movement of goods, together with the free movement of persons, services and capital, conforms the 'four freedoms', that at the inception of the European Communities in 1957 (Treaty of Rome) until later amendments, have been the core of the European integration process. Despite the fact that other policies have been gaining more and more importance (such as social policies, protection of the environment, etc.), they still shape the nature of the European Union, and the case law of the ECJ mainly relates to such issues. In the European legal system, they are considered as 'fundamental freedoms'.

That means that they cannot be easily restricted. A good example of this assertion can be found in the 'Schmidberger case'[8], where the fundamental character of the free movement of goods was recognized; equally, a balance between the requirements of the protection of fundamental rights in the Community and those arising from the free movement of goods was drawn, in order to ascertain whether the former could restrict the later:

'The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.[9]

First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case law since the judgment in Case 120/78 Rewe-Zentral (Cassis de Dijon) [1979] ECR 649.[10]

[…] freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued…'[11]

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[8] C-112/00, Schmidberger, [2003] ECR I-5659.
[9] Ibid, note 8, para. 77.
[10] Ibid, note 8, para. 78.
[11] Ibid, note 8, para. 79.

According to Harrie Temmink[12], the free movement of goods is an essential cornerstone of the internal market. He also stresses the fact that *'the elimination of obstacles for the free movement of goods is hence crucial for the smooth functioning of the internal market, in turn a condition sine qua non for the ongoing process of European economic integration'*[13]

The internal market, as opposed to the common market, is made up of the 'four freedoms'. The latter comprise the different policies carried out by the EC, as described in arts. 2 and 3 EC.

2.1 Article 28 EC

Art. 28 EC (art. 30 of the EC Treaty) reads as follows:

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

This article is included in Chapter 2, Title I, Part Three of the EC, which enshrines the free movement of goods. It is a provision directed against the restrictions of imports of goods among Member States. Also in this chapter can be found art. 29 EC, which is directed against restrictions to exports of goods to other Member States, and art. 30 EC, which lists the derogations from those two fundamental principles.

2.1.1 Scope

Art. 28 EC catches two different types of measures: quantitative restrictions (QR) and measures having equivalent effect to quantitative restrictions (MEQR). Directive 70/50/EEC[14], no longer in force (it only applied during the transitional period) provided with further insight into art. 28 EC. Likewise, it catches measures adopted by the Member States (not by private individuals) and the Community itself.[15]

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[12] Temmink, Harrie; 'From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection-a case law analysis', Yearbook of European Environmental Law, Volume 1, p. 61.
[13] Ibid, note 12, p. 62.
[14] Directive 70/50, [1970] OJ L13/29, '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'.
[15] Craig, Paul; and de Búrca, Gráinne; 'EU Law. Text, cases and materials'. Oxford University Press, Third edition 2003; p. 615.

Art. 28 EC has direct effect.[16] It means that the individuals can invoke it before the national courts, and they can, on its own motion, rule out national measures that run counter this provision.

Another, although contested, feature of art. 28 EC is the possible 'de minimis' effect of its application. In principle, art. 28 EC also catches situations with minimal effect, since their impact in trade is neither uncertain nor indirect. In the 'Foie gras'[17] case, the ECJ rejected a rule despite its defendants argued that a conflict with the French rule was purely hypothetical since other Member States produced that product in very small quantities. Advocate General La Pergola supported also this argument, whereas the ECJ finally dismissed it, stating that:

'Article [28] applies…not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State…'[18]

'Danish bees'[19] is another case where the ECJ rejected a de minimis rule for art. 28 EC. Nonetheless, here it was the Advocate General Fenelly that rejected the defendant's argument, whereas the ECJ did not pronounce itself against (or for) such a rule. The result, nonetheless, is that it was not upheld by the Court.

However, in other cases the ECJ has ruled that measures whose effects are too uncertain and indirect can fall outside art. 28 EC, such as in 'Peralta case'[20]. To note here that the ECJ has never explicitly stated that they fall outside art. 28 EC, but that there is a possibility of such a legal conclusion.

Hence it can be said that the case law on this particular area of art. 28 EC is unclear, although the ECJ has not upheld, so far, such a possibility. The Commission, on the other side, has strongly maintained that there is no such de minimis effect in relation to the free movement of goods.[21]

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[16] 'Guide to the concept and practical application of articles 28-30'. European Commission, Internal Market DG. January 2001, Agnete Philipson.
[17] C- 184/96, Commission v. France, 'Foie gras',[1998] ECR.
[18] Olivier, Peter; 'Some further reflections on the scope of articles 28-30 (ex 30- 36) EC'. Common Market Law Review 36, year 1999, p. 789, citing the 'Foie gras case'.
[19] C- 67/97, Criminal proceedings against Bluhme, [1998] ECR I-8033.
[20] Ibid, note 18, p. 789.
[21] Ibid, note 12.

2.1.2 Quantitative restrictions and measures having equivalent effect

Both measures actually define the scope of application of art. 28 EC. Much case law has been delivered by the ECJ in order to determine what MEQR are, whereas QR were quite clear since the beginning.

According to the European Commission quoting the 'Geddo case', QR are defined as 'any measure which amounts to a total or partial restraint of imports…or goods in transit'.[22] Some examples of quantitative restrictions would be an outright ban, a quota system, and even a covert or hidden quota system.

MEQR have been more difficult to interpret, and both the Commission and the ECJ have addressed the issue in directives and case law.

Directive 70/50/EEC was enacted in order to put black on white which the Commission's intentions regarding art. 28 EC were at that time. The definition of MEQR is broader than that of QR, and the Directive, no longer in force, gives some guidance as to its scope. The DG Internal Market, based on it, has included a non-exhaustive list of what could be considered a MEQR in its 'Guide to the concept and practical application of articles 28-30'.[23]

The Directive distinguishes between 'measures other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place'[24] and 'measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products'[25]. It can be seen that a distinction between 'distinctly and indistinctly applicable measures' was already covered in this Directive.

The ECJ has elaborated a sophisticated case law around MEQR distinguishing between 'distinctly applicable measures' and 'indistinctly applicable measures'. In 'Geddo'[26], the ECJ described them as 'measures which amount to a total or partial restraint of, according to the

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[22] Ibid, note 16.

[23] Ibid, note 12. Among other: import licenses; obligation to produce certificates; inspections and controls; fines and sanctions; conditions of credit and payment; obligations to appoint a representative on the territory of the importing Member State; obligation to have storage facilities in the importing Member State; national regulations or price controls; reimbursement of pharmaceuticals; obligations to make a declaration of origin; incitement to buy national products; obligation to use the national language; abusive reservation of names which are not indicative of origin or source; abusive restrictions on the use of generic names; parallel imports; etc.

[24] Ibid, note 14, art. 2.

[25] Ibid, note 14, art. 3.

[26] C-2/73,Geddo, [1973] ECR 865, para. 7.

circumstances, imports, exports of goods in transit'. It continued saying that 'measures having equivalent effect not only take the form of restraint described; whatever the description or technique employed, they can also consist of encumbrances having the same effect'. However, the most accurate definition of MEQR is included in 'Dassonville'[27].

2.1.3 The 'Dassonville' formula

'Dassonville' was the first case where the ECJ gave the widest interpretation of MEQR.[28]

The case concerned a Belgian law that required spirits bearing a designation of origin which were imported, sold or displayed for sale in Belgium, to have a certificate certifying that right to such designation of origin issued by the exporting country. Furthermore, a certification of origin adopted by the Belgian government was required. Importers of Scotch whisky, which had been already put into circulation in another Member State, pretended to import it into Belgium, but for whom a certificate of designation of origin from the British authorities would be less easily obtainable than by importers of the same product coming directly form the country of origin. The ECJ gave its ruling on the following terms:

'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.[29]

In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a member state takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.'[30]

The ECJ ruled that such a requisite amounted to a MEQR. According to 'Dassonville', the important point is the effect of the measure, not its intention. Moreover, para. 6 can be regarded as the first acknowledgement of what later on, in the 'Cassis de Dijon' judgement, would be fully recognised as the 'rule of reason'.

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[27] C-8/74, Procureur du Roi v. Dassonville, [1974] ECR 837.
[28] Wiers, Jochem; 'Trade and Environment in the EC and the WTO-A legal analysis'. Groningen, Europa Law Publishing, 2002; p. 54.
[29] Ibid, note 27, para. 5.
[30] Ibid, note 27, para. 6.

Eleanor Spaventa also stresses that what matters is the effect of the rule and not the rule's formulation itself: 'indirect discrimination occurs when rules, although neutral in their formulation, are likely to bear more heavily on a protected group'.[31]

Three elements can be seen in the substantive statement of para. 5 in 'Dassonville':

- Trading rules.
- Enacted by Member States.
- Capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

2.1.3.1 Trading rules

This is the first element in the 'Dassonville formula', which in latter judgements has been referred to as 'national measures', 'national rules', 'all commercial rules', 'any national rule', etc.[32]

2.1.3.2 Enacted by Member States

The measures caught by art. 28 EC are those enacted by the Member States, either by the central authorities, regional or local. No horizontal effect can be drawn from art. 28 EC. The 'Buy Irish case' is a good example on how the ECJ addresses the issue of the involvement of state entities in the adoption of measures: there, the Court ruled that despite the minimal role played by the Irish Government in the promotion campaign at issue, it sufficed to consider it as a national measure.

Inaction by a Member State to safeguard the free movement of goods can also be caught by this provision, as 'Spanish strawberries case' proved.[33] In that case, France was condemned by the ECJ for abstaining from taking action against French farmers in order to prevent their regular attacks against agricultural products originating in Spain and Belgium.

2.1.3.3 Distinctly and indistinctly applicable measures

This is perhaps the element which more ado has created among the doctrine and case law. As we already saw, Directive 70/50/EEC distinguished between distinctly and indistinctly applicable measures in arts. 2 and 3 respectively.

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[31] Spaventa, Eleanor; 'On discrimination and the theory of mandatory requirements'. The Cambridge Yearbook of European Legal Studies, volume 3, year 2000, p. 467.
[32] Wiers, Jochem; 'Trade and Environment in the EC and the WTO-A legal analysis'. Groningen, Europa Law Publishing, 2002; p. 95.
[33] Ibid, note 32.

Distinctly applicable measures are those that overtly discriminate. They have a different burden both in law and in fact on the domestic and imported goods, therefore art. 28 EC catches them. Indistinctly applicable measures are those covertly discriminatory: in law, they apply equally to both national and domestic products, but in fact they have a particular burden on the imported goods: the national producer has to satisfy only one regulator (the home state) whereas the imported goods have to satisfy a dual regulating burden (both the home and host state regulations).[34]

Many of the indistinctly applicable measures concern packaging and presentation requirements:

- 'Rau case'[35] concerned a Belgian law requirement to market margarine in cube-shaped packages. The ECJ recalled its judgement in 'Cassis de Dijon' and held that the requirement amounted to a MEQR since '*it is of such a nature as to render the marketing of those products more difficult or more expensive either by barring them from certain channels of distribution or owing to the additional costs brought about by the necessity to package the products in question in special packs which comply with the requirements in force on the market of their destination'* (para. 13).

- 'Prantl case'[36]: a German law restricted the use of bulbous shaped bottles with a long neck to German producers of quality wine, and it affected Italian wine produced in the same format bottle. The ECJ, despite the contention by the defendant that the measure applied to both domestic and imported goods alike, considered the measure to amount to a MEQR because '*even national legislation on the marketing of a product which applies to national and imported products alike falls under the prohibition laid down in article 30 of the EC Treaty if in practice it produces protective effects by favouring typical national products and, by the same token, operating to the detriment of certain types of products from other Member States*' (para. 21).

The doctrine on 'indistinctly applicable measures' and these judgements could not be properly understood without Directive 70/50/EEC and 'Cassis de Dijon', which widened the scope of justifications to breach of art. 28 EC by indistinctly applicable measures.

'Cassis de Dijon' concerned the refusal by German authorities of the importation of liqueur 'Cassis de Dijon' on grounds of its insufficient alcoholic strength to be marketed in Germany. The defendant argued that

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[34] Barnard, Catherine; 'The substantive law of the EU. The Four Freedoms'. Oxford University Press, First edition 2004.
[35] C-261/81, Rau, [1982] ECR 3961.
[36] C-16/83, Prantl, [1984] ECR 1299.

the German law amounted to a MEQR since it prevented the marketing in Germany of a product lawfully marketed in another Member State (France).

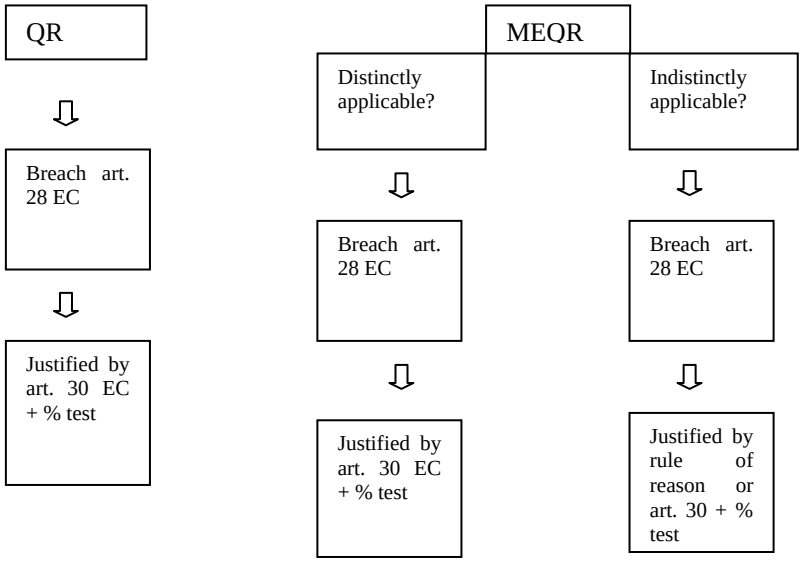
The ruling by the ECJ confirmed para. 5 of 'Dassonville', and the Court finally held that:

'The concept of 'measures having an effect equivalent to quantitative restrictions on imports' contained in article 30 of the Treaty (now art. 28 EC) *is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned'*

Then, as put by Craigh and de Búrca, 'Cassis de Dijon' has 'definitely signalled the ECJ's willingness to extend art. 28 EC to catch indistinctly applicable measures'.[37]

But in recent case law, the ECJ has avoided to address the question. In 'Danish bees', the ECJ did not distinguish whether the Danish measure was distinctly or indistinctly applicable: it simply stated that it was a MEQR, and then examined its possible justification.

According to Catherine Barnard, the scheme of measures caught by art. 28 EC and its possible justifications would be the following:[38]



[37] Craig, Paul; and de Búrca, Gráinne; 'EU Law. Text, cases and materials'. Oxford University Press, Third edition 2003; p. 64.
[38] Barnard, Catherine; 'The substantive law of the EU. The Four Freedoms'. Oxford University Press, First edition 2004.

2.1.4 Revisiting article 28 EC: the 'Keck formula' and selling arrangements

The 'Keck formula' is a consequence of the confusion created by the ECJ case law around the definition of MEQR. It helped to create an outer limit to the scope of art. 28 EC, the so-called 'selling arrangements'.

The case concerned a French general prohibition of resale at loss.[39] The ECJ held that the rule did not regulate the trade in goods, thus it could not restrict the volume of sales, neither of domestic nor imported goods. Despite it was true that the rule deprived traders of a method of sales promotion, it could not be characterised as a MEQR. The paragraphs that contain the core of the Keck ruling are the following:

It is established by the case law…that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as…) constitute measures of equivalent effect prohibited by Article 30 (now art. 28 EC). *This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.*[40]

By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment… so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[41]

Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.'[42]

Paragraph 15 contains a delimitation of what type of rules relating to goods can be considered as a MEQR prohibited by art. 28 EC, and also establishes

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[39] C-267/91 & 268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, [1993] ECR I-6097.
[40] Ibid, note 39, para. 15.
[41] Ibid, note 39, para. 16.
[42] Ibid, note 39, para. 17.

that the mandatory requirements (or 'public objective interest', as worded in the judgement) can take precedence over the free movement of goods if the rules apply indistinctly. Paragraph 16 contains the description of the new concept, 'selling arrangements', and sets its boundaries: they must apply to all traders in the same manner, in law and in fact. Paragraph 17 finally establishes the consequence of the precedent paragraph: those rules fall outside the scope of art. 28 EC.

This formula has prompted much criticism, since the ECJ did not accurately define what a selling arrangement not falling within art. 28 EC was. In fact, the word 'certain' in paragraph 16, without further clarification, brings much confusion to the doctrine. Advertising has been a discussion point in several ECJ judgements[43], whereas it was not clear whether it could fall within the concept of selling arrangement, or it was intrinsic to the goods themselves, as it was declared in 'Mars'[44].

In further case law, the ECJ has been fine-tuning what is covered by that concept.[45]

Some case law has also qualified the 'Keck formula' and confirmed that art. 28 EC still applies where, although being about selling,

- the rule also affects the nature of the product itself ('Familiapress case')
- the rule has a different impact, in law or in fact, for domestic traders and importers ('De Agostini case')

What are the implications of this new doctrine of 'selling arrangements' regarding the protection of the environment? In 'Danish bees'[46] the ECJ rejected the argument put forward by Denmark in that the prohibition was a selling arrangement and thus not caught by art. 28 EC; the Court held that the rule related to the intrinsic characteristics of the bees. It could have been an interesting opportunity to know its approach in this field, but it easily disregarded the possibility of a selling arrangement and concluded that the rule related to the bees as a product. There is no more case law in this field; it can be concluded that still, as generally applicable, that argument can be put forward and the ECJ will make an assessment to arrive at the conclusion whether the national measure falls within art. 28 EC or, as a selling arrangement, it does not.

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[43] Joined cases C-34-36/95 De Agostini [1997] ECR I-3843; C-405/98 Gourmet, [2001] ECR I-1795; C-470/93, [1995] ECR I- 1923; C-368/95, Familiapress, [1997] ECR I-3689.
[44] C-470/93, Mars, [1995] ECR I-1923.
[45] Olivier, Peter; 'Some further reflections on the scope of articles 28-30 (ex 30-36) EC'. Common Market Law Review 36, year 1999, p. 794: restrictions on when, where or by whom goods may be sold; advertising restrictions; price controls.
[46] C-67/97, Criminal proceedings against Bluhme, [1998] ECR I- 8033.

2.2 Article 29 EC

Art. 29 EC (art. 34 of the EC Treaty) rephrases art. 28 EC, but regarding exports:

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

Nonetheless, the ECJ has given a narrower meaning to this article.[47] Two cumulative conditions must be met so that a MEQR is caught by art. 29 EC:[48]

- The object or effect of the national measure must be the restriction of patterns of export.
- It must discriminate in favour of the national products or for the domestic market.

Art. 29 EC does not prohibit indistinctly applicable measures: therefore, they do not fall within that article and do not require further justification. Hence, for a national measure to be caught under art. 29 EC it must be overtly discriminatory.

2.3 Derogations from the free movement of goods

So far, we have briefly addressed the possible breaches of arts. 28 and 29 EC. It can be concluded that both distinctly and indistinctly applicable measures can breach these fundamental provisions of the internal market. Now, we must analyze their legal justifications. The legislators, as well as the Community judiciary, acknowledged at the inception of the Community that despite being a fundamental freedom, there might be grounds which can justify a derogation. At the outset, only art. 30 EC could interplay in this scheme, but later on the ECJ elaborated new grounds for justification, the so-called 'rule of reason', subtly mentioned in 'Dassonville' and explicitly recognized in 'Cassis de Dijon'. Later judgements have added new grounds for justification. The aim of this subsection is to address briefly both of them and analyze the conditions of their application.

[47] Ibid, note 12, p. 80.
[48] Ibid, note 12, citing C-15/79, Groenveld, [1979] ECR 3409.

2.3.1 Article 30 EC

Article 30 EC (art. 36 of the EC Treaty) reads as follows:

'The provisions of Articles 28 and 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'

As a derogation from a fundamental principle of Community Law, the ECJ has strictly interpreted this provision; national rules that make recourse to art. 30 EC are closely scrutinized by the Court. In addition, the measure is subject to the test of proportionality.[49]

Why this restricted list? According to Catherine Barnard, 'they reflect the priorities of the Community in 1957'.[50] Despite that fact, art. 30 EC was never affected by the later amendments of the EC Treaties to include other derogations such as consumer or environmental protection.[51]

The ECJ has set two important constraints to make recourse to art. 30 EC:

- A strict interpretation, as stated in the 'Irish souvenirs case'[52]
- It cannot be used to serve economic objectives, according to what stated in 'Commission v. Italy'[53]

The second part of art. 30 EC (*such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States)* addresses the question of discrimination, requiring explicitly that its application cannot result in a discriminatory treatment of domestic and imported goods. 'Henn and Darby case'[54] touched upon this question, where in paragraph 21 it was stated that where no lawful trade exists in a country, *'a prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type*

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[49] Ibid, note 15, p. 626.
[50] Ibid, note 38, p. 65.
[51] According to Jochem Wiers (ibid 32, p. 98), an attempt to include the protection of the environment in art. 30 EC did not succeed during the IC preparing the 1997 Amsterdam Treaty.
[52] C-113/80, Commission v. Ireland, [1981] ECR 1625.
[53] C-7/61, Commission v. Italy, [1961] ECR 317.
[54] C-34/79, Henn and Darby [1979] ECR 3795.

depending on whether they are produced within the national territory or another Member State'.

According to Jochem Wiers, 'the ECJ has very rarely addressed the second sentence of art. 30 EC individually, but often merging it into the proportionality test', a necessary requirement to comply with in order for application of art. 30 to be valid (see also fig. 1 in page 16).[55]

The ECJ has emphasised that the measures have to be proportionate. The principle of proportionality is a general principle of Community law, that has drawn inspiration from different national legal systems. However, the way that it has been interpreted and applied by the ECJ is closer to German administrative law than to any other legal system.

This principle is a threefold test: it entails appropriateness (or suitability) for attaining the objective pursued, it is, a balance means-ends; necessity (also referred to as 'least-trade restrictiveness': other measures less restrictive to attain the same objective are not available; it requires a weighing of competing interests); and proportionality stricto sensu.

The ECJ assesses the adverse consequences that the measure has on an interest worthy of legal protection and determines whether those consequences are justified in view of the importance of the objectives pursued. Paragraph 37 of 'Campus Oil case'[56] provides an example of such an assessment:

'As the Court has previously stated […]article 36 (now art. 30 EC) *as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken pursuant to that article must not create obstacles to imports which are disproportionate to those objectives. Measures adopted on the basis of article [36] can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-community trade more than is absolutely necessary'*.

It is contested whether the three elements of the proportionality test apply alternatively, or cumulative. In some cases ('Danish bees') the Court mentioned them separately, whereas in other cases they have been found to be cumulative conditions of the overall test of proportionality ('Franzén', 'Familiapress' and 'De Agostini').[57] It could be inferred that, in a case-by-case basis, the ECJ will assess the derogation proposed by the Member State and the consequences of its national measure: sometimes it will be necessary to go all the way to conclude whether the measure is proportionate, whereas other times a subtle appraisal will suffice.

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[55] Ibid, note 32, p.121.
[56] C-72/83, Campus Oil, [1984] ECR 2727.
[57] Ibid, note 32, p. 74.

As a conclusion, it can be said that the last indent of art. 30 EC, which has been equalled by most of the doctrine to the test of proportionality, has been designed to moderate the justifications permitted by that article.[58] This brief explanation of the principle of proportionality will be further analyzed in the following chapter.

2.3.2 Beyond article 30 EC

Paragraph 8 of 'Cassis de Dijon' provided that:

'In the absence of common rules relating to the production and marketing of alcohol […] it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.

This brief statement was the starting point for the elaboration of a new justifications' theory. It has been referred to as the 'rule of reason' (based on para. 6 of Dassonville, where it spoke of 'reasonable trade rules'), 'mandatory requirements', 'imperative requirements' or even 'overriding requirements of general public importance'. Nonetheless, to use a coherent term in this thesis, I will refer to them indistinctly as 'rule of reason' or 'mandatory requirements'.

The rationale behind this new theory of derogations is to justify obstacles to the free movement of goods than can be considered legitimate according to those mandatory requirements.

In 'Cassis de Dijon', some grounds were explicitly mentioned:

- the effectiveness of fiscal supervision
- the protection of public health
- the fairness of commercial transactions
- the defence of the consumer

Later case law has been adding new grounds of derogation, such as the protection of the environment[59], the protection or enhancement of artistic

[58] Ibid, note 32, pp. 78-79.
[59] Ibid, note 5.

works[60], different social and political choices among the Member States[61], pluralism of the press[62], etc.

Two considerations must be made regarding their application. The wording of para. 8 'Cassis de Dijon' is clear-cut when requesting that the provisions must be 'necessary in order to satisfy the mandatory requirements'. This means that they must satisfy the necessity principle (equalled by many to the test of proportionality). Another important requisite is that they are designed for national measures that apply indistinctly to national and imported goods. In the case of overt discrimination (distinctly applicable measures) only art. 30 EC will come into play. Then, unlike art. 30 EC, they cannot justify discriminatory measures.

Some authors have considered the mandatory requirements to be objective justifications for indirectly discriminatory measures. Thus, indistinctly applicable measures would be caught by art. 28 EC only when affecting imported goods more than domestic ones, if such effect could not be objectively justified. The mandatory requirements can be seen, according to Eleanor Spaventa, as a codification of the interests which, in a case-by-case basis, were found to be consistent with Community Law, and thus 'legitimate'.[63] She also argues that 'there is no discrimination when there might be an objective reason which justifies the different impact of the rule, a legitimate aim, an aim which is consistent with the values enshrined in a given system, that the rule seeks to pursue and which cannot be pursued otherwise but through that rule'.

Different approaches have been taken by other authors. Peter Olivier[64] advocates for treating art. 30 EC and the mandatory requirements in a similar way, on the grounds that they have similar patterns: the burden of proof is born by the party alleging its application, and the measures must be proportionate and necessary. However, this approach does not regard the distinction between distinctly and indistinctly applicable measures and what they entail: discrimination, a pattern very difficult to reconcile with the aim of the Community, which is the attainment of a real internal market, where goods can easily flow between Member States. Discrimination can difficulty be reconciled with this objective, hence the restrictive interpretation given by the ECJ to the Treaty derogations.

Spaventa also construes this distinction stating that at the inception of their theory, national rules or obstacles were not to be considered as MEQR when the imposition of the rules on imports was justified by one of the mandatory

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[60] C-60 & 61/84, Cinéthèque SA v. Fédération Nationale des Cinémas Français [1985] ECR 2605.
[61] C-145/88, Torfaen, [1989] ECR 3851.
[62] C-368/95, Vereignigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag, [1997] ECR I-368.
[63] Ibid, note 31.
[64] Ibid, note 18, p. 804.

requirements. This stressed the view that the ECJ is not amending the EC via judicial interpretation, but simply giving an interpretation of MEQR. 'The fact that mandatory requirements were internal to the definition of MEQR also allowed a certain consistency in the distinction between mandatory requirements and Treaty derogations. The former are intrinsic to the definition of MEQR, whereas the later are exceptions for a measure caught by art. 28 EC. Then, it is normal that the ECJ refused to apply the mandatory requirements to quantitative and discriminatory restrictions which fell automatically within art. 28 EC'.

A deeper analysis of the theory of mandatory requirements will be made in Chapter 3.

2.4 Avoiding the derogations from the free movement of goods: harmonization

According to Craig and de Búrca, 'Community harmonization measures may make recourse to art. 30 EC inadmissible'.[65] This is, undoubtfully, the general rule: once the Community has decided to legislate in a given area, national measures that derogate from it are difficultly accepted.

There are several types of harmonization: minimum, partial, total. Total harmonization is also named 'pre-emptive', since it fully prevents Member States from taking any measure in the field harmonized by the Community. On the other side, minimum harmonization permits Member States to introduce more stringent measures, as far as they are compatible with the Treaty.[66] As depicted by Michael Dougan, 'the applicable Community legislation sets a floor, the Treaty itself sets a ceiling, and the Member States are free to pursue an independent domestic policy between these two parameters'.[67]

The legislative instrument that most frequently serves harmonization purposes is the directive.

The problem of harmonization and the free movement of goods relates to the powers that Member States retain to make recourse to the derogations provided by art. 30 EC and/or the mandatory requirements. Joachim Wiers[68] puts it simply: if a subject matter is outside Community secondary legislation, then Member States can regulate it within the limits of primary Community law. But if secondary legislation has been adopted, the limits within which they can act will depend on the secondary legislation itself: if

[65] Ibid, note 15, p. 635.
[66] Ibid, note 15, citing M. Doogan, p. 635.
[67] Dougan, Michael; 'Minimun harmonization and the internal market'. Common Market Law Review 37, year 2000, p. 855.
[68] Ibid, note 32, p. 83.

it enables the Member States to go beyond and adopt more stringent standards, then the derogations can still play some role.

Some case law provides an example of the national powers retained once harmonization has taken placed:

In 'Van Bennekom case'[69] the ECJ held that only full harmonization prevents recourse to art. 30 EC: '*It is only when Community directives, in pursuance of art. 100 of the Treaty, make provision for the full harmonization of all the measures needed to ensure the protection of human and animal life and institute Community procedures to monitor compliance therewith that recourse to article 36 ceases to be justified*' (para. 35)

In 'Hedley Lomas case'[70], the ECJ held that '*recourse to art. 36 EC* (now art. 30) *is no longer possible when Community directives provide for harmonization of the measures necessary to achieve the specific objective'* (para. 18) And continued in para. 19 that '*this exclusion of recourse to article 36 cannot be affected by the fact that, in the present case, the Directive does not lay down any Community procedure for monitoring compliance nor any penalties in the event of breach of its provisions. The fact that the Directive lays down no monitoring procedure or penalties simply means that the Member States are obliged…to take all measures necessary to guarantee the application and effectiveness of Community law…'*

'Compassion case'[71] dealt with the interpretation of art. 29 and 30 EC and the validity of Directive 91/624/EEC, laying down minimum standards for the protection of calves (the Directive was based on art. 37 EC, agriculture) The applicants sought judicial review to ascertain whether a Member State could rely on art. 30 EC (particularly, on the grounds of public morality, public policy and protection of the health and life of humans, animals or plants) to justify restrictions to exports. The ECJ had to answer the question whether the Member States could take unilateral action after Community harmonization.

It held, first, that the ban at issue was contrary to art. 29 EC, and distinguished the present situation from other which was decided before the adoption of the Directive.

Then it analyzed the objective of the directive, arriving at the conclusion that it aimed at reconciling animal protection with the smooth functioning of the organisation of the common market in calves and derived products. The applicants argued that because the Directive did not provide full harmonization, recourse to art. 30 EC was still possible, whereas the ECJ finally maintained that even though minimum standards do not fully

[69] C-227/82, van Bennekom, [1983] ECR 388.
[70] C-5/94, Hedley Lomas, [1996] ECR I-2553.
[71] C-1/96, R. v. MAFF, ex parte Compassion in World Farming, [1998] ECR I-1251.

harmonise a given area, they still exhaustively lay down common minimum standards. Member States can adopt stricter standards, but they must allow the marketing (either import or export) of products insofar as they meet the minimum standards.

As van Calster puts it, 'the core of Compassion's reasoning is that even minimum standards exhaustively lay down common Community rules, they occupy therefore the field and prevent Member States' action'.[72]

A conclusion could be that once Community harmonization has taken place, art. 28 and 29 EC are less likely to be derogated; the choice of harmonization will determine how far to scrutinize the national restrictions. Interestingly, Harrie Temmink depicts four basic conceptions that derive from the ECJ case law in order to determine the powers that Member States retain following harmonization:[73]

1- The regime of arts. 28-30 EC applies even though Community legislation has been adopted, as long as the transposition period has not yet expired. The same situation applies when the harmonization measures require more detailed rules to be adopted for them to be applicable.

2- The 'principle of pre-emption': Art. 30 EC and/or the mandatory requirements cannot come into motion once the EC has exhaustively harmonized measures in the field that the Member States invoke to protect.[74]

3- The harmonization technique. If 'exhaustive (total) harmonization' has been carried out by the Community, the Member States cannot adopt any measure in that area; in the case of 'minimum harmonization', they can still adopt more stringent measures. But 'Gallaher'[75], as well as 'Compassion case' did, put clear that imported goods that already comply with the minimum standards set by a directive, are not subject to more stringent national measures.

4- The implementation of harmonization measures by the Member States: compliance must be not only with the Directive and the national legislation, but also with the primary legislation.

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[72] van Calsten, Geert; 'Trade and the environment-a watershed for article 30'. European Law Review, year 2000.
[73] Ibid, note 12, pp. 66-70.
[74] See also Michael Dougan, ibid , note 67 p. 866.
[75] C-11/92, R. v. Secretary of State for Health, ex parte Gallaher Ltd. Et al.,[1993] ECR I-3445, cited by Harrie Temmink.

How to decide if a Community directive harmonizes a given area? The answer is given mainly looking at the provisions of the directive, and at the actual objectives, which are usually described in the preamble. Nonetheless, sometimes it is still difficult to conclude the room left to the Member States for their own regulations. Wiers, aware of this situation, proposes the following: '(first) to determine the coverage of the national measure and the Community legislation, and then to look at the possibilities for national policies offered by the legislation. Depending on how such possibilities, if any, are phrased, arts. 28-30 EC may come into play'.[76]

This formula is noteworthy since it would make irrelevant the distinction between the different types of harmonization (minimum, partial, total) and the question of exhaustion: the importance relies on the effects of the instrument, read in conjunction with the general legal framework on which it is based on.

Finally, it is interesting to note that like all Community policies, harmonization measures have to pass the 'subsidiarity test' (art. 5 EC) It means that in each action taken, a balance between the pros and cons of Community and Member States' action must be drawn: the one placed in a better situation is the one that should adopt the act.

2.4.1 Harmonization in the environmental field

It is now clear that in the absence of Community measures, it is for the Member States to adopt those which they consider appropriate. In the case of environmental measures, they have to comply with the EC, including the general rules on the free movement of goods and the Community international obligations.[77] They have to respect the following principles:

- The measures must apply indistinctly to both domestic and imported products.
- They must be necessary to achieve their environmental objective (principle of necessity)
- They must be proportionate, i.e. the objectives should be attained with the least-trade restrictive measures, or with the alternative measures that less restrict the free movement of goods.[78]

In addition, the examination of the appropriateness of the national measures should be carried out on the basis of other principles which are more specific for environmental policy and are enshrined in art. 174 (2) EC:

- Principle of precaution and prevention.

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[76] Ibid, note 32, p. 86.
[77] European Commission. Single Market and Environment. Communication from the Commission to the European Parliament and the Council. COM (99) 263 final, 08.06.1999; p. 7.
[78] Ibid, note 77, p. 8.

- Principle of rectifying environmental damage at source.
- The 'polluter pays' principle.

In the case of Community measures, it has been stated by the ECJ in several occasions that the choice of legal basis for a Community measure is not left to the discretion of the Community institutions, but has to be based on objective criteria, in particular the stated objective and the content of the measure. Furthermore, when a measure pursues two objectives at the same time, preference is to be given to the legal basis that ensures greater participation of the European Parliament.

In our field of study, two different sets of provisions are used: arts. 94-95 EC under Chapter 3 (Approximation of laws) and arts. 174-176 EC (Title XIX on environment) The former provide for the achievement of the internal market, being a mechanism for the objectives of art. 14 EC; the latter provide for the establishment of an environmental policy, as prescribed in art. 3.1(l) EC.

Directives are the most frequent legislative instrument used in Community environmental policy, although some regulations have also been adopted (in the field of nature protection, waste and chemical)

Krämer[79] notes that, where two or more objectives of an environmental measure have a different emphasis, the ECJ has applied the theory of 'centre of gravity': it looks at the legislative measure as a whole as well as at its different provisions:

- Where the measure primarily aimed at the protection of the environment: art. 175 EC

- Where the main emphasis is placed on ensuring the free movement of goods, art. 95 EC, even in measures where it also aims, secondly, at the protection of the environment.

Krämer has brought about the following product categorization and its legal basis, focusing on the Council's practice of adoption of measures in the environmental and internal market field:[80]

- Products: art. 95 EC, except: authorisation for pesticides, ozone-depleting substances (art. 175 EC)
- Product-related noise measures, art. 95 EC.
- Waste-measures, art. 175 EC, except packaging and packaging waste, batteries, waste programmes form titanium dioxide industry, that fall within art. 95 EC.

[79] Krämer, Ludwig, 'European Environmental Law', Sweet & Maxwell, 2003, pp. 72-76.
[80] Ibid, note 79.

Regarding product standards directives, which are enacted mainly under art. 95 EC, they usually have attached a 'free movement clause': it means that even though a Member State adopts national legislation setting higher standards, it cannot impede the marketing of any goods originating in other Member State, as far as it complies with the minimum Community standards. It has been also confirmed by the case law.[81] Wiers's view is that total harmonization usually includes this type of clause.[82] In the absence of a 'free movement clause', the national stricter standards will be scrutinized under arts. 28-30 EC.

Minimum harmonization seems to be the common choice for environmental directives, as well as in other fields (e.g. consumer policy and employee protection)[83]

Needles to say that Member States still retain power to adopt measures that fall within areas not subject to harmonization, or particular areas not touched by partial harmonization.[84]

2.4.1.1 Articles 94 and 95 EC

Art. 95 EC is the main legal basis for harmonization in the internal market area. But a great number of environmental measures has been adopted under this provision, mainly related to product standards. Paragraph 3 has enabled such possibility:

'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

On the other side, paragraph 4 provides for a possible derogation: it allows Member States to apply more stringent provisions after adoption of a harmonization measure, 'on grounds of major needs'[85]. The needs are those referred to in art. 30 EC, the protection of the environment and the working environment. This derogation has a restriction explicitly included in paragraphs 5 and 6: the former stipulates that national provisions on the protection of the environment can be adopted if there is new scientific evidence that supports it; the later requires that they cannot be a '*means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market'.*

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[81] Ibid, note 16.
[82] Ibid, note 32, p. 86.
[83] Ibid, note 67.
[84] Ibid, note 12, p. 64.
[85] Ibid, note 77.

Some of the measures adopted under this provision are the following:

- Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances, O.J. L78
- Council Directive 91/173/EEC of 21 March 1991 amending for the ninth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, O.J. L85
- European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, O.J. L365, amended by Directive 2005/20/EC of the European Parliament and of the Council of 9 March 2005, O.J. L70
- Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, O.J. L350, amended by Directive 2003/17/EC of the European Parliament and of the Council of 3 March 2003 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels, O.J. L76

2.4.1.2 Articles 174, 175 and 176 EC

These three provisions conform the title specifically designed for the establishment of a Community environmental policy. Art. 174 EC lays down the objectives of the Community's environmental policy, whereby it aims at 'a high level of protection'. It also mentions the principles on which this policy shall be based.

Art. 175 EC provides the legal basis for Community environmental legislation, which has enabled to adopt a body of Community legislation on this area. Harmonization measures, mainly 'new approach' directives, have been taken on this legal basis. 'New approach' directives set the essential requirements that products must meet, and leave for the Member States 'flexibility in transposing their rules into national law, in order to choose the most cost-effective combination of instruments to reach the objectives'.[86]

Art. 176 EC enables Member States to adopt more stringent protection measures than those adopted at Community level, as far as they are compatible with the EC Treaty. Once again, articles 28-30 EC come into play:

'The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission'.

[86] Ibid, note 77.

The ECJ has observed this important remark, noting that the Community's purpose is not to regulate comprehensively the environmental field:

'In that connection, it must be observed that the Community rules do not seek to effect complete harmonisation in the area of the environment. Even though Article 130r (now art. 174 EC) *of the Treaty refers to certain Community objectives to be attained, both Article 130t of the EC Treaty* (now art. 176 EC) *and Directive 91/689 allow the Member States to introduce more stringent protective measures. Under Article 130r of the Treaty, Community policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community'*.[87]

Among other, the following Community measures have been adopted under these provisions:

- Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, O.J. L308
- Regulation (EC) No 2039/2000 of the European Parliament and of the Council of 28 September 2000 amending Regulation (EC) No 2037/2000 on substances that deplete the ozone layer, as regards the base year for the allocation of quotas of hydrochlorofluorocarbons, O.J. L244
- Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, O.J. L30
- Commission Directive 97/49/EC of 29 July 1997 amending Council Directive 79/409/EEC on the conservation of wild birds, O.J L223
- Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, O.J. L78
- Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, O.J. L135
- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L206, amended by Council Directive 97/62/EC of 27 October 1997 adapting to technical and scientific progress Directive 92/43/EEC, O.J.L305
- Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, O.J. L257, amended by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, O.J. L275

[87] C-318/98, Fornasar, [2000] ECR I-4785, para. 46.

- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, O.J. L327

3 The ‘rule of reason’

As already examined, national measures that treat differently imported and domestic goods could only be accepted if justified by any of the express derogations provided in art. 30 EC, on condition that they are proportionate.

Alongside with these derogations, the ECJ has elaborated a new body of justifications: the mandatory requirements, also known as the ‘Cassis de Dijon’ doctrine or rule of reason. Their application differs from those in art. 30 EC in that the departing point is a different set of national measures: those that apply equally in law and in fact, but however have a different impact on the imported goods. Their acceptance is likewise subject to the test of proportionality.

3.1 The ‘Cassis de Dijon’ judgement

‘Cassis de Dijon’[88] can be considered as a landmark in the ECJ’s case law on art. 28 EC. Briefly, the facts giving rise to this judgement were as follows: German legislation precluded the sale of any spirits of Cassis-type, if the alcohol content was below 25%. Cassis de Dijon, a spirit drink lawfully marketed in France, had an alcohol content below that level, therefore the German Federal Monopoly Administration for Spirits (die Bundesmonopolverwaltung) refused the application made by the importers to market it in Germany. They initiated proceedings against the Administration. The ECJ took the view that the German rule was in breach of art. 28 EC since the product had been lawfully produced and already marketed in a Member State. Furthermore, the German contentions that such a rule was necessary in order to protect both the public health and the consumers, were not upheld by the Court: against the first, the ECJ said that there were already in the German market a great number of other alcoholic beverages of lower alcohol content which the consumers could buy; against the second contention, it reasoned that less-trade restrictive alternative means to protect the consumers were available.

Paragraph 8 of the judgement contains the substance of the ECJ’s reasoning[89]. It is one of the most powerful statements ever formulated by the ECJ regarding the free movement of goods. It reinforced the ‘Dassonville formula’ and inserted into Community law the principle of ‘mutual recognition’ or principle of ‘equivalence’: a product lawfully marketed in one Member States must be, in principle, admitted in another

[88] C-120/78, Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.
[89] See subsection 2.3.2. above.

Member State without further requirements.[90] This principle can be only restricted, in the absence of harmonization, by national rules that:

- Are necessary in order to satisfy mandatory requirements;
- Are proportionate to the desired objective, and
- Are the means of achieving that objective which least hinders trade.[91]

Thus, the far-reaching effects of the formula on MEQR elaborated by 'Dassonville' could be now moderated by allowing national measures that were 'necessary in order to satisfy mandatory requirements'.[92]

Regarding the application of the mandatory requirements by national measures, 'Cassis de Dijon' confirmed for the first time that art. 28 EC also covers indistinctly applicable measures. Later on, the ECJ confirmed that the mandatory requirements only apply to those types of measures advanced by 'Cassis de Dijon':

- In 'Aragonesa case'[93], it was recalled the case law on the application of the Treaty derogations (also available when the contested measure restricts only imports) and the 'imperative requirements': '*…whereas according to the Court's case law the question of imperative requirement for the purposes of the interpretation of Article 30* (now art. 28 EC) *cannot arise unless the measure in question applies without distinction to both national and imported products, it is not necessary to consider whether the protection of public health might also be in the nature of an imperative requirement for the purposes of the application of Article 30*'

- In 'Walloon Waste case'[94], an express reference was made to the 'Aragonesa case': '*Imperative requirements can indeed be taken into account only in the case of measures which apply without distinction to both domestic and imported products (see inter alia the judgment in Joined Cases C-1/90 and C-176/90 Aragonesa….*'

[90] Temmink, Harrie; 'From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection- a case law analysis', Yearbook of European Environmental Law, Volume 1, p. 72.
[91] Ibid, note 90.
[92] According to Andreas R. Ziegler ('Trade and environmental law in the European Community'. Claredon Press Oxford 1996), the mandatory requirements has been one of the instruments used by the ECJ to moderate the consequences of 'Dassonville' on MEQR; the second has been a 'limitation of the concept applied to trade hindrance which limits the scope of the Dassonville formula, the Keck case law'.
[93] Joined cases C-1 and C-176/90 Aragonesa [1991] ECR I-4151, para. 13.
[94] C-2/90, Commission v. Belgium, [1992] ECR I-4431, para. 34.

Peter Oliver considers that 'Cassis de Dijon' left open the question of the relationships between the mandatory requirements and art. 30 EC.[95] Two schools of thought would have emerged on this issue: the first would advocate for a distinction between art. 30 EC and the mandatory requirements; the second school would advocate for considering the mandatory requirements as additional grounds of justification alongside with art. 30 EC. Accordingly, any measure, either distinctly or indistinctly applicable, that falls under art. 28 EC could be justified by art. 30 EC 'as extended by the mandatory requirements'.

The second point of interest is the question of proportionality. 'Cassis de Dijon' itself requested that recourse to the mandatory requirements be made on condition of necessity: '*Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirement….'* (para.8)

Malcom Jarvis, among others, has noted that the application of the proportionality test by the ECJ has been made in a rigorous way.[96] The explanation to this has been already mentioned: the derogations to the free movement of goods need to be interpreted restrictively.

3.1.1 The Commission's reaction: the Communication on Cassis de Dijon

The Commission issued a Communication[97] in 1980 soon after Cassis de Dijon was delivered (20th February 1979). In this Communication, the Commission acknowledged the far-reaching consequences that the Court's judgement could have.

It held good the principle of mutual recognition, and stated that the treatment given to imported goods, in the absence of Community legislation, had to be the same as that given to domestic ones: '*Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter'*.

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[95] Oliver, Peter; 'Free movement of goods in the European Community'. Sweet & Maxwell, third edition, 1996; p. 111.

[96] Jarvis, Malcom; 'The application of EC Law by national courts. The free movement of goods'. Clarendon Press, Oxford. 1998; p. 179.

[97] European Commission. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), O.J. C256, 03/10/1980.

It continued stating that this rule admits, nonetheless, exceptions in the form of trade rules, which are applicable under very strict conditions:

1. The rules are necessary, that is appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.)
2. They serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the Treaty such as the free movement of goods.
3. They are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.

An important remark is explicitly added by the Commission: the marketing of '*a product lawfully produced and marketed in another Member State, even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products*', cannot be restricted. '*Where a product "suitably and satisfactorily" fulfils the legitimate objective of a Member State's own rules (public safety, protection of the consumer or the environment, etc.), the importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products'*.

This conclusion drawn by the Commission has an important impact on what is regarded its work on harmonization legislation thereafter: the presumption of equivalence obviates the need for much harmonization legislation, being it confined to areas where the Member States legitimately invoke a mandatory requirement or an art. 30 EC derogation: '*The Commission's work of harmonization will henceforth have to be directed mainly at national laws having an impact on the functioning of the common market where barriers to trade to be removed arise from national provisions which are admissible under the criteria set by the Court'*.

3.1.2 The list of mandatory requirements

'Cassis de Dijon' enumerated a list of mandatory requirements. Nevertheless, they cannot be regarded as limited to those grounds explicitly included in the judgement: they were simply indicative of some of the public interests that could justify national measures restricting the free movement of goods; but as far as other public interests needed of special protection are encountered, they could be added to that list. This is one of the differences with art. 30 EC, that does not permit neither a broad interpretation nor other derogations explicitly not included in the provision, as repeatedly held by the ECJ.

The grounds listed in 'Cassis de Dijon' are:

- the effectiveness of fiscal supervision

- the protection of public health
- the fairness of commercial transactions
- the defence of the consumer

Further case law has been adding new grounds of derogation:

- the improvement of the working conditions/protection of the working environment (C-155/80, Oebel,[1981] ECR 1993)
- the promotion of culture in general (C-60 & 61/84, Cinéthèque v. Fédération Nationale de Cinemas Françaises, [1985] ECR 2605)
- the protection of the environment (mentioned as one of the primary objectives of the Community in ABDUH, but explicitly recognized as a mandatory requirement in C-302/86, Commission v. Denmark, [1988] ECR 4607)
- the protection of the consumer (C-382/87, Buet v. Ministère Public, [1989] ECR 1235)
- the protection of national socio-cultural characteristics (C-145/88, Torfaen, [1989] ECR 3851)
- the reduction of costs in the public health (C-120/95, N. Decker v. Caisse de Maladie des Employés Privés, [1998] ECR I-1831)
- the plurality of press (C-368/95, Familiapress, [1997] ECR I-3689)

3.2 The test of proportionality

Krämer notes that, when assessing the mandatory requirements, the first test carried out is the 'indistinctly applicable test', then proportionality and finally necessity.[98] However, it will be seen later that in some cases, the ECJ has disregarded this graduation and has only applied one test, namely the proportionality test (see 'Danish bottles case').

In a series of cases, the ECJ held that it is for the Member States to set the level of protection in the absence of Community legislation. Then, a proportionality test will be conducted to ascertain whether the measures are manifestly unreasonable. Some of the cases where this has been confirmed are the following:

'Sandoz'[99] concerned a refusal of the Dutch authorities to grant authorization to market some Sandoz products to which some vitamins had been added, since they posed a threat to public health. However, those products had been lawfully marketed in other Member States. The ECJ held that:

'As the Court found…it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of

[98] Krämer, Ludwig, 'European Environmental Law', Sweet & Maxwell, 2003.
[99] C-174/82, Sandoz, [1983] ECR 2445.

humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community. (para. 16)

……

Nevertheless the principle of proportionality which underlies the last sentence of article 36 of the Treaty requires that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the legitimate aim of protecting health. Accordingly, national rules providing for such a prohibition are justified only if authorizations to market are granted when they are compatible with the need to protect health.'(para. 18)

'Nijman'[100] concerned proceedings for infringement of the Dutch law on plant-protection products on grounds of an imported product from Sweden by Mr. Nijman. The law implemented Directive 79/117/EEC, which according to the ECJ, did not pursue complete harmonization. The product imported from Sweden was not covered by the annex of the Directive, therefore the question arose whether a criminal sanction for importation of this product could be regarded as a MEQR of art. 28 EC. The ECJ held in para.14 that *'it is for the Member States, pursuant to Article 36* (now art. 30 EC) *of the Treaty and in the absence of full harmonization in this matter, to decide at what level they wish to set the protection of the life and health of humans, whilst at the same time taking account of the requirements laid down in the Treaty, in particular in the last sentence of Article 36, regarding the free movement of goods'*.

Nijman brings to the front the issue on how to measure the proportionality principle in regard of product bans. The ECJ recognised the right of the Member States to ban products which had not been the subject of Community secondary legislation. Hence, a great discretion is left to the Member States to decide upon what measures they consider appropriate.

'Eurim'[101] imported into Germany proprietary medicinal products lawfully marketed in other Member States. Nevertheless, it had to repackage them as to comply with German law. A certificate was also required. The ECJ had to reply to the question whether these requirements amounted to a breach of art. 28 EC and could be justified under the public health protection derogation. It confirmed that recourse to art. 30 EC was possible where fully harmonization had not been achieved (para. 26) and that those rules were compatible with the Treaty *'only to the extent to which they are necessary for the effective protection of the health and life of humans. National rules or practices do not qualify for a derogation under Article 36* (now art. 30 EC) *if the health and life of humans can be protected as effectively using measures which are less restrictive of intra-Community trade'* (para. 27).

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[100] C-125/88, Criminal proceedings against H.F.M. Nijman, [1989] ECR 3533.
[101] C-347/89, Freistaat Bayern v. Eurim-Pharm GmbH, [1991] ECR I- 1747.

Finally, in 'German Crayfish'[102], Germany had imposed a general ban on the importation of live freshwater crayfish to protect the health and life of wild German crayfish. Despite the ECJ held that the measure was covered by art. 30 EC, it continued on saying that it did not comply with the proportionality test, since the same objective could have been pursued by less trade-restrictive measures. Here, the ECJ took the view that the proportionality test consisted mainly of the 'less-trade restrictiveness test'. In para. 18, it stated that '*a national measure satisfies the proportionality principle and can be upheld if the state seeking to enforce it proves that the aim sought could not have been achieved just as effectively by measures having less trade restrictive effects on intra-community trade'*.

The rationale behind the requirement of a test of proportionality is that both the free movement of goods and its possible restrictions can be regarded as superior values of the Community. Hence, there must be an element that moderates their interplay when they come together (a conflict of interests): the ECJ applies the test of proportionality to decide whether a restriction of the free movement of goods can be justified under the principles of Community law.

3.2.1 The 'Rau case'

'Rau case'[103] explicitly added the test of proportionality to the rule of reason. It concerned a Belgian law that required cube-shaped packages to market margarine. The Belgian Government claimed that such a requirement was necessary on grounds of consumer protection, namely to distinguish between margarine and butter.

The ECJ did not uphold that argument, and acknowledged that other lest-trade restrictive means to achieve that protection were available, for instance labelling:

'In this regard it must be recalled […] that in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and to imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods'.[104]

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[102] C-131/93, Commission v. Germany, [1994] ECR I-3303.
[103] C-261/81, Rau, [1982] ECR 3961.
[104] Ibid, note 103, para. 12.

'Rau' was the first case to refer to proportionate measures, to least restrictive ones, when referring to a derogation based on the rule of reason.

How strict is the application of this requirement when assessing restrictive national measures based on mandatory requirements? Certainly the ECJ can adopt different criteria in a case-by-case basis: in the 'Walloon waste case' it disregarded the pleas posed by the Advocate General Jacobs on that the measure did not comply with the principles of proportionality and necessity, and upheld it under the rule of reason, despite it was also discriminatory (the case is further analyzed in subsection 4.2.3)

3.2.2 Suitability and necessity

Wiers[105] describes suitability or appropriateness as the first proportionality test's element that '*looks at the legitimate aim invoked and assesses whether the measure is appropriate to pursue that aim, i.e. whether it can actually attain the objective sought'*. This definition implies a link between the national measure and its objective. He also considers that although the definition seems to be very straightforward, it is not always easy to appraise the suitability of the measure to achieve its aims. For instance, in the health and environmental fields, this part of the test requires complex technical and economic analysis, which the ECJ is usually in a difficult situation to carry out. It is for that reason that the ECJ will only rarely find that the measure does not fulfil the suitability test, and will take a closer look at the second element of the test, necessity.

Necessity or least-trade restrictiveness looks closely at the fact whether the measure adopted is the most appropriate for the aim pursued, or there might be other alternatives which less restrict trade. Perhaps, the most discussed point of this element is to what extent the ECJ can decide whether an alternative measure is equally effective in achieving the objective sought. *'And if there is an alternative measure which is less-trade restrictive, but also achieves the objective although in a slightly less effective way? What has the ECJ to do?*' as posed by Wiers.

3.2.2.1 The 'Familiapress case'

This Familiapress case[106] is an interesting example on how the ECJ addresses the question of the proportionality test regarding a mandatory requirement. It concerned a ban imposed by the Austrian authorities on offering consumers free gifts linked to the sale of goods or the supply of services. In this context, the German weekly magazine 'Laura', also distributed in Austria, contained a cross worded puzzle that the readers

[105] Wiers, Jochem; 'Trade and Environment in the EC and the WTO-A legal analysis'. Groningen, Europa Law Publishing, 2002, p. 103.
[106] C-368/95 Vereinigte Familiapress Zeitungsverlag- und Vertriebs GmbH v. Heinrich Bauer Verlag, [1997] ECR I-3689.

could send in the correct answer and enter into a draw for several money prizes. Germany did not prohibit such practices.

Despite the Austrian contention that the measure had to be considered a selling arrangement, the ECJ held that it affected the product itself, therefore it amounted to a MEQR. Furthermore, both Austria and the Commission argued that the objective of such a rule was to maintain press diversity, '*an overriding requirement for the purposes of art. 30*' (now art. 28 EC) and 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'* (para. 18)

In para. 27, the Court held that it is necessary to ascertain whether such national prohibition *'is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression'*

Regarding the first element, how proportionate the measure is, the Court simply gave to the national court some guidance on how to carry out the assessment: to ascertain whether the newspapers which offer the prizes are in competition with newspapers that do not have the possibility of offering them, and whether the prospect of wining a prize might prompt a shift in demand.

The second element analyzed is the alternative less restrictive measures that the Austrian legislature could have adopted (instead of a total ban). But here, the ECJ left it for the national court to determine whether some possible measures (para. 32) could have been taken, in which case the prohibition would not be disproportionate.

The ECJ, in this case, tackled the question of proportionality on both necessity and suitability. But furthermore, taking into account that the case dealt with press diversity (or freedom of press, a human right) the Court also held that justifications based on 'overriding requirements' must also be interpreted *'in the light of the general principles of law and in particular of fundamental rights (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43)'*. (para. 24) This is a new element introduced by the Court: general principles of Community law do play a role to moderate the use of mandatory requirements by national measures that restrict a Community fundamental principle.

3.2.2.2 The 'Danish bottles' case

The 'Danish bottles case'[107] concerned a Danish measure that introduced a compulsory deposit-and-return system for beer and soft drink containers,

[107] C-302/86, Commission v. Denmark, [1988] ECR 4607.

whereby only the authorised standardised ones could be used. In the case of non approved containers, there was a limit of 3.000 hectolitres per year per producer for imported beer and soft-drinks. This system had been set up by Denmark on grounds of protection of the environment.

This case is interesting due to two reasons: first, it was the first time that the ECJ accepted the protection of the environment as a ground of derogation (para. 9); this remark will be further analyzed in the next chapter. And second, because of the approach taken by the Court to the proportionality test.

The Commission had the view that the system was disproportionate since there were other less-trade restrictive means to protect the environment. The ECJ, against this contention, recalled a previous judgement where it stated that *'measures adopted to protect the environment must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection"'* (para. 11), and examined whether that situation was present in this case. It upheld the deposit and return system as something necessary and indispensable to achieve the objectives pursued by the system. Then it examined the requirement that producers and importers used only containers approved by the National Agency for the Protection of the Environment, and the further amendment whereby a limit of up to 3.000 hectolitres of beer and soft drinks a year in non-approved containers could be marketed. The ECJ found that the effect that the system had on the quantity of products marketed by importers was disproportionate (para. 21)

The Court spoke of 'necessity' ('*…necessary to achieve the objectives pursued by those rules'*[108]) to examine whether the system could be upheld. The system was regarded 'necessary', 'not disproportionate' (para. 13), and the limits on the products imported, 'disproportionate' (para. 21) to achieve the aims pursued.

The ECJ recalled the necessity and proportionality tests as the leading principles to use when striking a balance between free movement of goods and environment:

'In the absence of common rules relating to the marketing of the products concerned, obstacles to the free movement within the Community resulting from disparities between national laws must be accepted, in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirement of Community law. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to achieve the same objective, it should choose the means which least restrict the free movement of goods'[109]

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[108] Ibid, note 107, para. 12.
[109] Ibid, note 107, para. 6.

According to the case, a national measure fulfils the necessity principle if it is indispensable to achieve a legitimate aim (in the present case, the protection of the environment) And regarding proportionality the Court, disregarding the 'least-trade restrictiveness principle', struck a balance between the restrictions and the likely benefits for the environment[110]: it went a little beyond than usually, and instead of simply comparing various alternatives, it looked at the level of protection attained by them, what in the opinion of Jochem Wiers, *'the Court applied a third element of the proportionality test, a fully-fledged weighing of the impact on intra-community trade and the aim of the measure. It has rightly been criticised for not explicitly clarifying how it undertook this assessment'*[111]

3.3 The limits to apply the 'rule of reason'

The Treaty derogations, as restrictions to a fundamental freedom, must be interpreted strictly. This statement is also valid for the rule of reason, as Jan H. Jans notes, despite the more latitude that can exist in that case.[112]

I will analyze the three limits that apply: strict interpretation, non-suitability for economic objectives and non arbitrary discrimination.

3.3.1 A strict interpretation

The 'Irish souvenirs case'[113] spelled this first limit. The contested measure was an Irish rule that prohibited the importation of certain souvenirs unless they had an indication of the country of origin, or the word 'foreign' attached to them. Ireland did not dispute the fact that the national legislation amounted to a MEQR, but it maintained that it was justified in the interests of consumer protection and fairness of commercial transactions between producers, art. 30 EC.

The ECJ noted that none of both grounds of derogations were included in the wording of art. 30 EC, and recalling the judgement given in 'Bauhuis', it stated that that article had to be construed strictly. But it also noted that both justifications could be deemed as 'imperative requirements'.

When the ECJ analyzed both mandatory requirements, it made an analysis of the situation and the reasons put by the defendant to justify the measures. It said that '*the essential characteristic of the souvenirs in question is that*

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[110] Montini, Massimiliano; 'The nature and function of the necessity and proportionality principles in the trade and environmental context', RECIEL, Volume 6 Issue 2, 1997, p. 127.
[111] Ibid, note 105, p. 108.
[112] Jans, Jans H; 'European Environmental Law'. Kluwer Law International, Reprinted 1997; p. 230.
[113] C-113/80, Commission v. Ireland, [1981] ECR 1625.

they constitute a pictorial reminder of the place visited, which does not by itself mean that a souvenir, as defined in the orders, must necessarily be manufactured in the country of origin'[114]

It can be concluded that the Court, when examining the rule of reason, will also make a strict interpretation, a narrow construction of the concept: although not explicitly said in the judgement, it recalled a former judgment where, referring to art. 30 EC, it was stated that '*a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly*'.[115] It might also apply for the mandatory requirements, which is a derogation from that fundamental rule.

3.3.2 Non suitability for economic objectives

The ECJ has taken the view that measures that pursue economic objectives cannot limit the free movement of goods. But taking into consideration the 'Campus Oil case'[116], Harrie Temmink considers, particularly in the case of the protection of the environment, that this conclusion can be different 'when the economic implications are an integral and necessary part of the justified environmental measures'[117] He notes the special situation of waste measures, where both economic and environmental reasons go hand in hand (referring to the 'Wallon waste case', to be analyzed in the next section) Nonetheless, the general rule is that such measures cannot be upheld. Exceptions to this rule should be assessed in a case-by-case basis. According to Mónika Józon, this requirement is very often blurred by the way that the test of proportionality is applied by the Court.[118]

In 'Commission v. Italy case'[119], although referring again to art. 30 EC, it held that '*art. 36* (now art. 30 EC) *as distinct from article 226, is directed to eventualities of a non-economic kind which are not liable to prejudice the principles laid down by articles 30 to 34, as the last sentence of the article confirms'*. [120]

In 'Decker case'[121], which concerned a Luxembourg system for reimbursement of spectacles, with the requirement of prior authorization in the case of their purchase in the territory of another Member State, the Court held that '*it must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods. However, it cannot be excluded that the risk of seriously*

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[114] Ibid, note 113, para. 15.
[115] Ibid, note 113, para. 7.
[116] C-72/83, Campus Oil, [1984] ECR 2727.
[117] Ibid, note 90, p. 94.
[118] Józon, Mónika; 'The enlarged EU and the mandatory requirements'. European Law Journal, vol. 11 no 5 September 2005, p. 556.
[119] C-7/61, Commission v. Italy, [1961] ECR 317.
[120] Ibid, note 119, para. D.
[121] C-120/95, N. Decker v. Caisse de Maladie des Employés Privés, [1998] ECR I-1831.

undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind'[122]

In 'TK Heimdienst case'[123], the ECJ recalled the previous judgement, and confirmed again that *'…it must first be pointed out that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods…'*[124]

Finally, in 'Dusseldorp case'[125], 'Decker' was once again recalled and the ECJ held that *'even if the national measure in question could be justified by reasons relating to the protection of the environment, it is sufficient to point out that the arguments put forward by the Netherlands Government […] are of an economic nature. The Court has held that aims of a purely economic nature cannot justify barriers to the fundamental principle of the free movement of goods…'*[126]

3.3.3 Non arbitrary discrimination

Discrimination can be defined as treating different situations equally (material discrimination), or treating equal situations differently (formal discrimination)[127]. However, there is not arbitrary discrimination if there are objective reasons for the difference of treatment.

As already noted in subsection 2.1.3.3 the mandatory requirements apply in the case of 'indistinctly applicable measures', whereas the last proviso of art. 30 EC would apply in case of 'distinctly applicable measures'. Suffice it to say that may a national measure treat differently domestic and imported products, it could not be uphold by any of the mandatory requirements.

The general theory is to consider the national measures justified under the mandatory requirements as not falling within art. 28 EC. Although this article does not include the wording 'discrimination', it is generally accepted that it has no room in the Community legal system due to art. 12 EC and the express prohibition of discrimination on grounds of nationality. The restrictive list of derogations included in art. 30 EC can only come into play as far as they do not arbitrarily discriminate. Then, the mandatory requirements, unlikely to be included in the art. 30 EC system, and indirectly covered by art. 12 EC, cannot serve national justifications based on discrimination, either in law or in fact.

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[122] Ibid, note 121, para. 39.
[123] C-254/98, Schutzverband gegen unlauteren Wettbewerb v. TK Heimdienst Sass GmbH, [2000] ECR I-151.
[124] Ibid, note 123, para. 33.
[125] C-203/96, Dusseldorp, [1998] ECR I-4075.
[126] Ibid, note 125, para. 44.
[127] Ibid, note 105, p. 119.

3.4 Conclusions: art. 30 EC or the rule of reason?

As a general rule, the application of either art. 30 EC or the mandatory requirements will depend on the nature of the national measure at issue: the former may serve as a justification for both discriminatory and non discriminatory measures, whereas the latter can only apply in the absence of discrimination between the national and the imported goods. Furthermore, it is clear that art. 30 EC might serve for both import and export restrictions, whilst the mandatory requirements can be used only to justify import restrictions.

Art. 30 EC is an explicit exception for the general rule that prohibits discrimination; the mandatory requirements, on the contrary, come within the general EC legal framework, as they will only apply as far as no distinction is present in the national measures. But, does this always appear to be true? It should be, since the mandatory requirements are a construction of the ECJ without Treaty coverage: it is commonly accepted that only rules of the same rank can derogate a fundamental freedom. However, in the next section, that focuses on the case law concerning protection of the environment, we will see some judgements where, subtlety, a discriminatory measure was accepted by the ECJ under the mandatory requirements' theory. This blurs the distinction between art. 30 EC and the mandatory requirements, and makes one wonder whether the ECJ is willing to eliminate the difference between them.

4 Trade and environment: a new mandatory requirement

The judgement given in 'Cassis de Dijon' showed that the ECJ was leaving the door open, and a new set of derogations from art. 28 EC were recognized. At the outset, the judgement named only four possible justifications. But unlike art. 30 EC, the rule of reason is open to new additions, and so has occurred since the judgement in 'Cassis de Dijon' (see subsection 3.1.2)

The protection of the environment is one of those additions. It was included as late as 1988 in the 'Danish bottles case', although three years earlier, in the 'ABDHU case', it had been recognized as one of the primary Community objectives. Definitely, the SEA, that included the protection of the environment for first time among the Community policies, motivated the Court to give it rank of derogation.[128] But early in 1980, the Commission had already pointed at it in its Communication concerning the consequences of the judgement in 'Cassis de Dijon':

[…] barriers to trade resulting from differences between commercial and technical rules are only admissible:

- if the rules are necessary, that is appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.);

On the other side, there have been also some attempts to include it among the Treaty derogation of 'protection of health and life of humans, animals or plants', or at least to identify both justifications. It will be seen in the case law analyzed in the following subsections. Harrie Temmink considers that for such a possibility to be feasible, '*a very direct influence should be found between the protection of the environment and the protection of health and life of humans, animals or plants so that the ECJ accepted it'*.[129]

Andreas R. Ziegler takes the view that before the adoption of the rule of reason theory, the Court could be inclined to interpret the protection of health and life of humans, animals or plants as an integrative part of the protection of the environment: art. 30 EC could provide for national

[128] Weatherill, Stephen; 'Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation'. Common Market Law Review 36, year 1999, p. 83.
[129] Temmink, Harrie; 'From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection- a case law analysis', Yearbook of European Environmental Law, Volume 1, pp. 87-89.

measures for the protection of the environment, whilst at the same time interpreting art. 30 EC narrowly.[130]

Krämer also notes that both grounds of derogation come together in some aspects, but differ in many others. According to him, art. 30 EC could justify measures such as bans or restrictions to the use of substances or products which might be dangerous to health; measures to limit the presence of pollutants in drinking water or in the air; to regulate the marketing of pesticides or biocides, etc. But there are a great number of other measures such as environmental label schemes, eco-managing systems, environmental taxes and charges, measures to prevent the generation of waste, environmental impact assessment, deposit and return systems, environmental liability, etc. that could not be justified under art. 30 EC, therefore the need for a new mandatory requirement like the protection of the environment.[131]

However, Jan H. Jans also points out that the distinction between both justifications is not only a question of their material scope. He notes that the requirements for application of art. 30 EC and the rule of reason are not the same. In particular, he considers that the protection of the environment is a more comprehensive concept than the protection of health and life of humans, animals or plants, and that the rule of reason offers the Member States more latitude to take protective measures.[132]

4.1 Some considerations on the protection of the environment

The protection of the environment was firstly enshrined in the SEA in 1986, arts. 130 r, s, t. Since then, important changes have been made, and the subsequent Treaty amendments have resulted in a major influence of the environmental issues in the Community policies.

The Amsterdam Treaty made clear that the protection of the environment is among the most important objectives of the European Community.[133] According to the current state of affairs, environmental issues are included as principles of Community Law: in art. 2 EC, where 'a high level of protection and improvement of the quality of the environment' counts among the Community tasks; in art. 3.1(l) EC, where 'a policy in the sphere of the environment' is listed among the Community policies; and in art. 6

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[130] Zieger, Andreas R; 'Trade and environmental law in the European Community'. Claredon Press Oxford 1996, p. 65.
[131] Krämer, Ludwig, 'European Environmental Law', Sweet & Maxwell, 2003, pp. 96-111.
[132] Jans, Jan H; 'European Environmental Law'. Kluwer Law International, Reprinted 1997; p. 228.
[133] Wasmeier, Martin; 'The integration of environmental protection as a general rule for interpreting Community Law'. Common Market Law Review 38, year 2001, p. 159.

EC, which states that 'environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development' This article is a major step towards the integration of environmental requirements into other policies. Furthermore subsidiarity, as enshrined in art. 5 EC, is also a major principle in this area. In addition, the TEU has also included a reference to 'sustainable development' in art. 2.

Title XIX on environment includes the provisions on the subject-matter. Art. 174 EC sets the objectives of the Community environmental policy, describes the principles upon which this policy relies on and what it should take account of. It also explicitly enables the Member States to take provisional measures of a non-economic nature, in the case of harmonization measures adopted by the Community. Art. 175 EC provides for a legal basis for the adoption of legislation to protect the environment, either measures or actions in the areas described in paragraph 2, or action programmes in other areas. Art. 176 EC enables the Member States to take more stringent protective measures than those adopted under art. 175 EC; in any case, they must be compatible with the EC Treaty.

Wasmeier stresses that the consequences of art. 6 EC for the common market and the application of Community law are far-reaching. He speaks of an 'environmental common market', where economical and environmental objectives merge into one overall concept. In the case of conflict of interests, the economic objectives do not simply prevail over the environmental, as it was before, but reconciliation among them must be found. Full consideration of the environmental protection is to be taken nowadays. Therefore, the principle of integration plays a major role both in the adoption of new measures, and in the overall interpretation of primary and secondary legislation.[134]

Furthermore, the wording of art. 6 EC ('*Environmental protection requirements must be integrated into the definition and implementation of…')* entails that this principle is justiciable, i.e. that individuals can bring disputes before the courts taking this article as a basis for the proceedings. Recalling the judgement in 'Commission v. Council 1982'[135] where, regarding interpretation in consistency with the Treaty it was said that:

'Where the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to being incompatible with the Treaty',

Jan H. Jans concludes that any legislation adopted by the institutions that does not integrate environmental requirements properly, and cannot be

[134] Ibid, note 133, p. 160.
[135] C-218/82, Commission v. Council, [1983] ECR 4063.

justified by overriding reasons, is subject to annulment according to art. 230 EC.[136]

The requirement of integration does not only have consequences in the sphere of Community action; as it has been seen along the previous chapters, the Member States have also obligations, particularly since the protection of the environment, as a global matter, must be tackled in different levels. Synergies between Community and national actions must be present: the subsidiarity principle could be a safeguard in this regard. The same applies to the common market, in particular to the free movement of goods. This can be concluded from the fact that art. 6 EC is placed in the general part entitled 'Principles', that affects the rest of the EC. Art. 6 EC is the bridge between the environmental policy and the rest of policies at Community level.[137] But even before the entry into force of the Treaty of Amsterdam, the Court had already signalled such a consequence. Thus, the actions taken by the Member States to attain environmental objectives must also comply with their obligations regarding the common market.

4.2 Overview of the ECJ case law on the free movement of goods and environment

Next, a brief overview of the case law where the protection of the environment has been used as a shield to justify national measures that could affect intra-Community trade is displayed. I have avoided to include cases where the presence of environmental justifications is so remote that its contribution to the present discussion is minimal. Likewise, I have included some cases where the discussion turns around the use of such derogation in the case of exports (art. 29 EC) It was held before that its breach is only possible by discriminatory measures, which theoretically are only justified by the Treaty derogations. Nonetheless, its inclusion in the case law analysis is interesting from the point of view of a comprehensive understanding of this mandatory requirement. It also provides with some feedback on the Court's approach to this provision, which in the end conforms, together with art. 28 EC, the set of rules of the freedom of movement of goods.

[136] Ibid, note 132, p. 164.
[137] Ibid, note 131, p. 348.

4.2.1 ABDHU

The ABDHU case[138] concerned French legislation that had been passed pursuant to a Community directive (Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils) that required all waste oil to be delivered to officially waste oil collectors. The burning of waste oil was also prescribed in the French legislation, and the Association des Défense des Brûleurs d'Huiles Usagées (ADBHU) wondered whether the Directive could constitute a legal basis for the prohibition of such practices. Concerns were also raised relating to the conformity of the Directive with the freedom of trade, freedom of movement of goods and freedom of competition.

The Court observed that '*…art. 6 of the Directive pursues an aim which is of general interest, by seeking to ensure that the disposal of waste oils is carried out in a way which avoids harm to the environment'*[139]. And still referring to the Directive, it continued in para. 12:

'In the first place it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired'.

The ECJ concluded that the Directive had not exceeded those limits and that it had to be seen *'in the perspective of environmental protection, which is one of the Community's essential objectives'.*

This judgement was the first where environmental protection was called upon as one of the Community's essential objectives. Jans observes that the judgement's wording implies that environmental interests are of secondary importance.[140] Anyway, the importance of ABDHU is that the ECJ recognized the relevance of environmental protection vis-à-vis the free movement of goods, and six years after the Cassis de Dijon theory on the 'rule of reason', the protection of the environment seemed to be affirmed as a mandatory requirement.[141]

4.2.2 Danish bottles

The 'Danish bottles case'[142] was the first where the ECJ recognized the protection of the environment as a mandatory requirement.[143] It is a

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[138] C-240/83, Procureur de la République v. Association des Défense des Brûleurs d'Huiles Usagées, [1985] ECR 531.
[139] Ibid, note 138, para 11.
[140] Ibid, note 132, p. 220.
[141] Montini, Massimiliano; 'The nature and function of the necessity and proportionality principles in the trade and environmental context', RECIEL, Volume 6 Issue 2, 1997, p. 126.
[142] C-302/86, Commission v. Denmark, [1988] ECR 4607.

landmark decision regarding the relationships between the free movement of goods and environmental protection:[144]

The Court has already held… 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 the free movement of goods. That view is moreover confirmed by the Single European Act.[145]

In view of the foregoing, it must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 (now art. 28 EC) *of the Treaty.*[146]

Paragraph 8 points at one significant event that had occurred in the Community two years before this case: the introduction of the protection of the environment in the SEA, the first meaningful amendment of the Rome Treaty since its inception.

A brief address to the case can be recalled from section 3.2.2.2: Denmark had introduced, on grounds of protection of the environment, a compulsory deposit-and-return system for beer and soft drink containers, whereby only the authorised standardised ones could be used. Following an amendment of the system, a limit of 3.000 hectolitres per year per producer for imported beer and soft-drinks was introduced in the case of non approved containers.

The ECJ held that the deposit-and-return system was an indispensable element of a system intended to ensure the reuse of containers and therefore, necessary to achieve the environmental objectives of the Danish rules. Hence, the restrictions on the free movement of goods that it entailed were considered proportionate by the Court (para. 13)

Regarding the limit of 3.000 hectolitres/ year, the Court's view was different and it did not uphold it. It considered that it made the import of beer and soft-drinks more difficult, it was disproportionate and therefore in breach of art. 28 EC:

'Nevertheless, the system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports. In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued'[147]

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[143] Ibid, note 129, p. 89.
[144] Ibid, note 129, p. 61.
[145] Ibid, note 142, para. 8.
[146] Ibid, note 142, para. 9.
[147] Ibid, note 142, para. 21.

Taking into account the different conclusions arrived at by the Court on the system itself and its limits, Temmink considers that the interpretation of the judgement is that the protection of the environment can be regarded as an imperative reason to derogate from the free movement of goods, as long as it is not taken at the 'highest level'.[148] It seems that the ECJ thinks that a 'very considerable degree' of environmental protection is not necessary, but only a 'reasonable' degree of protection: it would not be for the Member States to decide on the necessary degree of the environmental protection, but Community law that determines what is necessary or reasonable. It can be inferred that the free movement of goods will be only restricted where the protection of the environment is of greater importance.

This case was decided before a 'Directive on packaging and packaging waste'[149] had been adopted. Denmark had regulated an area not subject to harmonization, and the ECJ had therefore to decide on the national restrictions that complied with Community law. That directive aims at reconciling both objectives of internal market and protection of the environment, defining the essential requirements of the packaging policy, and setting targets for the recovery and recycling of packaging waste.

Against this lack of legislation on the subject-matter of the case, Krämer considers that the 'reasonableness' of environmental protection could be pleaded against two arguments:[150]

- It is not consistent to ask for only reasonable measures where no harmonization has been adopted, according to art. 95 (5 to 8) EC.

- Only the ECJ can decide what reasonable is, and the Commission in the pre-litigation stage. But what criteria might be used, if there is no Community legislation?

This is why further case law should define the boundaries of the protection of the environment, once adopted as a mandatory requirement. But Ziegler also notes that, in relation to art. 30 EC, the Court has emphasized that *'in the absence of harmonized rules, Member States should choose their desired level of protection.…in accordance with its own scales of values and in the form selected by it…'*[151] This remark should also apply to the mandatory requirements, especially to the environmental protection, since it is recognized in the EC Treaty and is moderated by important principles such as the 'precautionary principle', and the 'polluter pays principle'.

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[148] Ibid, note 129.
[149] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, O.J. L365, amended by Directive 2005/20/EC of the European Parliament and of the Council of 9 March 2005, O.J. L70.
[150] Ibid, note 131, pp. 96-101.
[151] Ibid, note 130, p. 83-84.

Finally, it can also be said that the significance of the 'Danish bottles case' derives from the fact that for the first time, the ECJ spoke of the necessity and proportionality test as the leading principles that have to be used when striking a balance between trade and environment.[152]

4.2.3 Walloon Waste

The 'Walloon waste case'[153] concerned a ban imposed by the region of Wallonia on imports of waste from outside the region. The ban allowed for some exceptions to be made with the other two Belgian regions, Brussels and Flanders, but not with other States.

The Commission noted that by the time the ban had been adopted there was already a Directive on the supervision and control within the European Community of the transfrontier shipment of hazardous waste[154]. It introduced a comprehensive system relating to transfrontier shipments of hazardous waste with a view to its disposal in defined establishments. It considered that the ban did not comply with the directive. The ECJ upheld this argument (para. 21) It also considered that it infringed art. 28 EC: the Court took the view that recyclable and non-recyclable, and reusable and non-reusable waste could be deemed to be valuable, tradable goods, therefore falling within the scope of art. 28 EC (para. 23 to 28)

Belgium contented that the restriction of movement of goods prompted by the Wallonian rules was the consequence of the protection of the environment and protection of health sought by that legislation (para. 29) This defence attracts powerfully the attention, since it was making recourse to a mandatory requirement despite the discriminatory effect of the measure. But the ECJ reasoning is even more puzzling. It maintains that waste is matter of a special kind, a *'danger to the environment, regard being had in particular to the limited capacity of each region or locality for waste reception'*[155] And specially in Wallonia, due to the large inflow of waste coming from other Member States, which posed a real danger to its environment. Then, the ECJ found the Wallonian measures well founded (para. 32)

The core of the ECJ reasoning on protection of the environment and discrimination emerges once the Commission alleges the discriminatory effect of those measures:

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[152] Craig, Paul; and de Búrca, Gráinne; 'EU Law. Text,cases and materials'. Oxford University Press, Third edition 2003.
[153] C-2/90, Commission v. Belgium, [1992] ECR I-4431.
[154] Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, O.J. L30, that amended Council Directive 84/631/EEC [1984], OJ L326/31.
[155] Ibid, note 153, para. 30.

'Imperative requirements can indeed be taken into account only in the case of measures which apply without distinction to both domestic and imported products… However, in assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r (2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste.[156]

Moreover, that principle is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, to which the Community is a signatory…[157]

It follows that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory'[158]

Departing from an objectively discriminatory rule, rightly pointed as such by the Commission and Advocate General Jacobs, the ECJ arrived at the opposite conclusion relying on:

- the nature of the products concerned (waste);
- the interplay of environmental principles enshrined in the Treaty, such as that the damage has to be remedied at source;
- the interplay of international conventions to which the EC is party, particularly the 'Basel Convention on the control of transboundary movements of hazardous wastes and their disposal'

The ECJ drew this conclusion without assessing the proportionality of the measure. Furthermore, Wiers points at an interesting argument that might arise out of the judgement regarding the application of the principle of remedy of damage at source: what would be the situation in the case of French waste, for which its disposal in Wallonia would be the proper solution pursuant that principle, than its disposal in a French site not as close as the Wallonian one?[159] Which would be the solution, taking account of the principle of remedy at source and the discriminatory nature of the measure?

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[156] Ibid, note 153, para. 34.
[157] Ibid, note 153, para. 35.
[158] Ibid, note 153, para. 36.
[159] Wiers, Jochem; 'Trade and Environment in the EC and the WTO - A legal analysis'. Groningen, Europa Law Publishing, 2002, p. 124.

Regarding the discriminatory nature of the measure and the application of a mandatory requirement to uphold it, should the judgement be read as concluding that the measure was not discriminatory, and therefore the environmental protection could be alleged to justify it? Or was the measure still discriminatory, but because of its legitimate objective, it could be uphold by a mandatory requirement?

Duncan French[160] argues that the ECJ recent case law has blurred, relaxed the theory, since a balance free movement of goods-protection of the environment was difficulty attainable. Therefore, the ECJ would have been 'forced' to pursue some strategies to achieve a more equitable solution:

- The measure is indistinctly applicable, despite its apparent discrimination. This approach would be the one in the present case.
- Towards a broader interpretation of art. 30 EC in regard of 'protection of health and life of humans, animals or plants' (see the 'Danish bees case')
- Environmental protection might well justify distinctly applicable measures, contrary to previous interpretations of art. 30 EC. Nonetheless, Eleanor Spaventa rightly points out that the judgement ruled that the measure was not discriminatory, so '*this ruling stopped the scholarship to consider this case authority for the extension of mandatory requirements to discriminatory restrictions'*.[161]

Krämer also notes that the conclusion arrived at by the Court was given under a different wording of art. 174 EC (Treaty version of 1987). The current wording of the article requires that Community policy (and not Community action) takes the principles of remedy at source into account, which does not mean each Community measure but the Community policy as a whole. A different meaning would signify that a lot of Community measures would contradict those principles. As an example, he notes that many measures are not subject to the 'polluter-pays principle' but however, it does not make them invalid.[162]

4.2.4 Dusseldorp

The 'Dusseldorp case'[163] deals with art. 29 EC, a Treaty provision to which apparently the mandatory requirements' theory does not apply.

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[160] French, Duncan; 'The changing nature of environmental protection: the recent developments regarding trade and environment in the European Union and the WTO'. Netherlands International Law Review 47, year 2000.
[161] Spaventa, Eleanor; 'On discrimination and the theory of mandatory requirements'. The Cambridge Yearbook of European Legal Studies, volume 3, year 2000.
[162] Ibid, note 131.
[163] C-203/96, Dusseldorp, [1998] ECR I-4075.

Dusseldorp was a Dutch company that had applied for authorisation to export to Germany two loads of oil filters and related waste, which would be processed there by a German company, Factron. The authorisation was refused twice by the Dutch authorities, on grounds of breach of the Dutch long-term plan for the disposal of dangerous waste of June 1993, and Regulation 259/93 of 1 February 1993 'on the supervision and control of shipments of waste within, into and out of the European Community'. The Dutch Ministry of the Environment subsequently declared the complaints raised by Dusseldorp and Factron unfounded on the ground that *'the processing performed by Factron was not of a higher quality than that performed by the Netherlands waste processing and management undertaking, AVR Chemie'*. The complainants considered that this decision was contrary to Community legislation.

What the protection of the environment as a derogation concerns, paragraphs 41 to 48 contain the reasoning of the Court. The Dutch long-term Plan provided that '*export is not permitted unless the processing of oil filters abroad is superior to that performed in the Netherlands'*[164]. The ECJ considered that this would entail a restriction of exports in order to provide a particular advantage for national production (para. 42) The Netherlands Government justification for this restriction was based on environmental protection considerations, and likewise '*to enable AVR Chemie to operate in a profitable manner with sufficient material of which to dispose and to ensure it a sufficient supply of oil filters for use as fuel. In the absence of a sufficient supply, AVR Chemie would be obliged to use a less environmentally friendly fuel or to obtain other fuels which are equally friendly to the environment but involve additional costs'*[165]

The Court, recalling the judgement in Decker, concluded that aims of a purely economic nature could not justify these restrictions (para. 44) Although the Netherlands justified the measure on the imperative requirement of environmental protection, the Court did not touch upon the question, but simply relied on the first argument (economic nature of the measure) not to uphold it. In my opinion, the wording of para. 44 implicitly acknowledges that the protection of the environment could have justified the Dutch measure:

'Even if the national measure in question could be justified by reasons relating to the protection of the environment, it is sufficient to point out that the arguments put forward by the Netherlands Government, concerning the profitability of the national undertaking AVR Chemie and the costs incurred by it, are of an economic nature. The Court has held that aims of a purely economic nature cannot justify barriers to the fundamental principle of the free movement of goods…'

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[164] Ibid, note 163, para. 41.
[165] Ibid, note 163, para. 43.

My opinion of para. 44 is that the Court blurred the distinction between art. 28 and 29 EC, distinctly and indistinctly applicable measures, and the grounds of derogation in each case. It was previously held that art. 29 EC is restricted to prohibitions on discriminatory measures, then only art. 30 EC derogations may be invoked to justify measures falling therein. But the Netherlands still tried to rely on environmental protection in order to justify a discriminatory measure, and the Court either obviated it or implicitly upheld it. Since it did not assess the validity of the mandatory requirement alleged by the defendant, it remains a question open whether it would have supported the Dutch contention. Duncan French considers that this case, together with 'Aher Waggon', could be an initial step in recognising the 'artificiality' of the division between art. 30 EC and the need to protect the environment. In this regard, it must be said that the Netherlands also relied on the protection of the health and life of humans (art. 30 EC) to justify the measure, being it also ruled out by the ECJ, although in this case, an assessment on the substance of that justification was made by the ECJ (paras. 45-49)

4.2.5 Aher Waggon

'Aher Waggon'[166] concerned German rules on registration of aircrafts. There existed Community legislation on noise pollution (Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft, later amended by Directive 83/206/EEC) which provided for the possibility of stricter standards by the Member States. Germany did so, and its laws provided for a different treatment for aircrafts already registered in Germany by the time the new rules had been adopted: German registered aircrafts could continue to operate until they were subject to technical modifications, even though they did not related to noise emissions, or until they were temporarily withdrawn from service, whereas the aircrafts that sought to register for the first time had to comply with stricter rules. In the case of aircrafts of other Member States seeking to register in Germany, they had to comply with the German noise stricter standards.

On this ground, Aher Waggon was refused registration by the German authorities for an aircraft previously registered in Denmark: it complied with the Community limits, but exceeded the stricter German ones. Aher Waggon complained that the refusal was contrary to Community legislation, since aircrafts of the same type already registered in Germany and with the same sound level retained their registration.

The ECJ noted that the Directive simply imposed minimum levels and allowed the Member States to set stricter ones. But it also noted that possible restrictions to art. 28 EC could be justified by considerations of environmental protection and public health, as the German Government had

[166] C-389/96, Aher Waggon, [1998] ECR I-4473.

claimed, on condition that those measures were proportionate and less restrictive of intra-Community trade (paras. 19-20)

The Court made an assessment of the German stricter rules and their impact on German and non-German aircrafts:

As regards the imposition of stricter standards… limiting noise emissions from aircraft is the most effective and convenient means of combating the noise pollution which they generate…[167]

Furthermore, the restriction, through stricter rules governing noise emissions from aircraft, on the possibility of registering an aircraft in Germany applies to all aircraft, new or used, irrespective of their origin, and does not prevent aircraft registered in another Member State from being used in Germany.[168]

This paragraph seems to justify the non-discriminatory nature of the German rules. But then it continues in paras. 23 and 24, and assessing the difference of treatment between German aircrafts that operated before the implementation of the Directive and others, it arrives at the conclusion that the measure is not disproportionate (and not discriminatory), because it is the only way to ensure that the objectives of diminishing the noise levels are fulfilled: they would not be achieved if aircrafts from other Member States were given the same treatment of gradual compliance with the standards.

As in the previous case, the environmental protection considerations are barely analyzed by the Court. Then, it is hard to conclude whether the Court considered as a justification to the measure either the environmental protection or the Treaty derogation of public health. Any could be, since the Court finally held that the measure was not discriminatory. Or was it discriminatory but legitimate, as in 'Walloon waste case'?

Duncan French concludes that this case and 'Walloon waste' would be authority for an emerging opinion that environmental protection should also be permissible as a justification for distinct measures, whereas Eleanor Spaventa notes that, since the measure was finally justified by art. 30 EC, even though it had been said to be discriminatory, the mandatory requirement of environmental protection would have been set aside by art. 30 EC.

4.2.6 Danish bees

The 'Danish bees case'[169] concerned criminal proceedings against Mr. Ditlev Bluhme for infringement of Danish legislation that prohibited the particular subspecies of bees that only exists in the island of Laesø and

[167] Ibid, note 166, para. 21.
[168] Ibid, note 166, para. 22.
[169] C-67/97 Criminal proceedings against Bluhme, [1998] ECR I-8033.

certain neighbouring islands, *Apis mellifera mellifera* (Læsø brown bee), from cross-breeding with other subspecies, with the aim of avoiding its eradication.

The EC had issued secondary legislation in the form of Council Directive 91/174/EEC 'laying down zootechnical and pedigree requirements for the marketing of pure-bred animals'. However, specific rules for the application of the Directive to bees had not been adopted, therefore national legislation was still applicable, though with due regard of the EC provisions.

Mr. Bluhme contented that the Danish national legislation breached art. 28 EC by hindering intra-Community trade. The national court, when arising the preliminary question to the ECJ, based its reasoning not only on the possible effects of the national measure on intra-Community trade, but wanted also to ascertain whether such a rule, that affected only a very small part of the Danish territory, could be upheld on grounds of its minor effects: the possible interpretation of art. 28 EC as including a 'de minimis rule' was already commented on subsection 2.1.1 with regard to the 'Foi gras case', where it was dismissed by the ECJ.

The national court wanted to ascertain whether the Danish rule amounted to a MEQR, and if it could be justified by the protection of life and health of animals justification (art. 30 EC) The Court, recalling the 'Dassonville formula', confirmed the restrictive nature of the measure (para. 19) The fact that it only concerned a small part of the national territory did not affect that conclusion (para. 20). Likewise, the Court rejected the argument that the rule amounted to a selling arrangement, but it affected the intrinsic characteristics of the bees (para. 21)

Regarding the justifications to the Danish measure, the Norwegian government pointed to the protection of the environment in accordance with art. 30 EC (para. 27) However, the Danish Government pointed at the protection of biological diversity as recognized in several instruments, namely Council Directive 92/43/EEC 'on the conservation of natural habitats and of wild fauna and flora', and the Rio Convention on Biological Diversity of 5 June 1992.

At the outset, the Court considered that measures that aimed at preserving indigenous animal populations with specific characteristics protect the biological diversity, and can be justified under art. 30 EC. (para. 33) Then it considered necessary to carry out the proportionality test, to ascertain whether the measure at issue is necessary and proportionate, or if there could have been alternative less stringent measures to achieve the same aim.

Once again, the Court looked at the international instruments on the subject-matter and its put into practice in Community law, and briefly addressed the question of proportionality:

As for the threat of the disappearance of the Læsø brown bee, it is undoubtedly genuine in the event of mating with golden bees by reason of the recessive nature of the genes of the brown bee. The establishment by the national legislation of a protection area within which the keeping of bees other than Læsø brown bees is prohibited, for the purpose of ensuring the survival of the latter, therefore constitutes an appropriate measure in relation to the aim pursued[170]

The ECJ did not tackle the question whether the measure was distinctly or indistinctly applicable, since it was justified under art. 30 EC. Nonetheless, it is not arguably that the Danish measure was discriminatory. Jochem Wiers stresses the Opinion of Advocate-General Fenelly, that considered the measure to be indistinctly applicable[171]:

Golden bees, as members of a separate subspecies, can more readily be recognised as materially different in character, so that rules favouring one subspecies over the other need not, if they serve a legitimate public-interest objective related to that distinction, be regarded as discriminatory.

AG Fenelly recalls here that measures that treat differently different situations are not discriminatory. Furthermore, he made use of the principle that environmental damage should as a priority be rectified at source, to conclude that that was the purpose of the Danish measure. All this together led him to defend that the measure could be justified by the mandatory requirement of protection of the environment.

The Court did not follow the reasoning given by AG Fenelly, and upheld the measure on grounds of art. 30 EC.

4.2.7 Sydhavnens Sten & Grus ApS (FFAD)

This case[172], as Dusseldorp, deals with art. 29 EC. It concerned proceedings brought by Sydhavnens Sten & Grus against the municipality of Copenhagen regarding the collection of non-hazardous building waste organized by the former. Sydhavnens had been granted by the municipality of Copenhagen a permit to process building waste, but not a permit to process it within its boundaries, since there was already an existing station in charge of it.

As in other cases already analyzed, there was Community legislation, namely Directive 75/442/EEC on waste (later amended by Directive 91/156/EEC) and Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European.

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[170] Ibid, note 169, para. 37.
[171] Ibid, note 159, p.125.
[172] C-209/98, Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune, [2000] ECR I-3743.

The ECJ analyzed whether the system complied with art. 29 EC, and if not, whether it could be justified by the derogations of art. 30 EC or any form of environmental protection. The plaintiff maintained that the conferral of exclusive rights to process waste on a limited number of undertakings had the effect of restricting exports, which was contrary to the EC.

After analyzing the two municipality regulations that concerned waste recovery and their possible effects in exports, the Court assessed both justifications: regarding the first, the Court notes that the case concerned non-hazardous waste, and nothing had been proved that it represented a danger to health and life of humans, animals and plants. With regard to the protection of the environment, it stated in para. 48 that:

As regards the justification based on the protection of the environment, and in particular the principle referred to in Article 130r(2) of the Treaty that environmental damage should as a priority be rectified at source, it must be pointed out that the protection of the environment cannot serve to justify any restriction on exports, particularly in the case of waste destined for recovery (see, to that effect, Case C-203/96 Dusseldorp and Others [1998] ECR I-4075, paragraph 49). That is so a fortiori where, as in the case before the national court, environmentally non-hazardous building waste is involved.

It concluded in para. 49 that *'nowhere in the documents before the Court is it argued that the waste in question is harmful to the environment'*

It seems that the Court would have been inclined to accept the environmental protection as a justification. Despite recalling Dusseldorp to maintain that the protection of the environment does not serve to justify restrictions on exports, 'a fortiori' where the product concerned is non-hazardous, what if the waste had been hazardous? Para. 49 can suggest that perhaps a different conclusion could have been drawn, despite the strong assertion in the previous paragraph. Wiers also maintains, referring to this case, that *'in cases involving waste exports, the Court appears to maintain that justifying distinctly applicable measures infringing art. 29 EC by mandatory requirements is possible. This would be difficult to reconcile with the limited scope of art. 29, prohibiting only discriminatory export restrictions'*[173]

4.2.8 PreußenElektra AG

PreußenElektra[174] dealt with German laws that obliged electricity suppliers, either private or state-owned, to buy local green electricity, i.e. electricity

[173] Ibid, note 159, p. 126-127.
[174] C-379/98, PreußenElektra, [2001] ECR I-2099.

generated from renewable energy sources (the concept was defined by the law)

In a dispute between PreußenElektra and Schleswag, the Landgericht (District Court) took the view that the system set up by the German legislative amounted to a hindrance of intra-Community trade, and therefore, a breach of art. 28 EC: '*The Landgericht found, secondly, that the obligation to purchase electricity produced in Germany from renewable energy sources on conditions which could not be obtained on the open market might depress demand for electricity produced in other Member States, which might constitute an obstacle to trade between Member States prohibited by Article 30 of the Treaty* (now art. 28 EC)'[175]

The Court had to examine the compatibility of the German rules with art. 28 EC. It recalled previous case law to consider that obligations to obtain a certain amount of the supplies of a given product from a national supplier, had the effect of limiting the possibilities of imports of that product (para. 70) In order to ascertain whether the measure at issue could amount to such a restriction prohibited by art. 28 EC, the Court examined both its aim and the particulars features of the electricity market.

It acknowledged that the use of renewable energy sources for the production of electricity was useful for the protection of the environment, as it helped decrease the emissions of greenhouse gases, which was one of the priority objectives of the European Community, as recognized in several international and Community instruments (para. 74) It also noted that the Treaty of Amsterdam had included the integration of environmental protection and promotion of the environment among the Community principles. Furthermore, '*the 28th recital in the preamble to Directive 96/92 expressly states that it is 'for reasons of environmental protection that the latter authorises Member States in Articles 8(3) and 11(3) to give priority to the production of electricity from renewable sources'*[176]

As regards the nature of electricity, it holds that '*once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced'*[177]

For all these reasons, the ECJ took the view that the system at issue did not restrict trade between Member States, thus being compatible with Community law.

We can see that the ECJ made use of several reasons in order to uphold the measure based on the protection of the environment. Nonetheless, it must be also said that the Court, in para. 75, noted that that policy (referring to the

[175] Ibid, note 174, para. 26.
[176] Ibid, note 174, para 77.
[177] Ibid, note 174, para 79.

previous paragraph, that described and listed the Community and international instruments to fight against greenhouse effect gases) was also designed to protect the health and life of humans, animals and plants. Does it mean that it also upheld the measure on grounds of a Treaty derogation? In my opinion, the reasoning line mainly focused on the protection of the environment.

The Court recognized that the measure was not discriminatory, as it had done in 'Wallon waste', despite its effect was to limit the imports from traders located in other Member States (para. 70) Advocate General Jacobs had suggested, in its Opinion, to recognize the discriminatory nature of the measure, but to uphold it on grounds of environmental protection. He maintained that the protection of the environment required, in order to be effective, national measures that discriminated. He stood, hence, for a wider interpretation of this derogation, revisiting the previous case law and admitting discriminatory measures justified by reasons placed outside the EC. In para. 233 of his Opinion he stated that:

'Secondly, to hold that environmental measures can be justified only where they are applicable without distinction risks defeating the very purpose of the measures. National measures for the protection of the environment are inherently liable to differentiate on the basis of the nature and origin of the cause of harm, and are therefore liable to be found discriminatory, precisely because they are based on such accepted principles as that 'environmental damage should as a priority be rectified at source (Article 130r(2) of the EC Treaty). Where such measures necessarily have a discriminatory impact of that kind, the possibility that they may be justified should not be excluded'

Advocate General Jacobs, as boldly as he would do two years later in his Opinion in UPA case where he proposed to alter the interpretation of 'locus standi' to ease applications by particulars, advocated for an identification of the protection of the environment with the justifications of art. 30 EC. Did the ECJ follow his opinion? It must be remembered that it recognized that the effect of the measure was to restrict trade between Member States, therefore its discriminatory nature was beyond question. The reference to art. 30 EC in the judgment might arise some doubts about the real intention of the Court, but I might say that it dared to drop some indications about its considerations on the protection of the environment as a justification for national measures.

4.2.9 Toolex Alpha

Toolex Alpha[178], a Swedish company, used the substance trichloroethylene for certain applications in its manufacturing process. The Swedish national legislation on the subject matter, the law on chemical product and its

[178] C-473/98, Toolex Alpha, [2000] ECR I-5681.

subordinate regulations, prohibited the use of that substance. On this ground, the Chemical Inspectorate refused to grant it a permit to continue using this substance. Toolex Alpha considered that it was a breach of Community law, and initiated proceedings. The ECJ had to decide whether its prohibition was a MEQR and if the protection of health and life of humans, animals or plants could justify the national measure.

Several pieces of Community legislation regulated the area of concern, particularly one regulation and two directives.

The ECJ, taking into account the existence of this legislation, firstly analyzed whether it had achieved such a degree of harmonization as to preclude Member States from legislating on the same field. It held that the existing secondary legislation did not prevent Member States from regulating the industrial use of trichloroethylene, which was the subject-matter in discussion (para. 33), therefore the Swedish legislation on that field could not be appealed.

The Court held that the measure amounted to a MEQR (paras. 35-36) Despite the defendant, the Swedish Chemical Inspectorate, did not justify the measure neither on grounds of protection health and life of humans, animals or plants nor on the protection of the environment (para. 39), the Court analyzed the grounds of art. 30 EC. It based its assessment on international research and investigations on the carcinogenic consequences of trichloroethylene, and drew the conclusion that *'there is no evidence in this case to justify a conclusion by the Court that national legislation such as that at issue in the case in the main proceedings goes beyond what is necessary to achieve the objective in view'* (para. 45) And it also maintained in para. 46 that *'the system of individual exemptions, granted subject to conditions, established by the Swedish regulation appears to be appropriate and proportionate in that it offers increased protection for workers, whilst at the same time taking account of the undertakings' requirements in the matter of continuity'* It took this view because the Swedish system provided for the granting of exemptions to undertakings that still made use of trichloroethylene when *'no safer replacement product is available and provided that the applicant continues to seek alternative solutions which are less harmful to public health and the environment'*(para. 47) It can be concluded that the Swedish measure would be based upon two considerations: the protection of public health and the environment.

Regarding the proportionality test as a whole, the ECJ confirmed that the necessity test takes account of less trade-restrictive options that can equally achieve the aim pursued (see para. 40): it derives from here that if the necessity and appropriateness tests are fulfilled, a national measure will not be justified if its trade effects are disproportionate to its aim. In the case at hand, the Court found that the measure was necessary, appropriate and proportionate.

A final comment on the protection of the environment should be made. It was included when discussing a measure falling within art 30, as it was done in other cases, such as Nijman and Aher Waggon. Jochem Wiers considers that it could be suggested that some environmental protection goals can be read into the grounds of protection of health and life of humans, animals or plants. The Court did not do it, as it only found the measure to be justified under art. 30 EC. But by including the protection of the environment in the reasoning, it might have dropped what suggested by Wiers.

4.2.10 An attempt of a continuing Danish bottles case

Six years after the judgement in the 'Danish bottles case', the Community adopted a Directive on packaging and packaging waste[179], whose main aim was *to reduce the overall volume of packaging and packaging waste, with a view to prevent any impact on the environment or to reduce such impact, thus providing a high level of environmental protection and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community* (first whereas of the Directive)

Both aims are included again in art. 1.1 of the Directive. This article is a balance provision: prevention and reduction of environmental impact, and at the same time, ensures the functioning of the internal market.

Nonetheless, two cases were brought before the ECJ regarding the previously contested Danish legislation: a preliminary ruling (C-233/99) and a 226 EC or 'failure to act' action (C-246/99). Although the Danish legislation no longer contained the limit of 3.000 hectolitres a year for imported beer and soft drinks on non-approved containers, it still required that drinks were only marketed in returnable packaging: it was held compatible with EC legislation on a time that there was no secondary legislation harmonizing the subject-matter. But in 1999 there was already such Community legislation, that prevented a Member State from adopting national measures that collided with it: particularly, the aforementioned Directive prohibits Member States to impede the placing on their markets of packaging satisfying the provisions of the Directive. In addition, the Danish legislation still provided for the prohibition of imported drinks in metal packages.

Denmark allegedly supported its national ban of metal packaging on environmental protection reasons. The Commission contented that such a

[179] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, O.J. L365, amended by Directive 2005/20/EC of the European Parliament and of the Council of 9 March 2005, O.J. L70.

total ban run counter to the proportionality principle, since other alternative measures, e.g. labelling and environmental taxes, could secure the same or identical environmental advantages. It was their view that other less-trade restrictive measures were available, which helped attain the same or approximately identical level of protection as sought by the Danish legislature.

The problem, in this case, also arose in regard of the room left to the Member States to adopt stricter environmental standards than those laid down in the Directive. It was legally based on art. 95 EC, whose subparagraphs 4 to 6 enabled for such possibility. The Commission argued that the Directive sought full harmonization on packaging and packaging waste rules, whereas Denmark opposed that argument, even though it never invoked those subparagraphs to adopt stricter standards.

'Unfortunately' for the sake of the interpretation of environmental protection as a derogation from art. 28 EC and the interplay of harmonization in this difficult legal prospect, a judgement by the ECJ was never issued for none of the cases: the Danish court withdrew the preliminary questions that formed C-233/99 by letter sent to the ECJ on 14.2.2002, whereas in C-246/99, Denmark finally abided by the Commission's arguments and complied with its obligations, therefore by Order of 11.9.2002, the ECJ concluded the dispute.

Notwithstanding the lack of judgement, we could have some feedback from the Opinion of Advocate General Ruiz-Jarabo Colomer, although it is not authority to know what the ECJ would have finally ruled if the proceedings had continued. It is noteworthy to notice that the AG was of the opinion that the Directive fully harmonized the subject-matter (para. 40 of the Opinion); in the case that the Court did not agree with that conclusion, then the measure would amount to a MEQR which could not be justified by environmental protection arguments. A proportionality test would be required. The reasons given by AG Ruiz-Jarabo Colomer not to uphold this mandatory requirement were the following:

- The impact of imported beers in Denmark is so low, that it cannot affect the environment as much as to justify such a measure (para. 46)
- The Danish Government has not provided sufficient evidence to prove that the measure is necessary and proportionate (para. 47)
- Regarding the greenhouse effect and the volume of CO2 of single-use bottles and aluminium cans, the Commission provides data that prove that in both cases, the volume is the same. But the ban only applies to the latter, not to the former. AG Ruiz-Jarabo Colomer concludes that the protection of the environment should demand the same treatment, which is not present in the Danish system.

Definitely, the AG was not keen on relying on the protection of the environment to justify the Danish measure.

4.3 Final remarks

It can be seen that the boundaries between environmental protection and protection of health and life of humans, animals or plants are not always clear. Sometimes it has been the defendants who tried to support their measures on protection of the environment assimilating it to art. 30 EC, blurring the frontiers between distinctly and indistinctly applicable measures. Sybe de Vries has even considered that the gap between art. 30 EC and the rule of reason is filled by art. 6 EC.[180] So far, the ECJ has not given a clear indication. It is, nonetheless, quite understandable: its function is to interpret, not to legislate. To legislate would entail amending art. 30 EC to hold other derogations that the Council has not considered to include. This can be criticized: whereas the protection of the environment and consumers, for instance, have adopted the rank of Community policies in the several Treaty amendments, it has not occurred the same in regard with their status as derogations from the free movement of goods or services, thereby lying the responsibility of its interpretation on the Court.

The case law concerning environmental protection and free movement of goods is not abundant yet. But its importance is increasing. Environmental arguments are taken in consideration more and more by the ECJ when derogating from such a fundamental freedom. Notwithstanding this scarce case law, we can still draw some conclusions that might shape the path taken by the Court when coping with such conflict of interests. Chapter 6 will elaborate on such conclusions.

[180] de Vries, Sybe, University of Utrecht; 'European Court of Justice: case report. Case C-379/98, PreußenElektra AG and Schleswag AG'. European Environmental Law Review, June 2001; p. 204.

5 Trade and environment in the international field

The relationships between trade and environment are not only a matter of discussion at the Community level. They have also been discussed broadly in the international arena, and according to Massimiliamo Montini, 'this relationship is basically still unresolved'.[181]

This debate began in the 1972 Stockholm Conference on the Human Environment, which discussed the impact of trade on the environment. The Secretariat of the GATT contributed with a study on 'Industrial Pollution Control and International Trade', that reflected the existing concern that the environmental protection measures could become obstacles to trade. On the other side, the OECD had also set up an Environment Committee that dealt with trade and environment issues.[182]

In 1989, once again in the GATT framework, a 'Working group on the export of domestically prohibited goods and other hazardous substances' was set up, as a response to the complaints made by developing countries regarding the lack of information they had on imports of products prohibited in their producing countries on grounds of environmental protection.

Apart from the GATT, other forums had been producing studies and reports on environmental protection. The most remarkable of them was the 'Brundtland Report' (formally entitled ''Our Common Future') on sustainable development, produced by the former Prime Minister of Norway, Gro Harlem Brundtland, for the World Commission on Environment and Development in 1987. The report linked poverty and environmental degradation, and advocated for making use of the international economic growth to combat pollution, that mostly affected poor countries.[183]

In 1992 took place the UNCED (United Nations Conference on Environment and Development) in Rio de Janeiro, also known as the 'Earth Summit' or the 'Rio Conference'. The action programme adopted ('Agenda 21') addressed the need to promote 'sustainable development' through, among other, international trade. It called for its mutual supportive character in order to achieve both environment and development goals. Since then, that has become a cornerstone concept to refer to the need of reconciling trade and environment.

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[181] Montini, Massimiliano; 'The nature and function of the necessity and proportionality principles in the trade and environmental context', RECIEL, Volume 6 Issue 2, 1997, p. 121.
[182] 'Brief history of the Trade and Environment debate', www.wto.org
[183] Ibid, note 182, p. 3.

Principle 4 of the 'Rio Conference' called for the integration of environmental considerations into trade policies, affirming that *'in order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'*. As we saw in subsection 4.1, the principle of integration was adopted later by the EC (art. 6 EC)

On the other side, principle 12 deals with the reconciliation of environmental protection and free trade: *'unilateral actions to deal with environmental problems should be avoided and environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus'*.

The newly agreed WTO established in 1994 a Committee on Trade and Environment (CTE), with a view to suggesting amendments to the multilateral trading system. To address the relationships between MEA and the WTO trading rules has been its major task. In 2001, the Doha Ministerial Conference agreed on a Committee on Trade and Environment Special Session, which launched negotiations on the subject matter:[184] paragraph 31 of the Ministerial Declaration held that negotiations are agreed *'with a view to enhancing the mutual supportiveness of trade and environment'*. Paragraph 51 explicitly calls for the CTE, together with the Committee on Trade and Development, to hold negotiations and debates to achieve the objective of sustainable development. The CTE has reorganized its work following the Doha Conference, dividing itself in two 'sessions':[185]

Despite the progress made in these issues, the WTO points out that it is not its aim to protect the environment, but to make both policies mutually supportive. It deals with trade policies and trade-related aspects of environmental policies with significant effect on trade. Unlike the EC system, where both trade and environment are nowadays equally-ranked principles and Community policies must find a fine balance among them, the main purpose of the WTO is to continue to liberalize international trade, and ensure that environmental policies do not act as obstacles, as well as that trade rules do not act as hindrances of adequate domestic environmental protection.[186]

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[184] Ibid, note 182, p. 5.

[185] Ibid, note 182, p. 13. These two sessions are 'CTE Regular Session', that tackles items of special focus (such as labelling requirements for environmental purposes; the relevant provisions of the TRIPS Agreement; and the effect of environmental measures on market access) and other items (the export of domestically prohibited goods; charges and taxes for environmental purposes; the relationships between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEA; etc.); technical assistance; environmental reviews, and the Sustainable Development Forum; and 'CTE Special Session', established in Doha and directly engaged in negotiations, as provided by para. 31 of the Declaration.

[186] Ibid, note 182, p. 6.

5.1 A brief overview of the GATT/WTO rules

One of the most important trading principles in the GATT/WTO system is that of non-discrimination between imported and domestic like products (national treatment principle, art. III GATT) According to art. I GATT, the WTO Members are bound to grant to the products of other Members a treatment no less favourable than that accorded to the products of any other country (most-favoured-nation clause) Regarding to trade-related environmental issues, the principle of non discrimination ensures that national environmental protection policies are not adopted with a view to arbitrarily discriminating between foreign and domestically produced products. It is a safeguard against the use of these policies as a disguised restriction on international trade.[187] Just to recall here that all the 25 Member States of the EC are contracting parties to the WTO, as well as Romania and Bulgaria, that will join the EC in 2007, hence they are bound by these rules.

Art. XI GATT, that tackles the question of elimination of QR, prohibits such measures with the aim of encouraging countries to convert them into tariffs.

Art. XX GATT provides for some exceptions thanks to them the Members are allowed not to apply the GATT rules. Paragraphs b) and g) are relevant to environmental protection. They provide for such an exception if:

> b) necessary to protect human, animal or plant life or health;
> g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Unilateral measures adopted by the Members can be justified under these derogation grounds, on condition '*that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade*'.[188]

Two requirements must be met to ascertain that a measure does not discriminate unjustifiably or arbitrarily: first, there must have been a serious effort to negotiate by the Member country that adopted the measure; second, the measure is flexible.

Regarding the concept of 'disguised restriction to international trade', three criteria have been identified:

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[187] Ibid, note 182, p. 50
[188] Art. XX GATT, 'chapeau'.

- The publicity test: the measure has been announced publicly.
- The consideration whether the measure discriminates arbitrarily or unjustifiably.
- The structure of the measure at issue.[189]

With regard to specific instruments adopted under the GATT/WTO system, the Technical Barriers to Trade (TBT) Agreement has recognized the environmental protection as a derogation from the trade rules. It was adopted in 1979, and subsequently amended by the 1994 TBT Agreement. It confirms it as a legitimate objective that might justify the adoption of stricter unilateral standards by the contracting states. Art. 2.2 includes the protection of human, animal or plant life or health, and the protection of the environment as legitimate objectives.

Taking into consideration the potential effects that technical regulations have on trade, the TBT Agreement's aim is to ensure that product specifications, either mandatory or voluntary, as well as procedures to assess compliance with those specifications, do not create unnecessary obstacles to trade. It calls for harmonization of the Members' specifications and procedures with international standards. The requirement of necessity of the regulations adopted is explicitly included in art. 2.2 and other provisions. The first indent of art. 2.2 words that '*Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.*' This wording is once again repeated in art. 2.5: *'Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade'*. It can be seen that only necessary measures that ensure that international trade is not disrupted are accepted under this scheme.

Another interesting instrument is the SPS (Sanitary and Phytosanitary Measures) Agreement. It covers measures taken to ensure the safety of foods, beverages and feedstuffs from additives, toxins or contaminants, or for the protection of countries from the spread of pests or diseases. The measures must be taken to protect human, animal or plant life or health, and need not to be arbitrarily or unjustifiable discriminatory.[190] Once more, such measures must be necessary and consistent with the basic obligations of the SPS Agreement.

Outside the GATT/WTO scheme, several MEA have been adopted that deal with transboundary and global environmental problems. Some of them link the solution of environmental problems with trade measures, such as the

[189] Ibid, note 182, p. 54.
[190] Ibid, note 182, p. 56.

1987 Montreal Protocol[191], that requires the contracting parties to ban the import and export of controlled substances from non-parties and to ban the import from non-parties of certain products which contain controlled substances. Another important MEA is the Basel Convention on hazardous-waste, adopted in 1989.

Art. 174.2 EC enables the EC to negotiate and conclude international agreements on the subject-matter of its competence. Those agreements are mostly negotiated under the auspices of the United Nations Organization. The '6th Environment Action Programme' adopted by the EU contains an essential international dimension: the four priorities of the programme (climate change, nature and biodiversity, environment and health and quality of life and natural resources and wastes) can difficulty be achieved by the Community if there is no cooperation at international level with third countries and international organisations. Likewise, the Action Programme calls for ratification, compliance and enforcement of all international conventions and agreements relating to the environment to which the Community is a signatory party.[192]

Finally, there are also situations where single States adopt measures directed to protect the environment, but that at the same time restrict the international trade and their obligations under the WTO provisions. Montini defines this unilateral strategy as 'environmental unilateralism'[193].

5.2 Some case law on trade and environment

The case law of the GATT/WTO Panels has mainly focused on the development of the concept of necessity contained in art. XX b) GATT.

According to the document 'Brief history of the Trade and Environment debate', the first step to apply the exception provided in art. XX GATT is to identify whether the policy pursued through the measure falls within the range of policies designed either to protect human, animal or plant life or health, or to conserve exhaustible natural resources. The second step consists of determining whether the specific requirements of such paragraphs are met, namely the necessity test.

Art. XX g) GATT includes an additional requirement: the measure at stake should be made effective in conjunction with restrictions on domestic production or consumption.

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[191] Vienna Convention for the protection of the ozone layer (1985), amended by the Montreal Protocol.
[192] http://europa.eu.int/comm/environment/international_issues/agreements_en.htm
[193] Ibid, note 181.

Regarding the necessity itself of the measure, as worded in paragraph b), the Thai Cigarette' and 'EC-Asbestos' cases, hereafter analyzed, provide a definition.

Some of the most remarkable cases dealing with trade and environment are the following:

- The 'Thai Cigarette case'[194] was the first to raise environmental protection issues in the GATT context. It concerned a ban imposed by Thailand on the import and export of tobacco products on grounds of health concerns. The Panel found that other measures were less restrictive to achieve the same goals; therefore, the Thai measures were deemed not to be necessary within the meaning of art. XX b) The Panel defined the less-restrictive test as follows: '*the import restrictions imposed by Thailand could be considered to be necessary in terms of art. XX b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objective'*

- The first 'Mexican Tuna case' concerned restrictions imposed by the USA on the importation of yellowfin tuna and yellowfin tuna products from Mexico, on the grounds of animal health and life considerations. The GATT Panel also found here that the USA measures were not necessary, as it had not demonstrated that other measures, less restrictive, were also available to achieve the same objectives.

- In the second 'Mexican Tuna case', the Panel suggested a three-step analysis of art. XX b) GATT:

    - First, to assess whether the measure falls within the policy invoked, it is, policies to protect human, animal or plant life or health.
    - Second, to scrutinize if it is 'necessary' to protect human, animal or plant life or health. Here, 'necessary' means that no alternative exists to the measure adopted, then it is 'unavoidable', 'indispensable'.
    - Finally, to ascertain whether it has been applied in a manner which is not arbitrary or might give rise to discrimination between countries.

Nonetheless, a final decision was never adopted by the Panels in none of these two cases.

[194] BISD 37S/200, Thailand-restrictions on the importation of cigarettes.

- 'Reformulated Gasoline case'[195]. It concerned US measures on foreign refiners that were stricter than those imposed on domestic ones. The Panel took a consistent decision with previous cases on the term 'necessary', and held that the USA could have taken other measures that complied with the GATT rules. *'A measure would qualify as relating to the conservation of natural resources if the measure exhibited a substantial relationship with, and was nor merely, incidentally or inadvertently aimed at the conservation of exhaustible natural resources'.*[196]

- 'EC-Asbestos case'[197]: Canada brought a ban raised by the French Government against the import of asbestos, on grounds of its risks to human health, before the WTO Panel. Among other provisions alleged by the parties, the European Community defended the measure under art. XX b) as necessary to protect human health. Even though the Panel found the ban to be a violation of the non-discriminatory principle, it found it not to be unjustifiable or arbitrary, and also necessary to protect human health. Thus, the French measure was upheld by the Panel and by the Appellate Body on latter appeal. The latter elaborated on the concept of necessity: it referred to a previous case, and recalled that it entailed *'a process of weighing and balancing factors, such as the contribution of the measure to the goal, the importance of the interest protected and trade impacts'.*[198]

[195] WT/DS2/R, US-Standards for reformulated and conventional gasoline.
[196] Ibid, note 181, p. 52.
[197] WT/DS135/R, EC-Measures affecting asbestos and asbestos containing products.
[198] Wiers, Jochem; 'Trade and Environment in the EC and the WTO - A legal analysis'. Groningen, Europa Law Publishing, 2002; p. 185, referring to the 'Korea-beef case'.

6 Conclusions

Once made a deep analysis of the case law where the protection of the environment served to justify restrictions to the free movement of goods, the time is ripe to draw some conclusions.

I will consider several issues that, as seen through the previous chapters, should be given full consideration:

- Should the protection of the environment be considered as a ground of derogation similar to art. 30 EC?
- Art. 29 EC and the protection of the environment as a derogation.
- Is the ECJ on the path to produce a categorization within the environmental field?
- The impact of international agreements on the EC.

6.1 The protection of the environment, a justification alike art. 30 EC?

It was explained in subsection 2.3.2 that the conditions for the application of the Treaty derogations are different from those of the rule of reason. The former can justify either distinctly or indistinctly applicable measures, whereas the rule of reason can only justify indistinctly applicable measures. This difference is of great importance, since some authors have considered that the nature of the measures at issue is also different: whereas those caught by art. 30 EC are deemed to be MEQR, the ones justified by the rule of reason would not be MEQR, but measures with a legitimate objective that can run counter a fundamental principle. In the case of the protection of the environment it can be well explained and reasoned, since from the SEA it has gained more and more weight in the design and implementation of Community policies; moreover, the Treaty of Amsterdam included it as an integration principle into the design of other Community policies.

Some of the cases analyzed in Chapter 4 attempted to blur the distinction between distinctly and indistinctly applicable measure. The ‘Walloon waste’ is probably the most blatant. The measure at issue was, objectively, discriminatory; the Advocate General so considered it in its Opinion, as well as the Commission. The Court, nonetheless, making an interpretation of the concept of waste according to the environmental principles and the Basel Convention, arrived at a different conclusion; moreover, it avoided to assess the proportionality of the measure, when it is generally acknowledged to be one of the requisites to appraise such measures. Maybe the Court was aware of its discriminatory nature, but still considered that the objective pursued was of special significance and required its judicial protection. In ‘Aher Waggon’, the arguments used by the ECJ to justify the non-discriminatory

nature of the measure seem to be far-fetched to be repeated in other cases. It held that the German measure did not prevent aircrafts registered in other Member States to be used in Germany, whereas the actual consequence of the measure was to make their use more difficult (see pp. 58-59). Also in 'PreußenElektra' the effect of the measure was undoubtfully to restrict the trade of electricity among the Member States, but the Court once again made an interpretation of its aim that prompted it to uphold the measure on grounds of environmental protection (although it was careful and dropped art. 30 EC somewhere in the legal reasoning). In all these cases, the protection of the environment, as a legitimate objective, is beyond question. But how legitimate is it to blur a distinction that affects a fundamental principle such as the free movement of goods?

The principle of integration (art. 6 EC) could serve as a powerful explanation to support a change in the doctrine of distinctly and indistinctly applicable measures with regard to environmental protection.

Advocate General Jacobs in its Opinion in PreußenElektra is also very straightforward to suggest a radical change in that doctrine. He advocates for a more generous approach to the protection of the environment (see p. 63) The feasibility of environmental protective measures depends on their possible discriminatory application, he says. He relied on another principle, that damage should be rectified at source, to support his reasoning and to prove that environmental measures are inherently discriminatory.

So far, the Court has not pronounced itself expressly for such a possibility. As seen in some of the cases analyzed in Chapter 4, the Court's reasoning is very subtle and plenty of doubts as to consider whether it has intended to mean one or the other conclusion. The ECJ has consistently held that the Member States cannot rely on mandatory requirements to justify discriminatory restrictions; moreover, that a fundamental freedom can only be derogated by rules of the same rank. How to reconcile these powerful statements with the practical interpretation given in some cases dealing with environmental protection? A lack of consistency? I would regard it as a sign that the ECJ is sending to the legislators to prompt a change in the legal status of the protection of the environment as a derogation to the free movement of goods.

However, it is soon still to know the real consequences of the ECJ's intentions in this field. Barely few cases cannot lead us to any conclusion, although they show the stand taken by the Court in the discussion.

Another argument that supports the ECJ allegedly willingness to prompt such a change is its assimilation with the Treaty derogation of protection of health and life of humans, animals or plants. 'Danish bees' and 'Toolex Alpha' provided some examples of this line of reasoning, although once again, subtle and arguable. In the former, it was difficult to draw the line between a reasoning based on protection of life of animals and plants, and protection of the environment. Had the Court concluded that the measure

was indistinctly applicable, any of the justifications would have been valid. Nonetheless, the Court adjusted itself to the formal distinction of the justifications, and opted for art. 30 EC for a distinctly applicable measure. In the later case, the environment protection was mentioned again in the reasoning; but when it came to the conclusions, the ECJ opted for a MEQR justified by art. 30 EC, in a subtle manoeuvre as in 'Danish bees'.

To include the protection of the environment in art. 30 EC is limited by the narrow interpretation that this provision must be given. The academic doctrine has supported this view. But the Court has also proven to have great latitude to carry out this task: in the cases abovementioned, barely a distinction between them can be found.

In short, it seems that the Court's line of reasoning tends to blur again the doctrinal distinction between art. 30 EC and the environmental protection.

6.2 Article 29 EC and the mandatory requirements

In 2.2 it was explained that one of the conditions for a measure to be caught by art. 29 EC was its discriminatory effect, which favoured the national product or the domestic market. Thus, the rule of reason, exclusively applicable to indistinctly applicable measures, could not justify measures caught by art. 29 EC.

However, we saw at least two cases with subtle environmental protection arguments to justify national measures that run counter art. 29 EC. Another attempt to widen the boundaries of its application?

In 'Dusseldorp', the environmental reason put by the defendant was disregarded by the Court on grounds of its economical nature: nothing was said on that the measure could not be upheld by the protection of the environment as a mandatory requirement. Art. 30 EC was also raised by the defendant, and in this case, the ECJ made an assessment whether the measure could be justified under that derogation. Harrie Temmink maintains that this case throws some light on the intentions of the ECJ to apply the rule of reason to art. 29 EC. Noting para. 44 of the judgement, he considers that ECJ would have supported the measure. '*It may be inferred that the ECJ does not rule out the justification of export restrictions on the basis of environmental protection. Indeed, it is hard to believe that the phrase is a 'slip of the tongue', without independent significance, since the Advocate General had drawn explicit attention to the question*'.[199]

[199] Temmink, Harrie; 'From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection- a case law analysis', Yearbook of European Environmental Law, Volume 1; pp.92-93.

In ‘Sydhavnens Sten & Grus’, although the Court recalled the doctrine on non-suitability of the rule of reason to justify measures caught by art. 29 EC, it continued its reasoning stating that ‘the waste was non harmful to the environment’. Had the waste been harmful, would the Court have taken a different approach? Or was it because of the product involved, waste?

Once again, the question remains open: is the ECJ in favour of making recourse to the environmental protection to justify export restrictions? As I maintained in the first conclusion, it is soon again to conclude that the ECJ seeks a change in the approach to the rule of reason and art. 29 EC. But might the path taken by the ECJ be that the protection of the environment can justify both distinctly and indistinctly applicable measures, it shall undoubtfully have effects on art. 29 EC. The time is not yet ripe for such a conclusion. Perhaps, another interesting question remains whether, according to the nature of the measure, the ECJ might adopt one or another interpretation; i.e. whether the Court has elaborated a categorization of measures that affect the interpretation of the environmental protection as a mandatory requirement.

6.3 Towards a categorization by the ECJ?

There are two different types of cases regarding discrimination in the environmental protection field:

- Those that the ECJ considered the rule to be non discriminatory.
- Those in which discriminatory rules have been assessed in relation to environmental protection. Here, Spaventa considers that the ECJ has failed, not by chance, to mention discrimination.

But from the point of view of the subject-matter, has the Court elaborated any kind of categorization, for which a similar approach could be observed?

Few resemblances among the different cases analyzed can be found. Perhaps, the most outstanding one is that related to waste matters. Several of them concerned waste issues: ‘Walloon waste’, ‘Dusseldorp’ and ‘Sydhavnens Stens & Grus’. ‘Danish bottles’ concerned packaging and packaging waste; ‘Ahher Waggon’ dealt with noise pollution issues, whereas ‘PreußenElektra’ concerned greenhouse effect gases, and ‘Toolex Alpha’ chemicals.

The ECJ’s line of reasoning in the four cases dealing with waste can shed some light on its approach with regard to it. In a comprehensive construction of the term ‘waste’ in the ‘Walloon waste case’, it was considered as a tradable good of a special, particular nature, and that the Belgian measure at issue was not discriminatory, despite its obstacles to the importation of waste. Was the same concluded in the other cases dealing with waste?

- In ‘Dusseldorp’, the measure was not upheld for its clear, unarguable economic nature. This factor invalids any national measure, either under art. 30 EC or under the rule of reason. As discussed in 4.2.4, the Court’s reasoning left the door open for a possible justification under environmental protection.

- In ‘Sydhavnens Stens & Grus’, the Court concluded that the waste was not harmful, and did not uphold the measure. Had it arrived at a different conclusion, its justification by the mandatory requirement would have seem likely (see 4.2.7)

Only one case, namely ‘Walloon waste’, gave an undisputable positive approach of the Court regarding waste and protection of the environment. But still the other two also provided clear indications of its intentions.

Waste has been subject to control by the EC. Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community; earlier on, Directive 89/428/EC on the harmonization of programmes for the reduction of waste from the titanium dioxide industry and Directive 91/156/EC on waste. These several instruments harmonize the subject-matter, but still the Commission points at two main problems that difficult their harmonised application: the different definitions of waste by the Member States, and the lack of clear definition of recovery of waste.[200] Therefore, the role of the ECJ to fill the gap of this ‘unsuccessful’ harmonization is still important. In any case, it seems that the ECJ is very much inclined to support measures that aim at protecting the environment.

Regarding packaging waste, there is Directive 94/62/EC. Its approval prompted a different solution of the ‘Danish bottles case’ in 1988 and 1999 (see 4.2.10) and the reasonableness of measures following harmonization. In 1988 the Danish measure was upheld by the ECJ and it considered that in the absence of harmonization, the Member States should choose their desired level of protection; in 1999, although the Court did not have the opportunity to pronounce on the matter, the EC had already adopted a directive that aimed at a high level of environmental protection. Denmark abided by the Commission’s position, which favoured other less-restrictive and proportionate measures. Thus, this field seems to be less favourable for the application of this mandatory requirement. Nonetheless, one case is not authority enough to conclude a possible line of reasoning on the side of the ECJ.

[200] European Commission. Single Market and Environment. Communication from the Commission to the European Parliament and the Council. COM (99) 263 final, 08.06.1999; p. 20.

6.4 The impact of international legislation in the EC

With regard to the influence of the international legislation in the area of trade and environment, it must be noted that the EC and its Member States are signatory parties to the GATT/WTO, thus its rules are also applicable. Two systems, the international and the European, influence it: are they complementary each other? Do any divergence arise?

The Community legal basis for joining international environmental conventions that contain trade elements is art. 175 EC. The Community is affected in situations where international environmental measures have been adopted and it is party to them. In situations where there is no international agreement, the Community environmental measures do not run counter the GATT/WTO rules if they are not arbitrarily or unjustifiable discriminatory, they are necessary and pursue any of the objectives of art. XX b) or g) GATT.

The Member States' measures to protect the environment have not only to comply with Community primary and secondary law, but also with the GATT provisions and instruments, as well as MEA. Nonetheless, a quick look into the regulation of trade and environment at both the European and GATT/WTO level shows that the integration of both policies is more advanced in the EC system than in the WTO, where trade weights more than the protection of the environment. Perhaps because of that, the interpretation of this dichotomy could lead to a possible breach of WTO rules, something that has not occurred, so far.

The difference between the EC and the WTO systems is that the EC allows for national measures to be justified under judicial creation (the rule of reason) whereas the WTO does not foresee such a possibility. Nonetheless, the protection of the environment has now a higher rank position in the EC system, where it must be truly integrated into the other Community policies, including the commercial one. This far-reaching consequence of the principle of integration might prompt disputes in the international arena, if any third country takes the view that the measures adopted by the Community, or any of its Member States, have disruptive consequences in its trade policy.

6.5 Final considerations

The question of how to reconcile the principle of free movement of goods with the protection of the environment is challenging for both the doctrine and the judiciary. This paper has aimed at giving an introduction of the problems that arise on their difficult reconciliation. Indisputably, the discussion turns around how to restrict the free movement of goods in order

to give room to another principle with increasing social, political and legal acceptance.

The amount of Community legislation in the environmental field is numerous; the political influence of environmental issues is undeniable; the social awareness that exerts pressure to favour these policies is incontestable. It all requires a balance of interests, that the EC is favouring by adopting countless decisions in order to 'green' its policies. In the judicial sphere, the ECJ has adopted also a quite active role to increase the importance of the protection of the environment in the Community trade policies. I would say that it is still soon to arrive at any clear conclusion, but it is beyond question that the Court, as far as the national measures fulfil minimum requisites that do not run counter the established doctrine on distinctly and indistinctly applicability and the question of proportionality, will uphold them. But the Court is also inclined to adopt a wider interpretation to favour the environmental protection, if the products involved clearly threaten the environment, as seen in 'Walloon waste'.

The integration of the environmental protection in other Community policies is a major issue that is influencing and will even influence more in the future, the degree to which the Court takes into account environmental considerations. It is indisputable that the protection of the environment is a major social and legal value in the EC. Why not considering its introduction in art. 30 EC? It would change its status, and distinctly applicable measures would be caught by it. Some authors have already argued that the fulfilment of feasible environmental measures rely on its distinctly application. On the other side, it is also true that it is not desirable to restrict some policies in order to achieve other policies' goals. The harmonization procedure that takes place in the EC is the desirable alternative, but it has also limits (the possibility to adopt more stringent standards, explicitly envisaged in the EC) that does not avoid conflicts between free movement of goods-protection of the environment. In this regard, the interpretative function of the ECJ still remains fundamental for a successful balance of both interests: the key for a sustainable Europe.

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