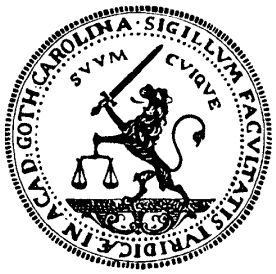

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Justifying Restrictions on the Free Movement of Goods: The Relationship between the Justifications listed in Article 36 TFEU and the Mandatory Requirements

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Contents

Summary

The European Court of Justice has established many fundamental principles with its case law, but one of the most important was created in the *Cassis de Dijon* case, where an open-ended list of mandatory requirements was first introduced, opening up new possibilities for Member States to justify measures that hinder the free movement of goods.

One question has however not been answered, and that is the question of the relationship between the mandatory requirements and the exhaustive list over derogations that is provided for in article 36 TFEU.
The conditions for applying those two different sources of derogations differ, depending on whether the disputed measure is distinctly or indistinctly applicable.
The case law of the Court has been somewhat confusing on the matter and therefore commentators and even Advocates Generals have been calling for a clarification from the Court.

A few different theories have been put forward by scholars in order to explain the mandatory requirements doctrine.
Questions have mainly arisen on whether the Court wants to keep the distinction between the derogations in article 36 and the mandatory requirements, or if it is in fact trying to slowly erase the dividing line with its constantly evolving case law?

One thing is for sure, and that is that the European Court of Justice must act soon in order to provide for some needed legal certainty on the matter.

Preface

There was never any doubt that my final thesis would be on a topic concerning the internal market. The confusion concerning the applicability of the mandatory requirements has always interested me, perhaps because of its complexity, so I decided early on to make an analysis about it.

This master thesis marks the end of two fantastic years of my life, years that I will always remember and cherish.
I can say, without any doubt, that the masters programme of European Business Law has fulfilled all my expectations, but I have learned so many new things in law from highly qualified teachers and also met great people from all over the world.

I want to thank Jörgen Hettne for his helpful guidance and for taking time from his busy schedule to guide me.

Also a special thanks to my husband Geir for his endless support and for being so positive about moving to Sweden with me and helping me let my dream come true.

Last but not least, thanks to my little girl, Hjördís Lilja, for being so good and patient while her mom has been busy writing this thesis, I am very much looking forward to being able to give her my fullest attention again.

Abbreviations

AG	Advocate General
Commission	The European Commission
CML Rev.	The Common Market Law Review
DG	Directorate General
EC	Treaty establishing the European Community
ECJ/Court	The European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EL Rev.	European Law Review
EU	European Union
MEE	Measure having equivalent effect to quantitative restrictions
MS	Member States of the European Union
OJ	Official Journal of the European Union
QR	Quantitative restrictions
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom

1. Introduction

The free movement of goods is one of the success stories of the European Union. It has been the key factor in creating and developing the internal market, which has the aim to ensure the free movement of the four freedoms, or goods, persons, services and capital, within the European Economic Area[1].
Trade is vital for the economies of the EU Member States, but around 75% of trade within the EU is in goods.[2]

Therefore it is important that measures that can possibly create obstacles to the fundamental freedom of free movement of goods are interpreted in a narrow manner.

Chapter 3 of the TFEU contains provisions that prohibit quantitative restrictions between Member States, but their role is to prevent the Member States from conducting measures that can possibly restrict the free flow of goods.

Article 36 TFEU provides for an exhaustive list of derogations from the free movement of goods that the Member States can apply under certain circumstances.
Additionally, the Court has developed a non-exhaustive list of mandatory requirements in order to justify certain measures that restrict the free movement of goods.

The conditions for applying the derogations in article 36 on the one hand and the mandatory requirements on the other differ, depending on whether the disputed measure is considered to be distinctly or indistinctly applicable.
If the measure is considered to be distinctly applicable, then it is only possible to justify it on the basis of the exhaustive list of derogations that is provided for in article 36 TFEU.
On the other hand, if a measure is considered to be indistinctly applicable, it can be justified either by the derogations provided for in article 36 or by invoking the mandatory requirements.

The fact that the Court has repeatedly shown tendency to disregard the distinction between distinctly and indistinctly applicable measures has created quite a confusion regarding the relationship between the exhaustive list of derogations from the free movement of goods in article 36 TFEU and the non-exhaustive list of mandatory requirements.

[1] The European Economic Area (EEA), was established on 1 January 1994, but it consists of the 27 Member States of the EU and three European Free Trade Association (EFTA) States (Iceland, Liechtenstein and Norway). It was established by the EEA Agreement, which enables the three EFTA states to participate fully in the European internal market.
[2] Information from the European Commission: ”Free Movement of Goods, Guide to the Application of Treaty Provisions Governing Free Movement of Goods”, p.7.

It is thus obviously very important to have clear guidelines on when the mandatory requirements can be applied and when they are not applicable.

Such a confusion cannot be accepted, but the question is what is the most appropriate approach for the ECJ to take?

1.1 Purpose and method

The main purpose of this thesis is to analyse the status of the relationship between the derogations listed in article 36 TFEU and the mandatory requirements, and if the latter should only be used where the measures are regarded to be indistinctly applicable.

A traditional legal method will be used. Controversial cases from the European Court of Justice will be covered, along with three different theories suggested in books and articles by several scholars.

The final goal is to make an independent analyse on whether the distinction between the derogations in article 36 TFEU and the mandatory requirements should be maintained or not and consequently comment on which approach would be the most appropriate one for the ECJ to adopt.

1.2 Delimitations

As a matter of terminology, the term “indistinctly applicable” will be used regarding rules that apply both to domestic and imported goods; “indirectly discriminatory” includes indistinctly applicable rules that in fact put more burdens on imported goods than domestic; and “non-discriminatory” indicates indistinctly applicable rules that are not indirectly discriminatory but still affect market access.
The term “distinctly applicable” is used for rules that treat imported goods less favourably than the domestic products, both in law and in fact.

The Court has used several concepts when referring to the mandatory requirements, such as “imperative requirements”, “overriding requirements of general public importance” and “overriding requirement justifying a restriction on the free movement of goods”, but the concept “mandatory requirements” will be used here.

The main emphasis will be on restrictions on imports according to article 34 TFEU, but article 35 on exports will also be covered when relevant.
The general rule has been that the mandatory requirements are not applicable if a measure is considered to fall within the scope of article 35.

1.3 Disposition

In chapter two, provisions concerning the free movement of goods in general will be covered, in order to achieve a basic understanding of the main principles governing this fundamental freedom.

The following chapter will cover the derogations from the free movement of goods that are exhaustively listed in article 36 TFEU, and, consequently, which measures the Court has found to be justified as mandatory requirements, but the list is non-exhaustive since it is constantly evolving.

Finally, the last chapter will cover the three different theories scholars have put forward concerning the status of the relationship between the derogations listed in article 36 TFEU and the mandatory requirements, followed by conclusions.

2. The Free Movement of Goods

2.1 General

To begin with, the free movement of goods was seen as a part of a customs union between the EU Member States, but the Treaty on the European Economic Community[3] stated that a "common market" should be set up, without any further indications.
Later, the emphasis moved on to creating an internal market where the four freedoms could move as freely as they do in national markets.
The framework for an internal market was first laid down with the Single European Act[4], but the deadline for completing the internal market was set at 31 December 1992.

Article 26 TFEU establishes the internal market, but it states that:
"1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned."

The provisions in articles 28 to 32 of the TFEU[5] lay down the foundation for a customs union by eliminating customs duties between EU Member States and establishing a common customs tariff.
Chapter 3 of the TFEU, or articles 34 to 37[6], have provisions on the "prohibition of quantitative restrictions between Member States", but their role is to prevent the Member States from restricting the flow of goods by for example placing quotas on their amount or by conducting similar measures with equivalent effect. The substance of these provisions has never been amended, but they have been renumbered.
However, if some of the more specific Treaty rules, such as article 110 TFEU on tax-related provisions, are applicable, they will prevail over the more general provisions in articles 34 to 37.

[3] The Rome treaties, or the EEC Treaty and the Treaty on the establishment of the European Atomic Energy Community (Euratom), came into force on 1 January 1958. The Customs Union came into force on 1 July 1968.
[4] The Single European Act (SEA) was signed in February 1986 and came into force on 1 July 1987.
[5] Formerly articles 23-27 EC.
[6] Formerly articles 28-31 EC.

Those provisions are also not applicable in cases where the free movement of a given product is fully harmonized by a specific legislation within the EU.[7]
According to information from the homepage of the Internal Market and Services Directorate General[8], approximately half of the trade in goods within the EU is covered by harmonised regulations, whereas the other half is covered by the non-harmonised sector, which is either regulated by national technical regulations or not specifically regulated at all.

The concept of goods has been interpreted by the ECJ as covering objects that are shipped across a frontier for the purposes of commercial transactions, whatever the nature of those transactions[9].
It is therefore essential to decide whether a certain object has economic value, but the ECJ has stated that objects such as coins that are no longer in use[10], electricity[11], natural gas[12], animals[13] and waste[14] are capable of falling within the goods concept.

2.2 Article 34 TFEU

2.2.1 Scope

Article 34 is the central provision within the chapter on the free movement of goods, but it prohibits quantitative restrictions on imports and all measures having equivalent effect.

Article 34 TFEU[15] thus provides that:
"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

The provision has direct effect[16], which means that it can be relied upon by private individuals before national courts.

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[7] *Supra* note 2, p.7.
[8] Information available at: http://ec.europa.eu/internal_market/top_layer/index_18_en.htm.
[9] In case 7/68, *Commission v Italy*, [1968] ECR 423, paragraph 1, the ECJ established that goods cover *"products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions"*.
[10] Cases C-358/93 and C-416/93, *Bordessa*,[1995] ECR I-361.
[11] Case C-393/92, *Almelo v Energiebedrijf Ijsselmij*, [1994] ECR I 1477.
[12] Case C-159/94, *Commission v France*, [1997] ECR I 5815.
[13] Case C-67/97, *Criminal proceedings against Ditlev Bluhme*, [1998] ECR I-8033.
[14] Case C-2/90, *Commission v Belgium ("Walloon Waste")*, [1992] ECR I 4431.
[15] Formerly article 28 EC.
[16] The provisions have had direct effect since the end of the transitional period, or from 1 January 1970. See also cases 74/76, *Iannelli & Volpi SpA v Ditta Paolo Meroni*, [1977] ECR 557, paragraph 13, and 83/78, *Pigs Marketing Board v Raymond Redmond*, [1978] ECR 2347, paragraph 66.

It has been interpreted widely by the ECJ, which has come up with several rules in order to widen its scope.

All measures that have been taken by EU Member States and are capable of affecting trade between them are covered, but the concept of "Member State" has been interpreted widely, including the activities of all bodies that have sufficient relations to public authorities. Measures taken by private undertakings or individuals are not included.

There is no "de-minimis"[17] principle effective in relation to provisions concerning the free movement of goods. This means that national measures do not fall outside the scope of the relevant provisions merely because the hindrance they create is on a small scale or it is possible for the products to be marketed in another way[18].

2.2.2 Quantitative restrictions and measures having equivalent effect

Quantitative restrictions have been defined in a broad manner by the ECJ, but according to the *Geddo* case[19], they can be defined as covering *"measures which amount to a total or partial restraint of, according to circumstances, imports, exports or goods in transit"*.
The concept has not given rise to difficulties of interpretation, but good examples of quantitative restrictions are outright bans on imports or exports and the imposition of quota systems that limit the quantity of goods coming into a particular Member State.
Due to the damaging effect they can have on trade between Member States, it is only possible to justify them by referring to one of the derogations listed in article 36 TFEU.

Measures having equivalent effect to quantitative restriction have a much broader scope and are more difficult to define than quantitative restrictions. Some guidance on how the Commission deals with the issue can be found in Directive 70/50, even though it no longer has legal effect[20].

The *Dassonville* case[21] first established an interpretation, often referred to as "the Dassonville doctrine", on the definition of measures equivalent to quantitative restrictions as: *"all trading rules enacted by MS which are*

[17] *"De minimis non curat praetor"* = small issues do not bother the judge.
[18] See for instance cases 269/83, *Commission v France*, [1985] ECR 837; 103/84, *Commission v Italy*, [1986] ECR 1759; and C-67/97, *supra* note 13.
[19] Case 2/73, *Riseria Luigi Geddo v Ete Nationale Risi*, [1973] ECR 865.
[20] Commission Directive 70/50/EEC, of 22 December 1969, 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. The directive was only effective during the transitional period.
[21] Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837.

capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".
According to this definition, three elements must be present in order for a measure to be categorised as a MEE:

1. Trading rules.
2. Enacted by Member States.
3. Capable of hindering, directly or indirectly, actually or potentially, trade within the EU.

The Dassonville doctrine has been confirmed by later cases, although with minor variations[22].

A distinction is made between "distinctly applicable measures" and "indistinctly applicable measures", but both of those concepts are used in articles 2 and 3 of the abovementioned Directive 70/50.
Distinctly applicable measures are loosely equivalent to directly discriminatory[23] measures, but they cover instances where the imported goods are treated less favourably than the domestic products, both in law and in fact. Examples of such measures are when additional requirements such as producing declarations on origin of products are imposed on the imported goods, national rules that limit channels of distribution, national rules giving preference to domestic goods and rules on price fixing.
Indistinctly applicable measures[24], on the other hand, are loosely equivalent to indirectly discriminatory[25] measures, applying by law equally to national and domestic goods, but in fact they have a particular burden on the imported goods. Therefore it is the effect of the rules that matters, not their form or intention. Non-discriminatory measures that affect access to markets are also covered. Examples of indistictly applicable measures are when imported goods have to satisfy a dual regulatory burden, but this has especially been a problem concerning product requirements.[26]

[22] For example, the wording "trading rules" and "intra-Community trade" is not often used.
[23] Direct discrimination occurs when comparable situations are treated differently, or when non-comparable situations are treated in the same way.
[24] The Court does not always use the terminology "indistinctly applicable", but instead it often states that the measure applies "without distinction to both national and imported goods", and then adds that the national measure imposes some additional burdens on the importer.
[25] Indirect discrimination occurs when rules that are neutral in their formulation, have the effect of being more likely to bear more heavily on a protected group.
[26] C. Barnard: "The Substantive Law of the EU: The Four Freedoms", pp. 64-65 and 98-110. Also, same author: "Fitting the Remaining Pieces into the Goods and Persons Jigsaw", EL Rev., vol. 26, 2001, p. 36.

2.2.3 Landmark cases concerning the scope of application of article 34 TFEU

2.2.3.1 Dassonville

The abovementioned *Dassonville* case[27] is the first case in a line of cases that had major influence on the scope of article 34 TFEU.
The facts of the Dassonville case were that Belgium required an official document issued by the government of the exporting country for products bearing a destination of origin. The traders in question had duly acquired a consignment of whisky from Scotland in free circulation in France and imported it into Belgium without having a special certificate of origin from British authorities. They made their own label with information on origin, but the reality was that it was almost impossible for traders outside of Belgium to obtain the required certificate.
The ECJ came to the conclusion that this constituted a measure equivalent to quantitative restrictions, but for the first time, the Court established an interpretation of that definition, often referred to as the "Dassonville doctrine".
The case shows that the effect on the market is what matters the most, so there is no need to prove discriminatory intention, it is sufficient that the disputed measure is capable of having effect on trade.

This definition was very much welcomed since it provided for much needed guidelines on which measures could possibly constitute a MEE.

Paragraph 6 of the case can be regarded as preparing the ground for the recognition of the rule of reason in the *Cassis de Dijon case*[28], but it states that:
"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".

The wording of the "Dassonville doctrine" was however quite wide and therefore it was obvious that the Court needed to give some clearer lines on the scope of the provision.

[27] Case 8/74, *supra* note 21.
[28] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein ("Cassis de Dijon"),* [1979] ECR 649.

2.2.3.2 Cassis de Dijon

The *Cassis de Dijon* case[29] is one of the key decisions of the ECJ.
It concerned the importation and marketing of the fruit liqueur Cassis de Dijon from France into Germany, but German law required liqueurs and other portable spirits sold in Germany to have a minimum alcohol content of 25%. There was no harmonized legislation on the subject within the EU at the time.
According to the ECJ, the German legislation was considered to be a MEE. The principle of proportionality was, however, not fulfilled according to the Court, since it should have been sufficient to put a label on the bottles with information on origin and alcohol content.

The case confirmed that article 34 TFEU covers the abovementioned indistinctly applicable measures, or measures that apply in the same way to domestic and imported goods.

The rule of reason, which was established by the case, states that only national measures that are applied without distinction between domestic and foreign goods can be justified on grounds other than those listed in article 36 TFEU, or the so-called mandatory requirements. Proportionality is also required, which means that disputed measures must be appropriate and necessary to achieve the aim pursued, without going beyond what is essential in order to attain it.

One of the most important rules concerning the free movement of goods was also established by the case, the rule on mutual recognition. The rule states that a Member State may not deny access to its markets by a product that has been lawfully produced or marketed in another Member State.

The European Commission responded to the *Cassis* case by publishing a Communication[30] where it put forward its interpretation of the case.
The Commission states, among other things in its Communication, that *"where a product "suitably and satisfactory" 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. In such a case, an absolute prohibition of sale could not be considered "necessary" to satisfy a "mandatory requirement" because it would not be an "essential guarantee" in the sense defined in the Court´s judgment."*

Regulation 764/2008[31], laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another

[29] Case 120/78, *ibid* note 28.
[30] 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")*, 3 October 1980, [1980] OJ C256/2.

Member State, has the aim to improve the functioning of the mutual recognition of goods. It establishes rules and procedures that must be followed by the Member States when they take or intend to take a decision which could hinder the free movement of a product that has been lawfully marketed in another Member State and is not covered by harmonised rules within the EU.
The Mutual Information or Transparency Directive[32], on the provision of information on technical standards and regulations, also obliges Member States to inform the Commission before they adopt any legally binding regulations setting a technical specification.

2.2.3.3 Keck and Mithouard

Almost twenty years after giving its ruling in the *Dassonville* case, the ECJ found it necessary to limit the scope of the term "measures having equivalent effect to quantitative restrictions", whereas what is now article 34 TFEU had been interpreted too broadly.
By its judgment in the joined cases of *Keck and Mithouard*[33], the ECJ thus stated, in paragraph 14, that: *"In view of the increasing tendency of traders to invoke Article 30* [now 34] *of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter".*

The cases involved prohibition in France on resale at a loss, or the resale of products in an unaltered state at lower prices than their actual purchase price.

The Court thus reviewed its previous practise and introduced a new approach towards non-discriminatory legislation, by establishing the so-called "Keck-doctrine" with the following words in paragraph 16 of the case:
"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

[31] Regulation No. 764/2008 of the European Parliament and of the Council, laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision no. 3052/95/EC.
[32] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations.
[33] Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [1993], ECR I-6097.

they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".
Therefore, selling arrangements were after *Keck* considered to fall outside the scope of what is now article 34, unless they were discriminatory. Product requirements on the other hand still fell under the criteria of *Dassonville* and *Cassis de Dijon.*

The Court came to the conclusion that the disputed legislation did not fall within the scope of article 34, since the requirements according to the French legislation were by nature not such as to prevent the access of goods from other Member States to the market or impede their access any more than it impedes the access of domestic products.

The judgment has been clarified to some extent by subsequent case law, where it has been stated what measures can be considered as "selling arrangements", but they relate to matters that are extrinsic to the goods themselves, for example where the good can be sold, when, to whom, how, or at which price.

The distinction between "selling arrangements" and rules concerning the characteristics of the goods in question can however still be fragile at times.
Advocate General Stix-Hackl listed a number of national measures that the Court has considered as being covered by the Keck doctrine in her opinion in the *Doc Morris* case[34]. According to her opinion, the measures covered are such as time restrictions, restrictions on who can offer goods for sale, the prohibition on the sale of tobacco products other than by specially authorized retailers, the prohibition on obtaining beverages from anyone other than the holder of a wholesale or a production license, a prohibition on televised advertising in the distribution sector, provisions on advertising that is not physically connected to the product, etc.[35]

2.2.3.4 Trailers

Fifteen years after the *Keck* judgment, the Court gave its judgment in the *Trailers* case[36], which concerned a ban in Italy on the possibility for motorcycles to tow trailers. The question therefore in fact focused on how to deal with a ban on the *use* of a product.

The case had originally been assigned to the Third Chamber of the Court, which referred it back to the Court, probably under some influence from the

[34] Opinion of Advocate General Stix-Hackl, delivered on 11 March 2003, in case C-322/01, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval,* [2003] ECR I-14887.
[35] M. Broberg and N. Holst-Christensen: "Free Movement in the European Union – Cases, Commentaries and Questions", p. 160.
[36] Case C-110/05, *Commission v. Italy,* [2009] ECR I-519.

opinion of Advocate General Kokott in the case *Mickelsson and Roos*[37], but she wanted to take Swedish regulations on restrictions on the use of jet-skis outside the scope of article 34, in accordance with the "Keck doctrine".
The Court addressed questions to the parties and to other Member States, on whether, and if so, under which conditions non-discriminatory restrictions on the use of products should be regarded as MEEs within the meaning of article 34 TFEU.

Advocate General Bot stated, in his opinion in the *Trailers* case[38], that to make a distinction between different categories of measures was in his opinion not appropriate, since it could often be difficult to divide the line between them. He consequently urged the Court to apply a market access test, *"based on the effect of the measure on access to the market rather than on the object of the rules in question"*[39].
The Court agreed with AG Bot, and started by pointing out that the rationale behind its jurisprudence on article 34 could be summarized into three principles; non-discrimination, mutual recognition of products and the free access of EU products to national markets.

It subsequently identified three situations where a rule could be considered to constitute a MEE and thus fall within the scope of article 34:

1. Distinctly applicable measures;
2. Indistinctly applicable product requirements; and
3. *"Any other measure which hinders access of products originating in other Member States to the market of a Member State"*[40].

The third situation represents a new evolution in the interpretation of article 34 TFEU. It is probably very welcomed by most scholars since it clarifies the evaluation of measures that have been in the "grey zone", that is measures that in fact belonged neither under the concept of product characteristics nor selling arrangements according to the *Keck* case.

On the use of a market access test, the Court stated, in paragraph 55 of its judgment, that:
"It should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State."

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[37] Opinion of AG Kokott, delivered on 14 December 2006, in case C-142/05, *Åklagaren v Percy Mickelsson and Joakim Roos,* [2009], 4 June 2009.
[38] Opinion of AG Bot, delivered on 8 July 2008, in case C-110/05, *Commission v. Italy,* [2009] ECR I-519, paragraphs 79 and 81.
[39] *Ibid.* note 38, paragraph 109.
[40] From paragraph 37 of the case, which provides that: *"Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC* [34 TFEU], *as are the measures referred to in paragraph 35 of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept."*

The Court came to the conclusion that the disputed rule constituted a MEE and therefore fell within the scope of article 34, but that it was justified on the ground of the mandatory requirement of road safety.

The case is of significant importance regarding the scope of article 34 since it re-introduces the market access test, which was first introduced in the *Dassonville* case but then curtailed by *Keck.* This means that *Keck* has now been confined to situations concerning selling arrangements in the narrowest possible sense, but the interpretation of article 34 has now been made clearer and simpler.
As Catherine Barnard rightfully states, in her article "Trailing a New Approach to Free Movement of Goods?", the power between the EU and the Member States has yet again swifted, but the re-introduction of the market access test has shifted the balance back in the favour of the EU.[41]

The *Mickelsson and Roos*[42] case, which was decided by the ECJ four months later, concerning a Swedish regulation banning water scooters from a major part of inland waterways, confirmed the conclusions of the *Trailers* case.

2.3 Article 35 TFEU

2.3.1 Scope

Article 35 TFEU has similar provisions as article 34, only concerning exports.
Like article 35, it has direct effect and prohibits both quantitative restrictions and measures having equivalent effect, although with some exceptions.

Article 35 TFEU[43] provides that:
"Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."

The provision thus applies to exports between EU Member States and is directed against measures that solely affect exports. The provision has, however, not been used as often as article 34 TFEU.

[41] C. Barnard: "Trailing a New Approach to Free Movement of Goods?", The Cambridge Law Journal, 2009, vol. 68, pp. 288-290.
[42] Case C-142/05, *Åklagaren v Percy Mickelsson and Joakim Roos,* [2009], 4 June 2009.
[43] Formerly article 29 EC.

2.3.2 Quantitative restrictions and measures having equivalent effect

There is one fundamental difference between the application of articles 34 and 35 TFEU, whereas article 35 only applies to measures that discriminate directly against goods and does therefore not apply to indistinctly applicable measures.
This principle was established in the *Groenveld* case[44], where the ECJ stated, in paragraph 7, that what is now article 34 TFEU: *"concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a member state and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other member states"*.

Some possible explanations on this difference are that article 34 applies to dual-burden rules, that is that importers have to satisfy the rules of state A (state of origin) and state B (host state), or even that the ECJ has just not yet gotten the right opportunity to revisit the rule that it created in the *Groenveld* case.[45]

The narrow construction that article 35 TFEU was given according to the "Groenveld formula" has been criticized by some commentators[46] and a number of Advocates Generals have called for the reappraisal of the Court´s approach on which measures can fall under the scope of article 35 TFEU. One of them, AG Capotorti, has endorsed the radical "unitary approach"[47], whereby the scope of article 35 would be as broad as the scope of article 34 TFEU.[48]

Therefore, as the status is today, the general approach by the Court seems to be that article 35 TFEU catches barriers to trade that have an actual and specific effect on exports and create a difference in treatment between trade within a Member State and exports.[49]

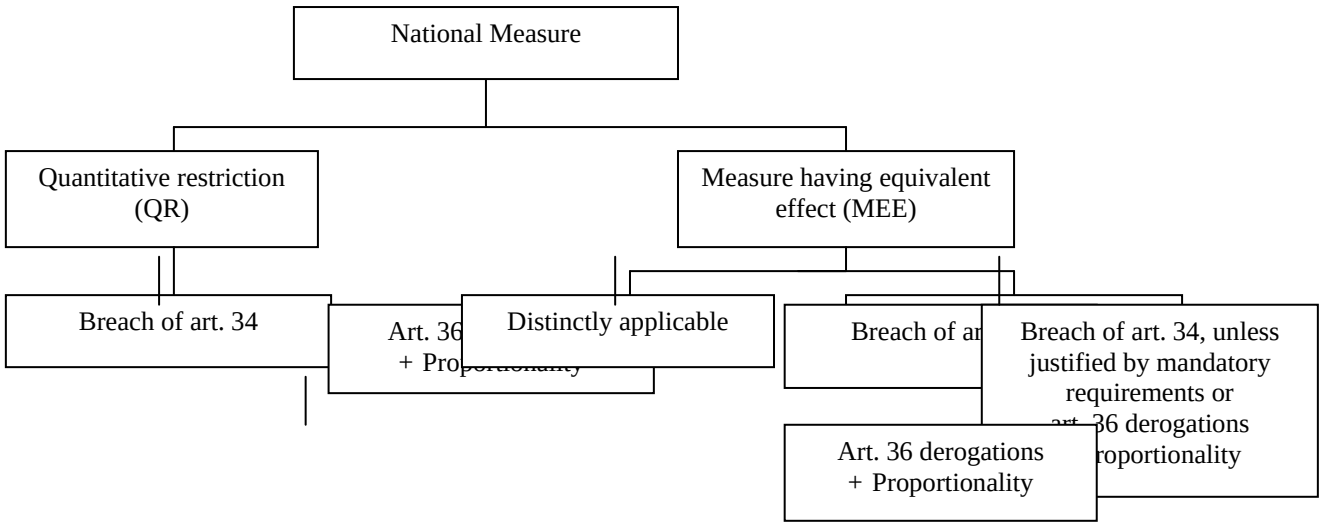
[44] Case 15/79, *P.B. Groenveld BV v Produktschap voor Vee en Vlees*, [1979] ECR 3409.
[45] *Supra* note 26, p. 171.
[46] For instance P. Oliver and S. Enchelmaier, in "Free Movement of Goods: Recent Developments in the Case Law", CML Rev. 44, 2007, pp. 684-689.
[47] Opinion of Mr Advocate General Capotorti delivered on 27 May 1981, in case 155/80, *Oebel*, [1981] ECR 1993.
[48] P. Oliver: "Some Further Reflections on the Scope of Articles 28-30 EC". CML Rev. 36, 1999, pp. 799-803.
[49] *Supra* note 2, p. 35-36.

3. Derogations from the Free Movement of Goods

3.1 General

The free movement of goods can only be restricted by the Member States in exceptional circumstances, but it depends on whether the disputed measure is a quantitative restriction or a measure equivalent to it.
If it falls under the former category, then it is only possible to refer to the exhaustive list of derogations that is provided for in article 36 TFEU.
However, if it is a MEE, it is essential to decide whether the measure is distinctly or indistinctly applicable, since the former can only be justified by the derogations provided for in article 36, while the latter can additionally be justified by the mandatory requirements.

The following figure from the book "The Substantive Law of the EU" by Catherine Barnard[50] gives a good idea of the different types of available derogations depending on whether the measures are regarded as quantitative restrictions or measures having equivalent effect:



3.2 The derogations listed in article 36 TFEU

[50] *Supra* note 26, p. 66.

3.2.1 Scope

Member States are, according to article 36 TFEU, allowed to let certain national measures take precedence over the free movement of goods, provided that those measures serve important interests that have been recognized as valuable within the EU. They must also fulfill the principle of proportionality and may not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of goods between the Member States.[51]

Article 36 TFEU[52] provides that:
"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

The provision has been interpreted in a rather strict manner in order to ensure that discriminatory restrictions on the free movement of goods cannot be easily justified.
This is apparent from the *Irish Souvenirs* case[53], where the Court stated, in paragraph 7, that what is now article 36 TFEU".. *constitutes a derogation from the basic rule that all obstacles to the free movement of goods between MS shall be eliminated and must be interpreted strictly, the exemptions listed therein cannot be extended to cases other than those specifically laid down"*.

The list over possible justifications is exhaustive, but they must be read in conjunction with the second sentence of the article, which requires that prohibitions or restrictions must not constitute means of arbitrary discrimination or disguised restriction on trade between Member States.
It is also required that the derogations must be proportionate, but according to Catherine Barnard[54], the principle of proportionality comprises two tests: on the one hand a test of suitability where the emphasis is on the relationship between the means and the ends, and the means that is employed by the ends must be suitable. On the other hand, there is the necessity test, where competing interests are weighed and then it is decided whether the consequences of the disputed measure are justified in view of the importance of the objective that is being pursued.
The burden of proof always lies with the Member State that invokes the justification.

[51] *Supra* note 26, p. 65.
[52] Formerly article 30 EC.
[53] Case C-113/80: *Commission v Ireland ("Irish Souvenirs case")*, [1981] ECR 1625.
[54] *Supra* note 26, p. 81.

The derogations in article 36 TFEU can never be used in order to justify deviations from harmonized EU legislation, but in instances where there is no harmonization within the EU, the Member States are allowed a certain margin of discretion in particular areas[55] regarding the adopted measures and the level of protection.

Besides the requirement that the derogations must be interpreted in a strict manner, the ECJ has also established that they can under no circumstances be used in order to pursue economic objectives[56].

3.2.2 Public morality

The first derogation that is mentioned in article 36 is public morality, but the Member States enjoy a rather wide margin of appreciation on what constitutes public morality in their territory.

This is obvious from the *Henn and Darby* case[57], where the ECJ agreed upon a ban in the UK on the import of obscene films and magazines from the Netherlands, stating in paragraph 15 that "*..In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory..*"

The conclusion was however quite different in the *Conegate* case[58], which concerned a ban on the importation of life-size inflatable dolls from Germany to the UK. The Court came to the conclusion that the measure could not be justified on the grounds of public morality since the manufacturing and marketing of similar national products was not banned.

It is therefore obviously considered discriminatory if the importation of a certain product is banned, while the marketing of similar national products is only restricted and not prohibited. The main difference between the two cases is that in *Henn and Darby*, there was no national market for the goods in question since both the manufacturing and marketing in the United Kingdom of the product were restrained.

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[55] It has especially been recognised for measures that are motivated by the necessity to ensure the protection of health and life of humans, but also public order, public morality and public security.

[56] This is obvious from paragraph 27 of case 95/81, *Commission v Italy*, [1982] ECR 2187, where the ECJ states that: *"It must be recalled that in accordance with the settled case law of the Court, article 36 must be strictly interpreted and the exceptions which it lists may not be extended to cases other than those which have been exhaustively laid down and, furthermore, that article 36 refers to matters of a non-economic nature"*.

[57] Case 34/79, *Henn and Darby*, [1979] ECR 3795.

[58] Case 121/85, *Conegate*, [1986] ECR 1007.

3.2.3 Public policy

The ECJ has interpreted the second derogation in a narrow manner, but if an alternative derogation also applies, the Court tends to rather use that one.
In fact it has only once been successfully invoked in a case concerning the free movement of goods, or in the *Thompson* case[59], where the Court stated that the United Kingdom had been justified in banning the export of old silver coins on the grounds of public policy, since it was considered to be a criminal offence there to melt down coins.[60]
The Court stated, in paragraph 34 of the case, that the ban was justified on the grounds of public policy since it stemmed from *"the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the state"*.

The derogation has increasingly been invoked by Member States in cases where actions on behalf of protesters have led to the hindrance of free movement of goods.
The French government invoked a public policy based justification in the *Centre Leclerc* case[61], which is a good example of how the Court has not been very sympathetic to arguments based on public policy.
The case concerned French legislation that imposed minimum retail prices for fuel, fixed primarily on the basis of French refinery prices and costs. The Court found that this constituted a MEE, but it did not accept the French government´s attempt to justify the measure on the ground that, in the absence of pricing rules, there would be civil disturbances, blockades and violence. The Court rejected the argument on the facts of the case, but Advocate General Verloren Van Themaat rejected it on principle, stating in his opinion[62] that: *"if roadblocks and other effective weapons of interest groups … were accepted as justification, the existence of the four fundamental freedoms of the Treaty could no longer be relied upon. Private interest groups would then … determine the scope of these freedoms. In such cases, the concept of public policy requires rather, effective action on the part of the authorities to deal with such disturbances"*.
Van Themaat therefore in fact turned the public policy argument put forward by the French authorities on its head, laying the responsibility of dealing with obstacles on the free movement of goods created by interest groups on the Member States.[63]
In the *Strawberry* case[64], concerning the failure by French authorities to act following violent attacks on behalf of French farmers against agricultural products from other Member States, the Court stated that what is now article

[59] Case 7/78, *Thompson*, [1978] ECR 2247.
[60] *Supra* note 26, pp. 67-68.
[61] Case 231/83, *Cullet v Centre Leclerc*, [1985] ECR 305.
[62] Opinion of Mr Advocate General VerLoren van Themaat delivered on 23 October 1984, in case 231/83, *ibid.* note 61.
[63] *Supra* note 26, p. 68.
[64] Case C-265/95, *Commission v France ("Strawberry case")*, [1997] ECR I-6959.

34 TFEU required the Member States to take all necessary and appropriate measures to ensure that the fundamental freedom it provides for is respected within their territory. The French Government argued that *"the situation of French farmers was so difficult that there were reasonable grounds for fearing that more determined action by the competent authorities might provoke violent reactions by those concerned, which would lead to still more serious breaches of public order or even to social conflict"*. The Court rejected the argument, stating in paragraph 55, that *"apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly"*.
It continued, however, by stating that the Member States enjoy a margin of discretion in determining what measures are the most appropriate in order to eliminate barriers to the importation of goods in a certain situation and that it was not for the Community institutions to act.
The Court came to the conclusion that the French authorities had not provided concrete evidence in order to prove the existence of a danger to public order and therefore they had violated against article 34 by not preventing the demonstrations.

Following the case, the Council adopted Regulation 2679/98[65], or the "Monti-regulation", on the functioning of the internal market in relation to the free movement of goods among the Member States. Its purpose was to set up an intervention mechanism in order to safeguard free trade in the single market. It provides that State A can complain to the Commission about certain obstacles to the free movement of goods that are attributable to State B, either through action or inaction. Those means are however always subject to the Member States´ duty to respect fundamental rights.[66]

Later, in the *Schmidberger* case[67], the ECJ was of the opinion that a decision by authorities in Austria not to ban a demonstration by an environmental group that led to the closure of a busy motorway impeded trade and was therefore caught by what is now article 34 TFEU.

3.2.4 Public security

[65] Council Regulation (EC) No 2679/98 of 7 December 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States.
[66] *Supra* note 26, pp. 71-72.
[67] Case C-112/00, *Schmidberger*, [2003] ECR I-5659.

The ECJ has so far been more sympathetic to arguments based on public security than those based public policy. This justification has especially been advanced in the EU energy market.[68]

In the *Campus Oil* case[69], the ECJ showed a broad approach to public security. The facts of the case were that Ireland required importers of petroleum products to buy up to 35% of their needs from a state-owned oil refinery at prices fixed by the Irish government.
The Court accepted Ireland´s justification based on public security, because of the exceptional importance of petroleum products as an energy resource.

It thus seems that the fact that the requirements also served economic objectives was not of importance, unlike the conclusion in *Commission v Greece*[70], where the Court was of the opinion that the requirements on behalf of the Greek government towards petrol companies, to hold minimum stocks of petrol at their own installations, were purely economic and could therefore not be justified.

The public security justification has for instance also been accepted by the Court in cases involving trade in strategically sensitive goods[71] and dual use goods[72], since *"…the risk of serious disturbance in foreign relations or to peaceful coexistence of nations may affect the security of a Member State"*[73].[74]

Finally, it should be noted, that it is possible for Member States to take certain measures relating to national security according to articles 346 to 347 TFEU.

3.2.5 The protection of health and life of humans, animals or plants

[68] *Supra* note 26, p. 72.
[69] Case 72/83, *Campus Oil*, [1984] ECR 2727.
[70] Case C-398/98, *Commission v Greece*[70], [2001] ECR I-7915
[71] Case C-367/89, *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC (Richardt case)*, [1991] ECR I-4621.
[72] Case C-83/94, *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer (Leifer case)*, [1995] ECR I-3231; case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany (Werner case)*, [1991] ECR I-4621.
[73] Paragraph 28 of case C-83/94 and paragraph 27 of case C-70/94, *ibid.* note 72.
[74] *Supra* note 2, p.38.

This is the derogation that is most often invoked by the Member States in order to justify obstacles to free movement of goods, and the ECJ has ruled that *"health and life of humans rank first among the property or interests protected by article 36 and it is for Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure, and in particular how strict the checks to be carried out ought to be"*[75].

Some fundamental rules have to be fulfilled when this justification is applied. For instance, the protection of health may not be invoked if the real purpose of the measure is to protect the domestic market. Also, the measures must always be well-founded, providing sufficient evidence, data, and all other relevant information[76].[77]

The case *Commission v United Kingdom*[78] is a good example of how the Court determines whether the protection of public health really is the purpose behind the Member State´s actions, or whether it is in fact designed to protect domestic producers.
The case concerned a ban in the UK against importing poultry meat from most other Member States. The UK government tried to justify it on the ground of the protection of public health, since it was considered necessary in order to prevent the spread of Newcastle disease with affected poultry. The Court however came to the conclusion that the ban was in fact more motivated by commercial reasons, in order to block French poultry from the market in the UK.

The burden of proof is put on the Member State that invokes the justification, and the ECJ has emphasized that real risks must be demonstrated in the light of the most recent results of international scientific research.
However, it is not necessary for the Member States to show a definite link between the evidence and the risk, it is sufficient to show that the area in question is surrounded by scientific uncertainty.[79]
In the *Sandoz* case[80], authorities in the Netherlands refused to allow the sale of muesli bars that contained added vitamins, on the ground that the vitamins were dangerous to public health. The muesli bars were readily available in Germany and Belgium. It was commonly accepted that excessive consumption of vitamins could be harmful to public health, but scientific evidence was not certain as regards the point at which the consumption of vitamins becomes excessive. The Court came to the conclusion that EU law permitted national rules prohibiting without prior

[75] Case 104/75, *Adriaan de Peijper, Managing Director of Centrafarm BV*, [1976] ECR 224, paragraph 15.
[76] Case C-270/02, *Commission v Italy*, [2004] ECR 1559; Case C-319/05, *Commission v Germany*, [2007] ECR I-9811.
[77] *Supra* note 2, p. 39.
[78] Case 40/82, *Commission v United Kingdom*, [1982] ECR 2793.
[79] *Supra* note 2, pp. 39-40.
[80] Case 174/82, *Sandoz*, [1983] ECR 2445.

authorization the marketing of vitamin-added foodstuffs that have been marketed in another Member State, provided that the marketing was authorized when the addition of the vitamins meets a real need, especially a technical or nutritional one.
Similarly, in the *Beer Purity* case[81], concerning a ban in Germany on the marketing of beer containing any additives, the Court did not approve of the justification put forth by the German authorities based on public health since it could not be proven that the additives presented a risk to public health.

The precautionary principle[82] was first used by the ECJ in the *National Farmers Union* case[83], even though it had been implicitly present in earlier case law concerning article 34.
The Court stated, in paragraph 63 of the judgment, that: *"Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent."*
The precautionary principle thus defines the circumstances where a legislator can adopt measures in order to protect consumers against health risks which, due to uncertainties at the present state of scientific research, are possibly associated with a product or service. Such measures cannot, however, be based on "purely hypothetical considerations"[84].

The main principle thus seems to be that if, in the absence of harmonization, there are uncertainties in scientific research, it is for the Member States to decide what degree of protection of health and life of humans they intend to assure, having regard to the principle of proportionality.

The Court seems to be particularly sympathetic to justifications based on public health if they are directly related to the functioning of national health systems. A good example of this can be found in the *Evans Medical* case[85], which concerned the refusal by British authorities to grant a license to an importer of narcotic drugs on the ground that the imports might undermine the sole licensed manufacturer in the United Kingdom, jeopardizing the reliability of the supply there of a particular drug. The Court stated that such measures could possibly be justified on the grounds of public health, provided that the principle of proportionality was fulfilled.[86]

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[81] Case 178/84, *Commission v Germany ("Beer Purity Case")*, [1987] ECR 1227.
[82] According to the Commission´s Communication from 2 February 2000, on the precautionary principle, it will be applied *"where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection."* COM (2000) 1, p. 10.
[83] Case C-157/96, *National Farmers Union*, [1998] ECR 224.
[84] Case C-236/01, *Monsanto Agricoltura,* [2003] ECR I-8105, paragraph 106; Case C-41/02, *Commission v Netherlands*, [2004] ECR 11375, paragraph 52; Case C-192/01, *Commission v Denmark,* [2003] ECR I-9693, paragraph 49; Case C-24/00, *Commission v France*, [2004] ECR I-1277, paragraph 56.
[85] Case C-324/93, *Evans Medical*, [1995] ECR I-563.
[86] *Supra* note 26, pp. 76-77.

Regarding the fact that a Member State subjects imports to checks that render it more difficult, especially when the goods have already been checked in the State of origin, the Court has, in its more recent case law, become skeptical about the need of a second set of controls.
This skeptical approach is evident from the case *Commission v United Kingdom*[87], concerning UHT milk. The Court stated that the UK´s concerns about the product could have been met by less restrictive means than the import ban and marketing system it had instituted, such as requiring certificates from the exporting State.

Animal health is also protected by the derogations in article 36 TFEU.
In the *Bluhme* case[88], which concerned a ban on the import of all bees except the Læsø brown bees on the Danish island Læsø, the Court considered the ban to be justified on the grounds of the protection of animal health, since it was supposed to ensure the survival of this specific bee population.[89]
In the light of the *Bluhme* case, it has been discussed whether the protection of health derogations also include environmental protection, but this issue will be discussed later.

3.2.6 The protection of national treasures possessing artistic, historic or archaeological value

It is up to the Member States to define which items can fall under the definition of a "national treasure", but they must obviously possess real "artistic, historic or archeological value".

Some guidance on the possible contents of the definition can be found in the provisions and annex of Directive 93/7/EEC[90], on the return of cultural objects unlawfully removed from the territory of a Member State.
According to the Directive, "national treasures" can include objects such as pictures, paintings, sculptures, films, books, means of transport and archives, provided that they are more than 50 or 100 years old.

Another measure in this field is Regulation 3911/92[91], on exports of cultural goods, which imposes uniform controls at borders on the export of protected goods to non-EU Member States.

This derogation has in fact not yet been successful in a case before the ECJ, but in the *Art Treasures* case[92], the Italian government invoked it in order to

[87] Case 124/81, *Commission v United Kingdom,* [1983] ECR 203.
[88] Case C-67/97, *supra* note 13.
[89] *Supra* note 26, p. 77.
[90] Council Directive 93/7/EEC of 15 March 1993, on the return of cultural objects unlawfully removed from the territory of a Member State.
[91] Council Regulation 3911/92 of 9 December 1992, on the export of cultural goods.

try to justify an Italian tax on the exports of goods having an artistic, historic, archaeological or ethnographic value.
The Court however came to the conclusion that the derogation was not applicable since the disputed tax was considered to be a charge having equivalent effect to a customs duty in accordance with what is now article 30 TFEU.[93]

3.2.7 The protection of industrial and commercial property

The concept of "industrial and commercial property" constitutes patents, trademarks, copyright, design rights and geographical denominations.[94]

Two principles have been established by the Court´s case law on the compatibility of the exercise of industrial property rights with articles 34 to 36 TFEU.
The first one is that the Treaty does not affect the existence of industrial property rights granted pursuant to the legislation of the Member States.
The second one is the "principle of exhaustion", which states that an industrial property right is exhausted when a product has been lawfully distributed by the owner of the right or with his consent in the market of a Member State. After that has been done, the owner of the right cannot oppose the importation of the product into any Member State where it was first marketed.[95]

Nowadays, a big part of this field is covered by harmonized legislation[96] and therefore falls outside the scope of the treaty provisions on the free movement of goods.

3.3. The mandatory requirements

[92] Case 7/68, *Commission v Italy ("Art Treasures case"),*[1968] ECR 617.
[93] *Supra* note 26, pp. 78-79.
[94] *Supra* note 26, p. 79.
[95] *Supra* note 2, p. 41.
[96] For instance Directive 89/104/EC on trademarks and Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("The Infosoc Directive").

3.3.1 General

The problem with the derogations that are listed in article 36 TFEU is that they reflect the pritorities within the European Union when the Rome Treaty was first drafted in 1957, but the provision has never been amended in order to expand the list.
The Court has therefore developed the non-exhaustive list of mandatory requirements in order to justify indistictly applicable measures that serve objectively justifiable purposes.

The ECJ first introduced the possibility of using the mandatory requirements as justifications with the following remarks in paragraph 8 of the abovementioned *Cassis de Dijon* case[97]*:*

"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."

According to this wording, the mandatory requirements relate in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. The wording "in particular" implies that the list is not meant to be exhaustive.
Several other mandatory requirements have been established by the constantly expanding case law of the ECJ, and it does seem that the Court has in fact been rather reluctant to refuse to recognise mandatory requirements that have been put forward by the Member States. Only justifications that are of an administrative or purely economic nature seem to have been rejected.

The principle has been that the mandatory requirements can only be invoked in order to justify indistinctly applicable measures[98], but it seems that this could be changing as will de discussed later.

It is also required that the measures put forward in order to justify an obstacle on trade must be unrelated to the origin of the goods and serve legitimate objectives, but the objectives that the Court has found to be legitimate are often based on EU policies, identified in EU legislation.[99]
Additionally, they must fulfill the principle of proportionality, which means that they must be necessary in order to achieve the declared objective[100].

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[97] Case 120/78, *supra* note 28.
[98] This was established with Case 113/80, *"Irish Souvenirs", supra* note 53.
[99] *Supra* note 26, p. 116.
[100] Case 261/81, *Walter Rau Lebensmittelwerke v De Smedt PVBA,* [1982] ECR 3961, but the Court stated in paragraph 12 that: *"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*

The Member State that claims to have a reason that could possibly justify a restriction has the burden of proofing the existence of that reason, and it must be accompanied by appropriate evidence.[101]

3.3.2 What has been accepted by the European Court of Justice as mandatory requirements?

The mandatory requirements that were specifically mentioned in the *Cassis* case will first be covered, and consequently other justifications that the Court has accepted in its case law as mandatory requirements will also be covered. The list is not meant to be exhaustive, since the Court´s case law is constantly evolving.

3.3.2.1 The effectiveness of fiscal supervision

The Court is concerned about ensuring that the free movement of goods does not lead to tax evasion, but this insistance on its behalf has to a certain extent been at the expense of the interests of EU citizens.

In the *Carciati* case[102], an Italian citizen was accused of smuggling a car registered in Germany into Italy, where the use of vehicles that had been imported temporarily tax-free was restricted. The Court came to the conclusion that Member States were allowed to impose rules within their territories that had the purpose to prevent tax fraud.
The conclusion of the case thus seems to imply that the Court is willing to give the Member States a certain margin of appreciation in cases where there is a possibility of tax evasions.

3.3.2.2 The protection of public health

The protection of public health is also a derogation according to the list in article 36 TFEU and therefore the ability to refer to it as a mandatory

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to attain the same objective it should choose the means which least restricts the free movement of goods".
[101] *Supra* note 2, pp. 45-46.
[102] Case 823/79, Criminal proceedings against Carciati, [1980] ECR 2773.

requirement is not of particular importance. The Court thus most often refers to article 36 when justifications are based on public health[103].

This was verified in the *Aragonesa* case[104], where the Court specifically stated that since the protection of health was already mentioned in article 36, it was not necessary to consider it as a mandatory requirement.[105] After this judgment, the Court always seems to refer to article 36 when it is faced with a justification based on public health.

3.3.2.3 The fairness of commercial transactions

There is a clear overlap between the fairness of commercial tranactions and consumer protection, but they are often used together, as was done in the *Hollandaise Sauce* case[106].
The case concerned a German law requiring that in order to be marketed in Germany, foodstuffs containing an ingredient which was not in conformity with the traditional German recipe must carry a trade description with an additional statement indicating that the substance in question had been used, even if that substance was already included in the list of ingredients. The Court considered whether the disputed measure could be justified on the ground of consumer protection or by the need to ensure fair trading, *"which, according to settled case law, may also justify hindrances to the free movement of goods"* [107], and came to the conclusion that the measure could not be justified.

When defining what can constitute an unfair commercial practise, no account may be taken of agreements that prohibit the importation of goods that have been lawfully manufactured in another Member State.
Therefore, a company cannot plead an agreement that it is a party of in order to prevent the parallel importation of goods lawfully manufactured or marketed in another Member State. [108]

In the *Imerco* case[109], Imerco, a group of Danish hardware merchants had commissioned in the UK a china service decorated with pictures of Danish royal castles and bearing on the reverse side the words "Imerco fiftieth anniversary", but the sale of it was reserved exclusively to members of Imerco. It was agreed between Imerco and the British manufacturer that the substandard pieces, amounting to approx. 20% of the production, might be

[103] For instance in the *"Beer Purity"* case, 178/84, *supra* note 81.
[104] Joined cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, [1991] ECR I-04151.
[105] Joined cases C-1/90 and C-176/90, *ibid.* note 96, paragraph 13.
[106] Case C-51/94, *Commission v Germany ("hollandaise sauce")*, [1995] ECR I-3599.
[107] Paragraph 35 of the case, *ibid.* note 106.
[108] L. W. Gormley: "EU Law of Free Movement of Goods and Customs Union", p. 515.
[109] Case 58/80, *Dansk Supermarked A/S v A/S Imerco*, [1981] ECR 181.

marketed by the manufacturer in the UK, but that it might not under any circumstances be exported to Denmark or other Scandinavian countries. The appellant, Dansk Supermarked, obtained a number of services marketed in the UK and offered them for sale in Denmark at lower prices than Imerco was offering.
The Court stated, in paragraph 15, that *"It follows that the marketing of imported goods may be prohibited if the conditions on which they are sold constitutes an infringement of the marketing usages considered proper and fair in the Member State of importation"*.
That was however not relevant here, and the Court stated, in paragraph 16, that *"the actual fact of the importation of goods which have been lawfully marketed in another Member State cannot be considered as an improper or unfair act since that description may be attached only to offer or exposure for sale on the basis of circumstances distinct from the importation itself"*.
The Court thus came to the conclusion that the marketing of the products could not be prohibited since they had been lawfully marketed in another Member State.

This requirement has also been used to justify national rules that seek to prevent unfair marketing process, such as the selling of imported goods that constitute precise imitations of familiar domestic goods, or "passing-off" [110].
It however seems that, in order to be justified on the ground of fairness of commercial transactions, the national rule must not prohibit the marketing of goods which have been made according to fair and traditional practices in State A merely because they are similar to goods that have been made in State B.[111]

3.3.2.4 The defence of the consumer

The emphasis on the importance of consumer protection has increased in recent years and it is for example provided in article 38 of the Charter of Fundamental Rights[112] that: *"Union policies shall ensure a high level of consumer protection"*.

In cases concerning consumer protection, the Court usually has in mind *"the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect"*[113].

[110] Case 6/81, *BV Industrie Diensten Groep v J.A. Beele Handelmaatschappij BV,* [1982] ECR 707.
[111] P. Craig & G. De Búrca: *EU Law: Text, cases and materials",* p. 708.
[112] Charter of Fundamental Rights of the European Union, OJ C 83/02, of 30 March 2010. The Charter became legally binding with the Lisbon Treaty, which entered into force on 1 December 2009.
[113] *Supra* note 26, p. 117. Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung,* [1998] ECR I-4657, paragraph 31. The Court also noted in the same paragraph that it was not necessary to order an expert´s report or commission a consumer research poll on whether the consumer was likely to be misled.

The *Clinique* case[114] concerned a requirement according to German rules that all products from the cosmetic brand ”Clinique” should instead be labelled ”Linique”, in order to avoid misleading the consumers into thinking they were buying products with medicinal properties. The Court rejected the consumer protection justification on the basis that it was obvious that the use of the name did not mislead consumers in other Member States.
Similarly, in the *Mars* case[115], which concerned a complaint stating that a mars +10% promotion was in fact a hidden price rise, the Court rejected the invoked justifications on the ground that reasonably circumspect customers should be able to know that there isn´t necessarily a link between the size of publicity markings relating to an increase in a product´s quantity and the size of that increase.[116]

The Court has, however, also shown that it is prepared to relax the criteria under specific circumstances, such as when account needs to be taken of social, cultural or linguistic factors.
Such specific circumstances were relevant in the *Graffione* case[117], where the Court stated that a Member State was justified in prohibiting the sale of toilet paper and paper handkerchiefs under the trademark ”Cotonelle” if there was considered to be a sufficiently serious risk of consumers thinking they contained cotton.[118]

The ECJ as usual emphasises the principle of proportionality and it has stated that in cases where imported goods are similar to the domestic, adequate labelling should be sufficient to provide the consumers with necessary information on the product.
The abovementioned *Beer Purity* case[119] is a good example of this, but it concerned a German law prohibiting the marketing of beer in Germany that did not have specific ingredients. The Court rejected the German government´s arguments, which were that the law was necessary in order to protect consumers who associated the term ”bier” with beverages made from the specific ingredients mentioned in the disputed law.
The Court stated that adequate labeling should be sufficient in order to protect the consumers and therefore the measure was not considered to be proportionate.
The Court has in fact quite often rejected justifications based on consumer protection by stating that adequate labelling requirements can achieve the national objective with less impact on trade within the EU.[120]

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[114] Case C-315/92, *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH* (*”Clinique case”),* [1994] ECR I-317.
[115] Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH (”Mars Case”),* [1995] ECR I-1923.
[116] *Supra* note 26, p. 118.
[117] Case C-313/94, *F.lli Graffione SNC v Ditta Fransa,* [1996] ECR I-6039.
[118] *Supra* note 26, pp. 118-119.
[119] Case 178/84, *supra* note 81.
[120] *Supra* note 111, p. 708.

3.3.2.5 Other mandatory requirements

I. The protection of the environment

The protection of the environment is one of the basic principles in EU law, but the importance of environmental protection is emphasized in article 191 TFEU, article 3 TEU, and article 37 of the Charter of Fundamental Rights of the European Union[121].

The Court has also emphasized the importance of environmental protction in its case law, but for instance it stated, in paragraph 8 of the *Deposit and Return* case[122], that the protection of the environment is *"one of the Community´s essential objectives, which may as such justify certain limitations of the principle of free movement of goods"*.

The Court has justified several national measures on the grounds of the protection of the environment, such as prohibiting the importation of waste from other Member States[123], a deposit- and return system for containers[124], a ban on certain chemical substances which also provides for exceptions when no safer replacement is available[125], and obliging suppliers of electricity to buy all electricity that has been produced from renewable energy sources from within a limited supply area[126].

The protection of the environment is linked to the protection of human life and health. In the *Bluhme* case[127], the ECJ treated environmental protection as part of public health and therefore it could be justified according to what is now article 36 TFEU.

Justifications based on environmental protection will be discussed further in chapter 4 below.

II. The improvement of working conditions

Health and safety at work normally fall under the derogations on public health in article 36 TFEU, but the improvement of working conditions can, even in the absence of any health considerations, be regarded as a mandatory requirement.

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[121] *Supra* note 112.
[122] Case C-302/86, *Commission v Denmark ("Deposit and Return case")*, [1988] ECR 4607.
[123] Case C-2/90, *supra* note 14.
[124] Case C-302/86, *supra* note 122.
[125] Case C-473/98, *Toolex Alpha*, [2000] ECR I-5681.
[126] Case C-379/98, *Preussen Elektra*, [2001] ECR I-2099.
[127] Case C-67/97, *supra* note 13.

In the *Oebel* case[128], concerning national legislation that prohibited the baking of bread at night, Advocate General Capotorti stated in his opinion[129] that such measures could be justified on the grounds that they served to improve working conditions.
The Court found the measure to fall outside the scope of what are now articles 34 and 35 TFEU, but it still indirectly confirmed the Advocate General´s opinion by stating that the prohibition on night baking was a legitimate element of economic and social policy decision in a manifestly sensitive sector.[130]

III. The promotion of culture

This justification can be a little problematic since it can obviously prove to be difficult to define what the concept of ”culture” can consist of.
The Court has therefore been rather reluctant to decide on it.

However, in the *Cinéthéque* case[131], concerning French legislation aimed at encouraging the creation of cinematographic works, the Court acknowledged that the protection of culture may, under specific conditions, constitute a mandatory requirement, even though that was not of relevance in its conclusion.

IV. Preventing the risk of seriously undermining the financial balance of the social security system

As has been mentioned above, economic reasons can never justify an obstacle to the free movement of goods.
However, in the *Decker* case[132], concerning the refusal by a Member State to reimburse the cost of a pair of spectacles with corrective lenses that were purchased from an optician that was established in another Member State, the ECJ stated that the risk of seriously undermining the financial balance of the social security system might constitute an overriding reason in the general interest capable of justifying a barrier to the free movement of goods.
The Court however came to the conclusion that the disputed rule could neither be justified on that ground nor on the ground of the protection of public health.

V. The protection of fundamental rights

[128] Case 155/80, *Oebel*, [1981] ECR 1993. See especially paragraph 12 of the case.
[129] Opinion of Mr Advocate General Capotorti, delivered on 27 May 1981, in case 155/80, *ibid.* note 119.
[130] P. Oliver: ”Free movement of goods in the European Community”, p. 315.
[131] Case 60-61/84, *Cinéthéque SA v Fédération nationale des cinémas francais,* [1985] ECR 2605.
[132] Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés,* [1998] ECR I-1831.

It is clear from the *Schmidberger* case[133] that the protection of fundamental rights can be relevant as a justification for indistinctly applicable measures. The ECJ was of the opinion that a decision by authorities in Austria not to ban a demonstration by an environmental group that led to the closure of a busy motorway impeded trade and was therefore caught by what is now article 34 TFEU. When considering whether the restriction could be justified, the Court stated that while national authorities enjoyed a wide margin of discretion when weighing different interests, it was necessary to determine whether the restrictions placed upon trade within the EU are proportionate in the light of the legitimate objectives pursued, namely the protection of fundamental rights such as the freedom of expression and assembly. The conclusion was that the restrictions were justified since the legitimate aim of the demonstration could not be achieved by less restrictive measures.
On the importance of respecting fundamental rights, the Court stated in paragraph 74 of the case that *"..since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."*

VI. The maintenance of press diversity

The Court has confirmed that the maintenance of press diversity can be justified as a mandatory requirement[134].
In the *Familiapress* case[135], which concerned a ban in Austria on publications offering readers the chance to take part in games for prizes, the ECJ stated that the maintenance of press diversity may constitute an overriding requirement justifying a restriction on the free movement of goods. The Court stated that such diversity helped to safeguard the freedom of expression, which is one of the fundamental freedoms guaranteed in the EU and also protected by article 10 of the European Convention on Human Rights[136].

It should be mentioned that Peter Oliver and Stefan Enchelmaier[137] are of the opinion that instead of considering fundamental rights and the maintenance of press diversity as mandatory requirements, the Court should have subsumed them with the public policy justification in article 36 TFEU,

[133] Case C-112/00, *supra* note 67.
[134] Some commentators, such as Laurence W. Gormley in his book "EU Law of Free Movement of Goods and Customs Union", seem to be of the opinion that the maintenance of press diversity should be placed within the abovementioned category of fundamental rights.
Most commentators however put the maintenance of press diversity in a special category, as is done here.
[135] Case C-368/95, *Familiapress*, [1997] ECR I-3689.
[136] The European Convention on Human Rights was signed in Rome on 4 November 1950.
[137] *Supra* note 46, pp. 697-699.

since such rights must rank as one of the "fundamental interests of society".

VII. The protection of road safety

The Court has repeatedly acknowledged that road safety can be capable of justifying a hindrance to the free movement of goods.
For instance, in paragraph 40 of the case *Commission v Finland*[138], the Court stated that *"it is not in dispute that road safety does constitute an overriding reason in the public interest capable of justifying a hindrance to the free movement of goods"*.

In the abovementioned *Trailers* case[139], the Court accepted that the disputed measures could be justified on the grounds of the need to ensure road safety, which according to case law *"constitutes an overriding reason relating to the public interest capable of justifying a hindrance to the free movement of goods"*[140].

VIII. The fight against crime

In the case *Commission v Portugal*[141], concerning a ban in Portugal on the affixing of tinted window films on cars, the Court stated, in paragraph 38 that: *"The fight against crime and ensuring road safety may constitute overriding reasons in the public interest capable of justifying a hindrance to the free movement of goods"*.
The Court however came to the conclusion that the disputed ban was not proportionate and could therefore not be justified.

IX. The protection of animal welfare

Animal health can be justified by invoking article 36 TFEU, but animal welfare on the other hand can possibly be justified as a mandatory requirement, at least according to the *Andibel* case[142].
The case concerned a Belgian decree that prohibited the importation of certain mammals, listed in an annex to it, into Belgium.

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[138] Case C-54/05, *Commission v Finland,* [2007] ECR I-2473. Similar results of the Court can also bee seen in case C-55/93, *Van Schaik,* [1994] ECR I-4837 (paragraph 19); case C-314/98, *Snellers,* [2000] ECR I-8633 (paragraph 55); and case C-451/99, *Cura Anlagen,* [2002] ECR I-3193 (paragraph 59).
[139] Case C-110/05, *supra* note 36.
[140] Paragraph 60 of the case.
[141] Case C-265/06, *Commission v Portugal,* [2008] ECR I-2245.
[142] Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat,* [2008] ECR I-4475.

The Court stated in paragraph 27 of the case that*"…the protection of animal welfare is a legitimate objective in the public interest, the importance of which was reflected, in particular, in the adoption by the Member States of the Protocol on the protection and welfare of animals.."*

X. The protection of national or regional socio-cultural characteristics

In the *Torfaen* case[143], concerning national rules that prohibited retailers from opening their premises on Sundays, the Court stated, in paragraph 14, that *"such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States"*.
It should be mentioned that after the *Keck* case, indistinctly applicable restrictions on Sunday trading are considered to fall outside the scope of article 34 TFEU.

4. The Relationship between the Derogations in Article 36 TFEU and the Mandatory Requirements

[143] Case 145/88, *Torfaen Borough Council v B & Q plc,* [1989] ECR 3851.

4.1 General

The traditional view has been that the mandatory requirements are separate from the derogations in article 36 TFEU, and that they can only be invoked in cases where the disputed measures are considered to be indistinctly applicable.

The European Court of Justice however seems to have found ways to overcome this separation without renouncing its earlier practise, one could even say that it has "glossed" over the issues of classification which has led to the fact that the Member States have gradually been able to rely more often on the broader list of mandatory requirements.

Some scholars have therefore argued that the separation is only artificial and that the Court is in fact moving towards simplification and treating the mandatory requirements in the same way as the derogations in article 36 TFEU.

According to Catherine Barnard[144], the Court originally used to take a three-stage approach in cases concerning obstacles to the free movement of goods:

1. Classified whether the measure was distinctly or indistinctly applicable.
2. Found a breach of what is now article 34 TFEU.
3. If the measure was distinctly applicable then it checked if the derogations listed in article 36 TFEU could be used, but if it was indistinctly applicable, then it considered whether the derogations in article 36 or the mandatory requirements could be invoked.

However, the Court has recently been replacing this three-stage approach with a two-stage approach:

1. Notes that the measure impedes or creates an obstacle to trade between Member States, without mentioning the question of discrimination.
2. Considers whether one of the derogations in article 36 or a mandatory requirement can be applied.

A few different theories concerning the possible status of this confusing relationship have been put forward by scholars. It is possible to divide them into three main categories that will be covered in chapter 4.3.
We will however begin with analysing the most controversial case law.

[144] *Supra* note 26, p. 126.

4.2 Case law

For practical reasons, the case law will be divided into two categories.
The former category focuses on the special circumstances where the protection of the environment has been invoked in order to justify measures that are obviously distinctly applicable, but the latter consists of cases where distinctly applicable measures have been justified by invoking other mandatory requirements than the protection of the environment.

4.2.1 Cases concerning the protection of the environment

”Walloon Waste Disposal”[145]

The case concerned a regional decree in Belgium that banned imports of waste into the region Wallonia from other Belgian regions or other EU Member States. The decree did not cover the disposal of locally produced waste and thus treated imports more harshly than domestic products.
Despite the fact that the decree was obviously directly discriminatory, the Court found it be indistinctly applicable and thus decided to apply the “imperative requirements of environmental protection” The Court emphasised the special nature of waste and how important it was for each area to be able to dispose of its own waste, but it stated in paragraph 34 of its decision 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”*.

This case is probably one of the best examples of how the Court has found measures that are obviously discriminatory to be indistinctly applicable and therefore capable of being justified according to the mandatory requirements.
The case has received lots of criticism from commentators[146], but the fact that the Court found the measures to be non-discriminatory militates against any considerations that the case could possibly be considered as authority for the extension of the mandatory requirements to discriminatory restrictions.[147]

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[145] Case C-2/90, *supra* note 14.
[146] For instance from N. Bernard, in: ”Discrimination and Free Movement in EC Law”, where he states, on page 95, that the reasonsing was not satisfactory and that *”the measure was clearly discriminatory and could not suddenly become non-discriminatory merely because it followed a sound principle of environmental policy”*.
[147] E. Spaventa: “On discrimination and the theory of mandatory requirements”. Cambridge yearbook of European legal studies, 3., 2002, p. 462.

”Dusseldorp”[148] and ”FFAD” [149]

The circumstances in this case were quite similar to the abovementioned *Walloon Waste* case, but in *Dusseldorp,* the Court analysed a restriction on the export of waste, which fell under what is now article 35 TFEU.
The conclusion in the case is very interesting, since the Court seemed to accept that mandatory requirements on the protection of the environment can justify discriminatory measures covered by article 35, but it expressly ranked the derogations in article 36 with the mandatory requirement on the protection of the environment.

The Court thus took into consideration the justification put forward by the Dutch government on the ground of environmental protection, despite the fact that the disputed measures were clearly discriminatory. It stated, in paragraph 44, that *”even if”* the national measure could have been so justified, the fact that it pursued aims of a purely economic nature excluded the possibility of relying on any justificatory ground.

This reasoning is especially confusing since, as has been mentioned, article 35 applies only to distinctly applicable measures and therefore justifications based on mandatory requirements should not be available.

The opinon of Advocate General Jacobs in the case is also very interesting, but he acknowledged, in paragraph 90 of his opinion[150], that the Court had been *”obliged to adopt rather tortuous reasoning”* in some cases and espcially in the *Walloon Waste* case.

The Court´s conclusions in the *FFAD* case were equally confusing as in *Dusseldorp,* but it also concerned restrictions on exports according to article 35 TFEU.
The Court came to the conclusion in *FFAD,* that in those specific circumstances a restriction could not be justified on the grounds of environmental protection, thus implying that if the facts of the case would have been different, such a justification could have been possible.

”Aher Waggon”[151]

The case concerned German rules on air pollution that distinguished according to the place of registration of aircrafts, which meant that aircrafts that were already registered in Germany at the time when the rules were enacted were treated more favourably.

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[148] Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer,* [1998] ECR I-4075.
[149] Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune,* [2000] ECR I-3743.
[150] Opinion of Mr Advocate General Jacobs delivered on 23 October 1997, in case C-203/96, *supra* note 148.
[151] Case 389/96, *Aher-Waggon GmbH v Germany,* [1998] ECR I-4473.

However, quite surprisingly, the Court did not consider the rules to be discriminatory, and therefore they could be justified on the grounds of public health and environmental protection.

Eleanor Spaventa[152] is of the opinion that *"there can hardly be no doubt that the effect of the rule was to impede noise polluting planes which had been registered abroad from registering in Germany.."*. She continues by stating that the form of the rule was however arguably non-discriminatory and therefore it could possibly be argued that the rule was indistinctly applicable.
It is rather difficult to agree with her reasoning, since the disputed measure clearly discriminated, both in law and in fact, against aircrafts that were registered in other Member States.

"Bluhme"[153]

The case, which has already been mentioned a few times, concerned a Danish law that only permitted a special species of bees to be imported into a small Danish island.
The Court found the measure to be indistinctly applicable, which is rather strange since it obviously constituted a quantitative restriction. Consequently, it came to the conclusion that the measure could be justified on the ground of the protection of life and health of animals in article 36, by referring to the "maintenance of biodiversity".

It has been discussed whether the Court was actually implying that the derogations on the protection of health in article 36 included environmental protection, since it referred to the maintenance of biodiversity.
The case law has however been rather unclear, although a few cases seem to suggest that there could be a possibility for such an interpretation[154].
Niamh Nic Shuibhne is of the opinion that the Court preferred an "imaginative reading" of article 36 instead of taking the bolder approach as it did in the *Walloon Waste*[155] and *Decker*[156] cases.[157]

"Preussen Elektra"[158]

The case concerned a national legislation that obliged suppliers of electricity to buy all electricity produced in their area of supply from renewable energy sources at minimum prices, higher than the real economic value of that type of electricity. The financial burden would then be distributed between those

[152] *Supra* note 147, p. 463.
[153] Case C-67/97, *supra* note 13.
[154] Cases like *Aher-Waggon* and *Preussen Elektra* seem to suggest that the public health derogation might include environmental protection, though the *FFAD* case (Case C-209/98, [2000] ECR I-3473) seems to point in the opposite direction.
[155] Case C-2/90, *supra* note 14.
[156] Case C-120/95, *supra* note 132.
[157] "The Free Movement of Goods and Article 28 EC: an Evolving Framework", p. 421.
[158] Case C-379/98, *supra* note 126.

undertakings and upstream private electricity network operators. The aim of the legislation was to contribute to the protection of the environment by reducing greenhouse gas emissions.
Despite the fact that the disputed legislation directly favoured domestic production and must therefore be assumed to have been directly discriminatory, the Court came to the conclusion that the measure was ”not incompatible” with what is now article 34. In reaching its conclusions, the Court referred to international conventions, the Amsterdam Treaty and relevant secondary legislation on environmental protection.

The reasoning of the Court can possibly be authority for the fact that environmental protection can be read into the public health derogation in article 36, but the Court stated, after discussing environmental protection, that: *”It should be noted that that policy is also designed to protect the health and life of humans, animals and plants”.*[159]

The opinion of Advocate General Jacobs[160] is very interesting, but he called upon the Court to clarify the situation it has created, by stating in paragraph 229 of his opinion that *”In view of the fundamental importance for the analysis of Article 30* [now 36] *of the Treaty of the question whether directly discriminatory measures can be justified by imperative requirements, the Court should, in my view, clarify its posisiton in order to provide the necessary legal certainty.”*
He pointed out a number of decisions where the ECJ had *“relied on imperative requirements in cases in which it was at least doubtful whether the measure could be considered as applying without distinction”*.
He also suggested that there could be good reasons for allowing environmental protection to be pleaded as justification, even in cases where there is direct discrimination, or as he stated in paragraph 226, on how the case showed that it was *”desirable that even directly discriminatory measures can sometimes be justified on grounds of environmental protection”*.
The Court did not respond to his suggestions.

4.2.2 Cases concerning other mandatory requirements

”Prantl”[161]

[159] Paragraph 75 of the case.
[160] Opinion of Mr Advocate General Jacobs delivered on 26 October 2000, in case C-379/98, *supra* note 126.
[161] Case 16/83, *Criminal proceedings against Karl Prantl,* [1984] ECR 1299.

This case is a good example of how the Court has found a measure that is obviously directly discriminatory to be indistinctly applicable and thus possibly justifiable by a mandatory requirement.
It concerned a German statutory provision that provided that only wines from certain specific regions of Germany could be marketed in bottles of a particular shape.
The Court took into consideration the justifications the German authorities put forward, based on consumer protection, and came to the conclusion that the proportionality test had not been fulfilled, since it would have been more adequate to put labels on the bottles.

”Sparkling Wine”[162]

First after *Cassis*, the Court often seemed to use the mandatory requirements as a tool for qualifying MEEs.
The *Sparkling Wine* case is one of the first judgments where the Court started to change its application of the mandatory requirements from just being qualifications of MEEs to being their basis for justification.[163]
The case concerned German rules that prohibited the marketing of a French brand of wine (”Petillant de Raisin”) in traditional champagne-type bottles, but it had always been marketed in such bottles in France.
The Court started with stating that the disputed measure was a MEE in accordance with article 34.
After coming to that conclusion, instead of using the mandatory requirements when it was qualifying whether the measure fell within the scope of article 34, it rather went directly into examining whether the measure could possibly be justified under the mandatory requirements of consumer protection and fair trading.

”Aragonesa”[164]

The case was mentioned above in connection to the protection of public health as a mandatory requirement. It concerned regional laws in Spain that prohibited the advertising of alcoholic beverages containing more than 23 degrees of alcoholic strength.
The Court´s conclusion that it was not necessary to consider the protection of public health as a mandatory requirement since it was already included in article 36, implies that the Court looks at the mandatory requirements as justifications rather than as a tool for the qualification of article 34 TFEU.

”De Agostini”[165]

[162] Case 179/85, *Commission v Germany (”Sparkling Wine case”)*, [1985] ECR 389.
[163] P. Pecho: ”Goos-Bye Keck?: A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05”, p. 266.
[164] Joined cases C-1/90 and C-176/90, *supra* note 105.

The case concerned a ban on advertising certain products on television in Sweden. It was held to have more impact on products from other Member States than on domestic products, since it is always more difficult for foreign companies to penetrate markets in other Member States.
The Court considered in its judgment whether the ban could be justified under the mandatory requirements of consumer protection, despite the fact that the measure was obviously distinctly applicable.

”Decker”[166]

The case concerned a rule in Luxembourg that subjected the reimbursement of spectacles purchased abroad to prior authorisation, but this was not required if the spectacles were bought within Luxembourg.
What is very interesting about the case is that, despite the fact that the Commission had argued that the measure was discriminatory, the Court did not consider the issue of discrimination, but instead it went straight into considering whether it could be justified among other things under the mandatory requirement of the preservation of the financial balance of the social system. The Court however came to the consclusion that the measure could not be justified.

However, not all commentators seem to agree on the fact that the measure was directly discriminatory.
Eleanor Spaventa[167] is for instance of the opinion that it is difficult to assess whether the measure would have been considered as discriminatory, since previous case law shows that the Court has mainly found rules that distinguish on grounds of place of production to be discriminatory, but the disputed rule in *Decker* did not fall within that category since it provided for a different regime according to where the product was purchased, not according to where it had been produced.
Eleanor points out two other cases where similar issues were at stake in order to prove her point. The *French Newspapers* case[168], concerning a French rule that provided that newspapers publishers would not be allowed tax advantages in respect of publications printed in other Member States. The Court however did not discuss the mandatory requirements nor did it refer to discrimination.
In the *Safir* case[169], however, within the scope of the free movement of services, considering a rule that distinguished according to the place of establishment of the insurance company in granting tax benefits to insuranse subscribers, Advocate General Tesauro called in his opinion[170] for a

[165] Case C-34/95, *Konsumentenombudsmannen v De Agostini*, [1997] ECR I-3843.
[166] Case C-120/95, *supra* note 132.
[167] In ”On Discrimination and the Theory of Mandatory Requirements”, *supra* note 147, pp. 460-461.
[168] Case 18/84, *Commission v France (”French Newspapers case”)*, [1985] ECR 1339.
[169] Case C-118/96, *Jessica Safir v Skattemyndigheten i Dalarnas Län*, [1998] ECR I-1897.
[170] Opinion of Mr Advocate General Tesauro delivered on 23 September 1997, in case C-118/96, *ibid.* note 169.

clarification on whether the law should be considered to be directly discriminatory or not. The Court, however, did not respond to his request.

”Trailers”[171]

The facts of this landmark decision have been covered, but one of the interesting factors of the case is that the Court, in paragraphs 58 and 59, decides that the disputed measure is a MEE and then consequently states that such a restriction may be justified on one of the grounds in article 36 or in order to meet mandatory requirements. Thus, it does not make a distinction between legitimate reasons that limit the scope of article 34 and reasons that justify its violation.

4.3 Different theories concerning the relationship between the derogations in article 36 TFEU and the mandatory requirements

4.3.1 The mandatory requirements weighed up within article 34 TFEU

[171] Case C-110/05, *supra* note 36.

According to this theory, the mandatory requirements fall within the scope of article 34 rather than article 36 TFEU, since the latter provision constitutes an exception to the fundamental principle of the free movement of goods, and such exceptions must always be interpreted in a narrow manner.

The mandatory requirements are thus seen as a negative criterion of qualification of a MEE, which means that if a mandatory requirement is considered to be satisfied, the measure will consequently fall outside the scope of article 34 TFEU.
However, if a Member States is unsuccessful in invoking the mandatory requirements, it may still try to rely on the justifications listed in article 36.

It is up to the Court to define which measures can be categorised as MEEs, and therefore this inclusion of mandatory requirements in making that definition is a legitimate exercise of the interpretative role of the Court.

A good example of a case that seems to imply this approach is the *Kohl* case[172], where the Court referred to the *Irish Souvenirs* case[173], and stated that considerations of consumer protection *"may in certain circumstances be taken into account in establishing whether national measures applicable without distinction to domestic and imported goods are caught by the prohibitions laid down in article 30* [now 34]; *they cannot, however, serve to justify restrictions on imports under article 36"*.

The case law that followed went in both directions, the Court used in turn the mandatory requirements both as a tool for qualification of MEEs and as a justification, but one of the first cases where they were used as a justification was in the abovementioned *Sparkling Wine* case[174].

In support of this approach, commentators have mentioned arguments such as that article 36 TFEU must be interpreted in a narrow manner since it provides for exceptions from one of the fundamental freedoms of the EU and that it also provides for a certain consistency in the distinction between the mandatory requirements and the derogations in article 36.

Another argument for it is the inclusion of public health as a mandatory requirement in the *Cassis* case[175], but if the Court would not have wanted to make a distinction between the mandatory requirements and the derogations in article 36, it would probably not have mentioned public health as a possible mandatory requirement.

[172] Case 177/83, *Th. Kohl KG v Ringelhan & Rennett SA and Ringelhan Einrichtungs GmbH.*, [1984] ECR 3651, paragraph 19.
[173] Case C-113/80, *supra* note 53.
[174] Case 179/85, *supra* note 162.
[175] Case 120/78, *supra* note 28.

On the other hand, it may be pointed out that it is not obvious what practical difference it would make whether a measure was to be considered as falling outside the scope of article 34 or caught by that article, but justified.[176]

The fact that the Court has increasingly been using the abovementioned two stage analysis[177] when it is evaluating whether a measure impedes the free movement of goods strongly implies that the mandatory requirements have in fact become extrinsic to the definition of MEEs. Cases that support this evolution are for instance the abovementioned *Sparkling Wine*[178], *Aragonesa*[179], *Decker*[180], *Dusseldorp*[181], and the *Trailers*[182] cases.

Additionally, the *Familiapress* case[183] seems to imply that the mandatory requirements are used as justifications, but the fact that the Court required a Member State that was invoking a mandatory requirement to comply with the principle of respect for fundamental rights, which are only applicable when they are acting within the scope of EU law, must mean that the mandatory requirements do not have the effect of taking a case outside the scope of article 34.[184]

4.3.2 The mandatory requirements as a judicial extension to the derogations in article 36 TFEU

According to this approach, the mandatory requirements would be available not only in the case of indistinctly applicable measures, but also in the case of distinctly applicable MEEs and quantitative restrictions.
It can often seem quite controversial that the Court seems to accept measures that are indirectly discriminatory as indistinctly applicable measures, while directly discriminatory measures fall under distinctly

[176] A. Arnull: ”The European Union and its Court of Justice”, p. 408.
[177] The Court then starts by stating that the measure is a MEE and consequently assesses whether it can be justified by the derogations in article 36 or the mandatory requirements.
[178] Case 179/85, *supra* note 162.
[179] Joined cases C-1/90 and C-176/90, *supra* note 105.
[180] Case C-120/95, *supra* note 132.
[181] Case C-203/96, *supra* note 148.
[182] Case C-110/05, *supra* note 36.
[183] Case 368/95, *supra* note 135.
[184] *Supra* note 176, p. 410.

applicable measures and cannot therefore be justified under the mandatory requirements.
Indirect discrimination does not necessarily always have to be less harmful than direct discrimination and therefore it is perhaps not always justifiable to make this distincion.

Many commentators have supported this approach, including Peter Oliver[185], Catherine Barnard[186], J.H.H. Weiler[187], Peter Von Wilmowsky[188] and Paul Craig and Gráinne De Búrca[189]. Advocate General Jacobs has also supported this approach, in his opinions in the *Dusseldorp*[190] and *Preussen Elektra*[191] cases.

To support this theory it can be pointed out that the Court´s approach in applying all the four freedoms[192] has converged in the recent years, though with some exceptions. This means that if the Court´s traditional approach would be applied to all of the four freedoms, the fact that the list in article 36 is longer than the corresponding lists for the other freedoms[193], would inevitably lead to unnecessary divergences.[194]
For instance, the protection of industrial and commercial property, which is one of the derogations listed in article 36, is a mandatory requirement in relation to the free movement of services[195], but it must be considered to be undesirable that similar grounds of justifications are applied differently, depending on whether goods or services are involved.

Paul Craig and Gráinne De Búrca are of the opinion that there is no reason why phrases within article 36, such as the protection of the health and life of humans, could not be interpreted in a way so they could also include matters like consumer protection or the protection of the environment for instance.
To support this opinion, they have pointed out the fact that the Court has construed other Treaty provisions in a far more expansive manner and that if it was legitimate for the Court to to create a non-exhaustive list of mandatory requirements in the *Cassis* case, then why should it not be possible to read article 36 in such a way as to include matters that are of high importance nowadays?[196]

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[185] *Supra* note 130, pp. 349-376.
[186] *Supra* note 26.
[187] J.H.H. Weiler: ”The Constitution of the Market Place”, in ”The Evolution of EU Law”, pp. 349-376.
[188] ”Waste Disposal in the Internal Market: the State of Play after the ECJ´s ruling on the Walloon Import Ban”, CML Rev., 30, p. 541.
[189] *Supra* note 103, pp. 704, 707 and 712.
[190] Case C-203/96, *supra* note 148.
[191] Case C-379/98, *supra* note 126.
[192] The four freedoms include the free movement of goods, capital, services and persons.
[193] Articles 45(3) TFEU (the free movement of workers), article 52 TFEU (right of establishment), and article 65 (free movement of capital and payments).
[194] *Supra* note 48, p. 691.
[195] P. Oliver and R. Wulf-Henning: “The Internal Market and the Four Freedoms”, vol. 41, 2004, p. 435. Also case 62/79, *A Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, [1980] ECR 833.
[196] *Supra* note 111, p. 707.

What also makes this theory attractive is its simplicity, it would provide some legal certainty on the issue and it would also make it unnecessary to decide whether a measure is distinctly applicable or not, but the concept of discrimination is not always easy to apply.
The proportionality test would then ensure effective policing of discriminatory measures and those measures that constitute ”arbitrary discrimination” according to article 36 TFEU will not be saved under those circumstances, regardless of whether they are indistinctly or distinctly applicable.
Article 18 TFEU can also be relied upon, but it expressly prohibits any discrimination on grounds of nationality.

Additionally, the mandatory requirements do have the same properties as the grounds of justification in article 36. This view was confirmed by the opinion of Advocate General Van Gerven in the *Aragonesa* case[197], where he was discussing the fact that the public health derogation was available both in article 36 and as a mandatory requirement.
He noted, in paragraph 14 of his opinion, that the distinction had *”little if any practical importance, since the conditions governing the applicability of the "Cassis de Dijon" doctrine and of Article 36 are the same (absence of harmonization, examination of the criteria of necessity and proportionality, prohibition of arbitrary discrimination or disguised restriction on trade)”*.
As has been mentioned, the Court came to the conclusion that it was not necessary to consider whether the public health derogation could be invoked as a mandatory requirement, since it was already available within article 36.

The biggest flaw of this theory is that it could pose problems concerning the legitimacy of the Court´s actions, but it has constantly been held that Treaty derogations must be interpreted in a restricted manner since they are derogations from fundamental freedoms that have been granted to EU citizens.

Eleanor Spaventa is of the opinion that it is important that the distinction between the derogations in article 36 and the mandatory requirements will be preserved. She has stated that *”to dispose of it would imply that the Court is amending the Treaty via judicial interpretation and would thus cast considerable doubts as to the legitimacy of the Court´s doing”*[198].

4.3.3 The mandatory requirements as objective justifications for indirectly discriminatory measures

[197] Opinion of AG Van Gerven, delivered on 11 June 1991, in joined cases C-1/90 and C-176/90, *Aragonesa*, *supra* note 96.
[198] *Supra* note 147, p. 457.

Most commentators usually just consider the two abovementioned theories, but according to Eleanor Spaventa[199], there is a third option, or to treat the mandatory requirements as objective justifications for indirectly discriminatory provisions.

According to this theory, indistinctly applicable measures can only be caught by article 34 as long as they affect imported goods more than domestic goods, and this effect cannot be objectively justified.
The mandatory requirements are thus seen as a judicial codification of the interests that are not considered to be inconsistent with EU law and thus ”legitimate” regulatory policies of the Member States, provided that they are also proportionate.

The concept of objective justifications should be distinguished from the assessment of comparability of situations that is performed in order to asssess whether there is any discrimination, either direct or indirect.
The emphasis is thus on establishing whether there is an objective difference that brings the rule outside the scope of the prohibition on discrimination.[200]

Elaine argues that the effects of measures are sometimes not conclusive on whether it is indirectly discriminatory since *”there might be an objective reason which justifies the different impact of the rule, a legitimate aim, ie 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”*[201]

This theory maintains the distinction between the mandatory requirements and the justifications listed in article 36 and thus allows for a certain degree of consistency with the Court´s rules concerning the exhaustive listing and narrow interpretation of the derogations in article 36.

The main obstacle of this theory is that in order to share it, one must be persuaded that the scope of article 34 is limited to a prohibition on discriminatory rules.
This in fact renders the theory inapplicable since it cannot be denied that non-discriminatory rules can be classified as MEEs if they impede access to the market.

[199] *Supra* note 147.
[200] *Supra* note 147, pp. 468-469.
[201] *Supra* note 147, pp. 468-470.

5. Conclusions

It must often be difficult for national courts to find the right balance in cases concerning restrictions on fundamental freedoms such as the free movement of goods.
The situation as regards the relationship between the derogations from the free movement of goods listed in article 36 TFEU and the mandatory requirements remains unclear and it is therefore of great importance that the European Court of Justice will give clear guidelines on the matter.

The evidently blurring line between those two means of justification raises new questions, such as if the mandatory requirements are to be considered as a judicial completion of article 36 and if so, then what about the principle of interpreting exceptions to fundamental freedoms in a restricted manner?

Out of the three theories that have been put forward, the approach to view the mandatory requirements as an extension to the derogations in article 36 is the most logical.
Its adoption would lead to a much-wanted legal certainty and simplification, but the principle of proportionality, along with other measures, would ensure that any possible abuses would be adequately policed.

Another strong point is that the list over possible derogations in article 36 does not reflect adequately interests that are of high importance nowadays and are even heightened elsewhere in the Treaties, such as the protection of the environment and consumer protection.
It does not make sense to approach justifications such as public health and consumer protection differently, just because the index of article 36 has not been changed since 1957, or like J.H.H. Weiler stated so correctly:
"It is one thing to construe existing derogations narrowly to avoid their abuse as means for disguised restriction to trade. It is quite another thing to freeze the Community and its Member States in defining the balance between free trade and other competing values in a time capsule sealed in 1957" [202].

Then the question arises whether a Treaty amendment would be needed?
Paul Craig and Gráinne De Búrca are of the opinion that such an amendment would not be needed, but they have pointed out that in the light of for example the *Cassis* judgment, the Court should be able to interpret the derogations in article 36 more widely, in order to include important justifications that are not listed therein.[203]

[202] *Supra* note 187, p. 364.
[203] *Supra* note 111, p. 107.

The consequences of the recently decided *Trailers* case[204] are yet to be seen, but it can be assumed that the adoption of a market access test like the Court seems to be implying to use there would be an ideal solution.
It would remove the need for classifying the disputed measures as distinctly or indistinctly applicable and abolish the distinction between the justifications listed in article 36 and the mandatory requirements.
We could then have a general objective justifications test, where each case would be considered on its individual merits.

Whatever path the Court will choose in the end, it is clear that it must act as soon as possible in order to provide for a long-needed legal certainty and consistency, which is necessary in order for the aims of the internal market to be fulfilled.

[204] Case C-110/05, *supra* note 36.

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