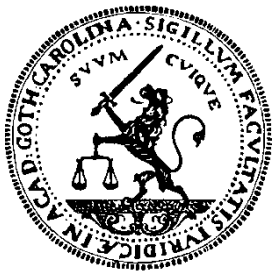

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Free Movement of Goods - Justifying Restrictions under the Derogations listed in Art. 36 TFEU and the Mandatory Requirements

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Contents

Summary

Art. 36 TFEU is an exception clause which provides that quantitative restrictions or measures having equivalent effect to quantitative restrictions falling under Art. 34 and 35 TFEU may be justified under certain circumstances. If a national measure can be considered liable to hindering the trade between Member States, the national measure can be justified by one of the derogations listed in Art. 36. The Court has interpreted Art. 36 TFEU strictly. Discriminatory measures will be carefully scrutinized to make sure that the defense is guaranteed.

The list in Art. 36 TFEU is exhaustive and therefore, the Court developed an open-ended list of so-called mandatory requirements in *Cassis de Dijon*. 'Mandatory requirements' or 'public interest requirements' can only be raised if the measure is considered to be indistinctly applicable a measure having equivalent effect to quantitative restrictions. The list of mandatory requirements is wider in scope than the derogations listed in Art. 36 TFEU; (a) indistinctly applicable or indirectly discriminatory measures should be considered to fall under *Cassis de Dijon* and (b) distinctly applicable or directly discriminatory measures should be considered to fall under Art. 36 TFEU.

These exceptions have to be shown by the Member State that the objectives of the rule are necessary and achievable. The relationship between the two sets of justifications is discussed in this thesis.

Preface

My interest in the Internal Market Law arouse when I studied the second course ‘Internal Market Law’ of the masters programme of European Business Law. My decision on specializing my competence in this field was confirmed when I read the course ‘New Challenges in the Internal Market’. It was then that I decided that I would write my thesis within this field, which I today can say that it was the right decision made.

Not only have it been fun and interesting to write about the exception clause to the free movement of goods, it has also honestly been very challenging. I have been lucky to have my wonderful and patient family and friends by my side during this term, but also throughout the whole master’s programme. I appreciate all the support they have been giving me and the positive attitude they given to motivate me moving forward.

I want to thank Eduardo Gill-Pedro for all the time he has been taking to help me and guide me. Not only has he been my supervisor during the masters programme, but he has also been my teacher in most of the courses, such as the Internal Market Law courses.

Lastly, I am very grateful to have been given the opportunity to read the master programme of European Business Law, where I have learned so many new things in EU law and met wonderful people. I can say that it has been a fun ride, without a doubt.

Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECJ	The European Court of Justice
ECSC	The European Coal and Steel
EEC	European Economic Community
EU	European Union
FTA	Free Trade Area
MEQR	Measure having equivalent effect on quantitative restriction
QR	Quantitative restriction
SEA	Single European Act
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1. Introduction

1.1 Background

Having goods flowing in and out from the European Union (further EU) can be seen as an obvious right for the concerned parties. The same refers to goods flowing in and out within EU from one Member State to another. One of the aims with creating the EU has been to have external frontiers without internal frontiers. The so-called intra-EU trade in goods between the Member States has increased since the creation and development of the internal market, which aims to ensure the free circulation for goods, services, capitals and persons between the Member States.[1]

This uniquely freedom of goods circulating within the EU is something that has had a positive effect on trade, but also created problems. When goods are being imported or exported within the EU the Member States has to legislate rules that has to adopt and be in alignment with the EU law. Trade within the EU constitutes 75 % in goods, which is essential for the economics of the EU Member States.[2]

The main rule is for the Member State to not interfere with the functioning of the internal market, Article (Art.) 26(2) Treaty of the Functioning of the European Union (TFEU).[3] Therefore, it is important that the national rules that hinder free movement of goods between Member States shall be prohibited, Art. 34 and 35 TFEU. Such rules can also be called "measures", "restrictions" or "obstacles".

Art. 36 TFEU provides an exhaustive list of derogations to when a Member State has the right to apply under certain circumstances. Additionally, the ECJ[4] introduced a non-exhaustive list of the so-called mandatory requirements in order to justify rules that restrict the free circulation of goods.

[1] Art. 26(2) of the Treaty on the Functioning of the European Union.
[2] Information from the European Commission: "Free Movement of Goods, Guide to the Application of Treaty Provisions Governing Free Movement of Goods", p. 7.
[3] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.
[4] With the entry into force of the Lisbon Treaty, the European Courts renamed as "Court of Justice of the European Union" which involves Court of Justice, the General Court and specialized courts. "The Court" will be used when indicating the Court of Justice.

There is a difference to when a Member State can apply the derogations listed in Art. 36 TFEU or the mandatory requirements. It depends on if the national rule is to be considered distinctly or indistinctly applicable. A measure can only be justified on the grounds of the exhaustive list of derogations listed in Art. 36 TFEU if it is distinctly applicable. The measure can be justified by the non-exhaustive list of mandatory requirements if it is to be considered indistinctly applicable.

1.2 Aim and Research Question

The aim of this thesis is to analyze the relationship between Art. 36 TFEU which is the express derogation for the free movement of goods and the list of the mandatory requirements. There will be an analyze on what grounds the Court establishes as a national measure that is considered to be a restriction to free movement of goods, and on what grounds a national measure can be justified. The case-law shows that the distinctions between the derogations listed in Art. 36 TFEU and the mandatory requirements can be sometimes be confusing. Therefore, the aim is to examine if there is some sort of guideline in what appropriate approach the Court takes. There will be an examination of legal requirements developed by the Court where there is any similarities or differences between the derogations listed in Art. 36 and the mandatory requirements. To be able to answer the question on justified grounds there has to be a test of proportionality. This too will be examined.

The research question will be;

- What is the relationship between the derogations listed in Art. 36 TFEU and the mandatory requirements developed from the Court's case law?

1.3 Delimitations

The subject of this thesis will focus on justification of restriction on free movement of goods based on the grounds listed in Art. 36 TFEU and the mandatory requirements mentioned in the case *Cassis de Dijon.*[5]

Fiscal measures, as a part of free movement of goods, such as Art. 30 and Art. 110 TFEU will not be discussed at all. The study of this thesis will only be on justification of restrictions on free movement of goods and therefore the other free movements will not be discussed, unless it is required to answer the research questions. The internal market also involves other areas

[5] Case 120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42.

such as competition and state aid, but it will not be mentioned in this thesis. Any preliminary reference procedure regulated under Art. 267 TFEU or infringements procedures regulated under Art. 258 TFEU will not be discussed.

1.4 Methodology and Material

The method that will be used in this thesis is a legal dogmatic method, which means that the current law is analyzed and presented.[6] The legal rules will be analyzed by going through the construction of legal concepts. The sources are those used in legal process meaning the primary statues and case law from the Court. These sources are also reflected and developed by lawyers through doctrine. It is up to the Court to interpret the Treaties, Art. 19(1) Treaty of the European Union (TEU). The Courts decision-making is assisted by the Advocate General (AG).[7] AG gives their opinion on how a case should be decide by viewing the law. Even though their opinion does not bind the Court, it is not unusual for the Court to follow and refer to the opinion of the AG.[8]

The legal rules are interpreted and looked at thorough examination of their content and their intended application. The legal dogmatic method looks at the accepted legal sources and answered the questions by looking at the EU law.[9] The EU law sources consist of primary legislation and secondary legislation.[10] The primary sources are the Treaty, Charter of Fundamental Rights (CFR) and the general principles of law.[11] The latter legislation constitutes the legislative acts, delegated acts and implementing acts that are adopted by the EU institutions based on the Treaty.[12] Secondary legislation has to be in compliance with the primary sources to be valid.[13]

[6] Sandgren, Claes, *Rättsvetenskape för uppsatsförfattare – Ämne, material, metod och argumentation*, 3 upplaga, Nordstedts Juridik, Stockholm, 2015, p. 43-44.
[7] P. Craig and G. De Búrca*,'EU Law text, cases, and materials'*, Published by Oxford University Press, Sixth Edition 2015. (Craig & De Búrca), p. 61
[8] Craig & De Búrca, p. 61.
[9] J. Hettne and I.O. Eriksson, *Eu-rättslig metod: teori och genomslag i svensk rättstillämning*, 2 upplagan, Nordstedts Juridik, 2011, (Hettne and Eriksson), p. 40.
[10] Craig & De Búrca, p. 105.
[11] Craig & De Búrca, p. 111-112.
[12] Craig & De Búrca, p. 113-120.
[13] Bernitz, Ulf and Kjellgren Anders, *Europarätttens grunder*, 5 upplagan, Norstedts Juridik, Stockholm, 2014 (Bernitz & Kjellgren) p. 47, 54.

One of the traditional interpretation theories will be taken into account when trying to obtain as accurate interpretation the EU law as possible. The teleological approach which focuses on the objective content of EU law.[14]

The purpose of using the legal dogmatic is to examine the relevant provisions in both TEU and TFEU, especially Art. 36 TFEU and provisions applicable to free movement of goods, as a part of the internal market law. The above-mentioned theory will be taken into account. When trying to solve a juridical matter, we search for the law and the way it is structured, but we also more often find the answer in the case law. The Court focuses on solving a matter from the objective of the EU law. Therefore, in order to answer the research topic, relevant EU law, books and articles on the provisions in the Treaty and the Court's case law will be used.

1.5 Disposition

In chapter two, the background of the internal market and free movement of goods will be explained. It is important to give an overview of the concepts in order to understand the main principles concerning the free movement of goods. It is also relevant to explain the concepts to understand the aim and research questions of this thesis.

In chapter three, the listed derogations in Art. 36 TFEU, Cassis de Dijon and proportionality test will be explained and analyzed. Relevant case-law will be analyzed and presented in more depth and explaining on what grounds a Member State can invoke a national measure that hinders free movement of goods to be justified.

Finally, in chapter four, conclusions are presented.

[14] Hettne and Eriksson, p. 158-170.

2. The Internal Market and Free Movement of Goods

The EU shall establish an internal market, Art. 3(3) TEU. What we today call the internal market is defined in Art. 26(2) TFEU. According to that provision an area without internal frontiers working with the free movement of goods, persons, services and capital has to be ensured. Furthermore, the EU shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, Art. 26 TFEU. Member States are not allowed to use restrictive rules that affects the trade or hinders the free movement of goods. The main focus of this thesis is what grounds can be considered justified of restrictions on the free movement of goods. For better understanding the justifications of restrictions on free movement of goods there will be an explanation of the internal market and the free movement of goods in this chapter.

2.1 Creating the Internal Market

The Paris Treaty[15] established the European Coal and Steel Community (ECSC) which had as its aim an economic integration by creating a "common market" for coal and steel. This has its objective to keep peace in Europe and was founded by six Member States. Coal and steel were basically the first goods that freely circulated between the six Member States. One can argue that the idea of the "internal market" was already created.

The reason for the creation of the European Economic Community (EEC) in 1957 was to focus more on the economic and not the political integration. The idea of a common market as a part of the European integration has since the Treaty of Rome[16] been a part of the aim of the EEC. By removing the barriers to trade and having a common customs tariff has brought the free movements of goods to freely flow within the Union in a proper way. The "four freedoms", which are a part of the Unions economic growth constitutes: free movement of goods, workers, capital and establishment and the provision of services. [17] The idea of the Treaty of Rome was inter alia to harmonize the economic activities within the Union, ensure the standard of living and encourage the Member States to have closer relationships with each other.[18] The Treaty of Rome plays an important role for the Union today because it provided the legal framework for the EEC for almost thirty years.[19] It was during this period of time

[15] Treaty of Paris, 11951K/TXT.
[16] Treaty of Rome, 11957E/TXT.
[17] Craig & De Búrca, p. 4-5.
[18] Art. 2 of Treaty establishing the European Community.
[19] Craig & De Búrca, p. 6.

that the EEC wanted to direct the focus on to insure the free movement of goods between the Member States by inter alia prohibiting barriers such as customs duties.[20]

In 1984 a new reform "Draft Treaty of European Union" was proposed. In which was forced by the Commission "White paper" and set out the timetable for completing the internal market before 1992.[21] Due to technological changes, industrial innovations and the need of the consumers constantly changing, the EU measures had to change too. Therefore, there is wrong to set out a date when the internal market will totally achieve its aim. The objective of the Single European Act (SEA)[22] was to bring together the Member States in cooperating when constituting the national rules about barriers by prohibiting the discriminatory rules. This was a part of the idea to create a "single market".[23]

The Commission "White Paper" has been a big part of fulfilling the economic aim of the Union (then Community). It had it aim on completion of the internal market as an example of blueprint adopted by the Council and resulted on the development of many adopted legislation within the internal market. It was first in 1992 that the Treaty on the European Union (TEU) was signed and constitutional changes to the Treaty of Rome were made. The Maastricht Treaty[24] established in 1993 made an impact and many changes in the institutional area within the Union.[25] Development in areas such as common Foreign and Security Policy, Economic and Monetary Union (EMU), European Police Office (Europol) and a new "Union" structure were made. In 1999 the Treaty of Amsterdam[26] came to force and was designed to enhance the EU's legitimacy. Areas such as freedom, security, justice, respect for the fundamental rights protected in the European Convention on Human Rights (ECHR) was developed and amendments introduced.[27] The Treaty of Nice[28] was signed in 2001 and concerned the institutional provisions of the Treaty.[29] It was first in 2007 that the Reform Treaty was designed and had the effect to amend the TEU and the EC Treaty which also changed the name into what today is the Treaty of the Functioning of the European Union

[20] Oliver, Peter, *Free Movement of Goods in the European Community*, 4 ed., Sweet & Maxwell, London, 2003 (Oliver) p. 5-6.
[21] Craig & De Búrca, p. 8.
[22] Single European Act [1987] OJ L169.
[23] Oliver, p. 95–96; Bernitz & Kjellgren, p. 30.
[24] Treaty of Maastrict [1992] OJ C191.
[25] Craig & De Búrca, p. 10-11.
[26] Treaty of Amsterdam [1997] C340/01.
[27] Craig & De Búrca, p. 11-14.
[28] Treaty of Nice [2001] C80/01.
[29] Oliver, p. 9-10.

(TFEU). This is where the word "Community" would be replaced with the word "Union".[30] The term "internal market" were firstly used and achieved by the Treaty of Lisbon which entered into force 2009 and is today called the Treaty.[31]

2.2 The Internal Market today

The Single Market is central for the EU. As above mentioned, the idea of the Community in the first place has led us to where the Union is today. The developing of the common market and economic integration are constantly forming the Union and focused on the aim of it. The Member States are involving in a free trade area in which all the customs duties (and quotas) on trade are removed between them. Even though the Member States has agreed to remove tariffs and quotas within the Union, there is a customs union in which they have agreed to apply a common level of tariff on goods entering from without. Also called the common customs.[32]

The common market applies to the free movement of goods within the customs union and is to be found in the Part Three of the TFEU. The Articles about the "four freedoms" has both economic and social objectives. Even though the free movement of goods ensures that the goods move freely within the union it is still affected by what kind of goods the consumers will favor and indirect guide what goods will be successful.[33] In order to attain a common market is for the EU law to make sure that a national measure is not hindering cross-border trade. The reason can be that the national measure for instance discriminate or has as object to make the goods from another Member State difficult to access the market. This approach for maintaining the aim for the economic integration is also called for positive harmonization.[34] It is also reinforced by mutual recognition. The principle of mutual recognition originated from the famous case *Cassis de Dijon*[35] where the Court stated that *"In the absence of common rules relating to the production and marketing of alcohol […] it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory."*

[30] Craig & De Búrca, p. 20.
[31] Bernitz & Kjellgren, p. 30-31.
[32] Craig & De Búrca, p. 607-608.
[33] Craig & De Búrca, p. 608.
[34] Information from the European Commission: "Free Movement of Goods, Guide to the Application of Treaty Provisions Governing Free Movement of Goods", p. 8.
[35] C-120/78 *Cassis de Dijon* [1979], para 8.

2.3 The Free Movement of Goods

Working towards creating and fulfilling and completing the internal market can't be achieved by a particular date but is something that will be established as an ongoing task.[36] The Free Trade Area (FTA) is distinguished by a common internal market. The internal market means that the goods can freely move between the involved States.[37] As mentioned above, free movement of goods is one of the freedoms of the internal market. The aim of the internal market is to ensure the free circulation of goods, imported and exported, from one Member State to another. This was firstly done with the ECSC. There is ground-breaking case-law settled by the Court in the area of free movement of goods such as *Dassonville*[38] and *Cassis de Dijon*[39] which nearly competes the internal market. These two cases will be introduced and discussed in sections 2.3.4 and 2.3.5.

The free movement of goods aims at ensuring the free circulation of goods within the EU by eliminating trade barriers between the Member States. The objectives with the free movement provisions of the Treaties is to eliminate *"all obstacles to intra-[Union] trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine [domestic]market".*[40]

The EU shall cover all trade in goods by agreeing on a customs union and *"…which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, […]"*, Art. 28 TFEU. One of the benefits with free trade is that the consumers have plenty of choices to choose between products because there is specialization within the market, and they get the chance to compare the advantages. This also applies to the sellers as well. They get to cooperate differently and more freely.[41] The barriers to trade can arise when one of the Member States puts pressure on another producer in another Member State, in which end with limiting the quantity of the goods from another Member States. These kind of barriers to trade are quantitative restrictions (QR) on trade. On the other hand, there is also measures having equivalent effect to quantitative restriction (MEQR), which means that a Member State can require the goods to achieve a certain

[36] Craig & De Búrca, p. 614.
[37] C. Barnard, 'The Four Substantive Law of the EU – The four freedoms', Published by Oxford University Press, Fifth Edition 2016, (C.Barnard, Fifth Edition 2016), p. 9.
[38] C-8/74 *Procureur du Roi v. Benoït and Gustave Dassonville* (*Dassonville*) [1974] ECLI:EU:C:1974:82.
[39] C-120/78 *Cassis de Dijon* [1979].
[40] C-15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECLI:EU:C:1982:135, para 16.
[41] C. Barnard, Fifth Edition 2016, p. 4.

standard or quality to be able to access the market.[42] To solve the problems round the different barriers to trade the Member States can agree to remove trade restrictions and require the Member States to recognize the goods within the EU and the other Member State.[43] Art. 34 and 35 TFEU target non-fiscal restrictions. Following are the two articles;

Art. 34 TFEU;
"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

Art. 35 TFEU;
"Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between Member States."

To apply the provisions on goods three conditions need to be satisfied; (1) the product at issue must be considered a good, (2) the good must be used in a cross-border trade situation between the Member States and EU and (3) the person which is concerned by the applied provision must be an addressee of the Treaty.[44] The definition of goods has been given in the Courts judgement in *the art treasures case*[45] that goods are products that *"can be valued in money and which are capable, as such, of forming the subject of commercial transactions".* The Court has found following goods to be as products; paintings and other works of art,[46] petroleum products,[47] animals,[48] coins that are not a legal tender,[49] and waste (whether recyclable or not).[50] The Court has also found electricity to be a good[51] and also constituted lottery as an activity not related to goods because it was a service.[52]

[42] C. Barnard, Fifth Edition 2016, p. 7.
[43] Ibid, p. 8.
[44] Ibid, p. 34; Bernitz & Kjellgren, p. 298.
[45] Case 7/68 *Commission v. Italy* [1968] ECLI:EU:C:1968:51, p. 428.
[46] Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson* [1999] ECLI:EU:C:1999:515, para 20.
[47] Case 72/83 *Campus Oil Ltd v. Minister for Industry and Energy* [1984] ECLI:EU:C:1984:256, para. 17.
[48] Case C-67/97 *Ditlev Bluhme* [1998] ECLI:EU:C:1998:584.
[49] Case 7/78 *Thompson* [1978] ECLI:EU:C:1978:209.
[50] Case C-2/90 *Commission v. Belgium* [1992] ECLI:EU:C:1992:310, para 28.
[51] Case C-393/92 *Almelo v. Energi bedriff Ijsselmij* [1994] ECLI:EU:C:1994:171, para. 28. Case C-158/94 *Commission v Italy (electricity)* [1994] ECLI:EU:C:1994:171, para. 17.
[52] Case C-275/92 *Customs Excise v. Schindler* [1994] ECLI:EU:C:1994:119.

2.3.1 Quantitative restrictions and measures having equivalent effect

According to Art. 34 and 35 TFEU goods have the right to be imported or exported from one Member State to another. They both prohibit QRs (such as quotas) on imports and exports and MEQRs. It's more likely that the Member States uses their power to create barriers to trade when the matters are in imports because it's more sensitive when the domestic goods gets threaten.[53] The Court has defined in *Geddo*[54] quantitative restrictions as *"measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit".* QRs on imports are national rules restricting (partial ban) or prohibiting (total ban) importation of goods, which leads to affecting not only total prohibition but also restricting quantity.[55] There are also quantitative restrictions that can be banned such as pornographically material, in which the Court stated that it is the *"extreme form of prohibition"*.[56] The rules of measures having equivalent effect to a quantitative restriction are on the shape, content, packaging, size, weight and labelling of goods.[57] This so-called product requirements constitutes MEQRs.

With all trading rules the Court means that Art. 34 TFEU is concerning the marketing period of the economic process and not the production period.[58] Measures that are adopted by the authorities by the federal state and other territorial authorities falls within the scope of Art. 34 TFEU.[59] The Court meant by "enacted by Member States", that there need to be for the national measure "enacted" to considered falling within the scope of Art. 34 TFEU. It is sufficient with the "enacted" to be a consistent policy or practice.[60] Art. 34 and 35 TFEU applies to government and quasi-government, but also to private law bodies as well.[61] Both Art. 34 and 35 TFEU applies to measures that are adopted by authority that is responsible for the acts taken by the national government.[62]

[53] C. Barnard, Fifth Edition 2016, p. 72.
[54] Case C-2/73 *Geddo v. Ente Nationale Risi* [1973] ECLI:EU:C:1973:89, para.7.
[55] Oliver, p. 89.
[56] Case 34/79 *R.v. Henn and Darby* [1972] ECLI:EU:C:1979:295, paras. 12-13.
[57] C. Barnard, Fifth Edition 2016, p. 73-74.
[58] C-8/74 *Dassonville* [1974].
[59] Joined Cases C-1 and 176/90 Aargonesa de Publicidad Esterior SA v. Departmento de Sanidad y Seguridad Social de la Generalitat de Cataluña [1991] ECLI:EU:C:1991:327, para. 8.
[60] C. Barnard, Fifth Edition 2016, p. 76.
[61] Case C-171/11 Fra.bo SpA v. DVGW ECLI:EU:C:2012:453; Directive 70/50/EEC of 22 December 1969, p. 87.
[62] Case 249/81 Commission v. Ireland (Buy Irish' campaign) [1982] ECLI:EU:C:1982:402.

2.3.2 Distinctly applicable measures and indistinctly applicable measures

The Commission Directive 70/50[63] was enacted in order to put a clear point with the Commission's intentions regarding Art. 34 TFEU. The Directive made a difference between *"measures other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place"*[64] and *"measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products."*[65] It can possibly be seen that a distinction between distinctly and indistinctly applicable measures was already covered in this Directive. The Directive has no legal effect, but it gives some guidance as to its scope of the wider definition of MEQR than of QR.

Distinctly applicable measure are directly discriminatory measures and means that the imported goods are treated less favorably than the domestic product. A distinctly applicable measure, also referred to as a measure that can only be justified by one ground of the Art. 36 TFEU derogations and not by the broader list of the judicially developed 'mandatory' or 'public interest' or 'imperative' requirements that are only applicable to indistinctly applicable measure.[66] While distinctly applicable measures discriminate rules, which treat foreign products and domestic products differently both in law and in fact, the indistinctly applicable measures treat foreign products less favorably than domestics products in facts rather than in law.[67]

2.3.3 Dassonville

This is the first case amongst other cases that had a major effect on the scope of Art. 34 TFEU.

The case *Dassonville*[68] is about a Belgian law that required Scotch whisky to have a British certificate of origin in order to be sold in the Belgian market. Dassonville purchased Scotch whisky in France to sell in Belgium. The Belgian rule had the effect of only favoring the whisky that came directly from UK into Belgium, but through other Member States that

[63] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), 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, OJ L 13/29.1.1970, OJ Spec. Ed. 17.
[64] Commission Directive 70/50/EEC, Art. 2.
[65] Commission Directive 70/50/EEC, Art. 3.
[66] C. Barnard, Fifth Edition 2016, p. 80-81 and 85.
[67] Bernitz & Kjellgren, p, 302-306.
[68] C-8/74 *Dassonville* [1974].

already had the whisky freely circulate in the market. These indirect importers could acquire such certificate, but with difficulty. The Court stated that the requirement to hold the certificate was a MEQR and not a matter of discrimination. The Court focused on the effect the measure had on the trade and that the measure having potential effect on trade may be sufficient to breach Art. 34 TFEU.

The so-called "rule of reason" came from paragraph 6, that reasonable restraints may not fall within the scope of Art. 34 TFEU.
"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 connection, 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 Court stated in the judgment of the case the *Dassonville formula;*
"All trading rules enacted by the Member States which are capable of hindering, directly and indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions". [69] The Belgian law was to be found a MEQR and applicable to Art. 34 TFEU because it was considered to hinder the intra-Union trade. The rule made it difficult to import and sale the whiskey into Belgium.

In order to understand the *Dassonville* formula we have to understand that the Court were concerned with the effect of the measure, and not the intention behind it. MEQR are measures which do not prohibit or restrict import of products by definition, but have the same effect as QRs would have and meaning that it would hinder trade between Member States.[70] Therefore, there is no need to prove discriminatory intentions.

[69] C-8/74 *Dassonville* [1974], para. 5.
[70] Maduro, Miguel Poiares, *We the Court – The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty,* Hart Publishing, Oxford, 1998 [Maduro] p. 51.

2.3.4 Cassis de Dijon

Even though *Dassonville* sowed the seeds for the applicability of Art. 34 TFEU it was the *Cassis de Dijon* that bore the fruit, in which the Art 34 were applicable to rules that were not discriminatory. The Court's ruling affirmed and developed the *Dassonville* judgment.

Cassis de Dijon is about a product requirement that the liqueurs should be of fruits. The German authorities denied the Cassis de Dijon, a blackcurrant fruit liqueur made in France, to be sold in Germany because it contained insufficient alcohol. According to German law it was required for fruit liqueurs to have a minimum alcohol content of 25 %, while the French cassis had an alcohol content of only 15.20 %.
The Court found the minimum alcohol required to be a MEQR as it imposed an additional burden on imported products by requiring them to comply with the measures of the imported Member States (double burden). On the other hand, the foreign products must be compatible with the national measures of the domestic product. However, such requirement creates additional burden on them and therefore is to be considered as hindering intra-Union trade of products as in the case. Furthermore, the Court found that the principle of proportionality was not fulfilled because there should be enough with putting a label on the bottles with information on alcohol content and the origin.[71]

The Court also stated:
"Obstacles to movement in the [Union] resulting from disparities between the national laws relating to the marketing of the products in questions 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".[72]

The approach in the case was that an indistinctly applicable measure are measures legislated by the Member States where there is no discrimination between foreign and national products, but which hinder trade of a product from one Member State to another or hinder or impede access of a product to a market. Furthermore, the mandatory requirements in the case meant that if Germany could successfully refer to the mandatory requirements this would lead to require the French products to comply with the higher German standards. As long as there are

[71] C-120/78 *Cassis de Dijon* [1979], para. 13.
[72] Ibid, para. 8.

no distinctions between the domestic and foreign goods, they can be justified on grounds other than the derogations listed in Art. 36 TFEU and the other mandatory requirements. The national measure has to be appropriate and necessary to achieve the measures aim and without going beyond what is necessary to achieve it.

The case introduced the well-known presumption of equivalence or mutual recognition which is important to the free movement of goods. Mutual recognition means that goods lawfully produced and marketed in one Member State can (in this case France), in principle, be sold in another Member State (Germany) without any restriction. Germany, as a Member State, must recognize French standards, as another Member State, as equivalent to its own.[73]

Lastly, the Commission quickly realized the importance of the *Cassis de Dijon* and 1980 issued a communication on the judgement.[74] This was an acceptance that the presumption of equivalence or mutual recognition prevented the need for much harmonized legislation. The principle of mutual recognition had a made it easier for the goods to circulate between the member states, but it did not solve all the problems that could emerge. Therefore, the Commission launched a 'Package on the internal market for goods' in February 2007[75]. This meant that as a part of the package the Regulation 764/2008 laid down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State.[76] This regulation is also called the 'Mutual Recognition' Regulation. It had two elements, whereas the first is the burden of proof is on the host state because they have to prove why they denied market access rather than the trader proving why its goods should be admitted. The second element is about the establishment of product contact points in each Member State which must provide information on the technical rules applicable.[77]

[73] C-120/78 *Cassis di Dijon* [1979], para. 8.
[74] Commission, *'Communication from the Commission regarding the Cassis de Dijon judgement'* [1980] OJ C256/2.
[75] COM(2007) 35.
[76] [2008] OJ L 218/21. This Regulation has been repealed by Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008.
[77] C. Barnard, Fifth Edition 2016, p. 96.

2.3.5 Certain selling arrangements - *Keck and Mithouard*

The concept of certain selling arrangements (CSAs) was introduced in *Keck*[78]. Since the case Dassonville, where the Court gave its ruling on the applicability and scope of Art. 34 TFEU, the interpretation of MEQR has been too broadly. The Court stated in the case *Keck* in paragraph 14 of its judgement;

"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 case is about a French rule which prohibited resale of a product at a loss. The Court stated that the French rule was a CSA and that it was allowed as long as they satisfied certain 'Keck conditions'. A CSA was regulating how a product could be sold, rather than regulating the product itself (product requirement). In other words, CSA are national measures that interfere with the marketing. The interfering can be used as a method of regulated rules on when, where, by whom goods can be sold, how (certain) goods can be advertised restrictions and price controls over goods.[79] The conditions in *Keck* are laid down in paragraphs 16 and 17 of its judgement;

"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 judgement … so long as those provisions apply to all relevant traders operating within the national operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."

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

[78] Case C-267/91 and C-268/91 *Criminal proceedings against Keck and Daniel Mithouard* (Keck) [1993] ECLI:EU:C:1993:905.
[79] Oliver, p. 125.

A CSA that does not fulfill the conditions laid down in paragraph 16 will be considered as discriminatory CSAs and will be considered as MEQR and therefore in breach of Art. 34 TFEU. Furthermore, such CSA must not hinder access of foreign products to the market of another Member State. If the conditions in paragraph 16 and 17 are fulfilled, such CSA are allowed and will not fall within the scope of Art. 34 TFEU. The conditions according to 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 Court found two imported qualifications in this case; (1) rules affecting the selling as a part of the product itself which falls within the scope of Art. 34 TFEU, and (2) that even if a national rule is categorized as being selling, it will fall within the scope of Art. 34 TFEU, if it has different impact, in law or fact, for domestic traders and importers.[80]

2.3.6 The scope of Art. 35 TFEU

Art. 35 TFEU prohibits QRs and MEQRs in relation to exports in the same kind as does Art. 34 TFEU in concern to imports. However, the Court has stated that there is a difference between the two provisions. Art. 34 are applicable to discriminatory provisions and also to indistinctly applicable measures, but it seems that Art. 35 TFEU are only applicable to discrimination.[81] One reason to such limitations is that export and imports restrictions are fundamentally different. The applicability of Art 34 TFEU to measures that are non-discriminatory is that they force a dual burden on the importer, meaning that they have to both satisfy the rules in their state and also the state of the importers. According to the applicability to Art. 35 TFEU this is not how it normally is. If an exporter has to consider a national rule on, for instance, quality standards for a product to be marketed in that state cannot apply Art 35 TFEU because they cannot claim that such rule makes it more difficult for an exporter to penetrate other markets.[82] Allowing exports to challenge domestic regulation under Art. 35 TFEU would essentially present them with a way of avoiding the wholly internal rule by allowing challenges to national rules which have no effect on intra-Union trade.

Art. 36 TFEU and mandatory requirements are not applicable as long as there is full harmonization of national rules. Therefore, in the absence of harmonization it is for the

[80] Craig & de Burca, p. 683-684
[81] Case C-12/02 *Criminal Proceedings against Marco Grilli* [2003] ECLI:EU:C:2003:538.
[82] Craig & de Burca, p. 677.

Member State to decide what level of protection is appropriate. Furthermore, Member States may no longer rely on Art. 35 TFEU or mandatory requirements if there is secondary law that has been harmonized within a specific field. When national standards are harmonized by directives or regulations, they must be interpreted according to those obligations and not referring to Art. 36 TFEU or mandatory requirements.[83]

This is illustrated in the *Nordiska Dental*[84] the Court found banning exports to be justified under the grounds relating to protection of the environmental and of the health. The case is between Kemikalieinspektionen (Swedish Chemicals Inspectors) and Nordiska Dental AB ('Nordiska Dental'). The case is about a refusal of the application submitted by Nordiska Dental for waiver of the prohibition on the exportation of mercury in the line of marketing amalgam for dental use. The preliminary question ruled was if *"a national prohibition on commercial exports from the country in question of dental amalgam containing mercury which is based on considerations of environmental and health protection?*[85] The Court stated that the Swedish prohibition on exporting dental amalgams containing mercury was incompatible with Directive 93/42 concerning medical devices (a 'new approach' directive) on the ground that the directive covered environmental considerations.[86]

In another case where the rule had been that only distinctly applicable measures were caught by Art. 35 TFEU is the case *Groenveld.*[87] The Court stated that Art. 35 TFEU concerned *"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."*[88] In this case the rule was equally applicable (non-discriminatory) and therefore didn't breach Art. 35 TFEU.

[83] Case C-102/98 *Commission v Germany* [1998] ECR I-6871.
[84] Case C-288/08 *Kemikalieinspektionen mot Nordiska Dental AB* [2009] ECLI:EU:C:2009:718.
[85] Ibid, para. 16.
[86] Ibid, para. 30.
[87] Case 15/79 *Groenveld v Produktschap voor Vee en Vlees.*[1979] ECLI:EU:C:1979:253.
[88] Ibid, para. 7.

3. Justifying restrictions under the derogations listed in Art. 36 TFEU and the mandatory requirements

In this chapter the derogations listed in Art. 36 TFEU and the mandatory requirements will be examined mostly by presenting relevant case-law and the AG opinions in some of the cases. The main focus will be to explain, analyze and present the justifying restrictions under the derogations listed in Art. 36 TFEU and the mandatory requirements. There will also be an explanation of the proportionality test, which is relevant because the national rules have to pass the test in order to attain the least restrictive possible in order to achieve the objective.

3.1 The derogations listed in Article 36 TFEU

The Court has interpreted Art. 36 TFEU strictly. Discriminatory measures will be carefully scrutinized to make sure that the defense is guaranteed. Both Art. 34 and 35 TFEU are subject to the exhaustive list of the derogations in Art. 36 TFEU. These derogations can never concern economic objectives.[89] The list in Art. 36 TFEU is exhaustive[90] and are not invokable in cases of full harmonization on Union level.[91]

Art. 36 TFEU states;

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

3.1.2 Public Morality

It is up for the Member State to decide and determine what is public morality.[92] We can see this in the Courts decision in *Henn and Darby*[93]*, "it is for each Member State to determine in*

[89] Case C-95/81 *Commission v. Italy* [1982] ECLI:EU:C:1982:216.
[90] Case C-113/80 *Commission v. Ireland* (Irish Souvenirs) [1981] ECLI:EU:C:1981:139.
[91] Case C-190/87 *Oberkreisdirektor des Kreises Borken and Others v Moorman* [1988] ECLI:EU:C:1988.
[92] C. Barnard, Fifth Edition 2016, p. 151; Oliver, p. 243.

accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory". In this case the UK banned importation of improper movies and magazines form the Netherlands on the grounds of public morality. The Court found that the prohibition is justified under the public morality exceptions within the meaning of Art. 36 TFEU and that such prohibition can be justified if there is no lawful trade in such goods within the UK. The ban did not aim to discriminate between foreign and domestic products as there were no national market for such products. Additionally, in *Conegate*[94] the Court thought it was suspicious when UK wanted to prevent import of sexy vacuum flasks and life-size inflatable dolls from Germany, because the same goods could be manufactured in UK. The Court said that the fact that goods cause offence could not be regarded as sufficiently serious to justify restrictions on the free movement of goods and therefore, the prohibition was discriminatory and not justified under Art. 36 TFEU. Further, even though Member States are free to determine the meaning of public morality, they still cannot put extra burden on foreign goods than those to equivalent domestic goods.

3.1.3 Public Policy

The definition of public policy is narrowly construed, and the Court is strict with not expanding it.[95] It is only used when no other alternative derogations are applicable. Therefore, there are few cases on public policy. The Court made it clear in the *Ringelhan*[96] with stating *"Whatever interpretation is to be given to the term "public policy" it cannot be extended so as to include considerations of consumer protection".* It can be difficult for a Member State to successfully invoke in a goods case on the ground public policy. We can see in the *Thompson*[97], a case where UK banned export on silver coins, even though they were no longer legal tender, to prevent them from destroying the coins or melt them down. Melting down coins was a criminal offence in the UK. Therefore, the Court said that the ban was justified on ground of public policy because it stemmed from *"the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interest of the State".* The Court drew a distinction between the public policy and economic interest. The Court also stated that it is not a consumer protection.

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[93] Case 34/79 *Regina v. Maurice Donald Henn and John Frederick Ernest Darby (Henn and Darby).* [1979] ECLI:EU:C:1979:295, para. 16.
[94] Case C-121/85 *Conegate v.HM Customs and Excise* [1986], ECLI:EU:C:1986:114.
[95] C. Barnard, Fifth Edition 2016, p. 152.
[96] Case 177/83 *Th. Kohl KG v. Ringelhan & Rennett SA and RIngelhan Einrichtungs GmbH* [1984] ECLI:EU:C:1984:334, para. 19.
[97] Case 7/78 *R.v. Thompson, Johnson and Woodiwiss* [1978] ECLI:EU:C:1978:209, para. 19.

Detail examination of the public policy argument was considered in the case *Cullet v. Centre Leclerc*[98]. The case is about a preliminary ruling on the interpretation of national rules imposing a minimum price on the sale of fuel to consumers and if it is compatible with EU law. The two parties involved in this case was Henri Cullet, a service-station operator at Toulouse and the chamber Syndicale des Reparateurs Automobiles et Detaillants de produits petroliers (Association of motor-car repairs and retailers of petroleum products), on the other hand, was the so-called 'centre leclerc'. [99] The French rule imposed minimum retail prices for petroleum products which are fixed for French refinery prices and costs.[100]

The Court examined the application of Art. 34 and 36 TFEU in this case. This is also a good case as an example of how the Court has not been very sympathetic to arguments based on public policy. One of the parties 'Sodinord and Sodirev' considered that fixing minimum prices were a method that created an obstacle to imports prohibited by Art. 34 TFEU. The Court stated that the French rule was MEQR.

The French government, supported by the Italian and Greek governments, considers such system as intending to harmonize the distribution of fuel supplies throughout national territory by making sure that sufficient commercial margins is for all retail outlets. The French government argued that prices on imports are not regulated and therefore cannot be a breach of Art 34 TFEU, because foreign operator with more advantageous cost prices than the process applicable in France would have it easier to enter the market.[101] The French government claimed to justify their measure on the ground that there would be civil disturbances, violence and blockades. The Advocate General Verloren Van Themaat opinion was 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, in the place of the Treaty and Community (and, within the limits laid down in the Treaty, national) institutions, determine the scope of those freedoms. In such case, the concept of public policy requires, rather, effective action on*

[98] Case 231/83 *Cullet v. Centre Leclerc* [1985] ECLI:EU:C:1985:29.
[99] Ibid, para. 1-2.
[100] Ibid, para. 4.
[101] Ibid, para. 21.

the part of the authorities to deal with such disturbances."[102] Furthermore, the Advocate General stated that the arguments based on the ground public policy made by the French government constituted a restriction on free movement goods between the Member States.[103] The Court answered that *"It is sufficient to state that the French government has not shown that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question in accordance with the principles set out above would have upon public order and security."* [104]

The Court has also noted *"[…]if applicable to domestic products and imported products alike, do not in themselves constitute measures having an effect equivalent to a quantitative restrictions but may have such an effect when the prices are fixed at a level such that imported products are placed at a disadvantage compared to identical domestic products, either because the competitive advantage conferred by lower cost prices is cancelled out."*[105]

The public policy derogation has more and more been invoked by the Member States to justify the state allowing protesters to exercise their fundamental rights, which by doing so are interfering with free movement of goods. The case law has also shown that Member States has invoked to prevent practices, often by importers, which results to civil unrest.[106]

3.1.4 Public Security

The Court has been more sympathetic when Member States have been invoking their argument based on public security than public policy.[107] The case *Campus Oil*[108] is about Ireland wanting to justify this requirement on the basis of public security. Ireland is dependent on imports for its supplies of petroleum products and required importers of these products to buy a certain amount of their needs from a state-owned oil refinery at prices given by the Irish government based on the costs incurred by the refinery. In this case the Court agreed on the justification on the ground of public security. Furthermore, they identified the petroleum products as important because that it is energy source in the modern economy and if hindering

[102] Opinion of Advocate General Mr Verloren Van Themaat in case 231/83 *Cullet v. Centre Leclerc* [1985] ECLI:EU:C:1985:29, page 312.
[103] Opinion of Advocate General Mr Verloren Van Themaat in case 231/83 *Cullet v. Centre Leclerc* [1985] ECLI:EU:C:1985:29, page 313.
[104] Case 231/83 *Cullet v. Centre Leclerc* [1985] ECLI:EU:C:1985:29, para. 33.
[105] Ibid. 23.
[106] C. Barnard, Fifth Edition 2016, p. 152.
[107] Ibid, p. 157.
[108] Case 72/83 *Campus Oil Limited and others c. Minister for Industry and Energy and others (Campus Oil)* [1984] ECLI:EU:C:1984:256.

the delivery of it would result in affecting the countries public security.[109] In another similar case *Commission v. Greece*[110] the Court found that Greece's ability to hold its own petrol supplies would not be enough to make it dependent because of a crisis in the country. In this case the Court were skeptical of the arguments the Greek government stated about justification on the ground public security. Greece wanted to have minimum holdings of petroleum products on its territory. The proportionality test was strict in this case.

In the case *Commission v. Portugal*[111] the Commission applied to the Court for clarifying of Portuguese law. The Commission sent a letter of formal to the Portuguese Republic about the prohibition by the Portuguese law of the affixing of tinted film to the windows of motor vehicles. According to EU law there is no legislation that has been adopted on tinted film designed to be affixed to the windows of motor vehicles, but there is legislation concerning the approval of safety glazing material and their installation on vehicles. EU legislation provides that the regular light transmittance must not be less than 75%, but when it concerns safety glazing the light transmittance must be at least 70% in the forward field of view.[112] As for the rearward field of view, the light transmittance may be less than 70 %, but only if the vehicle fits with two outer rear-view mirrors. According to Portuguese law *"the affixing of tinted film to the windows of passenger or goods vehicles shall be prohibited with the exception of lawful stickers and dark, non-reflective film to the goods compartment of goods vehicles".*[113]

According to the Commission this prevents tinted film lawfully manufactured and/or marketed in another Member State from marketed in Portugal. Any potential customer, traders or individuals will not buy such films because they cannot affix it to the windows of motor vehicles.[114] However, the Portuguese Republic has no proof of the use of tinted film, of whatever colour and characteristics, in particular with respect to light transmittance, presents a risk for public safety and/or road safety.[115]

[109] Ibid, para.34.
[110] Case C-398/98 *Commission v. Greece* [2001] ECLI:EU:C:2001:565.
[111] Case C-265/06 *Commission v. Portugal* [2008] ECLI:EU:C:2008:210.
[112] Ibid, paras. 1-7.
[113] Ibid, para. 6.
[114] Ibid, para. 14-15.
[115] Ibid, para. 19.

The Court finds that the ban must be regarded as being excessive and accordingly, disproportionate with respect to the objectives pursued. The Court points out that the Portuguese Republic agrees in that the provision restricts the marketing of affixing of tinted film to the windscreen and windows alongside passenger seats in motor vehicles from marketing in Portugal. The Court answers to Commission argument about the potential customer, traders or individuals having no interest in buying such goods. The ban constitutes a MEQR under Art. 34 TFEU.[116] Such measure may be justified only by the derogations listed in Art. 36 TFEU or by one of the overriding requirements referred to in the judgements of the Courts. Such measure has to be appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.

In this case the justification is to fight against crime in the context of public safety and to ensure that the obligation to wear seat belts is complied, which comes within the sphere of road safety. The burden of proof is on the Member State. The Portuguese Republic argued that the measure enables the passenger to immediately inspect by means of simple observation from outside the vehicle. However, the Court agrees in that it facilitates such inspection, but it is not necessary to attain those objectives and there are no other less restrictive means of doing so. The competent authority can fight against crime and ensuring road safety in other available ways and methods.[117] There were no other evidence shown that the ban is necessary to promote road safety and combat crime. Therefore, the Court declares the national measure prohibiting the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Art. 34 and 36 TFEU.[118]

3.1.5 The Protection of Health and Life of Humans, Animals, or Plants

The Member States uses the derogation; the protection of health and life of humans, animals, or plants the most and is also the most protected one, Art. 36 TFEU. The Court has stated that it is up for each Member State to determine the level of health protection desired for the citizens,[119] taking into account the climate in the state,[120] the normal diet of the population and its condition of health.[121] The Member States has to prove that they have genuine health

[116] Case C-265/06 *Commission v. Portugal* [2008] ECLI:EU:C:2008:210, para. 32-33 and 36.
[117] Ibid, para. 38-42.
[118] Ibid, para. 44-48.
[119] Case 97/83 *Criminal Proceedings against Melkunie* [1984] ECLI:EU:C:1984:212, para. 18.
[120] Case 54/85 *Ministére public v. Mirepoix* [1986] ECLI:EU:C:1986:123, para. 15.
[121] Case 94/83 *Criminal Proceedings against Albert Heijn BV* [1984] ECLI:EU:C:1984:285, para. 16.

concerns and show that there is a serious health policy. The Court scrutinizes the claims of the Member States very carefully.[122]

We can see how the Court scrutinizes carefully in *Beer Purity*[123] where the German government banned all the marketing of beer that was containing different kind of additives. The German government argued that Germans drank a lot of beer and the effects of the additives in the long-term was unidentified. The Court stated that the argument was not justified. According to international scientific research, the work of the Union's scientific committee for food, and the codex Alimentarius for the United Nations and the World Health Organization (WHO) the additives did not present a risk to public health. They also said that the German government allowed the additives to be used in other drinks and therefore their policy was incompatible. If there is uncertainty in the scientific evidence about the health risks of a particular product then it is for the Member States to decide how to protect the public health, as long as they don't interfere with the free movement of goods.[124]

The Court is more sympathetic when Member States arguments are based on the ground public health and are related to the national healthcare system.[125] In case *Evans Medical*[126] the British government denied granting license to an importer of narcotic drugs. The argument was that the imports undermined the sole license manufacturer in the UK, which could lead to jeopardize the authenticity of the supply of a specific drug in UK. The Court stated that the argument could be justified on public health grounds, if the objective were less restrictive to achieve and that the arguments were not based on economic grounds. The objective of the restriction must be the protection of public health. The restriction must be necessary for achieving the protection of public health. This means that the derogation can only be used when there is sustainability and no perfect consensus on the scientific or medical impact of specific substances.[127] There must exist proportionality which show that the restriction cannot be strict more than is required.

[122] Case C 118/86 *Openbaar Ministerie v Nertsvoederfabriek Nederland* [1987] ECLI:EU:C:1987:424.
[123] Case C-178/84 *Commission v. Germany* [1987] ECLI:EU:C:1987:126.
[124] Case C-174/82 *Officier van Justitie v. Sandoz* [1983] ECLI:EU:C:1983:213, para. 16.
[125] C. Barnard, Fifth Edition 2016, p. 161.
[126] Case C-324/93 *The Queen v. Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith Ltd.* [1995] ECLI:EU:C:1995:84.
[127] Craig & de Burca, p. 632.

There can arise problems when Member State "double check" the goods. The exporting Member State has already controlled and tested the goods before exportation. The imported Member State should not repeat the same controls and tests, unless the control is for any damages or diseased that might occur after the inspection in the exporting Member State.[128]

Another aspect to the ground public health is the precautionary principle which was introduced in the case *United Kingdom v. Commission*.[129] In this case the Commission prohibited the exportation of UK-origin beef in order to prevent the spread of BSE (mad cow disease). Even though there were uncertainty about the mechanism of transmission of the BSE, the number of BSE cases were decreasing. There were still doubt about its effectiveness. The precautionary principle allows restrictions when there is no prove, but assumptions are made to high risk of public health consistent with scientific evidence. The Court stated that when there is uncertainty as to the existence or extent of risks to human health, authorized institutions may take necessary measure to protect without waiting until the seriousness and reality of those risks become fully noticeable.[130] This means that Member States has the right to decide which level of public health protection will suffice when health risk of a certain product is uncertain.

Art. 36 TFEU does not only protect human health, but also animal health.[131] This principle is same as the protection of human life and health, but with the exception that human life is more important than animal life. The Court found in *Bluhme*[132] banning rule to be justified under Art. 36 TFEU. Denmark banned the import of any bee into a Danish island, except a specific brown bee. If a measure preserves an indigenous animal population with distinct characteristics contributed to the maintenance of biodiversity by guaranteeing that the population of the brown bees will survive. Having a prohibition on import of other bees protected the specific brown bees on the Danish Island and therefore were justified under Art. 36 TFEU.

[128] Philipson, A. Guide to the Concept and Practical Application of Articles 28-30 EC (Philipson, A.) (2001) p. 20.
[129] Case C-180/96 *United Kingdom v. Commission* [1998] ECLI:EU:C:1998:192.
[130] Oliver, P., 256.
[131] C. Barnard, Fifth Edition 2016, p. 162.
[132] Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ELCI:EU:C:1998:584, para. 19.

The case *Commission* v. *UK*[133] is about protection of animal (public) health. The Commission brought an action on that the United Kingdom has failed to fulfil its obligations under Art. 36 TFEU. The UK banned import of goods such as fresh, frozen or chilled poultry meat, eggs (other than hatching eggs) and egg products into England, Wales and Scotland from all other Member States except from Denmark and Ireland. The main issue is that ban on imported animal products and poultry products has not been given any specific license issued by the any appropriate authority.[134] The new policy, made by the United Kingdom government, meant that the banned import could only be accepted from countries which were totally free from Newcastle Disease, which prohibited the use of vaccine and which imposed mandatory slaughter requirements in the event of an outbreak of the disease. According to UK, it was only Denmark and Ireland that were able to satisfy these requirements. They also stated that they would be very desirable if other Member States could implement same bird health policy. This would permit free movement of poultry and poultry products through the entire EU.[135]

The Court mentions that it is for each of the Member State to determine the policy relating animal health and are free to adopt, with regard to the risks of Newcastle disease among poultry, either a policy of vaccination or one of non-vaccination and compulsory slaughter.[136] Furthermore, the Court states when examining the second sentence of Art. 36 TFEU that it is an observation that is designed to prevent restrictions on trade between the Member State, not creating discrimination in respect of goods originating in other Member States or indirectly to protect certain domestic products.[137] The Court examines *"certain established facts suggest that the real aim of the 1981 Measures was to block, for commercial and economic reasons, imports of poultry products from other Member States, in particular from France. The United Kingdom government had been subject to pressure from British poultry products to block these imports. It hurriedly introduced its new policy with the result that French Christmas Turkeys were excluded from the British marker for the 1981 season."*[138] It's a matter of fact that the French poultry products should be readmitted to Great Britain since the French Republic had fulfilled the three conditions laid down by the United Kingdom Government about imports of the products being justified on the ground of protection of animal health.

[133] Case C- 40/82 *Commission v. UK* [1982] ECLI:EU:C:1982:285.
[134] Case C- 40/82 *Commission v. UK* [1982] ECLI:EU:C:1982:285, para. 2.
[135] Ibid, para. 10-11.
[136] Ibid, para. 33.
[137] Ibid, para. 36.
[138] Ibid, para. 37.

They were still refusing French imports on the "fourth condition" that France had not closed its frontiers to poultry imports from non-Member Countries were vaccine was still in use.[139]

The Court found that the facts of the case were sufficient to establish that the 1981 Measures constituted a disguised restriction on imports of poultry products from other member states. The restriction was particularly on imports of such products from France. The United Kingdom has failed to fulfil its obligations under the Treaty by applying measures which had the effect of preventing imports of products mentioned in the case.[140]

The case *Gourmet International Products*[141] is about a preliminary ruling raised by the Swedish Court about prohibiting the company 'Gourmet International Products AB' from placing advertisements for alcoholic beverages in magazines. From the health risks point of view, the Swedish law does not allow advertisement of alcoholic beverages that contains more than 2.25 % of alcohol by volume. Therefore, should such alcoholic beverage be marketed with particular moderation and not encourage to alcohol consumption. However, this restriction does not apply to manufactures and restaurants, as long as the advertisement is not referred specifically on the public highway or individuals.[142] When GIP published a magazine with pages containing alcoholic beverages such as red wine and whisky, in which 90% of the subscribers were traders, manufacturer or retailers and the 10% were private individuals. The questions were raised on whether national legislation concerning general prohibition of alcohol advertisement were compatible with EU law, and if so, could such prohibition be justified and proportionate on the ground of protection of life and health of humans?

The Court answered if the issue at matter were an obstacle to free movement of goods and/or services, whereas the latter will not be discussed. Both parties in this case accepts the fact that Swedish law on prohibiting advertisement on alcoholic beverages affects sales of it, including importation from other Member States. The prohibitions purpose is to remove he consumption of alcohol.[143] The Court stated that *"[…]national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so*

[139] Ibid, para. 29.
[140] Case C- 40/82 *Commission v. UK* [1982] ECLI:EU:C:1982:285, para. 40 and 45.
[141] Case C-405/98 *Gourmet International Products* [2001] ECLI:EU:C:2001:135.
[142] Ibid, para. 2-6.
[143] Ibid, para. 14.

long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law, and in fact, the marketing of domestic products and of those from other Member State […]".[144] Furthermore, the Court points out that *"it cannot be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States."*[145]

In cases of products like alcoholic beverages the government are liable to impede such products access to the market by products from other Member States and as well as domestic products because of consumption which is related to traditional social practices and to local habits and customs.[146] The Court pointed out that the prohibition is on consumption of wine and whisky, which is mostly imported, and not on for example vodka, which is mostly Swedish origin.[147]

However, such rules are accepted in order to combat alcohol abuse which reflects on public health concerns. *"In order for public health concerns to be capable of justifying an obstacle to trade such as that inherent in the prohibition on advertising at issue in the main proceedings, the measure concerned must also be proportionate to the objective to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."*[148] There is no proof shown that public health grounds have been diverted from their purpose and used to protect domestic products indirectly or discriminate against goods originating from other Member States. As for the proportionate question on the prohibition on advertisement at issue it is for the Member State to decide as long as it does not *"constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."* Therefore, the prohibition on the advertisement on alcoholic beverages such those at issue in the main proceedings does not fall within the scope of Art. 36 TFEU.[149]

[144] Ibid, para. 15.
[145] Case C-405/98 *Gourmet International Products* [2001] ECLI:EU:C:2001:135, para. 19.
[146] Ibid, para. 19.
[147] Ibid, para. 21-22.
[148] Ibid, para. 28.
[149] Ibid, para. 32-33.

Commission v. Greece[150] is about an action brought by the Commission about a requirement that processed milk for infants should be sold exclusively by pharmacies under Greek legislation. The Commission argued that this restriction exceeded what was necessary to achieve the aims of protecting the health of infants and promoting breast feeding. The Greek government argued in its defense that it was necessary and appropriate in order to protect the health and life of infants during the critical first five months of life.[151]

"National legislation which reserves the sale of processed milk for infants solely to pharmacies is not designed to regulate trade in goods between Member States."[152] The Court states that such national measure might restrict the volume of sales and hence the volume of sales of processed milk for infants coming from other Member States which will hinder traders other than pharmacists from marketing the product.[153] Since the Greek legislation applied to all products and not only to protect the domestic products which were similar to processed milk for infants from other Member States or which were in competition with milk of that type, the Court found that the restriction on sale of such products falls outside the scope of Art. 36 TFEU.[154]

3.1.6 The Protection of National Treasures Possessing Artistic, Historic, or Archaeological Value

There is no case decided by the Court on the ground of national treasure.[155] The only case that tried the matter were an Italian case[156], were an Italian tax on exports of goods having an artistic, historic, archaeological, or ethnographic value. The Court decided since the tax was a charge having equivalent effect to a customs duty (CEE) it fell within the scope of Art. 30 TFEU, and since it was not a MEQR, Art 36 TFEU were not applicable. Art. 167(2) TFEU constitutes that *"Action by the Union shall be aimed at encouraging cooperation between the Member States"* inter alia *"conversation and safeguarding of cultural heritage of European significance".* There is secondary legislation that covers this ground: Regulation 3911/92 and Directive 93/7.

[150] Case C-391/92 *Commission v. Greece* [1995] ECLI:EU:C:1995:199.
[151] Case C-391/92 *Commission v. Greece* [1995] ECLI:EU:C:1995:199, para. 1-4.
[152] Ibid, para. 11.
[153] Ibid para. 12.
[154] Ibid, para. 18 and 21.
[155] C. Barnard, Fifth Edition 2016, p. 163.
[156] Case C-7/68 *Commission v. Italiy (art treasures)* [1968] ECLI:EU:C:1968:51.

3.1.7 The Protection of Industrial and Commercial Property

The protection of industrial and commercial property covers derogations such as patents, trademarks, copyright, and other types of design rights. It also covers geographical denominations. This area targets private interest instead of public interest. Intellectual property rights (IPRs) challenges EU with on the one hand encouragement on innovation and on the other hand the particular nature of property rights (their territoriality and exclusivity), which has traditionally been protected by the national law and can constitutes as a barrier to the internal market.[157] The Court has stated that Art. 36 TFEU and IPR cases that *"Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property".*[158] The particular subject matter of the IPR depends on the type of intellectual property, but is the exclusive right of the IPR holder to the first marketing of the product. The Court made a distinction between the existence of an IPR and the exercise of an IPR, where the existence of such IPR is a matter for the national law and the latter for the EU law. This led to giving the IPR holder the chance to gain monopoly profits from putting a product on the market for the first time and also take action on any infringement.[159] The Member States are free to legislate within this area in the absence of harmonization. However, the Member State cannot[160];

- Discriminate on grounds of nationality or place of manufacturer in the national legislation.
- Hinder goods from passing through their territory.
- Accept that the owner of an IPR prevents the import or sale of goods which has been lawfully distributed on the market of another Member State by the owner of that IPR. The same applies to if the owner of the IPR has given permission to do so.

3.2 Mandatory Requirements

The derogations listed in Art. 36 TFEU has a reflection of the priorities of the EU from the Treaty of Rome, which is problematic because the provision has never been amended so that the list could be extended. Therefore, in *Cassis de Dijon* the Court developed an open-ended list of so-called mandatory requirements. 'Mandatory requirements' or 'public interest requirements' can only be raised if the measure is considered to be indistinctly applicable

[157] C. Barnard, Fifth Edition 2016, p. 164.
[158] Case C-78/70 *Deutsche Grammophon v. Metro* [1971] ECLI:EU:C:1971:59, para 11.
[159] C. Barnard, Fifth Edition 2016, p. 165-166.
[160] C. Barnard, Fifth Edition 2016, p. 165-171; Stothers, Christopher, in Oliver (ed.) *Free movement of goods in the European Union,* 5 ed, Hart Publishing Ltd, 2010, p. 313-369 (Stothers in Oliver), p 324.

MEQR.[161] However, in practical terms given that the list of mandatory requirements is wider in scope than the derogations listed in Art. 36 TFEU; (a) indistinctly applicable or indirectly discriminatory measures should be considered to fall under *Cassis de Dijon* and (b) distinctly applicable or directly discriminatory measures should be considered to fall under Art. 36 TFEU.

Therefore, a non-directly discriminatory measure which cannot be justified under the case law relating to mandatory requirement could rarely, if ever, be sanctioned by Art. 36 TFEU, because the Courts interpretation of the derogations listed in Art. 36 TFEU are narrowed as being in derogation from the general principle of free movement of goods.[162] However, the Court has, one time, considered the validity of an indistinctly applicable measure under Art. 36 TFEU, which in practice had a discriminatory effect.[163] There is also one case in where the Court discussed both sets of justifications such as public health.[164]

Arguments in *Cassis de Dijon* were based on the following grounds: public health, consumer protection and unfair commercial practices. The list the Court introduced was the effectiveness of fiscal supervision, fairness of commercial transaction, protection of the public health and the defense of the consumer. These four mandatory requirements work as supplements to the derogations listed in Art. 36 TFEU. As mentioned before the list of mandatory requirements is not exhaustive since the Courts case law is constantly evolving.

More recently, after the *Cassis de Dijon,* the Court has developed mandatory requirements called 'imperative requirements', 'overriding requirements in the public interest' or 'public interest requirements'.[165] Mandatory requirements must be shown by the Member State that the objectives of the rule is necessary and achievable.[166] The mandatory requirements are accessible when there is no harmonized legislation.[167] The Court has since the recognition of

[161] This was confirmed by the Court in case C-113/80 *Commission v. Ireland* (Irish Souvenirs) [1981] ECLI:EU:C:1981:139.
[162] Case C-120/95 *Decker* [1998] ECLI:EU:C:1998:167; Case 72/83 *Campus Oil Limited and others c. Minister for Industry and Energy and others (Campus Oil)* [1984] ECLI:EU:C:1984:256.
[163] Case C-142/91 *Commission v. United Kingdom* [1983] ECLI:EU:C:1983:30.
[164] Case C-97/83 *Melkunie* [1984] ECLI:EU:C:1984:212.
[165] Case C-178/84 *Commission v. Germany* [1987] ECLI:EU:C:1987:126, para. 15 and 30; Case C-573/12 *Ålands vindkraft AB v. Energimyndigheten* [2014] ECLI:EU:C:2014:2037, para 75.
[166] Case C-254/05 *Commission v. Belgium (automatic fire detection systems)* [2007] ECLI:EU:C:2007:319, para. 36.
[167] Case 120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42, para. 8.

the four mandatory requirements in the *Cassis de Dijon*, developed case-law mentioning a range of other mandatory requirements such as[168];

- Protection of public goods and values (protection of environment, public health, animal welfare, the fairness of commercial transaction, protection of cinema as a form of cultural expression, protection of national or regional socio-cultural characteristics, protection of books as cultural objects and maintaining press diversity)
- Protection of individuals (defense of the consumer, protection of working conditions and children, road safety)
- Protection of public order (preventing the risk of seriously undermining the financial balance of the social security system, preventing fraud, ensuring the fight against crime, preserving the maintenance of order in society, protection of fundamental rights and the effectiveness of fiscal supervision)

This non-exhaustive list of mandatory requirements proves that the Court accepts justifications put by the Member States, as long that the national policies does not have the objective of a purely economic nature.[169] The most difficult mandatory requirements that has to been dealt with by the Court is: consumer protection, environmental protection and fundamental rights.[170]

3.2.1 Consumer Protection

The mandatory requirements that is claimed mostly as justification by the Member States is consumer protection. As for consumer protection the Court has stated *"the presumed expectations of average consumer who is reasonably well-informed and reasonably observant and circumspect".*[171] The Court has also stated that *"this individual also reads labels on products".*[172] The EU law does not allow national laws to protect the unobservant and unintelligent consumer, especially when such law is interrupting market integration which is of advantage for the consumer body as whole. According to the Court the consumer is better served by having the right to choose among different products, some which will be better quality than others, than a much smaller amount to choose of that will have higher national

[168] C. Barnard, Fifth Edition 2016, p. 173-174.
[169] Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH* [2000] ECLI:EU:C:2000:12, para. 33.
[170] C. Barnard, Fifth Edition 2016, p. 174.
[171] Case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt* [1998], ECLI:EU:C:1998:369, para. 31
[172] Case C-51/94 *Commission v. Germany* [1995], ECLI:EU:C:1995:352, para.34.

standards of consumer protection.[173] The claims based on consumer protection can also be named as "labeling", "language requirement" or "consumer understanding". Such measure has to be necessary and proportionate for applicability. The so-called "golden rule" which is a general rule from *Cassis de Dijon* means that the sale of a product should not be banned when the consumer can be sufficiently protected by appropriate labeling requirements.[174]

In the *Clinique*[175] where a German rule required the cosmetic products 'Clinique' to be sold under the name 'Linique' because they argued that the name 'Clinique' could confuse and mislead the consumers into believing that they bought medical products. The Court rejected the consumer protection justification because the product 'Clinique' were sold in departments for stores and presented as cosmetics and not at the pharmacies were, they would be presented as medicinal products. The product 'Clinique' were sold in other countries as well and did not confuse or mislead the consumers.[176] In another case *Mars*[177] the *"German 'Association against Pernicious Trading Practices', had claimed that Mars's '10%' promotion, argued that the campaign might conceal a price rise and that, since the '+10%' flash covered more than a tenth of the total surface area of the wrapping, consumers might be misled into thinking that they were receiving more than 10 per cent extra."*[178] The Court rejected the arguments because they said that Mars had not benefited from the campaign by increasing its prices and that *"reasonably circumspect consumers could be deemed to know that there was not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase".*[179]

The Rau[180] case is about a preliminary reference question from Germany about a requirement laid down by Belgian legislation as to the shape of packaging of margarine sold by retail and whether that is compatible with EU law. The margarine was packaged in plastic tubs having the shape of a truncated cone. According to Belgium legislation this could not be imported and sold unless it was in the form of cube-shaped blocks. The question asked to the Court was if there was a prohibited measure falling within the scope of Art. 36 TFEU and if *"[…]the*

[173] C. Barnard, Fifth Edition 2016, p. 175.
[174] Philipson, A.,p. 22.
[175] Case C-315/92 *Verband Sozialer Wettbewerb ev v. Clinique Laboratories SNC* [1994], ECLI:EU:C:1994:34.
[176] Ibid, para 21.
[177] Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe köln v. Mars GmbH* [1995], ECLI:EU:C:1995:224.
[178] Ibid, para. 2-8.
[179] Ibid, para. 24.
[180] Case 261/81 *Walter Rau v. Smedt* [1982] ECLI:EU:C:1982:382.

manufacture and marketing of margarine and edible fats, to market margarine or edible fats if each block or its external packaging is not cube-shaped and because of that prohibition margarine packaged in a different shape in another Member State in accordance with the provision of that state has to be specially packaged in cube-form in order for it to be imported into the Kingdom of Belgium?"[181]

The Court noted that the Belgian government argued the issue in matter is about sustaining the quality of products and that this did not constitute a real obstacle to trade. A prohibition of sale by retailers meant that there are other possibilities such as the wholesale trade.[182] Furthermore, the Belgian government argues that it is necessary for the consumer protection to require the cubic form to prevent getting consumer confused between butter and margarine. This argument can be justified, but however having adopted legislation about margarine lawfully manufactured and marketed in another Member State which prescribed for that product a specific kind of packaging and excluding any other form except cubic form, is an exaggerated requirement of the object in view. Consumer can be protected by other measures such as rules on labelling and is a lesser obstacle for the free movement of goods.[183]

"The article in question provides that the particulars which must appear on the packaging must 'be easy to understand and marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible'. That provision authorizes and requires the Member States to adopt the measures necessary to inform the consumer while leaving them considerable scope for the exercise of discretion. It by no means prevents the Belgian Government from adopting appropriate rules as to labelling applicable in a uniform manner to margarine produced in Belgium and in other Member States."[184] Therefore, the Court replied to the question submitted that the matter in the case constituted a MEQR within the meaning of Art. 36 TFEU.

A-Punkt Schmuckhandel[185] is about between a company, A-Punkt Schmuckhandels GmbH (A-Punkt) and Ms Schmidt which is seeking to hinder her from selling silver jewelry door-to-door. The Austrian legislation prohibits certain goods from collecting orders or selling,

[181] Case 261/81 *Walter Rau v. Smedt* [1982] ECLI:EU:C:1982:382, para 7.
[182] Ibid, para 11.
[183] Ibid para 16-17.
[184] Ibid, para 19.
[185] Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECLI:EU:C:2006:141.

including silver jewelry, at private homes.[186] Ms Schmidt has a company, registered in Germany, where she sells jewelry within EU in private homes. When she organized a 'jewelry party' in Austria a competitor brought an action seeking to prevent her business because the conducting of their business was prohibited according to Austrian law. The question was brought for preliminary ruling on whether this issue constituted a restriction on the free movement of goods under Art. 34 and 36 TFEU.[187]

The Court resonated such as, apart from it being partially harmonized and a ruling adopted saying that the consumers are guaranteed extensive protection and it is for the Member State to decide, as long as the measures are in consistent with fundamental principle of free movement of goods.[188] The Court ruled that provisions regarding certain marketing methods were provision regarding selling arrangements and prohibiting selling in private homes is to be regarded as a marketing method. The Austrian law applies to all relevant traders carrying business in Austria, despite their nationality.[189] The court states that the Austrian measure is likely to restrict the total volume of sales of the relevant products in the Member State concerned and leading to affecting the volume of sales of those products from other Member States.[190] However, it is not enough reason to fall within the scope of Art. 34 TFEU because it requires for the measure to constitute a MEQR only if the preclusion of the relevant marketing method affects products from other Member States than it affects domestic products. Since the prohibition does not concern all the ways of marketing the goods, but only one of them, it does not exclude the other methods of selling those goods in Austria.[191] It is for the national court to decide the mentioned. However, it is for the Court to decide, if the measure is to be found as a restriction falling within the meaning of the 'mandatory requirements' or Art. 36 TFEU, whether the prohibition is necessary and proportionate means to attain that objective. If so, the Court would have to take account the EU law about the protecting of consumers, because selling products at home has a higher risk of misleading and cheating on consumer due to lack of information or impossibility of comparing prices.[192]

[186] Ibid, para. 2-3.
[187] Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECLI:EU:C:2006:141, para. 5 and 7.
[188] Ibid, para. 10-12.
[189] Ibid, para. 16-18.
[190] Ibid, para. 21.
[191] Ibid, para. 24.
[192] Ibid para. 26 and 29.

The Court handles an indistinctly discriminatory measure in the case *Commission v. Italy.*[193] An Italian rule limited product that was made without vegetable fats had to be called 'chocolate' and the ones made with vegetable fats had to be called 'chocolate substitute'. Since the Irish chocolate were made out of only vegetables fats, they could not sell their chocolate under the name 'chocolate'. The Court found the Italian law created and additional burden on foreign products since other than Italian producers had to adjust their packaging of their products. Even though the national rule did treat the foreign and national products the same, it still leads to creating additional burden such as extra costs for them since they need to satisfy their home state standards in order to be able to lawfully produce their products there.

3.2.2 Environmental protection

The first case to handle the matter about environmental protection as a justification was *Commission v. Denmark (recyclable bottles).*[194] The case is about a Danish rule requiring that all container for beer and soft drinks had to be returnable. The Court accepted the arguments made by the Danish government that referred to the protection of the environment because the regulation was necessary and proportionate. However, they found that the requirement for the containers to be authorized by a national agency was disproportionate because it gave extra costs for providing special containers.

The case *Mickelsson and Roos*[195] is about a reference for a preliminary ruling concerning criminal proceedings brought by the Prosecutor against P.Mickelsson and J.Roos for failing to comply with a prohibition on the use of personal watercraft laid down by Swedish measure on the use of jet-skis (personal watercraft).[196] P.Mickelsson and J.Roos had been operating personal watercraft on waters other than a general navigable waterway, which is in infringement of the national regulations. Both of them admits to the facts but maintains that the application of those regulations is compatible with Art. 34 TFEU. The questions referred to the Court of Justice for a preliminary ruling is if Art. 34 - 36 TFEU hinder national provisions, such as those in the Swedish regulations, prohibiting the use of personal watercraft other than on a general navigable waterway or waters in respect of which the local authority has issued rules permitting their use? Does the Art. 34 - 36 TFEU also prevent the

[193] Case C-14/00 *Commission v. Italy* [2003] ECLI:EU:C:2003:22.
[194] Case 302/86 *Commission v. Denmark* [1988] ECLI:EU:C:1988:421.
[195] Case C-142/05 *Miceklsson and Roos* [2009] ECLI:EU:C:2009:336.
[196] Ibid, para. 1.

use of personal watercraft on waters which have not yet been the subject of an investigation?[197]

In the files sent to the Court it was shown that no waters had been designated as open to navigation by personal watercraft. This meant that the use of personal watercraft was permitted on only general navigable waterways. Both the accused and the Commission supports that those waterways are for heavy traffic of a commercial nature making the use of personal watercraft dangerous. There is merely marginal possibility for the use of personal watercraft in Sweden because the majority of navigable Swedish waters lie outside whose waterways. Even if the national measure does not have as its aim or effect of treating goods from other Member States less favourably, the restriction can have an influence on the behaviour of consumers and which in turn can affect the product from entering the market of that Member State. Knowing that the use permitted by a national measure is limited, affects its decision in buying that product as a consumer. [198]

The Swedish Government claims that the national regulations are justified by the objective of environmental protection and by the derogations listed in Art. 36 TFEU. The restriction on the use of personal watercraft to particular waters gives opportunity to prevent unacceptable environmental disturbances. It has been shown that it has negative consequences for fauna, especially where such craft is used for a longer time on a small area or driven at great speed. Furthermore, the effects the use of personal watercraft has is that the noise as a whole disturbs people and animals and especially certain protected species of birds. It also facilitates the spread of animal diseases because of the easy transport of personal watercraft.[199]

In this case the Court examines both the protection of the environment and the protection of health and life of humans, animals and plants. The prohibition on the use of personal watercraft leaves users of those craft with not less than 300 general navigable waterways on the Swedish coast and on the large lakes.[200] The national regulations provide for general prohibition of the use of personal watercraft other than general navigable waterways save where the competent authority designates waters. The national measure has to specifically contains that personal watercraft may be used without giving rise to risks or pollution deemed

[197] Ibid, para. 14-15.
[198] Case C-142/05 *Miceklsson and Roos* [2009] ECLI:EU:C:2009:336, para. 25-27.
[199] Ibid, para. 30.
[200] Ibid, para. 33 and 35.

unacceptable for the environment. There cannot be a general prohibition on using such goods on water other than navigable waterways because such measure is going beyond what is necessary to achieve the aim of protection of the environment.[201]

The Court states that the Swedish regulations are proportionate because it is the competent authority that required to adopt such implementing measure, they have the power conferred on them in that regard and designated the waters which satisfy the conditions provided by the national regulations and that the measure has been adopted within the reasonable time after the entry into force of those regulations.

3.2.3 Fundamental rights

The protection of the fundamental rights has been a difficult matter for the Court to handle. The *Schmidberger*[202] case handled the question referred by the Austrian Court whether the right to manifestation constituted an infringement to the free movement of goods. It also discussed whether the infringement could be justified by another fundamental rights such as the right to expression. Further, they referred to whether it is a breach considered sufficiently serious to give rise to State liability and right to compensation?[203] The case is about an environmental association that decided to make a manifestation and block one of the major motorways in Austria for more than 30 hours. The Austrian authority approved the request based on the argument that this event respects the national law and was announced several weeks before letting individuals to take their disposal. However, according to the national law, the lorries exceeding 7,5 tons are not allowed to circulate during some specific periods and weekdays. The effect of this event was that the lorries of the Schmidberger company could not circulate for four days and therefore could not deliver the goods in Germany and Italy.[204]

Schmidberger brought an action before the Austrian Court because its companies' lorries could not use the motorway for four days. They argued that the because of the Austrian authorities' actions in not failing the manifestation it was a restriction of the free movement of goods. It should not be justified on by the protestors' right to freedom of expression and

[201] Ibid, para. 37-38.
[202] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333.
[203] Ibid, para. 47.
[204] Ibid, para. 1-2, 6 and 12.

freedom of assembly the restriction was a breach of EU law in respect of the Member State concerned incurred liability.[205]

The Austrian Court argued that the claim should be rejected because the Austrian authorities had been giving their decision not to ban the manifestation on grounds that was carefully taken. Their decision was scrutiny of the facts of the circumstances. The information as to the date of the closure of the motorway had already been announced in Austria, Germany and Italy and that it would not result in incidents or traffic jams. Furthermore, the Austrian authority stated in their defense that the manifestation was not permanent nor serious and that this is a part of a democratic society.[206] Schmidberger company had no proof in showing that the lorries had to use the motorway during the days of manifestation, nor that it was impossible to take another route in order to avoid loss.[207]

The Opinion of AG Jacobs was that the blockage of the motorways was a hinder to free movement of goods and that such hindrance because he stated that *"[…]only a single route was blocked, on a single occasion and for a comparatively short period; neither the intention nor the effect was to prevent imports of particular kind or origin; no criminal conduct was involved."*[208] Furthermore, AG Jacob stated that the measure is justified and proportionate based on that *"[…] where a Member State seeks to protect fundamental rights recognized in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue."*[209] The disruption caused by the measure taken was on a short period of time under one isolated occasion, *"excessive restrictions on the demonstration itself would have been liable to deprive the demonstrators of the rights which the authorities sought to protect. Such restrictions might even conceivably have caused reactions leading to greater disruption than was the case for a planned demonstration controlled in cooperation with the authorities."*[210]

[205] Ibid, para. 16.
[206] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 17.
[207] Ibid, para. 18.
[208] Opinion of Advocate General Jacobs in case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, paras. 67-68 and 78.
[209] Ibid, para. 102.
[210] Ibid, paras. 108-111.

The Court agreed with the opinion of the AG Jacobs. The Court pointed out the importance of the free movement of goods as a fundamental principle of the EU. The importance of the internal market and not creating barriers to trade between the Member States.[211] The Court stated that *"In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a MEQR which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified."*[212]

The Austrian Court asked if the purpose of the manifestation, which was to draw attention to the threat to the environment and public health because of the heavy goods vehicles on the motorway, could destroy the EU laws obligations related to the free movement of goods. However, this infringement can be legitimate. In fact, the goal of the Member State was to respect the right of expression of the association. The right to free expression, interpreted in the light of the European Convention on Human Rights (ECHR) is not an absolute right but a qualified right. It means that the right can be limited if the Member State follow a legitimate objective and the infringement is proportionate to the aim of the action.[213] The EU does not accept a national measure which is incompatible with the humans right. The Member States must respect the fundamental rights, which is a legitimate interest and can be used as a justification to restriction of the free movement of goods.[214] The Court state that even though the free movement of goods constitutes one of the fundamental principle of the Treaty, it may be that a restriction can be legitimate if it falls within the scope of Art. 36 TFEU and are relating to the ground of public interest. Further, the Court states that the freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest.[215]

The Court found that the Austrian authority proved that the conditions for justification were fully respected and that another solution was not possible. It could had been more serious

[211] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 51-60.
[212] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 64.
[213] Ibid, para. 65-69.
[214] Ibid, para. 73-74.
[215] Ibid, para. 78-80.

disruption to the intra-EU trade and public order by having unauthorized manifestations or acts of violence on the part of the demonstrators that thought that their fundamental rights had been infringed. The government were not in breach with EU law and therefore, could not give rise to liability on the part of the Member State. There is no need to rule on the question concerning the conditions necessary for a Member State to incur liability for damage cause to individuals.[216]

3.2.4 Other Mandatory Requirements

3.2.4.1 Public Health

One of the mandatory requirements that is claimed mostly as justification by the Member States are public health. Public health is both regulated in Art. 36 TFEU and a mandatory requirement. Public health has been challenged in many cases in both categories which has been creating a confusion because of the overlapping of the defences.[217] The traditional view is that only indistinctly applicable measures could take advantage of the mandatory requirement. The Court has shown that they are *"not been too concerned about it treats a justification within Article 36 or within the list of mandatory requirements, provided that the justification comes within both lists, more especially where it is unclear whether the impugned rule is discriminatory or indistinctly applicable."*[218]

In *Aragonesa de Publicidad*[219] case the restriction was of the high rate of alcohol advertisement on the streets such as in cinemas and transport in order to protect public health. The Court found the prohibition to be justified because *"the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which, such as public highways and cinemas, are particularly frequented by motorists and young persons, two categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticized for being disproportionate to its stated objective."*[220]

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[216] Ibid, para. 92-96.
[217] Case C-178/84 *Commission v. Germany* (German Beer) [1987] ECLI:EU:C:1987:126, see para. 44 where the Court refers to several cases on justification based on public health under Art. 36 TFEU.
[218] Case C-97/83 *Melkunie* [1984] ECLI:EU:C:1984:212; Case C-178/84 *Commission v. Germany* (German Beer) [1987] ECLI:EU:C:1987:126.
[219] Joined Cases C-1 and 176/90 Aargonesa de Publicidad Esterior SA v. Departmento de Sanidad y Seguridad Social de la Generalitat de Cataluña (Aragonesa de Publicidad) [1991] ECLI:EU:C:1991:327.
[220] Joined Cases C-1 and 176/90 Aragonesa de Publicidad [1991], para. 18.

The facts of the case *Gilli and Andres*[221] is that Herbert Gilli (Gilli) and Paul Andres (Andres), the defendants, challenged the compatibility with Art. 36 TFEU of certain Italian rule in relation to the production and marketing of vinegar. This Italian law concludes the right for the government to adopt legislation for banning of fraud in the preparation and marketing of musts, wines and vinegars. It should be prohibited to direct or indirect use in the food area of synthetic alcohols and products containing acetic acid not proceeded from the fermentation of wine or piquette. Because this cannot be classified as vinegar in accordance with the Italian law and therefore, not be sold to or marketed for use, directly or indirectly, for human consumption. Both the defendants were selling such products, whereas Gilli is charged with having marketed and stocked for the purpose of sale apple vinegar containing acetic acid not derived from the acetic fermentation of wine, and Andres is charged with having stocked the same product for sale.[222]

The question if the prohibition on putting the market products containing acetic acid not derived from the acetic fermentation of wine must be considered as being a QR on imports or a MEQR under Art. 36 TFEU? The defendants argue that when referring to the protection of public health the apple vinegar is more conductive to the human health than vinegar made from wine because of the highly content of potassium and does not contain any harmful substances. Appel vinegar is not harmful to public health. Furthermore, when demanding protection of the consumer they cannot be confused or misled because containers of apple vinegar have a label which is sufficiently explicit to distinguish from wine vinegar. A prohibition on import into Italy of a sub-product of the common agricultural production to protect the human health.[223]

The Court found that *"there is no factor justifying any restriction on the importation of the product in question from the point of view either of the protection of public health or of the fairness of commercial transactions or of the defense of the consumer".*[224] They referred to the documents in the file on the case about apple vinegar not containing any harmful substances and therefore not harmful to health and because of the clear label indicating that it is in fact apple vinegar and hard to confuse it with wine vinegar. The effect of the Italian rule is to protect domestic products by prohibiting and leading to not putting products from other

[221] Case 788/79 *Herbet Gilli and Paul Andres* [1980] ECLI:EU:C:1980:171.
[222] Case 788/79 *Herbet Gilli and Paul Andres* [1980] ECLI:EU:C:1980:171, page 2072-73.
[223] Ibid, p.2074-75.
[224] Ibid, para. 4.

Member States to their market. The Court found this to be an obstacle to trade which is incompatible with the provision of Art. 36 TFEU.[225]

3.2.4.2 Fairness of Commercial Transactions

The defences such as the consumer protection and the fairness of commercial transactions can overlap. The fairness of commercial transaction is based on preventing unfair marketing practices, meaning that the selling of imported goods that are imitations of acquainted domestic goods.[226]

3.2.4.3 Road Safety

In the so-called *Trailers*[227] the Commission asks the Court to decide if the Italian Republic has failed to fulfil its obligations under Art.34 TFEU. The Italian Republic has prohibited mopeds, motorcycles, tricycles and quadricycles (hereinafter 'motorcycles') from towing in trailer.[228] Therefore, the question in the case was on how to deal with a ban on the use of a product.

According to the Commission there is two rules that concerns the use of a products; (1) products that are used subject to compliance with certain conditions particular to the product or which limit that use in space or time, or (2) those products which lay down absolute, or almost absolute, prohibitions of the use of the product. As for the first rule the Commission refers to paragraph 5 in *Dassonville* and as for the second rule, once they impose a prohibition on the use of a certain product or limited or exceptional use of it as well, they constitute MEQRs on imports which falls within the scope of Art. 34 TFEU.[229]
The Court agreed with the opinion given of Advocate General (AG) Bot in this case. Advocate General Bot stated that a distinction between different categories of measure is not appropriate, because making such distinction may lead to uncertainty. Further, AG Bot requested the Court to analyze and apply the market access test. The test should be on the

[225] Ibid, para 7 and 10-11.
[226] Case 58/80 *Dansk Supermarked v Imerco* [1981] ECLI:EU:C:1981:17 ; Case 16/83 *Karl Prantl* [1984] ECLI:EU:C:1984:101
[227] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66.
[228] Ibid, para.1.
[229] Ibid, para. 18.

characteristics of the product as 'selling arrangement'.[230] This meant that the general criteria is *"based on the effect of the measure on access to the market rather than on the object."*[231]

According to settled case law Art. 34 TFEU reflects an *"obligation to respect the principle of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets."*[232]

The Court found that the Italian measure hinders access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in other Member States and falls within the scope of Art. 34 TFEU. Such prohibition may be justified on one of the derogations listed in Art. 36 TFEU and it must achieve its objective and not go beyond what is necessary to attain it. In the present case, the Italian republic claims that the prohibition is to be justified because of the need to ensure road safety. According to case law this kind of justification has been constituted overriding reason relating to the public interest capable of justifying an obstacle to the free movement of goods.[233] There were no type-approval rule that could ensure that the use of a motorcycle with a trailer was not dangerous. This could be dangerous both for the driver of the vehicle and for other vehicles on the road. Therefore, the Court regarded that the prohibition in question is appropriate for the purpose of ensuring road safety and that such rule was justified on the ground of the mandatory requirement of road safety.

When the Court analyzed when a measure could be a MEQR and applicable to Art. 34 TFEU, they recognized three issues; (1) if the measures are distinctly applicable, (2) if the product requirements were indistinctly applicable and (3) if there existed any other measure that could hinder access of products originating in other Member States to access the market in another Member State.[234] What is special about this case is that the Court has never interpreted the third issue on whether it falls within the scope of Art. 34 TFEU. The result of this case has clarified measures that have not belonged to neither 'selling arrangements' nor 'product characteristics'. When the Court used the market access test, they stated that a prohibition on

[230] Opinion of Advocate General Bot in case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66, paras. 79 and 81.
[231] Ibid, para. 109.
[232] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66, para. 34.
[233] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66, para. 58-60.
[234] Ibid, para. 37.

the use of a product within a Member State *"has a considerable influence on the behaviour of consumer, which, in its turn, affects the access of that product to the market of that Member State."*[235] This test has been introduced in *Dassonville* and restricted in *Keck,* but this case leads to a clearer and easier was of interpreting the scope of Art. 34 TFEU.

3.3 Proportionality test

A Member State has the opportunity to justify their national law that can be a restriction to free movement of goods. This means that as long as the restriction can be justified the national measures are allowed. There are some conditions that must be satisfied in order for such rule to be justified. These conditions are; (1) there must be a legitimate objective to be protected by the rule that makes restrictions and (2) that such rule must fulfill the principle of proportionality.

The principle of proportionality constitutes by some test; (1) a test of suitability, (2) a test of necessity and (3) stricto sensu. The tests are applicable for both justification under Art. 36 TFEU and 'mandatory requirements'.[236] Whereas the first test refers to the relationship between the means and the end and is explained such as the means must be suitable, meaning adequate and appropriate, to attain the end.[237] There has to be a *"reasonable connection between the measure laid down by the authorities and the exercise of control."*[238] The second test refers to the measure having an interest worthy of legal protection and the objectives of the measure is important and therefore necessary. The strictu sensu test is proportionality in narrow sense which includes balancing of interest. On the on hand guaranteeing and protecting free movement of goods and on the other hand the objective which is protected by the measure in question. This is illustrated in the case *Schmidberger*[239], where the Court applied the strictu sensu test and balanced on one hand the free movement of goods and the other hand the fundamental right to expression. The Court stated:
"[…] whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the

[235] Ibid, para. 55.
[236] Oliver, p. 217.
[237] C. Barnard, Fifth Edition 2016, p. 179.
[238] Case 132/80 *NV United Foods and PVBA Aug. Van den Abeele v. Belgium* [1981] ECLI:EU:C:1981:87, para. 28.
[239] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 78 and 81.

public interest."[240] Furthermore, *"[…] the interests involved must be weighed having regard to all circumstanced of the case in order to determine whether a fair balance was struck between those interest."*[241] *"The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-[Union] trade are proportionate in the light of the legitimate objectives pursued, namely, in the present case, the protection of fundamental rights."*[242]

If a Member State does not invoke ground for justification. the Court has stated: *"[…] the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated."*[243] The burden of proof is on the national authorities to show that their rules satisfy the proportionality test.[244] There is some interesting evidence that when the proportionality test is done by the Court the results tends to be that the national measure is disproportionate. When the national court tends to do the proportionality test the results is quite the opposite, the national measure is proportionate.[245]

3.4 General comments

Art. 36. TFEU has existed since the Treaty of Rome. So, the list of derogations is not completely in line with the value of the modern society. The provision does not mention for example the protection of the consumers or the environmental protection, but does correspond to the preoccupations of this period. This is the reason why there is a 'mandatory requirement-list'. One can possibly argue that the consumer protection is not in line with the value of the modern society and can be seen in the cases were the Court has stated *"the presumed expectations of average consumer who is reasonably well-informed and reasonably observant and circumspect".*[246] The Court has also stated that *"this individual also reads labels on products".*[247]

[240] Ibid, para 78.
[241] Ibid, para 81.
[242] Ibid, para 82.
[243] Case C-254/05 *Commission v. Belgium* [2007] ECLI:EU:C:2007:319, para. 36.
[244] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66, para. 62.
[245] C. Barnard, Fifth Edition 2016, p. 180.
[246] Case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt* [1998], ECLI:EU:C:1998:369, para. 31
[247] Case C-51/94 *Commission v. Germany* [1995], ECLI:EU:C:1995:352, para.34.

It seems that the derogations under Art. 36 TFEU are clearer and easier to define on whether it is justified or not, because if such rule is discriminatory, they are both in law and in fact. We can see this clearly in the Courts decision in *Henn and Darby*[248] found that the prohibition is justified under the public morality because the ban did not aim to discriminate between foreign and domestic products as there were no national market for such products. Additionally, in *Conegate*[249] the Court said that the fact that goods cause offence could not be regarded as sufficiently serious to justify restrictions on the free movement of goods and therefore, the prohibition was discriminatory and not justified under Art. 36 TFEU. However, case law has shown that it is difficult for the Member States to prove mandatory requirements and prove that they are proportionate.[250] If a rule is discriminatory and falls under one of the mandatory requirements it is harder to identify when it is justified because it is so in fact and not in law. For instance, case law has shown that the Court's decision is harsher when the matter includes the consumer protection or when scientific proof is needed.[251]

The traditional view is that the 'mandatory requirements' are separate from the derogations under Art. 36 TFEU, and that such rules only are applicable to measures considered to be indistinctly applicable.[252] A non-directly discriminatory measure which cannot be justified under the case-law under the list of mandatory requirements could rarely, if ever, be sanctioned by Art. 36 TFEU, because the Courts interpretation of the derogations listed in Art. 36 TFEU are narrowed as being in derogation from the general principle of free movement of goods.[253] However, the Court has considered the validity of an indistinctly applicable measure under Art. 36 TFEU, which in practice had a discriminatory effect.[254] There is also one case in where the Court discussed both sets of justifications such as public

[248] Case 34/79 *Regina v. Maurice Donald Henn and John Frederick Ernest Darby (Henn and Darby).* [1979] ECLI:EU:C:1979:295, para. 16.
[249] Case C-121/85 *Conegate v.HM Customs and Excise* [1986], ECLI:EU:C:1986:114.
[250] Case 302/86 *Commission v. Denmark* [1988] ECLI:EU:C:1988:42 (disproportionate); Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66 (disproportionate). Case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt* [1998], ECLI:EU:C:1998:369, para. 31; Case C-51/94 *Commission v. Germany* [1995], ECLI:EU:C:1995:352, para.34; Case C-315/92 *Verband Sozialer Wettbewerb ev v. Clinique Laboratories SNC* [1994], ECLI:EU:C:1994:34.
[251] Case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt* [1998], ECLI:EU:C:1998:369, para. 31; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe köln v. Mars GmbH* [1995], ECLI:EU:C:1995:224; Case C-315/92 *Verband Sozialer Wettbewerb ev v. Clinique Laboratories SNC* [1994], ECLI:EU:C:1994:34, para 21.
[252] This was confirmed by the Court in case C-113/80 *Commission v. Ireland* (Irish Souvenirs) [1981] ECLI:EU:C:1981:139.
[253] Case C-120/95 *Decker* [1998] ECLI:EU:C:1998:167; Case 72/83 *Campus Oil Limited and others c. Minister for Industry and Energy and others (Campus Oil)* [1984] ECLI:EU:C:1984:256.
[254] Case C-142/91 *Commission v. United Kingdom* [1983] ECLI:EU:C:1983:30.

health.[255] The protection of health, plants or animals might overlap with protection of environment.[256] Even though some of the defences mentioned in Art 36 TFEU and mandatory requirements can overlap, they are not identical.

Furthermore, the case *Keck* might have been created more confusion. Selling arrangement falls outside the scope of Art. 34 TFEU *"provided that they apply to all traders in the national territory, and affect in the same manner, in law and fact, the marketing of domestic and imported products."* Discriminatory rules are to be considered protectionist, but also as hindering or prohibiting the access to the relevant market. While the indistinctly applicable measures are to be considered because they forcefully supplement costs on cross-border situations that hinder or prohibits market access. Other cases such as selling arrangements or products use are caught as far as they hinder or prohibit market access.[257] As before Keck the focus was on the balancing conflict of interest and value. After Keck the focus for the Court is to balance all interests.

When the Court analyzed when a measure could be a MEQR and applicable to Art. 34 TFEU, they recognized three issues; (1) if the measures are distinctly applicable, (2) if the product requirements were indistinctly applicable and (3) if there existed any other measure that could hinder access of products originating in other Member States to access the market in another Member State.[258] The Court has never interpreted the third issue on whether it falls within the scope of Art. 34 TFEU until in the case *Trailers*. The result of this case has clarified measures that has not belonged to neither 'selling arrangements' or 'product characteristics'. When the Court used the market access test, they stated that a prohibition on the use of a product within a Member State *"has a considerable influence on the behaviour of consumer, which, in its turn, affects the access of that product to the market of that Member State."*[259]

However, some scholars' opinions have been that the separation is only in principle and that the Court is moving towards simplifying the handling of the 'mandatory requirements' in the same way as the derogations in Art. 36 TFEU. It would obviously be easier if the possibility to justify measures regardless of distinctly applicable or indistinctly applicable measures

[255] Case C-97/83 *Melkunie* [1984] ECLI:EU:C:1984:212; Case C-405/98 *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP) (Gourmet)* [2001] ECLI:EU:C:2001:135, paras. 27 and 34.
[256] Case 142/05 *Mickelsson* [2009] ECLI:EU:C:2009:336, para. 33.
[257] Craig & de Burca, p. 691.
[258] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECLI:EU:C:2009:66, para. 37.
[259] Ibid, para. 55.

existed. The arguments are that it is impossible, given the wording of Art. 36 TFEU. According to Craig and de Burca they argue that *"[…] if it was legitimate in Cassis to create an open-ended list of mandatory exceptions, not mentioned in the Treaty, then it if difficult to see why it would not be legitimate for the ECJ to read Article 36 to include matters such as the environment or consumer protection."*[260]

According to Weatherill and Beaumont there could be a clear distinction between the derogations in Art. 36 TFEU and the mandatory requirements termed as dual-burden rules and equal-burden rules. Whereas the first is concerned with *Cassis de Dijon*. In other words, State A imposes measures on the content of goods and State B applies those measures, even though State B already are compatible with the trade rules in their state. *Cassis de Dijon* is preventing state A from imposing such rules, unless they can be justified by mandatory requirements. The latter one is applicable to rules for all goods, despite the origin of the goods.[261]

The *Cassis de Dijon* led to negative integration by adjudication by the Court, meaning that trade rules would be incompatible with Art. 34 TFEU unless they were satisfying the mandatory requirement. If a national rule survived because of the mandatory requirement this resulted in rulemaking, so-called positive integration. The *Cassis* strategy has resulted in four problems;[262]

1. If a national measure did not satisfy the *Cassis* test then the rule hade to be removed. This conclusion was acceptable, as long as one agreed with it. The Court has held that national measures on food standards cannot be satisfied by the mandatory requirements based on the argument that the importing state could use a policy that were less restrictive on rules concerning product labelling. According to Weatherill the Court more often has a harsh attitude towards consumer and gives less attention to the consumer confusion.[263]
2. The problem created by the relationship between Art. 36 TFEU and the mandatory requirement. The Court has to consider the balance when deciding on the legitimacy of these kind of grounds. On the one hand the market integration and on the other hand the social objective.[264]

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[260] Craig & de Burca, p. 705.
[261] S. Weatherill and P. Beaumont, *EU law,* [1999], Third edition, p. 608.
[262] Craig & de Burca, p. 715-717.
[263] S, Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation,* [1999] 36 CMLRev 51.
[264] See inter alia Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333; Case 7/78 *Thompson* [1978] ECLI:EU:C:1978:209; Case 142/05 *Mickelsson* [2009] ECLI:EU:C:2009:336.

3. The problem concerns the relationship between market integration and the protectiveness by the national rules. EU has to ensure that trade rules does not interfere with the objective of the single market integration. When the Court has to take this to consideration the risk that the attention for consumer protection goes away because there is no balance for the social protection towards a deregulated free market economy.[265]
4. Lastly, the sharing competence of regulating between the EU and the Member States. It is for the Member States to set their definition and interpretation of Art. 34 TFEU, as long as there is no harmonized legislation or requirement.

[265] K. Alter and S. Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision,* [1994] 26, Comapartive Political Studies, 535, 544.

4. Conclusion

The internal market requires the elimination of inter alia non-fiscal barriers to trade between the Member State. Art. 34 TFEU determines that QRs and MEQRs on importations between the Member States are prohibited. Art. 35 TFEU lays down corresponding prohibition as regards QRs and MEQRs on exports. The objective of these two provisions is to prohibit measures that limit quantitively the importations and exportation of goods.

Art. 36. TFEU is an exception clause, which has existed since the Treaty of Rome and contains an exhaustive list of justifications. This list of public policies is not completely in line with the value of the modern society. The provision does not mention for example the protection of the consumers or the environmental protection. Therefore, the Court introduced in *Cassis de Dijon* a non-exhaustive list of mandatory requirements. The member states can invoke one of the derogations listed in Art. 36 TFEU or mandatory requirement. Furthermore, a measure has to be proportionate to be considered justified and compatible with EU law. The Court applies the proportionality test that is similar for both the sets of justifications. The assessment of the so-called proportionality test has three steps; (1) a test of suitability, (2) a test of necessity and (3) stricto sensu. When the Court applies the proportionality test, they take into account, on the on hand guaranteeing and protecting free movement of goods and on the other hand the objective which is protected by the measure in question.[266]

The Court has interpreted Art. 36 TFEU strictly to ensure that discriminatory restrictions on the free movement of goods are not easily justified. Both Art. 34 and 35 TFEU are subject to the exhaustive list of the derogations in Art. 36 TFEU. These derogations can never concern economic objectives and are not invokable in cases of full harmonization on Union level. For example, the Court prefers not to use public policy because it is only applied when there is no other exception to use.[267] Additionally, the Court gives more attention to exceptions such as public health, public morality and public security.[268]

The list the Court introduced in *Cassis de Dijon* covered four mandatory requirements that could be considered as supplements to the derogations listed in Art. 36 TFEU. The Court has since the recognition of the four mandatory requirements, developed case-law mentioning a

[266] See section 3.2.3 and 3.3.
[267] See section 3.1.3.
[268] See section 3.1.2., 3.1.4., 3.1.5.

range of other mandatory requirements.[269] The mandatory requirements are accessible when there is no harmonized legislation and the national policy does not have the objective of a purely economic nature. Case law has shown that it is difficult for the Member States to prove mandatory requirements and prove that they are proportionate.[270]

The Court strike a balance between the internal market and the justification grounds between the two cases. However, the difference in the Courts reasoning is existent and depends on if the national rule in questions is to be considered distinctly or indistinctly applicable. A measure can only be justified on the grounds of the exhaustive list of derogations listed in Art. 36 TFEU if it is distinctly applicable or directly discriminatory measure. The measure can be justified by the non-exhaustive list of mandatory requirements if it is to be considered indistinctly applicable or indirectly discriminatory. The Court has also shown that there is a difference when applying Art. 34 and Art. 35 TFEU. Art. 34 are applicable to discriminatory provisions and also to indistinctly applicable measures, while it seems that Art. 35 TFEU are only applicable to discrimination.

A non-directly discriminatory measure which cannot be justified under the case law relating to mandatory requirement could rarely, if ever, be sanctioned by Art. 36 TFEU, because the Courts interpretation of the derogations listed in Art. 36 TFEU are narrowed as being in derogation from the general principle of free movement of goods. However, the Court has, one time, considered the validity of an indistinctly applicable measure under Art. 36 TFEU, which in practice had a discriminatory effect. There is also one case in where the Court discussed both sets of justifications such as public health. Another situation to where the defences has been overlapping is that the Court has used both justifications such as environmental protection and the protection of health and life of humans, animals and plants listed in Art. 36 TFEU. Even though the overlapping of justifications from the two cases has existed there still is no case in where the Court has been deciding if an indistinctly applicable measure is to fall under Art. 36 TFEU.

It is quite obvious that the distinctions between the two sets of justifications exists, but the question on whether the Treaty should amend and adapt to the modern society remains.

[269] See section 3.2 Mandatory requirement for more clarity of the different mandatory requirements.
[270] See the different cases under section 3.1 Mandatory requirements.

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