§ 8

Free Movement of Goods

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Leading cases: ECJ *Dassonville* [1974] ECR 837; *Cassis de Dijon* [1979] ECR 649; *Keck* [1993] ECR I-6097; *Mars* [1995] ECR I-1923; *de Agostini* [1997] ECR I-3843; *DocMorris* [2003] ECR I-14887.

Further reading: Ahlfeld *Zwingende Erfordernisse im Sinne der Cassis-Rechtsprechung des Europäischen Gerichtshofs zu Art. 30 EGV* (Baden-Baden 1997); Frenz *Handbuch Europarecht. Band 1. Europäische Grundfreiheiten* (Berlin et al. 2004); Füller *Grundlagen und inhaltliche Reichweite der Warenverkehrsfreiheiten nach dem EG-Vertrag* (Baden-Baden 2000); Hoffmann *Die Grundfreiheiten des EG-Vertrags als koordinationsrechtliche und gleichheitsrechtliche Abwehrrechte* (Baden-Baden 2000); Kingreen *Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts* (Berlin 1999); Millarg *Die Schranken des freien Warenverkehrs in der EG* (Baden-Baden 2001).

1 According to the conception of the TEC, the free movement of goods is guaranteed by a whole set of rules:

2 Articles 25 et seqq. of the TEC contain the provisions relevant to the customs union. In these provisions, the **abolition of custom duties on imports and exports** as well as **charges having equivalent effect** (Article 25 of the TEC/ Article III-151 IV of the Draft Constitution) on the one hand, and the introduction of a **common customs tariff** in relation to third states (Article 26 of the TEC/ Article III-151 V of the DC) on the other hand are provided for in detail. While Article 25 of the TEC (Article III-151 IV of the DC) has direct effect, attributes corresponding rights to individuals and in this respect features[1] the same characteristics as the Fundamental Freedoms[2], the common customs tariff is (necessarily) introduced by secondary community law.[3]

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1 The notion of custom duties is relatively clear whereas the notion of measures having equivalent effect raises several questions. As to this, with further references to case-law, cf Epiney in: Bieber/Epiney/Haag *Die Europäische Union* (6th ed, Baden-Baden 2004) § 13, paras 20 et seqq.

2 As to the notion → § 7 para 7.

3 Cf more detailed Voß in: Grabitz/Hilf (eds) *EU* (München) Art 23 TEC paras 17 et seqq.

3 The **prohibition of quantitative restrictions on imports and exports** and of **measures having equivalent effect** (Articles 28-30 of the TEC/ Articles III-153-154 of the DC) complement the prohibition on tariff trade barriers held in Article 25 of the TEC (Article III-151 IV of the DC) with such of non-tariff nature and therewith substantially contributes to the opening of the markets in terms of the cross-border circulation of goods.

4 Article 31 of the TEC (Article III-155 of the DC) finally provides for the **transformation of state trade monopolies**. This provision – which complements the prohibition of tariff and non-tariff barriers – should prevent the behaviour of state trade monopolies from restricting the effectiveness of the rules on the free movement of goods.[4]

5 The following observations are limited – pursuant to focus of this volume – to the aspect named in second place, which is also by far of greatest importance in the (judicial) practice. As to the scope of Articles 28, 29 of the TEC, one can – according to the aforementioned general doctrines (→ § 7 paras 50 et seqq) – distinguish between the scope of protection (I.), interference (II.) and justification (III.). Thereby, the already generally discussed problems are only touched upon, so that emphasis is placed on the questions particularly relevant or specific to the movement of goods.

I. Scope of Protection

6 The **territorial scope of applicability** of Articles 28, 29 of the TEC (Article III-153 of the DC) results from Article 299 of the TEC (Article IV-440 of the DC) and therewith corresponds with the scope of the TEC.[5]

7 The **material scope of applicability** of Articles 28, 29 of the TEC (Article III-153 of the DC) can be drawn from Article 23(2) of the TEC (Article III-151(2) of the DC). Accordingly, two aspects are of significance:

8 First of all, **„goods“** must be concerned. This notion is not defined in the Treaty; however, it has been subject to a certain clarification by the case-law of the ECJ.[6] Accordingly, goods are to be understood as movable physical objects, which in principle have a monetary value, so that they can be the objects of commercial transactions. However, here the ECJ partly also takes a pragmatic point of view, eg by affirming the quality as a merchandise

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4 However, state trade monopolies are not forbidden, but (also) subjected to the rules of the free movement of goods. Cf more detailed on the provision and its interpretation by the ECJ, with further references, Epiney in: Calliess/Ruffert (eds) *Kommentar EUV/EGV* (2nd ed, Neuwied et al. 2002) Art 31 TEC.

5 More detailed → § 7 para 48.

6 For instance, cf ECJ *Jägerskiöld* [1999] ECR I-7319, paras 30 et seqq.

in the case of waste[7] in order to avoid delimitation problems – a monetary value is sometimes, but not always, attributable to waste, and this estimation is also quite susceptible to change. Electric current and gas are also considered to be goods[8], which is particularly appropriate in view of their transferability and practical handling as goods with monetary value. However, it must be pointed out that these delimitation problems are not of great practical relevance, given that the free movement of services (Article 49 of the TEC/ Article III-144 of the DC) would apply in case that Article 28 of the TEC (Article III-153 of the DC) was not found to be relevant.

9 Even if movables are concerned, the quality as merchandise and therewith the relevance of Articles 28, 29 of the TEC (Article III-153 of the DC) may be negated if the movable as such is insignificant and of no or of a fairly negligible value, particularly because the main focus of the commercial activity is to be sought in another field. In this sense, the confiscation of lottery tickets and the corresponding promotion material ensuing the application of a general prohibition of lotteries is not to be seen under the light of the free movement of goods, but rather with focus on the free movement of services, since the sending of the materials is unseparably linked with the running of lotteries.[9] The quality as a merchandise must however be affirmed if a product acts as a „storage container", such as gramophone records.[10]

10 Secondly, the merchandise must either originate **from the Member States** or – in case of goods from third states – has to be located **in the free circulation between Member States**. The proof of the Community character of the goods is regulated in detail in the Customs Code.[11]

11 The question whether the quality as merchandise should be excluded **for ethical reasons** has not yet been answered exhaustively.[12] This problem becomes pertinent when it comes to corpses as well as embryos or stem cells and can also arise accordingly within the scope of other Fundamental Freedoms. Finally, there are better reasons against a categorical restriction of the notion of goods from an ethical point of view: First of all, the question of the possible scope of such a restriction can hardly be answered in a general abstract manner and therewith predictably: The views as to what is „ethical", and what is not, differ considerably, as exemplified by the current discussion regarding stem cells. Furthermore - and particularly - the systematics of Articles 28 et seqq of the TEC (Article III-153 of the DC) departs from the

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7 ECJ *Commission v Belgium* [1992] ECR I-4431, paras 22 et seqq = Kunig JK 93, EWGV Art 30/3.
8 ECJ *Almelo* [1994] ECR I-1477, para 28; ECJ *Preussen Elektra* [2001] ECR I-2099, paras 68 et seqq.
9 ECJ *Schindler* [1994] ECR I-1039, paras 22 et seq.
10 On this and as to the delimitation from „inventions" Voß in: Grabitz/Hilf (note 3) Art 23 TEC para 12.
11 On this, more detailed, Voß in: Grabitz/Hilf (note 3) Art 23 TEC paras 16 et seqq.
12 On this problem Frenz, *Handbuch Europarecht Bd I* (Berlin et al. 2004) paras 701 et seq.

assumption that such problems are to be resolved in the framework of justification, given that in principle Article 28 of the TEC (Article III-153 of the DC) does precisely not pay regard to the legal classification of a certain product in a Member State. This aspect is rather considered at the level of justification (Article 30 of the TEC/ Article III-154 of the DC and mandatory requirements, particularly public order). Therefore, it would seem more reasonable to resolve the possible ethical questionableness of the trade with certain products at this level; in doing so, consideration can be paid to the Member States' diverse solutions to such questions.

12 In this connection, also the **special rules** regarding specific goods and **general exemptions** should be pointed out: The former exist for goods subjected to the EAEC Treaty, whereas this Treaty also provides for the abolition of the internal barriers. One could contemplate applying the provisions of the TEC at least subsidiarily,[13] which would come into question in case that the concrete guaranties of the TEC reach further.[14] As to agricultural products, the rules on the free movement of goods are (amongst others) applicable as far as Articles 33-38 of the TEC (Articles III-227-232 of the DC) do not provide for something else (Article 32(2) of the TEC/ Article III-226(2) of the DC). Finally, it must be indicated that trade with arms, munitions and war material can be restricted in accordance with Article 296(1)(b) (Article III-436(1)(b) of the DC).

13 Pursuant to the case-law of the ECJ, the applicability of Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC) incidentally also presupposes a **cross-border situation**.[15] Accordingly, so-called „reverse discrimination" – ie such cases in which, due to the application of community law (eg Article 28 of the TEC/ Article III-153 of the DC), domestic products are treated less advantageously in comparison with goods imported from other Member States of the EU – is admissible in view of Community law. However, in consideration of the development of Community law – especially the introduction of the aim to establish a „boundless" single market – it would not seem appropriate any more to exclusively require a frontier crossing as a condition for the applicability of Community law. Here, a differential approach would be more suitable, so that the absence of a cross-border element could certainly be significant for the manner of the examination of Article 28 of the TEC (Article III-153 of the DC) at the level of justification, but would however not *a priori* exclude the appli-

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13 Cf Voß in: Grabitz/Hilf (note 3) Art 23 TEC para 14.

14 Thus, the EAEC Treaty for instance only contains a prohibition of quantitative restrictions, but not of measures having equivalent effect.

15 On this, already more detailed → § 7 paras 20, 25; from case-law, particularly regarding Art 28 TEC, cf ECJ *Mathot* [1987] ECR 809, para 12; ECJ *Rousseau* [1987] ECR 995, para 7.

cation of this provision.[16] Finally, also the case-law of the ECJ, which conceives the presence of a cross-border element more and more broadly[17], serves to illustrate the questionableness of the requirement of a „frontier crossing".

II. Interference

14 Articles 28, 29 of the TEC (Article III-153 of the DC) prohibit quantitative restrictions on imports and exports as well as measures having equivalent effect, whereas the two provisions shall be discussed separately (2, 3) due to their respective scopes which differ in their contents.[18] *A priori*, both of the provisions can only apply on condition that an obligor takes action (1.).

1. Addressees (Obligors)

15 **Case 1 - Problem:** (ECJ *Schmidberger v. Austria* [2003] ECR I-5659)
On the Brenner Motorway, a central north-south transit axis, a demonstration was held in 1998 by environmentalists who were opposed to the (increasing) transit traffic. The demonstration was not prohibited by the competent Austrian authorities (after the filing of a corresponding application) and lead to a 30 hour blockade of the motorway. The Austrian authorities informed extensively about the demonstration some time in advance and suggested different detours. Eugen Schmidberger, a freight forwarder, sued the Republic of Austria in front of the Higher Regional Court (OLG) of Innsbruck and requested compensation for the specified loss of earnings resulting from the fact that he could not use his lorries during the period in question. During the course of the proceedings, the OLG Innsbruck raises the question whether the Republic of Austria had violated its Community law obligations by not having prohibited the demonstration.

16 The norm addressees of Articles 28 et seqq of the TEC (Article III-153 of the DC) are primarily the **Member States**, which in practice originate by far the most significant part of the limitations of these Fundamental Freedoms. In connection to Article 10 of the TEC (Article I-5 II of the DC), there is incidentally also an obligation of the Member States to, on certain conditions, intervene against trade barriers that emanate from individuals.[19] Based on the formulations in recent case-law[20] it remains unclear whether, in order for Article 28 read in conjunction with Article 10 of the TEC (Article III-153 read in conjunction with Article I-5 II

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16 More detailed on this approach Epiney *Umgekehrte Diskriminierungen* (Köln et al. 1995) especially p 200 et seqq; also on this issue Hammerl *Inländerdiskriminierung* (Berlin 1997).

17 From recent case-law cf especially ECJ *Carpenter* [2002] ECR I-6279, paras 28 et seqq = Ehlers JK 12/02. TEC Art 49/6; ECJ *Garcia Avello* [2003] ECR I-11613.

18 At least based on case-law and the herewith represented point of view.

19 ECJ *Commission v France* [1997] ECR I-6959, paras 24 = Erichsen JK 99, TEC Art 30/3. → More detailed on this § 7 para 43.

20 ECJ *Schmidberger* [2003] ECR I-5659 = Schoch JK 11/03, TEC Art 28/3.

of the DC) to be pertinent, it suffices that the comportment of individuals leads to some kind of – even if minimal – interference with the free movement of goods or whether a certain interference threshold is necessary. In any case, within the scope of justification attention must be paid to other interests, especially such as Fundamental human rights guarantees.

17 It is also a state measure when individuals assert their industrial property rights: The holder of the right certainly has to assert his claim; the subsequent measure restricting imports however – confiscation, prohibition of marketing under certain conditions or similar – emanate from state organs (authorities or courts).[21] Incidentally, it is irrelevant whether the state measure is of an imperative character or not; only the discriminatory or limiting effect is decisive .[22] Consequently, the ECJ found an advertising campaign of the Irish authorities prompting the purchase of domestic products to constitute a measure having equivalent effect to an import restriction.[23]

18 But also the **Community organs** themselves have to keep to the requirements of Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC)[24], which already results from the hierarchy of norms (primary law has priority over secondary law).

19 Whether and to which extent **individuals** are obliged[25] by Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC) is – just as within the frame of the other Fundamental Freedoms (→ § 7 paras 42, 43) – not (yet) completely clarified. Meanwhile, the relevant case-law seems to assume that Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC) have no extensive horizontal effect.[26] However, recent case-law also emphasises that formally private enterprises - which were established on the basis of legal provisions, which by law are obliged to reach certain objectives, which have to comply with certain public law provisions while performing their activity and which are financed by means of mandatory contributions by certain persons - have to comply with the requirements of Article 28 of the TEC if they introduce a regulation concerning all businesses of the regarding economic branch, which can affect intra-community trade just as provisions emanating from the state.[27] In the presence of

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21 From case-law, cf for instance ECJ *Ideal Standard* [1994] ECR I-2789, paras 33 et seq; ECJ *Haag II* [1990] ECR I-3711, paras 8 et seq; among literature only Leible in: Grabitz/Hilf (note 3) Art 29 TEC para 6.

22 On this, cf below.

23 ECJ *Commission v Ireland* [1981] ECR 1625, para 12.

24 ECJ *Meyhui* [1994] ECR I-3879, para 11.

25 Individuals are (as a matter of course) addressees of Arts 28 et seqq TEC inasfar as they can invoke these provisions.

26 ECJ *Commission v Ireland* [1982] ECR 4005, paras 6 et seqq; ECJ *Bayer* [1988] ECR 5249, para 11; the contrary statement in ECJ *Dansk Supermarked* [1981] ECR 181, paras 17 et seq has subsequently not been taken up by the Court, so that it can be assumed that the ECJ is from now on opposed to a horizontal effect; also ECJ *Commission v France* [1997] ECR I-6959, paras 24 et seqq = Erichsen JK 99, TEC Art 30/3 is likely to follow this approach, given that the circumstance, that the ECJ did not even address the issue of a possible responsibility of the private parties, rather indicates that it rejects a horizontal effect.

27 ECJ *Commission v Germany (CMA quality mark)* [2002] ECR I-9977 = Schoch JK 4/03, TEC Art 28/2.

such a constellation, the ECJ obviously proceeds on the assumption that the behaviour of the private company is imputable to the state.[28]

20 A negation of an extensive horizontal effect anyhow seems well-grounded within the framework of Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC) - namely against the background of the function and objectives of Articles 28 et seqq of the TEC (Article III-153 et seqq of the DC) within the entire system of the Treaty: Because first of all, these provisions should essentially complement the prohibition of custom duties and measures having equivalent effect with the ban on non-tariff barriers. Furthermore, in view of the efficient realisation of the free movement of goods, it is not absolutely necessary to include individual behaviours, these being subjected to other provisions of the Treaty, namely the rules of competition (Articles 81 et seq of the TEC/ Article III-161 of the DC). Incidentally, the extensive horizontal effect[29] obviously attributed by the ECJ to the framework of Article 39 of the TEC is in principle problematic: Because it is likely to not take the (also relevant) private autonomy and freedom of contract into account, and, in this respect, also to go beyond the function of the Fundamental Freedoms – not to mention the subsequent problems as to implementation and application (for instance at the justification level). It would therefore seem more convincing to follow the approach - dominating in case-law – of limiting the horizontal effect to sets of rules which have a similar legal or factual binding force as state norms:[30] It enables the efficient enforcement of the Fundamental Freedoms in the problematic fields, and is sufficient already because otherwise the state duty to protect applies. Insofar, the named, more recent case-law is fundamentally convincing, since it obviously negates a general horizontal effect of Article 28 of the TEC (Article III-153 of the DC) and rather approves of an attribution of individuals' behaviour to the State and therewith a commitment to Article 28 of the TEC (Article III-153 of the DC) only on condition that the state pursues a public task with means of private law, controls the company in different aspects and that the regulation emanating from the company has the same effect on the intra-community movement of goods as a state regulation.

21 **Case 1 - Answer:**
Austria's behaviour (no prohibition of the demonstration on the Brenner motorway and authorisation of the manifestation, respectively) could constitute a breach of Article 28 in conjunction with Article 10 of the TEC. These provisions oblige the Member States to take the necessary measures to make sure that the possibility of virtually exercising the free movement of goods is not compromised by the behaviour of (other) individuals. There is such a prejudice in the case at hand, since the blockade of

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28 However, as to the open questions raised by this decision, cf Epiney [2004] NVwZ 555, 561.
29 ECJ *Aragonese* [2000] ECR I-4139, paras 34 et seqq = Ehlers JK 01, TEC Art 39/1; → § 9 para 46.
30 Cf already ECJ *Walrave* [1974] ECR 1405; cf also ECJ *Bosman* [1995] ECR I-4921.

the motorway impedes the freight forwarder from transporting the goods within a economically reasonable period of time; the fact of hindering the transit of goods or even making it impossible namely constitutes a violation of Article 28 of the TEC. Therefore, the authorisation of the demonstration in question represents a measure having equivalent effect to a quantitative import restriction. However, this limitation of the free movement of goods can be justified by the protection of Fundamental human rights, namely the freedom of free speech and of assembly, as guaranteed in Articles 10, 11 of the ECHR. These principles namely represent legitimate interests, which are basically appropriate to justify a restriction of the free movement of goods. Accordingly, two interests – the realisation of the free movement of goods on the one side and the aforesaid Fundamental human rights on the other – are opposed to each other, which are to be balanced in consideration of all the circumstances in each individual case. In the present case it must particularly be pointed out that the demonstration was authorised, that the motorway was blocked (only) once for 30 hours, that the blockade was geographically limited, that the demonstration was not opposed to the trade with goods of a certain kind or origin, that the authorities had taken various accompanying and framework measures in order to limit the jamming of road traffic and that a simple prohibition of the assembly would have meant an unacceptable interference with the freedom of assembly, and stricter requirements imposed on the demonstration could have deprived it of an essential part of its impact. Having regard to all these circumstances, the appreciation of values by the Austrian authorities in the present case cannot be considered to be unjustifiable, so that they have not gone beyond their wide scope of discretion. A violation of Articles 28, 10 of the TEC must therefore be denied.

2. Import Restrictions and Measures Having Equivalent Effect (Article 28 of the TEC/ Article III-153)

a) Quantitative Restrictions

22 First of all, Article 28 of the TEC (Article III-153 of the DC) prohibits **import restrictions**. This applies to measures, which restrict the import of goods according to their quantity or value.[31] Normally, import restrictions concretely assume the form of contingents; but also bans on imports and transits – as the most severe form of restriction – are included. This also entails the conclusion that other measures, which do not directly restrict the import itself – thus particularly such measures which set up certain requirements as to the condition of the goods – are to, or can, respectively, be seen as measures having equivalent effect.[32]

23 Import restrictions by definition constitute cases of (direct) discrimination; non-discriminatory measures are therefore to be examined from the perspective of measures having equivalent effect.

24 However, quantitative restrictions on imports have in the meantime become exceptional (eg environmentally motivated measures for instance in view of the protection of species), so that their practical relevance can be neglected.

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31 ECJ *Geddo* [1973] ECR 865, para 7.

32 Among case-law cf for instance ECJ *Commission v United Kingdom* [1983] ECR 203, paras 21 et seq; ECJ *Commission v Germany* [1989] ECR 229, paras 4 et seq. More detailed on the delimitation cf, with further references, Epiney in: Calliess/Ruffert (note 4) Art 28 TEC paras 8 et seqq.

b) Measures Having Equivalent Effect

25 **Case 2 - problem:** (ECJ *Gourmet International* [2001] ECR I-2001, I-1795)
In Sweden there is a ban on advertising for alcoholic beverages in newspapers and magazines as well as in radio and television. Based on this prohibition, the Konsumentombudsman (consumer ombudsman) demanded the competent court to forbid Gourmet International Products AB (GIP) to publish advertisements for alcoholic beverages in newspapers, magazines, radio and television. The court would like to allow the claim; however, it entertains doubts as to the compatibility of such a ban with Article 28 of the TEC.

26 Central for the scope and relevance of Article 28 of the TEC (Article III-153 of the DC) is the prohibition of **measures having equivalent effect to import restrictions**. Their inclusion in the scope of Article 28 of the TEC (Article III-153 et seqq of the DC) must be seen against the background that the free movement of goods often is, or can be, respectively, hindered by non-quantifiable measures just as „effectively" - but less „visible" - than by restrictions on imports

27 Against this background, it is above all the **impact of a measure** which is decisive for the determination of the notion of measures having equivalent effect: If a measure entails the same or similar consequences for the import of goods from other Member States as import restrictions, it is covered by Article 28 of the TEC (Article III-153 of the DC). In detail, different forms of measures having equivalent effect can therewith be distinguished in dependence on the „whether" and „how" of a discrimination.

aa) Direct Discrimination

28 First of all, all measures explicitly differentiating according to the origin of the goods (inland on the one hand, the other Member States on the other hand) are covered by the notion of measures having equivalent effect. Examples from practical experience in this context are, for instance, mandatory health inspections for imported goods[33] or labelling obligations only for imported goods[34].

bb) Indirect Discrimination

[33] Cf the facts of the case in ECJ *Commission v Germany* [1989] ECR 3997.

29 Also **indirectly discriminating measures** are forbidden, thus such measures which certainly tie in with a „neutral" criterion, but in principle factually concern and discriminate against, respectively, imported goods (→ on this generally § 7 para 22). In detail, the delimitation between indirect discrimination and the restrictions which will be dealt with below is problematic and hardly practicable based on generally applicable criteria, at least in the application area of the Fundamental Freedoms.[35] Incidentally, this distinction is of no practical relevance, at least within the scope of Article 28 of the TEC (Article III-153 of the DC), since the reasons of justification are the same for indirect discrimination and restrictions.[36]

30 The point of view partly represented in literature,[37] which states that in the „core area" – eg the access itself to an occupation within the frame of Article 39 of the TEC (Article III-133 of the DC) – of the Fundamental Freedoms a general prohibition of restrictions applies, whereas in the „borderland" – eg the regulation of the exercise of an occupation within the application area of Article 39 of the TEC (Article III-133 of the DC) – only a (broadly understood) prohibition of discrimination applies, is of no significance based on case-law (which is mostly adopted in the literature), at least in connection with Article 28 of the TEC (Article III-153 of the DC): Because Article 28 of the TEC (Article III-153 of the DC) is generally to be interpreted as a prohibition of restrictions, and limitations to the state of facts result from the so-called *Keck* formula, so that no room is left for a differentiation pursuant to „core and border areas" of the Fundamental Freedoms, and no such necessity exists either. Incidentally, this differentiation is already problematic in its approach: First of all, it implies that in the case of the core area, there generally is a severe interference with the rights of the concerned individuals, which is however not necessarily the case, since eg certain employment modalities could possibly at least factually lead to access limitations. Closely connected to this is the consideration that the core and border areas are often very hard to separate.

31 Against this background, a delimitation between indirect discrimination and restrictions will be abstained from in the following, and the problem areas will be dealt with in connection with the discussion on the restrictions.

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34 Cf the facts of the case in ECJ *Commission v Ireland* [1981] ECR 1625.

35 As to Art 12 TEC and the hereby relevant criteria Epiney (note 16) p 102 et seqq.

36 Cf below paras 48 et seqq → § 7 para 90.

37 Cf for instance Lecheler/Gundel *Übungen* (Berlin et al. 1999) p 177; in the same direction probably also Jarass [2000] EuR 705, 711.

cc) Restrictions

32 Also non-discriminatory measures, which „only“ **restrict the free movement of goods**, generally fall within the scope of Article 28 of the TEC (Article III-152 of the DC), which is already obvious insofar as these can also as a result have similar effects as import restrictions. As examples, rules on product quality or on advertising can be named.

33 However, the presence of the conditions, under which such a restriction must be assumed, is in need of specification, since otherwise all measures which in some way relate to the free movement of goods could fall under Article 28 of the TEC (Article III-153 of the DC). The point of departure still is the so-called ***Dassonville* formula**: Accordingly, a measure having an equivalent effect is to be understood as any trading rule enacted by a Member State "which is capable of hindering directly or indirectly, actually or potentially, intra-community trade".[38] Therewith, it is the restrictive effect of the measure that is decisive, so that the capability of a measure to deploy restrictive effects on trade turns out to be significant. Thereby, it is irrelevant, whether these effects have virtually occurred or not.[39]

34 This **broad scope of the notion of measures having equivalent effect** bears the consequence that goods which were lawfully produced in one Member State can in principle be imported and marketed in other Member States, even if they do not correspond to the national standards (particularly product and approval requirements). Of course, the existence of grounds of justification remains reserved. Furthermore, even rules which are not directly related to products, such as provisions on manufacturing and marketing, can fall under the *Dassonville* formula, because they are also in principle capable of deploying (negative) effects on the volume of (certain) imported products. Therewith it also becomes clear that the consequent application of the *Dassonville* Formula results in a very considerable widening of the scope of Article 28 of the TEC (Article III-153 of DC) which means that there is hardly any state measure which cannot fall within this scope, since numerous provisions at least directly and potentially produce repercussions on the import of products, so that a hardly limitable amount of national provisions can, or could, respectively, be assessed on the basis of Community law, concretely Article 28 of the TEC (Article III-153 of DC).

35 Against this background, the judiciary has developed different approaches, which limit the scope of Article 28 of the TEC (Article III-153 of the DC) in comparison with the *Dassonville* formula.

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38 ECJ *Dassonville* [1974] ECR 837, para 5.

36 First of all, various judgements of the Court must be named in which the latter denied a **sufficiently close relation to the free movement of goods**. The ECJ for instance denied the presence of a measure having effect equivalent to import restrictions in its decision on the German prohibition to bake in the night-time (prohibition to deliver bread rolls before 6 o'clock in the morning) on the grounds that it was a national sales regime without a cross-border effect, and that it could therefore not compromise trade between Member States.[40] Nor did the Court consider Article 28 of the TEC (Article III-153 of DC) to be relevant regarding the Belgian prohibition of serving alcohol in the night-time: Because the measure was said not to be linked in any way with the import of goods, so that it was not capable of hindering trade between Member States.[41] Finally, it must also be pointed out that the Court - on similar grounds - refused to apply the standard of Article 28 of the TEC (Article III-153 of the DC) in order to assess the prohibition of Sunday shop opening.[42] These judgements are particularly interesting because in all cases an indirect and potential interference with the import volume of products could hardly be denied, so that solely on the base of the *Dassonville* formula the relevance of Article 28 of the TEC (Article III-153 of the DC) must have been affirmed. This is especially striking in the case of the Belgian prohibition of serving alcohol in the night-time: Because the whole purpose of this measure is precisely to decrease the demand and therewith the imports. From this "early" case-law[43] - because prior to the *Keck* case-law[44] - it can only be deducted that precisely for measures which are not (directly or indirectly) discriminating, potential market losses and therewith repercussions on the volume of imported products are not in every case sufficient in order for Article 28 of the TEC (Article III-153 of the DC) to become applicable. However, it has not become clear according to which criteria the scope of the *Dassonville*-formula should be limited.

37 Insofar, the ***Keck* ruling** from 1993[45] introduced a certain, also dogmatic, clarification. The subject-matter of the judgement was the French prohibition of resale of certain goods at a loss, which could not be judged on the standard of Article 28 of the TEC (Article III-153 of the DC). The Court reasoned that **"certain selling arrangements"** did not fall within the scope of Article 28 of the TEC (Article III-153 of the DC) if they fulfilled two conditions:

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39 Explicitly ECJ *Prantl* [1984] ECR 1299, para 20.
40 ECJ *Oebel* [1981] ECR 1993, para 10.
41 ECJ *Blesgen* [1982] ECR 1211, para 9.
42 ECJ *Torfaen Borough* [1989] ECR 3851, para 14.
43 In addition to the mentioned decisions, cf the further references in Middeke *Nationaler Umweltschutz im Binnenmarkt* (Cologne et al. 1994) p 132 et seq, in consideration of the different approaches to their dogmatic classification; in detail on the relevant case-law also Hammer *Handbuch zum freien Warenverkehr* (Vienna 1998) p 35 et seqq.
44 Cf in the text below in the next paragraph.
45 ECJ *Keck* [1993] ECR I-6097.

Firstly, they have to apply to all concerned economic actors which exercise their activity within the Member State, and secondly, the marketing of domestic and imported products must be affected in the same manner, in fact and in law.[46] The *Keck* case-law therewith already limits the scope of Article 28 of the TEC (Article III-153 of the DC) - contrary to the previously developed so-called *Cassis-de Dijon* case-law, which from a dogmatic point of view must be located at the level of justification.[47]

38 However, since the ECJ did not define the notion of „certain selling arrangements", soon the question arose which national measures exactly should not (any more) fall within the scope of applicability of Article 28 of the TEC (Article III-153 of the DC). Certain indications can be developed from the *Keck* formula itself, but also from **subsequent case-law**, whereas primarily the following aspects are of importance:

39 Measures which in some way relate to the **quality of products** itself (including their packaging, at least if it is inseparably connected to the product) do not constitute selling arrangements. For instance, the prohibition of labelling the wrapping of a chocolate bar under certain circumstances with the addition „+10%" must be considered as a measure having equivalent effect and is to be assessed on the basis of Article 28 of the TEC (Article III-153 of the DC).[48] The prohibition of marketing certain products by means of a certain denomination is not either to be seen as a selling arrangement in the sense of the *Keck* formula, for instance the prohibition of marketing cosmetics under the name „Clinique".[49] Due to the close connection with the product for sale, also the prohibition of offering prize draws in magazines or other printed papers is to be considered a measure having equivalent effect to import restrictions.[50]

40 Measures which determine the **marketing of a product**, however without being „connected" to it, are in principle to be seen as selling arrangements. Accordingly, the obligation to sell baby food only in pharmacies must be classified as a selling arrangement.[51] But also the regulation of the opening hours of petrol stations is considered by the ECJ to constitute a selling arrangement.[52]

41 When it comes to **borderline cases**, according to the ECJ it depends on whether a certain measure already impedes or restricts the **market access** of a product, in other words, whether it bears the consequence that the product in question cannot even access the market

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46 ECJ *Keck* [1993] ECR I-6097, para 16.
47 Cf below para 53 et seqq and → § 7 para 63.
48 ECJ *Mars* [1995] ECR I-1923, paras 12 et seq.
49 ECJ *Clinique* [1994] ECR I-317; cf also ECJ *Graffione* [1996] ECR I-6039.
50 ECJ *Familiapress* [1997] ECR I-3689, para 12 = Erichsen JK 98, TEC Art 30/1 = → § 14 paras 31, 38.
51 ECJ *Commission v Greece* [1995] ECR I-1621, para 15.

of the concerned Member State, or that its access is hindered, so that in this regard an inequality of treatment between domestic and imported products must therefore be affirmed.[53] In the case of distribution-related advertising, for instance, the focus is not set on the access to the market, since this is guaranteed „boundlessly", but on the manner of marketing the product. Consequently, according to the case-law of the ECJ, the prohibition of television advertisement for certain goods must in principle be qualified as a selling arrangement, except if such a prohibition has stronger effects on products from other Member States.[54]

42 In this connection it must be recalled that a measure can generally not constitute a selling arrangement if it shows different effects on domestic and imported products, thus if it directly or indirectly discriminates the latter. This was the case with a rule of the Austrian Trade, Commerce and Industry Regulation Act, which held that only those vendors may offer groceries for sale „on the move", who operate a fixed establishment in the concerning or an adjacent administrative district, since this rule entailed that foreign vendors were prevented from accessing this spectrum of the Austrian market.[55] The ECJ reasoned similarly with regard to the very comprehensive Swedish prohibition of advertising alcohol: Such a regulation was said to entail that the market access for products from other Member States was impeded to a larger extent than for the domestic products which were anyway already better established.[56] Also the German prohibition of mail order trading for pharmaceutical products does not constitute a selling arrangement, according to the ECJ, since it affects the foreign pharmacies (and therewith the imported products) which as such are not active in the German market more substantially than the domestic pharmacies; for the former, the internet as a means of access to the German market was said to be of a considerably larger importance than for the latter.[57] Altogether, there is thus a tendency in case-law to consider all those marketing and advertising rules with a noticeable impact on the sales volume of the concerning goods and which directly or indirectly influence the level of recognition of products, not to constitute

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52 ECJ *t'Heukske* [1994] ECR I-2199, para 13 et seqq.

53 In this direction for instance ECJ *Commission v Greece* [1995] ECR I-1621, paras 11 et seq; ECJ *Alpine Investments* [1995] ECR I-1141, para 37; now explicitly in ECJ *Gourmet International* [2001] ECR I-1795, para 18: According to the considerations in the *Keck* ruling, „national provisions restricting or prohibiting certain selling arrangements only fall outside of Art 28 TEC, if they are not by nature such as to prevent the access of products of another Member State to the market or to impede access any more than they impede the access of domestic products".

54 ECJ *Leclerc* [1995] ECR I-179, paras 20 et seqq; ECJ *de Agostini* [1997] ECR I-3843, paras 39 et seq.

55 ECJ *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I-151, para 9 = Schoch JK 00, TEC Art 28/1. Very critical of this decision against the background of the – according to his opinion – too broad interpretation of the notion of indirect discrimination Gundel [2000] EuZW, 311 et seq.

56 ECJ *Gourmet International* [2001] ECR I-1795, paras 20 et seq; cf also below the answer to case 2.

57 ECJ *DocMorris* [2003] ECR I-14887 = [2004] NJW, 131.

selling arrangements, since they are a stronger „burden“ to imported products due to the in principle better market launch of national products.

43 All **delimitation problems**[58] can however not be solved with these indications, as it is exemplified by the general prohibition of advertisements for a certain product (eg alcohol or tobacco): The relevant judgements of the ECJ emphasise, as already mentioned, on the one hand that television advertising for instance constitutes a selling arrangement,[59]since the access to the market itself is not restricted and the possibility of selling the corresponding products remains possible without limitation; beyond this, a material discrimination between imported and domestic products is obviously rejected. On the other hand, however, the ECJ points out that a measure always has equivalent effect if the (complete) prohibition of a form of sales promotion of a product in a Member State has unfavourable effects on products from other Member States.[60] This also seems to be reasonable insofar as a quasi general prohibition on advertising is likely to entail that particularly newly launched products can hardly be established. Since new domestic products can probably also only be launched in the market with considerably difficulties, the effects of such a measure approach those of a market access restriction. It still remains open where exactly to draw the line between both cases. Insofar, the rulings of the ECJ absolutely could have turned out differently with respect to the non-product related advertising.

44 However, the **approach of the ECJ** can also be **questioned** independently of such delimitation problems: Namely, if one departs from the assumption that the whole purpose of Article 28 of the TEC (Article III-153 of the DC) is primarily to ensure that products emanating from different Member States can circulate freely within the Union territory, it suggests itself to judge depending on whether the framework for the marketing or distribution of products is regulated generally or whether it is a matter of subjecting certain products in some manner to a particular regulation. The latter is however always the case if a national provision does not concern all products, but a **delimitable product group** – as, for instance, baby food, tobacco, alcohol etc. This approach also suggests itself against the background that – as exemplified by the restriction of selling certain products only in certain specialised locations – numerous provisions, which as such do not affect market access and are not discriminatory either, can cause quite significant losses of market shares for the economic actors and are, as

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58 For which different approaches have also been pointed out in literature; for an overview on the different represented approaches cf Epiney in: Calliess/Ruffert (note 4) Art 28 TEC para 35, with further references.

59 ECJ *Leclerc* [1995] ECR I-179, paras 20 et seqq; cf also ECJ *Hünermund* [1993] ECR I-6787, paras 19 et seqq.

60 ECJ *de Agostini* [1997] ECR I-3843, para 40; likewise ECJ *Gourmet International* [2001] ECR I-1795, paras 20 et seq.

to their effects, insofar absolutely comparable with directly product-related provisions. Moreover, with the hereby represented approach it would also be possible to resolve borderline cases without problems: For instance, in the case of the mentioned general prohibition on advertising, the purpose is to regularise a certain delimitable product or product group, so that a measure having equivalent effect must be affirmed.

45 Furthermore, it does anyhow not depend on a **„noticeability"** of any kind of the measure or a „proximity" between the measure and the interfering effect:[61] Because finally this is a matter of a sort of weakening of the criterion of the suitability of a measure to deploy restrictive effects on trade, whose outlines, however, are obviously unclear and can hardly be subjected to a previsible concretion. Incidentally, it must be stated that the „minor intensity" of a measure is anyhow to be considered at the level of justification within the frame of the proportionality test. However, the case-law of the ECJ is not always clear in this regard: While the ECJ partly seems to consider a sort of noticeability or proximity between the measure and the restrictive effect to be necessary,[62] other rulings indicate that this is precisely not the case, for instance, when the answer to the question whether a provision had a restrictive effect – which was doubtable – is exclusively based on its legal content, not however on the requirement of a noticeability of some kind.[63]

46 Case 2 - Answer:

A prohibition on advertising such as the one in the case at hand generally concerns alcohol, thus also imported alcohol, so that insofar the scope of applicability of Article 28 et seqq of the TEC becomes relevant (cf also Article 23(2) of the TEC). The judgement in question is a state measure. Furthermore, it constitutes a measure having equivalent effect in the sense of the *Dassonville* formula, because a ban on advertising can - and even should - lead to the reduction of sales (also) of imported alcohol, thus to an interference with intra-community trade. It might however be questionable, whether there is a selling arrangement in the sense of the *Keck* formula in the case at hand. In principle, the prohibition does not represent a product related but a sales related measure, since it is the marketing method that is regulated, and the advertising is not inseparably connected to the product either. Furthermore, the market access of alcohol as such is not affected; marketing still remains possible. Insofar, it would be possible to assume that the prohibition constitutes a selling arrangement. However, in view of the fact that the Swedish prohibition does not only ban one form of sales promotion of a product, but also hinders the producers and importers from almost every kind of distribution of advertising aimed at consumers, and that – especially when stimulants such as alcohol are concerned - social traditions play an

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61 Obviously different → § 7 para 74; as here for instance Füller *Grundlagen und inhaltliche Reichweite der Warenverkehrsfreiheiten nach dem EG-Vertrag* (Baden-Baden 2000) p 111 et seqq; Leible in: Grabitz/Hilf (note 3) Art 28 TEC para 15; cf with reference to recent case-law also Epiney [1999] NVwZ, 1076, 1077; more detailed on the problem also Keßler *Das System der Warenverkehrsfreiheit im Gemeinschaftsrecht* (Berlin 1997) p 21 et seqq.

62 Cf for instance ECJ *Semeraro* [1996] ECR I-2975, paras 32 et seq; ECJ *CMC Motorradcenter* [1993] ECR I-5009, paras 8 et seqq; ECJ *Peralta* [1994] ECR I-3453, para 24; ECJ *BASF* [1999] ECR I-6269, para 16.

63 ECJ *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I-151, paras 25 et seqq = Schoch JK 00, TEC Art 28/1; cf also ECJ *Commission v France* [1998] ECR I-6197, paras 16 et seqq; opposed to a "noticeability test" probably also ECJ *Prantl* [1984] ECR 1299, para 20; ECJ *Yves Rocher* [1993] ECR I-2361, paras 17 et seqq = Kunig JK 94, EWGV Art 30/4; ECJ *Bluhme* [1998] ECR I-8033, para 22; ECJ *EDSrl* [1999], ECR I-3845.

important role while selecting beverages, it must be considered that the comprehensive ban on advertising in question has stronger effects on products from other Member States than on domestic products. Consequently, there is an obstacle to the free movement of goods between the Member States and Article 28 of the TEC is applicable. However, the prohibition could be justified on grounds of health protection (Article 30 of the TEC), since it is supposed to contribute to the battle against alcoholism. In the facts of the case there are no indications that the prohibition does not meet the standards of the principle of proportionality; for this purpose, an examination of the legal and factual circumstances would be necessary, which is to be carried out by the national court requesting the preliminary ruling.

3. Quantitative Restrictions on Exports and Measures Having Equivalent Effect

47 According to Article 29 of the TEC (Article III-153 of the DC), **quantitative restrictions on exports** and **measures having equivalent effect** are prohibited. The purpose of the ban of Article 29 of the TEC (Article III-153 of DC) corresponds with the one of Article 28 of the TEC (Article III-153 of the DC) insofar as it aims at avoiding the hindrance of the free movement of goods which arises when Member States saturate the demand on their intrastate markets by means of restrictions on exports.[64] Insofar, it is absolutely possible to tie in with the principles developed within the scope of Article 28 of the TEC (Article III-153 of the DC) while interpreting Article 29 of the TEC (Article III-153 of DC).[65]

48 However, the ***Dassonville*** **formula** must be **narrowed** against the background of the approaches developed within the framework of Article 28 of the TEC (Article III-153 of the DC), given that its "complete" application would finally bear the consequence that almost every production or distribution provision would violate Article 29 of the TEC (Article III-153 of the DC), since hereby the intra-community trade is regularly affected at least indirectly and potentially because such provisions exert negative influence on manufacturing costs. Therefore, also the ECJ acts on the assumption that Article 29 of the TEC (Article III-153 of the DC) is only applicable to such 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"[66]. In the subse-

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64 As to the purpose of Art 29 TEC cf Müller-Graff in: vd Groeben/Schwarze (eds) *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, (6th ed, Baden-Baden 2003) Art 29 TEC para 1.

65 Leible in: Grabitz/Hilf (note 3) Art 29 TEC paras 2 et seqq; Müller-Graff in: vd Groeben/Schwarze, Art 29 TEC paras 1 et seqq.

66 ECJ *Groenveld* [1979] ECR 3409, para 7; from recent case-law ECJ *EDSrl* [1999] ECR 845, para 10; ECJ *Belgium v Spain* [2000] ECR I-3123, paras 36 et seqq with regard to the requirement of bottling wine emanating from a certain region in precisely this region in order to be able to use the respective denomination of origin.

quent case-law this approach was confirmed, whereas it was not required anymore that the advantage for the domestic market of the respective state comes along with a disadvantage for the production of other Member States.

49 This approach is convincing because sales on the domestic market are only favoured in the case of special provisions concerning exports or – in the words of the ECJ, respectively – provisions having "the specific effect of restricting patterns of export"; therewith, it is only on this condition that trade between Member States is virtually affected.[67]

50 Ultimately, this restrictive interpretation of the notion of measures having equivalent effect within the scope of Article 29 of the TEC (Article III-153 of the DC) leads to the consequence that this rule only includes a prohibition of those measures which distinguish between products for the domestic market and products destined for export. Therewith, general measures applicable to all products are *a priori* excluded from the scope of Article 29 of the TEC (Article III-153 of the DC). Thus, in this sense only discriminating measures are included, whereas the differentiation has to tie in with the destination of the goods.

III. Justification

51 In case of a quantitative restriction to imports and exports or a measure having equivalent effect - which entails that the elements of Article 28 or 29 of the TEC (Article III-153 of the DC) are met - the respective measure is in principle prohibited. However, Community law provides for possibilities of justification, whereas it can be distinguished between grounds of justification explicitly held in the Treaty (2.) and unwritten grounds of justification (so-called "mandatory requirements") (3.). Both categories have in common that the principle of proportionality must be observed (4.). Moreover, there are a number of common questions which arise for all grounds of justification and which will therefore be discussed conjointly (1.).

52 The purpose of the possibility of deviating from the fundamental prohibition held in Articles 28, 29 of the TEC (Article III-153 of the DC) consists in guaranteeing that the application of these provisions does not lead to the non-observance of certain protection concerns. Insofar, it is **not** a matter of **a general protection clause** (in favour of the Member States) or of "extracting" certain objectively defined areas from the scope of applicability of the rules on the free movement of goods, but it is only the **pursuit of certain protection targets** and therewith the **safeguarding of certain objects of legal protection**[68] which are allowed - in consideration of the requirements determined under Community law. These principles also

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67 More detailed Epiney, in: Bieber/Epiney/Haag (note 1) § 13 paras 79 et seq; of a different opinion however Füller (note 61) p 244 et seqq.

68 Explicit for instance in ECJ *Commission v Germany* [1979] ECR 2555, para 5.

entail that the objects of protection – whether explicitly regulated in the Treaty or unwritten – have to be interpreted pursuant to Community law principles as **Community law terms**. However, the related notions, in their turn, partly refer to concepts of the Member States, particularly the concepts of public order and public morality. But here Community law also sets boundaries insofar as the "filling in" of the content of these notions by the Member States must remain within a certain scope.[69]

1. Transversal Aspects

a) No Secondary Legislation

53 A justification can *a priori* only come into question on condition that the respective field is not regulated by **secondary legislation**.[70] This restriction which is only relevant for Member States' provisions results from the purpose of the possibility available to the Member States of reverting to the justification grounds of Article 30 of the TEC (Article III-154 of the DC) as well to as the mandatory requirements: Because if the respective object of legal protection is (already) protected by Community law provisions, there is no necessity for an autonomous protection by the Member States, given that otherwise the existing Community harmonisation would be undermined. In other words, in these cases Community law acts on the assumption that the protection of the respective object of legal protection should be taken into consideration in secondary legislation. This view is confirmed by the rules in Article 95(4) et seqq of the TEC (Article III-172 et seqq of the DC), which precisely (as an exception) allow the Member States to – under certain (narrowly defined) circumstances – apply a higher protection standard also within the scope of applicability of Community secondary legislation.

54 However, this restriction to the possibility of invoking Article 30 of the TEC (Article III-154 of the DC) and the mandatory requirements is (of course) only applicable insofar as a completed harmonisation virtually exists,[71] whereas the conclusive character[72] of a commu-

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69 Anyhow, this „scope concept" implies that the contents of public order, for instance, (can) vary in the different Member States, as exemplified by lotteries which are (partly) forbidden in some Member States, however admitted in others; cf the facts of the case in ECJ *Schindler* [1994] ECR I-1039 et seqq; ECJ *Familiapress* [1997] ECR I-3689 et seqq = Erichsen JK 98, TEC Art 30/1.

70 ECJ *Hedley Lomas* [1996] ECR I-253, para 18; ECJ *Decker* [1995] ECR I-1831, para 42 et seq; → § 7 para 95.

71 Cf ECJ *Commission v Germany* [1998] ECR I-6871, paras 26 et seqq; ECJ *Ortscheit* [1994] ECR I-5243, para 14.

72 However, the question as to the exhaustive character of a provision can sometimes be difficult to answer; on this cf Slot [1996] ELR, 378 et seqq; comprehensively in Furrer *Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen* (Baden-Baden 1994).

nity law provision must always be denied if the protection of the respective legally protected good is not regulated exhaustively.[73]

55 According to the case-law of the ECJ[74], the prohibition of reverting to the general justification grounds of primary Community law in case of an exhaustive provision of secondary community law must be understood as "absolute" insofar as it also applies when the attainment of the protection level aimed at by secondary law is not possible because other Member States do not meet the community law requirements – even in cases in which the relevant act of Community law does not provide for a control or sanction procedure.[75] This approach corresponds to the principle usually applied by the ECJ that the non-observance of Community law by another Member State does not have any influence on one's own obligation to respect community law. However, the question arises whether the application of this in principle mandatory view is also imperative and appropriate for the hereby discussed constellation: The whole purpose of the possibilities of justification according to Article 30 of the TEC (Article III-154 of the DC) and by means of the mandatory requirements must after all be seen in the protection of the respective objects of legal protection. This concern is no longer relevant when the Community legislator itself defines the protection level; however, it is renewed when the underlying protection standard is not – or cannot be, respectively – reached. Insofar, it is no longer the "typical" constellation in which a Member State wants to replace the Community provisions by its own conceptions or protection standard or that a Member State refuses to comply with its Community obligations under reference to the non-observance of the Treaty obligations by another Member State, so that the right to revert to Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements could have at least been admitted in cases of serious and clear violations of secondary legislation by other Member States.[76]

b) The Relation of Article 30 of the TEC to the "Mandatory Requirements", Scope of Applicability of the Grounds of Justification and Dogmatic Classification

56 As already mentioned initially, Community law contains explicit justification grounds held in the Treaty, which are laid down in Article 30 of the TEC (Article III-154 of the DC), as well as unwritten grounds of justification. The latter were developed by the ECJ in its *Cassis de*

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73 Cf the examples from case-law in ECJ *Denkavit* [1991] ECR I-3069, paras 16 et seqq; ECJ *Compassion in World Farming* [1998] ECR I-1251, paras 26 et seqq; ECJ *Ortscheit* [1994] ECR I-5243, paras 13 et seqq.

74 ECJ *Hedley Lomas* [1996] ECR I-2553, para 19.

75 This problem essentially arises in the admittedly limited situation of restrictions on exports.

76 Of a different opinion Müller-Graff in: vd Groeben/Schwarze (note 65) Art 30 TEC paras 14, 32.

Dijon case-law[77]. This regulation raises the question as to the relation of the two categories of grounds of justification, their respective scope of applicability as well as the dogmatic classification of the mandatory requirements as grounds of exclusion or as grounds of justification.

57 The **case-law of the ECJ** with regard to these questions can be summarised in the following points:

Article 30 of the TEC - as an **exemption provision** - is to be interpreted narrowly, and the listing of the named grounds of justification is of an **exhaustive character**.[78] This approach excludes, quasi analogous to Article 30 of the TEC (Article III-154 of the DC), the development of further grounds of justification.

58 Nevertheless, it quite soon became clear that the grounds of justification held in Article 30 of the TEC (Article III-154 of the DC) are not sufficient in order to guarantee the efficient protection of important objects of legal protection, given that the list contained in Article 30 of the TEC (Article III-154 of the DC) originates form 1957 and that throughout the years the necessity emerged to also pursue other protection targets, such as consumer or environmental protection. Against this background, the ECJ emphasized in the - in this respect fundamental - *Cassis de Dijon* case[79] that barriers to trade imposed by national provisions must always be accepted if they are "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" which pursue a "purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community".[80] Whilst it initially was questionable which was the relation between the **mandatory requirements** and the grounds of justification held in Article 30 of the TEC[81], the ECJ has in the meantime clarified that only those interests, which are not already included in Article 30 of the TEC (Article III-154 of the DC), can be considered as mandatory requirements.[82]

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77 ECJ *Cassis de Dijon* [1979] ECR 649.

78 ECJ *Commission v Greece* [1991] ECR I-1361, para 9; ECJ *Commission v Italy* [1982] ECR 2187, para 27.

79 This case dealt with a German provision according to which fruit liqueurs are only martketable as such if they have a minimum alcohol strength of 25%, which was precisely not the case with the French liqueur „Cassis de Dijon".

80 ECJ *Cassis de Dijon* [1979] ECR 649, paras 8, 14.

81 Since the protection of health, which is already contained in Art 30 TEC, was also listed as an example for a mandatory requirement.

82 ECJ *Aragonesa* [1991] ECR I-4151, para 13.

59 The case-law regarding the question whether the mandatory requirements are to be seen as **grounds of exclusion** or as **grounds of justification** is not entirely clear. The formulations used by the Court are likely to indicate that the first approach is preferred.[83]

60 The fact that the ECJ obviously draws a conceptual distinction between the two constellations also shows when the Court states that the grounds of justification of Article 30 of the TEC (Article III-154 of the DC) can always be applicable – thus also for direct discrimination based on the origins of the goods -, whereas reverting to the mandatory requirements was found to be inadmissible for cases of direct discrimination;[84] however, it must be pointed out that precisely in the field of environmental protection directly discriminating provisions were on various occasions generally considered to be justifiable[85], so that this case-law insofar does not seem to be completely consistent.[86]

61 This case-law however leads to certain inconsistencies – apart from the fact that the ECJ partly had to put quite substantial effort into reasoning in order to in the end qualify (in reality) directly discriminating measures as non-directly discriminating, so that the justification possibilities based on environmental concerns could come into consideration:[87] Thus, the dogmatic classification of the mandatory requirements as grounds of exclusion seems to lead to certain doubts, given that the latter have a parallel function to grounds of justification and are moreover examined pursuant to the same principles. Furthermore, also in the case of mandatory requirements the restrictive effect on imports remains, so that the elements of Articles 28, 29 of the TEC (Article III-153 of the DC) are in fact fulfilled; insofar their qualification as grounds of justification is more suitable. In close connection to this is the consideration that the exclusion of a justification possibility for direct discriminations by mandatory require-

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83 Cf for instance ECJ *Aragonesa* [1991] ECR I-4151, para 13; ECJ *Commission v Germany* [1989] ECR 229, para 16; however, cf also ECJ *Familiapress* [1997] ECR I-3689, para 18 = Erichsen JK 98, TEC Art 30/1, where the ECJ speaks of justification.

84 Cf for instance ECJ *Commission v Ireland* [1981] ECR 1625, para 11; ECJ *Schutzverband* [1983] ECR 127, para 11; ECJ *Commission v Belgium* [1992] ECR I-4431, paras 33 et seqq = Kunig JK 93, EWGV Art 30/3; probably also ECJ *Decker* [1998] ECR I-1831, paras 45 et seqq; in case of indirect discriminations (and anyhow in case of restrictions), however, the mandatory requiremetns can additionally also apply, cf ECJ *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I-151, paras 25 et seqq = Schoch JK 00, TEC Art 28/1, which dealt with an indirect discrimination, the ECJ, however, did not fundamentally exclude the recourse to the mandatory requirement of the protection of the supplying of goods at short distance to the advantage of local businesses; similar ECJ *de Agostini* [1997] ECR I-3843, paras 44 et seqq; in this sense also already ECJ *Commission v Ireland* [1981] ECR 1625, paras 11 et seqq; however, the case-law is not completely clear in this regard, cf for instance ECJ *Cullet* [1985] ECR 305, paras 27 et seqq; recently also ECJ *Ciola* [1999] ECR I-2517, para 14 = Ehlers JK 00, TEC Art 49/1.

85 ECJ *Sydhavnens* [2000] ECR I-3743, para 48; in fact also already in ECJ *Commission v Belgium* [1992] ECR 4431, paras 34 et seq = Kunig JK 93, EWGV Art 30/3; cf also ECJ *Preussen Elektra* [2001] ECR I-2099, which concerned a distinction according to the domicile of the electricity producer, even though the ECJ did not explicitly adress the question of the existence of a direct discrimination.

86 More detailed on this problem cf Heselhaus [2001] EuZW, 645 et seqq.

87 As in the case of the Walloon import ban on waste, cf ECJ *Commission v Belgium* [1992] ECR I-4431, paras 33 et seqq = Kunig JK 93, EWGV Art 30/3.

ments does not seem appropriate: Thereby, a sufficient protection of the concerned objects of legal protection is namely impeded in certain cases, since it is precisely not *a priori* excluded that for instance considerations of environmental protection could also justify directly discriminating measures. The possibility of "abuses" can be met at the level of proportionality.[88] This view would also pay regard to the parallel functions of the justification possibilities enabled by Article 30 of the TEC (Article III-154 of the DC) and the mandatory requirements as well as their in fact parallel application and examination.[89] If one is to follow this approach, the emphasis set on the exhaustive character of Article 30 of the TEC (Article III-154 of the DC) lacks any sense whatsoever, since the therein held grounds of justification are in any case at least functionally completed by the mandatory requirements. All in all, a uniform justification dogmatic therefore seems to be most reasonable: In a first step it is examined whether the elements of Articles 28 or 29 of the TEC (Article III-153 of the DC) are fulfilled; subsequently, the relevance of a „public interest" (either a ground held in Article 30 of the TEC/ Article III-154 of the DC or a "mandatory requirement") is examined; and in a third step the proportionality of the measure is questioned. As a result, the herewith represented point of view only leads to other results than the case-law of the ECJ when it comes to the question of the applicability of the mandatory requirements on direct discriminations.

c) Noneconomic Character

62 **Case 3 - Problem:** (ECJ *Evans Medical* [1995] ECR I-563)
Diacetylmorphine is an opium derivative. The production and processing of this substance in Great Britain was so far only authorised for two pharmaceutical enterprises domiciled in Great Britain; as far as third parties were concerned, any import of the substance was prohibited. This regulation was supposed to secure that a reliable supply of diacetylmorphine, which is used as a pain reliever, was guaranteed and that illegal trade was cut off. However, it was partly suspected that this regulation served to secure the existence of the only admitted producer. The British Home Secretary now changed this practice under reference to (among other things) its incompatibility with Article 28 of the TEC, which causes the concerned pharmaceutical enterprises to take legal proceedings. The competent court referred the question, whether the regulation was in accordance with Article 28 of the TEC, to the ECJ for preliminary ruling.

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88 Cf in this connection also Heselhaus [2001] EuZW, 645, 648 et seq, who pleads for a particularly strict proportionality test in case of direct discriminations.

89 → of another opinion § 7 para 90; likewise for instance Weiss [1999] EuZW, 493, 497; Leible in: Grabitz/Hilf (note 3) Art 28 TEC para 20; Hakenberg *Grundzüge des Europäischen Wirtschaftsrechts* (München 1994) p 99 et seq even goes as far as to interprete the case-law in the sense that the ECJ now departs from an uniform notion of (in other words, it would not anymore depend on the existence of a direct or indirect discrimination), subsequently examines the existence of a (exclusionary) selling arrangement and then conducts an uniform justification test.

63 A justification of a restriction to the free movement of goods can only come into consideration if the asserted grounds of justification are of a **noneconomic character**.[90] This in the end equals a restriction to those grounds of public interest which can be asserted within the frame of Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements: As soon as the targeted objectives are of an economic character, an application of the mandatory requirements or of Article 30 of the TEC (Article III-154 of DC) (where eg the public order might be of relevance) does not come into question. An economic character can be assumed when the adopted measures in fact serve to steer the economy, achieve economic policy objectives or to prevent economic disadvantages in general.

64 The exclusion of such grounds from the scope of applicability of Article 30 of the TEC (Article III-154 of the DC) as well as of the mandatory requirements results from the purpose of Articles 28 et seqq of the TEC (Articles III-153 et seqq of the DC): The "basic philosophy" of these provisions – as well as of the other Fundamental Freedoms – is precisely that restrictions to the free movement of factors of production are to be abolished, given that they are assumably opposed to economic efficiency. If this is the case, then measures which aim at economic objectives precisely by trade restricting means, cannot be covered by Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements. Otherwise, the possibilities of justification enabled by Article 30 of the TEC (Article III-154 of the DC) and the mandatory requirements could be "misused" in order to meet economic difficulties which possibly arise (momentarily) due to the application of Articles 28 et seq of the TEC (Article III-153 et seq of the DC).

65 However, the prohibition on asserting economic grounds does not exclude that the primary protection target of a certain provision is pursued by means of economic policy measures. Thus, only the independent pursuit of economic targets for their own sake is excluded; however, if economic policy measures only constitute a „means to an end" and in fact serve other purposes, they can in principle fall within the scope of Article 30 of the TEC (Article III-154 of the DC) and the mandatory requirements. This can eg be the case if it is a matter of supplying the population with important pharmaceuticals for health protection reasons.[91] However, such measures might not meet the requirements of proportionality.[92]

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90 Constant case-law, cf for instance ECJ *Evans* [1995] ECR I-563, para 36; ECJ *Campus Oil* [1984] ECR 2727, paras 35 et seq; ECJ *Cullet* [1985] ECR 305, paras 30 et seqq; ECJ *Commission v Greece* [2001] ECR I-7915, para 21.

91 ECJ *Evans* [1995] ECR I-563, paras 36 et seq; cf also ECJ *Campus Oil* [1984] ECR 2727, paras 34 et seqq; ECJ *Decker* [1998] ECR I-1831, paras 39 et seqq.

92 Cf below paras 79 et seqq.

66 It is however not possible to appeal to Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements if the public order is disturbed due to economic difficulties, which eg may occur in cases of boycott measures affecting imports from other Member States. Because it contradicts the systematics of the Treaty to qualify the functioning of the Fundamental Freedoms as a disturbance of the public order and therewith factually make it subject to some sort of reservation of the general police blanket clause.

67 **Case 3 - Answer:**
The preliminary question is admissible, although the practice in question has already been changed: Because the answer to the posed questions should enable the national court to assure itself that the change of the national practice was in fact necessary in order to meet the requirements of Community law.
Diacetylmophine is merchandise in the sense of Article 23(2) of the TEC, since it can be the object of trading transactions and is transported across borders for this purpose. The prohibition of the import of diacetylmorphine constitutes a quantitative restriction on imports for the purpose of Article 28 of the TEC, since the import of merchandise is limited according to its value or quantity or – as in the present case - even forbidden. A justification can only be considered for measures of a noneconomic nature, ie for such which do not serve to steer the economy or to reach economic policy targets. Precisely these, however, are in dispute when the existence of an enterprise is assured, so that this consideration cannot be taken to account in order to justify the restriction on imports. On the other hand, the regular supply to the country with a substance, that is used for important medical purposes, serves the protection of health (Article 30 of the TEC) and therewith may in principle justify an hindrance to intra-community trade. However, the measure must comply with the principle of proportionality. In the case at hand, the facts of the case to not allow a conclusive determination (which is incidentally incumbent to the national court) whether a milder measure would have been possible.

d) The Question of the Necessity of a Territorial Reference

68 In the first instance, Article 30 of the TEC (Article III-154 of the DC) and the recognition of the mandatory requirements are of course supposed to secure that the defined protection targets can be pursued and achieved within the territory of the respective Member State.[93] It is however not excluded that a Member State – by the means of national measures – also pursues targets which are in fact "residing" in the territory of another state. For instance, a prohibition of imports for endangered animal species can (only) be aimed at the protection of animals in another state. It is now questionable whether the Member States can also pursue such „extraterritorial targets" by invoking Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements, or whether this is *a priori* excluded.

69 In connection with the whole purpose of the possibilities of justification by means of the objects of legal protection held in Article 30 of the TEC (Article III-154 of the DC) and cov-

[93] Or also of the Community. This constellation shall however remain out of consideration in the following. It essentially raises the question of conformity of corresponding unilateral measures with the GATT/WTO-legislation. On this cf, with further references, Epiney [2000] DVBl, 77 et seqq.

ered by the mandatory requirements, a general preclusion of such a pursuit of "extraterritorial protection interests" does not seem appropriate: Because this provision should precisely enable the Member States to protect the concerned objects of legal protection, whereas the intensity of this protection generally lies within their scope of evaluation.[94] Then, however, there is no visible reason why national measures should not in principle be able to safeguard objects of legal protection beyond their own territory. However, this possibility must find its limits where the sphere of competence of other (Member) states begins; thus, it would not be conform to the conception of the justification possibilities enabled by Article 30 of the TEC (Article III-154 of the DC) and the mandatory requirements if a state was able to impose its concept of a certain domain on other states. In other words, it depends on the competence of the Member States to regulate the respective issues. Therefore, the Member States must also effectively demonstrate an "own" protection interest, whose existence is precisely not to be determined in accordance with the territory. It rather depends on an (also) legally justifiable own responsibility for the object of legal protection, which can also result on grounds of international integration or interdependence, respectively.[95]

e) The Significance of the Community Fundamental Human Rights

70 Measures taken by Member States or by the Community in order to safeguard objects of legal protection held in Article 30 of the TEC (Article III-154 of the DC) or covered by the mandatory requirements can also affect other positions protected by Fundamental human rights, for instance if the freedom of expression is limited due to measures which are supposed to preserve press diversity, but also always already then when economic freedom is affected.

71 The Community Fundamental human rights (→ detailed § 14)[96] of course oblige the Community itself and its organs. But they also have binding effect on the Member States in-

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94 On this below paras 83 et seqq.

95 So far, the ECJ did not yet have to decide this question. In literature, the opinions reach from a fundamental inadmissibility of the pursuance of extraterritorial objects of legal protection („extraterritorialer Rechtsgüter") (Gornig/Silagi [1992] EuZW, 753, 756; probably also Everling [1993] NVwZ, 209, 211) over an exceptional admissibility in case of the existance of a global responsibility („globalen Gesamtverantwortung") of the states for certain interests (Müller-Graff in: vd Groeben/Schwarze (note 65) Art 30 TEC paras 37 et seqq; similar Weiher *Nationaler Umweltschutz und internationaler Warenverkehr* (Baden-Baden 1997) p 99 et seqq) to a connection with international protection interests („internationale Schutzinteressen"), whereas in the case of their relevance a possibility of justification is given (as in Kahl *Umweltprinzip und Gemeinschaftsrecht* (Heidelberg 1993) p 192 et seq; Middeke (note 43) p 167 et seq).

96 With regard to the protection of Fundamental human rights in the EU cf Kokott (1996) 121 AöR, 599 et seqq; against the background of the „proclamation" of the Charter of Fundamental Rights for instance Besselink [2001] MJ, 68 et seqq; v Bogdandy [2001] JZ, 157 et seqq; Calliess [2001] EuZW, 261 et seqq; Weber [2000] GYIL, 101 et seqq.

asfar as the latter apply or enforce Community law.[97] Moreover, the Community Fundamental human rights must also be observed in cases of Member State regulations which fall into the scope of applicability of Community law and which, as far as their admissibility is concerned, refer to Community notions - such as the relevant objects of protection in Article 30 of the TEC (Article III-154 of the DC) or within the frame of the mandatory requirements. It is probably against this background that the case-law of the ECJ must be seen, which emphasises that the Community law justification for Member State measures restricting the Fundamental freedoms must be interpreted "in the light of fundamental rights".[98]

72 This fundamental applicability of the Community Fundamental human rights has repercussions primarily at two levels: Firstly, the object of legal protection invoked within the frame of Article 30 of the TEC (Article III-154 of the DC) or the mandatory requirements must be able to justify restrictions to the affected Fundamental right, which applies to most of the cases. Secondly, and above all, the effect on the Fundamental right must be considered at the level of proportionality: Suitability, necessity and proportionality in the narrow sense must also be examined with regard to the interference with the Fundamental human rights. Normally, however, these aspects of the proportionality test will coincide with the "normal" review of proportionality, since it is precisely the measure restricting trade which constitutes an interference with the respective Fundamental human right.[99]

2. Written Grounds of Justification

73 Article 30 (Article III-154 of the DC) allows for the implementation of measures which actually infringe Articles 28, 29 of the TEC (Article III-153 of the DC) by virtue of a range of grounds held in detail. As already mentioned,[100] the ECJ assumes - on the basis of a narrow interpretation of the individual grounds of justification - that the list held in Article 30 of the TEC (Article III-154 of the DC) is exhaustive. In detail, four groups of exceptions can be dis-

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97 More detailed on the question of the binding effect of the Fundamental human rights of the Community cf Epiney (note 16) p 125 et seqq; from case-law particularly ECJ *ERT* [1991] ECR I-2925, para 43; ECJ *Commission v Germany* [1992] ECR I-2575, para 23 = Kunig JK 92, EWGV Art 30/2; ECJ *Familiapress* [1997] ECR I-3689, para 27 = Erichsen JK 98, TEC Art 30/1; → § 14 paras 33 et seqq.

98 ECJ *Commission v Germany* [1992] ECR I-2575, para 23 = Kunig JK 92, EWGV Art 30/2; ECJ *Familiapress* [1997] ECR I-3689, para 24 = Erichsen JK 98, TEC Art 30/1. In literature, this approach of the ECJ ist mostly followed. Cf for instance Holznagel *Rundfunkrecht in Europa* (Tübingen 1996) p 156; Becker in: Schwarze Art 30 TEC, para 62; very critical however Kingreen *Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts* (Berlin 1999) p 164; similar Störmer (1998) 123 AöR, 541, 567. More detailed on the problem Schaller *Die EU-Mitgliedstaaten als Verpflichtungsadressaten der Gemeinschaftsgrundrechte* (Baden-Baden 2003) p 79 et seqq; Wallrab *Die Verpflichteten der Gemeinschaftsgrundrechte* (Baden-Baden 2004) p 43 et seqq.

99 → probably likewise § 7 para 94.

100 Above paras 57 et seqq.

tinguished, whereas in the following – on the basis of the relevant case-law – only a short overview on the significance of the individual exceptions will be given.[101]

74 The objects of protection of **public morality, order and security** refer to different aspects of the public order: In the end, this is a matter of observing the significant fundamental rules of a community[102], whereas public order represents a sort of generic term and the public security[103] and morality[104] take up specific aspects thereof.[105]

75 The **protection of health and life of humans, animals and plants** – which is of great significance in the case-law of the ECJ – only covers such measures which aim at the protection of humans, plants and animals as such; thus – always in accordance with the case-law of the ECJ - a direct relation to the named objects of protection is necessary, whereas with regard to the named objects of legal protection, only measures or concerns, respectively, of indirect effect (eg such which primarily serve consumer or environmental protection) are covered by the „mandatory requirements“.[106]

76 The objects of protection which are the **national treasures possessing artistic, historic or archaeological value** refer to the interest of the Member States of preserving certain works of art or other objects which are significant for the national identity. In ECJ's case-law, this protection interest has so far not played any role.[107]

77 The **protection of industrial and commercial property** refers to such legal instruments which are destined to protect industrial or commercial legal positions. According to the case-law of the ECJ, this primarily includes patent right[108], trademark right[109] and copyright[110], but also denominations of origin and geographical indications of provenance[111].

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101 For more details, particularly regarding the relevant case-law, reference is made to the commentary literature. From monograph literature Millarg *Die Schranken des freien Warenverkehrs in der EG. Systematik und Zusammenwirken von Cassis-Rechtsprechung und Art 30 EG-Vertrag* (Baden-Baden 2001) p 139 et seqq.

102 For instance the prevention of fraud in connection with the granting of export aid ECJ *Deutsche Milchkontor* [1994] ECR I-2757, para 44.

103 Public morality in fact concerns the protection system of the state in order to maintain its monopoly of power, but also the protection of the existence of the state as well as of its central institutions; cf for instance ECJ *Richardt* [1991] ECR I-4621, paras 22 et seqq = Kunig JK 92, EWGV Art 30, 36/1.

104 The public security refers to moral conceptions which the coexistence of the population should comply with; cf ECJ *Conegate* [1986] ECR 1007, para 14; ECJ *Henn and Darby* [1979], 3795 et seqq.

105 Cf Müller-Graff in: vd Groeben/ Schwarze (note 65) Art 30 TEC para 49. In the same direction probably also ECJ *Campus Oil* [1984] ECR 2727, para 33.

106 Among case-law cf for instance ECJ *Bluhme* [1998] ECR I-8033 et seqq; ECJ *van Harpegnies* [1998] ECR I-5121; ECJ *Commission v Germany(German Purity Law for beer)* [1987] ECR 1227.

107 As to the arrising questions of interpretation cf, with further references, Epiney in: Calliess/Ruffert (note 4) Art 30 TEC para 37.

108 ECJ *Thetford* [1988] ECR 3585, paras 14 et seq.

109 ECJ *Hoffman-La-Roche* [1978] ECR 1139, paras 7 et seq.

110 ECJ *Basset* [1987] ECR 1747, para 11 et seqq.

111 ECJ *Delhaize* [1992] ECR I-3669, para 10; ECJ *Belgium v Spain* [2000] ECR I-3123, para 50; ECJ *Exportur* [1992] ECR I-5529, para 25.

78 In detail, the interpretation of these objects of legal protection leaves several questions which however cannot be examined more closely in this context.[112]

3. Unwritten Barriers

79 As already mentioned[113], in its judgement *Cassis de Dijon*[114] the ECJ developed the principle that restrictions on trade can also be justified by so-called mandatory requirements relating to the public good, whereas the ECJ assumes that these can only apply to indirect discriminations and restrictions, not however to direct discriminations.[115]

80 The ECJ has applied the original *Cassis* formula in numerous rulings and has partly also developed it further[116], especially by the explicit acceptance of other mandatory requirements, such as environmental protection[117], the securing of the financial balance of social security systems[118], cultural purposes[119] or also the securing of the conditions under which goods are supplied at short distance in relatively isolated areas of a Member State[120].

81 However, the mandatory requirements are not enumerated exhaustively („in particular"), so that *a priori* all public interests can be subsumed thereunder, always provided that they can be recognised as such from a Community law point of view; hence, they may in particular not be of an economic character.[121]

4. Proportionality

82 **Case 4 - Problem:** (ECJ *Belgium v Spain* [2000] ECR I-3123)
According to the relevant Spanish provisions, in order to legitimately use the denomination of origin „Rioja" for wine emanating from the homonymous region, the wine must (among other things) have been bottled in the producing region. Belgium sued the Spanish State before the ECJ due to this aspect of the origin regulation. Spain claims the requirement of the bottling in the producing region itself to

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112 More detailed cf, with numerous references from case-law, Epiney in: Calliess/Ruffert (note 4) Art 30 TEC paras 39 et seqq.

113 Cf above paras 57 et seqq.

114 ECJ *Cassis de Dijon* [1979] ECR 649.

115 Cf above paras 57 et seqq.

116 Cf the overview on case-law in Ahlfeld *Zwingende Erfordernisse im Sinne der Cassis-Rechtsprechung des Europäischen Gerichtshofs zu Art 30 EGV* (1997), p 85 et seqq; Millarg (note 102) p 163 et seqq.

117 ECJ *Commission v Denmark (deposit-and-return system for empty containers)* [1988] ECR 4607, paras 8 et seq; ECJ *Commission v Belgium* [1992] ECR I-4431.

118 ECJ *Decker* [1998] ECR I-1831, para 39.

119 ECJ *Cinéthèque* [1985] ECR 2605, paras 21 et seqq; ECJ *Commission v Netherlands (Mediawet)* [1991] ECR I-4069, paras 29 et seq; ECJ *Veronica Omröp Organisatie* [1993] ECR I-487, paras 9 et seq; however, in this regard case-law is partly also quite reluctant, cf for instance ECJ *Leclerc* [1985] ECR 1, paras 28 et seqq, with regard to Art 49 TEC.

120 ECJ *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I-151, para 34 = Schoch JK 00, TEC Art 28/1.

121 On this above para 61 et seqq.

be necessary in order to be able to guarantee the quality of the wine, whereas Belgium argues that it constitutes an illegal restriction on the free circulation of goods.

83 If there is a ground of justification (either one held in Article 30 of the TEC or a mandatory requirement), the respective (national or Community) measure still has to comply with the principle of proportionality, ie the respective measure must be suitable in view of the target, constitute the mildest means – in other words, comply with the principle of necessity – and be appropriate (proportionate in the narrow sense of the term).[122] This principle which has been recognised in settled case-law is finally based on the application of general principles of law and is also imperative against the background of the whole purpose of Articles 28, 29 of the TEC (Article III-153 of the DC) as well as the recognised possibilities of justification, given that the restriction on the free movement of goods should be limited to the necessary degree and appropriately proportionate to the aimed protection target

84 From Article 30(ii) of the TEC (Article III-154 of the DC), which holds that the measures taken under reference to Article 30 of the TEC (Article III-154 of the DC) may not constitute a means of arbitrary discrimination nor a disguised restriction on trade, no further requirements can be drawn. These requirements finally rather correspond with the principle of proportionality.[123] It is also hardly imaginable that „arbitrary discriminations" or „disguised restrictions" to trade could be suitable and necessary.

85 However, a justification under Article 30 of the TEC (Article III-154 of the DC) or on the basis of the mandatory requirements can *a priori* only be considered provided that the objects of protection are at risk. This does however not mean that such a threat must be proved with one hundred per cent certainty (as far as this is possible in the first place). Thus, there may absolutely be an element of uncertainty; however, a substantiated and comprehensible description of the present endangerment is necessary. For instance, coli bacteria indicate pathogenic microorganisms, which can represent a substantial threat to health.[124] Whereas it could not be established that the additives in certain beers pose a threat to health in view of the normal diet[125] of the German population.[126] Nor was the low nutritional value of a food-

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122 Whereas the ECJ only exceptionally rejects a measure based on the appropriateness criterion. Cf (however with regard to Art 12 TEC) ECJ *Pastoors* [1997] ECR I-1, paras 19 et seqq. With regard to the proportionality test within the frame of Art 28 TEC for instance ECJ *Decker* [1998] ECR I-1831, paras 39 et seqq; ECJ *Familiapress* [1997] ECR I-3689, paras 19 et seqq = Erichsen JK 98, TEC Art 30/1; ECJ *Bluhme* [1998] ECR I-8033; ECJ *Commission v Denmark (deposit-and-return system for empty containers)* [1988] ECR 4607, paras 11 et seqq.

123 Whereas the case-law of the ECJ is not unifrom in this respect. On this problem, with further references to literature and case-law, cf Epiney in: Calliess/Ruffert (note 4) Art 30 TEC, paras 47 et seqq.

124 ECJ *Melkunie* [1984] ECR 2367, para 17.

125 Which can in principle absolutely be considered. Cf ECJ *Heijn* [1984] ECR 3263, para 16; ECJ *Muller* [1986] ECR 1511, para 20.

stuff found to constitute a health threat.[127] Furthermore, the ECJ held in a recent judgement regarding the compatibility of a Danish prohibition on trade with food products which had been enriched with vitamins and mineral nutrients, that, if there were scientific uncertainties as to a possible harmful effect of additives in foodstuff, the Member States had the obligation to decide to which extent the protection of health of the population should be guaranteed. However, the existence of a health threat had to be based on a detailed examination of the respective risk; a marketing prohibition could only be enacted if the asserted danger to public health can be considered to be sufficiently proven on the basis of the available scientific information, whereas the evaluation of the degree of probability of the harmful effects as well as the potential severity had to be taken into account.[128]

a) The Discretion Enjoyed by the Member States

86 The principle of proportionality[129] regulates a means-end relation; in other words, the question is whether a certain measure is suitable, necessary and appropriate in view of the attainment of a certain goal. The requirement of proportionality, thus, does not answer the question as to the applicable level of protection or the aimed target, respectively, but presupposes its determination. In view of the circumstance that Article 30 of the TEC (Article III-154 of the DC) as well as the mandatory requirements can in principle only be applied in those cases in which there is precisely no determination of the protection level in Community legislation, it is incumbent on the Member States to decide which level of protection they want to apply; in other words, they can thus decide how far eg the protection of health or consumers shall reach.[130] This competence of the Member States also relates to uncertainty as to the facts, eg regarding the dangerousness of certain substances.[131]

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126 ECJ *Commission v Germany (German Purity Law for beer)* [1987] ECR 1227, para 49.

127 ECJ *Commission v Germany* [1989] ECR 229, para 10.

128 EuGH *Commission v Denmark* [2003] ECR I-9693; cf also ECJ *Commission v France* [2000] ECR I-1129, where the ECJ emphasises that the Member States can determine the applicable protection standard in the field of health protection.

129 Comprehensive on this principle in Communitly law, even if with regard to legislation cf Emmerich-Fritsche *Der Grundsatz der Verhältnismäßigkeit als Direktive und Schranke der EG-Rechtsetzung* (Berlin 2000); cf also Jarass [2000] EuR, 705, 721 et seqq.

130 Likewise also case-law. Cf for instance ECJ *Commission v Germany (German Purity Law for beer)* [1987] ECR 1227, para 41; ECJ *Melkunie* [1984] ECR 2367, para 18; ECJ *Commission v France* [2000] ECR I-1149. From literature Ahlfeld (note 117) p 62 et seqq; more detailed on the problem Epiney/Möllers *Freier Warenverkehr und nationaler Umweltschutz* (Cologne et al. 1992), p 70 et seqq.

131 Cf ECJ *Sandoz* [1983] ECR 2445, para 19; ECJ *van Bennekom* [1983] ECR 3883, summary para 6; ECJ *Muller* [1986] ECR 1511, para 20.

87 It is however questionable whether the competence of the Member States[132] also relates to the determination of the respective conceptions of the pursued protection policies, ie for instance the determination of the principles on the basis of which consumer protection is to be conceived. This problem can indeed – at least regarding certain policies, such as consumer protection – be of significant importance for the conduct of the proportionality test and its result: Thus, for instance, the necessity of a measure must be evaluated differently, depending on whether the evaluation is based on the image of the „sensible consumer" or that of the „vulnerable" or „absent-minded" consumer.

88 Here, the ECJ at least partly applies the principle that the conception of the respective policy and therewith the basis for the proportionality test have to be determined pursuant to Community standards. Especially in the field of consumer protection (in connection with health protection), the ECJ refers to a Community concept of the „responsible" consumer, which at the level of the necessity test has the result that in principle imperative provisions on product quality and a prohibition on sales resulting thereof are not admissible, since compulsory marking constitutes the milder measure.[133]

89 However, this approach is not convincing: In those cases in which there is no Community law regulation, the Member States in principle have the competence to determine the respective policies and to take the corresponding measures. This competence does not only relate to the „whether" of the pursuance of the corresponding aims, but also to the „how", which also includes - in addition to the determination of the protection level - the definition of the conceptions on which the respective policy is based. It is not apparent why the Community's conception should be able to take the place of Member States' one, since it is not a matter of the definition of Community notions, but of the setting of political priorities. Insofar, the case-law of the ECJ does not seem entirely unobjectionable. At least the relevant case-law so far focuses on the field of consumer protection, whereas other policy fields are obviously treated more generously.[134] Incidentally, the ECJ recently tends to reduce the density of control, for instance if it states - with regard to a prohibition on selling a creme labelled „Lifting" - that such a regulation infringes the Treaty if an average consumer, reasonably well informed and reasonably observant and circumspect, expects the creme to have an effect

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132 With regard to Community law provisions, the problem is not posed in this form.

133 Constant case-law. Cf only ECJ *Commission v Germany (German Purity Law for beer)* [1987] ECR 1227, paras 35 et seqq; ECJ *Cassis de Dijon* [1979] ECR 649, para 13; ECJ *van der Veldt* [1994] ECR I-3537, para 19; ECJ *Commission v Spain* [2003] ECR I-459; ECJ *Commission v Italy* [2003] ECR I-513.

134 Especially in the field of health protection, cf the references in note 131.

comparable to surgical lifting.[135] The determination whether this is the case or not is left to the national court.[136]

b) The Requirements of Proportionality in Detail

90 As mentioned initially, the principle of proportionality includes the requirements of suitability, necessity and appropriateness.

91 Every measure is suitable if it is in principle able to reach the aimed target. Whether this condition is (probably[137]) fulfilled, must – where necessary – be determined by means of corresponding scientific investigations. The requirement of suitability of a measure is eg not fulfilled if a Member States considers imported goods of a certain quality to constitute a danger which it seeks to prevent, but does not take any measures with regard to comparable domestic goods.[138] A measure is also suitable if it does not manage to completely reach the aimed target, but contributes – even if to a small extent – to its achievement, which is eg often the case with measures in the field of environmental protection. All in all, against this background the ECJ quite seldomly negates the suitability of a measure.[139]

92 The necessity of a measure is always given when the aimed protection target cannot be reached by measures less restrictive of the free movement of goods. However, the necessity test must always be based on the defined protection target. The necessity must for instance regularly be negated for the so-called „duplicated checks" – eg the requirement of technical analyses for imported products which have already been analysed in country of origin and whose analysis results are accessible.[140] Also the aims connected to import controls can often be reached in another manner, eg by marketing regulations or other controls.[141] In order to be able to affirm the necessity, it must be demonstrated in a justifiable manner that the also contemplable milder measure would not have been as efficient. However, when it comes to uncertainties as to the facts, the Member States should also have a certain margin of discretion.

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135 Which of course is not the case.

136 Cf ECJ *Lauder* [2000] ECR I-117.

137 As to uncertainties regarding the facts of the case, the Member States must also here have a certain scope of discretion. Cf more detailed Epiney (note 16) p 303 et seqq.

138 ECJ *Conegate* [1985] ECR 1007, para 15; cf also ECJ *Commission v Italy* [1990] ECR I-4285, paras 6 et seq.

139 However, cf also ECJ *Commission v Germany* [1989] ECR 229, para 10; ECJ *Cassis de Dijon* [1979] ECR 649, para 11; suitability was eg affirmed in the following cases: ECJ *Denkavit* [1991] ECR I-3069, para 23; ECJ *Aragonesa* [1991] ECR I-4151, ECR 15.

140 ECJ *Harpegnies* [1998] ECR I-5121; ECJ *Commission v France* [1998] ECR I-6197, paras 22 et seqq; incidentially, cf the specifications regarding a system of prior authorisation in ECJ *Canal Satélite* [2002] ECR I-607.

141 Cf eg ECJ *Commission v Germany* [1994] ECR I-3303, para 25; ECJ *Commission v United Kingdom* [1988], ECR 547, paras 15 et seqq.

Thus, the ECJ points out that in case of difficulties relating to the question of the effectiveness of the measures, the necessity of the measure can already then be assumed if there are no indications that the national measure goes beyond what is necessary in order to reach the aim.[142] Incidentally it should be recalled that here – as also in the following step, the appropriateness test – the violation of Fundamental human rights must, where necessary, be taken into account.

93 The appropriateness of a measure is a matter of balancing the impairment of the free movement of goods and, where applicable, the restriction of Fundamental human rights on the one side and the pursued protection interest on the other. As mentioned initially[143], a measure fails at the most exceptionally due to the criterion of appropriateness.[144]

94 Case 3 - Answer:

The Belgian application for a declaration that the measure was infringing Community law is admissible (Article 227 of the TEC).

The measure in question constitutes a measure having equivalent effect to an export restriction (Article 29 of the TEC): Because the export of unbottled wine is certainly still possible; but this wine may not carry the denomination of origin „Rioja". This, however, impairs its sales potential, since denominations of origin play an important role in terms of the marketing of products, especially as far as wine is concerned. Hence, the requirements of the *Dassonville* formula are met. Since this measure only relates to exported products (unbottled wine which is exported from the region), there is also a specific restriction on export patterns. Wine, which is namely only handled within the region and is bottled in approved wine cellars can still carry the denomination of origin.

Denominations of origin belong to the industrial property rights. They are supposed to protect their holder from abuse of the denominations by third parties to their advantage. Incidentally, they should guarantee that the labelled product originates in a certain geographical area and features special qualities. Consequently, a justification pursuant to Article 30 of the TEC is in principle possible. However, the proportionality of the measure, particularly its necessity, is questionable: The starting point of the considerations is the circumstance that the bottling procedure is difficult and should only be conducted by persons or companies, respectively, with a vast know-how in order to prevent the wine from losing its quality and therewith its characteristics. This is also valid for the transportation of unbottled wine. Against this background, the ECJ affirms the necessity: The mentioned know-how is most likely to be present in the companies of the concerned region, which precisely have a larger experience in handling this quality wine, so that there is a higher probability of the named procedures being conducted professionally. Furthermore, the controls in other Member States are partly less strict than in Spain. Finally, compulsory marking alone is not sufficient, since in the case of quality losses the reputation of all wines marketed under the denomination of origin „Rioja" would be affected. However, the fundamental approach of the ECJ is not convincing: It is not apparent why the bottling and transportation of Rioja should be more difficult than of other quality wines, so that „companies from regions with quality wines" could have been used as a criterion. Above all, there are other methods of determinating the

142 ECJ *Kemikalieinspektionen* [2000] ECR I-5681, paras 40 et seqq; ECJ *Heinonen* [1999] ECR I-3599, paras 36 et seqq; cf also ECJ *Commission v Belgium* [2000] ECR I-3123; ECJ *Consorzio del Prosciutto di Parma* [2003] ECR I-5121; ECJ *Ravil/Bellon* [2003] ECR I-5053.

143 Cf above paras 79 et seqq.

144 However, cf also ECJ *Canal Satélite* [2002] ECR I-607, where the ECJ – in connection with a system of prior authorisation for the initialisation of certain devices for the digital transmission or the digitial reception of television signals over satellite – also refers to considerations attributable to the criterion of appropriateness, eg when it points out that an authorisation procedure, even if it meets the requirements of suitability and necessity, is still not compatible with Art 28 TEC, if it hinders the market participants from exercising their freedoms.

qualification of companies which restrict the free movement of goods to a lesser extent, such as an admission procedure, an examination of the required know-how or regular inspections.