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ENVIRONMENTAL RESTRICTIONS TO THE PRINCIPLE OF FREE MOVEMENTS OF GOODS

Case C-428/12 *Commission v. Spain*

by

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I. INTRODUCTION: ENVIRONMENTAL RESTRICTIONS TO THE PRINCIPLE OF FREE MOVEMENTS OF GOODS, A PERMANENT OPENED QUESTION

Pursuant to Article 3(3) of the Treaty on European Union (TUE) and Article 26 of the Treaty on the Functioning of the European Union (TFUE), free movement of goods is deemed to be one of the pillars of the internal market of the European Union (EU)[1]. Besides, like it has been highlighted by many authors[2], a "double system" ensures the free circulation of goods within the internal market: on the one hand, Articles 28 and 30 of TFUE prohibit discriminatory taxes or fiscal barriers; on the other, Articles 34 and 35 TFUE prohibit *quantitative restrictions* on imports and exports of goods as well as any measures of *equivalent effect*.

[1] Article 3(3) TUE reads as follows: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance". Besides, Article 26(1) provides that: "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties". As underscored by Professor N. DE SADELEER, the principle of free movement of goods is deemed to be one of the cornerstones of the internal market: see N. DE SADELEER, "Autonomía regulatoria ambiental y libre circulación de bienes", en J.SANZ LARRUGA/ M.GARCÍA PÉREZ/J.J. PERNAS GARCÍA, (Dirs.), *Libre Mercado y protección ambiental: intervención y orientación ambiental de las actividades económicas,* INAP, Madrid, 2013, p.54.

[2] For an in-depth review of that issue, see N. DE SADELEER, *EU Environmental law and the Internal Market,* Oxford, Oxford University Press, 2014, pp. 227-336,

Accordingly, these treaty provisions not only play a key role regarding the functioning of the internal market, but also operate as a means of "negative harmonization" with respect to European environmental law[3], where the subject matter has not been subject to harmonized EU secondary rules. This paper attempts to discuss the scope of these provisions, in particular Article 34 TFEU[4].

Besides, sustainable development is coming to the forefront as a fundamental objective of the EU, as well as a condition to be fulfilled by internal market rules. Thus, that principle should bring environmental protection and the internal market into equilibrium[5]. In that connection, Article 36 TFUE authorizes Member States to maintain or to adopt environmental protection measures as exceptions to the prohibition laid down in Article 34[6]. Accordingly, restrictions to the principle of free movement of goods that are necessary to protect the environment or to achieve environmental objectives are permissible.

Therefore, in accordance with these primary law provisions, national authorities should examine on a case-by-case the consistency of their environmental measures. This paper aims to explore this question.

My view is that the relationship between the internal market and the environmental protection's requirements is a permanent opened question, which must be examined according to the features of each case. In Case C-428/12, the Court of

[3] See N. DE SADELEER (2013): 38. Regarding "positive harmonization" and its relationship with national environmental regulations, see M. MORA-RUIZ, "La competencia estatal para la aprobación de normas adicionales de protección ambiental en ámbitos armonizados en el nivel comunitario: studio jurisprudencial de los artículos 114 y 193 TFUE", in J.SANZ LARRUGA/ M.GARCÍA PÉREZ/J.J. PERNAS GARCÍA, (Dirs), *Libre Mercado y protección ambiental: intervención y orientación ambiental de las actividades económicas,* INAP, Madrid, 2013, pp. 79-104.

[4] The article reads as follows: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".

[5] This thesis is supported by several authors; see, between others, C. PLAZA MARTIN, *Derecho Ambiental de la Unión Europea,* Tirant Lo Blanch, Valencia, 2005, p. 59; and A. BETANCOR RODRÍGUEZ, *Derecho Ambiental,* La Ley, Madrid, 2014, p.450. The author stresses the cross-wide character of the environmental European policy stemming from Article 11 TFUE.

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

Justice of European Union (CJEU) reviewed the consistency of a Spanish regulation laying down requirements regarding the authorization of certain vehicles transporting goods with Article 34 TFEU. Though this is not a very special case, in view of the numerous judgements handed down by the CJEU, it is nevertheless likely to attract attention given the ways in which the Court is weighing the functioning of the internal market against environmental concerns. In fact, this case offers us the opportunity of verifying how the case law of the CJEU on Article 34 and Article 36 evolved [7], as well as to look at the influence such a judgement is likely to have on domestic law. We turn now to these issues.

II. The CJEU decision of 3rd April 2014, C-428/12, *Commission v. Spain*[8]

2.1. Facts of the case

The case arose from an infringement action initiated by the European Commission against Regulation 20th March 2007 (Orden FOM/734/2007[9]), which implements a Law and a Royal Decree on land transport[10]. At the hearth of the contention lied the obligation placed upon private and public persons transporting goods to obtain an administrative license. The regulation at issue required that in order to be used as a private transport vehicle, the first truck of the transport company was not older than 5 months since it was firstly registered. That being said, in virtue of Article 31 in relation to Articles 32 and 22, the other vehicles used by the operator could be older than the five months threshold unless a global limit of six years was exceeded[11]. It must be noted that the scope of ambit of the regulation was restricted to undertakings whose main economic activities did not encompass the transportation of goods.

From the Commission's point of view, the licence required to carry out such transport activities was subject to a temporal requirement that was likely to discriminate the import of foreign vehicles. Strictly speaking, the regime at issue was precluding the

[7] N. DE SADELEER (2013): 55
[8] Judgment of the fifth Chamber of the CJUE.
[9] *BOE* num. 75, 28th march.
[10] Law 16/1987, 30th July, on land transport (*BOE* 31st july, www.boe.es), and Royal Decree 1211/1991, 28th September (*BOE* 8th October, www.boe.es).
[11] Paras. 6 to 9.

import of trucks complying with EU and the Member State of origin technical requirements (art.3)[12].

Accordingly, the Spanish regulation at issue encapsulated a general transport vehicle licensing scheme.

According to the Commission, the Spanish Regulation amounted clearly to a restriction on import of foreign heavy vehicles, irrespective of the fact that these vehicles complied with technical requirements set out either by the EU or by other Member States. Consequently, this obligation had to be qualified as a measure of *equivalent effect to a quantitative restriction on imports within the meaning* of Article 34 TFUE[13] and was therefore clearly unlawful on the ground that it was in breach of the principle of mutual recognition.

On the other hand, the Commission pointed out the fact that neither environmental, nor road safety reasons justified the Spanish measure in the light of Article 36 TFEU. What is more, regarding the environmental reasons, the Commission argued that the Spanish regulatory approach should have been less restrictive, taking into consideration for instance the technical controls carried out in other Member States. As a result, the proportionality principle was violated[14].

By contrast, the Spanish authorities dismissed the claims put forward by the Commission, in a very particular way. Firstly, they argued that Article 34 was not infringed, and thus that it was not necessary to address the exceptions provided for under Article 36. Nevertheless, they paid heed to the advantages entailed by the measure at issue for both the environment and road safety.

In fact, the Spanish authorities took the view that the measure at stake didn't have a significant impact on the internal market. Accordingly, it could not be qualified as a restriction on import of foreign vehicles[15]. What is more, the Spanish authorities

[12] Paras. 1, 2 and 3.
[13] Para. 15. There is a significant *corpus* of CJEU case law on the matter, whose starting point is the so-called *Dassonville* formula (1979): See J.H. JANS/H.H.B VEDDER, *European Environmental Law,* 3rd Edition, European Law Publishing, Brussels, 2008, pp.234-236; N. DE SADELEER (2013): 57; and A. BETANCOR (2014):453.
[14] Para. 17, 19 and 24.
[15] Para. 20.

emphasized the low costs of the measure in contrast to the alternative measures, proposed by the Commission [16].

2.2. Decision of the Court

The CJUE finds the measure in breach of Article 34, and holds that it could not be justified by one of the exceptions provided for under Article 36. The Court develops its thinking in two ways.

Firstly, in a positive way, the Court focuses on the concept of "measures having an equivalent effect to quantitative restrictions on import" within the meaning of Article 34 and examines under which circumstances such measures could be justified.

As a matter of fact, the measures falling within the scope of ambit of Article 34 can be very different, ranging from import bans, permits, technical requirements, to registration. In the annotated case, the Court underlines that the Spanish measure doesn't distinguish national vehicles from vehicles registered in the other Member States[17]. As a result, there is no direct discrimination in order to afford protection to national vehicles[18]. However, the national measure amounts to a measure having equivalent effect on the grounds that it could limit the imports of certain vehicles in relation to their country of origin [19]. In that connection, the Court underscores that the prohibition of measures having equivalent effect to quantitative restrictions on imports "covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[20].

Nevertheless, the main reason for the Court to ascertain the violation of Article 34 is the essential character of the requirement of the Spanish Regulation. In short, in requesting that a vehicle subject to Article 31 of the Regulation has to be younger than five months since the data of its registration, the regulation hinders its normal use by the undertaking. A restriction on the uses of the vehicles amounts to a restriction on the free

[16] Paras. 22 and 25.
[17] In fact, this is the reason why the national measures should be subject to a case by case analysis, as Professor DE SADELEER has pointed out. See N. DE SADELEER (2013): 38.
[18] Paras. 26 and 28.
[19] Para. 29
[20] Para. 26. See, inter alia, Case C-150/11 *Commission* v *Belgium*, para. 50.

movement of goods within the meaning of Article 34 TFUE[21]. As a result, the access to the Spanish market is restricted[22].

Secondly, in a negative way, the Court goes on to say that the Spanish authorities cannot justify their measure in the light of Article 36.

In so doing, the Court underlines the need for the national authorities to demonstrate that their measures in breach of Article 34 are adequate to achieve the environmental objectives or to protect the health of their citizens[23].

The Court takes the view that Article 36 TFUE cannot be invoked for the following reasons.

a) There is no relationship between the "five month requirement" for the use of the first vehicle by the undertaking and the technical safety requirements of the vehicles or the air pollution reduction objective.

b) On the contrary, the length of time the vehicle has been registered is not taken into consideration for the other vehicles used by the undertaking. Accordingly, the safety and environmental objectives are irrelevant for these vehicles.

c) Finally, given that the Spanish authorities did not demonstrate the impossibility to adopt less restrictive measures, the measure at issue is in breach of the principle of proportionality[24]

As a consequence, the CJUE expresses the view that there are no valid reasons to apply Article 36 TFUE.

[21] As the Court stresses that "the companies only have a limited interest on purchasing this sort of vehicles, for the private but complementary land transport" (para. 31).
[22] Paras. 32 and 33 in relation to para. 41.
[23] See J.H. JANS/H.H.B VEDDER (2008): 247. According to these authors, under Article 36 in relation to the precautionary principle, there is "some room for measures applicable with distinction", because "…differentiation is allowed, but discrimination is not…"
[24] Respectively, paras. 37, 38 and 39.

III. FINAL COMMENTS ON THE DECISION AND ITS CONSEQUENCES FOR THE SPANISH LEGAL SYSTEM

Case 428/12, *Commission v. Spain* offers us the opportunity to address the relationship between environmental concerns and the internal market, taking into consideration that these two interests have been placed upon equal footing in virtue of Article 3(3) TEU, as discussed above.

According to some authors[25], there are no clear criteria to assess where a national measure is in breach of Treaty provisions safeguarding economic freedoms within the internal market or, whether these measures are lawful on the grounds that they achieve environmental objectives. As a result, the CJEU plays a key role in interpreting the EU Treaties as well as secondary EU law. This paper's aim was to highlight the fact that the CJEU contributes on a case-by-case basis to fix the "meeting point" between the internal market and the environment.

In addition, the case annotated here points out how every national measure can be considered from different points of view regarding the functioning of the internal market, and how national regulations don't always achieve environmental objectives. Therefore, account must be made of the fact that national authorities don't always have a good understanding of the possibilities offered by Article 36.

With regard to the qualification of the measure as a measure of equivalent effect, it is important to stress that the Court applies some very broad concepts in order to check all the possible criteria that could demonstrate that a national measure is unlawful, for being in breach of the principle of free movements of goods. The Court is therefore endowed with significant room for discretion to review whether the measure at issue is or is breach of Article 34[26].

In this connection, the Court considers whether the measure at issue directly discriminate imports, its impact on imports[27] and, finally, the most recent idea, which is whether the national measure (the five month requirement in that case) has such an

[25] N. DE SADELEER (2013): 55

[26] The concept of good is interpreted by the Court to cover any object subject to a commercial transaction, including waste: J.H.JANS/H.H.B VEDDER (2008): 234; and N. DE SADELEER (2013): 56.

[27] The insignificant impact of the measure at stake on the market was one of the reasons put forward by the Spanish Authorities to justify their regulation. However, it is acknowledged that Article 34 does not provide for any *de minimis* approach. Accordingly, the impact of the measure does not play any role on the qualification. See N. DE SADELEER (2013): 57, 58.

impact that the uses of goods is likely to be limited[28]. With regard to the Spanish regulation, the Court reaches the conclusion that the national measure is subject to this last criterion, paying heed to the use of the good and the importance of the five month requirement, in order to consider the measure unlawful.

On the other hand, these wide criteria stand in contrast with the restricted jurisprudential interpretation of the environmental exceptions. As we saw in Case C-428/12, a measure can be allowed under Article 36 no matter whether it prohibits the marketing or the use of certain goods, or merely restricts its use. Anyway, the measure should be directly achieve environmental purposes (or other imperative requirements laid down in that provision), and should be the most appropriate means to achieve the concrete environmental objectives, in accordance with the proportionality principle[29].

In Case C-428/12, the Court did not review the proportionality of the Spanish measure, on the account that it was not backed up by genuine environmental considerations. In particular, the national authorities didn't take into consideration the impact on the environment of the so-called "five months age requirement". As a result, they could not ascertain the validity of this justification, although the Member State has to provide the evidence concerning the validity of a national measure in breach of Article 34.

As a matter of fact, a new Regulation, Orden FOM/1996/2014, adopted on October 24th[30], merely revokes Articles 31(1), 32(1) and Articles 35 and 36 as a result of the judgment commented upon in this working paper. In so doing, the Spanish authorities didn't make any attempt to achieve environmental objectives at all. That highlights the weakness of the former environmental considerations.

On the other hand, the proportionality principle and the necessity principle have been finally inserted in the legal Spanish system by Law 20/2013 of 9th December 2013, concerning the unity of the national market (*Ley 20/2013, de Garantía de Unidad de Mercado*)[31]. These are deemed to be paramount principles of the public or

[28] *Ibidem:*59-63.
[29] N. DE SADELEER (2014): 309-322. This author stresses the following criteria of the proportionality test: a) "Suitability test or adequacy test" of the measure; b) "control of the necessity of public authority intervention"; c) Proportionality *stricto sensu*, between the measure's objective and the impact on the market and free movement of goods.
[30] *BOE* núm. 264, 31st October (see www.boe.es).
[31] *BOE* núm. 295, 10th December (see www.boe.es).

administrative intervention on economic activities (article 5). It follows that as a general rule licensing economic activities is excluded. However, intervention is allowed for imperative reasons such as environmental protection, or other compulsory requirements in as much as these requirements are adequate to achieve the regulatory objectives (article 17).

In other words, given this new legislation, a measure such as the one we have examined in this working paper could hardly be lawful nowadays.