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ENVIRONMENTAL REGULATORY AUTONOMY AND THE FREE MOVEMENT OF GOODS

by

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Introduction

Focusing since the early 1970s on the regulation of "point-sources" of pollution - listed installations, discharges into water, land-fills, brownfields, etc. -, environmental policy at both the national and international level has gradually shifted throught the 1990s towards the control of diffuse pollution. In spite of the fact that industrial and energy production remains an important source of pollution emissions, the growth in emissions has been consumption-related. In effect, the rise in consumption of products and services increases the pressure on the environment. The traditional focus on production processes was no longer appropriate to safeguard the environment. Against this background, the EU and the Member States alike have been laying down a number of product standards with a view to enhancing environmental protection.

Given the different product regulatory approaches being developed across the EU, there has been a fear of emergence of new barriers to free trade. For some, a neo-protectionnist policy underlies national measures regulating products and services for the protection of the environment. Indeed, a better protection of the environment through limiting the placing on the market or the use of hazardous products and substances might constitute a plausible alibi for reinforcing competitiveness of national undertakings.

What is more, such a strategy can be made all the more insidious by the use of measures that apply without distinction to both domestic and imported goods. Should such domestic rules be swept aside by the free movement of goods, considered by the Court of Justice as 'one of the fundamental principles of the Treaty' ([1]) and by most academic authors as a major component of the European integration process? Given that the Treaty provisions on free movement have to be construed broadly, are the courts called on to interpret narrowly environmental measures caught by the TFEU provisions on free movement of goods?

There are two ways in which to ascertain the compatibility of environmental measures taken by Member States with fundamental economic freedoms, such as free movement of goods: positive and negative harmonization. Either the measure will be assessed only in the light of secondary legislation as in the case of complete harmonization, or it will be observed that the measure goes beyond the scope of existing directives and regulations, and its lawfulness will be assessed directly in the light of Treaty law. This calls for a few words of explanation.

First, in the absence of harmonization through directives or regulations, or if harmonization by EU measures adopted usually on the basis of either Articles 192, either Article 114 TFEU is not deemed to be complete, the provisions of the TFEU on free movement of goods (Art. 28, 30, 34, 35 and 110 TFEU) are applicable. These provisions prohibit Member States from restricting free movement (*negative harmonization*). The scope of these rules tends to differ according to the legal category to which they belong: to each barrier to the free movement of goods corresponds a prohibition governed by specific rules. Moreover, these provisions are mutually exclusive of one another.

Second, regulation of products and services impairing the environment is often governed by rules adopted by the EU institutions (*positive harmonization*), in the framework provided for

([1]) See, e.g. Case 265/65 *Commission v. France* [1997] ECR I-6959.

([2]) The starting point of the EU environmental policy was related to the need to adopt harmonized

in the TFEU ([2]). In such a case, the free discretion of national authorities to regulate trade in goods will be limited as harmonization deepens. For instance, harmonization on the basis of Article 114 TFEU of rules on the marketing of many products, such as dangerous substances, fertilizers, insecticides, biocides, GMOs, cars, trucks, aircrafts, watercrafts, or electric and electronic equipments, creates a precise legal framework limiting Member States' ability to lay down their own product standards. The advantage of such harmonization is undeniable for producers and distributors since it allows the setting, on the scale of the internal market, of environmental standards which then govern the marketing of products and their free circulation within that market. Given that positive harmonization determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it has been preferred to negative harmonization.

As a matter of principle, internal market harmonization precludes Member State regulatory autonomy. By way of illustration, many directives and regulations whose legal base is Article 114 TFEU aim to facilitate freedom of trade, besides protecting non-merchant interests. However, things are made none the simpler. On the one hand, Article 114 (4) to (10) TFEU allows Member States to provide for reinforced protection; on the other hand, entire segments of environmental secondary law favour minimal over full harmonization. This is notably the case of acts adopted on the basis of Article 192 TFEU ([3]). There undeniably is some degree of regulatory flexibility for the adoption of such national measures regulating products to the detriment of total harmonization.

Thus, despite the impulse of secondary law, the environmental protection level varies significantly to this day from one Member State to another. Yet if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods, even if it does not provide for any difference of treatment between domestic and imported products. It is therefore necessary to constantly examine the justification and proportionality of the domestic measure that differs from others ([4]).

The purporse of this chapter is not to revisit the controversies arising from the interpretation of the different TFEU provisions on free movement of goods but rather to explore the ways in which they apply to a broad range of environmental measures that draws inspiration from administrative, tax, and even criminal law.

([2]) The starting point of the EU environmental policy was related to the need to adopt harmonized environmental product standards with a view to warding off the risk of market fragmentation resulting from disparate national regulation. Since the late 1960s a considerable body of EU legislation, ranging from GMOs to motor vehicles, has developed. See L. Krämer, *EC Environmental Law*, 6th ed. (Thomson, 2007) 224-270; N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 207-247.

([3]) For instance, several waste management directives based on Article 192 TFEU lay down product requirements.

([4]) If a Member State provides for less restrictive rules than those in another Member State this does not imply by itself that more restrictive rules will be disproportionate or therefore incompatible with EU law (Case C-294/00 *Gräbner* [2002] ECR I-6515, para. 46; Case C-277/02 *EU-Wood-Trading* [2004] ECR I-11957, para. 47). Indeed the choice by one Member State of a system of protection different from that of another Member State may not have any influence on the evaluation of the necessity and proportionality of the contested provisions (Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 34 and *Gräbner,* para. 47).

A dividing line must be drawn between fiscal and non-fiscal barriers to the free movement of goods. Indeed, when faced with a measure hindering inter-State trade, the practitioner will have to distinguish the prohibition of charges having equivalent effect to customs duties and of discriminatory internal taxation (either Articles 28 and 30 TFEU; or Article 110 TFEU) from quantitative restrictions on imports or exports or any other measures having equivalent effect (Articles 34 and 35 TFEU). Accordingly, tariff and non-tariff obstacles to trade in goods are examined in two separate sections.

Given that to each barrier to the free movement of goods and services corresponds a prohibition governed by specific rules, the following table lists the provisions that shall be commented upon in this first chapter.

Table 1. Tariff and non-tariff arriers to the free movement of goods

Tariff barriers to the free movement of goods	
Custom duties	Articles 28-30 TFEU
Charges having an equivalent effect thereto	Articles 28-30 TFEU
Discriminatory internal taxation	Articles 110 TFEU
Non-tariff barriers to the free movement of goods	
Quantitative restrictions	Articles 34-35 TFEU
Measures having an equivalent effect to quantitative restrictions	Articles 34-35 TFEU
Exemptions to the prohibition of quantitative restrictions and measures having an equivalent effect to quantitative restrictions	Articles 36 TFEU

The Treaty of Lisbon has not modified the TFEU provisions commented on in this chapter apart from renumbering them a third time. For the sake of convenience, we are using the new numbers.

1
Tariff barriers to the free movement of goods

A. Introductory remarks

In spite of the extension of the ordinary legislative procedure (OLP), fiscal harmonization, given its sensitive nature, is still subject in accordance with Article 113 TFEU to a decision-making that has not been changing since the Treaty of Rome. Indeed, by way of derogation from the OLP, environmental 'provisions primarily of a fiscal nature' in accordance with Article 192(2), a) TFEU as well as 'excise duties and other forms of indirect taxation' pursuant to Article 113 TFEU have to be enacted by the Council acting unanimously in accordance with a special legislative procedure (SLP) and after consulting the European Parliament. As a matter of fact, the SLP has been precluding the adoption of a system of EU environmental taxes ([5]). Therefore, in sharp contrast to the harmonization of product standards with a view to enhancing the internal market in virtue of Article 114 TFEU, the harmonization of ecotaxes did not make any headway.

([5])For instance, the Council dismissed in 1992 and 1995 the few attempts made by the Commission as regard an environmental ecotax on energy. See COM(97)30 Final, [1997] OJ C 139/14.

It follows that Member States have significant freedom to carry out their tax policy with the aim of protecting the environment. However, account must be made of the fact that environmental taxes levied either to raise revenue or to inflence undertakings and consumers' behaviour may afford protection to domestic products. In ensuring that tax policy does not serve protectionist interests, several provisions of the TFEU are likely to prohibit the adoption of fiscal instruments aiming at protecting the environment.

Sections B and C address two separate categories of provisions limiting the use of tariff charges, even if such charges pursue the protection of the environment. Found in title II on free movement of goods, the first of these categories contains Articles 28 and 30 TFEU, which prohibit Member States from adopting customs duties on imports or exports or charges having equivalent effect to customs duties (hereinafter referred to as CEE). Finding its basis in Article 110 TFEU, the second category condemns internal taxation of a discriminatory nature.

When faced with a fiscal measure, the practitioner will thus have to distinguish the prohibition of CEEs (Articles 28 and 30 TFEU) from discriminatory internal taxation (Articles 110 TFEU). The financial character of the measure brings it within the scope of the aforementioned provisions, excluding it from the category applicable to 'measures having equivalent effect' (hereinafter referred as MEEs) to 'quantitative restrictions' on imports pursant to Articles 34 TFEU and following.

Whereas the Court of justice has often adjudicated cases concerning MEEs resulting from national, regional, or local measures on the protection of the environment, it has rarely had to resolve questions concerning the compatibility of environmental taxes with inter-State trade obligations. Nevertheless, such questions are of great practical significance, because of the risk of potential conflict between domestic tax mechanisms relating to the protection of the environment – about to become widespread due to the impetus that the fight against climate change has known recently – and primary EU law ensuring free inter-State trade of goods. Furthermore, the upholding of the polluter pays principle in both EU and domestic legal orders ([6]) should prompt Member States to employ fiscal means more often to reduce the release of GHGs or to influence the behaviour of producers and consumers, through taxing products causing damage or by awarding tax relief to less hazardous products ([7]).

B. Prohibition of custom duties and of charges having equivalent effect under Articles 28 and 30 TFEU

1. Scope of ambit

Articles 28 and 30 TFEU prohibit Member States from applying customs duties on inter-State imports and exports as much as charges having equivalent effect (CEEs), notably 'customs duties of a fiscal nature'. For lack of a definition within the Treaty, the Court defined the

([6]) Though the Court of Justice should ensure the respect of this principle in tax cases brought before it, the Court rarely invokes said principle. In condemning the export prohibition of waste oils outside of France for non-conformity with Articles 36 TFEU it refuted the economic argument of the French authorities on the ground that the EU directive gave them the power to 'grant to such undertakings "indemnities" financed in accordance with the principle of "polluter pays"' (Case 172/82 *Inter-Huiles* [1983] ECR I-555 para. 13).

([7]) See Communication of 26 March 1997 on Environmental Taxes and Charges in the Single Market COM (97) 9 final. See also the 6th Environment Action Programme Art 3 (1) (c).

concept of CEE in broad terms to avoid the emergence of new forms of customs duties ([8]). It is settled case law that a CEE covers 'any pecuniary charge, however small and whatever its designation and mode of application, which is … unilaterally imposed on domestic or exported goods by reason of the fact that they cross a frontier of one of the Member States and which are not customs duty in the strict sense' ([9]).

Customs duties and CEEs are necessarily protectionist and discriminatory, as they are levied upon the crossing of borders. There is an absolute prohibition of such charges, as opposed to the rules applicable to internal taxation that are caught by Article 110 TFEU or to the MEEs ([10]). Hidden protectionist tariffs, disguised as lawful pecuniary charges, are therefore prohibited. Environmental protection cannot justify such charges ([11]). Moreover, there is *no de minimis* rule: neither the minimal character of the duty ([12]) nor the absence of discriminatory or protectionist effects ([13]) has any bearing on this prohibition. The same applies to the absence of competition between the imported product and domestic products ([14]). Finally, none of the following elements can alter the classification as a CEE ([15]): the form of taxation, its purpose, its description, the method of levying, and the use of revenue. As such, in the case of an environmental tax, the use of the revenue for financing environmental policy has no bearing on the classification with respect to Article 28 TFEU.

As far as environmental charges are concerned, the Court has held that the following national measures are CEEs: an internal due meant to finance a public body promoting energy saving ([16]), the obligation for waste exporters to contribute to a fund for the return of illegally exported waste ([17]), a local tax on marble excavated in the territory of a municipality ([18]), and an environmental tax on the use of pipelines ([19]), irrespective of the environmental purpose of these charges.

2. Permissible charges

The Court of justice held that a charge escapes the classification of CEE in three hypotheses:'if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike …, if it constitutes payment for a service in fact rendered to the economic operator of a sum in

([8]) Case 2/62 *Commission v. Luxembourg* [1962] ECR 425.
([9]) Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para. 20; Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 20; Case C-387/01 *Weigel* [2004] ECR I-4981, para. 64, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, para. 51.
([10]) Case 7/68 *Commission v. Italy* [1968] ECR 423. See L. Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford, OUP, 2009) 384-386.
([11]) See by analogy, Case C-7/68 *Commission v. Italy* [1968] ECR 423; Case C-29/72 *Marimex* [1972] ECR 1309; Case C-78/76 *Steinike* [1977] ECR 595; and Case C-158/82 *Commission v. Denmark* [1983] ECR 3573.
([12]) Case 24/68 *Commission v. Italy* [1969] ECR 193, para. 14.
([13]) Case 24/68 *Commission v. Italy* [1969] ECR 193, at p. 201; Joined cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR I-211, at p. 222.
([14]) Joined Cases 2 & 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR I-211; and Case T-115/94 *Opel Austria* [1997] ECR II-39, para. 121.
([15]) Case C-45/94 *Ayuntamiento de Centa* [1995] ECR I-4385, para. 28.
([16]) Joined Cases C-79–83/90 *Compagnie commerciale de l'Ouest* [1992] ECR I-1873.
([17]) Case C-221/06 *Stadtgemeinde Frohnleiten* [2007] ECR I-9643.
([18]) Case C-72/03 *Carbonati Apuani v. Carrara* [2004] ECR I-8027.
([19]) Case C-173/05 *Commission v. Italy* [2007] ECR I-XX, para. 42.

proportion to the service…., or again, subject to certain conditions, if it attaches to inspections carried out to fulfil obligations imposed by Community law'([20]). Attention should be drawn to the fact that these three situations do not fall within the definition of a cutom duty or a CEE at all ([21]). Given that we shall deal with the first exemption - charges falling within the scope of a system of general exemption - in section C, we shall consider the two other exceptions.

Firstly, when a pecuniary charge is required as a counterpart for a service in favour of the importer or exporter, it is an internal due, not a CEE. It ought to be remembered that national law distinguishes taxes or charges ("Steuer" in German, "Skat" in Danish, "impôt" in French, "impuestos" in Spanish, "imposto" in Portuguese, or "belasting" in Dutch) from a pecuniary charge required as a counterpart for a service ("gebürhen" in German, "gebyr" in Danish, "redevance" in French, "tasas" in Spanish, "taxa" in Portuguese, or "heffing" in Dutch). Whereas the revenues of charges go to the general budget, on the contrary, pecuniary charges are a payment in return for a clearly identified service or cost. As a result, the revenue of pecuniary charges required as a counterpart for a service is not affected to the general budget. Moreover, under constitutional law a pecuniary charge required as a counterpart for a service can be adopted by the government whereas the lawmaker is called on to adopt a charge.

In truly exceptional circumstances ([22]), three conditions must be met for the due to escape the clutch of Articles 28 and 30 TFEU. Given the strictness of these restrictions, the Court seldom qualifies a pecuniary charge as a payment for a genuine administrative service rendered to the importer or the exporter.

The first condition is that there must be no obligation to resort to the service subject to the charge ([23]). In other words, performance of the service may not be imposed, which is rarely the case for services performed by public undertakings in a monopoly or quasi-monopoly situation.

Next, the benefit must not only be provided actually and individually to the economic operator, but must also provide it with a real benefit. As follows from the following judgment, when the service provided is linked to the fulfilling of a mandatory formality, there is no real benefit. The Court of Justice was able to apply this requirement to a waste management scheme. Despite an obligation of secondary law for Member States to reimport illegally exported waste into their territory ([24]), the fee due by German exporters to a solidarity fund, fee which was computed on the basis of the amount and nature of the exported waste, was held to be contrary to Article 30 TFEU, in that 'compliance by the Federal Republic of Germany with an obligation which Community law imposes on all the Member States in pursuit of a general interest, namely protection of health and the environment, does not confer on exporters of waste established in its territory any specific or definite benefit'([25]). As a result, the costs incurred by environmental inspections of goods on crossing a border must be borne by the regulatory agencies.

([20]) Case 18/87 *Commission v. Germany* [1988] ECR 5427, para. 6.
([21]) C. Barnard, *The Substantive Law of the EU,* 3rd ed. (Oxford, OUP, 2007) 67-68.
([22]) Opinion AG W. Van Gerven in in Case 340/87 *Commission v. Italy* [1989] ECRI-1483, para. 10.
([23]) Case 266/81 *SIOT* [1983] ECRI-731.
([24]) See Article 26(2)(a) of Regulation 259/93 of 1 February 1993 that has been replaced by Articles 22 to 24 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, [2006] OJ L 190, 1.
([25]) Case C-389/00 *Commission v. Germany* [2003] ECR I-2001, para. 35.

Finally, fees must amount to a sum proportionate to the real cost of the counterpart service ([26]). In this connection, two examples will suffice. In its judgment of 27 February 2003 on the validity of a German fund for the coverage of reimportation costs of illegally exported waste, the Court of Justice underlined the absence of a direct link between the amount of the contribution paid by waste transporters and the real costs of the act of reintroducing waste on domestic territory ([27]). To cite another example, the Court has been more flexible as regard the proportionality of a charge in *Escalier and Bonnarel*. Given that a pesticide to be introduced as a parallel import may be used in circumstances differing from those of the reference product, the national simplified marketing authorisation procedure may entail for the competent authorities costs which differ from one case to the next. Accordingly, State authorities may charge the services related to such parallel imports rendered to the farmers. However, to respect the principle of proportionality, the 'the amount of the charges imposed … must have some correspondence to the costs incurred by the control or the administrative steps needed for the examination of the marketing authorisation application'([28]). Conversely, a charge which bears no relation to the costs incurred by the control or the administrative steps needed for examination of the authorisation application is inconsistent with the principle of proptionnality. However, the Court took the view that the principle of proportionality did not preclude 'an appraisal of such costs as a fixed sum' ([29]).

Secondly, the charge levied for a control imposed by secondary law is not a CEE inasmuch as it attaches to inspections carried out to fulfil obligations imposed by EU law in the general interest of the EU. By contrast, charges for inspections required by national law do consitute a CEE. As a result, the Member State autorithies cannot charge the importer to cover the inspection even if the inspection is justified under Article 36 TFEU ([30]).

C. Prohibition of discriminatory internal taxation under Article 110 TFEU

1. Limits to regulatory autonomy

Member States have significant freedom to carry out their tax policy unless it has been harmonised at EU level. Therefore fiscal measures adopted at national level benefit from a presumption of legitimacy in the light of EU law. However, if Member States retain their sovereignty in fiscal matters, they must nevertheless not discriminate against foreign producers. As such, even if a charge is not a CEE under Articles 28 and 30 TFEU, it may still be contrary to Article 110 TFEU, which prohibits Member States from imposing 'on the products of other Member States any internal taxation … in excess of that imposed directly or indirectly on similar domestic products' or 'of such a nature as to afford indirect protection to other products'. The fact that waste for disposal has no market value does not imply that it is not covered by the concept of 'products' within the meaning of Article 110 TFEU. Indeed, waste for disposal, even if it has no intrinsic commercial value, may nonetheless give rise to commercial transactions in relation to the disposal or deposit thereof ([31]).

([26]) Case 170/88 *Ford Espana* [1989] ECR I-2305; and Case C-111/89 *Bakker Hillegom* [1990] ECR I-1735, paras. 12 to 16.
([27]) Case C-389/00 [2003], para. 45.
([28]) Joined cases C-260 & 261/06 *Escalier and Bonnarel* [2007] ECR I-9717, para. 49.
([29]) Ibid.
([30]) C. Barnard, above, 44; A.G. Toth, *The Oxford Encyclopediae of European Community Law,* vol. II (Oxford, OUP, 2005) 7.
([31]) Case C-221/06 *Stadtgemeinde Frohnleiten* [2007], paras. 36-38.

The scope of Article 110 TFEU is extremely broad. Whereas the first paragraph of that provision prohibits discrimination between 'similar' products, the second paragraph prohibits taxation of products aiming at affording protection to 'other' products. Together these two paragraphs encompass a broad range of tax regimes ranging from the ones taxing effectively identical products to the ones taxing marginaly substitutable products ([32]).

Article 110 TFEU does not overlap with Articles 28-30 TFEU that prohibit any pecuniary charge imposed on goods by reason of the fact they cross the border ([33]). Nor does Article 110 TFEU overalp with Article 34 TFEU. Whereas Article 110 TFEU is by definition 'fiscal in purpose' ([34]), Article 34 TFEU is concerned with non-fiscal barriers. In other words, for the contested domestic measure to fall within the scope of Article 110 TFEU, its main objective must be fiscal and therefore redistributive. In sharp contrast, Article 34 TFEU is concerned with non-fiscal barriers.

In this respect, one might wonder if economic instruments such as ecotaxes could be deemed as technical barriers ([35]). In other words, if ecotaxes are more dissuasive than redistributive, should they be assimilated to products standards and therefore fall within the scope of Article 34 TFEU? In answering this question, it must be kept in mind that the line to be drawn between Article 110 TFEU and Article 34 TFEU is a fine one, in particular in cases where domestic charges are so high that they are likely to affect significantly the inter-State trade.

In *Commission* v. *Denmark,* the Court has pointed out that where, in the absence of comparable domestic production, the prohibition in Article 110 TFEU did not apply. As a result, the only possibility of appraising an adverse effect of the manifest over-taxation of vehicles on the free movement of goods is 'by reference to the general rules contained in Article *[34 TFEU]* et seq. of the Treaty' ([36]). However, it appears that this was the only case in which the Court has alluded to the possibility of applying what is now Article 34 TFEU to exceptionally high internal taxation.

In its opinion in *Danske Bilimportører*, AG Jacobs considered that a 'manifestly excessive' tax – a Danish tax on cars amounting to 200 per cent of the value of the car was, though Denmark still had no car production of its own – 'could exceptionally be assessed under

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([32]) A.G. Toth, above, 712.

([33]) The provisions prohibiting CEEs pursuant to Articles 28-30 TFEU may not be cumulatively applied with the one on discriminatory internal taxation falling within the ambit of Article 110 TFEU. The reason for these provisions to be mutually exclusive is that while Member States may adopt taxes and charges within the general system of internal taxation inasmuch as they are not discriminatory, customs duties and CEEs are categorically prohibited. Regarding environmental charges, case law has shed some light on the line to draw between the scopes of respectively Articles 28-30 and Article 110 TFEU. See Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, para. 23; and Case C-221/06 *Stadtgemeinde Frohnleiten* [2007], ECR I-9643, para. 28.

([34]) A.C. Toth, above, 708.

([35])Ecotaxes have been defined by the General Court as 'an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base. It seeks to tax certain goods or services so that the environmental costs may be included in their price and/or so that recycled products are rendered more competitive and producers and consumers are oriented towards activities which better respect the environment'. See Case T-210/02, *British Aggregates Association* [2006] ECR II-2789, para. 114.

([36]) Case C-47/88 *Commission v. Denmark* [1990] ECR I-4509. See P. Oliver, *Oliver on Free Movement of Goods,* above, 101-102.

Article 34'([37]). The AG concluded that it was 'totally incompatible with the aims of the internal market for a Member State to be able to tax certain imported goods to such an extent that the flow of intra-Community trade is appreciably affected' ([38]). Nevertheless, he reached the conclusion that the Danish tax fell outside the scope of Article 34 TFEU. The Court endorsed the Advocate General's reasoning.

One could also invoke the judgment on Danish bottles to uphold the application of Article 34 TFEU to pecuniary measures that form barriers to importation; in this case, a deposit arrangement was imposed for the placing on the market of certain bottles – a pecuniary measure *par excellence* – and the Court examined its conformity with Article 34 TFEU ([39]). However, this argument seems unconvincing, in that the contested system was a deposit system, not a tax system. The distinction between purely regulatory taxes and redistributive taxes is more delicate than would appear to be.

Last, it is in this context important to stress that Member States endorse rather subtle approaches as regard eco-taxation. As a matter of fact, the level at which the tax rates are set out are more incitative than prohibitory. These taxes encourage either undertakings or consumers to modify their behaviour. As a result, the tax rates do not preclude consumers to purchase the most polluting products; they make it less attractive than more environmentally friendly products.

To conclude with, contrary to the case law on Articles 34 and 36 TFEU, 'in the absence of discriminatory or protective effect', Article 110 TFEU does not allow the condemnation of the excessive character of the level of taxation that Member States could impose on given goods ([40]). Nothing therefore prohibits a heavier taxation of products causing harm to the environment with the aim of encouraging the consumer to fall back on less hazardous products.

2. Appraisal of similarities between domestic and imported products

Any kind of discrimination towards foreign goods shall be prohibited under paragraph 1 of Article 110, provided that there is similarity between domestic and imported products. If this is not the case, courts have to assess whether the imported and domestic products compete, in which case the second paragraph applies. There is similarity, a key concept, either if the relevant products fall into a same category of taxation, customs duties or statistics, or if consumers perceive them as being usable in a similar manner ([41]). In this connection, the relevant criterion is the interchangeability of products. It is necessary to ascertain whether products have sufficient properties in common to be considered an alternative choice for the consumer. The assessment of discrimination requires, in principle, the existence of a comparative element between national production and its competitors. Failing such production, the measure in question would appear to fall outside the scope of Article 110

([37]) Opinion AG Jacobs in Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6523, para. 42.
([38]) Ibid., para. 76.
([39]) Case 302/88 *Commission v. Denmark* [1988] ECR I-46, para. 13.
([40]) Case 140/79 *Chemial Farmaceutica* [1981] ECR I-1; Case C-132/88 [1990], para. 17; Case C-47/88 *Commission v. Denmark* [1990] ECR I-4509, para. 10; and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6523, para. 38.
([41]) Case C-45/75 *Rewe* [1976] ECR 181 ; Case C-106/84 *Commission v. Denmark* [1986] ECR I-833, para. 12 ; and Case C-302/00 *Commission v. France* [2002] ECR I-2055, paras. 24-28. For a full account, see C. Barnard, above, 50; A.G. Toth, above, 713.

TFEU - it must then be ascertained whether it falls within Article 34 TFEU -, but the position of the Court of Justice is not settled in that regard.

In certain environmental cases, there is little discussion regarding the similarity between products of different tax arrangements. For instance, the origin of contaminated land matters little: be it from polluted sites identified with precision through field surveys pursuant to Austrian law or be it from the territory of other Member States that do not have the same kind of legislation, contaminated land is a category of *'waste similarly intended for disposal by means of long-term depositing'* and the two kinds of contaminated land are thus *'similar products'* ([42]). Furthermore, though primary law provides for the principle that environmental damage should as a priority be rectified at source ([43]), which is in line with the proximity principle and the principle of self-sufficiency, one may not differentiate polluted land identified by use of a national register and polluted land originating from abroad ([44]).

However, such comparison is likely to become much more difficult with respect to other cases. In the eyes of environmentally sensitive consumers, eco-minded consumption, which has flourished in certain Member States, increases the differences between products fulfilling a similar function. It should also force courts to evaluate the degree of similarity in new light. Is a vehicle equipped with a catalytic converter similar to competing products without this technology? Can a recyclable battery be put on the same foot as the one to be thrown away after use? Is a disposable bottle that cannot be reused different from a reusable bottle that will not become waste? Is sustainably harvested fish dissimilar to other fish? Are all these products close substitutes?

Generally speaking, the Court endorses a broad interpretation of the term 'similar' within the meaning of paragraph 1 ([45]). If one applies the traditional case law of the Court, environment-friendly qualities within a same range of products would not suffice to eliminate the similarity between these products. By way of illustration, a tax system exempting catalyst-equipped motor vehicles from an environmental tax and taxing vehicles without catalysts would thus be contrary to Article 110 (1) TFEU if the domestic industry mainly produces clean cars. Indeed, the anti-pollution tax would then mostly target foreign vehicles and would be likely to reduce the number of imports.

So far, the Court has not yet settled the matter of whether, in the framework of selective taxation regarding the environment, products considered by consumers as similar but having different environmental impacts could be taxed differently according to their contribution to pollution, without however falling within the scope of Article 110 (1) TFEU. When analysing a Greek system taxing more heavily imported second-hand vehicles than those bought within its borders the Court of Justice held that imported second-hand vehicles could be compared with second-hand vehicles bought in Greece without stating whether these vehicles should be considered as like or competing products ([46]).

That being said, it ought to be remembered that in most Member States consumers' expectations are increasingly function of the environment-friendly quality of available

([42]) Case C-221/06 *Stadtgemeinde Frohnleiten* [2007], para. 59.
([43]) Art. 191(2) TFEU.
([44])Case C-221/06 *Stadtgemeinde Frohnleiten* [2007], paras. 60 to 69.
([45]) P. Kapteyn and P. VerLoren Van Themmat, *Introduction to the Law of the European Comunities* (3rd ed., Kluwer, 1998) 605.
([46]) Case C-375/95 *Commission v. Greece* [1997] ECR I-5981.

products. In this regard, the EU Ecolabel scheme merits special note in that it promotes those products that have a high level of environmental performance.[47] In particular, it is providing consumers 'with accurate, non-deceptive, science-based information on the environmental impact of products' ([48]). Besides, account must be taken of the fact that the Commission considers that the evaluation of similarity must take into account the objective of environmental protection. As such, one must consider 'whether goods with the same function but with different environmental properties due to content or differences in production methods could be regarded as being different goods' ([49]). Even if it has the same function as a competing product, a product with an eco-label has different environmental properties than competing products ([50]). Therefore, if one takes the view that these products differently impair the environment, one might conclude that they fulfil different consumer needs. Last but not least, one should also expect a case law evolution on this matter, due to the integration clause embodied in Article 11 TFEU.

3. Differentiated system of taxation

Article 110 TFEU does not prohibit the Member States from adopting differentiated taxation regarding similar products, inasmuch as they aim to achieve legitimate economic and social objectives. In order to be admissible, the charge must be part of a general taxation regime which applies the same criteria to domestic and foreign products and which is objectively warranted by the objective pursued. The tax must have the same effects on all taxpayers, be they nationals or foreign. The amount of tax to be paid cannot be greater for imported products. Similarly, the tax base and the means of collecting the tax must be identical. As a result, such differentiation however shall only be compatible with EU law if it meets the following requirements ([51]).

Firstly, the Court accepts that differentiated taxation systems may pursue aims that are compatible with the requirements of the TFEU and of secondary law. The Court thus considered that the compatibility of green electric power production methods with the environment was an important goal of the EU's energy policy ([52]).

Secondly, the differentiating criteria are deemed to be objective. This requirement shall be met if the differentiated tax policy on goods ([53]) or energy ([54]) is based on distinctions linked to the nature of the raw materials used or to the power production processes. The same applies to consumer tax exemptions for regenerated oils ([55]) and to a progressive tax based on the

([47]) EP and Council Regulation (EC) No 66/2010 on the EU Ecolabel, OJ [2010] L 27/1.
([48]) 1st Recital of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ [2010] L 27/1.
([49]) Communication of the Commission of 26 March 1997 *'Environmental Taxes and Charges in the Single Market'* COM (97) 9 final I-8.
([50]) Ibid.
([51]) Case 196/85 *Commission v. France* [1987] ECR I-1597, para. 6; and Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para. 29.
([52]) Case C-213/96 *Outokumpu Oy* [1998] ECR I-1567, para. 33. The environmental aim may even appear more important if the preamble of a Directive underlines the importance attached to the environmental incidence of methods of production (Opinion of AG Jacobs on the aforementioned case, para. 58).
([53]) Case 46/80 *Vinal* [1981] ECR I-77, para. 13.
([54]) Case C-213/96 *Outokumpu Oy* [1998] ECR I-1801, para. 31.
([55]) Case 21/79 *Commission v. Italy* [180] ECR I-1.

cylinder capacity of taxed motor vehicles ([56]). It follows that an exemption from consumption tax in favour of regenerated oils, and imposition of a progressive tax as a function of the number of cylinders of motor vehicles being taxed have also to be based on objective criteria.

These criteria must be in conformity with secondary law. Tax differentiation based on environmental criteria will therefore not be permitted if secondary EU law prohibits the adoption of such measures. This may be illustrated by the following case. A fiscal distinction between mineral oils of primary distillation and those stemming from a regeneration process was thus deemed to be in conformity with Article 110 TFEU, in that the directive on waste oils did not aim to harmonise national systems on excise duties and other forms of indirect taxation ([57]).

Thirdly, the respect of the first two conditions does not obliterate a risk of discriminatory fiscal treatment. Assume, for instance, that a Member State imposes a higher carbon tax on cement made with coal than on cement produced with other sources of energy. Assume that this tax is pursuing a legitimate objective and is based on objective technical criteria. The fulfilment of these two criteria does not preclude the risk that the tax at issue may treat imported cement less favourably than domestic low-carbon cement. In that case, it may infringe Article 110 TFEU on the grounds that the effects of differentiated taxation must avoid all forms of discrimination, direct or indirect, towards imports and must avoid protection of domestic production ([58]). In other words, environmental measures must not be enacted in a way which gives rise to discrimination against imported products. Where the tax concerned is discriminatory in nature, 'the fact that the purpose of and reason for the tax may be environmental in nature or seek to reduce pollution has no bearing on any finding of infringement'([59]).

In this respect, the Greek tax system applicable to second-hand vehicles imported in Greece, and intending to discourage registration of vehicles that are old, dangerous and polluting and thus to encourage the use of new vehicles of 'anti-pollution technology' is an egregious example. This tax system was found to infringe the principle of non-discrimination embodied in Article 110 TFEU, despite a seemingly legitimate objective ([60]). By the same token, the objective of protection of the environment underpinning a Romanian tax scheme on second-hand cars taking the form of preventing the use of particularly polluting vehicles has to be achieved more completely and consistently by imposing the pollution tax on all vehicles of that kind in circulation in Romania.[61]

One might wonder whether differentiated taxation, with underlying overriding reasons relating to environmental protection, could be validated despite having potentially negative effects on imported products. In fact, a Member State may not invoke practical difficulties to extend tax relief to imported goods, and this has often been confirmed in cases relating to environmental protection. There are various examples in the case law.

([56]) Case C-132/88 *Commission v. Greece* [1990] ECR I-1567; and Case C-113/94 *Casarin* [1995] ECR I-4203. See also Case C-47/88 *Commission v. Denmark* ECR I-4509.
([57]) Case 21/79 *Commission v. Italy* [1980], para. 18.
([58]) Case 319/81 *Commission v. Italy* [1983] ECR I-601, para. 13; Case 106/84 *Commission v. Denmark* [1986] ECR I-833, para. 22; and Case C-213/96 *Outokumpu Oy* [1998] ECR I-1801, para. 30.
([59]) Opinion AG Sharpston in Case C-402/09 *Ioan Tatu* [2011] ECR I-xx, para. 38.
([60]) Case C-375/95 *Commission v. Greece* [1999] ECR I-I-5981, para. 29.
([61]) Case C-402/09 *Ioan Tatu* [2011] ECR I-000.

In a judgment on the taxation of second-hand vehicles imported in Greece, the Court refused the argument of Greek authorities according to which applying reduced rates for the special consumer tax to such vehicles would require an individual control of each vehicle upon import. Rather, the Court held that such difficulties 'cannot justify the application of internal taxation which discriminates against products from other Member States' ([62]).

In *Outokumpu Oy*, the Court condemned a system of differentiated taxation on the grounds that it taxed imported electricity at a flat rate. Though this flat rate was lower than the highest rate applicable to electricity of domestic origin, it could lead, 'if only in certain cases, to higher taxation being imposed on imported electricity' ([63]). The technical difficulty of applying differentiated rates to imported electricity was not taken into account ([64]).

In the same vein, the Court held in *Stadtgemeinde Frohnleiten* that: 'While it may indeed be extremely difficult for the Austrian authorities to ensure that [contaminated] sites located in other Member States […] satisfy the requirements laid down in the Austrian legislation', this cannot justify the application of 'the exemption applicable to waste from disused hazardous sites […] in Austria' when importers of foreign waste cannot benefit from this exemption ([65]).

Needless to say that the Court's refusal to take into consideration practical difficulties arising from the extension of tax relief to imported products could jeopardise environmental taxation schemes ([66]). This case law has obvious practical consequences: if a Member State cannot, for practical reasons, provide tax relief aimed at domestic anti-pollution products to similar imported products, it will have to repeal its differentiated tax system.

2
Prohibition of measures having equivalent effect to quantitative restrictions on imports and on exports

A. Introductory remarks

National product standards are likely to fall under the concept of 'measures having equivalent effect' to 'quantitative restrictions' on imports - Article 34 TFEU- and on exports - Article 35 TFEU-. Because of the preference given to free movement of goods in the framework of the internal market, pursuant to Articles 3(3) TEU and 26 TFEU, these two provisions are of considerable importance within the EU legal order.

Articles 34 and 35 TFEU only apply to barriers not covered by other Treaty provisions. As seen previously, barriers resulting from customs duties or taxation are covered by respectively Articles 28 and 30 TFEU, Article 110 TFEU, which constitute *lex specialii* for these fields. By the same token, the TFEU provisions on free movement of goods and services are mutually exclusive of one another. In this respect, *Commission v. Ireland* is a good case in point ([67]). The fact that an invitation to tender for the construction of a water main in an Irish

([62]) Case C-375/95 *Commission v. Greece* [1997], para. 47.
([63]) Case C-213/96 [1998], para. 41.
([64]) Para. 39.
([65]) Case C-221/06 *Stadtgemeinde Frohnleiten* [2007], paras. 70 and 71.
([66]) See Opinion of AG Mayras in Case 21/79 *Commission v. Italy* [1980], para. 1.
([67]) Case 45/87 *Commission v. Ireland* [1988] ECR 4929.

municipality relates to service does not preclude the application of Article 34 TFEU on the grounds that the clause at issue requires the asbestos pressure pipes to conform to Irish standards. Indeed, the clause related to the intrinsic qualities of the pipes, irrespective of the purpose of the invitation to tender.

Inasmuch as there has been much discussion on the issue of conflicts between national environmental policy and these TFEU provisions ([68]), we shall briefly examine the characteristics of this regime before underlining the practical difficulties shown by case law of the Court of justice.

If the wording of Articles 34 and 35 TFEU is concise, the meaning and therefore the scope of these two provisions have given rise to questions of interpretation. Contrary to the case law on food additives, where the Court of justice defined clear limits, the Court's case law concerning the environment sways between the aim of preserving the internal market and the desire to recognise environmental protection as being of public interest. Moreover, the variety of situations concerned - promotion of renewable energy, conservation of biodiversity, waste management, regulation of harmful substances, etc. - does not make the life of commentators any easier. Finally, there are many questions, for instance regarding the validity of extraterritorial measures, as well as the lessening of the distinction between measures applying equally and without distinction and measures applicable with distinction, that have not yet been fully resolved by the Court of Justice, as if it were uneasy on the subject.

B. Personal scope of application of Articles 34 and 35 TFEU

Articles 34 and 35 TFEU essentially target measures taken by a public authority. As far as environmental issues are concerned, they are likely to encompass a myriad of different types of public undertakings responsible for a range of functions ranging from water-treatment to land-planning. By way of illustration, in *Fra.bo* the Court ruled that Articles 34 and 35 are applicable to a private law association with *de facto* rule-making competence regarding the standardisation and certication of products used in drinking water ([69]).

([68]) N. de Sadeleer, *Le droit communautaire and les déchets* (Brussels, Bruylant, Paris, L.G.D.J., 1995) 73-162; IB., 'Les limites posées à la libre circulation des déchets par les exigences de protection de l'environnement' (1993) 5 : 6 *CDE* 672-696; IB., *Environmental Principles* (Oxford, O.U.P., 2002) 341-354; IB., *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB Press, 2010) 363-412; D. Geradin, *Trade and the Environment. A Comparative Study of EC and US Law* (Cambridge, CUP, 1997); L. Krämer, 'L'environnement et le Marché unique' (1993) 1 *RMC* 48; IB., 'Environmental Protection and Article 30 TFEU' (1993) *CMLRev*. 111-143; D. Misonne and N. de Sadeleer, 'Is There Space in the EU for National Product-Related Measures?' in M. Pallemarets (ed.), *EU and WTO Law: How tight is the Legal Straitjacket for Environmental Product Regulation* (Brussels, VUB Press, 2006) 45-82; A. Notaro, *Judicial Approaches to Trande and Environment. The EC and the WTO* (London, Cameron & May, 2003); J. Scott, 'On Kith and Kine: Trade and Environnement in the EU and WTO' in J.H.H. Veiler (ed.), *The EU the WTO and the NAFTA* (Oxford, OUP, 2000) 126-133; H. Temmink, 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection - a Case Law Analysis' *Yb Eur Env L* (2000) I 61-102; G. Van Calster, *International & EU Trade Law. The Environmental Challenge* (London, Cameron & May, 2000); C. Vial, *Protection de l'environnement et libre circulation des marchandises* (Brussels, Bruylant, 2006); J. Wiers, *Trade and Environment in the EC and the WTO. A Legal Analysis* (Groeningen, Europa Law Publishing, 2002); A.R. Ziegler, *Trade and Environmental Law in the European Community* (Oxford, Clarendon, 1996).
([69]) Case C-171/11 *Fra.bo* [2012] paras. 31-32.

Even if the principle of free movement of goods applies less strictly to EU institutions than it does to Member States ([70]), the former are also required to comply with these provisions in framing their legislation ([71]). Accordingly, the Court has assessed the compatibility of EU environmental regimes – waste management, ([72]) and CFCs ([73]) - with the principle of free movement of goods.

As a matter of principle, provisions on the free movement of goods do not apply to individuals ([74]), as opposed to provisions in competition law, as the Court clearly put an end to this controversy in its *Sapod Audic* judgment. If two legal persons entered into a contract regarding the use of Green Dot logo for recycled packaging, the contractual provision could not be classified as a barrier under Article 34 TFEU ([75]). There is therefore no horizontal effect.

C. Material scope of application of Articles 34 and 35 TFEU

Two criteria are used to define the scope of Articles 34 and 35 TFEU, namely the nature of the 'goods' meant to move freely within the internal market and the nature of the barriers concerning these goods. In the absence of Treaty definitions of 'goods', 'quantitative restrictions' and 'measure having equivalent effect', one must refer to the Court of justice's case law to determine the scope of these provisions.

Nowhere in the Treaty is the concept of "goods" defined. Both Article 34 and Article 35 TFEU use respectively the terms "imports" and "exports" rather than the terms "goods" or "products". Concerning all '*goods taken across a frontier for the purposes of commercial transactions […], whatever the nature of those transactions'* ([76]), the concept of 'goods' is interpreted broadly and can thus cover goods such as non-recyclable waste ([77]).

With respect to the measures falling within the scope of ambit of Articles 34 and 35 TFEU, it

([70]) Opinion of AG Poiares Maduro of 14 September 2004 in Case C-42/02 *Commission v. Netherlands* [2004] ECR I-11375, paras. 30 to 33. See also F.G. Jacobs, 'Recent developments in the principle of proportionality in EC law' in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart, 1999) 21; T. Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standards of Scrutiny', in *The Principle of Proportionality in the Laws of Europe,* above, 66; P. Kapteyn and P. VerLoren Van Themmat, above, 640; H. Unperath and A. Johnston, 'The Double-headed Approach to the ECJ concerning Consumer Protection' (2007) 44 *CMLR* 1237-1284.

([71]) Joined cases 80 & 81/77 *Commissaires réunis* [1978] ECR I-1978, para. 297; Case 15/83 *Denkavit Nederland* [1984] ECR I-2171, para. 15; Case C-51/93 *Meyhui* [1994] ECR I-3879, para. 11; and Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para. 27; Case C-469/00 *Ravil v. Bellon* [2003] ECR I-5053, para. 86 ; C-108/01 *Consorzio del Prosciutto di Pama v. Asda Stores* [2003] ECR I-5121, para. 53 C434/02 *Arnold André v. Herford* [2004] ECR I-11825, para. 57 ; Case C-210/03 R *Swedish Match* [2004] ECR I-11893, para. 59 and Joined Cases C-154 and 155/04 R *Alliance for Natural Health* [2005] ECR I-6451, para. 47.

([72]) Case 240/83 *Procureur de la République v. ADBHU* [1985] ECR 555, para. 13.

([73]) Case C- 284/95 *Safety Hi-Tech* [1998] ECR I-4301, para. 63; and Case C-341/95 *Bettati* [1998] ECR I-4355, para. 61.

([74]) Case C-311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR I-3801, para. 30. See also the implicit reasoning in Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

([75]) Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para. 74.

([76]) Case C-324/93 *Evans medical* [1995] ECR I-563, para. 20.

([77]) Case C-2/90 *Commission v. Belgium ('Walloon Waste')* [1992] ECR I-1, para. 27.

ought to be remembered that these provisions only apply if one can establish the existence of a quantitative restriction or a MEE. Given that it is unlikely to face quantitative restrictions, the definition of a MEE is therefore essential in the Court of Justice case law, which, through a broad interpretation of free movement of goods, puts more store in the effect of the measure than in its legal nature. That said, whereas the Court opted for a discrimination criterion in determining the scope of Article 35, the Court made clear in *Cassis de Dijon* that all measures with an impact on intra-Community trade, discriminatory as well as non-discriminatory, were caught by Article 34TFEU. Accordingly, one should differentiate the scope of MEEs on imports (subsection 1) and exports (subsection 2).

1. MEEs on imports

1.1. From *Dassonville* to *Keck*

Since its *Dassonville* judgment of 11 July 1974, the Court of Justice has broadly interpreted the concept of MEE. According to the wording of the judgment, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions' ([78]). Repeated on countless of occasions, this formula is still regularly cited in judgments. Its striking feature is its sheer breadth ([79]).

In *Cassis de Dijon*, the Court clarified that MEEs, not limited to measures directly affecting imports, were encompassing measures that are 'applicable without distinction' to foreign and domestic goods, as a foreign producer may find it more difficult to respect these rules than the national producer. According to settled case law, 'in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods' constitute MEEs prohibited by Article 34 TFEU ([80]). The condition that the goods were 'lawfully manufactured and marketed in another Member State' reflects 'the obligation to comply with the principle of mutual recognition of products' ([81]). Mutual recognition can be defined as 'a principle whereby the sale of goods lawfully produced and marketed in one Member State may not be restricted in another Member State without good cause'([82]). It follows that the importer can reckon upon a single regulation by the home state instead of having to overcome the hurdle to cope with both the home state and the domestic regulation ([83]).

Against this background, the incorporation under former Article 28 EC (new Article 34 TFEU) of national measures which are indistinctly applicable has in any case permitted a considerable extension of the control of obstacles to trade between the Member States, which in turn gave rise to difficulties regarding the justification of national environmental measures.

([78]) Case 8/74 *Dassonville* [1974] ECR I-837.
([79]) P. Oliver, 'Of Trailers and Jet-Skis: is the Case Law on Article 34 TFEU Carrering in a New Direction' (2010) *Fordham Intl L J* 4; C. Barnard, above, 92.
([80]) Case C-120/78 *Cassis de Dijon* [1979] ECR 649.
([81]) Case C-110/05 *Commission* v. *Italy* [2009] ECR I-519, para. 34 and the case law cited; Case C-108/09 *Ker-Optika* [2010], para. 48, noted by N. de Sadeleer (2011) 2 *EJCL* 435-444.
([82]) Case C-120/78 *Cassis de Dijon* [1979] ECR 642, para. 14.
([83]) A. Rosas, 'Life after Dassonville and Cassis: Evolution but No Revolution' in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law Rome* (Oxford, Hart, 2010) 440.

Last but not least, there is a general view, reflected in the Court's consistent case law, that there is not even a *de minimis* exception to Article 34 TFEU ([84]). Along this vein, the Court applied that provision in several environmental cases irrespective of the market effects of the measures at issue. As is clearly illustrated in *Bluhme*, a MEE may constitute a restriction on a very small fraction of imports of beehives ([85]). Similarly, in cases on the reuse of bottles for sale in Germany, the Court of Justice reminded parties that the extent of the barrier should not be taken into consideration, as a restrictive measure must be classified as a MEE 'even though the hindrance is slight and even though it is possible for the products to be marketed in other ways' ([86]).

To conclude with, the result of the *Dassonville* and *Cassis* case law is that the Court has been casting Article 34 TFEU net so broadly, that this provision captures not only protectionist measures but also *bona fide* environmental regulations. However, the most contentious questions surrounding the scope of this 'all-encompassing principle'([87]) arose in the course of subsequent cases.

Aware of the excessively broad scope of ambit of Article 34 TFEU, in *Keck* the Court of Justice decided to narrow it down. It removed 'certain selling arrangements' - sales at a loss, rules on advertising, opening of stores on Sundays, etc. - as long as these arrangements are equal in impact on both domestic and imported goods ([88]). In so doing, the Court drew a distinction between selling arrangements and product requirements. On the one hand, the selling arrangements fulfilling the *Keck* conditions are not subject to any sort of justification. On the other, measures concerning the dimensions, weight, form, size, composition, designation, labelling, and presentation of goods, are falling within the scope of Article 34.

Inasmuch as legal rules aiming to protect the environment concern primarily the characteristics of a good such as the toxicity of a chemical product, the origin or rarity of a plant or animal species, the danger of waste, the labelling, the concentration of hazardous substances rather than selling arrangements, it is unlikely that the Court of justice or national courts will be faced with the case of national regulation on the selling arrangements for said good. Hence, as far as environmental issues are concerned, product bans, product standards, registration requirements, and emissions thresholds have to be considered as MEEs. To this day, as illustrated by the following examples, few environmental measures have been classified as concerning selling arrangements under the *Keck* case law.

([84]) Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, para. 13 ; Case 16/83 *Prantl* [1984] ECR 1299, para. 20; Case 269/83 *Commission* v. *France* [1985] ECR 837, para. 10; and Case 103/84 *Commission* v *Italy* [1986] ECR 1759, para. 18. Recent case law by the ECJ does not always clearly indicate whether there is a *de minimis* rule regarding Article 34 TFEU. See on the one hand e.g. Case C-16/83 *Prantl* [1984] ECR I-1299, para. 20; joined cases C-177 & 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR I-1797, para. 13; Case C-269/83 *Commission v. France* [1985] ECR I-837, para. 10 and Case C-158/94 *Commission v. Italy* ECR I-I-5789, para. 18; see on the other hand e.g. Case C-266/96 *Corsica Ferries France* [1998] ECR I-I-3949, para. 31; Case C-44/98 *BASF* [1999] ECR I-6269 and the implicit reasoning in Case C-254/98 *TK-Heimdienst* [2000] ECR I-I-151, para. 30.

([85])Opinion AG Fennelly in Case C-67/97 *Bluhme* [1998] ECR I-803, para. 16.

([86]) Case C- 463/01 *Commission v. Germany* [2004]; and Case C-309/02 *Radlberger and Spitz*, [2004], paras. 63 and 68.

([87]) A. Rosas, above, 437.

([88]) Joined cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

The prohibition to import bees on an island ([89]), the marking of heavy metal concentration in batteries and accumulators before their sale ([90]), a deposit system encouraging the reuse of mineral water bottles, through the use of reusable glass bottles ([91]) were found not to fall within the scope of the selling arrangements exemption

1.2. *Trailers* and *Swedish Watercrafts*: a three-pronged approach to the concept of MEE

Since *Keck*, MEEs have been divided into two categories: product rules and selling arrangements. However, two judgments handed down by the grand chamber on 10 February 2009 ("*Italian Trailers*" case) and by the second chamber of the Court on 4 June 2009 ("*Swedish Watercrafts*") made far-reaching changes to this two-pronged approach to the concept of MEE ([92]). In the two cases at hand, as well as in subsequent cases ([93]), the Court identified three categories of measures that will now be covered by Article 34 TFEU.

The first category involves measures which have the object or effect of treating products originating from other Member States less favourably([94]). In other words, it covers all national measures which are directly or indirectly discriminatory. It follows that, whenever they have the object or the effect of discriminating against foreign producers, all measures governing the characteristics of a product, its use, as well as selling arrangements fall under this first category.

The second category concerns measures which, where national laws have not been harmonised, regulate the requirements which these products must satisfy, even if these rules are indistinctly applicable to all products. This corresponds to the category of measures relating to the intrinsic characteristics of the products as defined under *Cassis de Dijon*.[95] In contrast to the first category, the measures falling within the scope of the second category are not aiming at discriminating foreign products. By way of illustration, that would be the case of national regulations laying down technical standards on the placing on the market of pesticides or chemical substances.

Last but not least, the final category from this trilogy consists of 'any other measure which hinders access of products originating in other Member States to the market of a Member State' ([96]). Vigorous debate ensued as to how to interpret these terms ([97]). We take the view that this category covers non-discriminatory measures, which do not fall within the scope of the first two categories, but which do prevent or impede access to the market for imported products. As a result, this third category embraces authorisation requirements, restrictions on

([89]) Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 21.
([90]) Case C-143/03 *Commission v. Italy* [2004], para. 29.
([91]) Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para. 73; and Case C-463/01 *Commission v. Germany* [2004], para. 68; Case C-309/02 *Spitz* [2004], para. 73.
([92]) Case C-110/05 *Commission v. Italy 'Trailers'* [2009] ECR I-519, Case C-142/05 *Mickelsson and Roos 'Swedish Watercrafts'* [2009] ECR I-000.
([93]) Case C-108/09 *Ker-Optika* [2010], paras. 48-51, noted by N. de Sadeleer (2011) 2 *EJCL* 435-444.
([94]) Case C-110/05 *Trailers*, para. 36; and Case C-108/09 *Ker-Optika,* para. 49.
([95]) Case 120/78 *Rewe-Zentral* [1979] ECR I-649.
([96]) Case C-110/05 *Trailers* [2009] ECR I-519, para. 37; Case C-142/05 *Swedish Watercrafts* [2009] I-4273, para. 24.
([97]) E. Spaventa, 'Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos'* (2009) 34 *ELRev* 921-922; T. Horsley, casenote (2009) 46 *CMLRev* 2016.

transport, as well as the way in which the use of products is regulated ([98]). For instance, a measure falls into this residual category where it has the effect of preventing consumers from using products according to 'the specific and inherent purposes for which thet were intended or of greatly restricting their use'([99]).

Figure 2 shows how the three categories of measures now covered by Article 34 TFEU unfold.

Table 2. Categories of MEEs

Categories of MEEs	**Principles**	**Test**	**Features of environmental MEEs**
1st category	Principle of non discrimination	Measures discriminating directly or indirectly against foreign producers. As a result, all measures governing the characteristics of a product, its use, as well as selling arrangements that require higher quality requirements than for domestic ones are caught by this category	E.g. an outright ban on advertising.
2nd category	Principle of mutual recognition (*Dassonville*)	Product requirements to be met by goods that have been 'lawfully manufactured and marketed' in other MS, even if those rules are indistinctly applicable. In effect, these indistincltly applicable standards barr the access to the domestic market to substitutable goods in a way they are marketed in another MS.	E.g. product standards related to form, size, dimension, weight, trade description, composition, packaging, labelling and presentation of goods, safety requirements, thresholds of hazardous substances, dangerous properties.
2nd category	Access of products to national markets (*Trailers*)	'Any other measure which hinders access of products originating in other Member States'	E.g. prohibitions or restrictions on use of the goods, authorisation requirements, and restrictions on transport.

There are three points to be made about this new arrangement.

Firstly, the two-pronged approach – on the one hand, national measures prescribing the characteristics of goods and, on the other, the selling arrangements has been sidelined. However, selling arrangements have not disappeared as such. They may be caught into the

([98]) E. Spaventa, above, 920.
([99]) Case C-142/05, *Swedish Watercrafts,* para. 58.

first category inasmuch they are discriminatory,([100]) or into the third category if they prevent the access to the market of the importing Member State. The following table identifies three types of environmental measures likely to be qualified as MEEs– product requirements, selling arrangements, and restrictions on use - and their respective regimes.

Table 3. Types of environmental measures caught by Article 34 TFEU

Object	**Differentiated product requirements**	**Selling arrangements**	**Restrictions on use**
Illustrations regarding environmental policy	E.g. product standards	*De jure* or *de facto* restrictions on where, when, and where and by whom hazardous substances may be sold E.g. restrictions to sell hazardous goods to qualified undertakings, advertising restrictions	E.g. restriction on transport, on use, etc.
Time at which the measure is adopted	Upstream	Downstream	Downstream
Case law	*Cassis de Dijon*	*Keck*	*Trailers*
Test	2nd category	1st or 3rd category	3rd category
Regime	Presumption of illegality	Presumption of legality provided that the arrangements apply to all traders operating within the national territory and affect in the same manner in law and in fact the selling of domestic products and of those from other MS	Assessment of the impact of the measure on consumer's behaviour

Secondly, the inclusion of the third category – access to market - is a novel feature of the case law ([101]). In effect, the Court of Justice is placing emphasis on a market access criterion, independent of any discrimination test, thereby complying with its early case law in

([100]) As far as selling arrangements are concerned, the Court appears to consider that they operate as an exception to the *Dassonville* case, provided that the two requirements established in the *Keck* case are met. *Ker-Optika* confirms that certain selling arrangements fall outwith the scope of Article 34 TFEU. See Case C-108/09 *Ker-Optika bt* [2010], para. 51.

([101]) A. Rosas, above, 445; P. Oliver, *Oliver on Free Movement of Goods* (Oxford, Hart, 2010) 129-130; C. Barnard, *The Substantive Law of the EU,* 3rd ed., above, 105.

Dassonville. It follows that measures merely restricting and not just prohibiting the use of a product fall within the scope of ambit of Article 34 TFEU ([102]). That being said, it is still unclear what the term 'access' means([103]). In particular, the question arises as to which degree the access of the national market must be hindered ([104]).

Thirdly, these judgments are likely to have an impact on the ability of national authorities to regulate the use of hazardous products. In effect, a broad interpretation of the market access test is likely to enlarge tremendously the scope of ambit of Article 34 TFEU. As a result, Member States may be deprived of their right to conduct policies that are not aimed at protecting their national market.

1.3. Measures governing the use of products are falling within the scope of Article 34 TFEU

In both *Trailers* and *Swedish Watercrafts* cases, the national measures at stake were neither product requirements to which the *Cassis de Dijon* case law would apply nor selling arrangements in line with the *Keck* jurisprudence. What is more, the regulations concerned had the effect of discouraging consumers from purchasing the vehicles, either because their use was prohibited, or because it was heavily regulated. These two cases gave the Court the opportunity to adjudicate, for the first time ([105]), that a national measure regulating the use of a product was falling within the scope of Article 34 TFEU([106]). It follows from this that the concept of MEE within the meaning of Article 34 TFEU covers all other generally applicable measures which impede the access to the market of a Member State for products originating in other Member States, where these totally ban the use of a product or have 'a considerable effect on the behaviour or the consumers'([107]). In so doing, the Court placed greater emphasis on the effect that the measure had on access to the market than on the nature of the rules in question, which did not contain requirements relating to the characteristics of the product ([108]). Whereas the case law has been traditionally focusing on the effects of the measure on the suppliers, the impact of the measure on consumers' behaviour must henceforth be taken into consideration ([109]).
We shall now examine the three categories that can be drawn from these two cases: a) measures completely prohibiting the use of a product; b) measures preventing users from using products for the specific and inherent purposes for which they were intended; and c) measures greatly restricting their use (as fig. 4 shows).

([102]) T. Hosley, above, 2007.
([103]) P. Oliver, *Oliver on Free Movement of Goods*, above, 129-130; T. Hosley, above, 2014; J. Snell, 'The Notion of Market Access: A Concept or Slogan' (2010) *CMLR* 470.
([104]) See Case C-456/10 *ANETT* [2012], para. 30.
([105])The Court has seldom had to deal with measures regulating the use of products. See Case 119/78 *SA des Grandes distilleries Peureux* [1975] ECR 975; and Case C-473/98, *Toolex* [2000] ECR I-5681.
([106])Case C-110/05 *Trailers*, para. 58.
([107])Case C-110/05 *Trailers*, para. 56; Case C-142/05, *Swedish Watercrafts*, paras. 26-27.
([108]) AG Bot in Case C-110/05 *Trailers*, paras. 109-111.
([109]) I. Lianos, 'Shifting Narratives in the European Internal Market' (2010) *Eur B L Rev* 733; A. Sibony, above, 733.

Table 4. Categories of measures governing the use of products caught by Article 34 TFEU

1st category	Prohibition of all use of a product
2nd category	Inability of users to use a product for the 'specific and inherent purposes' for which it was intended
3rd category	Measures greatly restricting the use of a product on the accournt that the have a considerable influence on the behaviour of the consumers

The first category does not leave any room for discussion. In fact, where the authorities prohibit all use of a product, they indirectly prevent its commercialisation. Knowing that they are not permitted to use a given product, consumers have practically no interest in buying it ([110]).

As regards the second category, the inability of users to use a product for the 'specific and inherent purposes' for which it was intended also amounts to a MEE on imports. Such measures relate closely to the very definition of the product itself. With regard to the *Swedish Watercrafts* case, the possibilities for the use of the watercrafts were very marginal at the time the questions were referred to the Court ([111]).

The third category –measures having 'a considerable influence on the behaviour of consumers' – gives rises to conflicting opinions. Indeed, if the influence is not deemed to be 'considerable', the measure at issue falls outside the scope of ambit of Article 34 TFEU([112]). In other words, a mere impact on sales of import is insufficient to engage Article 34. Given that mere restrictions are likely to apply across a complete product market – chemicals, pesticides, GMOs, etc. –, they would be a 'rather ineffective attempt at protectionism'([113]). Some authors have voiced concerns regarding the subjective appraisal entails by such an approach([114]). Indeed, the nature of the criteria of 'considerable influence' on the behaviour of consumers and 'great restriction' of the use of the products are eminently fuzzy. Arguably, one is left quite in the dark as to how to interpret these criteria. Heavy restriction on use is not the same as a total restriction on use. What thresholds should apply? Does a 25% reduction in sales amount to a 'great restriction' on the use of the product?

([110]) See, by analogy, Case C-265/06 *Commission v. Portugal* [2008] ECR I- 2245, para. 33, concerning the affixing of tinted film to the windows of motor vehicles.
([111]) Case C-142/05, *Swedish Watercrafts*, paras. 25 and 28; Case C-433/05, *Sandström* [2010] ECR I- para. 32.
([112]) G. Davies, 'The Court's jurisprudence on free movement of goods' (2012)2 *EJCL-REDC* 364.
([113]) S. Weatherill, 'The road to ruin: 'restrictions on use' and the circular lifecycle of Article 34 TFEU' (2012)2 *EJCL-REDC* 227.
([114]) P. Oliver, 'The Scope of Article 34 TFEU after Trailers', (2012)2 *EJCL-REDC* 316.

More fundamentally, one could object that sensitive regulatory choices regarding the mere use of products should be subject to judicial review on the grounds that the Court of Justice would be forced to assess the necessity of these choices([115]).

In any case, the *Perlata* test must apply ([116]): mere or minor restrictions on use the effects of which would be 'too uncertain or too indirect' should in no case fall under the scope of Article 34 TFUE ([117]).

1.4. Limits to the material scope of Article 34 TFEU

The material scope does have certain limits. In a handful of cases, the Court has accepted that some restrictions may be so "uncertain and indirect" or as "too random and indirect" in their effects as not to be regarded as capable of hindering trade ([118]). In particular, the Court implicitly applied a rule of remoteness in several environmental cases, such as the compatibility of fishing conservation quotas with Articles 34 and 35 TFEU ([119]), the discharge of dangerous substances at sea ([120]), urban-planning laws restricting the opening of new shops in town centres ([121]). However, in *Blhume,* a case concerning the prohibition to import bees into part of the Danish territory, the Court held that the Danish measure had a 'direct and immediate impact on trade' though the number of bees was fairly limited ([122]).

2. MEEs on exports

In contrast to Article 34 TFEU on which there is a considerable body of case law, it is only in exceptional circumstances that the Court has had the opportunity to consider the scope of Article 35 TFEU – fifty cases in total. The *Groenveld* judgment offers the starting point for appreciating the difference between Articles 34 and 35 TFEU ([123]). In short, Article 35' scope is more limited than that of Article 34 TFEU. As the Court has held 'only the national measures having as their specific object or effect the restrictions 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 special advantage for national products or for the domestic market of the State in question'([124]). In ruling in this manner, the Court has refused to extend the *Cassis* case law to restrictions on exports.

([115]) M. Fallon and D. Gerard, 'Trailing the trailers in search of a typology of barriers' (2012)2 *EJCL-REDC* 258.
([116]) Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24.
([117])P. Oliver, *Oliver on Free Movement of Goods,* above, 127-128, and 131.
([118]) C-96/94 *Centro Servizi Spediporto v Spedizioni Maittima del Golfo* [1995] ECR I-2883 ; C-379/92 *Peralta* [1994] ECR I-3453 ; C-134/94 *Esso Espanola v Comunidad Autonoma de Canarias* [1995] ECR I-4223 ; C-266/96 *Corsica Ferries v Ministero dei Trasporti* [1998] ECR I-3949, para. 31; Case C-44/98 *BASF* [1999] ECR I-6269, para. 16; and Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, para. 30. See P. Oliver, above, 95-96.
([119]) Cases 3, 4 nd 6/76 *Kramer* [1976] ECR 1279, paras. 55-59.
([120]) Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24.
([121]) Case C-140/94 *DIP v. Bassano di Grappa* [1995] ECR I-3257, para. 29. However such measures may fall under the Treaty provisions on establishment. See Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-0000.
([122]) Case C-67/97 *Bluhme* [1998], para. 22.
([123]) Case C-15/79 *Groenveld* [1979] 3409; Case 155/80 *Oebel* [1981] 1993.
([124]) Case 155/80 *Oebel* [1981] 1993, para. 15; Case 172/82 *Inter-Huiles* [1983] ECR I-555, para. 12 ; and Case 203/96 *Dusseldorp* [1998] ECR I-4075, para. 40.

In requiring a demonstration of different treatment between national goods and those which are exported, the Court is seeking to guard itself against the risk of being submerged by litigation relating to the national measures with no direct relationship with the free movement of goods ([125]). Consider environmental measures relating to the production of goods. Imagine the case of a permit that prohibits the use of a particular manufacturing technique because it is harmful to the environment. Though it would prevent the manufacturer from producing goods intended for export to the other Member States, if the *Groenveld* doctrine were not to be followed, it would fall within the reach of Article 35 TFEU. Needless to say that such interpretation would jeopardize pollution control of listed installations.

Nonetheless, the *Groenveld* case law has been subject to certain variations, at least in formal terms. Given the specialist nature of our subject, this section will only comment on the variations in cases concerning the transit of goods with reference to environmental protection ([126]). The judgment related to the prohibition imposed by Austria on the transit by trucks heavier than 7.5 tonnes along a motorway crossing an Alpine valley. According to the national authorities, the measure was justified by the obligation to comply with EU air pollution standards. Moreover, the Austrian measure concerned sought to promote combined road and rail transport across the Alps. It transpired that the measure mainly affected the transport of goods between northern Italy and southern Germany, which thus transited through Austria, at the heart of the EU. In its judgment the Court of Justice did not appear to draw any distinction between the arrangements applicable to Article 34 TFEU and those applicable to Article 35 ([127]). However, as noted above, in the *Groenveld* judgment the Court expressly rejected the *Dassonville* holding with regard to limits on exports. It will also be noted that a shift in meaning occurs between the *Schmidberger* case and the Inn motorway case, since in the latter judgment the Court returns to the *Schmidberger* formula ([128]). That said, the Court did not clearly state whether or not it would consider the prohibition on the use of the Inn motorway as discriminatory. It is therefore a matter of regret that the Court did not rule more clearly on this point ([129]). Subsequently, the Court limited itself to holding that the Austrian regulation was justified by a mandatory requirement.

Thirty years after the *Groenveld* judgment, in *Gijsbrechts*, a case concerning Belgian consumer protection law, the Court made some minor changes to the imbalance between the criteria applicable to Article 34 and those applicable to Article 35 TFEU ([130]). In particular, the Court noted that although it was applicable without distinction to all operators, the Belgian measure as a matter of fact had a greater affect on exports, and for this reason amounted to an MEE. A reading of this paragraph may give rise to different and partially divergent interpretations. In our view there is no longer a requirement for *de jure* different treatment for exported goods in order to amount to a restriction on free movement. A *de facto* difference in

([125]) P. Oliver, above, 135

([126]) This issue is discussed in A. Defossez, 'L'histoire d'une divergence et d'une possible réconciliation : l'article 29 TCE' (2009) 1 *CDE*, 18.

([127]) Case C-320/03 *Commission v. Austria* [2005] ECR I-9871.

([128]) Case C-112/00 *Schmidberger* (2003) ECR I-5659, para. 56.

([129]) A. Rigaux casenote under Case C-205/07 *Gysbrechts* (2009) *Europe* 29.

([130]) Case C-205/07 *Gysbrechts* [2008] ECR I-9947, para. 43. See A. Defossez, 'Arrêt *Gysbrechts* : le droit de rétractation du consommateur face au droit de l'UE' (2009) *REDC* 549-559 *;* P. Oliver, above, 139-140 ; A. Dawes, 'A Freedom Reborn ? The New Yet Unclear Scope of Article 29 EC' (2009) *ELRev* 639; W.-H. Roth, casenote (2010) 47 *CMLRev* 509.

treatment is sufficient in order for the restriction on exports to be prohibited under Article 35 TFEU. The following table differentiates the nature of the two tests.

Table 5. Tests for export restrictions caught by Article 35 TFEU

Groenveld	Discrimination resulting from a formal distinction between the domestic measure and the export
Gijsbrechts	*De facto* discriminatory effect of the measure on export

E. Territorial scope

In principle, provisions on free movement of goods apply only if the contested national measure impedes inter-State trade, with the exception of purely national situations, i.e. situations that do not have a foreign element likely to link them to trade between Member States ([131]). Hence, Articles 34 and 35 TFEU apply only to goods passing between Member States. As a result, those moving within a Member State are not caught by these provisions. However, the application of Article 34 TFEU cannot be excluded on the sole basis of the fact that all elements of the case are limited to the borders of one Member State ([132]). As regards environmental protection, the Court certainly seems to have conceded that Articles 34 and 35 TFEU may apply to local situations. By way of illustration, a Danish measure prohibiting the import of bees on part of the Danish territory ([133]), and a Copenhagen municipal regulation for collecting and retreating building waste destined for recovery([134]) were found to be MEEs within the meaning of Article 34.

F. Exceptions to free movement of goods

Articles 34 and 35 TFEU do not enshrine a general freedom to trade or the right to the unhindered pursuit of one's commercial activities ([135]). Indeed, these provisions are aiming at removing restrictions on imports and exports of goods rather than deregulating the national economy ([136]). As a result, they must not be confused with Article 16 EUCFR which recognises 'the freedom to conduct a business in accordance with Community law and national laws and practices'. A MEE is likely to be justified in the light of two derogations.

1. Article 36 TFEU and the rule of reason

The first exception can be found in Article 36 TFEU. Though Article 36 TFEU does not mention a specific ground of justification as regard environmental protection, the protection

([131]) Case 152/78 *Commission v. France* [1980] ECR I-2299; Joined cases 314 – 316/81 & 83/82 [1982] *Waterkeyn* ECR I-4337; Case 98/86 *Mathot* [1987] ECR I-809; Case 168/86 *Rousseau* [1987] ECR I-1000.
([132]) Joined cases C-1 & 176/90 *Aragonessa de Publicitat Exterior* [1991] ECR I-4179; Case C-47/90 *Delhaize* [1992] ECR I-3669; Case C-184/96 *Commission v. France* [1998] ECR I-6197*;* and Joined cases C-321 – 324/94 *Pistre* [1997] ECR I-2343, paras. 44 and 45.
([133]) Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 20.
([134]) Case C-209/98 *Entreprenorforeningens Affalds/Miljosektion - Kobenhavns Kommune* [2000] ECR I-3743, para. 42.
([135]) Case C-292/92 *Hünermund* [1993] ECR I-6787, 6813.
([136]) Opinion AG Poiares Maduro in Case C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135, paras. 37 and 41.

of 'health and life of humans, animals or plants' clause has been successfully invoked in a swathe of environmental cases. In effect, many environmental protection measures aim to protect *'public health'* ([137]) and can be justified on the basis of this clause. By way of illustration, restrictions of the marketing and use of phytopharmaceutical products ([138]) and of substances harmful to workers and to the environment ([139]), animal waste management ([140]), registration of aircrafts to limit noise pollution ([141]) and measures encouraging renewable energy ([142]) concern both health protection policy and environmental policy. What is more, these grounds can also serve to validate national measures for nature conservation, as illustrated by numerous judgments of the Court of justice ([143]).

However, Article 36 TFEU does not permit measures on the management of natural resources, such as the creation of a deposit and recycling system for empty packaging, eco-labelling, remediation of contaminated soils when there is no health risk, and quantitative water management ([144]). Moreover, its ever strict interpretation does not make the work of national authorities any easier. Furthermore, the protection of such interests may certainly never lead to 'arbitrary discrimination' or to 'disguised restrictions' to trade between Member States.

Given the narrow scope of ambit of Article 36 TFEU, the Court held in the *Danish Bottles* case as well as a number of subsequent cases that environmental protection was 'one of the Community's essential objectives', and later approved environmental measures on the basis of such a mandatory requirement ([145]). Accordingly, this specific ground of justification concerns environmental policy in its own rights.

Nothing prevents the combination of the mandatory requirement relating to environmental protection with other mandatory requirements. For instance, national legislation on the delivery of certificates of registration for new vehicles can thus be justified both by mandatory requirements on road safety and by such requirements on environmental protection ([146]). By the same token, although it hinders the free movement of goods, a positive list that prohibits the keeping of animals which do not belong to the species or categories referred to

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([137]) The EU environmental policy has the aim pursuant to Article 191(1) TFEU and Article 169(1) TFEU to 'contribute to […] protecting human health'.

([138]) Case 272/80 *Biologische produkten* [1981] ECR I-3277, para. 87; Case C-125/88 *Nijman* [1989] ECR I-3533; Case 94/83 *Heijn* [1984] ECR I-3263; Case 54/85 *Mirepoix* [1986] ECR I-1067; Case C-443/02 *Schreiber* [2004] ECR I-7275.

([139]) Case C-473/98 *Kemikalieinspektionen v. Toolex Alpha* [2000] ECR I-5681.

([140]) Case 118/86 *Nertsvoederfabriek Nederland* [1987] ECR 3883, para. 15.

([141]) Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paras. 19 to 25.

([142]) Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, para. 75.

([143]) Joined cases 3, 4 & 6/76 *Cornelis Kramer* and others [1976] ECR I-1279, para. 59; Case 169/89 *Gourmetterie Van den Burg* [1990] ECR I-2143; Case C- 510/99 *Tridon* [2001] ECR I-7777; Case C-131/93 *Commission v. Germany* ('German crayfish') [1994] ECR I-3303; and Case C-67/97 *Bluhme* ('Laesø bees') [1998] ECR I-8033; Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 33; Case C-249/07 *Commission v. Netherlands* [2008], para. 43; Case 219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW* [2008] ECR I-4475, para.28; Case 100/08 *Commission v Belgium* [2009] ECR I-000, para. 96.

([144]) Case 302/83 *Commission v. Denmark* [1988] ECR 4607, para. 9.

([145]) See notably Case 302/86 *Commission v. Denmark* [1988] ECR I-4604, para. 9; Case C-389/96 *Aher Waggon* [1998] ECR I-4473; Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32 and Case C-176/03 *Commission v. Conseil* [2005] ECR I-000, para. 41; and Case C-320/03 *Commission v. Austria* [2005], para. 72.

([146]) Case C-314/98 *Snellers Auto's* [2000] ECR I-8633, para. 55.

in that list is deemed to pursue several legitimate objectives, namely the welfare of animals held in captivity, the 'protection of the health and life of humans or animals', as well as 'the protection of the environment'([147]). However, it is difficult to define the line separating Article 36 TFEU from a mandatory requirement regarding environmental protection. While national legislation on pesticides was assessed by reference to Article 36 TFEU, ([148]) the mandatory requirement was invoked for cases on waste management.

And yet there is a major difference between these two kinds of derogations. Mandatory requirements can only justify measures that apply without distinction to imports as well as to domestic products ([149]). Converly, as long as there is no arbitrary discrimination or disguised restriction to trade, differentiated national measures may be justified on grounds contained in Article 36 TFEU ([150]). It follows that Article 36 TFEU has the advantage, for national authorities, of covering environmental protection measures that are not applicable without distinction to domestic and imported goods. However, this distinction has been put into question since the *Walloon Waste* case. In effect, the Court of Justice upheld different restrictions on use as admissible irrespective of the fact they were likely to be distinctly applicable ([151]). These judgments indicate that the Court refuses to solve the duality between mandatory requirements and grounds of justification mentioned in Article 36 TFEU.

2. Narrow interpretation of Article 36 TFEU and the rule of reason

Both Article 36 TFEU and the rule of reason must nevertheless be interpreted narrowly ([152]). Firstly, reasons of general interest are of a non-economic nature. For instance, the Court has proved itself uncompromising with regard to national measures aiming at profitability of waste treatment plants, refusing to apply the rule of reason to them on the ground that these measures aimed at protecting an economic sector ([153]). Secondly, these derogations remain applicable 'as long as full harmonization of national rules has not been achieved' ([154]). As a result, Member States loose the possibility to adopt standards that are more restrictive than those contained in secondary law, either by reference to a mandatory requirement or by invoking one of the justification provided for in Article 36 TFEU ([155]). By way of illustration,

([147]) Case 219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW* [2008] ECR I-000, paras. 27, 28, 29.
([148])Case 272/80 *Biologishe Produkten* [1981] ECR 3277, para. 13.
([149]) Joined Cases C-1& 176/90 *Aragonesa* [1991] ECR-4151, para. 13 ; Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431, para. 34. See also A. C. Toth, above, 393-394; P. Oliver, above, 219-220; C. Barnard, above, 115.
([150])Case 7/61 *Commission v. Italy* [1961] ECR 317 ; Case 113/80 *Commission v. Ireland* (*'Irish souvenirs'*) [1981] ECR I-1625, para. 11; Case 288/83 *Commission v. Ireland* [1985] ECR 1761; Case 229/83 *Leclerc* [1985] ECR I-1201, para. 22; and Joined cases C-1 & 176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, para. 13.
([151])Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431, para. 34; Case C-389/96 *Aher Waggon* [1998] ECR I-4473, para. 19; Case 203/96 *Dusseldorp* [1998] ECR I-4075 paras. 44 and 49; Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, paras. 73 and 75; Case C-320/03 *Commission v. Austria* [2005], paras. 84 and 85; Case C-142/05 *Mickelsson and Roos 'Swedish Watercrafts'* [2009] ECR I-4273. See N. de Sadeleer, *Commentaire Mégret, above,* 388-391.
([152]) Case 46/76 *Bauhuis* [1977] ECR I-5.
([153]) Case 172/82 *Inter-Huiles* [1983] ECR 55; Case 203/96 *Dusseldorp* [1998] ECR I-4075.
([154]) See Case 215/87 *Schumacher* [1989] ECR 617, para. 15; Case C-369/88 *Delattre* [1991] ECR I-1487, para. 48; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, para. 26; Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, para. 10; and Case C-320/93 *Ortscheit* [1994] ECR I-5243, para. 14
([155]) Case C-102/98 *Commission v. Germany* [1998] ECR I-6871.

in *Nordiska Dental*, the Court stated that the Swedish prohibition on exporting dental amalgams containing mercury was incompatible with Directive 93/42 concerning medical devices – a "new approach" directive – on the grounds that that directive covered environmental considerations ([156]). Sweden could not reckon upon Article 36. Given that the EU lawmaker has adopted a vast body of legislation harmonizing the conditions under which goods are entitled to be placed on the market and to circulate within the EU ([157]), Member States' room for manoeuvre appears to be rather limited as regard the adoption of product standards. Finally, in all cases, the burden of proof of their relevance is borne by the Member State, not by the Commission ([158]).

3. Fundamental rights and national constitutional values

It is in a case on noise pollution that the Court of Justice first unveiled a new derogation, in a judgment on the freedom of environment campaigners to block transpaline transport through a tunnel during thirty hours, a protest that the authorities had tacitly allowed to go ahead. The Court held that although the protest was a MEE and was thus prohibited by Article 34 TFEU, it could be justified by a fundamental right stemming from both the ECHR Article 10 and the Austrian constitution ([159]). The fact that the national authorities had not prohibited such a protest, which hindered free movement of trade, was thus found not to be contrary to Articles 34 and 35 TFEU when combined with Article 4(3) TUE.

G. The proportionality of environmental measures contrary to Articles 34 and 35 TFEU

Once an MEE has been justified under Article 36 TFEU or the rule of reason, the Member State is free to determine the level of protection it wishes to pursue. To prevent the principle of free movement of goods from becoming nugatory, the Court has been putting in place a series of criteria to assess the proportionality of the the measures justified under the aforementioned exceptions. The principle of proportionality allows one to assess means used – ban, prohibition, approval, authorisation, restriction on use, etc. - with reference to the objectives pursued –health or environment - to best take into account the legitimate interests of undertakings in freely trading their goods. As stakeholders necessarily adopt opposite stances regarding the adequacy of the level of protection in this field, one must stress that the proportionality principle is ideologically neutral and does not aim to favour environmental interests over economic interests nor to create such a hierarchy of values from nothing. As these criteria are applied in a flexible and evolutionary manner, it is difficult to establish a fixed definition of the principle. Nevertheless, certain Advocates General, whose point of view was echoed by several authors, managed to compile a list of conditions for the application of the principle, by dividing it into three successive tests. The *Fedesa* judgment

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([156]) Case C-288/08 *Nordiska Dental* [2009] ECR I-000, para. 30, noted by L. Krämer (2010)7:1 *JEEPL* 124-128

([157]) The Commission is taking the view that half of the trade in goods within the EU is regulated by harmonized legislation. E.g. Commission, 'A single market for goods'.

([158]) Case 45/87 *Commission v. Ireland* [1988] ECR I-4929; Case C-128/89 *Commission v. Italy* [1990]; Case Case C-13/91 *Debus* [1992]; and Case C-17/93 *Van der Veldt* [1994] ECR I-3537. See also the Communication from the Commission on the Single Market and the Environment, COM(99) 263.

([159]) Case C-112/02 *Schmidberger* [2003] ECR I-5659, para. 74, noted by C. Brown (2003) 40 *CMLRev* 1499 and R. Agerbeek (2003) *ELRev* 255. While Austria argued that the protest was justified by a mandatory requirement in the general interest concerning the environment the ECJ rectified the claim stating that the pursued aim was the protection of free speech.

also echoes this systematic approach. The three tests apply as follows: prohibitory measures are valid if they are 'appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued' ([160]). However, the Court is applying these tests in different ways and does not always clearly distinguish them.

Firstly, the principle of proportionality thus requires that the measure be adequate, suitable with a view to attaining its objective. This first stage is known as the *'suitability test'* or *'adequacy test'*. The first question to answer is whether the facts noted by the national authorities justify a need for a measure to protect the environment. Does the current situation or risk of environment degradation require Member State intervention? In order to be deemed suitable, the measure at issue must be linked to the environmental objective pursued ([161]).

Secondly, the principle of proportionality implies a comparison of measures likely to attain the desired result and the selection of the one with the least disadvantages. If it appears that an alternative measure would meet the target while hindering to a lesser degree inter-State trade, the contested measure is no longer necessary and must be deemed disproportionate. The national measure must therefore be necessary in attaining the objective pursued.

Therefore, when the planned measure gravely hinders free movement of goods, national authorities must carefully examine the possibility of adopting less restrictive measures, and they may only set them aside if they are clearly insufficient to attain the objective ([162]). An examination of a more recent judgment reveals the Court's tendency to intensify yet further its proportionality review ([163]). However, it occurs that the Court has sometimes taken care not to examine such considerations ([164]).

Thirdly, some consider that a third test is required, an analysis of the measure itself, no longer through comparison with others, to determine whether the advantage provided is not disproportionate with regard to the damage caused to inter-State trade ([165]). Thus, the Member State must demonstrate that 'the level of protection it decides to afford to its legitimate interests is commensurate with the degree of interference this causes in intra-Community

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([160]) Case C-331/88 *Fedesa* [1990] ECR I-4023, para. 13. See, to the same effect, Opinion AG Van Gerven in Cases C-312/89 *Sidef Conforama* and C-332/89 *Marchandise* [1991] ECR I-997, para. 14; and Opinion AG Poiares Maduro in Cases C-434/04 *Jan-Erik Anders Ahokainen* [2006] ECR I-9171, paras. 23-26.

([161]) The Court has accepted the environmental adequacy of a number of environmental measures: Case C-379/98 *Preussen Elektra* [2001]; Case C-463/01 *Commission v. Denmark* [1998] ECR 4607, para. 13; Case C-463/01 *Commission v. Germany* [2004] ECR I-11705, paras. 76 and 77; and Case C-309/02 *Radlberger and Spitz* [2004] ECR I-11763, paras. 77 and 78; Case C-67/97 *Bluhme* [1998], para. 37; C-142/05 *Swedish Watercrafts* [2009], para. 34.

([162]) See for instance: Case C-320/03 *Commission v. Austria* [2005] ECR I-7929, paras. 87-88; Case 118/86 *Nertsvoederfabriek* [1987] ECR I-3883, para. 14.

([163]) Case C-28/09 *Commission c/ Austria* [2011], para. 133.

([164]) Case *Commission v. Belgium* [1992]*;* Case C-510/99 *Tridon* [2001], para. 58; Case *Preussen Elektra* [2001]; Case *Safety High-Tech* [1998], para. 64.

([165]) W. Van Gerven, 'The effect of proportionality on the actions of Member States of the European Community: national viewpoints from continental Europe', in *The Principle of proportionality in the laws of Europe* (1999) 38; G. De Búrca, 'The principle of proportionality and its application in EC law' (1993) 13 *YbEL* 105-150.

trade' ([166]). This should be the case of a draconian measure that has hardly no environmental benefit. At the request of several Advocates General, the Court of justice has occasionally mentioned this third test, without, however, applying it as such, insofar as it always invalidated the contested measures on the basis of their non-essential character. For instance, in the *Danish Bottles case*, AG Slynn expressed the view that 'There has to be a balancing test between the free movement of goods and environmental protection, even if in achieving the balance the high standard of protection sought has to be reduced. The level of protection must be a reasonable level'. In adjudicating that the Danish measure requiring approved containers was disproportionate, the Court has implicitly supported AG Slynn's views ([167]).

The following figure summarizes the conditions to be fulfilled to admit MEEs.

Table 6. Conditions to be fulfilled to admit measures hindering inter-State trade	
No complete harmonization at EU level	Secondary legislation entailing complete harmonization precludes Member States to justify their measures under Article 36 TFEU or a mandatory requirement
Legitimate objective of public interest	The measure must pursue a legitimate objective of public interest. Given that the environment has been recognised as 'a major objective in EU law' by the Court of Justice, Member States can invoke a mandatory requirement.
Non-economic nature of the measures	Expressing general interest, Member States can invoke neither Article 36 TFEU nor a mandatory requirement for economic reasons.
Respect for the principle of non-discrimination	In order to be justified either by a mandatory requirement, the measure must not draw distinctions on the basis of the nationality of products or producers. On the other hand, nature protection and health related measures can aply with distinction to domestic and foreign products.
Necessity and proportionality	The measure must have a causal link to the objective pursued and be appropriate for achieving it.

Conclusions

At the outset, interactions between environmental protection measures and the free movement of goods are at odds with one another. As the above discussion has evidenced, numerous measures covering all aspects of the environmental policy do restrict one way or another inter-State trade though they may not be their objective. Moreover, negative harmonization is likely to restrict the Member States' regulatory powerts to protect the environment. Given that conflicts do not oppose primary law against national law, secondary law may also be relied on by economic operators objecting environmental restrictive measures. Thus, under the terms of

([166]) Opinion AG Poiares Maduro in Cases C-434/04 *Jan-Erik Anders Ahokainen* [2006] ECR I-9171, para. 26. See Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 81.
([167]) Cases 302/86 *Danish Bottles* [2006], para. 21.

the Directive on packaging and packaging waste, the German state favoured the re-use of bottles, which however brought it into conflict with a directive obliging the producers of mineral water to fill their bottles at source ([168]). Similarly, as noted in the previous part, the Netherlands requested the Commission that they be allowed to adopt more stringent measures pursuant to Article 114(5) TFEU than those provided for under a directive harmonising the rules applicable to the marketing of motor vehicles. The Dutch authorities relied on the need to respect a directive on air quality where the thresholds had been exceeded due to atmospheric pollution caused by cars ([169]).

The attempts to reconcile the conflicts between the fundamental freedom to trade in goods and the environmental protection have not always been characterized by coherence. The overall impression generated by this heterogeneity of cases is thus one of confusion. Nontetheless, it is clear from that a change of emphasis within case law which for too long had favoured commercial interests is underway.

This development has come about, on the one hand, due to the deterioration in environmental circumstances and, on the other hand, due to the fact that, as noted in part one, the treaties have struck a better balance between the internal market and sustainable development, two objectives that have been placed on an equal footing. It follows that when the Member States have to take action against environmental risks, they must have sufficient room for manoeuvre and must not become reliant on the sluggishness of the Union's decision making procedures.

However, the case law analysed in this chapter is throwing up more questions than it resolves on issues such as the validity of ecotaxes, measures prohibiting the use of products, and the scope of mandatory requirements.

([168]) Case C-309/02 *Radlberger and Spitz* [2004] ECR I-11763; and Case C-463/01 *Commission v. Germany* [2004] ECR I-11705.
([169]) Cases C-439/05 and C-454/05 R *Land Oberösterreich* [2007] ECR I-7441.