CONSUMER PROTECTION AND THE FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION: THE ABILITY OF MEMBER-STATES TO BLOCK THE ENTRY OF GOODS ACROSS BORDERS

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ABSTRACT

Just recently, the United Kingdom held a referendum whereby the outcome was a slight victory for those wishing to leave the European Union ("Brexit"). Including the United Kingdom, the European Union constitutes a twenty-eight member-state common market that allows for the free movement of goods, services, capital, and labor. Ironically, although the United Kingdom plebiscite favored leaving the European Union's guarantee of free movement of goods, 50 percent of that country's exports go to the other twenty-seven member-states. The United Kingdom's departure also threatens to make trade with Europe more difficult for firms in the United States as 25 percent of American exports headed to Europe move through the United Kingdom. Akin to the referendum held in the United Kingdom, the world is seeing constant political threats to free and open trade among countries despite the aggregate and cumulative benefits of free trade. The goal of this work is to inform the reader and practitioner as to the basic rules that support the free movement of goods pursuant to Article 34 of the Treaty on the Functioning of the European Union. This paper will also cite the

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various exceptions that member-states can invoke against the free movement of goods on consumer protection grounds thus blocking the entry of goods across member-state borders. Topics associated with the free movement of goods addressed in this paper include product contents, packaging, inspections, prohibitions, goods from non-member-states, country of origin, legal tests applied by the European Court of Justice, product labeling, the role of science, deceptive advertising, selling arrangements, blatant protectionism, and abuse of process.

I. INTRODUCTION

A. The Free Movement of Goods, the European Union, and Brexit

The United Kingdom is about to embark on a two-year period by which it will secede ("Brexit") from the European Union ("EU").[1] The economic impact of the United Kingdom's exit from the EU is far from clear.[2] There is great concern that the vote in the United Kingdom may lead to a great reduction in cross-border investment.[3] Some of this concern is due to the uncertainly in the regulatory environment that the United Kingdom's decision to leave the EU has caused.[4] Surprisingly, however, one-half of the United Kingdom's exports go to other EU member-states.[5] The free movement of goods and labor seems to be well-developed while other economic sectors, such as finance and energy, have not been integrated as well and there exists a belief by some that services are more difficult to trade freely in comparison to goods despite the fact that 70 percent of the EU economy consists of

1. *See* Stephen Fidler & Anton Troianovski, *Britain's Theresa May Begins Sounding Out Europe on Brexit Negotiating Position*, WALL ST. J. (July 20, 2016, 4:56 PM), http://www.wsj.com/articles/britains-theresa-may-begins-sounding-out-europe-on-brexit-negotiating-position-1469048210 (explaining that the referendum held in the United Kingdom did not begin this process; rather, the U.K. government must trigger Article 50 of the Lisbon Treaty, which then begins the two year period of exit negotiations).

2. *Straws in the Wind*, ECONOMIST (July 16, 2016), http://www.economist.com/news/britain/21702225-forget-financial-markets-evidence-mounting-real-economy-suffering.

3. *See Picking Losers*, ECONOMIST (July 9, 2016), http://www.economist.com/news/business/21701805-how-different-industries-are-exposed-turmoil-britain-picking-losers (listing various foreign companies, like the auto industry, where as much as two-thirds of the cars made in the United Kingdom are exported, which may rethink this relationship in light of Brexit).

4. *See Rules and Britannia*, ECONOMIST (July 9, 2016), http://www.economist.com/news/business/21701811-uncertainty-especially-about-regulation-spreads-among-industries-most-exposed-britain-rules (arguing that this uncertainty is unlikely to abate until the exit negotiations are finalized and companies feel more certain as to what regulatory environment they will encounter in the United Kingdom).

5. *Single-Market Blues*, ECONOMIST (July 16, 2016), http://www.economist.com/news/europe/21702233-european-project-britain-helped-build-grinding-halt-single-market-blues.

services.[6] One good that might also be designated a service, data, could cause a significant rift between the United Kingdom and the EU.[7] Even with the departure of the United Kingdom from the EU, there is unlikely to be a separation of the four freedoms to keep the existing member-states in the EU.[8] However, following the United Kingdom's plebiscite to remove itself from the EU, many of the leaders of the "Leave" movement cited a desire to keep access to the single market and believed the United Kingdom could do so without having to succumb to the principle of free movement of workers.[9] In fact, the current United Kingdom Prime Minister, Theresa May, set the ability to remain in the common market as a high priority but has demanded that Brexit require the removal of the jurisdiction of the European Court of Justice ("ECJ") over such matters as the free movement of workers requirement.[10] In order to maintain a position within the common market, the United Kingdom has hinted that it might be willing to pay for that access.[11] Recently, the High Court ruled that the United Kingdom may not leave the EU without consent of Parliament.[12] The issue remains contentious in Parliament as one member has expressed concern that Brexit may lead to higher food costs.[13] As well, the opposition party has called for a separate vote on Brexit unless the United Kingdom can remain within the

6. *Id.*

7. *Rules and Britannia*, *supra* note 4.

8. *See Single-Market Blues*, *supra* note 5.

9. Jenny Gross & Jason Douglas, *U.K. Politicians Weigh Price of EU Single-Market Access After Brexit Vote*, WALL ST. J. (June 30, 2016, 12:24 AM), http://www.wsj.com/articles/brexit-contenders-to-succeed-cameron-weigh-price-of-eu-single-market-access-1467234465.

10. Jenny Gross & Nicholas Winning, *U.K.'s Theresa May Pledges to Set EU Divorce in Motion by End Of March*, WALL ST. J. (Oct. 2, 2016, 11:19 PM), http://www.wsj.com/articles/u-k-s-may-plans-to-trigger-article-50-by-end-of-march-1475401597.

11. Jenny Gross, *U.K. Would Consider Paying for EU Market Access After Brexit, Minister Says*, WALL ST. J. (Dec. 1, 2016, 1:49 PM), http://www.wsj.com/articles/u-k-would-consider-paying-for-eu-market-access-following-brexit-1480598639?mod=euref.

12. Alexis Flynn & Jenny Gross, *U.K. Court Puts Brexit in Hands of Parliament*, WALL ST. J. (Nov. 3, 2016, 8:57 PM), http://www.wsj.com/articles/brexit-legal-challenge-set-for-court-ruling-1478159686.

13. Nicholas Winning, *U.K. Prime Minister Theresa May Faces Pressure in Parliament over Brexit Plans*, WALL ST. J. (Oct. 12, 2016, 1:17 PM), http://www.wsj.com/articles/brexit-process-wont-get-parliamentary-vote-government-says-1476269263.

common market.[14] Additionally, there is discussion among those in the Scottish Parliament that Scotland should hold a second referendum on whether to remain within the United Kingdom so that it can remain in the EU.[15] Firms in the United Kingdom are asking for greater consultation with the government as the government contemplates how to move out of the EU, and these firms have signaled a strong desire to remain within the EU's common market.[16]

There is comment that the EU may be becoming more protectionist in ideology.[17] Although clearly unofficial, there are two potential forms of Brexit: "soft Brexit" (protectionist, but less so), whereby the United Kingdom is able to leave the EU but maintain access to the common market; and "hard Brexit" (more protectionist), whereby the United Kingdom removes itself completely from the EU.[18] Most economists believe that a hard Brexit will be more costly to the British economy than a soft Brexit.[19] This higher cost associated with a hard Brexit may be reflected in the sharp decline suffered by the British pound since the June 2016 referendum.[20] Regardless, other European countries may find it more difficult to get into the EU, even those considered to be quite "pro-European," because of the United Kingdom's desire to remove itself from the common market's free

14. Alexis Flynn, *U.K. Political Parties Draw New Brexit Battle Lines*, WALL ST. J. (Nov. 6, 2016, 1:39 PM), http://www.wsj.com/articles/u-k-political-parties-draw-new-brexit-battle-lines-1478446584.

15. Jason Douglas & Jenny Gross, *'Brexit' Sparks Political Turmoil Across U.K.*, WALL ST. J. (June 26, 2016, 7:58 PM), http://www.wsj.com/articles/brexit-fallout-roils-u-k-labour-party-1466937187.

16. Chip Cummins, *U.K. Businesses Issue Plea for More Say in Brexit Talks*, WALL ST. J. (Oct. 8, 2016, 9:55 AM), http://www.wsj.com/articles/u-k-businesses-urge-government-to-retain-access-to-eu-single-market-1475920137.

17. *Fear of the Maple Menace*, ECONOMIST (July 16, 2016), http://www.economist.com/news/europe/21702231-one-brussels-biggest-trade-deals-looks-uncertain-after-brexit-fear-maple-menace.

18. *Mind Your Step*, ECONOMIST (Oct. 8, 2016), http://www.economist.com/news/britain/21708264-theresa-may-fires-starting-gun-what-looks-likely-be-hard-brexit-taking-britain-out.

19. *Id.*

20. Richard Barley, *Brexit Turns Ugly for Pound, Gilts*, WALL ST. J. (Oct. 7, 2016, 4:50 PM), http://www.wsj.com/articles/brexit-turns-ugly-for-pound-gilts-1475840667.

movement of workers requirement.[21] The anti-integration fervor in Europe threatened to put a proposed trade agreement between the European Union and Canada, the Comprehensive Economic and Trade Agreement ("CETA"), in jeopardy.[22] The CETA trade pact was subject to thirty challenging national and regional legislative approvals and for a brief period was held up by politicians in Wallonia, a Belgian regional government, for fear of Canadian competition in the dairy industry.[23] Additionally, some member-states do not appreciate the fact that their citizens may still need a visa to visit Canada.[24] The EU and Canada, however, recently signed the CETA free trade agreement.[25] Ironically, this agreement could serve as a blueprint for a future agreement between the EU and the United Kingdom when the latter officially leaves the EU.[26]

B. The Threat to Free Movement of Goods Around the World

Generally, global trade increases economic growth by moving production where it is most efficient.[27] However, global trade is moving at its slowest pace since the financial crisis in part due to the rising anti-globalization sentiment.[28] Politicians around the world are erecting barriers to trade in an attempt to boost short-term domestic growth.[29] Those running for office in the

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21. *See* Nathan Hodge, *Brexit Spurs Worries in Ukraine Over Its Future with EU*, WALL ST. J. (July 3, 2016, 2:31 PM), http://www.wsj.com/articles/brexit-spurs-worries-in-ukraine-over-its-future-with-eu-1467570052.

22. *Fear of the Maple Menace*, *supra* note 17.

23. Viktoria Dendrinou, *Brexit Vote Clouds EU-U.S. Trade Deal*, WALL ST. J. (July 19, 2016, 7:33 PM), http://www.wsj.com/articles/brexit-vote-clouds-eu-u-s-trade-deal-1468971211; *Wallonia Is Adamantly Blocking the EU's Trade Deal with Canada*, ECONOMIST (Oct. 22, 2016), http://www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia.

24. *Fear of the Maple Menace*, *supra* note 17.

25. Viktoria Dendrinou & Julia-Ambra Verlaine, *EU, Canada Sign Landmark Free-Trade Agreement*, WALL ST. J. (Oct. 30, 2016, 3:44 PM), http://www.wsj.com/articles/eu-canada-prepare-to-sign-ceta-trade-deal-1477831000.

26. *Id.*

27. Paul Hannon & William Mauldin, *World Trade Set for Slowest Yearly Growth Since Global Financial Crisis*, WALL ST. J. (Sept. 27, 2016, 5:16 PM), http://www.wsj.com/articles/world-trade-seen-growing-at-weakest-pace-since-financial-crises-1474965904.

28. *Id.*

29. *Id.*

United States and Europe are hammering international trade while riding the wave of political populism, thus damaging chances at further trade agreements.[30] Even in emerging markets, governments are proffering localization rules binding firms to hire domestic workers and invest within their polities.[31] Both trade in goods and cross-border lending are in decline.[32] One estimate is that if global free trade ended, the purchasing power of the wealthy would decline by 28 percent but the purchasing power of the truly poor would drop by 63 percent.[33]

Likewise, in the United States there is a political wave of anti-globalism threatening the ratification of the Trans-Pacific Partnership ("TPP").[34] Ironically, most Americans favor free trade but have a particular problem with the TPP due to the false yet popular belief that the trade pact includes China.[35] What is true is that trade between the United States and China has increased significantly since 2000 and only 12 million workers in the United States are employed in manufacturing.[36] The United Kingdom's decision to leave the EU has also made a trade agreement between the United States and the EU quite fragile.[37] The United States sends approximately 25 percent of its exported products to the EU through the United Kingdom.[38]

C. The Free Movement of Goods and the TFEU

Article 34 (ex 28, 30) of the Treaty on the Functioning of the European Union ("TFEU") is a relatively short article and reads

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30. *Id.*

31. Ian Talley & William Mauldin, *Worries Deepen that Globalization Is Hitting the Skids*, WALL ST. J. (Oct. 6, 2016, 9:14 PM), http://www.wsj.com/articles/worries-deepen-that-globalization-is-hitting-the-skids-1475779212.

32. *Id.*

33. *Why They're Wrong*, ECONOMIST (Oct. 1, 2016), http://www.economist.com/news/leaders/21707926-globalisations-critics-say-it-benefits-only-elite-fact-less-open-world-would-hurt.

34. *The Problematic Proposal*, ECONOMIST (Aug. 13, 2016), http://www.economist.com/news/finance-and-economics/21704789-shifts-global-trade-patterns-are-fuelling-new-anti-trade-fervour.

35. *Id.*

36. *Id.*

37. Dendrinou, *supra* note 23.

38. *Id.*

succinctly, "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[39] The purpose of Article 34 is to liberalize and promote trade between member-states without restrictions yet also attempt to strike a balance between market liberalization and national sovereignty.[40] The focus of Article 34 has been to combat non-fiscal limitations that member-states may place on goods coming into that member-state from another member-state.[41] The Framers of the Treaty of Rome (1957) did not believe that the removal of customs duties and taxation hurdles would have been enough to create a common market for goods, and thus barriers of a non-economic nature would have to be prohibited–which is the function of Articles 34 and 35 (ex 29, 34).[42] For the most part, according to the ECJ, "[a] quantitative restriction is a limit on the amount of imports" coming into a member-state.[43] Traditional limitations on imports would include quotas, bans, and licensing requirements.[44] However, the ECJ has interpreted Article 34 to prohibit restrictions member-state governments may place on imports even if they are not literal limits, such as regulations that might have the equivalent effect of a literal limitation on imported goods.[45] Over time, Article 34 has been interpreted broadly to include both direct and indirect measures that negatively affect the movement of goods across member-state boundaries.[46] For example, member-state regulations concerning the shape, content, packaging, and labeling of goods which, technically, are not quantitative

39. Consolidated Version of the Treaty on the Functioning of the European Union art. 34, Oct. 26, 2012, 2012 O.J. (C 326) 47, 61 [hereinafter TFEU].

40. CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 120 (4th ed. 2013).

41. *Id*. at 71.

42. MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 289 (7th ed. 2012). Article 35 (ex 29, 34) of the TFEU, *supra* note 39, states: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between member-states."

43. DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS 746 (2d ed. 2010) (citing Case 2/73, Geddo v. Ente Nazionale Risi, 1973 E.C.R. 865).

44. *See* BARNARD, *supra* note 40, at 71 (classifying these examples as non-fiscal barriers to trade).

45. CHALMERS ET AL., *supra* note 43, at 746.

46. BARNARD, *supra* note 40, at 71.

restrictions yet have been found to violate Article 34's guarantee of free movement of goods.[47] Article 34 does not define "quantitative restriction," nor does it define the phrase "measures having equivalent effect."[48] A common justification for putting into place a limitation on imports is to protect consumers.[49] In fact, reasons of "public health" and "consumer protection" are the two most common grounds invoked by member-states to limit the free movement of goods which are valid grounds pursuant to Article 36 (ex 30, 36) of the TFEU.[50] The scope of Article 34 applies to any governmental or quasi-governmental body exercising authority pursuant to public law.[51]

II. PURPOSE OF THIS WORK

There are several objectives collectively supporting the purpose of this work. First, this paper will acquaint the reader with the basic rules associated with the free movement of goods as required by the EU's common market, and as espoused by the ECJ, that support Article 34's general ban on measures that interfere with the free movement of goods. Second, this work will divulge and explain the various exceptions to Article 34 allowable pursuant to Article 36. Third, and more specifically and importantly, this work will provide the practitioner with a working knowledge of when and how member-states can protect their citizens from goods coming from other member-states on consumer protection grounds. Fourth, and relatedly, this work will explore the level of discretion maintained by the

47. *Id*. at 73.

48. ALINA KACZOROWSKA, EUROPEAN UNION LAW 521 (3d ed. 2013).

49. CHALMERS ET AL., *supra* note 43, at 767.

50. BARNARD, *supra* note 40, at 174. Article 36 (ex 30, 36) of the TFEU, *supra* note 39, states

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

51. HORSPOOL & HUMPHREYS, *supra* note 42, at 290.

member-states as defined by the ECJ.

III. CASE LAW OF THE EUROPEAN COURT OF JUSTICE

A. Product Contents

When there is an absence of harmonizing law in the EU on a particular product, the ECJ will grant member-states significant authority to regulate the production, marketing, distribution, and consumption of that product within its territorial boundaries so long as the member-state's regulation does not amount to a quantitative restriction on imports as prohibited by Article 34 (ex 28, 30) of the TFEU.[52] The defendant in *Gilli* was charged with violating Germany's prohibition against the sale of products with acetic acid not derived from the fermentation of wine by importing apple vinegar containing acetic acid.[53] The ECJ commented that such a restriction on apple vinegar would be upheld in the face of Article 34 if: (1) the restriction applied equally to imports and domestic products, (2) the restriction is necessary to protect human health, and (3) the restriction is considered fair in regard to commercial transactions.[54] The ECJ first questioned whether the apple vinegar in question maintained injurious substances, which it answered in the negative.[55] Second, the ECJ reasoned that any concern that Germany may have in regard to acetic acid could be remedied by a label letting consumers know that the apple vinegar contained the ingredient.[56] Third, and most importantly, the ECJ found that the German prohibition on acetic acid not derived from the fermentation process was a means to merely protect the domestic production of apple vinegar; thus, the prohibition was a quantitative measure illegally interfering with the free movement of goods.[57]

The Italian government went as far as admitting to promote their durum wheat industry when defending its prohibition

52. Case 788/79, Criminal Proceedings Against Gilli & Andres, 1980 E.C.R. 2071, ¶ 5.

53. *Id.* ¶¶ 1-2.

54. *Id.* ¶ 6.

55. *Id.* ¶ 7.

56. *Id.* ¶¶ 7-8.

57. *Id.* ¶¶ 10-12.

against pasta made from either wholly common wheat or a mix of common wheat and other wheats in *Glocken v. USL*.[58] Indeed, the Italian government went as far as stating that otherwise there did not exist a legitimate rationale for some of its regions to change crops.[59] The Italian government put forth three additional grounds in defense of its pasta law: (1) it wanted to guarantee the quality of the pasta, since, according to the Italian government, it was well-known that durum wheat pasta cooks better than its counterparts; (2) to provide protection for consumers, since consuming the large amounts of chemical additives and colorants associated with common wheat-based pastas is harmful to human health; and (3) labels would not be sufficient to warn Italian consumers that pasta products for sale in a retail environment were made from something other than purely durum wheat.[60] More specifically in regard to the third argument, the Italian government contended that Italian consumers have certain expectations about their pastas, including that only durum wheat is used.[61] Relatedly, the Italian government feared that manufacturers and marketers of pasta with a blend of common wheat and durum wheat would overstate the percentage of durum wheat in the pasta to which Italian consumers would not be able to test the pasta in the retail setting before purchase to determine the integrity of the labeling.[62]

Problematically for the Italian government, it could not provide any information that consuming additives and colorants associated with common wheat-based pasta created any health hazards.[63] The ECJ also believed that a labeling requirement for pasta both in a retail setting and in a restaurant would be sufficient to warn Italian consumers that they may be consuming pasta that contained common wheat, and reminded the Italian government of its strong authority to require content labeling.[64]

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58. Case 407/85, 3 Glocken GmbH & Gertraud Kritzinger v. USL Centro-Sud & Provincia autonoma di Bolzano, 1988 E.C.R. 4233, ¶¶ 2, 5.

59. *Id.* ¶ 5.

60. *Id.* ¶¶ 5, 12, 19.

61. *Id.* ¶¶ 15-16.

62. *Id.* ¶ 21.

63. *Id.* ¶¶ 12-13.

64. *Id.* ¶ 20.

Furthermore, any labeling requirement would serve as a less restrictive means in comparison to a complete ban on common wheat pasta.[65] Moreover, the ECJ found that the Italian government did not use the term "pasta" as a discriminating label to distinguish between common wheat pasta and durum wheat pasta, thus nullifying Italy's argument that to Italians the term "pasta" only meant durum wheat pasta.[66] On the issue of protecting durum wheat farmers, the ECJ found that durum wheat pasta was actually outperforming its counterparts in the export markets where Italy's pasta content rules were inapplicable so there was no need to protect the durum wheat market within Italy.[67] In the end, the ECJ found Italy's pasta content rules violated Article 34 (ex 28, 30) as a quantitative restriction on imports which could not be saved by the public health clause of Article 36 (ex 30, 36).[68]

The Netherlands government in *Criminal Proceedings Against Kelderman* contended that Article 34 (ex 28, 30) was not violated since its bread law allowed the assigned minister to have broad authority to grant exemptions to regulations concerning bread; however, the ECJ disagreed.[69] Here, Kelderman was charged with violating a general bread law—the "broodbesluit," enacted in 1925 by the Dutch government—which, among other things, set a limit for dry matter in bread. The Dutch government argued that the importer's brioches from France were not in compliance with the broodbesluit since they maintained 300 grams of dry matter for every 400 grams of fresh product.[70] According to the Dutch government, the broodbesluit was designed to ensure consumer protection, protect the public health, and further fair trading by setting requirements for the description of bread products.[71]

The ECJ commented that it is tolerable to maintain

65. *Id.* ¶ 22.

66. *Id.* ¶ 20.

67. *Id.* ¶ 27.

68. *Id.* ¶ 28.

69. Case 130/80, Criminal Proceedings Against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527, ¶¶ 2, 14, 16.

70. *Id.* ¶¶ 2-3.

71. *Id.* ¶ 3.

differences among the member-states in regard to the marketing of products so long as these differences are supported by a need to protect human health, promote consumer protection, and ensure fair trading.[72] However, the ECJ was also concerned that the application of these differences may require goods producers to vary the method of manufacture according to each member-state's regulations, which could limit the free flow of goods (bread in this case) across member-state lines. The ECJ further noted that while it is noble to want to ensure Dutch citizens receive sufficient nutritive content in bread, the court could not accept this as a defense for differences in bread content across the member-states since the dry matter requirements were set based on concerns over bread sizes, not nutrition.[73] According to the ECJ, if the Netherlands' government's concern was the actual size and weight of bread products and there existed a need to protect consumers to make sure they were getting the amount desired, a labeling requirement would be more suitable.[74] The ECJ was equally suspicious about the Dutch government's assertion that broad administrative discretion creating the ability to freely provide exemptions to the bread law would save the Dutch law in the face of Article 34 and commanded that the free movement of goods is a right that cannot be dependent upon the discretionary power of a member-state.[75]

The ECJ has held that a member-state may regulate the use of food additives under Article 36 (ex 30, 36) even if the result is a difference in treatment between domestic goods and exported goods.[76] In *Koninklijke*, the Netherlands government charged a cheese producer for violating rules on the additive nisin, a naturally occurring antibiotic used to preserve cheese.[77] The nisin ban only applies to cheese that is produced for domestic consumption but does not apply to cheese produced in the

72. *Id.* ¶ 6.

73. *Id.* ¶¶ 7, 9-10.

74. *Id.* ¶¶ 11-12.

75. *Id.* ¶ 14.

76. Case 53/80, Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 409, ¶ 17.

77. *Id.* at 410-11.

Netherlands for export.[78] The defendant alleged that his conviction could not stand because the Netherlands' Economic Offences Act violated Articles 34 (ex 28, 30) and 35 (ex 29, 34), and could not be justified under Article 36, on the grounds of protecting human health because of the disparate treatment given to cheese depending upon whether it was sold domestically or exported.[79]

This case shows how diverse cultures within the EU have struggled to integrate. One of the claims made by the defendant, specifically to the application of Article 34, is that nisin is not banned in other member-states and is regulated on different levels.[80] Despite these facts, the ECJ upheld the Dutch law allowing the disparate treatment on the grounds that each member-State can regulate food additives due to the fact that the dietary needs of those living in other member-states are different, and that even studies by the World Health Organization and the Food and Agriculture Organization have not determined the dangerousness of nisin.[81] Additionally, the ECJ did not find that the Dutch regulation was arbitrary or a disguised restriction on trade between the member-states because of the uncertainty of the health dangers of nisin; thus it could be justified by Article 36.[82] However, the ECJ did seem to send a message to the European Council that uniform rules on food additives could help eliminate these potential barriers to the free flow of goods because of the variation of national law.[83]

Within this greater discretion to regulate food products in the name of protecting human health and life lie foods supplemented by vitamins.[84] In *Sandoz*, the Dutch government denied a permit to Sandoz who wished to sell nutritional bars and beverages supplemented with vitamins A and D.[85] Upon application to the

78. *Id.* at 411.

79. *Id.* ¶ 7.

80. *Id.* ¶¶ 9-11.

81. *Id.* ¶ 13.

82. *Id.* ¶¶ 16-17.

83. *See id.* ¶¶ 14-15.

84. Case 174/82, Criminal Proceedings Against Sandoz BV, 1983 E.C.R. 2445, ¶¶ 15, 17.

85. *Id.* at 2448.

Dutch government for a license to market the products, the government stated that the license could only be granted if Sandoz could show that there was a market demand for the product and the product was not harmful to health.[86] Sandoz challenged the rejection of the application on the grounds that it violated Article 34 (ex 28, 30) and could not be sustained by a derogation from Article 36 (ex 30, 36) since the products could lawfully be sold in both Germany and Belgium.[87]

In upholding the denial of the marketing license, the ECJ ruled that vitamin additives were indeed food additives and relied on the common theme that since there was great variation in the national laws of member-states on vitamin additives and research on vitamin additives was uncertain, member-states could regulate them under Article 36 without infringing upon the free movement of goods under Article 34's ban on quantitative restrictions.[88]

However, the ECJ did make two other strong statements in regard to the Dutch government's policies. First, a member-state cannot, without infringing upon Article 34, order a firm to produce proof that the product is safe for human consumption without examining the totality of information held by the producer/importer about their product.[89] Second, and perhaps most important in light of Article 34, a member-state can base a licensing decision on whether the producer/importer can show there is a market for the product with that member-state.[90]

Inclusive in the definition of food additives, and representing an area that the ECJ has given member-states an equal amount of discretion, are pesticides. In *Ministère Public v. Mirepoix*, the ECJ upheld a French government ban on vegetables imported into France which had "maleic hydrazide," a growth inhibiting

86. *Id.*

87. *Id.*

88. *Id.* ¶¶ 7-8. Interestingly enough, the ECJ delved deeper into the world of food nutrition with a discussion on whether vitamin additives, especially those which are fat soluble like Vitamins A and D, should be judged on their use alone or in conjunction with a diet that could lead to intensified harmful side-effects. *Id.* ¶ 9.

89. *Id.* ¶ 24.

90. *Id.* ¶¶ 25-27.

pesticide, applied to them.[91] The defendant in *Mirepoix* argued that since the pesticide is allowed in other member-states, the French ban infringes upon Article 34 (ex 28, 30) and cannot be upheld in light of Article 36 (ex 30, 36) as a necessary protection for human health and life since the harmful effects of maleic hydrazide are uncertain.[92]

The ECJ found that the ban on the pesticide was permitted under Article 36, and thus did not violate Article 34. According to the ECJ, since each member-state is given the discretion to regulate the treatment of foodstuffs due to the void of EU law, different populations maintain different eating habits. Because there is indeed a level of uncertainty about the effects of maleic hydrazine, different climates require the use of, and thus permit, different pesticides.[93] However, the ECJ did articulate that such bans on pesticides should be stated in policy and easily obtainable for the potential importer.[94]

At issue in *Criminal Proceedings Against Van der Veldt* was whether Belgium's limit on the amount of salt added to bread as a preservative was a proportional measure designed to protect public health.[95] Belgian law at the time required that bread maintain a salt content not greater than 2 percent; however, the bread products imported from the Netherlands by the defendant were tested by the Belgian government to maintain salt levels of 2.11 percent and 2.17 percent.[96] The Netherlands, also an EU member-state, required that bread products not exceed a salt content of greater than 2.5 percent.[97] Although the ECJ mentioned that, in the absence of EU-wide harmonizing rules on particular food products, member-states have the ability to regulate the manufacturing and marketing of those food products within their borders, the ECJ found that Belgium's salt content

91. Case 54/85, Ministère Public v. Mirepoix, 1986 E.C.R. 1067, ¶ 2.

92. *Id.* ¶ 7.

93. *Id.* It was also important that the pesticide was banned for all foodstuffs in France that were domestically grown for domestic use. *Id.* ¶ 2.

94. *Id.* ¶ 17.

95. Case C-17/93, Criminal Proceedings Against Van der Veldt, 1994 E.C.R. I-3537, ¶¶ 13, 15.

96. *Id.* ¶ 4.

97. *Id.* ¶ 8.

restrictions in bread products constituted a quantitative restriction that violated Article 34 (ex 28, 30); arguably, Belgium's lower content ceiling could force bread producers elsewhere, i.e., the Netherlands, to change their manufacturing methods, which would ultimately affect the overall movement of bread products across member-states.[98]

However, the ECJ did leave room for Belgium to justify its limitations on salt content on public health grounds as permitted by Article 36 (ex 30, 36).[99] According to the ECJ, the salt content limitations set by the Belgian government can only be upheld on Article 36 grounds if the limitations are proportionate to Belgium's aims to protect public health.[100] In order to establish that its food content limitations are legitimately tied to a concern for public health, a member-state must justify the limitations based on scientific research, which the ECJ decided the Belgian government was unable to do.[101] More narrowly, the ECJ found Belgium's claim that a person's intake of salt would increase by 0.6 grams per day if he or she consumed bread made in the Netherlands instead of Belgian bread was closer to general conjecture than scientific research.[102] Perhaps more importantly, the ECJ stated that consumers concerned with higher salt intake would benefit more from Belgian labeling requirements that would notify Belgian consumers of the higher salt intake associated with bread from the Netherlands, and that such use of labeling requirements would protect public health without restricting free movement of goods.[103]

Seven years later, the ECJ addressed the same Belgian restriction on salt found in bread, and once again held that the limitation constituted a measure having the equivalent effect to a quantitative restriction on the free movement of goods in violation of Article 34 (ex 28, 30).[104] Even while referencing its decision in

98. *Id.* ¶¶ 10-12.

99. *Id.* ¶ 13.

100. *Id.* ¶ 15.

101. *Id.* ¶¶ 17-18, 20.

102. *Id.* ¶¶ 16-17.

103. *Id.* ¶ 19.

104. Case C-123/00, Criminal Proceedings Against Bellamy & English Shop Wholesale SA, 2001 E.C.R. I-795, ¶ 12.

Van der Veldt, the ECJ, without much comment, stated that the salt content limitation could not be justified pursuant to Article 36's (ex 30, 36) public health clause.[105]

Bellamy, however, had an additional component to it, as the ECJ was asked to determine whether the Belgian advertising law could be justified pursuant to Article 36 (ex 30, 36).[106] Bellamy, the defendant, imported foodstuffs into Belgium from the United Kingdom and was charged with importing bread with a salt content of 2.88 percent in addition to violating Belgian advertising law, which prohibited retailers from giving the impression that imported foodstuffs had certain unique qualities (when in reality all similar foodstuffs have such qualities) and from failing to use a clear, visible description of the foodstuffs.[107] The question here focused on the milk that Bellamy was importing, which she argued was a very common foodstuff with characteristics and qualities for which consumers are familiar and there is little risk to any purchaser being misled.[108] Once again, the ECJ reminded readers that member-states are free to regulate goods within their borders in regard to designation, form, size, weight, composition, presentation, labeling, and packing when there is a void in EU-wide harmonizing law, but such domestic regulations cannot violate Article 34 (ex 28, 30) even if the regulations do not create a distinction among those products unless there is a public interest objective met pursuant to Article 36.[109]

The ECJ then introduced a discussion on the application of Directive 79/112 to the facts in the case at bar.[110] Directive 79/112 was designed to assist member-states with harmonizing their food product labeling and presentation laws in an attempt to better inform consumers; Article 2 of the Directive prohibits labeling methods that could mislead a consumer, such as suggesting that a foodstuff item has certain unique characteristics when, in fact, all similar foodstuffs have the same

105. *Id.*
106. *Id.* ¶ 14.
107. *Id.* ¶¶ 7-8.
108. *Id.* ¶¶ 14-16.
109. *Id.* ¶ 18.
110. *Id.* ¶ 19.

qualities.[111] The ECJ focused on the Belgian government's application of its law with the discussion of Directive 79/112 in mind, where an importer could be charged with violating a domestic labeling law which required a description of a foodstuff and without that description a consumer might be misled, and if that application can be justified pursuant to Article 36.[112] However, the ECJ provided no answer to the question due to the fact that there was a discrepancy in the facts as presented by the Belgian government and the Commission.[113]

The ECJ perhaps did the best job of articulating the various interests and arguments capable of being proffered in regard to a member-state's attempt to regulate the contents of a food product against the common market's requirement of free movement of goods in *Commission v. Spain*.[114] In the case at bar, the European Commission brought an action against the Spanish government for failure to meet its obligations under Article 34 (ex 28, 30) in regard to Spain's requirement that food products advertised as chocolate not contain any fats other than cocoa butter.[115] Directive 73/241 actually set the requirements for ingredients that could be considered chocolate, including a minimum total dry cocoa solids content of 35 percent with at least 14 percent of dry non-fat cocoa solid content and 18 percent cocoa butter, but also recognized that many member-states permitted the use of vegetable fats other than cocoa butter in chocolate products.[116] According to the ECJ, Directive 73/241 only set minimum requirements for chocolate products in the EU and is separate from any member-state law that allows for additional contents, such as vegetable fats, in conjunction with or in substitute of cocoa butter.[117] Furthermore, the ECJ stated that Directive 73/241 allows member-states to authorize the use of other fats, such as vegetable fats, in the creation of chocolate products other than cocoa butter and a member-state's prohibition against the

111. *Id.* ¶ 19-20.
112. *Id.* ¶ 23.
113. *Id.* ¶ 26.
114. Case C-12/00, Comm'n v. Spain, 2003 E.C.R. I-459.
115. *Id.* ¶¶ 1, 20.
116. *Id.* ¶¶ 4, 89.
117. *Id.* ¶ 90.

use of other fats cannot be justified on the grounds that the product could no longer qualify as chocolate so long as the minimum stated requirements pursuant to Directive 73/241 are met.[118] Additionally, in such circumstances, a member-state is not permitted to require a manufacturer or importer to change the name of the product, such as here where the Spanish law required food products containing anything but cocoa butter to be labeled "chocolate substitute," and a mere labeling requirement that identified the ingredients of the product would be sufficient to protect consumers without damaging the product's competitiveness in the marketplace.[119]

The European Commission put forth several arguments that collectively articulated its position. First, the Commission stated that six member-states allowed the term "chocolate" to apply to food products that contained up to 5 percent vegetable fat.[120] Second, as identified earlier, Directive 73/241 only states the minimum ingredients necessary to identify a food product as "chocolate"; the addition of other ingredients does not necessarily diminish the food product.[121] Third, and perhaps more germane to the free movement of goods, the Commission contended that if Spain's limitation were to be upheld, there would be two sets of member-states for the purposes of what is and what is not considered "chocolate."[122] Fourth, and also significant to the free movement of goods, the Commission believed that Spain's limitation on chocolate content would create additional packaging, labeling, and marketing costs for businesses bringing products containing vegetable fats into the Spanish market.[123] Fifth, and certainly in line with the third and fourth arguments, the Commission believed the use of the term "substitute" as would be required for products containing vegetable fats associated the product with a negative connotation and would damage its

118. *Id.* ¶¶ 91-92.

119. *Id.* ¶¶ 22, 93-95.

120. *Id.* ¶ 29. These member-states included Denmark, Finland, Ireland, Portugal, Sweden, and the United Kingdom. *Id.*

121. *Id.* ¶ 30.

122. *Id.* ¶ 31.

123. *Id.* ¶ 34.

marketability.[124] Lastly, the Commission did not believe the Spanish rule on chocolate could be justified on consumer protection grounds when a simple, neutral, and objective indication of vegetable fat content could be placed on the product which, on balance, would be better than restricting the free movement of goods.[125]

In turn, the Spanish government first argued that Directive 73/241 did not and was not intended to harmonize the rules on chocolate products across the EU and that since chocolate production was the domain of domestic law, an internal market on chocolate did not exist.[126] Second, the Spanish government articulated that its law was not a measure reflecting the equivalent of a quantitative restriction on the free movement of goods but instead was merely regulating a selling arrangement in that products with vegetable fats would be labeled "chocolate substitute" and such a rule would apply equally to domestic and international producers.[127] Third, Spain contended the phrase "chocolate substitute" was not a negative term, but rather reflected an objective reality that merely better informs the consumer and does not increase labeling, marketing, and production costs since importers must still label products coming into Spain in a way that conveys information easily to the consumer.[128] Fourth, Spain did not believe that it should be required to allow the term to apply to products with vegetable fat content merely because six member-states allow vegetable fat content in products labeled "chocolate."[129] Lastly, the Spanish government stated that the prohibition of vegetable fat in products eligible to be labeled "chocolate" is necessary because Spanish consumers expect only cocoa butter in chocolate and a small notation of vegetable fat as an ingredient would not mean anything to a Spanish consumer while the use of the term "chocolate substitute" could be used to identify quality, taste, consistency, and durability of the vegetable fat-contained

124. *Id.*
125. *Id.* ¶ 37.
126. *Id.* ¶ 39.
127. *Id.* ¶ 42.
128. *Id.* ¶¶ 44-45.
129. *Id.* ¶ 49.

product.[130]

The ECJ found that, despite the richness of both sets of arguments, Spain's prohibition against vegetable fat in products eligible to be labeled "chocolate" and the mandate that products with vegetable fat be labeled "chocolate substitute" was not in compliance with Article 34.[131] Regarding Spain's argument that it was merely regulating a selling arrangement, the ECJ likewise found that anytime a product manufacturer was obliged to alter its labeling and packaging of goods to be imported into another member-state, a selling arrangement was not being regulated but rather a measure equivalent to a quantitative restriction is created.[132]

In *Morellato*, the ECJ held that the Italian government violated Article 34 (ex 28, 30) of the TFEU by requiring bread products for sale in Italy to contain no more than 34 percent moisture content and at least 1.4 percent ash content, and be made without bran.[133] In this fairly short case, the Italian government tested the bread products of the importer and found that they exceeded the moisture content limit (at 38.4 percent), had less ash than required (1.05 percent), and contained bran.[134] Once again, the ECJ's chief concern in regard to the free movement of goods was that a bread producer in another member-state would be forced to change its product-making ways, despite the fact that the goods producer was meeting the domestic legal requirements for that good, thus increasing the associated manufacturing costs in order to make the product legally available for sale in Italy.[135] Specific to the free movement of goods, the ECJ's concern was that such product content requirements could serve as a limitation on the free movement of goods.[136] Although the Italian government was free to justify the bread content requirements on public health grounds pursuant to

130. *Id.* ¶ 48.

131. *Id.* ¶ 98.

132. *Id.* ¶¶ 75-78.

133. Case C-358/95, Morellato v. Unità Sanitaria Locale (USL) No 11, Pordenone, 1997 E.C.R. I-1431, ¶¶ 5, 16.

134. *Id.* ¶ 5.

135. *Id.* ¶ 11.

136. *Id.* ¶¶ 11, 13.

Article 36 (ex 30, 36), the Italian government proffered no such evidence and the ECJ noted that the government allowed other bread products to be imported into Italy that did not meet the stated content requirements being challenged in *Morellato*.[137]

The fat content of cheese was at issue in *Ministère Public v. Deserbais*.[138] Here, the defendant was charged with violating French legislation requiring any cheese with the label "Edam" to have a minimum fat content of 40 percent; in contrast, the defendant's imported cheese from Germany which maintained the name Edam only contained 34.3 percent fat.[139] The French government had adopted the legislation pursuant to the International Convention on the Use of Designations of Origin and Names for Cheeses ("Stresa Convention"), crafted in 1951.[140] Following a conviction and an assessed fine, the defendant argued on appeal that the French minimum fat content requirement was a violation of Article 34 (ex 28, 30) of the TFEU since the imported cheese, with the "Edam" label attached, had been lawfully created and sold in Germany, another member-state of the EU.[141] In *Deserbais*, the ECJ limited its discussion to a balance between a member-state's rights to reserve trade names for certain products against the need for free movement of goods as required by Article 34, but also found that "Edam" was more so a type of cheese and not a region whereby a member-state would have much more ability to limit the use of a trade name to specify a region versus the name of a type of cheese.[142] The ECJ mentioned that although EU law had not been harmonized in a particular area of law such as cheese designation law at the time this decision was reached, Article 34 will not tolerate a member-state's ability to require a particular type of cheese to have a minimum fat content if that same cheese with the same name has been legally made and marketed in another member-state.[143] In regard to the Stresa Convention, the ECJ commented that such international

137. *Id.* ¶¶ 14-15.

138. Case 286/86, Ministère Public v. Deserbais, 1988 E.C.R. 4907.

139. *Id.* ¶ 2.

140. *Id.*

141. *Id.* ¶¶ 4-6.

142. *Id.* ¶¶ 8-9.

143. *Id.* ¶¶ 12-13, 19.

agreements are guidelines, not binding law, that member-states should follow but not to the point where wholesale conformation in regard to food contents restricts the free movement of goods as required by Article 34.[144] The ECJ also stated that the Stresa Convention was signed before the EU's existence, in 1951, and only Denmark, France, Italy, and the Netherlands are members.[145]

In *Criminal Proceedings Against Guimont*, the ECJ stressed the importance of nomenclature related to Emmenthal cheese to find that a French law requiring that form of cheese to be sold with a rind violated Article 34's (ex 28, 30) prohibition against measures having an equivalent effect to a quantitative measure limiting the free movement of goods.[146] The French law required cheese labeled "Emmenthal" not only to include a rind but also to meet certain requirements pertaining to color and manufacturing methods.[147] The defendant, Guimont, was assessed a fine via the criminal charge of "selling or offering a foodstuff with a deceptive labelling" for selling cheese under the name "Emmenthal" when the cheese product did not contain a rind.[148] Guimont's chief argument, in an attempt to show that the French law on cheese content infringed upon Article 34, was that the term "Emmenthal" was a generic term used in several EU member-states and the label was routinely used on packages of cheese sold without rinds; thus, such a restriction on such cheese in place would limit trade of these cheese products across the member-states.[149]

144. *Id.* ¶ 14-15, 18.

145. *Id.* ¶ 16.

146. Case C-448/98, Criminal Proceedings Against Guimont, 2000 E.C.R. I-10663, ¶¶ 4, 35.

147. *Id.* ¶ 4. According to French law, Emmenthal cheese was described as "a firm cheese produced by curing, pressing and salting on the surface or in brine; of a colour between ivory and pale yellow, with holes of a size between a cherry and a walnut; hard, dry rind, of a colour between golden yellow and light brown." *Id.*

148. *Id.* ¶¶ 3, 5. The French labeling law stated "[t]he labels and labelling methods used must not be such as to give rise to confusion in the mind of the purchaser or the consumer, particularly as to the characteristics of the foodstuff and, specifically, as to its nature, identity, properties, composition, quantity, durability, method of conservation, origin or provenance, method of manufacture or production." *Id.* ¶ 3.

149. *Id.* ¶ 9.

The French government began its defense of the rind requirement for Emmenthal cheese to be sold within its borders by arguing that Article 34 does not apply in such a case since the regulation did not apply to imported cheese products and was designed only to apply to domestic producers of Emmenthal cheese.[150] The ECJ quickly dismissed the French government's argument stating Article 34 applies to any domestic law that is capable, either directly or indirectly, actually or potentially, of restricting trade in goods across the member-states and that the French law in question would clearly have an impact on both domestic and imported Emmenthal cheese products.[151] The ECJ did state that Article 34 restricts a member-state to require that products of a national origin enjoy the same legal treatment as imports in all situations and a difference in legal treatment is possible if that difference does not restrict trade in goods across the member-states.[152] The ECJ also showed great concern for a member-state to be able to limit the application of a generic term that is associated with a food product such as cheese, and a member-state's ability to restrict the use of this term may restrict the free movement of goods.[153] However, different legal treatment, and thus different legal requirements, are only permissible when the difference between the domestic good and the imported good is more than a minor difference and the difference, in order to be significant enough to justify different treatment, must be based on composition or production.[154] In specific regard to the facts of *Guimont*, the ECJ found the only difference between the defendant's Emmenthal cheese product and the product otherwise regulated and appropriately labeled by French law is the maturing stage of the production process, and that the rind was not a significant enough difference to justify a French restriction on the use of the name "Emmenthal" —especially when the defendant's cheese product was lawfully made and sold in another member-state.[155]

150. *Id.* ¶¶ 13-14.
151. *Id.* ¶¶ 15-17.
152. *Id.* ¶ 15.
153. *Id.* ¶ 26.
154. *Id.* ¶¶ 30-31.
155. *Id.* ¶¶ 32-34.

When attempting to justify a restriction on the free movement of goods as established by member-state law and based on a concern for public health, the burden of proof rests with the member-state creating the restriction to show that a "reference consumer" would have certain expectations about a product and the restriction is necessary to protect that consumer.[156] According to the ECJ, a reference consumer is an average consumer reasonably well informed, reasonably observant, and circumspect.[157] In *Commission v. Spain*, the ECJ found Spain's requirement that any bleach cleaning products suitable for the purpose of disinfecting drinking water contain between 35 and 60 grams/liter of actual chlorine a violation of Article 34's (ex 28, 30) prohibition against restrictions on the free movement of trade.[158] It should be mentioned that *Commission v. Spain* resulted from the inability of the European Commission and the Spanish government to agree that Spain was not meeting its obligations to ensure the free movement of goods pursuant to Article 34 after the Commission notified Spain in what is called the pre-litigation procedure.[159] Pursuant to Decision 3052/95/EC, member-states must exchange information in regard to any domestic regulation that might limit the free movement of goods across the member-states in regard to a particular product.[160] The process of correspondence between Spain and the European Commission ended with a final letter to the European Commission from Spain stating that the minimum chlorine content requirement for products to be labeled "bleach" was justified on the grounds that it was needed to protect consumers and the requirement was not disproportionate to that concern.[161]

The Spanish government's chief defense for prohibiting any bleach-related cleaning agent from being labeled "bleach" unless it maintained at least 35 grams/liter of actual chlorine was based on a concern for consumer protection in that the product will not adequately control household threats such as salmonella,

156. Case C-358/01, Comm'n v. Spain, 2003 E.C.R. I-13145, ¶¶ 53-54.

157. *Id.* ¶ 53.

158. *Id.* ¶¶ 5, 61.

159. *Id.* ¶¶ 1, 3, 17.

160. *Id.* ¶ 3.

161. *Id.* ¶ 17.

campylobacter, and *E. coli* unless the 35 grams/liter threshold is met.[162] Furthermore, the Spanish government argued this threshold was even more important given Spain's climate which possessed a relatively high ambient temperature.[163] As well, Spain contended that since the minimum and maximum chlorine requirements applied equally to domestic and imported bleach-related cleaning products, there was no interference with trade across the member-states.[164] Finally, Spain showed great concern for consumers who might buy such a product labeled "bleach" without knowing that the product contained a lesser than usual amount of chlorine yet expecting that the product would maintain its traditional whitening and disinfecting properties.[165]

While both the European Commission who brought the claim and the Spanish government agreed that the chlorine content rule served as an obstacle against the free movement of goods, the two parties differed on whether the minimum chlorine requirement could be saved on public health grounds. The ECJ found that public health was not a significant enough concern to justify the obstacle.[166] Although the ECJ agreed that chlorine could be a dangerous chemical, it contended that a cleaning product with less than that amount could not be a threat to public health, and if chlorine content of less than 35 grams/liter is found in a bleach-related product, then consumers can simply be warned that such a cleaning product is not suitable for some forms of disinfection.[167] In regard to the Spanish government's concern that consumers may try to use a bleach-related product with less than 35 grams/liter for uses that are not appropriate, the ECJ once again found that a labeling requirement is more suitable to warn consumers about the limitations of such bleach-related products, and that labeling is not disproportionate to the Spanish government's objective in protecting consumers.[168]

162. *Id.* ¶ 40.
163. *Id.*
164. *Id.*
165. *Id.* ¶ 41.
166. *Id.* ¶¶ 38, 45-46.
167. *Id.* ¶¶ 46-47.
168. *Id.* ¶¶ 48-50.

Furthermore, the Spanish government could not conclusively show that a reference consumer could not be adequately informed about the limitations of a bleach-related product through a labeling requirement which would prevent inappropriate uses of the product.[169]

B. Packaging

Europeans take their wines very seriously. However, member-states may not impose restrictions on the shape of an imported wine's bottle in the name of consumer protection under Article 36 (ex 30, 36).[170] The criminal defendant in *Prantl* was importing wine into Germany in a "Bocksbeutel" bottle which, in Germany, traditionally signifies that the wine is from one of six German regions.[171] Prantl, an importer of Italian wines, was charged with violating a German wine regulation requiring that only wine originating from one of the six designated areas of Germany be sold in Bocksbeutel bottles.[172] Germany tried to support its regulation by arguing that it was necessary for consumer protection so that consumers in Germany would be assured that the wine they choose came from one of these six regions, that the regulation applies to both domestic and imported wines, and that the regulation will not have an appreciable effect on EU trade.[173]

In one of its most eloquent statements about the meaning of Article 34 (ex 28, 30), finding that the German wine regulation violated the Article, the ECJ commented:

> It must be borne in mind in the first place that Article [34] of the [TFEU] prohibits all measures having an effect equivalent to a quantitative restriction in trade between Member States. For there to be a breach of that prohibition it is sufficient that the measures in question are liable to impede, directly or indirectly, actually or potentially, trade between the Member States. It is not

169. *Id.* ¶ 56.

170. Case 16/83, Criminal Proceedings Against Prantl, 1984 E.C.R. 1299, ¶ 38.

171. *Id.* ¶¶ 2-3.

172. *Id.*

173. *Id.* ¶ 19. The ECJ, however, noted that the same Bocksbeutel bottle had a tradition in Italy "going back more than one hundred years." *Id.* at 1302.

> necessary that they should have an appreciable effect on intra-Community trade.[174]

Thus, the ECJ had no sympathy for the argument that a restriction could be justified on the grounds that it will not substantially injure trade between member-states. The ECJ reasoned that the restriction on the shape of a wine bottle did indeed protect wine producers in the designated six German regions, but to the disadvantage of other producers as they would incur substantial expenses in new packaging.[175] Further, the ECJ stated that national law cannot grant domestic producers an exclusive right to a particular packaging form.[176]

The facts of *Lebensmittelwerke v. De Smedt* are interesting and a bit rare in this line of cases in that the cause of action arose from a contract dispute between a German seller and a Belgian buyer of margarine.[177] Here, the contract between the seller and buyer required the seller to provide margarine to the buyer. However, the buyer refused to continue with the contractual arrangement when the seller was providing the products in packaging shaped in truncated cones instead of cube-shaped blocks, which the buyer believed violated Belgian requirements on the packaging and marketing of margarine, meaning the seller would not be able to retail the products.[178] Indeed, Belgian law required all margarine products be packaged in cube-shaped blocks.[179] After the buyer refused to accept further deliveries of the truncated cone-shaped margarine tubs, the seller sued the buyer for breach of contract.[180] Ironically, the buyer's chief defense to the breach was that Belgium's requirement that all margarine be packaged in cubes was not a violation of Article 34 (ex 28, 30) since the packaging requirement was necessary so that Belgian consumers could differentiate between butter and margarine in a retail setting; thus, the buyer did not have to meet

174. *Id.* ¶ 20.

175. *Id.* ¶ 23.

176. *Id.* ¶ 28.

177. Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961, ¶ 2.

178. *Id.*

179. *Id.* ¶ 3.

180. *Id.* ¶ 4.

its obligations under the contract.[181] The Belgian government suggested that no violation of Article 34 existed because earlier decisions on quantitative measures focused on product quality, which this case did not, and that the form of packaging does not serve as a restraint in the free movement of goods.[182]

The ECJ found the Belgian packaging law to be a measure having the equivalent effect of a quantitative restriction limiting the free movement of goods pursuant to Article 34 for several reasons.[183] First, the ECJ believed that a mandate to conform packaging of a product to a particular form makes the marketing and distribution of the product more difficult and more expensive.[184] Second, and perhaps more reflective of domestic protectionism, the ECJ reviewed evidence showing that there was virtually no foreign-manufactured margarine sold in Belgium.[185] Third, the ECJ did not tolerate Belgium's consumer protection argument that due to Belgian consumer habits, margarine must be packaged in cube form so that consumers can tell the difference between butter and margarine.[186] Instead, the ECJ believed a better approach would be to protect consumers by maintaining a labeling requirement so that Belgians would know whether they are purchasing butter or margarine, which would have a much lesser impact on the free movement of goods.[187] The ECJ also remarked that Directive 79/112 on the approximation of member-state law on the labeling and advertising of foodstuffs allows member-states to mandate labeling on food products so that the consumer can easily understand a label attached to a product in a conspicuous place that is easily legible and visible.[188]

Product promotions identified on a product's packaging can give rise to an action under Article 34 (ex 28, 30).[189] In *Association*

181. *Id.* ¶ 5.

182. *Id.* ¶ 11.

183. *Id.* ¶ 20.

184. *Id.* ¶ 13.

185. *Id.* ¶ 14.

186. *Id.* ¶¶ 16-17.

187. *Id.* ¶ 17.

188. *Id.* ¶¶ 18-19.

189. Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln eV. v. Mars GmbH, 1995 E.C.R. I-1923, ¶¶ 1-4.

v. Mars, a non-governmental association designed to combat unfair competition practices brought an action based on German law against an importer of novelty ice cream bars which were marked "+10%" during a short-term advertising and promotion campaign on the grounds that the price of the ice cream bars would not be restricted to the pre-promotion prices and that the packaging (wrapper) was actually more than 10 percent greater than the pre-promotion packaging, possibly leading the consumer to believe the ice cream bar was actually more than 10 percent larger than the pre-promotion ice cream bars.[190] After reminding readers that differences in marketing laws across the several member-states might be acceptable in cases where the differences are justified by concerns for consumer protection and fair trading so long as the measures taken by a member-state are proportionate to the objective pursued by the member-state and less restrictive alternatives to achieve that objection are not available, the ECJ found the association's concerns did not outweigh the greater concern for the free movement of goods under Article 34.[191]

First, in traditional fashion, the ECJ voiced the concern that such differences could force manufacturers and packagers to alter the presentation of their products to make them suitable for each member-state despite the fact that, as was the reality in this case, the goods were legally manufactured and sold in the home member-state.[192] More particular to the facts of the case, the ECJ found that there was no expectation on behalf of consumers that the price of the ice cream bar would not increase and that German law actually prohibited manufacturers from enforcing prices on retailers.[193] Relatedly, there was no evidence that the manufacturer/importer actually increased profits through the advertising campaign or any evidence that retailers actually did increase their prices.[194] Instead, the ECJ believed that a non-contractual form of pressure on retailers not to increase

190. *Id.* ¶¶ 2-4, 7-8.
191. *Id.* ¶ 15.
192. *Id.* ¶ 13.
193. *Id.* ¶ 18.
194. *Id.* ¶ 19.

prices actually benefits consumers.[195] The ECJ also did not find that consumers would expect proportionality between the extended size of the ice cream bar and the packaging and that such a fear could also not serve as an interest strong enough to trump Article 34, especially since the advertising campaign was short in duration.[196]

A member-state can require that foodstuffs subject to be sold in a vending machine be packaged.[197] In *Schwarz*, the ECJ upheld Austria's requirement that all confectionary food and similar food using sugar substitutes subject to sale in a vending machine be packaged while on display and available for purchase pursuant to the public health clause of Article 36 (ex 30, 36).[198] Schwarz, an importer of unpackaged chewing gum, faced a criminal charge by the Austrian government for violating that member-state's law requiring such products to be packaged for sale. Schwarz retorted that the Austrian law violated Article 34 (ex 28, 30) as a limitation on the free movement of goods across the EU in that firms producing such products would be harmed in contrast to their Austrian competitors.[199] Schwarz also contended that, in regard to the need for protection of public health, even a person purchasing packaged gum from a vending machine would have to unwrap the product with his or her hands; thus, risk of contamination from the delivery tray was still present.[200] Furthermore, the defendant mentioned that his unpackaged gum could be sold in Germany and Italy at present but if he were forced to package the gum, he could not sell it in those countries.[201] Interestingly, the European Commission took a fairly agnostic approach and believed that, although the Austrian law clearly created a measure having the equivalent effect as a quantitative restriction pursuant to Article 34 given the additional packaging expense that Schwarz would have to incur,

195. *Id.* ¶ 20.

196. *Id.* ¶ 25.

197. Case C-366/04, Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139, ¶ 38.

198. *Id.* ¶¶ 36, 38.

199. *Id.* ¶¶ 18-19, 21.

200. *Id.* ¶ 22.

201. *Id.*

the public health concern would save the Austrian law at present based on a set of hypothetical circumstances and that any real risk to human health would have to be based on scientific evidence available at the present time.[202]

The ECJ had little difficulty finding that the Austrian law requiring all confectionary products be packaged if subject to sale in a vending machine constituted a measure having the equivalent effect of a quantitative restriction pursuant to Article 34.[203] Specifically, the ECJ acknowledged that the packaging requirement for the sale of gum would require importers like Mr. Schwarz to package the products, making the act of importation more expensive, and that some vending machines in the EU, such as those found in neighboring Germany, are constructed for the purchase of non-packaged gum and cannot dispense packaged gum.[204] However, the ECJ found significant evidence as to the need, pursuant to the Austrian government's point of view, for vending-machine-dispensed gum to be packaged; non-packaged gum could become unsanitary as the product could be adulterated by moisture, insects, and/or a worker's hands as he or she places the unpackaged goods into the vending machine without having first washed his or her hands.[205] Additionally, the ECJ found that contamination through contact with the delivery tray inside the vending machine could expose the food product to pathogenic germs.[206]

As one might imagine, a twenty-eight-member trade organization such as the EU would want to enact legislation to protect the environment. Directive 94/62 is designed to harmonize national law across the member-states concerning the management of packaging and packaging waste in order to protect the environment in both the EU and other countries with which the EU may trade.[207] Specifically, the Directive asks member-states to encourage reusable packaging systems in conformity with the TFEU and requires member-states to set up

202. *Id.* ¶¶ 23-24.

203. *Id.* ¶ 29.

204. *Id.*

205. *Id.* ¶¶ 34-35.

206. *Id.* ¶ 35.

207. Council Directive 94/62, pmbl., 1994 O.J. (L 365) 10 (EC).

packaging systems that provide for the return and/or collection of reusable packaging and/or packaging waste from consumers and final users of the products within that packaging in order to make efficient any waste management system and to provide for the reuse or recovery of the recycling of the packaging and/or packaging waste.[208] In *Commission v. Germany*, the ECJ held that Germany's Regulation on the Avoidance and Recovery of Packaging Waste ("VerpackV law") which significantly altered the reusable packaging system for mineral water within Germany violated both Directive 94/62 and Article 34 (ex 28, 30).[209]

The VerpackV law required distributors who sell liquids for consumption into the marketplace using non-reusable packaging to charge the purchaser a deposit in the form of a tax which varied based on the volume of the liquid in the non-reusable container.[210] The VerpackV law also required producers and distributors of goods to accept free of charge any packaging returned to distributors from final customers at or in the immediate vicinity of the actual point of delivery and recover the packaging that could satisfy the recovery requirement through reuse of the packaging.[211] Additionally, the VerpackV law exempted firms from the mandatory deposit requirement if the firm, a producer or distributor, is exempt from the requirement to accept the returned packaging because that firm participates in a global collection system.[212] Most importantly for the facts in the case at bar, the VerpackV law provided that if for two years straight the volume of reusable packaging for beer, mineral water (in various forms), carbonated water, soft drinks, and fruit juices falls below 72 percent, these drinks contained in non-reusable packaging will be subject to the above mentioned deposit and return system.[213] The VerpackV law's dynamics gave rise to the facts in that the German government expected the use of non-reusable packaging for the above-mentioned drinks to require a deposit paid for some

208. *Id.* arts. 5, 7.

209. Case C-463/01, Comm'n v. Germany, 2004 E.C.R. I-11705, ¶ 84.

210. *Id.* ¶ 10.

211. *Id.* ¶¶ 8-9.

212. *Id.* ¶ 11.

213. *Id.* ¶¶ 12-14.

time to come.[214] At that point, the European Commission brought an action against the German government contending that the VerpackV law's insistence on a deposit for certain non-reusable packaging violated the free movement of goods guarantee.[215]

The European Commission's concern in regard to the VerpackV law was mostly two-fold. First, the European Commission believed that the German law would make it more expensive for distributors from other member-states to remain in the market for mineral water by introducing a deposit and return system for non-reusable packaging that is dependent upon the percentage of reusable packaging utilized in Germany.[216] Second, and related, the European Commission feared that Germany's approach using a rate for the use of reusable packaging might deter the marketing and sales of new products in Germany where the product would be placed in a non-reusable form.[217] The German government defended its VerpackV law by first stating that the law could not have been a measure with the equivalent effect of a quantitative measure in violation of Article 34 or Directive 94/62 because the law was designed to implement the Directive's requirements.[218]

The ECJ found that although it was a matter of EU law that when a member-state enacts domestic law in accord with a Directive that member-state legislation cannot be deemed an illegal barrier to the free movement of goods, it was clear that Directive 94/62 merely allowed member-states to encourage reusable packaging systems within the confines of the TFEU.[219] The ECJ also believed that the VerpackV law did not treat producers of mineral water inside and outside of Germany equally; it was clear, and not disputed by the German government, that more distributors of mineral water located outside of Germany use non-reusable packaging in contrast to those producers inside Germany.[220] From the ECJ's perspective,

214. *Id.* ¶ 14-15.
215. *Id.* ¶¶ 16, 20.
216. *Id.* ¶¶ 22, 53.
217. *Id.* ¶ 29.
218. *Id.* ¶¶ 54-55.
219. *Id.* ¶ 55.
220. *Id.* ¶¶ 58-60.

the change in packaging management systems would incur several new costs for labeling, new forms of packaging, the refunding of deposits, and the collection of old packaging and would also require all producers and distributors to move out of the global collection system and to the deposit and return system.[221] The ECJ was especially sympathetic to producers and distributors of mineral water located far from Germany in that they would bear high costs associated with reusable packaging given the VerpackV law since, according to EU law (Directive 80/777), mineral water must be bottled at the source; thus, if the packaging was to be reused, the packaging would have to be brought back to the spring that served as the source of the water.[222] Although a producer of mineral water could reduce the costs associated with packaging by using a universal reusable package that is used across the various member-states, an importer established in a member-state outside of Germany would still have to conform to the German market's requirements as stated by the VerpackV law.[223]

The ECJ also did not agree with Germany's assertion that its VerpackV law was outside the scope of Article 34 because the German law merely regulated a selling arrangement.[224] The ECJ stated that a member-state's act that alters the packaging or the labeling of imported products does not constitute the regulation of a selling arrangement as here the VerpackV law would not only shift producers' and distributors' use of reusable to non-reusable packaging but would also change the labeling associated on the packaging as new information would have to be afforded to the consumer.[225] Likewise, the ECJ was not sympathetic to Germany's contention that the VerpackV law was a necessary derogation from Article 34, as supported by Article 36 (ex 30, 36), in order to protect the environment.[226] Germany defended the environmental cause of the VerpackV law by arguing that it was designed to avoid waste, determine the most appropriate way to

221. *Id.* ¶ 59.
222. *Id.* ¶ 61.
223. *Id.*
224. *Id.* ¶ 66.
225. *Id.* ¶¶ 67-68.
226. *Id.* ¶ 71.

manage non-reusable packaging, and protect against littering and that maintaining a deposit and return system for non-reusable packaging was the best way to both protect the environment and change consumer behavior.[227] The ECJ acknowledged that environmental concerns can justify a derogation from the free movement of goods guarantee pursuant to Article 36, but the ECJ did not find that the VerpackV law was proportionate to the German government's environmental goals in that producers and distributors would not have enough time to adapt their packaging systems and furthermore, given the VerpackV's potential for change based on the percentage of reusable packaging used, producers and distributors would face constant uncertainty.[228]

The facts of *Visnapuu v. Kihlakunnansyyttäjä* perhaps show best not only how complicated a member-state's attempt to protect consumers can become in the face of the TFEU, but also how many provisions of the TFEU were designed to ensure the free movement of goods.[229] In perhaps one of its strongest statements about the link between the TFEU and human health, the ECJ remarked "health and life of humans rank foremost among the assets and interests protected by the [TFEU] and that it is for Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved."[230] In *Visnapuu*, the ECJ held that Article 34 (ex 28, 30) and Article 36 (ex 30, 36) do not prohibit a member-state (Finland) from requiring a seller of alcoholic beverages located in other member-states from maintaining a license to sell those beverages in the member-state requiring the license when the seller or the seller's agent is responsible for shipping and transporting the beverages.[231] The ECJ also held that Finland could impose an excise duty on the packaging associated with the alcoholic beverages while also exempting sellers of alcohol pursuant to Article 110 (ex 90, 95) and Directive

227. *Id.* ¶¶ 72-73.

228. *Id.* ¶¶ 80-82.

229. Case C-198/14, Visnapuu v. Kihlakunnansyyttäjä, ECLI:EU:C:2015:751.

230. *Id.* ¶ 118.

231. *Id.* ¶ 129.

94/62.[232]

In a case that involved issues of packaging, taxes, and consumer protection, the ECJ was called on by the Finnish national courts to evaluate Finland's laws on excise taxes associated with packaging, waste, and alcohol, collectively.[233] Finland's law affecting beverage packaging levied a duty on beverage packaging unless the packager or importer integrated it into a "functioning return system" which would ensure the reuse or recycling of the beverage packaging so that the material was either refilled or recovered as a raw material.[234] The law creating the excise duty applied to alcohol and alcoholic beverages produced in Finland and imported from both EU member-states and non-member-states.[235] This same law on excise duties affected what was labeled a "distance sale," which Finnish law defines as a sale where an authorized warehouse, registered trader, or unregistered trader buys goods in another member-state that are subject to the excise tax and the goods are directly imported into Finland by the importer/seller directly from another member-state.[236] Finnish law also required that three groups importing goods subject to the excise duty declare such goods and provide for a guarantee of the required payment: all unregistered traders, all persons liable to pay excise taxes, and those involved in a distance sale where a tax representative in Finland is not maintained.[237] The excise legislation also required these groups to pay the excise duties when the goods reach Finland.[238]

Finland's law on waste created the framework for a functioning return system associated with beverage packaging and a "producer group" whereby producers, packagers, and/or importers of beverage products can set up an association or trade group to handle such beverage packaging so as to allow smaller firms which cannot alone ensure the reuse or recycle of the

232. *Id.* ¶ 76.
233. *Id.* ¶ 37.
234. *Id.* ¶¶ 8-10.
235. *Id.* ¶¶ 11-12.
236. *Id.* ¶ 14.
237. *Id.* ¶ 15.
238. *Id.* ¶ 13.

packaging.[239]

Finland's law on alcohol allowed for the importation of alcoholic beverages for personal use without an import license so long as the ownership of those alcoholic beverages is always held by the purchaser and ownership is possessed by the consumer before importation whereby that owner either transports the beverages alone or entrusts the transport of the goods to a third party other than the seller.[240] More importantly, Finnish law granted a monopoly to government-owned firms for the retail sale of alcohol with two exceptions: first, in a transaction where the alcoholic beverage contains a maximum of 4.7 percent by volume of ethyl alcohol from a seller with a retail license to do so; and second, when the alcoholic beverage contains no more than 13 percent of ethyl alcohol and the seller is also the producer of the beverage.[241]

The defendant, Visnapuu, held a firm that sold alcoholic beverages via home delivery from Estonia to Finland of various brands and alcohol content levels but violated Finnish law in various ways including not declaring the alcoholic beverages upon import into Finland, not designating a tax representative, not paying excise tax on the goods nor the packaging, not guaranteeing payment for the excise tax, and not holding retail or wholesale licenses.[242]

The first significant question for the ECJ was whether the collection of Finnish law violated Directive 94/62, which was designed to foster the harmonization of member-state law in regard to packaging and packaging waste.[243] According to the ECJ, Directive 94/62 attempted to strike a balance between concerns for the protection and health of the environment and the free movement of goods among the member-states. However, it did not create the guidelines for absolute harmonization; thus, member-states do have some flexibility when constructing systems for the reuse and recycling of packaging so long as the systems are implemented in a way that does not discriminate

239. *Id.* ¶¶ 17-18.
240. *Id.* ¶ 21.
241. *Id.* ¶¶ 22-28.
242. *Id.* ¶¶ 30-31.
243. *Id.* ¶¶ 40, 43.

against goods from other member-states.[244]

Given that holding, the ECJ proceeded to determine whether the TFEU had been violated by Finland's statutory scheme.[245] In regard to the rules on packaging, the ECJ settled the debate as to whether Article 34 or Article 110 applied, and found that Article 110 applied.[246] Article 110 prohibits discriminatory internal taxation, either directly or indirectly, against imported goods.[247] According to the ECJ, the excise tax placed on the packaging of alcoholic products was a form of internal taxation which was applied regardless of the origin or destination of the product and the packaging itself, even if waste, is considered a "product."[248] Upon finding that Article 110 was not violated by Finland's provision for excise taxes on packaging, the ECJ found that there was no discriminatory treatment between beverage packaging containing products from other member-states and the similarly situated domestic products, especially since the tax was the same amount and despite the fact that a packager/seller/importer from another member-state engaged in a distance sale may have additional difficulties associated with joining a functioning return system required to otherwise avoid the application of the excise tax.[249] Likewise, the ECJ found that Directive 94/62 was not violated as the statutory scheme creates a system for the reduction of waste either through reuse or recycle via a functioning return system, yet also allows sellers/packagers/importers to create their own system to avoid the excise tax on the packaging of alcoholic beverages.[250] Directive 94/62 is also not violated by the mandate to join a functioning

244. *Id.* ¶¶ 43-46.

245. *Id.* ¶¶ 48.

246. *Id.* ¶¶ 49, 55.

247. Article 110 (ex 90, 95) of the TFEU, *supra* note 39, states

> No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

248. *Visnapuu*, 2015 E.C.R. ¶¶ 53-55.

249. *Id.* ¶¶ 58, 63.

250. *Id.* ¶¶ 73, 76.

return system created by similar traders by way of a government-authorized association which meets the objectives of the Directive.[251]

A tougher question for the ECJ was whether the retail licensing requirement for alcohol products originating from another member-state yet sold in Finland transported by the seller or the seller's agent should be evaluated under Article 34 or Article 37 (ex 31, 37).[252] Article 37 prohibits member-states from creating monopolies in a way that discriminates against goods from other member-states.[253] The ECJ split and held that Article 37 should apply to Finnish law concerning the existence and operation of a monopoly and Article 34 should apply to the narrower issue of the import licensing requirement.[254]

The ECJ stated that Article 37 does not require the complete dismantling of a state-created monopoly but merely requires that the operation of the monopoly enterprise not place goods from another member-state, in regard to their marketing and procurement, at a disadvantage compared to domestically produced goods.[255] However, the ECJ contended that the record did not contain enough information to determine if the monopoly was operating in a discriminatory fashion such that the reviewing

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251. *Id.* ¶ 73. The ECJ here endorsed the "polluter pays principle." *Id.* ¶ 74.

252. *Id.* ¶ 77.

253. Article 37 (ex 31, 37) of the TFEU, *supra* note 39, states

> 1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
>
> 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
>
> 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

254. *Visnapuu*, 2015 E.C.R. ¶¶ 90-91, 97.

255. *Id.* ¶ 95.

national court should have the discretion to determine if the state-created monopoly distorted trade in alcohol products across the member-states.[256]

In regard to Article 34, the ECJ contended that the retail licensing requirement was liable to restrict trade in alcoholic products between Finland and the rest of the member-states since the requirement prevents sellers/importers/producers established in a member-state other than Finland from freely importing alcoholic goods into Finland due to the Finnish government granting exclusive rights to a monopoly for retail sale with two limited exclusions.[257] Additionally, the exception where a producer of an alcohol product with a maximum content of 13 percent of ethyl alcohol is eligible to retail alcohol products without a retail license only benefits producers in Finland.[258] The ECJ found that the retail licensing requirement was a measure having an equivalent effect to a quantitative restriction in violation of Article 34, but allowed the retail licensing to be evaluated by Article 36's clause allowing for derogations to protect the health and life of humans.[259]

The Finnish government articulated that the purpose behind the retail license requirement and the associated narrow exceptions was designed to allow the government to monitor compliance regarding the sale of alcoholic beverages as Finland also maintained restrictions as to when alcohol could be sold to those over the age of 18.[260] Relatedly, the Finnish government only believed that less restrictive means would allow for the necessary monitoring if sellers were permitted to use multiple distribution channels and that alcohol abuse would not be curtailed sufficiently.[261] Although the ECJ reiterated that a restriction on the free movement of goods could be justified on grounds of public health, such a restriction could not be a ruse for arbitrary discrimination against goods coming from another

256. *Id.* ¶ 96.
257. *Id.* ¶¶ 101-02, 105.
258. *Id.* ¶ 106.
259. *Id.* ¶¶ 108-09.
260. *Id.* ¶¶ 112-13.
261. *Id.* ¶¶ 113-15.

member-state.[262] While the retail licensing requirement withstood the Article 36 challenge, the ECJ did not find the compliance concerns or the restrictions on sales and distribution to be disproportionate to the Finnish government's attempt to protect humans from the consequences of alcohol abuse, nor did the Finnish law have the effect of discriminating against alcohol products from other member-states. The ECJ did allow the national court to verify the Finnish government's concerns in conjunction with the government's limitation on the distribution of alcoholic products.[263] Interestingly enough, the ECJ did not find that the Finnish collection of regulations flunked the protection for free movement of goods pursuant to Article 34 even though the Finnish government admitted that in addition to public health concerns, it wanted to promote tourism by allowing artisanal producers of alcoholic beverages to sell their goods at the site of production, due to the exception allowing those with products having up to 13 percent ethyl alcohol to be sold by only the producer. Instead, the ECJ stated that a reviewing national court should also have the discretion to determine if the government was more concerned with tourism than public health.[264]

C. Inspections

The ECJ has ruled that the inspection practices of a member-state cannot unduly restrict the flow of goods from another member-state.[265] In the instant case, the Italian government, concerned about the potential contamination of its citrus crop, initiated rules requiring both a "phytosanitary" certificate for grapefruit from the country of origin and an inspection by the Italian government at the point of entry.[266] Over the course of a few years, the additional inspections became so costly and cumbersome that the Italian government began to restrict the importation of grapefruit to five coastal ports.[267]

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262. *Id.* ¶ 116.

263. *Id.* ¶¶ 122-24.

264. *Id.* ¶¶ 126-28.

265. Case C-128/89, Comm'n v. Italy, 1990 E.C.R. I-3239, ¶ 22.

266. *Id.* ¶ 4.

267. *Id.* ¶ 5.

The European Commission brought a claim against Italy for not living up to its responsibilities under Article 34 (ex 28, 30), which bars quantitative restrictions on imports, arguing that the net effect was that grapefruit could no longer be imported through land ports, which over a ten-year period completely erased imports of grapefruit from member-states;[268] that the Italian regulations favored grapefruit imports from non-member-states (who were more likely to transport their crops via water); and that the regulations were disproportionate to the goal of protecting the domestic citrus crop.[269] The argument made by the Commission is perhaps the most important. The Commission argued that less restrictive policies existed that could be utilized by Italy to protect its crop which did not mandate closing import access by road for, effectively, the other member-states.[270]

Italy could not successfully defend its policies in the face of Article 36 (ex 30, 36).[271] Article 36 does allow for derogations from the requirements of Article 34 in order to protect plant life. However, the ECJ found that the Italian regulations were overly burdensome and that the citrus crop could have been protected in other ways, thus following the Commission's recommendations, such as requiring that grapefruit be sealed at its point of origin and maintaining inspections at other places instead of customs points.[272] The ECJ explicitly rejected Italy's argument that requiring grapefruit to enter the country via coastal ports was an administrative necessity due to the cost of the inspections and the potential that grapefruit possessing contagions might be smuggled into Italy.[273]

The ECJ has also held arbitrary phytosanitary inspections to violate Article 34 (ex 28, 30) of the TFEU.[274] An arbitrary inspection will be found if the inspection is required of plants

268. The Commission cited that 6,184 tons of grapefruit were imported from member-States in 1983; by 1989, imports were non-existent. Italy imposed its new regulations in 1980. *Id.* ¶ 6.

269. *Id.* ¶ 8.

270. *Id.*

271. *Id.* ¶¶ 11-12.

272. *Id.* ¶ 20.

273. *Id.* ¶¶ 26-27.

274. Case 39/73, Rewe-Zentralfinanz eGmbH v. Direktor der Landwirtschaftskammer Westfalen-Lippe, 1973 E.C.R. 1039, 1045.

(such as fruit) imported into the member-state while the same plants, grown domestically, do not.[275]

The ECJ will not tolerate inspections that cause undue delay.[276] In a somewhat harshly worded opinion, the ECJ found that a French inspection policy governing Italian wines was an intentional ploy to limit the amount of Italian wine imported into France in violation of Article 34 (ex 28, 30).[277]

The facts of the *Italian Table Wines Case* are compelling. The Italian government, in conjunction with the European Commission, lodged a complaint that excessive delays at customs ports were intended to limit the amount of Italian table wine coming into France and the proof seems overwhelming.[278] In the early 1980s, at a time when large amounts of Italian wine were imported into France, the price of wine began to plummet and violent demonstrations occurred in the Midi area of France, a large wine producing territory.[279] A few months earlier, however, the French government had notified the Italian government of several irregularities in regard to the importation of wine from Italy into France, including inappropriate means of transportation that could lead to contamination of the wine.[280] It was unclear from the record as to whether the increased inspections and the self-restraint agreements by the French National Committee for Community Trade in Wines and Spirits, a private interest group, were the result of the protests concerning the low wine prices or the irregularities concerning shipping.[281]

The French government soon began to test up to three of every four consignments of Italian wine imported into France and scrutinized to the last detail any irregularities in shipping paperwork, barring those shipments that possessed any problems.[282] The increased scrutinization of the paperwork

275. *Id.* ¶¶ 2-5.

276. Case 42/82, Comm'n v. France, 1983 E.C.R. 1013, ¶¶ 19-20.

277. *Id.* ¶ 62.

278. *Id.* ¶ 1.

279. *Id.* ¶ 7.

280. *Id.* at 1027-28.

281. *Id.* at 1026.

282. *Id.* ¶ 55.

seemed to coincide again with violence in the Midi region.[283] The Commission notified the French government on two occasions that the inspection practices were holding up large quantities of Italian wine that would otherwise be importable into France.[284] On those occasions, the French government would cease its aggressive inspection practices only to resume them shortly thereafter.[285]

The ECJ did not accept the French government's argument that any irregularity in transportation or its accompanying paperwork created suspicion about the wine consignment's quality, making it subject to an inspection, and that any minor suspicion should be allowed to be cured by other measures aside from a full inspection.[286] The ECJ stated that any time a member-state would change its customs procedure, it must give notice to the other member-states and allow them to make adequate preparations.[287] The ECJ also rejected the French government's argument that the test inspections of each consignment were needed to ensure compliance with Community regulations and to protect consumer health.[288] In the end, the ECJ ruled that the French government's procedures were intentional, arbitrary, and a disguised attempt at restricting the amount of Italian table wine into France.[289]

Fees for the inspections of goods, including animals and animal products, cannot be excessive. The ECJ has ruled that inspection fees can have the same effect as a customs duty, a violation of EEC Regulation 805/68, and cannot be justified under Article 36's (ex 30, 36) protection of health and life of humans, animals, or plants clause.[290] In *Marimex*, the ECJ reasoned that inspections fees have the economic potential to raise the price of

283. *Id.* at 1024.

284. *Id.* at 1021.

285. *Id.* ¶ 20.

286. *Id.* ¶ 61.

287. *Id.* ¶ 36.

288. *Id.* ¶¶ 56-57.

289. *Id.* ¶¶ 62-64.

290. Case 84/71, SpA Marimex v. Ministero delle Finanze, 1972 E.C.R. 89, ¶ 3. Regulation 805/68 "prohibits 'the levying of any charge having effect equivalent to a customs duty' both in trade of third countries . . . and in the internal trade of the Community." *Id.* at 91.

the importer's stock and thus have the same restrictive effect as a customs duty.[291] This is true even if the inspection fee is for reasons of sanitation.[292] Similar fees for the inspection of live animals or animal products also cannot be justified on the grounds that the member-state is providing a service to the importer, violating Article 34 (ex 28, 30).[293]

In a fairly short decision, the ECJ held in *Criminal Proceedings Against Brandsma* that in regard to potentially harmful commercial products, member-states must take into consideration the technical analyses and/or laboratory tests conducted by other member-states before putting an inspection process into place.[294] Here, the defendant was charged with violating Belgian law for selling a pesticide labeled "HEMA Tegelreiniger" without first going through an inspection and authorization process, which was used to combat algae from growing on walls and tiles.[295] However, the same product was freely sold in the Netherlands.[296] The case was made easier for the ECJ in that all parties agreed, pursuant to Article 34 (ex 28, 30), that Belgium's regulation was a measure having the equivalent effect as a quantitative restriction; thus, the ECJ was able to concentrate on whether the Belgian government could save its regulation through the public health clause of Article 36 (ex 30, 36).[297] The ECJ found that the nature of the product in question was a chemical compound that could hurt humans and animals and that although it was available in another member-state, Belgium could subject the importer/seller to an authorization and inspection pursuant to Article 36.[298] Regardless of the inspection or authorization process applied to the imported goods from another member-state, the ECJ warned the Belgian government that it could not repeat the same product

291. Case 35/76, Simmenthal SpA. v. Ministero delle Finanze Italiano, 1976 E.C.R. 1871, ¶ 23.

292. *Id.*

293. *Id.*

294. Case C-293/94, Criminal Proceedings Against Brandsma, 1996 E.C.R. I-3159, ¶ 12.

295. *Id.* ¶ 2.

296. *Id.*

297. *Id.* ¶¶ 4-7.

298. *Id.* ¶ 13.

tests used by another member-state which had sanctioned the product for sale and use in that member-state.[299]

Two additional points should be addressed in *Brandsma*. First, the ECJ placed the burden of proof on the member-state attempting to block the movement of goods coming into that member-state on public health grounds in regard to both safety and the sufficiency of the testing conducted by the member-state that previously approved the product for sale.[300] Second, and in common form for the ECJ, when there exists no harmonizing legislation on a particular topic within the EU, member-states have greater discretion in regard to regulating a particular good that could be injurious to human health and life.[301]

A member-state's inspection of goods crossing member-state boundaries can trigger review under several articles of the TFEU aside from Article 34. In *Commission v. Germany*, the ECJ held that an inspection fee imposed by the German government to cover the costs of veterinary inspections of animals imported into Germany, as required by EU Directive 81/389/EEC, did not constitute a violation of Articles 28 (ex 23, 9) and 30 (25, 12).[302] Article 28 prohibits customs duties from being assessed by a member-state government on both imported and exported goods along with measures having the equivalent effect.[303] Likewise, Article 30 prohibits the same customs duties and measures

299. *Id.*

300. *Id.* ¶ 7.

301. *Id.* ¶ 11.

302. Case C-18/87, Comm'n v. Germany, 1988 E.C.R. 5427, ¶ 14. Article 28 (ex 23, 9) of the TFEU, *supra* note 39, states

> 1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
>
> 2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 30 of the TFEU, *id.*, states "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature."

303. TFEU, *supra* note 39, art. 28.

having equivalent effect that may be fiscal in nature.[304] The ECJ stated that such fees for inspections can contravene Articles 28 and 30, regardless of the amount, when the fees serve as an obstacle to goods moving freely from one member-state to another and/or when associated with administrative formalities.[305] As well, when fees are assessed unilaterally on goods moving within the EU simply because of their trans-border crossing and are not customs duties, Articles 28 and 30 are violated.[306] However, a member-state can justify such fees and not violate the TFEU if the fees do not exceed the actual costs of the inspection(s); are required for the goods moving from one member-state to another and are uniformly applied to domestic goods; are required by EU law; and the inspections associated with fees actually promote the free movement of goods by removing concerns, such as public health, found in Article 36 (ex 30, 36).[307] According to the ECJ, the fees assessed for the inspection by the German government were to serve as a guarantee of health and life of animals in the public interest.[308] The ECJ also provided some advice to member-state governments by stating that any harm the inspection fees may have on the free movement of goods could be remedied through EU law standardizing such fees.[309]

In *Ligur Carni v. Unità Sanitaria*, the ECJ wrestled with the question as to whether an Italian law violated EU law that mandated inspections of meat imported into Italy; a fee for those inspections; and that an importer of meat either use the distribution services of a local cooperative or pay the cooperative if the importer wished to use another firm for distribution including its own services.[310] The Italian law in question applied to any imported meats even if the imports had been inspected and found satisfactory by a veterinarian and accompanied by a health

304. *Id.* art. 30.

305. *Germany*, 1988 E.C.R. ¶ 5.

306. *Id.*

307. *Id.* ¶ 8.

308. *Id.* ¶ 12.

309. *Id.* ¶ 15.

310. Case C-277/91, Ligur Carni Srl v. Unità Sanitaria Locale n. XV di Genova, 1993 E.C.R. I-6621, ¶¶ 6-9, 13.

certificate in another member-state.[311] The plaintiffs were several meat importers operating in Italy that contended that the Italian law violated the free movement of goods principles espoused by Article 34 (ex 28, 30) and three Directives: 64/433/EEC, concerning health problems affecting intra-EU trade in fresh meat; 89/662/EEC, concerning issues related veterinary checks with the idea of completing the common market; and 90/425/EEC, concerning zootechnical checks applicable to intra-EU trade in certain live animals and products with the idea of completing the common market.[312]

The ECJ had little trouble finding the Italian law's mandate that inspections of imported meat be allowed into Italy only upon inspection in Italy despite inspection in another member-state to be a violation of Directive 64/433/EEC.[313] As well, the ECJ held that the fee requirement for the inspection to be paid at the time of service violates Directive 64/433/EEC.[314] According to the ECJ, the Directive allows for one inspection within the EU and once that inspection occurs, it replaces the need for inspections in other member-states, including the member-state of destination.[315] However, the ECJ did state that only when a member-state seriously suspects irregularities associated with the product crossing member-state borders may a destination member-state impose an inspection so long as the inspection is non-discriminatory, does not delay the movement of the product which might impair its quality, and is not disguised as a barrier to intra-EU trade.[316] Relatedly, the ECJ also found the fees associated with the inspections could not be justified by Directive 64/433/EEC and the TFEU based on the public interest and that when such expenses are necessary, the general public must incur those costs.[317]

Lastly, the ECJ found that the requirement that an importer of meat use the cooperative established by the Italian government

311. *Id.* ¶ 8.
312. *Id.* ¶¶ 1-2.
313. *Id.* ¶ 27.
314. *Id.*
315. *Id.* ¶ 26.
316. *Id.* ¶¶ 24-25.
317. *Id.* ¶ 31.

to distribute the meat once inside Italy and pay for that service, or pay the cooperative for its services despite using its own distribution process, violates Article 34 of the TFEU.[318] The ECJ stated that such a requirement is a barrier to trade in goods across borders even if the requirement applies to both imported and domestic meat since the effect is to make the importation of meat more difficult.[319] According to the ECJ, Article 34 is directly effective and requires member-states to adhere to the free movement of goods guarantee without implementing legislation from the EU directing member-states.[320]

Although the dominant portion of this work has and will focus on imports, measures affecting exports can also interfere with the free movement of goods even when a member-state insists that ensuring consumer protection is only obtainable through those measures. In *Germany v. DMK*, the ECJ was asked by the German courts to determine if the German government's screening process for skimmed milk goods for a fee which occurred at the German border as those goods left Germany violated Article 35 (ex 29, 34), Article 28 (ex 23, 9), and Article 30 (ex 25, 12) of the TFEU.[321] The German screening process included a border check to determine the quality of skimmed milk products headed for other member-states where samples would be taken by customs officials from each truck transporting the products, which occurred at the same time other export formalities were conducted.[322] The fees assessed by the German customs authorities covered the costs of the analysis of the product.[323]

The ECJ held that the inspections violated Article 34 (ex 28, 30) since the inspections were conducted in a systematic fashion at the border between Germany and a neighboring

318. *Id.* ¶ 44. The ECJ found that the freedom to provide services in another member-state pursuant to Article 56 (ex 49, 59) and the right to establishment in another member-state pursuant to Article 49 (ex 43, 52) did not apply to the facts of the case. *Id.* ¶¶ 41-42.

319. *Id.* ¶¶ 37-38.

320. *Id.* ¶ 39.

321. Case C-426/92, Germany v. Deutsches Milch-Kontor GmbH, 1994 E.C.R. I-2757, ¶¶ 10-12, 34, 46.

322. *Id.* ¶¶ 10-11.

323. *Id.* ¶ 12.

member-state.[324] The ECJ went to long lengths to examine EU law in the form of several regulations concerning the safety of skimmed milk and could not find a requirement in the regulations stating that the inspections of skimmed milk must occur at an international border, despite Germany's argument that the inspections were conducted as they were to meet the requirements of those regulations.[325] The ECJ cited its own precedent holding that inspections—especially systematic inspections, even if they are conducted pursuant to concerns for human health—carried out at frontiers where delays occur which in turn incur additional costs for importers or exporters are contrary to Article 34.[326] Furthermore, the ECJ discounted Germany's concern for fraud, stating that fraudulent activity affecting the skimmed milk could take place at any time during transport away from the international border, including while the goods are in the member-state of destination, and that member-states serving as the final destination may also inspect the goods.[327] Regardless, the ECJ did state that a system of inspections limited to spot checks would be acceptable.[328]

The fees assessed for the inspections conducted by the German government on exported skimmed milk products also violated Articles 28 and 30 of the TFEU.[329] According to the ECJ, such fees constitute a charge having the equivalent effect to a customs duty and violate Articles 28 and 30 when they are assessed merely because the goods are crossing a member-state border.[330] The ECJ made it clear that such fees for inspections at the border assessed merely because the goods are crossing a border violates a fundamental principle of the EU's common market which requires the free movement of goods.[331]

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324. *Id.* ¶ 34.
325. *Id.* ¶¶ 25, 33.
326. *Id.* ¶¶ 20-22.
327. *Id.* ¶¶ 41, 43.
328. *Id.* ¶ 45.
329. *Id.* ¶ 54.
330. *Id.* ¶ 50.
331. *Id.* ¶ 51.

D. Prohibitions

In *Commission v. Germany*, the ECJ ruled that a German ban on freshwater crayfish imports designed to protect the native crayfish population from aphanomycosis (crayfish plague) was an infringement on Article 34 (ex 28, 30).[332] Germany attempted to justify its ban on crayfish imports, which applied to imports from both member-states and non-member-states, on grounds that there was no other way to protect its crayfish population since the virus is carried by species in both member-states and non-member states.[333]

Several traders initially brought claims against the German government, followed by the European Commission, who had harvested crayfish inside and outside the EU member-states for export to Germany.[334] Germany countered, however, that its regulation allowed for several derogations and indeed would license importers for educational and research purposes.[335]

The ECJ did not accept Germany's arguments that the restriction was the only means in which to protect the native crayfish population or that the exceptions to the restriction were enough to save it in the face of Article 34's prohibition on restrictions on imports.[336] The ECJ required Germany to prove that its restriction was an "indispensable" measure for the purposes of effective protection, which it could not do, as the ECJ made several less restrictive suggestions such as inspections and health checks on imports.[337]

The ECJ swam through a myriad of issues regarding Article 34's (ex 28, 30) guarantee of free movement of goods in *Vereinigte Familiapress v. Bauer Verlag*.[338] At the time of the case, Austrian law prohibited the sale of goods whereby those goods were linked to the offer of free gifts.[339] A German newspaper

332. Case C-131/93, Comm'n v. Germany, 1994 E.C.R. I-3303, ¶¶ 3, 20.

333. *Id.* ¶ 20.

334. *Id.* ¶ 4.

335. *Id.* ¶ 6.

336. *Id.* ¶¶ 20-27.

337. *Id.* ¶¶ 18, 20, 25.

338. Case C-368/95, Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Bauer Verlag, 1997 E.C.R. I-3689.

339. *Id.* ¶ 4.

company which sold its newspapers in Austria challenged the law after attempting to offer a drawing for readers who successfully solved its crossword puzzle on the grounds that the Austrian law served as a violation of Article 34.[340] The Austrian government defended its legislation on two principal grounds. First, it stated that the prohibition on offers of free gifts associated with the sale of goods was merely a regulation of a selling arrangement and thus outside the scope of Article 34 as the prize competitions are only methods of promoting sales.[341] Second, the Austrian government contended that its prohibition was necessary in order to ensure diversity within the press which, if Article 34 did apply, should be an overriding interest.[342] More specifically, the Austrian government argued that small publishers would not be able to offer the same free gift opportunities as larger publishers, and an arms race of sorts based on the offering of increasingly larger gifts would screen out some competitors from the media marketplace and that currently there existed a high level of concentration of press within Austria compared to Germany.[343]

The ECJ was not very sympathetic to the Austrian government's claim that its regulation was outside the scope of Article 34, remarking that Article 34 maintained a wide scope of activity and that despite the fact the regulation was aimed at a particular method of sales promotion, it focused on the content of the goods; thus, a mere regulation of a selling arrangement did not exist.[344] As well, the ECJ retorted that if the Austrian law were to stand, newspaper publishers would have to alter the contents of their newspapers which inhibits the free flow of such goods; thus the law constitutes a measure having the equivalent effect of a quantitative limitation on the free flow of goods between member-states.[345]

The ECJ was seemingly more sympathetic to the Austrian government's argument that diversity in the press was an overriding interest, as the ECJ stated that such a concern could

340. *Id.* ¶¶ 3, 5.
341. *Id.* ¶ 10.
342. *Id.* ¶ 13.
343. *Id.* ¶¶ 14-17.
344. *Id.* ¶¶ 8, 11.
345. *Id.* ¶ 12.

be an overriding interest saving such a regulation in the face of Article 34; the ECJ even cited Article 10 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") as a requirement that freedom of expression be protected throughout the continent.[346] However, the ECJ returned to the arena of EU law and stated that any such regulation limiting the free movement of goods must serve an objective and that the means by which that objective is pursued must be proportionate.[347] The ECJ cited a case where it gave member-states the right to carefully control lotteries within their borders but also stated that lotteries were different than newspapers entering their readers into a drawing if they successfully complete a crossword puzzle in that the former pose a greater risk for crime or fraud.[348] As well, and also in relation to the concerns on the freedom of expression, the ECJ stated that such a prohibition actually limits the amount of free press and expression and the European Convention does not allow for such derogations unless such a measure is necessary to ensure diversity in the press as reflected in a democratic society.[349] The ECJ contended that a prohibition such as Austria's on newspapers that allows for free gifts can only be supported in the face of Article 34 if it is proportionate to the objective of maintaining diversity in the press, by removing smaller publications from competition in regard to the offering of free gifts, and that it is up to the national courts to determine whether proportionality exists, which must be specific to that member-state's marketplace for media.[350] More narrowly, the ECJ instructed that national courts must consider whether, from the consumer's standpoint, other newspapers that do not offer prizes could replace the news content of the newspapers that do offer such prizes.[351]

According to the ECJ, member-states are well within their

346. *Id.* ¶ 18.

347. *Id.* ¶ 19.

348. *Id.* ¶¶ 20-22 (citing Case C-275/92, Her Majesty's Customs & Excise v. Schindler & Schindler, 1994 E.C.R. I-1039, ¶ 61).

349. *Id.* ¶ 26.

350. *Id.* ¶¶ 27, 29, 34.

351. *Id.* ¶ 31.

rights pursuant to Article 34 (ex 28, 30) to regulate the hours by which retail stores in that member-state may operate without infringing upon the free movement of goods.[352] In *B&Q*, a retailer challenged a local government's (United Kingdom) enforcement of a British law requiring stores to be closed for operations on Sundays, with the exception of a few consumer items such as intoxicating liquors, certain foodstuffs, tobacco, newspapers, and other consumer staples.[353] B&Q, an operator of do-it-yourself garden stores asserted that such a ban on Sunday transactions violated Article 34 and was not justified by Article 36 (ex 30, 36) as a measure having the equivalent effect of a quantitative restriction on the free movement of goods since 10 percent of the goods sold by B&Q were from other member-states.[354]

While finding that Article 34 did not limit a member-state's discretion to prohibit the sale of goods, or some goods, on Sundays, the ECJ stated that the United Kingdom's legislation did not treat domestically produced and imported goods dissimilarly.[355] More narrowly, the ECJ stated, while citing its precedent, that a member-state's rules concerning the hours of work and delivery serves legitimate social and economic policy which is the domain of each member-state pursuant to the TFEU.[356] Additionally, the ECJ did not find the United Kingdom's prohibition on Sunday sales to be disproportionate to its goals which include maintaining a balance of working and non-working hours to meet national or regional socio-cultural norms.[357]

Issues concerning goods, services, inspections, and prohibitions were all present in *Dynamic Medien v. Avides Media*.[358] In *Dynamic Medien*, the ECJ seemingly carved out a greater level of member-state discretion pursuant to Article 36 (ex 30, 36) for the protection of children.[359] However, regardless of

352. Case C-145/88, Torfaen Borough Council v. B&Q plc, 1989 E.C.R. 3851, ¶ 17.

353. *Id.* ¶¶ 1-4.

354. *Id.* ¶¶ 5-7.

355. *Id.* ¶ 11.

356. *Id.* ¶¶ 13.

357. *Id.* ¶ 14.

358. Case C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 2008 E.C.R. I-505.

359. *Id.* ¶¶ 43-44.

this level of discretion, the ECJ still demands that any measures taken to protect children from goods moving from one member-state to another must be proportionate to the objective of protecting children.[360] The ECJ was asked to determine whether Germany's law on the protection of young persons violated the free movement of goods requirement of Article 34 (ex 28, 30) of the TFEU.[361] Germany's law required any pre-recorded video cassettes or other image storage media that could later be replayed on a screen by a child or adolescent be subject to an inspection by the German government or a voluntary self-regulation entity when sold to a consumer without personal contact between that consumer/purchaser and the seller.[362] The German law required that the media be approved suitable for the recipient's age range and labeled as such.[363] Media that did not have a label signaling approval by the requisite governmental body or self-regulatory body could not be offered for sale to a child or adolescent nor made available for sale in retail trade, such as outlets or kiosks.[364]

The litigation in *Dynamic Medien* began when a German firm alleged that a British rival, Avides Media, which sold media through an electronic trading platform on its internet site, was importing into Germany Japanese cartoon cassettes, which had already been imported into the United Kingdom with an inspection and label from the British Board of Film Classification ("BBFC") stating that the cassettes were approved for viewing by those aged 15 years and older.[365] However, as the German firm correctly pointed out, the cassettes had not been inspected in Germany by the requisite authorities.[366]

The ECJ found that Germany had the leeway under Article 34 to require that any such media that could be accessible to children or adolescents be first subject to an inspection by a governmental or quasi-governmental body whereby there was no personal

360. *Id.* ¶ 46.
361. *Id.* ¶¶ 8, 15.
362. *Id.* ¶¶ 8-9.
363. *Id.* ¶ 9.
364. *Id.* ¶ 10.
365. *Id.* ¶¶ 11-13.
366. *Id.* ¶ 13.

contact between the seller and buyer.[367] The ECJ first mentioned that the German law applied to both imported media as well as media developed and subject to sale domestically and thus there existed no prejudice against imported goods.[368] Although Dynamic Medien, the namesake plaintiff bringing the cause of action against Avides Media, prevailed in the case, one of the German firm's chief arguments was that the German law was not a measure having the equivalent effect as a quantitative restriction because the law only regulated a selling arrangement since the law treated domestic and imported goods similarly and thus is beyond the scope of Article 34.[369] Here, the ECJ gave one of its best recitals on what is not a selling arrangement, stating that Article 34 has a very broad scope and covers all member-state rules that either directly or indirectly, actually or potentially, hinder the free movement of goods across the member-states.[370] As well, according to the ECJ, even if the member-state regulation is not intended to hinder the free movement of goods, the determining factor is whether that regulation has the potential to do so, especially in cases in which goods coming from other member-states are regulated yet have already been freely available in those other member-states.[371] However, member-state rules which restrict the marketing and sale of products to certain points of sale and might limit the economic freedom of operators yet which do not regulate the content of the goods are rules that govern selling arrangements.[372] The ECJ here believed that Germany's law on the protection of young persons was a measure having the equivalent effect of a quantitative measure and was thus within the scope of Article 34 and not a law governing a selling arrangement because the cassettes were subject to an inspection for their content by an importing member-state after they had also been subject to an inspection in the exporting

367. *Id.* ¶ 52.
368. *Id.* ¶ 21.
369. *Id.* ¶ 25.
370. *Id.* ¶ 26.
371. *Id.* ¶ 27.
372. *Id.* ¶ 31.

member-state.[373] Furthermore, the ECJ contended that the second inspection process may make the market for those goods more expensive and difficult for the producer.[374]

The ECJ was much more receptive to Dynamic Medien's argument, shared by the German government, that if the law wasn't regulating a selling arrangement then the law could be saved by Article 36's (ex 30, 36) public interest exception.[375] More narrowly, the firm and German government contended that the public policy objective of protecting young people and allowing them to develop a sense of personal responsibility and sociability was a legitimate objective of a member-state.[376] Although Avides Media seemingly agreed with that position, the British firm believed that the German government's law was disproportionate to the aim of protecting young persons as a form of public interest.[377] The ECJ, for its part, mentioned several international agreements recognizing the need to protect young persons, such as the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Charter of Fundamental Rights of the European Union.[378] According to the ECJ, these international agreements attempt to strike a balance between protecting children and making sure they have access to a diversity of media for their own development.[379]

More directly to the facts in the case at bar, the ECJ found that it was clear that Germany was merely attempting to protect young persons from materials and other media that might be injurious and also believed that since harmonizing legislation on the subject matter did not exist, member-states have additional discretion to regulate such materials.[380] The ECJ did not find a system of inspection and labeling for media disproportionate to the German government's goal, even if the materials in question were freely available in another member-state and that the other

373. *Id.* ¶ 33.
374. *Id.* ¶ 34.
375. *Id.* ¶¶ 31, 36-37.
376. *Id.* ¶ 37.
377. *Id.* ¶ 38.
378. *Id.* ¶¶ 39-41.
379. *Id.* ¶ 40.
380. *Id.* ¶¶ 43-45.

member-state's governmental or quasi-governmental body had inspected and labeled the materials in order to protect children.[381] However, the ECJ cautioned that the second inspection and labeling process required by a member-state must be easily accessible, able to be completed within a reasonable period of time, and subject to judicial review if the inspection leads to a denial of entry for the goods.[382]

With facts similar to *Dynamic Medien*, the ECJ held that a member-state cannot justify the denial of the importation of goods on the basis that they are obscene if the member-state does not have a prohibition on the domestic manufacture and sale of the same goods.[383] In *Conegate*, British customs officials seized a number of articles that were described as "window display models" according to the accompanying invoices but upon further investigation the goods were in actuality life-size, inflatable rubber dolls.[384] The British authorities seized the dolls pursuant to the Customs Consolidation Act of 1876 which prohibits the importation of obscene materials.[385]

Conegate challenged the seizure of the dolls arguing that it was not unlawful to manufacture or sell similar items under British law and thus the Customs Consolidation Act imposed quantitative restrictions in violation of Article 30 (ex 28, 30) of the TFEU.[386] The ECJ did state that under the TFEU, member-states were free to establish their own standards of public morality.[387] However, the ECJ further stated that those standards must apply equally and that domestic law cannot impose restrictions based on public morality that are harsher than those that apply to domestically produced and sold goods.[388] Therefore, a member-state cannot rely on Article 36's (ex 30, 36)

381. *Id.* ¶ 49.

382. *Id.* ¶ 50.

383. Case 121/85, Conegate Ltd. v. Her Majesty's Customs & Excise, 1986 E.C.R. 1007, ¶¶ 15-16.

384. *Id.* at 1008. The dolls had various names such as "Love Love Dolls," "Miss World Specials," and "Rubber Ladies." *Id.*

385. *Id.* ¶ 2.

386. *Id.* ¶ 3.

387. *Id.* ¶ 12.

388. *Id.*

allowance for exceptions to Article 34 (ex 28, 30) based on public morality.[389]

The outcome of such a case is very different if the domestic law of the member-state also outlaws the items that are seized by customs officials.[390] This is true even if the domestic law in the member-state differs from region to region.[391] In *Henn & Darby*, the ECJ determined that the British authorities could seize and destroy obscene materials, as well as impose criminal punishments on the importers, in order to prevent the importers from violating both the Customs Consolidation Act of 1876 and British criminal law.[392]

The defendants argued that the state of British law varied too much for the British government to claim that a "public morality" exception under Article 36 (ex 30, 36) should apply to the seizure of what was mostly sexually graphic films, some of which depicted violence and young and adolescent girls having sex with older men.[393] The ECJ rejected the argument on the ground that each member-state is free to define public morality under the TFEU.[394]

The ECJ has ruled that Articles 34 (ex 28, 30), 35 (ex 29, 34), and 36 (ex 30, 36) apply to goods imported into the EU from non-member-states once the goods are put into free circulation in the community.[395] The ECJ has found an Irish ban on all potatoes imported from non-member-states in violation of Article 34 when the potatoes had been first imported into the United Kingdom and then imported into Ireland.[396] In the *Cyprus Potatoes Case*, the Irish government imposed a ban on all potatoes coming from non-member-states after a large quantity of imported potatoes from other member-states adversely effected the Irish potato market in the early 1980s, and after "consulting" with the

389. *Id.* ¶ 20.

390. Case 34/79, The Queen v. Henn & Darby, 1979 E.C.R. 3795, ¶¶ 16-17.

391. *Id.* ¶ 17.

392. *Id.*

393. *Id.* ¶ 4. The defendants' argument rested on the fact that the criminal law governing obscene materials was different in Scotland, Wales and England. *Id.* ¶ 5.

394. *Id.* ¶ 16.

395. Case 288/83, Comm'n v. Ireland, 1985 E.C.R. 1761, ¶ 24.

396. *Id.* ¶ 29.

European Commission.[397] In turn, the European Commission notified the Irish government that it was in violation of the TFEU by instituting the ban on potatoes since the ban was applied to any potatoes that originated from a non-member-state, including those already imported into the EU.[398]

The Irish government defended the potato ban on four grounds. First, since the Commission did not object until after an Irish import of Cyprus potatoes (which were first imported into the United Kingdom), the Commission had already given an "informal approval" of the ban pursuant to Article 134 (ex 115) of the Treaty of Amsterdam.[399] Second, the Irish government argued that the Cyprus potatoes were merely "routed through" the United Kingdom and were not in "free circulation," which would invoke Article 34.[400] Third, the Irish government argued that Articles 34-36 did not apply since the potatoes were agricultural products.[401] Fourth, Ireland argued that if Articles 34-36 did apply, Ireland could impose the ban based on Article 36's public

397. *Id.* ¶¶ 2-3.

398. *Id.* ¶¶ 4-6.

399. *Id.* ¶ 10(a). Article 134 (ex 115) of the Treaty of Amsterdam states

> In order to ensure that the execution of measures of commercial policy taken in accordance with this Treaty by any Member State is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties between such measures lead to economic difficulties in one or more Member States, the Commission shall recommend the methods for the requisite cooperation between Member States. Failing this, the Commission may authorise Member States to take the necessary protective measure, the conditions and details of which it shall determine.
>
> In case of urgency, Member States shall request authorisation to take the necessary measures themselves from the Commission, which shall take a decision as soon as possible; the Member States concerned shall then notify the measures to the other Member States. The Commission may decide at any time that Member States concerned shall amend or abolish the measures in question.
>
> In the selection of such measures, priority shall be given to those which cause the least disturbance of the functioning of the common market.

Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 115, Oct. 2, 1997, 1997 O.J. (C 340) 1, *repealed by* the Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

400. *Ireland*, 1985 E.C.R. ¶ 10(b).

401. *Id.* ¶ 10(c).

policy clause due to the consequences already felt by the Irish potato market.[402]

The ECJ found the potato ban, as it applied to potatoes imported first into a member-State and then to Ireland, a violation of Article 34's prohibition against quantitative restrictions, since, in its judgment, the potatoes were in "free circulation."[403] Furthermore, the ECJ stated that the condition of the Irish potato market did not warrant an exception to Article 34 under Article 36's public policy clause since member-states cannot use Article 36 to protect mere economic interests alone.[404] As well, the ECJ stated that the failure of the Commission to present an outright objection to Ireland's potato ban did not constitute approval by the Commission.[405]

E. Country of Origin

Member-states cannot impose regulations on imported goods designed to distinguish imported goods from domestically produced goods if the member-state does not impose similar requirements on similar domestically produced goods.[406] In *Irish Souvenirs*, the Irish government required imported goods that were to be sold as souvenirs to possess a label stating the good's country of manufacture or that it was "foreign."[407] Potentially, a tourist could mistakenly believe that they were purchasing a souvenir that was made in Ireland or the tourist could see that the souvenir was not manufactured in Ireland and opt to purchase a more "authentic" souvenir.

The Irish government tried to substantiate the regulation in the name of consumer protection under Article 36 (ex 30, 36): a purchaser of the souvenir has a right to know that the items was not authentically Irish.[408] Additionally, the Irish government contended that its regulation was not a quantitative restriction, in violation of Article 34 (ex 28, 30), since the imported souvenirs

402. *Id.* ¶ 10(d).
403. *Id.* ¶ 24.
404. *Id.* ¶ 28.
405. *Id.* ¶ 22.
406. Case 113/80, Comm'n v. Ireland, 1981 E.C.R. 1625, ¶¶ 16-17.
407. *Id.* at 1627.
408. *Id.* ¶ 5.

could still be imported into Ireland and later purchased by consumers.[409]

The ECJ, however, found that the requirement that the imported souvenirs bear a distinguishing label a violation of Article 34.[410] Seemingly, once the ECJ found that the imported goods were treated in a different manner, a violation of Article 34 was present. However, the ECJ did state that the Irish government could still meet its consumer protection interest by allowing firms who domestically produce souvenirs to use an authenticity label which the imported souvenir could not possess.[411]

In a case that involved issues concerning packaging, country of origin, and a prohibition, the ECJ held in *Commission v. Germany* that a member-state cannot prohibit the sale of a particular variety of wine from being sold in any other shape of wine bottle than what is required by that member-state.[412] Here, the Commission challenged Germany's wine law which prohibited the sale of many beverages, such as "petillant de raisin," in the traditional bottle in which it is sold which, in the particular case of this variety of wine, is associated with its country of origin, France.[413] The particular bottle petillant de raisin was usually sold in was described as a champagne-style bottle with a wired mushroom-shaped stopper.[414] Germany's defense of its wine law and the resulting prohibition on the sale of such wine in this particular bottle was based on the need to protect consumers, which also applied to both imported and domestic wine products.[415]

Although the ECJ stated that in cases such as this with a lack of harmonizing law across the EU, member-states would have greater discretion to enact domestic law that would protect consumers; while such domestic law could be tolerated when it applied equally to both domestic and imported products, it cannot

409. *Id.* at 1631-32.
410. *Id.* ¶ 13.
411. *Id.* ¶ 16.
412. Case 179/85, Comm'n v. Germany, 1986 E.C.R. 3879, ¶¶ 1-2, 14-15.
413. *Id.* ¶ 1.
414. *Id.* ¶ 3.
415. *Id.* ¶ 6.

force producers of such products to incur costs due to that law like this case where the producer of imports would be forced to use different bottles to market and sell petillant de raisin in Germany.[416] The ECJ also cited Regulation 355/79, which provides for detailed rules on labeling of wines of particular regions, suggesting that labeling, aside from packaging (bottle) requirements should protect consumers adequately and that such labeling can inform consumers as to not only the product but also its contents.[417] Assisting the ECJ in its decision was evidence that the petillant de raisin had been lawfully made and sold for over 30 years in the champagne-style bottle the German government was attempting to prohibit and that other types of alcoholic beverages, such as cider and sparkling wine, had also been sold in that same bottle inside and outside of Germany, which the German wine law permitted.[418] In the end, the ECJ firmly stated that Germany's concern for consumer protection was not enough in this case to inhibit the free movement of goods as required by the TFEU by restricting the use of bottle shapes or presentation styles.[419]

One of the most complex cases regarding country of origin designations and Article 34 (ex 28, 30) is *Exportur SA v. LOR SA*.[420] *Exportur* began with a bilateral agreement between the French and Spanish governments crafted in 1973 which identified certain geographic regions and provided protection for those regions through their use as designations on a variety of products.[421] Specifically, the agreement cited designations of origin, indications of provenance, and names of certain products whereby goods made in these selected areas of France and Spain received protection so that producers of similar goods could not use these designations and indications on their wares if the products were not made in those areas.[422] Both France and Spain could create rules and regulations for the use of those

416. *Id.* ¶¶ 8-10.
417. *Id.* ¶ 12.
418. *Id.* ¶ 14.
419. *Id.* ¶ 13.
420. Case C-3/91, Exportur SA v. LOR SA & Confiserie du Tech, 1992 E.C.R. I-5529.
421. *Id.* ¶ 4.
422. *Id.*

designations and indications.[423] Here, Exportur attempted to get an injunction against two French firms so that the latter two firms could not use two protected designations of origin, both reflecting Spanish towns, in association with their confectionary products, which were produced in France.[424] In retort, the French firms insisted that the 1973 agreement between Spain and France was a violation of Article 34, which requires the free movement of goods across member-state borders.[425]

The French firms insisted that the products they produce in their French city of production (Perpignan) were no different than what was produced in the two Spanish towns (Alicante and Jijona) and that the qualities and characteristics of the products are unrelated to geographical origin.[426] The European Commission agreed with the French firms by arguing that the case at bar was more of a commercial property case; thus, so long as the French firms met the qualities and characteristics of the product as identified in Spanish law and the product is not actually grown from the specific geographic areas, any limitation on the use of the designations and indications would violate the free movement of goods guarantee in Article 34.[427] The two French firms also cited their long-term use of the Spanish designations which, according to the firms, has also been consistent and fair.[428]

The ECJ found that the position taken by the two French firms and the European Commission was untenable in that such a position would void the country of origin-based designations and indications of any protection and that such designation and indications enjoy a high reputation among consumers and are simply too valuable to the producers that operate within these specific geographic regions.[429] The ECJ also discounted the argument made by the two French firms that the facts in the case at bar were similar to that of *Prantl* in that there was a difference

423. *Id.* ¶¶ 4, 11.
424. *Id.* ¶¶ 2, 5.
425. *Id.* ¶¶ 5-6.
426. *Id.* ¶ 26.
427. *Id.* ¶¶ 27-28.
428. *Id.* ¶ 31.
429. *Id.* ¶ 28.

between country of origin designations and indications and the use of a particular shape of wine bottle.[430]

A stronger argument put forward by the two French firms was that the two Spanish designations (towns) had become generic terms associated with the products in question.[431] The ECJ commented that it understood the 1973 agreement between France and Spain to mean that producers in either France or Spain could not use the geographic names of the other to take advantage of reputations associated with those geographic areas which would be in line with the concept espoused in Article 36 (ex 30, 36) which allows member-states to put derogations from the free movement of goods doctrine in Article 34 into place in regard to commercial and industrial property, so long as the geographic name has not become generic.[432] The ECJ upheld the French and Spanish governments' ability to protect the geographic designations and indications identified in their 1973 agreement so long as they have not become generic pursuant to Article 36.[433] However, the ECJ did not comment on how it or a national court would go about determining whether a geographical designation or indication has become generic for the purposes of Article 36.[434]

If a particular case entertained by the ECJ involves harmonizing legislation from the EU government and the TFEU, the ECJ will attempt to make a decision based on the harmonizing legislation first.[435] Directive 94/11 addresses the marketing and labeling of footwear within the EU and prohibits member-states from interfering with the marketing and sales of footwear so long as firms marketing and selling footwear abide by the Directive's labeling requirements.[436] Directive 94/11 requires that labeling should identify the material of the footwear and should be included on the footwear, specifically on one of the two

430. *Id.* ¶¶ 31-34.

431. *Id.* ¶ 35.

432. *Id.* ¶ 37.

433. *Id.* ¶¶ 38-39.

434. *Id.* ¶ 39.

435. Case C-95/14, Unione Nazionale Industria Conciaria (UNIC) v. FS Retail, ECLI:EU:C:2015:492, ¶ 33.

436. *Id.* ¶¶ 9-10.

shoes in a visible manner.[437] Additionally, the Directive holds the manufacturer, his or her agent, or the retailer responsible for making sure that the information contained as part of the label is accurate.[438] Member-states are permitted to require additional information for labeling requirements pursuant to Directive 94/11 so long as the free movement of goods principle is not infringed.[439]

In *UNIC v. FS Retail*, two Italian-based trade associations attempted to enforce Italian law which prohibited the use of Italian words that mean leather on leather shoes when the shoes were not made from Italian leather.[440] The purpose of the Italian law was to protect consumers by preventing any form of confusion that might arise when a purchaser may believe he or she is purchasing a product with qualities that traditional leather might have, including that the leather in question came from an animal.[441] As well, the Italian law required that the country of origin be part of the label if the leather goods were made outside of Italy.[442] The Italian law did not distinguish between goods made in another EU member-state and goods made outside the EU and also instituted administrative penalties for such violations.[443] According to the ECJ, Italy's labeling requirement created an irrebuttable presumption that goods made with leather outside of Italy but possessing one of the Italian words for leather would infringe the Italian law and be a misrepresentation to consumers.[444] The two Italian trade associations asserted that the defendant shoe manufacturers were misleading the Italian consumer public because the labels on the shoes did not state the country of origin while using the Italian word for leather.[445] The trade associations proffered that the lack of a country of origin yet using the Italian word for leather wrongly suggested to Italian

437. *Id.* ¶ 11.

438. *Id.*

439. *Id.* ¶ 12.

440. *Id.* ¶ 13. The words in question were "cuoio," "pelle," and "pelliccia," which all describe leather. The Italian law also prohibited the use of terms that were derivatives or synonyms. *Id.*

441. *Id.*

442. *Id.*

443. *Id.* ¶¶ 15-16.

444. *Id.* ¶ 14.

445. *Id.* ¶ 18.

consumers that the shoes were indeed manufactured in Italy, which was not accurate as the shoes were made in China.[446]

First, the ECJ found that the Italian law did constitute a measure having the equivalent effect as a quantitative restriction as the law created a labeling requirement negatively affecting a manufacturing process that took place either in another EU member-state or in a country which was not a member-state but with goods freely available in the EU before arriving in Italy.[447] Second, although the ECJ was asked by the Italian national court to address the issue on grounds involving the TFEU, specifically Articles 34 (ex 28, 30), 35 (ex 29, 34), and 36 (ex 30, 36), and Directive 94/11, the ECJ principally made its decision based on Directive 94/11.[448] The ECJ contended that the purpose of Directive 94/11 was to harmonize the various labeling systems existing in the member-states prior to its adoption and to eliminate any barriers to the free movement of goods.[449] According to the ECJ, Directive 94/11 did not create a minimum set of standards for the labeling of footwear, but instead provided an exhaustive body of law to which member-states are not allowed to enact more stringent standards.[450] The ECJ acknowledged that Directive 94/11 did allow for member-states to require additional textual information as part of a label, but member-states cannot do so in a way that impedes the free movement of goods across borders.[451]

The ECJ found that the Italian labeling law violated Directive 94/11 without making a decision on whether the Italian law violated the TFEU.[452] According to the ECJ, Directive 94/11 requires only that the content of the material of the shoe be identified and not the country of origin.[453] Furthermore, Directive 94/11 applies to goods made in another member-state and imported into Italy as well as goods made in a non-member-state

446. *Id.* ¶¶ 18-20.
447. *Id.* ¶¶ 21-22.
448. *Id.* ¶¶ 32-34, 46.
449. *Id.* ¶ 36.
450. *Id.* ¶ 37.
451. *Id.* ¶ 38.
452. *Id.* ¶ 46, 54-55.
453. *Id.* ¶ 39.

and imported into another member-state before being imported into Italy.[454] Although the ECJ did not rest its decision on Article 34 of the TFEU, the ECJ did remind the reader in the case at bar that its precedent reflects a theme where a member-state's requirement that a country of origin be affixed to a product does inhibit the free flow of goods, thus slowing down the pace of economic interpenetration among the EU member-states by hamstringing the sale of goods based on the location of the workers who crafted the goods.[455]

In *Commission v. Ireland*, the ECJ stated that a member-state cannot require that goods including precious metals must be hallmarked with that member-state's own standards for fitness when the product has already been hallmarked pursuant to another member-state's hallmarking procedure and the information is sufficient to protect a consumer, nor can a member-state require those same goods to bear a sponsor's hallmark if the sponsor is registered in Ireland pursuant to Article 34 (ex 28, 30).[456] The European Commission, which brought the claim against Ireland for not fulfilling its duties pursuant to the TFEU, contended that by prohibiting a good made with precious metals with its country-of-origin hallmark already affixed to it constitutes a measure having the equivalent effect as a quantitative restriction, as such a good would have to be stripped of its country-of-origin hallmark and replaced with a hallmark that is suitable under Irish law.[457] Although the Commission understood the need to protect consumers so that they would know the precise precious metal content of the good purchased, there needed to be a balance that respects the differing methods of ensuring consumer protection in the precious metals market—so long as the country-of-origin hallmark provided equivalent content information as what would be required by Ireland, mutual recognition of member-state-required hallmarks should be the norm.[458] In contrast, the Irish government believed that a member-state

454. *Id.* ¶ 40-41.

455. *Id.* ¶ 44.

456. Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, ¶ 76.

457. *Id.* ¶¶ 12-15.

458. *Id.* ¶¶ 16-17, 22.

could prohibit precious metal-related goods from being imported into that member-state if the country-of-origin hallmark where the public interest justifies it; in the case at bar, other hallmarks not meeting the requirements of Irish law could easily mislead a purchasing consumer so a separate labeling requirement (not a separate hallmark) would not be sufficient.[459]

The ECJ agreed with the Commission's position and further cited precedent on the topic of mutual recognition of country-of-origin hallmarks and also recognized that if Ireland's law on the hallmarking of precious metal-related goods were to stand, the importer would bear increased costs and difficulty in marketing and selling such wares.[460] In more direct fashion, the ECJ stated that a member-state cannot require a new hallmark to be stamped on goods containing precious metals if the goods have already been hallmarked by the authority and legally manufactured in another member-state.[461] However, the ECJ did contend that the member-state hallmark representing the country of origin must provide sufficient information in order to protect purchasing consumers and adopted a test where the ampleness of a hallmark would be based on the average consumer who is reasonably well-informed and reasonably observant and circumspect.[462] The ECJ also stated that if the Irish law were to be upheld, there would be a possibility that goods with precious metal content would be identified as either originating from Ireland or another member-state, which would also serve as a measure having the equivalent effect as a quantitative restriction and also a violation of the TFEU's guarantee of free movement of goods.[463]

IV. MAJOR CONSIDERATIONS OF THE ECJ REGARDING THE FREE MOVEMENT OF GOODS AND CONSUMER PROTECTION: AN ANALYSIS

This section will detail, based on an analysis of the case law

459. *Id.* ¶¶ 19-21.
460. *Id.* ¶¶ 26-27.
461. *Id.* ¶ 30.
462. *Id.* ¶ 32.
463. *Id.* ¶ 74.

discussed above, what is most important to the ECJ in regard to its characterization of the scope and limitations of the free movement of goods pursuant to Article 34 and other supporting articles of the TFEU.

A. The Use of Tests

In regard to determining the scope and limitations on how much discretion a member-state has in regulating the free movement of goods in order to protect consumers, the ECJ has established several tests. First, the ECJ stated that a member-state's restriction on the free movement of goods invokes the scrutiny of Article 34 when the restriction directly or indirectly, actually or potentially, restricts the free trade in goods.[464] Furthermore, as the ECJ commented in *Prantl*, the threshold of interference with the free movement of goods is quite low as Article 34 applies even if the effect on intra-EU trade is low.[465] Second, in order to determine what is and what is not a measure having the equivalent effect and thus a violation of Article 34, the ECJ in *Gilli* held that a measure that is applied equally to imported and domestic goods, a restriction necessary to protect human health, and fair in regard to commercial transactions would not violate the TFEU's Article 34.[466] Although it is likely obvious that a member-state's restriction on the free movement of goods that treats domestic and imported goods differently is highly likely to be deemed impermissible, the question as to whether the restriction is necessary to protect consumer health is a tougher question. Regardless, the ECJ held in *Brandsma* that the member-state wishing to enforce its restriction has the burden of proof to show that the restriction is necessary to protect human health.[467] Relatedly, if no harmonizing law on the subject matter exists, member-states are

464. Case C-448/98, Criminal Proceedings Against Guimont, 2000 E.C.R. I-10663, ¶¶ 15, 17.

465. Case 16/83, Criminal Proceedings Against Prantl, 1984 E.C.R. 1299, ¶ 20.

466. Case 788/79, Criminal Proceedings Against Gilli & Andres, 1980 E.C.R. 2071, ¶ 6.

467. Case C-293/94, Criminal Proceedings Against Brandsma, 1996 E.C.R. I-3159, ¶ 7.

afforded greater discretion to protect human health.[468]

In two of the cases identified in this work, *Commission v. Spain* and *Commission v. Ireland*, the ECJ provided a three-part test to determine the level of expectation a consumer, dubbed a "reference consumer," might have about a particular product.[469] According to the ECJ, a reference consumer is one who is well-informed, reasonably observant, and circumspect.[470] The application of this test determines the extent to which a member-state can either ban an imported product from coming into that member-state or whether the use of a label on the product as a less restrictive alternative will suffice to protect consumers.

Although the corpus of case law identified in this work shows largely that the ECJ abhors fees to be collected by member-states as goods move from one member-state to another, the ECJ has provided that fees assessed based on an inspection are tolerable when the fees do not actually exceed the cost of the actual inspection, are applied to both imports and domestic goods, and actually support the free movement of goods by removing public health concerns.[471]

B. Labeling as Both a Remedy and a Form of Unlawful Protectionism

The ECJ's jurisprudence on labeling comes in two forms and is a bit schizophrenic. First, the ECJ has stated that a mere labeling requirement implemented by a member-state informing consumers of content is a less restrictive means to protect consumers without interfering with the free movement of goods, especially when a member-state is contemplating a ban to protect consumers.[472] This basic doctrine has been extended by the ECJ to include concerns over the shape of a product (margarine and butter), the shape of a product's packaging (shape of a wine

468. *Id.* ¶ 11.

469. Case C-358/01, Comm'n v. Spain, 2003 E.C.R. I-13145, ¶¶ 53-54; Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, ¶ 32.

470. *Spain*, 2003 E.C.R. ¶ 53.

471. Case C-18/87, Comm'n v. Germany, 1988 E.C.R. 5427, ¶¶ 8, 14.

472. Case 407/85, 3 Glocken GmbH & Gertraud Kritzinger v. USL Centro-Sud & Provincia autonoma di Bolzano, 1988 E.C.R. 4233, ¶¶ 10, 22.

bottle), and the contents of products (bread and milk).[473] In many of the cases where the ECJ suggests a labeling requirement in lieu of a ban in order to protect consumers, a chief concern is to limit the amount of extra costs a manufacturer/distributor/importer might incur to meet the specifications of the member-state attempting to implement a restriction which, in order to be sustained, must be proportionate to public health aims and supported by scientific research.[474]

Second, the ECJ has also prohibited the mandate by a member-state to require a label in some cases where the ECJ believes that label will have a negative effect on the free movement of goods. In *Commission v. Spain*, the ECJ believed that Spain's requirement that any chocolate-related product with contents including anything but cocoa butter as the required fat be labeled "chocolate substitute" was a measure having the equivalent effect as a quantitative restriction and that a more simple, less-restrictive requirement merely letting consumers know the type of fat would suffice to protect consumers.[475] Making the ECJ's decision more tenable in *Commission v. Spain* was likely the fact that Directive 73/241 actually set out the requirements for what could be included within the "chocolate" category.[476] In related fashion, the ECJ has denied a member-state from prohibiting a specific food product label to be attached to a type of cheese because the cheese product did not meet the minimum level of fat content and did not originate from a particular geographic region.[477] The ECJ also barred a member-state from prohibiting the use of the term "bleach" by a product manufacturer because the cleaning product did not have the requisite amount of chlorine.[478] In *UNIC*, the ECJ stated that Italian law could not prohibit the use of the term "leather," in the

473. Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961, ¶ 17; Case 179/85, Comm'n v. Germany, 1986 E.C.R. 3879, ¶ 13; Case C-123/00, Criminal Proceedings Against Bellamy & English Shop Wholesale SA, 2001 E.C.R. I-795, ¶¶ 12, 18, 23.

474. Case C-17/93, Criminal Proceedings Against Van der Veldt, 1994 E.C.R. I-3537, ¶¶ 10-12.

475. Case C-12/00, Comm'n v. Spain, 2003 E.C.R. I-459, ¶¶ 22, 93-95, 98.

476. *Id.* ¶ 30.

477. Case 286/86, Ministère Public v. Deserbais, 1988 E.C.R. 4907, ¶¶ 8-9, 12-13, 19.

478. Case C-358/01, Comm'n v. Spain, 2003 E.C.R. I-13145, ¶¶ 5, 61.

Italian language, as a label on shoes that were manufactured in another member-state for fear that consumers would be misled that they were purchasing leather shoes made in Italy.[479] The *UNIC* decision was likely made easier for the ECJ since Directive 94/11 addressed the marketing of shoes and prohibited member-states from imposing additional labeling requirements limiting the free movement of goods.[480] In *Irish Souvenirs*, the Irish government was blocked from mandating that any imported goods that would serve as souvenirs be labeled "foreign" due to the ECJ's concerns that domestic and imported goods would be subject to differential treatment.[481] Ironically, the ECJ stated in *Irish Souvenirs* that the Irish government could allow domestically-produced souvenirs to maintain labels that made it clear to consumers that those products were made in Ireland which, if implemented as policy, would also lead to differential treatment since imported souvenirs could not make the same claim.[482]

Despite the ECJ's aggressive approach to making sure that member-states cannot impose prohibitions or labeling rules that interfere with the free movement of goods pursuant to Article 34, the ECJ does create an exception when it comes to the protection of children. In *Dynamic Medien*, the ECJ upheld both a prohibition and a labeling requirement.[483] Here, the ECJ approved of Germany's requirement that any media could not be sold directly to minors (a prohibition) unless it had been inspected by German authorities and was appropriately labeled.[484] The German regulation was sustained by the ECJ even though the media-related goods were already available in the EU and had previously been inspected.[485]

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479. Case C-95/14, Unione Nazionale Industria Conciaria (UNIC) v. FS Retail, ECLI:EU:C:2015:492, ¶¶ 13-14, 21-22, 46.

480. *Id.* ¶ 12.

481. Case 113/80, Comm'n v. Ireland, 1981 E.C.R. 1625, ¶¶ 4, 18.

482. *Id.* ¶ 16.

483. Case C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 2008 E.C.R. I-505, ¶¶ 33, 52.

484. *Id.* ¶ 33.

485. *Id.* ¶ 49.

C. The Role of Science for Consumer Protection

In a somewhat refreshing manner, science does play a role in the discussion as to whether, and to what degree, consumers need protection. According to the ECJ in *Visnapuu*, a member-state should have the ability to determine the level of consumer protection necessary and the ECJ likewise noted that human health protection is crucial to the TFEU.[486] In *Glocken*, the ECJ stated that a member-state must show some health grounds to justify a measure having the equivalent effect of quantitative measure restricting imports.[487] Here, Italy could not sustain its justification in regard to chemical additives and colorant despite its contention that a labeling requirement would not suffice to protect potential purchasers.[488] Similarly in *Kelderman*, the ECJ stated that if nutrition was the concern of a member-state then that member-state would have to show how a lack of a particular ingredient would adversely impact consumer health.[489] Like *Kelderman*, *Van der Veldt* also dealt with the contents of bread. Although the ECJ found that in both cases the member-state could not defend its ban on imported breads not complying with its content laws, the ECJ in *Van der Veldt* expressed concern that if each member-state's bread content laws were upheld, bread manufacturers would have to alter their techniques to meet the needs of each member-state.[490] The ECJ was more prescriptive in *Van der Veldt*, stating that content restrictions could be upheld in the name of consumer protection through application of Article 36 so long as the limits are proportionate to public health and scientific research supports the public health concern.[491] Furthermore, the ECJ stated that the scientific proof proffered by a member-state could not be mere conjecture and once again the ECJ believed that a simple labeling requirement would suffice to

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486. Case C-198/14, Visnapuu v. Kihlakunnansyyttäjä, ECLI:EU:C:2015:751, ¶ 118.

487. Case 407/85, 3 Glocken GmbH & Gertraud Kritzinger v. USL Centro-Sud & Provincia autonoma di Bolzano, 1988 E.C.R. 4233, ¶¶ 6, 12-14.

488. *Id.* ¶¶ 12-13, 19.

489. Case 130/80, Criminal Proceedings Against voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527, ¶¶ 5-6.

490. *Id.* ¶ 15; Case C-17/93, Criminal Proceedings Against Van der Veldt, 1994 E.C.R. I-3537, I-3538.

491. *Van der Veldt*, 1994 E.C.R. at I-3538.

warn consumers.[492] In another bread case, *Morellato*, the ECJ, after suggesting that a labeling requirement would be less restrictive and more acceptable than a ban, was again concerned that bread manufacturers would have to alter their manufacturing processes to meet the needs of each member-state; additionally, and more harmful to Italy's attempt to sustain its bread content law, the ECJ found that Italy was allowing other breads to be sold that did not meet its requirements.[493]

Despite the long line of cases whereby the ECJ believed that a labeling requirement would be much more in line with Articles 34 and 36 in order to protect consumers, the ECJ has upheld some member-state restrictions based on consumer protection concerns. In perhaps an obvious case, the ECJ in *Schwarz* stated that a member-state could require, pursuant to Article 36, that food in a vending machine be packaged in order to prevent the communication of diseases; while acknowledging that the additional packaging would be an added expense for product manufacturers, the ECJ found that such an expense would be worthwhile to prevent contamination.[494] According to the ECJ, a member-state can also ban food additives when the dangerous health effects are unknown.[495] The ECJ in *Koninklijke* stated that such a ban was tolerable even when this would lead to differences between domestic and imported goods, it applied to goods legally available in other member-states, and the food additive itself is available in other member-states.[496] The ECJ also did not find that a labeling requirement would suffice while upholding a member-state's ban on vegetables sprayed with a particular pesticide. In *Mirepoix*, the ECJ upheld the pesticide ban but also acknowledged differences in eating habits across the EU as a source of support for sustaining the ban.[497]

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492. *Id.*

493. Case C-358/95, Morellato v. Unità Sanitaria Locale (USL) No 11, Pordenone, 1997 E.C.R. I-1431, I-1436-38.

494. Case C-366/04, Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139, I-10149-50.

495. Case 53/80, Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 409, 417-18.

496. *Id.* ¶¶ 14, 16.

497. Case 54/85, Ministère Public v. Xavier Mirepoix, 1986 E.C.R. 1067, ¶ 15.

The issue of pesticides was again debated in *Brandsma*, yet the ECJ did not allow Belgium to ban products with a particular pesticide because the goods had already been tested sufficiently in another member-state; since another member-state had sanctioned the safety of the goods, Belgium could not block their entry as a repeat of similar tests was deemed to be a measure having the equivalent effect of a quantitative measure in violation of Article 34 which could not be saved by Article 36.[498] According to the ECJ in *Brandsma*, a member-state would have the burden of proof to show that a duplicate test was needed due to health concerns.[499] The ECJ's decision in *Ligur* fits well within the paradigm of *Brandsma* as the ECJ stated that a second inspection for imported meats at the border could only be conducted if a member-state seriously suspected irregularities and the second inspection was not discriminatory, did not delay the movement of the goods, and was not disguised as a barrier to trade.[500] The ECJ did accept a member-state's requirement that a product manufacturer has the burden of proof to show that certain vitamin additives maintained sufficient market demand in order for that product manufacturer's product to be lawfully imported.[501] This requirement was sustained by the ECJ even though the vitamin additives were freely available in other member-states.[502]

D. Deceptive Advertising

Member-states, rightfully, have a concern to protect their citizens from product manufacturers that have engaged in deceptive advertising. The ECJ will examine the use of terms associated with the advertising of goods and the impact on commercial success.[503] Regardless of a member-state's concern,

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498. Case C-293/94, Criminal Proceedings Against Brandsma, 1996 E.C.R. I-3159, I-3159-60.

499. *Id.* ¶ 7.

500. Case C-277/91, Ligur Carni Srl v. Unità Sanitaria Locale n. XV di Genova, 1993 E.C.R. I-6621, ¶¶ 24-25, 35.

501. Case C-174/82, Officier Van Justitie v. Sandoz BV, 1983 E.C.R. 2445, ¶¶ 20, 27.

502. *Id.* at 2471.

503. Case 407/85, 3 Glocken GmbH & Gertraud Kritzinger v. USL Centro-Sud & Provincia autonoma di Bolzano, 1988 E.C.R. 4233, ¶¶ 21-22.

the ECJ has maintained that such concerns do not interfere with the free movement of goods as required by the TFEU. The ECJ stated that differences in marketing laws across the member-states are tolerable if justified by concerns for consumer protection, the member-state's regulation is proportionate to a legitimate objective of the member-state, and less restrictive alternatives do not exist.[504] In *Mars*, the ECJ did not believe that a product promotion where the product's price increased with the associated increased size of the product as designated by the wrapping was a form of deceptive advertising that could be barred by a member-state pursuant to Article 34. To support its finding that a German trade association's assertions of deceptive advertising were erroneous, the ECJ relied on market realities by which the product manufacturer would likely not maintain higher prices in order to be successful in a promotional campaign and pointed out that German law also prohibited product manufacturers from imposing prices on retailers.[505]

The ECJ's decision in *Commission v. Germany*, on the subject of consumer protection, reflects the most common approach used by the ECJ to settle such matters. Once again, the ECJ suggested the use of a labeling requirement by Germany to combat any deceptive advertising that might be associated with the use of a particular shape of wine bottle.[506] Maintaining consistency, the ECJ was concerned with a member-state's enforcement of a ban that might increase the packaging costs for product manufacturers and importers.[507] Although the ECJ's decision was bolstered by Directive 94/11, which applies directly to the advertisement of shoes across the EU, the ECJ held that Italy could not prohibit the use of certain Italian words for leather that might lead to consumers mistakenly believing that they were purchasing Italian leather shoes despite the fact that the Italian law did not treat goods made in the EU and goods made outside the EU differently.[508] In *UNIC*, the Italian government also

504. Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln eV. v. Mars GmbH, 1995 E.C.R. I-1923, ¶¶ 13, 15.

505. *Id.* ¶¶ 18-20.

506. Case 179/85, Comm'n v. Germany, 1986 E.C.R. 3879, ¶ 12.

507. *Id.* ¶¶ 8-10.

508. Case C-95/14, Unione Nazionale Industria Conciaria (UNIC) v. FS Retail,

required a labeling requirement that identified the shoes as not being made from Italy, which the ECJ believed would be a violation of Article 34 as the costs to manufacturers would increase.[509] In *Commission v. Ireland*, the ECJ stated that a member-state could not require its own hallmarking system in order to protect consumers if an imported metal good had already been hallmarked in another member-state when that hallmark provided sufficient information.[510] The ECJ was also concerned that if it had sustained Ireland's hallmarking requirement, metal goods sold in Ireland would easily be identified as either of Irish origin or not of Irish origin.[511]

E. Goods Available in Another Member-State

When goods are already available for sale in another member-state, it is much more difficult for a member-state to ban their entry. In a case that involved a member-state's labeling requirement with the goal of protecting consumers, the ECJ stated that Spain could not require producers of chocolate to label their product "chocolate substitute" because the fat used in the product was something other than cocoa butter, at least in part because such chocolate-related products with fats other than cocoa butter were available in the EU.[512] In *Deserbais*, the ECJ stated that France could not prohibit a cheese manufacturer from using the term "Edam" associated with its cheese product which did not meet France's minimum fat content requirement, again at least in part, because the manufacturer's product was sold in other member-states.[513] As well, the ECJ held in *Morellato* that a member-state cannot ban one type of bread based on its content laws while not banning other types of bread not in compliance with its bread content laws.[514] Metal-based goods already hallmarked in another member-state must be allowed to enter a

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ECLI:EU:C:2015:492, ¶ 33.

509. *Id.* ¶ 44.

510. Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, ¶ 76.

511. *Id.* ¶ 74.

512. Case C-12/00, Comm'n v. Spain, 2003 E.C.R. I-459, ¶¶ 90-92, 98.

513. Case 286/86, Ministère Public v. Deserbais, 1988 E.C.R. 4907, ¶¶ 12-13, 19.

514. Case C-358/95, Morellato v. Unità Sanitaria Locale (USL) No 11, Pordenone, 1997 E.C.R. I-1431, ¶¶ 11, 13-15.

member-state without requiring a second hallmarking.[515] The ECJ has extended this principle to goods that have been tested and available for sale in another member-state even if the good in question is, at some level, acknowledged to be dangerous.[516] Even in cases involving obscenity, according to the ECJ, if the obscene goods are available in the member-state attempting to ban their import, that member-state is in violation of Article 34.[517] However, if the member-state equally bans the same obscene goods regardless of whether they are domestically produced or imported, then the ban can be sustained pursuant to Article 36.[518]

The ECJ's decisions in *Koninklijke*, *Sandoz*, *Mirepoix*, and *Dynamic Medien* are exceptions to the general rule that if a good is freely available elsewhere in the EU, a member-state cannot bar that good from entry into its borders. In *Koninklijke*, *Sandoz*, and *Mirepoix*, there was a strong link between science and the ability of a member-state to ban the goods in question, and the ECJ upheld the member-states' bans on the goods in question despite the fact that the goods were available in other member-states.[519] In *Koninklije* and *Mirepoix*, the ECJ seemed to heavily defer to the member-state governments since the scientific evidence in regard to the food additives and pesticide, respectively, was unclear.[520] In *Sandoz*, the ECJ went further and permitted a member-state to require that the product be licensed based on the product manufacturer's ability to show market demand for the product in that member-state.[521] The decision by the ECJ in *Dynamic Medien* reflects the greatest extent to which the ECJ is willing to delegate to the member-states the ability to protect consumers even when the goods in question have been examined in another member-state and have been made available

515. Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, ¶ 76.

516. Case C-293/94, Criminal Proceedings Against Brandsma, 1996 E.C.R. I-3159, I-3160.

517. Case 121/85, Conegate Ltd. v. Her Majesty's Customs & Excise, 1986 E.C.R. 1017, 1025.

518. Case 34/79, The Queen v. Henn & Darby, 1979 E.C.R. 3795, ¶ 17.

519. Case 53/80, Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 409, 424; Case 54/85, Ministère Public v. Xavier Mirepoix, 1986 E.C.R. 1067, 1080; Case C-174/82, Officier Van Justitie v. Sandoz BV, 1983 E.C.R. 2445, 2466.

520. *Koninklijke*, 1981 E.C.R. ¶¶ 16-17; *Mirepoix*, 1986 E.C.R. ¶¶ 14-16.

521. *Sandoz*, 1983 E.C.R. ¶¶ 25-27.

in another member-state. Here, the ECJ let stand Germany's prohibition pursuant to Article 36 against media being imported into Germany without a second inspection if the transaction was not conducted between the seller and buyer if the buyer is a child, even when an initial inspection had been conducted by the United Kingdom.[522] However, this second inspection is limited to instances when the second inspection is easily accessible, can be completed in a reasonable time period, and the second member-state's denial is subject to judicial review.[523]

F. Article 34 and Selling Arrangements

One of the chief arguments made by a member-state in an attempt to defend a restriction on the free movement of goods is that the transaction—a selling arrangement and therefore not the goods—is the focus of the regulation having an impact on the free movement of goods; as such, this selling arrangement is outside the scope of Articles 34 and 36. According to the ECJ in *Bauer Verlag*, Article 34 encompasses a wide variety of activity, and in this case the ECJ found that a member-state's prohibition against the sale of goods which are associated with free gifts to be in violation of Article 34 and not a regulation applying merely to a selling arrangement.[524] The ECJ in *Bauer Verlag* also expressed concern that newspapers seeking markets in other member-states would have to alter their contents in order meet the regulations of various member-states if Austria's prohibition were to be upheld.[525] In *Dynamic Medien*, the ECJ refused to accept Germany's argument that a regulation requiring a second inspection of digital media which could be sold to children without a direct relationship between a buyer and a seller to be one that regulates a selling arrangement, instead finding the goods to be within the scope of Articles 34 and 36 since the

522. Case C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 2008 E.C.R. I-505, ¶¶ 43-45, 49.

523. *Id.* ¶ 50.

524. Case C-368/95, Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag, 1997 E.C.R. I-3689, ¶ 11.

525. *Id.* ¶ 12.

media was being regulated based on its content.[526] In *Commission v. Spain*, the ECJ refused to find that Spain's requirement that a chocolate product containing a fat which was not cocoa butter to be labeled "chocolate substitute" was not a regulation addressing a selling arrangement and found the regulation to be within the scope of Article 34.[527]

G. Blatant Protectionism and Abuse of Process

As noted in the introduction to this work, protectionism is on the rise. The case law evaluated in this work reflects some situations where a member-state has, or could have, engaged in blatant protectionism. In *Gilli*, the ECJ found Germany's ban on the sale of products created through the use of imported apple vinegar as nothing more than an attempt by Germany to protect its domestic market for apple vinegar.[528] In *Glocken*, the Italian government admitted that it was attempting to protect its durum wheat industry by prohibiting the importation of pasta for sale in the Italian market if the pasta was not made from durum wheat, which the ECJ found to be a violation of Article 34 despite arguments made by the Italian government that such a prohibition was necessary to protect consumers whose expectations were narrowly applicable to the quality of pasta crafted within that member-state.[529] The ECJ also did not tolerate Germany's attempt to prohibit the importation of wine in bottles that were strongly associated with wine produced in German geographic areas in the name of consumer protection.[530] Although the ECJ found an Article 34 violation in a case involving imported crayfish, Germany contended that it was attempting to protect its crayfish population by prohibiting the importation of crayfish from other member-states despite the fact that crayfish could be imported for the purposes of research and education.[531] In similar

526. *Avides Media*, 2008 E.C.R. ¶¶ 25-27.

527. Case C-12/00, Comm'n v. Spain, 2003 E.C.R. I-459, I-512.

528. Case 788/79, Criminal Proceedings Against Gilli & Andres, 1980 E.C.R. 2071, ¶¶ 10-11.

529. Case 407/85, 3 Glocken GmbH & Gertraud Kritzinger v. USL Centro-Sud & Provincia autonoma di Bolzano, 1988 E.C.R. 4233, ¶¶ 2, 5, 15-16, 28.

530. Case 179/85, Comm'n v. Germany, 1986 E.C.R. 3879, ¶¶ 8-9.

531. Case C-131/93, Comm'n v. Germany, 1994 E.C.R. I-3303, ¶¶ 6, 20.

fashion, the ECJ would not tolerate Italy's attempt to choke off the importation of grapefruit despite the Italian government's argument that the restrictions were valid pursuant to Article 36 and the need to protect plant life.[532] Instead of designing a system to limit grapefruit through points of inspection, the ECJ stated that other less restrictive means should be implemented such as inspection at the point of packaging.[533] The ECJ has stated that Article 36 cannot be used by a member-state to protect a failing sector of its economy from competition from imports.[534] In *Commission v. Ireland*, the ECJ found that Ireland's ban on imported potatoes was protectionist and Ireland could not prohibit such imports even if the goods originated from outside the EU and were only passing through another member-state before arriving in Ireland.[535] Although the Austrian government hinted that it merely wanted to protect small newspapers from unfair competition with larger newspapers by providing opportunities for small newspapers to give away free gifts, the ECJ would not tolerate the prohibition against larger newspapers providing those gifts.[536] The ECJ also did not allow a trade association to enforce an Italian law prohibiting the use of the Italian word for leather to be placed on shoes not made of Italian leather or a requirement that the country of origin be placed on the shoe.[537]

Abuse of process can be identified in the way in which member-states attempt to inspect goods as they cross member-state boundaries. In *Rewe-Zentralfinanz*, the ECJ stated that arbitrary inspections can violate Article 34.[538] Likewise, the ECJ held in *Italian Table Wines* that inspections at the border cannot cause unusual delays, noting that inspections can be used as intentional ploys to restrict imports and that prices can

532. Case C-128/89, Comm'n v. Italy, 1990 E.C.R. I-3239, ¶¶ 24, 28.

533. *Id*. ¶¶ 17-18.

534. Case 288/83, Comm'n v. Ireland, 1985 E.C.R. 1761, ¶¶ 28-29.

535. *Id.* ¶¶ 27, 29.

536. Case C-368/95, Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag, 1997 E.C.R. I-3689, I-3715, I-3719-20.

537. Case C-95/14, Unione Nazionale Industria Conciaria (UNIC) v. FS Retail, ECLI:EU:C:2015:492, ¶¶ 21-22.

538. Case 39/73, Rewe-Zentralfinanz eGmbH v. Direktor der Landwirtschaftskammer Westfalen-Lippe, 1973 E.C.R. 1039, 1042.

increase for importers due to these inspections.[539] As well, the ECJ has stated that inspection fees cannot be excessive and can have the same impact as a customs duty.[540]

The ECJ's decision in *Visnapuu* seems to be a bit of an anomaly. Here, the Finnish government was permitted by the ECJ to maintain its alcohol licensing system, its taxation system, and the monopoly distribution system even though the Finnish government admitted that it was trying to protect its craft alcohol industry.[541] The ECJ was willing to sustain Finland's alcohol licensing system on the grounds that it would bolster consumer protection by protecting consumers from alcohol abuse so long as the licensing system did not discriminate against imports.[542]

H. Increased Costs for Manufacturers and Importers

Perhaps the chief concern for importers operating within the EU is the increased cost associated with a member-state's attempt to implement and enforce a measure equivalent to a quantitative restriction. The ECJ's jurisprudence reflects a strong position against any domestic regulation that might force importers to incur additional costs that might make their products more expensive in the marketplace within the member-state imposing the regulation. In three cases, *Kelderman*, *Van der Veldt*, and *Morellato*, the ECJ feared that domestic regulations concerning the content of bread would force manufacturers to incur additional costs as they would be forced to alter the bread making process to conform to the requirements of each member-state.[543] The ECJ's decision in *Prantl*, where the ECJ did not tolerate Germany's regulation concerning the shape of wine bottles used for imported wine in the face of Article 34, created a high threshold for member-states to meet if they wish

539. Case 42/82, Comm'n v. France, 1983 E.C.R. 1013, ¶¶ 41-42, 44-45.

540. Case 84/71, SpA Marimex v. Ministero delle Finanze, 1972 E.C.R. 89, ¶ 3.

541. Case C-198/14, Visnapuu v. Kihlakunnansyyttäjä, ECLI:EU:C:2015:751, ¶¶ 76, 118, 129.

542. *Id.* ¶¶ 116, 122-24.

543. Case 130/80, Criminal Proceedings Against voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527, ¶ 15; Case C-17/93, Criminal Proceedings Against Van der Veldt, 1994 E.C.R. I-3537, I-3538-39; Case C-358/95, Morellato v. Unità Sanitaria Locale (USL) No 11, Pordenone, 1997 E.C.R. I-1431, ¶¶ 12-13.

to pass on additional costs to importers through packaging regulations.[544] In *Prantl*, the ECJ noted that although the impact of intra-EU trade would be minimal, Article 34 still prohibits such regulations.[545] The ECJ ruled in similar fashion in *Commission v. Germany*, stating that a labeling requirement would be a less restrictive alternative than forcing manufacturers and producers to alter their packaging to fit the needs of each member-state.[546] In *De Smedt*, the ECJ contended that member-states cannot regulate the shape of a product in the name of consumer protection—otherwise member-states could enforce shape requirements that would also increase costs for product manufacturers.[547]

Inspection processes also cannot, pursuant to Article 34, create additional costs for importers. In *Italian Table Wines*, the ECJ stated that inspections at the border cannot cause unusual delays which, in turn, may create additional costs for importers.[548] According to the ECJ in *Marimex*, inspections cannot be excessive as such fees increase the costs of an importer's product.[549] The ECJ held in *Simmenthal* that fees for the inspections of live animals alone violates Article 34.[550] The ECJ also commented in *Commission v. Germany* that inspection fees cannot be assessed as a customs duty in violation of Articles 28 and 30.[551] Inspections cannot be implemented in cases where the goods have already been inspected in another member-state unless the member-state wishing to engage in a second inspection has serious concerns about irregularities.[552] Member-states also

544. Case 16/83, Criminal Proceedings Against Prantl, 1984 E.C.R. 1299, 1331-32.

545. *Id.* ¶¶ 19-20.

546. Case 179/85, Comm'n v. Germany, 1986 E.C.R. 3879, ¶¶ 12-13.

547. Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961, ¶¶ 13, 20.

548. Case 42/82, Comm'n v. France, 1983 E.C.R. 1013, 1022.

549. Case 84/71, SpA Marimex v. Ministero delle Finanze, 1972 E.C.R. 89, 91-92.

550. Case C-106/77, Simmenthal SpA v. Ministero delle Finanze, [1977] 2 C.M.L.R. 1, at 17.

551. Case C-18/87, Comm'n v. Germany, 1988 E.C.R. 5427, ¶ 14.

552. Case C-277/91, Ligur Carni Srl v. Unità Sanitaria Locale n. XV di Genova, 1993 E.C.R. I-6621, ¶ 24.

cannot engage in discriminatory inspection practices for goods subject to export which may create an expensive delay.[553]

The need for consumer protection did justify the need for additional costs to be assumed by a manufacturer in *Schwarz*.[554] Here, the ECJ stated that it is tolerable for a member-state to require that food placed in a vending machine be packaged in order to prevent the spread of disease and contagion.[555]

V. CONCLUSION

As stated above, the United Kingdom, despite its plebiscite leading it down a path to exit the EU, may attempt to keep a place within the common market at least in regard to the free movement of goods. However, according to the legal architect of several of the treaties keeping the EU as a whole toward greater integration, a trade pact completed between the United Kingdom and the EU allowing the former to stay within the latter's common market is nearly impossible before the United Kingdom's departure will be complete.[556] Therefore, at least for the time being, the United Kingdom and every member-state is bound by the above principles set forth by the ECJ in the case law addressed in this article.

Simply stated, given the jurisprudence of the ECJ regarding the free movement of goods, it is very difficult for a member-state to put into place measures that interfere with the free flow of goods across member-states based on a concern for consumer protection. Although this work was limited to issues concerning consumer protection, it can be bluntly stated that in the overwhelming majority of the cases cited in this work, the ECJ has not tolerated a member-state's attempt to treat domestically-produced goods and goods made in other member-states differently. Likewise, once goods are freely

553. Case C-426/92, Germany v. Deutsches Milch-Kontor GmbH, 1994 E.C.R. I-2757, ¶¶ 20, 22.

554. Case C-366/04, Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139, ¶¶ 28-29, 33.

555. *Id.* ¶ 35.

556. George Parker, *Brexit Transition Deal May Avert UK Economic 'Catastrophe'*, FIN. TIMES (Dec. 29, 2016), https://www.ft.com/content/5b423566-c7a3-11e6-9043-7e34c07b46ef?sharetype=share.

available in any one member-state, even if their origin is outside the EU. This basic, yet very important, constitutional principle has very limited exceptions even in situations whereby a member-state feels it must protect its citizen-consumers from certain goods.