

EUROPEAN UNION LAW

concerning § 12 II The free movement of goods (art. 28 et seq., 110 et seq. FEU Treaty)

Case 1
(facts of the case)

A is a Romanian manufacturer of innovative high tech bicycles with especially good road holding. In order to commercialise his bikes more efficiently, he offers them for favourable prices but takes high prices for spare parts - in particular for the wheels (tyres and rims). Furthermore, he designed the wheels in a special size, which makes it impossible to use spare parts of other bicycle manufacturers.

One day, the EU member state X issues a regulation, according to which in this state only bicycles with wheels in standard sizes (24, 25, 26, 27, 28 inches etc) may be sold. The regulation is justified with requirements of consumer protection. In addition, it is said to be necessary because there had been accidents after owners of bikes with special wheel sizes had inserted spare parts in standard sizes and the bikes had not been secure any more. In part, there had been confusion; in part the bike owners would had accepted the minimal size differences for financial reasons.

A consults his daughter B who is studying law for some years. He would like to know whether this regulation is compatible with EU law. What will be the (correct) answer of B?

Notice: Assume the secondary Union law not containing any rules concerning the question of the size of the wheels of bicycles up to now.

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Case 1
(discussion of the case)

SUBJECTS: The structure of the case solution, introductory sentences and concluding sentences, free movement of goods

OUTLINE OF THE CASE SOLUTION:

The (correct) answer of B to the question of her father A will be that the regulation in member state X is compatible with EU law if it does not violate any primary or secondary law of the European Union.¹ In the given case, the regulation in member state X might violate one of the economic fundamental freedoms of the citizens of the Union, namely the free movement of goods under art. 28 ff., 110 f. FEU Treaty.² The free movement of goods is violated if the sphere of protection [scope/area of protection] of this freedom is concerned (A) and the regulation represents an encroachment on [interference with] this freedom (B) and this encroachment is not justified by the limits of the free movement of goods and therefore illegal (C).³

A. Sphere of protection⁴

The sphere of protection of the free movement of goods is concerned if⁵ there is a situation of cross-border mobility (I.) concerning goods (II.) that are in circulation in the European internal market (III.).

I. Situation of cross-border mobility: (+)

As all fundamental freedoms under the FEU Treaty, the free movement of goods is only relevant in situations of cross-border mobility, since it only guarantees the free economic exchange between the member states. Concerning the regulation in member state X, this necessary relevance of Union law is given because the regulation does not only apply to domestic products of the member state X but also to bicycles that have been produced in other EU member states. Romania is a EU member state and part of the EU internal market since 2007.

¹ Note: The introduction should refer precisely to the question asked or presented in the facts of the case and then, starting from this point, work out the real question of the case.

² Note: Since in the given case there are no reasons to suspect that any other fundamental freedoms or other norms of European Union law are violated, the case question is obviously limited to this issue. This should be made clear at the beginning of the examination.

³ Note: This sentence is the most important part of the introduction: Firstly, it is indicative of the dogmatic structure of the free movement of good as a fundamental freedom. Secondly, it presents without unnecessary explanations the structure of the following examination. Such introductory sentences may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers, secretaries of state ...).

⁴ Concerning the structure of the examination of a possible violation of the free movement of goods, see *Diagram 9* from this course. That diagram proposes a special structure that is most suitable for the examination of a violation of that special freedom. It is also possible to follow the general examination scheme for all economic fundamental freedoms presented in *Diagram 8* of this course, which is based on the idea of the convergence of the fundamental freedoms. Some authors prefer other structures of examination, following different understandings of the general dogmatics of the fundamental freedoms.

⁵ Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of the examination of complex, important or particularly difficult aspects. However, the general context must always be clear (I., II. and III. are sub-aspects of A!).

II. Goods: (+)

The regulation is about goods: All movable physical (corporeal) products, which generally can be valued in money, are goods in the sense of art. 28 ff. FEU Treaty. This includes bicycles. This requirement is also met.

III. Goods in circulation in the internal market

As required in art. 28(2) FEU Treaty, these goods are in free circulation in the European internal market, since (at least some of) the bicycles falling under the regulation originate in member states of the Union.

The sphere of protection of the free movement of goods is concerned.⁶

B. Encroachment

The regulation of member state X can only violate the free movement of goods if it represents an encroachment on [an interference with] the freedom. It does not impose any payment obligations and hence does not erect any tariff barriers. But it might constitute a non-tariff barrier. Since it does not impose quantitative restrictions on imports, it may only represent an encroachment in the form of a measure having equivalent effect to quantitative restrictions on imports in the sense of art. 34 FEU Treaty.⁷

I. Open (direct) discrimination

A measure having equivalent effect to quantitative restrictions on imports can consist in an open discrimination. This is the classical form of an encroachment on an economic fundamental freedom. However, in the given case, there is no open discrimination, since the regulation in the member state X is concerning domestic and foreign traders of bicycles in the same way.

II. Hidden (indirect) discrimination

A measure in the sense of art. 34 FEU Treaty can also consist in a hidden discrimination. There is a hidden discrimination if a formally indistinctly applicable measure typically concerns foreign goods more frequently or more intensively as domestic goods.⁸ However, there are no facts of the given case pointing in this direction.⁹ In particular, the "facts of the case" do not indicate if A is the only vendor of bicycles with wheels in a special size in the member state X or if there are domestic competitors who also offer bicycles with special size wheels.

III. (Non-discriminative) restriction

Conceivably, a measure having equivalent effect in the sense of art. 34 FEU Treaty may also consist in a non-discriminative restriction, which concerns domestic and foreign goods in the same way but hinders intra-union trade. This understanding would go beyond the original conception of the fundamental freedoms as prohibitions of discriminations in the Treaty. However, today it is well established in the jurisprudence of the European Court of Justice and in legal science that the fundamental freedoms also have the function of prohibitions of restrictions. Concerning the free movement of goods, the ECJ has made this plain already in 1974 in the *decision Dassonville*¹⁰. According to the Dassonville formula, "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"¹¹, may constitute a measure

⁶ Note: Every major part of the examination must be finished by a *concluding sentence* that indicates clearly, which sub-question has been answered (in which context) with which result. This is crucial for the orientation of the reader. Without such concluding sentences, the reader will soon lose his bearings.

⁷ Note: Such an introduction presents the systematics of possible encroachments on the free movement of goods as arranged in the FEU Treaty, thereby facilitating the classification of the measure of member state X. This is conducive to avoid mistakes. It is also necessary to explain the case to any non-expert in the field (if you talk to any client, CEO or state secretary about "measures having equivalent effect" without any explanations, they will assume that you have freaked out...). However, if the case solution is meant for experts only and shall be short, it is possible to refer directly to art. 34 FEU Treaty ("In the given case, the regulation in member state X may constitute a measure having equivalent effect ... in the sense of art. 34 FEU Treaty").

⁸ Note: Sometimes, it is helpful to describe what is meant by technical terms by a definition.

⁹ Note: The facts of the case must be interpreted correctly. It is strictly inadmissible to allege or assume any facts or circumstances that do not follow clearly from the "facts of the case"!

¹⁰ ECJ, case 8/74, Dassonville, summary 1 and no. 5.

¹¹ Note: In European Union law, it is sometimes helpful to cite short essential passages of famous court decisions literally. This allows every reader to develop his own interpretation of the judgement and reduces the risk of misunder-

having equivalent effect in the sense of art. 30 EEC Treaty (now: 34 FEU Treaty). Following the Dassonville formula, there is such a restriction in the given case, because the regulation of the member state X will make it impossible for the Romanian vendor A (and other foreign vendors) to sell bicycles with special size wheels in this state. The regulation represents a rule on necessary properties of goods, i.e. a norm that determines certain properties certain products must have if they shall be traded in a state. Following the *decision Cassis de Dijon* of the ECJ of 1978¹², such rules must also be considered as measures having equivalent effect to quantitative restrictions on imports.¹³

The regulation in the member state X represents an encroachment on the free movement of goods.⁶

C. Illegality of the encroachment (no justification by the fundamental freedom's limits)

An *encroachment* on a fundamental freedom does *not* yet signify a *violation*. Despite its negative impact, the measure is compatible with EU law if the encroachment is justified by the fundamental freedom's limits. In the given case, the (explicit) limit in art. 36 FEU Treaty (I.) or the inherent limits of the free movement of goods (II.) might justify the restriction of the intra-union trade in bicycles with special size wheels.

I. Justification by the limit in art. 36 FEU Treaty

The encroachment might be justified by the limit in art. 36 FEU Treaty. This limit is applicable to *all* non-tariff barriers, including measures having equivalent effect to quantitative restrictions on export.

1) Fulfilment of the preconditions formulated in art. 36 FEU Treaty

The preconditions formulated in art. 36 FEU Treaty are fulfilled, since the regulation of the member state x is motivated (it is at least *also* motivated) on grounds of public policy and public security (cf. art. 36 phrase 1 FEU Treaty). It serves (at least also serves) to prevent accidents, which might be caused by bicycles that are not safe for traffic because their owners have inserted spare parts in inappropriate sizes. The secondary law of the Union does not contain any rules concerning the question of the size of wheels of bicycles that might exclude regulation by the member states (see the facts of the case). The facts of the case do not allow assuming that the regulation constitutes a means of arbitrary discrimination or a disguised restriction on trade between member states, making it inadmissible under art. 36 phrase 2 FEU Treaty.¹⁴

2) Compliance with the limits of limits

However, the encroaching measure must comply with the so-called limits of limits ["Schranken-Schranken"], in particular with the principle of proportionality. According to this principle, an encroachment on a fundamental freedom can only be justified if it serves a legitimate aim (in the given case: to protect public policy and security by preventing accidents caused by unsafe bicycles) and if it is suitable, necessary and proportionate for pursuing this aim. Concerning the suitability of the regulation in member state X there are no doubts.¹⁵ But this does not apply to the aspect of necessity: The dangers, which may be caused by the insertion of inappropriate spare parts in standard sizes into bicycles designed for special size wheels, can be avoided by *less intrusive measures* as, for example, the obligation to attach warning notices to the user manual and to the original wheels, or the obligation to install special wheel suspensions that do not allow the insertion of inappropriate spare parts.¹⁶ Therefore, as a measure for the protection of public policy and security, the regulation does not comply with the principle of proportionality.

standings. In some cases, it might even be useful to cite the essential passages in different language versions, since they might differ from each other, leading to different interpretations in the various languages.

¹² ECJ, case 120/78, Cassis de Dijon, summary 3 and no. 15.

¹³ Caution: Strictly speaking, this reasoning is insufficient! The last sentence only reflects the jurisprudence of the ECJ. It explains that the ECJ classifies such measures as "having equivalent effect", but it does not explain if, according to your opinion, this is correct. If the case solution shall meet scientific standards, the reference to court decisions cannot replace your own reasoning! However, you may confine yourself to seize on some arguments submitted by the Court, present them in your own words and if necessary refine them.

¹⁴ Note: At this point, another interpretation of the case may also be tenable.

¹⁵ Note: You may go deeper into this question, but the result is obvious. Therefore, and in order to allow focussing on more important aspects of the case, a cursory investigation of this aspect appears sufficient. You are not so sure? In this case, you should complement the case solution by some short deliberations at this point.

¹⁶ Note: At this point, there must be extensive reasoning, taking thoroughly into consideration the requirements of the principle of proportionality and the facts of the case but also making use of one's phantasy to make out and discuss efficient but less intrusive alternative measures!

Due to this disregard of the limits of limits, the encroachment on the free movement of goods is not justified by the freedom's limit in art. 36 FEU Treaty.

II. *Justification by the inherent limits of the free movement of goods*

The encroachment may be justified by the inherent limits ["immanente Schranken"] of the free movement of goods. The existence of the inherent limits is recognized since the *decision Cassis de Dijon* of the ECJ¹⁷. This was a necessary compensation for enlarging the concept of encroachment to hidden discriminations and to non-discriminative restrictions by indistinctly applicable measures.¹⁸ Restrictions are acceptable, as far as the national provisions are "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer". Such imperative reasons of public interest can justify such measures. In the given case, the requirements of consumer protection should be taken into consideration. There is a risk - which has materialized in the case of A - that some producers of bicycles purposefully construct bikes with special size wheels in order to force the clients to buy their overpriced spare parts. However, an intelligent, responsible consumer in the internal market may protect himself by refraining from buying products, which make it necessary to buy expensive original spare parts. Therefore, "imperative" reasons of consumer protection are not identifiable. Furthermore, even in the interest of consumer protection, a *prohibition* to sell bicycles with special size wheels is *not necessary*: Even for this purpose, the obligation to attach a warning notice or consumer information to the user manual and to the bike or the wheels is sufficient. Finally, a prohibition rendering the trade of bikes with special size wheels a priori impossible constitutes a particularly severe encroachment on the free movement of goods and therefore is *not proportionate (in the strict sense)*.¹⁹ So also in this respect, the principle of proportionality as a limit of limits is not observed. Thus, the measure cannot be justified by the inherent limits.

After all, the *encroachment* on the free movement of goods by the regulation of the member state X is *not justified by the freedom's limits*.²⁰

Result: The (correct) answer of B to the question of her father A will be that the regulation of the member state X violates the free movement of goods (in the given case: art. 34 FEU Treaty) and hence is not compatible with EU law.²¹

NOTE

The presented case solution has been formulated extensively in detail, in order to demonstrate the interaction of introductory sentences, discussions of main aspects and concluding sentences. Since the case does not pose any particular difficulties, the solution may also be shorter. However, it is vital that the *line of thoughts* becomes clear without any gaps and that it *reflects the dogmatic structure of the field of law*, in our case of the economic fundamental freedoms. If this is accomplished, in most cases even a non-lawyer can understand and reconstruct the case solution (you may try out with your parents, grand-parents, sisters...).

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de. For any questions, suggestions and criticism please contact me in my office (block C, room 208) or via e-mail at thomas.schmitz@cimonline.de.

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¹⁷ ECJ, case 120/78, Cassis de Dijon, summary 2 and no. 8.

¹⁸ Note: This is just one short sentence, but it shows sufficiently why you are following the line of the European Court of Justice, and displays intellectual independence.

¹⁹ Note: Also at this point, there must be thorough reasoning!

²⁰ Note: Usually, at the end of the case solution, it is necessary to "*resurface*" from the depth of an intricate, multi-layered examination. In that case, a thread of carefully formulated concluding sentences must *lead the reader step-by-step "upwards"*. Do not skip any step. If there are any gaps, the reader cannot follow the line of thoughts to the end and consequently often cannot reconstruct the result. This applies in particular to readers who are not experts in the field.

²¹ Note: The last concluding sentence at the very end of the case solution must correspond to the first introductory sentence at its very beginning! This is a logical and hence imperative requirement. You should always check this congruence before completing your work.

Incompatibility of the regulation with the EU law because of a violation of the fundamental freedom of free movement of goods (art. 28 et seq. 110 et seq. FEU Treaty)

- introduction sentences

A. Sphere of protection

- I. Situation of cross-border mobility
- II. Goods
- III. Goods in circulation in the internal market

B. Encroachment

- here: by a possible *measure having equivalent effect to quantitative restrictions on imports* (→ non-tariff barrier, see art. 34 FEU Treaty)

- I. Open discrimination
- II. Hidden discrimination
- III. (Non-discriminative) restriction

- problem: Are the fundamental freedoms prohibitions of discriminations only or prohibitions of restrictions too? (See ECJ, Dassonville, and, concerning *rules on necessary properties of goods*, ECJ, Cassis de Dijon)

C. Illegality of the encroachment (no justification by the fundamental freedom's limits)

- I. Justification by the limit in art. 36 FEU Treaty
 - 1) Fulfilment of the preconditions formulated in art. 36 FEU Treaty
 - 2) Compliance with the limits of limits ["Schranken-Schranken"]
 - problem: proportionality (here: necessity)?
- II. Justification by the inherent limits of the free movement of goods ["immanente Schranken"]
 - 1) Applicability of the inherent limits
 - 2) Fulfilment of the preconditions of the inherent limits (pursuit of *imperative reasons of public interest*)
 - problem: "mandatory requirements" of consumer protection?
 - 3) Compliance with the limits of limits
 - problem: proportionality (here: necessity, proportionality in its strict sense)?

- closing sentences ("resurfacing" from the depth of the construction of the solution of the case)