# European Market Freedoms

## Cases and Materials

# 1 Introduction

### (1) CJEU Case 8/74 *Procureur du Roi v Dassonville,* ECLI:EU:C:1974:82

Belgian law provided that goods bearing a designation of origin could only be imported if they were accompagnied by a certificate from the government of the exporting country certifying their right to such a designation. Dassonville imported Scotch whisky into Belgium from France without being in possession of the certificate from the British authorities. The certificate would have been very difficult to obtain in respect of goods which were already in free circulation in a third country, as in this case. Dassonville was prosecuted in Belgium and argued by way of defence that the Belgian rule constituted an MEQR according to (now) Art 34 TFEU.[1]

Judgment

[5] All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

[6] In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

[7] Even without having to examine whether or not such measures are covered by Article 36 [now Art 36 TFEU], they must not, in any case, by virtue of the principle expressed in the second sentence of hat Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[8] That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

[9] Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

[1] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 639.

## (2) 'Spaak Report'

*Comité Intergouvernemental Créé Par La Conférence De Messine,* Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères, Doc. MAE 120 f/56 (1956), translation taken from *Joseph J.A. Ellis,* Source Material for Article 85(1) of the EEC Treaty, 32 Fordham Law Review 247, 249 (1963)

[p. 13] The object of a European common market should be to create a vast zone of common economic policy, constituting a powerful unit of production and permitting a continuous expansion, an increased stability, an accelerated raising of the standard of living, and the development of harmonious relations between its Member States.

To attain these objectives, a fusion of the separate markets is an absolute necessity. Through the increased division of labor, such a fusion will enable the wasting of resources to be eliminated and, through an increased certainty of supply, the production of goods regardless of cost to be abandoned. In an expanding economy, this division of labor is expressed not so much by an abandonment of existing production programs as by a relatively more rapid development, in the common interest, of the most economic production programs. Competitive advantage will, moreover, be determined less and less by natural conditions. Just as atomic energy gives greater freedom in the siting of industries, so the common market will do full-justice to the management of enterprises and to human abilities: the pooling of resources will ensure equality of opportunity.

## (3) Adam Smith, The Wealth of Nations, 1776, Book IV, chap. II

It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy […] What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage. The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished ... but only left to find out the way in which it can be employed with the greatest advantage.

## (4) David Ricardo, On the Principles of Political Economy and Taxation, 3rd ed. 1821, chap. 7.11

Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by regarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically: while, by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world. It is this principle which determines that wine shall be made in France and

Portugal, that corn shall be grown in America and Poland, and that hardware and other goods shall be manufactured in England.

# 2 Free Movement of Goods: Customs Union

## (1) CJEU Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1

Article 12 EEC-Treaty (now Article 30 TFEU): Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.

Van Gend en Loos imported a quantity of a chemical from Germany into the Netherlands. It was charged with an import duty which had allegedly been increased (by changing the tariff classification from a lower to a higher tariff-heading) since the coming into force of the EEC Treaty, contrary to Article 12 EEC-Treaty. On appeal against payment before the Dutch Tariefcommissie, Article 12 EEC was raised in argument and two questions were referred to the ECJ under Article 267 TFEU. The first was 'whether Article 12 of the EEC-Treaty has direct application within the territory of a Member State; in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim individual rights which the courts must protect'. Observations were submitted to the ECJ by the Belgian, German, and Netherlands governments. Belgium argued that the question was whether a national law ratifying an international Treaty would prevail over another law, and that this was a question of national constitutional law which lay within the exclusive jurisdiction to the Netherlands court. The Netherlands government argued that the EEC Treaty was not different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who had created the Treaty.[2]

Judgment

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

[2] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 183 et seq.

In addition the task assigned to the Court of Justice under Article [267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. […]

The wording of Article 12 [EEC-Treaty, now Article 30 TFEU] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 [EEC-Treaty, now Article 30 TFEU] does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles 169 and 170 of the Treaty [now Articles 258 and 259 TFEU] put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court […]

A restriction of the guarantees against an infringement of Article 12 [EEC-Treaty, now Article 30 TFEU] by Member States to the procedures under Article 169 and 170 [now Articles 258 and 259 TFEU] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

## (2) CJEU Case 24/68 *Commission v Italy* ECLI:EU:C:1969:29

Italy imposed a levy on goods which were exported to other Member States with the ostensible purpose of collecting statistical material for use in discerning trade patterns. The Court reiterated its holding that customs duties were prohibited irrespective of the purpose for which the duties were imposed, and irrespective of the destination of the revenues which were collected. It then continued as follows.[3]

Judgment

[8] The extension of the prohibition of customs duties to charges having equivalent effect is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency.

The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.

[9] Thus, in order to ascribe to a charge an effect equivalent to a customs duty, it is important to consider this effect in the light of the objectives of the Treaty, in the Parts, Titles and Chapters in which Articles 9, 12 [now Articles 28, 30 TFEU], 13 and 16 [have been repealed] are to be found, particularly in relation to the free movement of goods.

Consequently, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the act that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.

[10] It follows […] that the prohibition of new customs duties or charges having equivalent effect, linked to the principle of the free movement of goods, constitutes a fundamental rule which, without prejudice to the other provisions of the Treaty, does not permit of any exceptions.

## (3) CJEU Case 87/75 *Bresciani v Amministrazione Italiana delle Finance* ECLI:EU:C:1976:18

The Italian authorities imposed a charge for the compulsory veterinary and public-health inspections which were carried out on imported raw cowhides. Was this to be regarded as a charge having equivalent effect pursuant to Article 30 TFEU?[4]

Judgment

[8] The justification for the obligation progressively to abolish customs duties is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods. The

[3] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 614.
[4] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 616.

obligation progressively to abolish customs duties is supplemented by the obligation to abolish charges having equivalent effect in order to prevent the fundamental principle of the free movement of goods within the common market from being circumvented by the imposition of pecuniary charges of various kinds by a Member State. The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.

[9] Consequently, any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another Member State by reason of the fact that they cross a frontier, constitutes a charge having an effect equivalent to a customs duty. In appraising a duty of the type at issue it is, consequently, of no importance that it is proportionate to the quantity of the imported goods and not to their value.

[10] Nor, in determining the effects of the duty on the free movement of goods, is it of any importance that a duty of the type at issue is proportionate to the costs of a compulsory public health inspection carried out on entry of the goods. The activity of the administration of the State intended to maintain a public health inspection system imposed in the general interest cannot be regarded as a service rendered to the importer such as to justify the imposition of a pecuniary charge. If, accordingly, public health inspections are still justified at the end of the transitional period, the costs which they occasion must by met by the general public which, as a whole, benefits from the free movement of Community goods.

[11] The fact that the domestic production is, through other charges, subjected to a similar burden matters little unless those charges and the duty in question are applied according to the same criteria and at the same stage of production, thus making it possible for them to be regarded as falling within a general system of internal taxation applying systematically and in the same way to domestic and imported products.

## (4) CJEU Case 18/87 *Commission v Germany* ECLI:EU:C:1988:453

German regional authorities charged certain fees on live animals imported into the country. These charges were to cover the cost of inspections undertaken pursuant to Directive 81/389. The question arose whether they should be regarded as charge having equivalent effect (CEEs) according to Article 30 TFEU. The ECJ began by stating the new orthodox proposition that any pecuniary charge imposed as a result of goods crossing a frontier was caught by the Treaty, either as a customs duty or as a CEE. It then recognized an exception to this basic principle.[5]

Judgment

[8] Since the contested fee was charged in connection with inspections carried out pursuant to a Community provision, it should be noted that according to the case-law of the Court […] such fees may not be classified as charges having an effect equivalent to a customs duty if the following conditions are satisfied :

[5] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 618.

(a) they do not exceed the actual costs of the inspections in connection with which they are charged;

(b) the inspections in question are obligatory and uniform for all the products

concerned in the Community;

(c) they are prescribed by Community law in the general interest of the Community;

(d) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 of the Treaty.

[9] In this instance these conditions are satisfied by the contested fee. […]

# 3 Free Movement of Goods: Discriminatory Internal Taxation

## CJEU Case 112/84 *Humblot v Directeur des Services Fiscaux*

## ECLI:EU:C:1985:185

French law imposed an annual car tax. The criterion for the amount of tax to be paid was the power rating of the car. Below a 16CV rating the tax increased gradually to a maximum of 1,100 francs. For cars above 16CV in power there was a flat rate of 5,000 francs. There was no French car which was rated above 16CV, and therefore the higher charge was borne only by those who had imported cars. Humblot was charged the 5,000 francs on a 36CV imported vehicle, and argued that this tax violated Article 95 [now Article 110 TFEU].[6]

Judgment

[12] It is appropriate in the first place to stress that as Community law stands at present the Member States are at liberty to subject products such as cars to a system of road tax which increases progressively in amount depending on an objective criterion, such as the power rating for tax purposes, which may be determined in various ways.

[13] Such a system of domestic taxation is, however, compatible with Article 95 only in so far as it is free from any discriminatory or protective effect.

[14] That is not true of a system like the one at issue in the main proceedings. Under that system there are two distinct taxes: a differential tax which increases progressively and is charged on cars not exceeding a given power rating for tax purposes and a fixed tax on cars exceeding that rating which is almost five times as high as the highest rate of the differential tax. Although the system embodies no formal distinction based on the origin of products it manifestly exhibits discriminatory or protective features contrary to Article 95, since the power rating determining liability to the special tax has been fixed at a level such that only imported cars, in particular from other Member States, are subject to the special tax whereas all cars of domestic manufacture are liable to the distinctly more advantageous differential tax.

[6] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 622.

[15] In the absence of considerations relating to the amount of the special tax, consumers seeking comparable cars as regards such matters as size, comfort, actual power, maintenance costs, durability, fuel consumption and price would naturally choose from among cars above and below the critical power rating laid down by French law. However, liability to the special tax entails a much larger increase in taxation than passing from one category of car to another in a system of progressive taxation embodying balanced differentials like the system on which the differential tax is based. The resultant additional taxation is liable to cancel out the advantages which certain cars imported from other Member States might have in consumers' eyes over comparable cars of domestic manufacture, particularly since the special tax continues to be payable for several years. In that respect the special tax reduces the amount of competition to which cars of domestic manufacture are subject and hence is contrary to the principle of neutrality with which domestic taxation must comply.

# 4 Free Movement of Goods: Quantitative Restrictions and Measures Having Equivalent Effect

## (1) CJEU Case C-275/92 *Schindler*

G. and J. Schindler sent letters from the Netherlands to the U.K. inviting recipients to participate in lotteries. They acted on behalf of a regional state lottery in Germany. The British Customs and Excise authorities seized the letters on the grounds that they infringed the U.K. legislation on lotteries and gambling. G. and J. Schindler challenged the seizure before U.K. courts which referred the case to the ECJ (Art. 267 TFEU). The question was raised whether they could rely on the provisions on the free movement of goods. Five governments argued that lotteries were not an 'economic activity' within the meaning of the Treaty. They submitted that lotteries had traditionally been prohibited in the Member States, or were operated either directly by the public authorities or under their control, solely in the public interest. They considered that lotteries had no economic purpose since they were based on chance. In any case, lotteries were in the nature of recreation or amusement rather than economic. Three governments and the Commission argued that operating lotteries was a 'service' within the meaning of Article 60 [now Article 57] of the Treaty. They submitted that such an activity related to services normally provided for remuneration to the operator of the lottery or to the participants in it, but not covered by the rules on the free movement of goods. The defendants in the main proceedings argued that their activity came within the scope of Article 30 [now Article 34] of the Treaty. They submitted that the advertisements and documents announcing or concerning a lottery draw were 'goods' within the meaning of the Treaty.

[19] Since some governments argue that lotteries are not 'economic activities' within the meaning of the Treaty, it must be made clear that the importation of goods or the provision of services for remuneration […] are to be regarded as 'economic activities' within the meaning of the Treaty.

[20] That being so, it will be sufficient to consider whether lotteries fall within the scope of one or other of the articles of the Treaty referred to in the order for reference.

[21] The national court asks whether lotteries fall, at least in part, within the ambit of Article 30 [now Article 34] of the Treaty to the extent that they involve the large-scale sending and distribution, in this case in another Member State, of material objects such as letters, promotional leaflets or lottery tickets.

[22] The activity pursued by the defendants in the main proceedings appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.

[23] The point relied on by Gerhart and Jörg Schindler, that on the facts of the main proceedings agents of the SKL send material objects into Great Britain in order to advertise the lottery and sell tickets therein, and that material objects which have been manufactured are goods within the meaning of the Court's case-law, is not sufficient to reduce their activity to one of exportation or importation.

[24] Lottery activities are thus not activities relating to 'goods', falling, as such, under Article 30 [now Article 34] of the Treaty.

[25] They are however to be regarded as 'services' within the meaning of the Treaty. […]

## (2) CJEU Case C-97/98 *Jägerskiöld*

On 29 May 1997, Mr Gustafsson fished with a spinning rod in waters belonging to Mr Jägerskiöld in the commune of Kimito in Finland. Two days earlier, on 27 May 1997, he had paid the fishing licence fee provided for by Finish law and that allowed him to practice that type of fishing even in private waters. Mr Jägerskiöld brought an action before the national court for a declaration that Mr Gustafsson may not, without his permission, fish with a rod in the waters belonging to him, notwithstanding the fact that Mr Jägerskiöld had paid the fishing licence fee provided for by the Law on Fishing. In support of his action, Mr Jägerskiöld argued that the amendment made to the Law on Fishing , on which the right to fish with a rod was based, was contrary to the rules of the Treaty concerning the free movement of goods or to those relating to the freedom to provide services. The Tingsrätt decided to stay proceedings and to refer to the Court several questions, inter alia whether fishing rights or spinning licences were to be considered ‘goods’ in accordance with the Treaty provisions?

Judgment

[30] […] it must be reiterated that, in its judgment in Case 7/68 *Commission* v *Italy,* cited above […] the Court defined goods, for the purposes of Article 9 of the EC Treaty [now Article 28 TFEU] […] which forms the first article of the third part of Title I of the EC Treaty,

entitled 'Free movement of goods', as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.

[32] However, in *Commission* v *Italy* the Court was asked whether articles of artistic, historic, archaeological or ethnographic interest escaped the application of the Treaty provisions relating to the customs union on the ground that they could not be assimilated to 'consumer goods or articles of general use' and did not constitute 'ordinary merchandise'. As is clear from the actual definition given by the Court, the status of 'products' of the goods in question was not therefore contested, so that this definition cannot in itself serve to define fishing rights or permits as goods within the meaning of the Treaty provisions relating to the free movement of goods.

[33] It must also be observed that anything which can be valued in money and which is capable, as such, of forming the subject of commercial transactions does not necessarily fall within the scope of application of those Treaty provisions.

[35] […] as is clear from the judgment in Case C-275/92 *Schindler* [1994] ECR 1-1039, the organisation of lotteries does not constitute an activity relating to 'goods', even if such an activity is coupled with the distribution of advertising material and lottery tickets, but must be regarded as a provision of 'services' within the meaning of the Treaty. In that activity, the provisions of services in question are those provided by the lottery organiser in letting ticket buyers participate in the lottery against payment of the price of the lottery tickets.

[36] The same applies to the grant of fishing rights and the issue of fishing permits. The activity consisting of making fishing waters available to third parties, for consideration and upon certain conditions, so that they can fish there constitutes a provision of services which is covered by Article 59 et seq. of the EC Treaty [now Article 56 et seq. TFEU] […] if it has a cross-frontier character. The fact that those rights or those permits are set down in documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods.

[37] That conclusion cannot be affected by a reference to intellectual property rights, which, according to Mr Jägerskiöld, are covered by those provisions despite their intangible nature.

[38] First, […] although intellectual property rights may affect intra-Community trade in goods, they do not in themselves constitute such goods. Secondly, intellectual property rights may affect trade not only in goods but also in services […].

[39] Consequently, the answer to be given to the first question must be that fishing rights or fishing permits do not constitute 'goods' within the meaning of the provisions of the Treaty relating to the free movement of goods but form a 'provision of a service' within the meaning of the Treaty provisions relating to the freedom to provide services.

[Regarding the free movement of services the Court ultimately held that **t**he provisions of the Treaty relating to the freedom to provide services are not applicable to a situation, such as that in the main proceedings, which is confined in all respects within a single Member State.]

## (3) CJEU Case 249/81 *Commission v Ireland (*'Buy Irish')

The Irish Government introduced a campaign ('Buy Irish') to promote the sales of Irish goods to shoppers in Ireland. A symbol indicating Irish origin was attached to goods and an information service was available. The Irish government submitted that the scheme was not successful as the sale of imported products actually rose during the promotion period. Nevertheless, the Commission brought an action against Ireland under Article 258 TFEU.

Judgement

II — The Irish Goods Council

[10] The Irish Goods Council was created on 25 August 1978, a few months after the disputed campaign was launched, in the form of a company limited by guarantee and not having a share capital; it was registered in accordance with Irish company law (Companies Act 1963). The Council is in fact the result of the amalgamation of two bodies, the National development Council, a company limited by guarantee and registered under the Companies Act, and the Working Group on the Promotion and Sale of Irish Goods.

[11] The Irish Government maintains that the Irish Goods Council was created under the sponsorship of the government in order to encourage Irish industry to overcome its own difficulties. The Council was established for the purpose of creating a framework within which the various industries could come together in order to cooperate for their common good.

[12] The Management Committee of the Irish Goods Council consists, according to the Articles of Association of that institution, of 10 persons appointed in their individual capacities by the Minister for Industry, Commerce and Energy; the same Minister appoints the chairman from among the members of the Management Committee. The members and the chairman are appointed for a period of three years, and their appointments may be renewed. In practice, the members of the Management Committee are selected by the Minister in such a manner as to represent the appropriate sectors of the Irish economy.

[13] It appears from the information supplied by the Irish Government at the request of the Court that the activities of the Irish Goods Council are financed by subsidies paid by the Irish Government and by private industry. The subsidies from the State and from the private sector amounted, respectively to IRL 1 005 000 and IRL 175 000 for the period between August 1978 and December 1979; IRL 940 000 and IRL 194 000 for 1980; and IRL 922 000 and IRL 238 000 for 1981.

[14] The Irish Government has not denied that the activities of the Irish Goods Council consist in particular, after the abandonment of the Shoplink Service and the exhibition facilities offered to Irish manufacturers in Dublin, in the organization of an advertising campaign in favour of the sale and purchase of Irish products, and in promoting the use of the "Guaranteed Irish" symbol.

[15] It is thus apparent that the Irish Government appoints the members of the Management Committee of the Irish Goods Council, grants it public subsidies which cover the greater part of its expenses and, finally, defines the aims and the broad outline of the

campaign conducted by that institution to promote the sale and purchase of Irish products. In the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty.

[…]

[23] The first observation to be made is that the campaign cannot be likened to advertising by private or public undertakings, or by a group of undertakings, to encourage people to buy goods produced by those undertakings. Regardless of the means used to implement it, the campaign is a reflection of the Irish Government's considered intention to substitute domestic products for imported products on the Irish market and thereby to check the flow of imports from other Member States.

[24] It must be remembered here that a representative of the Irish Government stated when the campaign was launched that it was a carefully thought-out set of initiatives constituting an integrated programme for promoting domestic products; that the Irish Goods Council was set up at the initiative of the Irish Government a few months later; and that the task of implementing the integrated programme as it was envisaged by the government was entrusted, or left, to that Council.

[25] Whilst it may be true that the two elements of the programme which have continued in effect, namely the advertising campaign and the use of the "Guaranteed Irish" symbol, have not had any significant success in winning over the Irish market to domestic products, it is not possible to overlook the fact that, regardless of their efficacity, those two activities form part of a government programme which is designed to achieve the substitution of domestic products for imported products and is liable to affect the volume of trade between Member States.

[26] The advertising campaign to encourage the sale and purchase of Irish products cannot be divorced from its origin as part of the government programme, or from its connection with the introduction of the "Guaranteed Irish" symbol and with the organization of a special system for investigating complaints about products bearing that symbol. The establishment of the system for investigating complaints about Irish products provides adequate confirmation of the degree of organization surrounding the "Buy Irish" campaign and of the discriminatory nature of the campaign. In the circumstances the two activities in question amount to the establishment of a national practice, introduced by the Irish Government and prosecuted with its assistance, the potential effect of which on imports from other Member States is comparable to that resulting from government measures of a binding nature.

[28] Such a practice cannot escape the prohibition laid down by Artilcle 30 [now 34] of the Treaty solely because it is not based on decisions which are binding upon undertakings. Even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty [now Article 3 TEU].

[29] That is the case where, as in this instance, such a restrictive practice represents the implementation of a programme defined by the government which affects the national economy as a whole and which is intended to check the flow of trade between Member States by encouraging the purchase of domestic products, by means of an advertising campaign on a national scale and the organization of special procedures applicable solely to domestic products, and where those activities are attributable as a whole to the government and are pursued in an organized fashion throughout the national territory.

[30] Ireland has therefore failed to fulfil its obligations under the Treaty by organizing a campaign to promote the sale and purchase of Irish goods within its territory.

## (4) CJEU Case C-51/93 *Meyhui*

Meyhui imports Schott's products to Belgium and insists that Schott should label its goods in compliance with a European Directive on definitions and rules regarding the composition, characteristics of manufacture and labelling of crystal glass products. The directive requires that certain information is given in the languages of the Member State in which they are marketed, in this instance Belgium. Schott refuses to act accordingly. The Belgian court that referred the case to the ECJ considered it possible that the labelling requirement in question violated the free movement of goods as it does not leave open the possibility of using another language easily comprehensible to the purchaser or of informing the purchaser by other means.

Judgment

[10] Article 30 [now Article 34 TFEU] prohibits obstacles to the free movement of goods resulting from rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply without distinction to all national and imported products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods […] Where such justification exists, the measure in question must, in any event, be proportionate to the goal pursued.

[11] It is settled law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions […].

[12] In this instance, the explanatory notes in question are part of a directive which is designed, as is clear in particular from the first three recitals in the preamble thereto, to eliminate obstacles to trade caused by differences between the rules of the Member States concerning the composition and description of crystal glass products by means of the adoption of common requirements.

[13] However, the prohibition on affixing to crystal glass products in categories 3 and 4 of Annex I to Directive 69/493 their description in a language other than the language or languages of the Member State in which those goods are marketed constitutes a barrier to intra-Community trade in so far as products coming from other Member States have to be given different labelling causing additional packaging costs.

[14] It is therefore necessary to determine whether, in the context of the harmonization sought by the directive, such an obstacle is justified.

[Ultimately the Court held:]

[19] The fact that consumers in a Member State in which the products are marketed are to be informed in the language or languages of that country is therefore an appropriate means of protection. In this regard it should be held that the hypothesis referred to by the national court that another language may be easily comprehensible to the purchaser is of only marginal importance.

[20] Finally, the measure chosen by the Community legislature in order to protect consumers does not appear disproportionate to the goal pursued. There is nothing in the file to suggest that there might conceivably be some different measure which could achieve the same goal while being less constrictive for producers.

## (5) CJEU Case C-171/11 *Fra.bo Spa v DVGW*

The Court had to address the question whether a private-law association that draws up technical standards for products used in the drinking water supply sector (and certifies products on the basis of those standards) must comply with Article 34 TFEU.

Judgment

[2] That reference was made in the context of proceedings between Fra.bo SpA ('Fra.bo'), a company governed by Italian law specialised in the production and distribution of copper fittings intended in particular for piping for water or gas, and the German certification body, the Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein ('DVGW') concerning the latter's decision to withdraw or refuse to extend the certificate for copper fittings produced and distributed by Fra.bo.

[…]

[14] As a private-law association, the DVGW considers that it is not bound by the provisions governing the free movement of goods and that only the Federal Republic of Germany is required to answer for any infringements of Article 28 EC [now Article 34 TFEU] in connection with the adoption of Paragraph 12(4) of the ABVWasserV. Consequently, there is nothing preventing the DVGW from drawing up technical standards which go beyond those in place in Member States other than the Federal Republic of Germany and to apply them to its certification activities. It is also free, on quality-related grounds, to take account only of laboratories accredited by it. […]

[24] It is common ground that the DVGW is a non-profit, private-law body whose activities are not financed by the Federal Republic of Germany. It is, moreover, uncontested that that Member State has no decisive influence over the DVGW's standardisation and certification activities, although some of its members are public bodies.

[25] The DVGW contends that, accordingly, Article 28 EC [now Article 34 TFEU] is not applicable to it, as it is a private body. The other parties concerned consider that private-law

bodies are, in certain circumstances, bound to observe the free movement of goods as guaranteed by Article 28 EC [now Article 34 TFEU].

[26] It must therefore be determined whether, in the light of inter alia the legislative and regulatory context in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State.

[27] In the present case, it should be observed, firstly, that the German legislature has established, in Paragraph 12(4) of the ABVWasserV, that products certified by the DVGW are compliant with national legislation.

[28] Secondly, it is not disputed by the parties to the main proceedings that the DVGW is the only body able to certify the copper fittings at issue in the main proceedings for the purposes of Paragraph 12(4) of the ABVWasserV. In other words, the DVGW offers the only possibility for obtaining a compliance certificate for such products.

[29] The DVGW and the German Government have referred to there being a procedure other than certification by the DVGW, which consists in entrusting an expert with the task of verifying a product's compliance with the recognised rules of technology within the meaning of Paragraph 12(4) of the ABVWasserV. It is apparent, however, from the answers to the written and oral questions put by the Court that the administrative difficulties associated with the absence of specific rules of procedure governing the work of such experts, on the one hand, combined with the additional costs incurred by having an individual expert report drawn up, on the other, make that other procedure of little or no practical use.

[30] Thirdly, the referring court takes the view that, in practice, the lack of certification by the DVGW places a considerable restriction on the marketing of the products concerned on the German market. Although the ABVWasserV merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it is apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the DVGW.

[31] In such circumstances, it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings.

[32] Accordingly, the answer to the first question is that Article 28 EC [now Article 34 TFEU] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

## (6) CJEU Case C-267 and C-268/91 *Bernard Keck and Daniel Mithouard*

Keck and Mithouard had resold goods at a loss. This violated a French law forbidding such practices. Keck and Mithouard submitted that the law restricted the volume of sales of imported goods by depriving them of a method of sales promotion and that it was therefore

incompatible with Article 30 of the Treaty (now Article 34 TFEU). Any restrictive effect on trade plainly affected *all* goods, not just imports.[7]

Judgment

[11] By virtue of Article [34 TFEU], quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

[12] National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

[13] Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

[14] In view of the increasing tendency of traders to invoke Article [34] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

[15] It is established by the case-law beginning with 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

[16] By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

[17] Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more

[7] Summary of the facts: Weatherill, EU Law, 7th ed., p. 371.

than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article [34] of the Treaty.

[18] Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty [now Art. 34 TFEU] is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

## (7) CJEU Case C-34-36/95 *Konsumentombudsmannen (KO) v De Agostini and TV-Shop*

The Case concerned a Swedish ban on television advertising directed at children under 12 and a ban on commercials for skincare products. It was argued that this was in breach of (now) Article 34 TFEU and hence not be applied in relation to advertising broadcast from other Member States. The Court characterized the Swedish law as one of concerning selling arrangements. It then continued as follows. [8]

Judgment

[40] In […] *Keck* […] at paragraph 16, the Court held that national measures restricting or prohibiting certain selling arrangements are not covered by Article [34] of the Treaty, so long as they apply to all traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

[41] The first condition is clearly fulfilled in the cases before the national court.

[42] As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

[43] Although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it is to be noted that in its observations De Agostini stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.

[44] Consequently, an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, is not covered by Article [34] of the Treaty, unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.

[45] In the latter case, it is for the national court to determine whether the ban is necessary to satisfy overriding requirements of general public importance or one of the aims listed in Article 36 [TFEU] if it is proportionate to that purpose and if those aims or requirements could not have been attained or fulfilled by measures less restrictive of intra-Community trade.

[8] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 657.

## (8) CJEU Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products (GIP)*

The Swedish Consumer Ombudsman sought an injunction restraining GIP from placing advertisements for alcohol in magazines. Swedish law prohibited advertising of alcohol on radio and television, and prohibited advertising of spirits, wines, and strong beer in periodicals other than those distributed at the point of sale. The prohibition on advertising did not apply to periodicals aimed at traders such as restaurateurs. GIP published a magazine containing advertisements for alcohol. 90 per cent of the subscribers were traders, and 10 per cent were private individuals. GIP argued that the advertising ban was contrary to (now) Article 34 TFEU. It contended that the advertising ban had a greater effect on imported goods than on those produced in Sweden.

Judgment

[18] It should be pointed out that, according to paragraph 17 of its judgment in *Keck and Mithouard,* if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article 30 of the Treaty, they must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products.

[19] The Court has also held, in paragraph 42 of its judgment in Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR 1-3843, that it cannot be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

[20] It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

[21] Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.

[22] The information provided by the Consumer Ombudsman and the Swedish Government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported, in comparison with other products such as vodka, which is mainly of Swedish origin, does not alter that conclusion. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have

been greater; second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption.

[23] Furthermore, although publications containing advertisements may be distributed at points of sale, Systembolaget AB, the company wholly owned by the Swedish State which has a monopoly of retail sales in Sweden, in fact only distributes its own magazine at those points of sale.

[24] Last, Swedish legislation does not prohibit 'editorial advertising', that is to say, the promotion, in articles forming part of the editorial content of the publication, of products in relation to which the insertion of direct advertisements is prohibited. The Commission correctly observes that, for various, principally cultural, reasons, domestic producers have easier access to that means of advertising than their competitors established in other Member States. That circumstance is liable to increase the imbalance inherent in the absolute prohibition on direct advertising.

[25] A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article [34] of the Treaty.

[The Court then discusses whether such an obstacle may be justified by the protection of public health and concluded: 'the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterize the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.']

## (9) CJEU Case C-142/05 *Mickelsson*

The Court considered whether (now) Article 34 TFEU should be interpreted as precluding national regulations which prohibited the use of personal watercraft on waters other than designated, i.e. generally navigable waterways.

Judgment

[24] It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as 'measures having equivalent effect to quantitative restrictions on imports' for the purposes of Article [34 TFEU] […]. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (see Case C-110/05 *Commission* v *Italy* [2009] ECR I-0000, paragraph 37).

[25] It is apparent from the file sent to the Court that, at the material time, no waters had been designated as open to navigation by personal watercraft, and thus the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European Communities maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden are, therefore, merely marginal.

[26] Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State (see to that effect, *Commission* v *Italy*, paragraph 56).

[27] Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, *Commission* v *Italy*, paragraph 57).

[28] In that regard, where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article 30 EC or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34 TFEU].

[The Court accepted, however, that the Swedish rule could be justified for the protection of the environment, provided that certain conditions were met.]

## (10) CJEU Case C-265/95 *Commission v France ('French Farmers')*

The Commission brought an Article 258 TFEU action against the French government for breach of what is now Article 34 TFEU combined with Article 4(3) TEU, because the government had taken insufficient measures to prevent French farmers from disrupting imports of agricultural products from other Member States. The problems arose from protest action by French farmers and others, intercepting lorries, destroying their loads and threatening their drivers.

[24] In order to determine whether the Commission's action is well founded, it should be stressed from the outset that the free movement of goods is one of the fundamental principles of the Treaty.

[…]

[27] That fundamental principle is implemented by Article [34] et seq. of the Treaty.

[28] In particular, Article [34] provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

[29] That provision, taken in its context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to flows of imports in intra-Community trade.

[30] As an indispensable instrument for the realization of a market without internal frontiers, Article [34] therefore does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.

[31] The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.

[32] Article [34] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty [now, in amended form, Art. 4(3) TEU], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.

[33] In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.

[34] It is therefore not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories.

[35] However, it falls to the Court, taking due account of the discretion referred to above, to verify, in cases brought before it, whether the Member State concerned has adopted appropriate measures for ensuring the free movement of goods.

[The Court proceeded from this statement of legal principle to determine that the violent acts had created obstacles to intra-EU trade; and that France had failed to meet its legal obligations to respond. In reaching this conclusion, the Court referred to:

- The duration of incidents (which had been occurring regularly for more than 10 years);
- Failure of the French police to attend, despite the fact that in certain cases the competent authorities had been warned of the imminence of demonstrations by farmers, or, even if present, to intervene, even where they far outnumbered the perpetrators;

- the fact that although a number of acts of attacks by identifiable individuals were filmed by television cameras, a very small number of persons had been identified and prosecuted.[9]]

[52] In the light of all the foregoing factors, the Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in this case, cannot but find that, having regard to the frequency and seriousness of the incidents cited by the Commission, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them.

[53] That finding is all the more compelling since the damage and threats to which the Commission refers not only affect the importation into or transit in France of the products directly affected by the violent acts, but are also such as to create a climate of insecurity which has a deterrent effect on trade flows as a whole.

[54] The above finding is in no way affected by the French Government's argument that the situation of French farmers was so difficult that there were reasonable grounds for fearing that more determined action by the competent authorities might provoke violent reactions by those concerned, which would lead to still more serious breaches of public order or even to social conflict.

[55] Apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly […].

[56] It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators.

[57] In the present case the French Government has adduced no concrete evidence proving the existence of a danger to public order with which it could not cope.

[58] Moreover, although it is not impossible that the threat of serious disruption to public order may, in appropriate cases, justify non-intervention by the police, that argument can, on any view, be put forward only with respect to a specific incident and not, as in this case, in a general way covering all the incidents cited by the Commission.

## (11) CJEU Case 15/79 *Groenveld*

Dutch legislation prohibited all manufacturers of meat products from having in stock or processing horsemeat. The purpose was to safeguard the export of meat products to countries that prohibited the marketing of horseflesh. It was impossible to detect the presence of horsemeat within other meat products, and therefore the ban was designed to

[9] Summary taken from Weatherill, EU Law, 7th ed., p. 328.

prevent its use by preventing meat processors from having such horsemeat in stock at all. The sale of horsemeat was not actually forbidden in the Netherlands.[10]

Judgment

[2] That question was raised in the course of proceedings instituted by a wholesaler of horsemeat, who wishes to extend his operations to the manufacture of sausages from horsemeat, against the refusal of the Produktschap, the defendant in the main action, to exempt him from the prohibition set out in Article 3 (1) of the above-mentioned regulation.

[3] The order for reference, in particular Point 7, shows that the regulation in question was adopted for the purpose of protecting Netherlands exports of meat products both to Member States and to non-member countries which constitute important export markets and where there are objections to the consumption of horsemeat or indeed where the importation of products containing horsemeat is prohibited. As it is practically impossible to determine the presence of horsemeat in meat products the sole means of ensuring that such products do not contain horsemeat is to prohibit manufacturers of meat products from having in stock, preparing or processing horsemeat. Thus exports of meat products to the United States must be accompanied by a certificate that the products in question meet requirements at least equivalent to those laid down by United States rules in that field, whereby a similar prohibition is imposed. Article 3 (1) of the abovementioned regulation applies solely to the industrial manufacture of meat products but not to the stocking or retail sale of horsemeat by butchers. The file further establishes that the regulation in question does not affect imports or re-exports of horsemeat originating in other Member States or nonmember countries.

[5] As a preliminary observation it should be pointed out that the market affected by the national measure in question, that in horsemeat, is not governed by any specific Community regulation. […]

[6] Article [35 TFEU] provides that "quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".

[7] That provision concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition like that in question which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export.

[8] The foregoing appreciation is not affected by the circumstance that the regulation in question has as its objective, *inter alia,* the safeguarding of the reputation of the national production of meat products in certain export markets within the Community and in non-member countries where there are obstacles of a psychological or legislative nature to the

[10] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 650.

consumption of horsemeat when the same prohibition is applied identically to the product in the domestic market of the State in question. The objective nature of that prohibition is not modified by the fact that the regulation in force in the Netherlands permits the retail sale of horsemeat by butchers. In fact that concession at the level of local trade does not have the effect of bringing about a prohibition at the level of industrial manufacture of the same product regardless of its destination.

[9] The reply to the question submitted must therefore be that in the present state of Community law a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article 34 of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.

## (12) CJEU Case C-205/07 *Gysbrechts*

Belgian Law prohibited a supplier in a distant selling contract from requiring that the consumer provide his payment card number, even though the supplier undertook not to use it to collect payment before expiry of the period in which the consumer could withdraw from the contract and return the goods.

Judgment

A measure having equivalent effect to a quantitative restriction on exports within the meaning of Article [35 TFEU]

[38] To answer the question put by the referring court, it must therefore be determined whether the prohibition laid down by the provision at issue in the main proceedings constitutes a measure having equivalent effect to a quantitative restriction on exports.

[39] The compatibility of a provision such as that at issue in the main proceedings with Article [35 TFEU] must be examined by taking into account also the national authorities' interpretation of it, namely that suppliers are not allowed to require that consumers provide their payment card number, even though the suppliers undertake not to use it before expiry of the period for withdrawal.

[40] In that regard, the Court has classified as measures having equivalent effect to quantitative restrictions on exports national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question, at the expense of the production or of the trade of other Member States (Case 15/79 *Groenveld* [1979] ECR 3409, paragraph 7).

[41] In the main proceedings, it is clear, as the Belgian Government has moreover noted in its written observations, that the prohibition on requiring an advance payment deprives the traders concerned of an efficient tool with which to guard against the risk of non-payment. That is even more the case when the national provision at issue is interpreted as prohibiting

suppliers from requesting that consumers provide their payment card number even if they undertake not to use it to collect payment before expiry of the period for withdrawal.

[42] As is clear from the order for reference, the consequences of such a prohibition are generally more significant in cross-border sales made directly to consumers, in particular, in sales made by means of the internet, by reason, inter alia, of the obstacles to bringing any legal proceedings in another Member State against consumers who default, especially when the sales involve relatively small sums.

[43] Consequently, even if a prohibition such as that at issue in the main proceedings is applicable to all traders active in the national territory, its actual effect is none the less greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State.

[44] It must therefore be held that a national measure, such as that at issue in the main proceedings, prohibiting a supplier in a distance sale from requiring an advance or any payment before expiry of the period for withdrawal constitutes a measure having equivalent effect to a quantitative restriction on exports. The same is true of a measure prohibiting a supplier from requiring that consumers provide their payment card number, even if the supplier undertakes not to use it to collect payment before expiry of the period for withdrawal.

[The Court then considered a justification for consumer protection and concluded:]

[63] The answer to the question put by the referring court is therefore that Article [35 TFEU] does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article [35 TFEU] does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card.

## (13) CJEU Case 34/79 *Henn and Darby*

The defendants were convicted of being 'knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles.' They had shipped pornography into Felixstowe from Rotterdam. Their appeal against conviction was based on the submission that the legal control of pornography restricted the free circulation of goods contrary to (what is now) Article 34 TFEU. The matter reached the House of Lords which referred questions of interpretation under (now) Article 267 TFEU to the Court of justice.[11]

Judgment

[11] The first question asks whether a law of a Member State which prohibits the import into that State of pornographic articles is a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article [34] of the Treaty.

[12] That article provides that "quantitative restrictions on imports and all measures having equivalent effect" shall be prohibited between Member States. It is clear that this provision includes a prohibition on imports inasmuch as this is the most extreme form of restriction.

[11] Summary of the facts: Weatherill, EU Law, 7th ed., p. 328.

The expression used in Article [34] must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36.

[13] The answer to the first question is therefore that a law such as that referred to in this case constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

Second and third questions

[14] The second and third questions are framed in the following terms:

‘2. If the answer to Question 1 is in the affirmative, does the first sentence of Article 36 upon its true construction mean that a Member State may lawfully impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

(i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

(ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?"

It is convenient to consider these questions together.

[15] Under the terms of Article 36 of the Treaty the provisions relating to the free movement of goods within the Community are not to preclude prohibitions on imports which are justified *inter alia* "on grounds of public morality". In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. In any event, it cannot be disputed that the statutory provisions applied by the United Kingdom in regard to the importation of articles having an indecent or obscene character come within the powers reserved to the Member States by the first sentence of Article 36.

[16] Each Member State is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory, as defined in [Article 52 TEU and Article 355 TFEU], whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States.

[17] The answer to the second and third questions must therefore be that the first sentence of Article 36 upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws and that

such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.

## (14) CJEU Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*

The applicants intended to import the liqueur 'Cassis de Dijon' into German from France. The German authorities refused to allow the importation because the French drink was not of sufficient alcoholic strength to be marketed in Germany. Under German law such liqueurs had to have an alcohol content of 25 per cent, whereas the French drink had an alcohol content of between 15 and 20 per cent. The applicant argued that the German rule was an MEQR, since it prevented the French version of the drink from being lawfully marketed in Germany.[12]

Judgment

[8] In the absence of common rules relating to the production and marketing of alcohol […] it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being 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.

[9] The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.

[10] As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

[11] Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.

[12] The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

[12] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 647.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

[13] As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

[14] It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article [34] of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

## (15) CJEU Case 178/84 *Commission v Germany*

German law prohibited the marketing of beer which was lawfully manufactured in another Member State unless it completed with sections 9 and 10 of the Biersteuergesetz (Beer Duty Act 1952). Under this law only drinks which complied with the German Act could be sold as '*Bier',* and this meant that the term could be used only in relation to those drinks which were made from barley, hops, yeast, and water. The German Government argued that the

reservation of the term *'Bier'* to beverages made only from these substances was necessary to protect consumers who associated the term *'Bier'* with beverages mad from such ingredients. It also argued that its legislation was not protectionist in aim, in that any trader who made beer from such ingredients could market it freely in Germany. The ECJ cited the principles from *Dassonville* and *Cassis*, it found that the German rule constituted an impediment to trade and then considered whether the rule was necessary to protect consumers.[13]

Judgment

[31] The German Government's argument that Article 10 of the Biersteuergesetz is essential in order to protect German consumers because, in their minds, the designation 'Bier' is inseparably linked to the beverage manufactured solely from the ingredients laid down in Article 9 of the Biersteuergesetz must be rejected.

[32] Firstly, consumers' conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of the common market is, it should be added, one of the factors that may play a major contributory role in that development. Whereas rules protecting consumers against misleading practices enable such a development to be taken into account, legislation of the kind contained in Article 10 of the Biersteuergesetz prevents it from taking place. As the Court has already held in another context […] the legislation of a Member State must not 'crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'.

[33] Secondly, in the other Member States of the Community the designations corresponding to the German designation 'Bier' are generic designations for a fermented beverage manufactured from malted barley, whether malted barley on its own or with the addition of rice or maize. The same approach is taken in Community law as an be seen from heading No 22.03 of the Common Customs Tariff. The German legislature itself utilizes the designation 'Bier' in that way in Article 9 (7) and (8) of the Biersteuergesetz in order to refer to beverages not complying with the manufacturing rules laid down in Article 9 (1) and (2).

[34] The German designation 'Bier' and its equivalents in the languages of the other Member States of the Community may therefore not be restricted to beers manufactured in accordance with the rules in force in the Federal Republic of Germany.

[35] It is admittedly legitimate to seek to enable consumers who attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration. However, as the Court has already emphasized […] , that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, 'by the compulsory affixing of suitable labels giving the nature of the product sold'. By indicating the raw materials utilized in the manufacture of beer 'such a course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in

[13] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 678.

trading and in offers to the public'. It must be added that such a system of mandatory consumer information must not entail negative assessments for beers not complying with the requirements of Article 9 of the Biersteuergesetz.

## (16) Case C-112/00 *Schmidberger*

The ECJ held that a decision by Austria not to ban a demonstration by an environmental group that led to a closure of the Brenner motorway was caught by what is now Article 34 insofar as it impeded trade for the relevant period. The ECJ then considered whether the restriction was justified, more, especially because the Austrian government in allowing the demonstration was influenced by considerations relating to freedom of expression and assembly as enshrined in the ECHR and the Austrian constitution. The ECJ accepted that fundamental rights were part of the Community legal order, but that these rights are the principles concerning the free movement of goods were not absolute.[14]

Judgment

[81] In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

[82] The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

[The ECJ emphasized that the demonstrators had sought permission from the Austrian Government, and that the demonstration was limited in scope and time.]

[86] Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission* v *France,* cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

[87] Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly

[14] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 683.

informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

[88] Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in Commission v France, cited above.

[89] Finally […] the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.

[The ECJ accepted that alternative solutions would have been liable to lead to more serious disruption of trade, such as unauthorized demonstrations.]

[93] Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.

# 5 Free Movement of Services

## (1) CJEU Case 33/74 *Van Binsbergen*

A Dutch national acting as legal adviser to Van Binsbergen in respect of proceedings before a Dutch social security court transferred his place of residence from the Netherlands to Belgium during the course of the proceedings. He was told that he could no longer represent his client since, under Dutch law, only those established in the Netherlands could act as legal advisers. A reference was made to the ECJ to determine whether Article 56 TFEU had direct effect, and whether the Dutch rule was compatible with it.[15]

Judgment

[20] With a view to the progressive abolition during the transitional period of the restrictions referred to in Article [56], Article [59] has provided for the drawing up of a 'general programme' — laid down by Council Decision of 18 December 1961 (1962, p. 32) — to be implemented by a series of directives.

[21] Within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of professional

[15] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 791.

qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.

[22] These directives also have the task of resolving the specific problems resulting from the fact that where the person providing the service is not established, on a habitual basis, in the State where the service is performed he may not be fully subject to the professional rules of conduct in force in that State.

[…]

[24] The provisions of Article [56], the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.

[25] The provisions of that article abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.

[26] Therefore, as regards at least the specific requirement of nationality or of residence, Articles [56] and [57] impose a well-defined obligation, the fulfilment of which by the Member States cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under Articles [59] and [62].

[27] Accordingly, the reply should be that the first paragraph of Article [56] and the third paragraph of Article [57] have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided.

## (2) CJEU Case C-384/93 *Alpine Investments*

Alpine Investments, a provider of financial services, was prevented by Dutch rules from contacting potential customers by telephone without their prior written consent. This ban on ‘cold calling’ extended to offers made to individuals both inside and outside the Netherlands.

Judgment

[26] First, it must be determined whether the prohibition against telephoning potential clients in another Member State without their prior consent can constitute a restriction on freedom to provide services. The national court draws the Court's attention to the fact that providers established in the Member States where the potential recipients reside are not necessarily subject to the same prohibition or in any event not on the same terms.

[27] A prohibition such as that at issue in the main proceedings does not constitute a restriction on freedom to provide services within the meaning of Article [56] solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory (see the judgment in Case C-379/92 *Peralta* [1994] ECR 1-3453, paragraph 48).

[28] However, such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross border services.

[29] Secondly, it must be considered whether that conclusion may be affected by the fact that the prohibition at issue is imposed by the Member State in which the provider is established and not by the Member State in which the potential recipient is established.

[30] The first paragraph of Article [56] of the Treaty prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State […].

[31] It follows that the prohibition of cold calling does not fall outside the scope of Article [56] of the Treaty simply because it is imposed by the State in which the provider of services is established.

[32] Finally, certain arguments adduced by the Netherlands Government and the United Kingdom must be considered.

[33] They submit that the prohibition at issue falls outside the scope of Article [56] of the Treaty because it is a generally applicable measure, it is not discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States. Since it affects only the way in which the services are offered, it is analogous to the non-discriminatory measures governing selling arrangements which, according to the decision in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR 1-6097, paragraph 16, do not fall within the scope of Article [34] of the Treaty.

[34] Those arguments cannot be accepted.

[35] Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less, as has been held above (see paragraph 28), constitute a restriction on the freedom to provide cross-border services.

[36] Such a prohibition is not analogous to the legislation concerning selling arrangements held in *Keck and Mithouard* to fall outside the scope of Article [34] of the Treaty.

[37] According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.

[38] A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.

[39] The answer to the second question is therefore that rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article [56] of the Treaty.

**The third question**

[40] The national court's third question asks whether imperative reasons of public interest justify the prohibition of cold calling and whether that prohibition must be considered to be objectively necessary and proportionate to the objective pursued.

[41] The Netherlands Government argues that the prohibition of cold calling in offmarket commodities futures trading seeks both to safeguard the reputation of the Netherlands financial markets and to protect the investing public.

[42] Financial markets play an important role in the financing of economic operators and, given the speculative nature and the complexity of commodities futures contracts, the smooth operation of financial markets is largely contingent on the confidence they inspire in investors. That confidence depends in particular on the existence of professional regulations serving to ensure the competence and trustworthiness of the financial intermediaries on whom investors are particularly reliant.

[43] Although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does none the less have a direct effect on the good reputation of Netherlands financial services.

[44] Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.

[45] As for the proportionality of the restriction at issue, it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective […]

[46] As the Netherlands Government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller's services with competitors' offers. Since the commodities futures market is highly speculative and barely comprehensible for nonexpert investors, it was necessary to protect them from the most aggressive selling techniques.

[47] Alpine Investments argues however that the Netherlands Government's prohibition of cold calling is not necessary because the Member State of the provider of services should rely on the controls imposed by the Member State of the recipient.

[48] That argument must be rejected. The Member State from which the telephone call is made is best placed to regulate cold calling. Even if the receiving State wishes to prohibit cold calling or to make it subject to certain conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that State.

[49] Consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.

[…]

[55] In the light of the above, the prohibition of cold calling does not appear disproportionate to the objective which it pursues.

[56] The answer to the third question is therefore that Article 56 does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures.

## (3) CJEU Case C-341/05 *Laval un Partneri*

Laval, a Latvian company won a construction contract to carry out temporary work in Sweden due to its considerably lower labour costs. Swedish labour unions organized a blockade against the company. The industrial action was aimed at forcing Laval to sign a collective agreement in Sweden containing wage conditions and other terms of employment.

Judgment

*[…] Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article [56 TFEU]*

[86] As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article [56 TFEU], since, pursuant to Article [153(5) TFEU] […] the Community has no power to regulate that right.

[87] In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law […]

[88] Therefore, the fact that Article [153(5) TFEU] does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

[89] According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC […].

[…]

[91] Although the right to take collective action must […] be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

[…]

[93] In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods […] .

[94] As the Court held, in *Schmidberger* and *Omega,* the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality […].

[98] Furthermore, compliance with Article [56 TFEU] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

[99] In the case in the main proceedings, it must be pointed out that the right of trade

unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector — certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment […] — is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article [56 TFEU]

[100] The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

[101] It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community […] a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it […].

[102] The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

[103] In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law.

[105] Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include […] inter alia, improved living and working conditions […].

[107] In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

[108] However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to *[the possibility under the Posted Workers Directive for Sweden to impose, in relation to posted workers, certain specified minimum protections and conditions of employment on a non-discriminatory basis]* , their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

[109] Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means […].

[110] However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay […].

[111] In the light of the foregoing, the answer to the first question must be that Article [56 TFEU] [is] to be interpreted as precluding a trade union […] save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions […].

# 6 Free Movement of Workers

## (1) CJEU Case C-415/93 *Union des Associations Européennes de Football v Jean-Mark Bosman*

The Union of the European Football Associations (UEFA) had adopted two rules which the national football associations had to implement. The first rule, incorporated into players' contracts, allowed national football clubs to impose a transfer fee when a player moved to a new club. Without a fee players could not change clubs. The second rule restricted the number of non-national players in a team to three. Bosman, a Belgian footballer, was unable to move from a Belgian to a French club because the latter refused to pay the transfer fee. He sued the Belgian club, the Belgian football association and the UEFA, claiming that the rules infringed Article 45 TFEU.

Judgment

**Interpretation of Article 48 of the Treaty with regard to the transfer rules**

[…]

[82] […] it is to be remembered that, as the Court held in paragraph 17 of its judgment in Walrave, cited above, Article [45] not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.

[83] The Court has held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law (see *Walrave,* cited above, paragraph 18).

[84] It has further observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article [45] of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application (see *Walrave,* cited above, paragraph 19). That risk is all the more obvious in a case such as that in the main proceedings in this case in that, as has been stressed in paragraph 24 above, the transfer rules have been laid down by different bodies or in different ways in each Member State.

[85] UEFA objects that such an interpretation makes Article [45] of the Treaty more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health.

[86] That argument is based on an false premiss. There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.

[87] Article [45] of the Treaty therefore applies to rules laid down by sporting associations such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in gainful employment.

[…]

*Existence of an obstacle to freedom of movement for workers*

[92] It is thus necessary to consider whether the transfer rules form an obstacle to freedom of movement for workers prohibited by Article [45] of the Treaty.

[93] As the Court has repeatedly held, freedom of movement for workers is one of the fundamental principles of the Community and the Treaty provisions guaranteeing that freedom have had direct effect since the end of the transitional period.

[94] The Court has also held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State […].

[95] In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity […].

[96] Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned […].

[97] The Court has also stated, in Case 81/87 *The Queen* v *H. M. Treasury and Commissioners*

*of Inland Revenue* ex parte *Daily Mail and General Trust pic* [1988] ECR 5483, paragraph 16, that even though the Treaty provisions relating to freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals […].

[98] It is true that the transfer rules in issue in the main proceedings apply also to transfers of players between clubs belonging to different national associations within the same Member State and that similar rules govern transfers between clubs belonging to the same national association.

[99] However, as has been pointed out by Mr Bosman, by the Danish Government and by the Advocate General in points 209 and 210 of his Opinion, those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

[l00] Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

[…]

[102] […] that conclusion is not negated by the case-law of the Court […] to the effect that Article [34] of the Treaty does not apply to measures which restrict or prohibit certain selling arrangements so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16).

[103] It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article [34] of the Treaty (see also, with regard to freedom to provide services, Case C-384/93 *Alpine Investments* v *Minister van Financiën* [1995] ECR I-1141, paragraphs 36 to 38).

[104] Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose […].

[…]

[114] The answer to the first question must therefore be that Article [45] of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

## (2) CJEU Case C-281/98 *Angonese v Cassa di Riparmio di Bolzano SpA*

Roman Angonese was an Italian citizen whose mother tongue was German. He applied to take part in a competition for a post with the Cassa die Riparmio bank in Bolzano, Italy. A condition for entry to the competition imposed by the bank was a certificate of bilingualism (in Italian and German). The certificate was to be issued by the public authorities in Bolzano after an examination held only in that province. The national court found as a fact that Angonese was bilingual, and that non-residents of Bolzano could face difficulties obtaining the certificate in good time. Since Angonese did not obtain the certificate the bank refused to admit him to the competition for the post, and he argued that the requirement to have the certificate was contrary to Article 45 TFEU.[16]

[30] It should be noted at the outset that the principle of non-discrimination set out in Article [45] is drafted in general terms and is not specifically addressed to the Member States.

[31] Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (see Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405, paragraph 17).

[32] The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see *Walrave,* paragraph 18, and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 83).

[33] Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, limiting application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application (see *Walrave,* paragraph 19, and *Bosman,* paragraph 84).

[34] The Court has also ruled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 31). The Court accordingly held, in relation to a provision of the Treaty which was mandatory in nature, that the

[16] Summary of the facts: Craig/de Búrca, EU Law, 5th ed. 2011, p. 717.

prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see *Defrenne,* paragraph 39).

[35] Such considerations must, *a fortiori,* be applicable to Article 48 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 of the EC Treaty [now Article 18 TFEU]. In that respect, like Article [157 TFEU] […], it is designed to ensure that there is no discrimination on the labour market.

[36] Consequently, the prohibition of discrimination on grounds of nationality laid down in Article [45] of the Treaty must be regarded as applying to private persons as well.

[…]

[45 It follows that, where an employer makes a person's admission to a recruitment competition subject to a requirement to provide evidence of his linguistic knowledge exclusively by means of one particular diploma, such as the Certificate, issued only in one particular province of a Member State, that requirement constitutes discrimination on grounds of nationality contrary to Article [45 TFEU].

[46] The reply to be given to the question submitted must therefore be that Article [45] of the Treaty precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.

# 7 Freedom to Establishment

## (1) CJEU Case C-212/97 *Centros*

The Facts concerned a company which was registered (and therefore had its primary establishment) in the UK, but which had never traded there. It had chosen the UK in which to register because UK law imposed no requirements on limited liability companies as to the provision for, or the paying-up of, a minimum share capital. The main purpose of establishing in the UK was to conduct business in Denmark, the minimum capital requirement laws of which were considerably stricter, through a branch. The Danish Board of Trade and Companies refused to register the branch on the ground that Centros was not in fact seeking to establish a branch in Denmark, but rather a principal establishment, while circumventing legitimate national rules including those on the paying-up of minimum capital. The Danish government argued that Centros was seeking to abuse EU rights of establishment; and secondly, following the reasoning in *Daily Mail,* the absence of harmonization of national corporate laws seemed to militate against permitting Centros to rely on Article 49 TFEU.

Judgment

21 Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are

prevented from exercising the freedom of establishment conferred on them by Articles [49 and 54 TFEU].

[22] Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

[23] According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

[24] It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law […].

[25] However, although, in such circumstances, the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions […].

[26] In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

[27] That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

[28] In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article [50(2)(g) TFEU], to achieve complete harmonisation.

[29] In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its

activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

[30] Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles [49 and 54 TFEU], in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles [49 and 54 TFEU] are specifically intended to guarantee.

[31] The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

[32] Referring both to Article 56 of the Treaty and to the case-law of the Court on imperative requirements in the general interest, the Board argues that the requirement that private limited companies provide for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

[33] The Board adds that there is no less restrictive means of attaining this dual objective. The other way of protecting creditors, namely by introducing rules making it possible for shareholders to incur personal liability, under certain conditions, would be more restrictive than the requirement to provide for and pay up a minimum share capital.

[34] It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR1-1663, paragraph 32, and Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR 1-4165, paragraph 37).

[35] Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its

branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.

[36] Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OT 1989 L 395, p. 36).

[37] Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

[38] Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.

[39] The answer to the question referred must therefore be that it is contrary to Articles [49 and 54 TFEU] for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.