

## European Community Law

Topic 5: The Fundamental Freedoms (1): Goods

{Lecture 12 (of 21)}:

### Free Movement of Goods: Eliminating Fiscal Barriers

#### Aim:

To provide a clear outline of the principal provisions aimed at: (a) eliminating the fiscal barriers; and (b) preventing the imposition of discriminatory taxation on competing 'foreign' products .

#### Objectives:

After carefully studying the following notes and other prescribed readings for this lecture you should be able to:

1. Discuss the judicial interpretation of the provisions contained in Arts.23, 25 and 90 EC;
2. Explain how a charge may be levied on imported goods without the charge constituting a customs duty or a charge having equivalent effect; and
3. Provide, orally and in writing a detailed analysis of the interpretation on Art.90EC and explain the relationship, if any, between Arts.25 and 90.

### Part One of the EC Treaty: 'Principles'; Elements Relating to the Free Movement of Goods

*Article 2EC* provides that the task of the Community is to be achieved via, *inter alia*, implementation of 'the common policies or activities referred to in Article[] 3 ...'; and within *Art.3*, paragraph 1(a) provides for the **prohibition**, as between Member States, both of fiscal and physical barriers to trade, i.e., 'the prohibition ... of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect'. The aim is to secure the free movement of goods within the common or internal market. The significance of this is that the free movement of goods constitutes one of the four fundamental freedoms of EC law, the others being the free movement of persons, services and capital.

Pursuit of each of the fundamental freedoms is provided for both in *Art.3(1)(c)*, which refers to 'an internal market [being] characterised by the **abolition**, as between Member States, of obstacles to the free movement of goods, persons, services and capital'; and *Art.14*, which states, in para. 2, that: 'The *internal* market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.' Clearly, then, under EC law, the

adherence to the EC Treaty provisions promoting the free movement of goods is of paramount importance.

### **Principles Underpinning the Free Movement of Goods**

The essence of the free movement of goods - or EC trade law - reduces to two main principles: one relating to the removal of fiscal barriers, the other prohibiting quantitative restrictions. *Firstly*, goods manufactured, produced or in free circulation in one Member State may be exported from that Member State and imported into another Member State without either of them imposing, on the goods in question, customs duties or charges having an equivalent effect. *Secondly*, it is impermissible for either an importing Member State or for an exporting Member State to subject goods to other artificial trade barriers by way of imposing on them quantitative restrictions on the imports/exports when those goods have been manufactured in or produced by the exporting state or they are in free circulation there having been imported from a third (non-EC) country. Accordingly, *the free movement of goods requires the absence of fiscal barriers and of quantitative restrictions*. The *elimination* of such artificial barriers promotes negative integration within the Community.

It is generally regarded that the free movement of goods promotes productive efficiency by removing the barriers to competition. The ECs competition policy in *Arts.3(1)(g)* and *81-89* reinforces the basic provisions relating to the free movement of goods. In essence, the difference between the free movement of goods provisions and the provisions of the competition policy is that whereas the former are always addressed to Member States, the latter are, generally (though not exclusively), addressed to private undertakings - natural and juristic persons - and associations of undertakings. (See Lectures 14-16 on Competition Law).

### **The Basic Legal Framework Relating to the Free Movement of Goods**

Four elements constitute the Treaty provisions aimed at promoting the free movement of goods, the first three of which relate to fiscal provisions – the concerns of this lecture - viz; *Art.23(1)*, which provides that: ‘The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries’;

*Art.25*, which is concerned with the prohibition between Member States of customs duties and charges having an equivalent effect on imports and exports;

and, from Title VI of the Treaty (the competition, taxation and approximation of laws Title):

*Art.90*, which is a rule against discriminatory internal taxation, in that it provides: ‘No Member State shall impose, directly or indirectly, on the products of other Member States, any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products’.

In summary, then, *Arts.23, 25 and 90 are the provisions which are intended to promote the free movement of goods via the dismantling of the fiscal barriers*.

The fourth and final element is comprised of *Arts.28* and *29EC*, which are the principal provisions relating to the prohibition on quantitative restrictions: they apply to imports and exports, respectively.

*Art.28* provides that: ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States; and

*Art.29* provides that: ‘Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.’

{**N.B.:** *Art.30* is of major importance in that it contains *significant exceptions* to Arts.28 & 29, i.e., exceptions to the prohibitions on quantitative restrictions. [See next lecture for details and analysis]. *Case 120/78*, which provides reasons for derogations from the principle of free movement of goods, is also discussed in detail.}

The analysis of the basic legal framework provided by Arts.23, 25 & 90EC is as follows:

## **1. Prohibition on Fiscal Barriers Impeding the Free Movement of Goods**

### **(i) The Customs Union: Article 23 EC**

The EC is more than a free-trade area: it is a customs union in which not only have the customs duties between Member States been eliminated but all Member States have a common external tariff with regard to third (non-EC) States. This is known as the common customs tariff (CCT). As noted (on p1), the *prohibition* of customs duties has promoted negative integration of the Member States of the EC.

With regard to the provisions of *Art.23(1) & (2) EC<sup>1</sup>*, they apply both to products originating in Member States *and* to products coming from third countries which are in free circulation in the Member States. That is:

products which enter the Community market from third countries are as capable of enjoying free movement within it as goods which were produced within the Community, once the initial tariff at the Community’s external border is paid [which is a provision of *Art.24EC*] and they enter into free circulation within a Member State.<sup>2</sup>

{*Regulation 2913/92 EEC* contained provisions which helped determine the place of origin: that is, where goods were subjected to a production process in more than one country the place of origin was the country where the last economically justifiable process occurred, provided that that process resulted in a new product or was an important or essential phase of the manufacture of the goods}.

### **Definition of Goods**

The meaning of ‘goods’ for the purpose of *Art.23EC* is not provided for in the Treaty nor has a wholly satisfactory definition emerged from the decisions of the ECJ. Nevertheless,

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<sup>1</sup>The prohibition of customs duties on imports and exports and of all charges having equivalent effect ...

<sup>2</sup>*Charlesworth, A and Cullen, H. EC Law*. London: Pitman 1994, p208.

for most practical purposes, it would appear that a generally satisfactory explanation of the term was supplied in Case 7/68, Commission v. Italy, where it was held that;

by goods, within the meaning of Article 23 [ex Art.9] of the EC Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.

The problem with this definition, however, is that it does not clearly distinguish goods from services; though in Case 52/79, Procureur du Roi v. Debauve, the supply of television signals was held to be a service, not a good. Moreover, in Case 7/78, R v. Thompson et al., the ECJ developed a distinction between 'goods' and 'means of payment.' The free movement of goods provisions did not apply to coins that were legal tender and thus a means of payment. However, in this case the coins were pre-1947 silver coins and no longer legal tender: accordingly, they were goods. Nevertheless, an export ban was upheld on the public policy ground that it was illegal to destroy the coins which a state had a fundamental interest in minting. (N.B.: Legal tender is not covered by the free movement of goods provisions but by those relating to the free movement of capital. See now **Art.56EC** [ex **Art.73b**: &, prior to that, formerly Art.67 EC: Bordessa et al, Cases 358 & 416/93].

## **(ii) Customs Duties and Charges Having an Equivalent Effect: Article 25 EC**

The aim of eliminating all customs duties as between the original Member States was completed eighteen months ahead of the twelve-year transitional period provided for in Art.8 EEC (later Art.7a EC; then Art.14EC). As new Member States joined the EEC/EC they, too, achieved a customs union over a transitional period. 'Old' **Art.12**, sometimes referred to as the standstill procedure, provided that:

Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

The essence of this old provision has been retained in the 'new' **Art.25** which provides that:

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

In other words, ***a customs duty, or a charge having an effect equivalent to a customs duty, is one that is levied by reason of the fact that a frontier has been crossed: Joined Cases 2 & 3/69***. That the ECJ has provided a strict interpretation of 'old' Art.12 [now Art.25] is evident from the decisions in Cases 2 & 3/69 and 7/68.

In Cases 2 & 3/69, a Belgian court had sought a ruling from the ECJ under **Art.177EEC** [now **Art.234EC**] in relation to the imposition of a levy of one-third of one per cent of the value of imported diamonds. The levy was paid into a fund to provide welfare benefits for the workers in the Belgian diamond industry. The Belgian authorities claimed that the levy was designed neither to raise money for the national exchequer nor for protectionist reasons

since Belgium was not a diamond producer. Nevertheless, the ECJ **HELD**, that the levy infringed Art.12 [now Art.25] and was prohibited because:

‘It follows ... that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that *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 fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect ... 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.*’

The principle in this case was succinctly addressed by ***Weatherill & Beaumont***<sup>3</sup> who expressed the view that:

“It may seem disturbing that a philanthropic system of welfare provision was held incompatible with Community law. However, the unacceptable element of the system was not its purpose but its method. Funds were raised through a levy on goods at point of importation. This creates an obstacle to trade.”

(See also Case 7/68, the Italian art treasures case, and the later Commission v. Italy case on the charge imposed on imports and exports, Case 24/68. Case 7/68 was an ‘old’ **Article 169EEC** case [now Art.226EC]: it provided a definition of goods (see supra) and decided that an Italian export tax on certain articles of artistic and historic interest was in breach of Community law – i.e., the fact that the items had an artistic and a cultural significance did not deprive them of a commercial significance; again, it was the *effect*, not the purpose, that contravened EC law).

**N.B.:** ‘old’ **Art.12** [now Art.25] was held to be directly effective in Case 26/62, Van Gend en Loos. Moreover, **Arts.25** [ex Art.12] and **90** [ex. Art.95] are mutually exclusive (see infra).

However, it has been said that the imposition of customs charge will **not necessarily** bring it within the ambit of ‘old’ Art.12 EC, as in Case 132/82, Commission v. Belgium (Re Storage Charges). Here, the imposition of a charge by the customs on imports for storage services, *requested by the importer*, was not a charge within the ambit of ‘old’ Article 12. Moreover, a charge also would not constitute a customs duty or a charge having equivalent effect if the following cumulative conditions were satisfied:

- (a) The charges do not exceed the actual costs of the inspection services rendered and in connection with which they were charged;
- (b) The services in question are obligatory and uniform for all the products concerned in the Community;
- (c) The services are required by Community law in the general interests of the Community; and

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<sup>3</sup> ***Weatherill, S & Beaumont, P.*** EU Law, 3/e. London: Penguin, 1999, p457

(d) The services promote the free movement of goods, in particular by neutralising obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 30 of the EC Treaty.

If a contested charge satisfies these four conditions, it cannot be classified as a charge having an equivalent effect and proscribed under Article 12: Case 18/87, EC Commission v. Germany (Re Animals Inspection Fees), [1990] 1 CMLR 561.

In summary, there are no exceptions to Art.25EC. A charge may be levied to cover the costs of a service that is particularly beneficial to a trader; and a charge may also be levied in respect of a service required by law. Such charges are not exceptions to Art.25EC, they are charges that fall outside the ambit of the article by being neither customs duties nor charges having an equivalent effect.

### **(iii) Internal (i.e. Domestic) Taxation: Article 90 EC**

*Article 90 EC* provides that: (1) ‘No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on **similar** domestic products. (2) Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to *other products*.’

In essence, the ‘no discrimination on the grounds of nationality’ rule found in Art.12EC has been applied in the field of internal taxation.

In Case 90/79, Commission v. France, it was said that a tax was that which relates ‘to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.’

Thus, whereas Member States are free to decide on a rate of taxation for a particular product, they cannot (as a general rule) apply rates that discriminate as between domestic and imported products which are similar or which afford indirect protection to the former.

The criterion by which indirect protection is assessed is that the products must be in actual or potential competition: Case 170/78, Commission v. U.K. (Re Excise Duties on Wine). In this case, the duty on wine was higher than the duty on beer and the U.K. argued, *inter alia*, that beer and wine were not “similar” because beer was generally consumed in public houses whereas wine was consumed at home! The ECJ responded by noting that changing habits as well as the current market had to be taken into consideration. The Court concluded that beer and wine were similar and the different rates of taxation gave indirect protection to beer over (mostly imported) wines. (Contrast: Case 243/84, John Walker).

Moreover, in Case 112/84, Humblot, it was discriminatory for France to impose a higher rate of tax on cars rated above 16CV (horsepower) – all of which were imported. France did not manufacture cars of that ‘horsepower’ but it did manufacture cars of less than 16CV, which constituted a competing product.

However, where there is no domestic production of a *similar or competing* product as in Case 27/67, it has been held to be lawful to impose a domestic tax on a class of product which is comprised only of imported goods.

It is a well established principle that a charge may *not* be treated at the same time as having equivalent effect to a customs duty *and* as coming within the scope of a system of domestic taxation: Case 77/76: Cucchi v. Avez. Whereas **Art.90** applies internally to all goods in a class of product within the importing Member State, **Art.25** applies only to goods which are imported; domestic products are excluded. This reaffirmed the judgement in Case 10/65 where the ECJ decided that the application of Arts.25 [12] and 90 [95] is mutually exclusive.

In determining whether a charge imposed by a Member State is a customs duty, or a charge having equivalent effect, thereby coming within the scope of Art.25; or a measure falling within the internal taxation system of that Member State, thereby coming within Art.90, *Charlesworth & Cullen*<sup>4</sup> state that:

The important consideration to be taken into account... is that where the charge under examination is capable of being seen as part of the Member State's internal taxation system, being based on some general criteria concerned with the particular function or quality of the goods, i.e. alcohol content of spirits or engine capacity of cars, *and it has no connection with those goods crossing a frontier*, Article [90] will be the correct provision to apply rather than Article [25]. In such circumstances the important element to determine the legality or otherwise of the measure will be based on whether there is discrimination against the product on the grounds of national origin or, alternatively, whether a protective effect has been afforded to some national product which might be in competition with it.

### **Discriminatory internal taxation of 'similar' foreign products and taxation that affords indirect protection to 'other products'.**

**Art.90(1)** prohibits discriminatory internal taxation being levied on foreign goods that compete with 'similar domestic products'. By contrast, Art.90(2) prevents Member States from imposing taxation on foreign goods in order to afford protection to other products.

Proceedings against Member States under **Art.226EC** have yielded a wide interpretation of 'similar'. In Case 106/84, Commission v. Denmark, it was said that 'similarity' in Art.90(1)EC refers to products that:

'... have similar characteristics and meet the same needs from the point of view of consumers ... not according to whether they are strictly identical but whether their use is similar or comparable'.

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<sup>4</sup>Ibid., p220

That beer and wine could be regarded as ‘similar’ [or at least competing] products, and so should not be subjected to different levels of taxation had already been decided in Case 170/78, Commission v. UK (Re Excise Duties on Wine).

It is possible for different rates of taxation to apply to ‘similar’ products, however, as long as strict criteria are met and discrimination is avoided: Case 196/85, Commission v. France.

### **Art.90(2)EC**

In Case 193/85, Cooperative Co-Frutta, the view was expressed that where there is no similarity between products, **Art.90(2)EC** may be applicable to:

‘all forms of indirect tax protection in the case of products which, without being similar within the meaning of [Art.90(1)] , are nevertheless in competition, even partial, indirect or potential competition, with each other’.

In the Cooperative Co-Frutta case, it was found that an internal tax that applied almost exclusively to imported bananas provided indirect protection to other fruit that was principally ‘home produce’.

### **Harmonisation of Indirect Taxation**

Given that the EC has the competence to harmonise indirect taxation, and there may be pressure to do so since the introduction of the Euro, the immediate prospect is, at best, slim, given that under **Arts.93 & 94EC** such a proposal would require the unanimity of the voting in Council.

### **References**

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