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**Cassis de Dijon Case: Free Movement of Goods and Prohibition of Non-tariff Barriers  
in the European Union Law**

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## 1. Introduction

Before the European Union (EU), the European Communities were initially based on the Schumann Declaration which was declared by the French Foreign Minister Robert Schumann on 9 May 1950<sup>1</sup>. Then in 1952, the European Coal and Steel Community (ECSC) was established by the Paris Treaty in order to resolve conflicts resulting from coal and steel, and following that, in 1957, two Rome Treaties were signed<sup>2</sup>. Treaty of Rome I established the European Atomic Energy Community (EURATOM)<sup>3</sup> to provide a peaceful development of atomic energy, and the Treaty of Rome II established the European Economic Community (EEC)<sup>4</sup>. Article 2 of the 1957 Rome Treaty has stated that the aim of the EEC is organizing an internal market between the member states where the free movement of workers, goods, services, and capital are successfully provided without barriers<sup>5</sup>. Moreover, increasing the level of economic integration and living standards were also intended. Since it was expected that these aims would lead to peace and stability after two world wars, with the help of the integration, waging war was seen as economically impossible. Economics was one of the main grounds of the EU even before the organization was officially established. It is used as a tool for integration since it creates interdependence and relatively strong ties between the members which would continue for a long time<sup>6</sup>.

The free movement of goods is one of the most fundamental principles of the EEC Treaty, as are other freedoms of service, capital, and persons, and Article 30 said that:

*“Quantitative restrictions on imports and all measures having equivalent effect shall,...., be prohibited between member states.”*<sup>7</sup>

The concept of “measures having an equivalent effect” was new, and the definition of it created many disputes in the literature. The term is mentioned also under the EU customs union which is provided in The Treaty on the Functioning of the EU (TFEU)<sup>8</sup>. Customs union has three important components. First, custom duties and charges having equivalent effect are

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<sup>1</sup> Armin Cuyvers, ‘The Road to European Integration’ in A Cuyvers, E Ugirashebuja, J E Ruhangisa, and T. Ottervanger (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (OUP 2017) pages 22-42.

<sup>2</sup> The Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951).

<sup>3</sup> The Treaty establishing the European Atomic Energy Community (EURATOM) (Rome, 25 March 1957).

<sup>4</sup> Cuyvers, ‘The Road to European Integration’.

<sup>5</sup> The Treaty establishing the European Economic Community (also known as the Treaty of Rome), (Rome, 25 March 1957).

<sup>6</sup> Peter Oliver and Martín Martínez Navarro, 'Free movement of goods' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020).

<sup>7</sup> Treaty establishing the European Economic Community [1957] Article 30.

<sup>8</sup> Treaty on the Functioning of the European Union (TFEU) [1957] Article 28.

prohibited in Articles 28 and 30. Then, Articles 34, 35, and 36 clarify that quantitative measures and measures having equivalent effects are also prohibited. Finally, the external customs tariff is covered under Article 31 of TFEU<sup>9</sup>.

This paper will briefly introduce the customs union and the internal market of the EU and explain the main characteristics of one of the freedoms, which is the free movement of goods. Under the free movement of goods, there are certain prohibitions regarding both tariff and non-tariff barriers. After examining these, one of the most significant decisions of the European Court of Justice (ECJ) will be explained, which is “Cassis de Dijon”. Later on, mutual recognition and mandatory requirements will be defined as they are two important concepts that occurred and shaped the internal market after the decision of the Court. Finally, in the last section, further decisions of the Court will be considered.

## **2. Customs Union and Internal Market**

Under Article 28.1 of TFEU, the EU institutes a customs union that covers all trade in goods. Unlike a free trade area, a customs union includes both internal and external trade, and it does not include liberalization of trade between the members. It also aims to have unification regarding trade rules for goods that come from the third parties which include a common customs tariff<sup>10</sup> and a common commercial policy<sup>11</sup>. There are also certain prohibitions in order to harmonize the national laws to make goods move more freely through the member states<sup>12</sup>. As a principle, the rules against the free movement of goods do not differ whether the goods originate in the EU or other states. Therefore, all goods are able to move freely in every member state, regardless of their origin<sup>13</sup>. This principle was found in the case of *Commission v Ireland*, where Ireland had infringed Article 34 of TFEU by enforcing a licensing system on potatoes that originated in Cyprus but moving freely in the UK (Back then Cyprus was not a member state and the UK was a member state)<sup>14</sup>.

In 1957, Rome Treaty has established a “common market”, and the Court claimed in its judgment that

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<sup>9</sup> TFEU [1957].

<sup>10</sup> TFEU Article 31.

<sup>11</sup> TFEU Article 201.

<sup>12</sup> Oliver and Navarro, 'Free movement of goods'.

<sup>13</sup> Oliver and Navarro, 'Free movement of goods'.

<sup>14</sup> Case 288/83 *Commission v Ireland* [1985] ECR 1761.

*“The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.”*<sup>15</sup>

Today, in the founding treaties, the concept of common market has been changed into “internal market” and it is defined in the Article 26.2 of TFEU as

*“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 the Treaties.”*<sup>16</sup>

The main aim of this internal market is to trade between the member states as they are a single state. This market is providing the member states an area that all means of production, capital, and labor can move freely. Moreover, this market also creates a maximum allocative efficiency which increases the general level of wealth of the member states<sup>17</sup>. An internal market is closer than a free trade area and a customs union for reaching economic integration, however, for full integration, political factors should be completely considered. To accomplish a full economic union, economic integration should be combined with a regulation on monetary and fiscal policies as well<sup>18</sup>.

### **3. Free Movement of Goods**

The term “goods” was clarified in the decision of the ECJ after the Commission vs Italy case. The Court defined it as *“products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”*<sup>19</sup> Nevertheless, this definition was not comprehensive. The Court has extended the definition firstly that provision of goods within a contract for the provision of service is considered as a good in terms of Article 28, and then to extend more further, it provided that non-recyclable waste is also involved within the definition of goods<sup>20</sup>. In addition to that, in contrast to other fundamental freedoms of the EU, the free movement of goods does not take into account nationality or residence as crucial aspects<sup>21</sup>.

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<sup>15</sup> Case 15/81 Gaston Schul [1982] ECR 1409, para 33.

<sup>16</sup> TFEU Article 26.

<sup>17</sup> Armin Cuyvers, ‘The EU Common Market’ in A Cuyvers, E Ugirashebuja, J E Ruhangisa, and T. Ottervanger (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (OUP 2017) pages 293-302.

<sup>18</sup> Cuyvers, ‘The EU Common Market’.

<sup>19</sup> Case 7/68 Commission v Italy (‘Works of art’) [1968] ECR 423, 428.

<sup>20</sup> Case C-393/92 Almelo [1994] ECR I-1477.

<sup>21</sup> Oliver and Navarro, ‘Free movement of goods’.

### **3.1 Prohibition of Tariff Barriers**

#### **3.1.1 Custom Duties**

The prevention of custom duties between the member states in the EU was a fundamental factor of the internal market. The reason was that they are one of the most crucial obstacles against trade. These charges are imposed on goods since they cross a border between states. Consequently, the Court has no chance to provide custom duties on many situations because of the fact that a clear prohibition was declared by the founding treaties. The Van Gend en Loos case is very important regarding this issue. In this decision, the Court has mentioned the principle of direct effect for the first time<sup>22</sup>, and therefore it used the chance to claim that the abolition of custom duties is an “essential provision” and represents a fundamental foundation of the EU<sup>23</sup>.

#### **3.1.2 Prohibition of Measures Equivalent Effects**

In the Article 30 of TFEU, charges having equivalent effects are also prohibited since it makes it more difficult for the member states to circumvent the prohibitions on custom duties. The founding treaty did not clarify the definition of this concept, so the definition has been left to the Court, by the Diamond decision regarding the specific features of the disputed tax<sup>24</sup>. In this case, a Social Fund for Diamond Workers was established by the Belgium government, and its purpose was to give an award for the social benefits of the diamond workers. The Court has decided 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 within the meaning of Articles [28] and [30] of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product.”<sup>25</sup>*

Here, a “pecuniary charge” means an obligation to pay a money, and a charge must be levied on domestic or foreign goods since they pass a border<sup>26</sup>. Additionally, the amount of charges

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<sup>22</sup> Case 26/62 Van Gend en Loos [1963] ECR 1.

<sup>23</sup> Oliver and Navarro, 'Free movement of goods'.

<sup>24</sup> Case 2/69 Sociaal Fonds voor de Diamantarbeiders ('Diamonds') [1969] ECR 211.

<sup>25</sup> Diamonds (n 22) paras 15-18.

<sup>26</sup> Case C-402/14 Viamar, EU:C:2015:830 concerned a car registration tax, which is usually a form of internal

is not important, in any case it represents a barrier to the free movement of goods. Again, as it was mentioned earlier, the prohibitions should make more difficult for the member states to surround the prohibitions as well. Moreover, a measure may correspond a measure having an equivalent effect regardless of their characteristics of being discriminatory or protective. It means that a measure levied on both exports and imports can be considered as a measure having an equivalent effect. Finally, the ECJ strictly ruled that these prohibitions on custom duties and the measures having an equivalent effect are fundamental rules that cannot be authorized of any exceptions, and these are mentioned in Article 30 TFEU<sup>27</sup>.

On the other hand, there may be two situations that may escape the strict prohibitions declared in Article 30. First, based on the case-law of the EU, a service should consult a particular benefit on the importer or the exporter, and its charge should be proportionate to the advantage that consulted<sup>28</sup>. Second, if the health circumstances are required by the EU, the member states have to deliver the costs which are subject to specific conditions<sup>29</sup>. Furthermore, in Commission v. Germany decision, the Court stated the conditions as follows:

*“(a) the charge must not exceed the actual cost of the inspection;*

*(b) the inspections in question must be obligatory and uniform for all products in the EU;*

*(c) the inspections must be required by EU law; and*

*(d) they promote the free movement of goods by eliminating obstacles which could arise from unilateral measures of inspection adopted by Member States in accordance with Article 36.<sup>30</sup>*

*In contrast, where EU law merely permits Member States to carry out the inspections, this exception does not apply<sup>31</sup>.”*

### **3.2 Prohibition of Non-tariff Barriers on Exports**

In terms of exports, quantity restrictions are prohibited which include total bans and quotas. In the Delhaise decision, a Belgium company ordered 33K hectoliters of wine from Spain.

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taxation. However, the tax was not reimbursed even if vehicles were re-exported without ever being registered in the Member State concerned. Consequently, the Court found that the tax was imposed solely by virtue of the fact that the goods crossed the frontier and thus constituted a charge of equivalent effect prohibited by Article 30.

<sup>27</sup> eg. *Diamonds* (n 22) paras 19-21.

<sup>28</sup> Case 132/82 *Commission v Belgium* [1983] ECR 1649, para 8

<sup>29</sup> Case 46/76 *Bauhuis* [1977] ECR 5.

<sup>30</sup> Case 18/87 *Commission v Germany* [1988] ECR 5427, para 8.

<sup>31</sup> Case 314/82 *Commission v Belgium* [1984] ECR 1543.

Contrary to Spanish rules which limited the amount of wine available for other states. the Court said that the Spanish rules breach Article 35 as there was a limitation on the export of the good to other member states<sup>32</sup>.

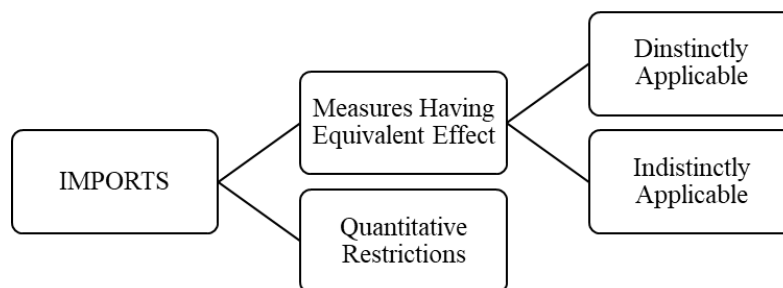
Article 35 also prohibits distinctly applicable measures having an equivalent effect. It prohibits national rules, imposing conditions on exports which are not applied to the domestic products as well. In the case-law, the national rule, providing for a license for exported goods was found in breach of Article 35. In addition to that, indistinctly applicable measures and selling arrangements are not covered by Article 35. It only includes distinctly applicable measures and measures having an equivalent effect. Both quantitative measures and measures having an equivalent effect on exports may be justified according to Article 36 derogations.

*Article 36 of TFEU:*

*“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or disguised restrictions on trade between the Member States.”<sup>33</sup>*

### 3.3 Prohibition of Non-tariff Barriers on Imports

It includes prohibitions of quantitative restrictions and measures having equivalent effects.



<sup>32</sup> Case C-47/90 Etablissements Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA et al. [1992] ECRI-3669.

<sup>33</sup> TFEU Article 36.



### 3.3.1 Quantitative Restrictions

Quantitative restrictions are not defined in the founding treaties. Nevertheless, in *Geddo* Case, the Court ruled that “the prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports of goods in transit.”<sup>34</sup> Here, the term “total restraint” is an export or import ban, and “partial restraint” is a quota system that includes exports or imports.

There are also quotas and limitations on the number of goods that are subject to import and they are prohibited by Article 34 of TFEU.

*“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Member States”*<sup>35</sup>

In addition to that, based on the case law of the ECJ, these limitations can only be justified by Article 36’s derogations and the principle of proportionality. The national law of the member states that restricts the import of the goods can only be prohibited by this article. The exceptions may include, as they are mentioned in the Article, public mortality, public security, public health, protection of the life of humans, protection of the life of animals; artistic, historic, or archaeological heritage, and protection of industrial and commercial property. As long as these exceptions exist in compliance with the second sentence of Article 36, they can be accepted as exceptions and save the member state concerned.

### 3.3.2 Measures of Equivalent Effects

National rules on the shape, content, packaging, and labeling of goods may hinder internal trade but cannot be described as quantitative measures. Based on the case-law of the ECJ, legally binding acts, inactions, or practices that are capable of influencing the conduct of the consumers and traders as well as administrative practices are within measure<sup>36</sup>. The definition of measures of equivalent effect is found in the case of *Dassonville*<sup>37</sup>. The ECJ ruled that

*“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.”*<sup>38</sup>

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<sup>34</sup> Case 2/73 *Geddo* [1973] ECR 865, 879.

<sup>35</sup> TFEU Article 34.

<sup>36</sup> Laurence W Gormley, *Free Movement of Goods and EU Legislation in the Court of Justice* (Cambridge University Press, 2012).

<sup>37</sup> Case 8/74 *Dassonville* [1974] ECR 837.

<sup>38</sup> *Dassonville* (n 47) 852.

According to the ECJ, all trading rules enacted by the member states which are capable of hindering directly or indirectly, actually or potentially inter-community trade are considered as measures having equivalent effect.

As an example, in the case of 1982 *Commission vs Ireland*<sup>39</sup>, the Court held that the activities of a company which was backed by the government for the promotion of the sale of national products, by advertising such products and the use of homemade sign on the goods infringed Article 34. Although it was not a restriction, it made domestic products better on the consumers' eyes. Additionally, the national marketing rules may also provide for certain restrictions on imported products which may infringe Article 34. For example, import licences which by their nature only apply for imported goods or the requirements to stamp the origin of the goods on the product itself. In 1981, *Rau v DeSmedt*, the Court provided that the Belgian rule requiring the margarine to be produced in cubes and not in any other form would breach Article 34 because it imposes an economic disadvantage on exporters to Belgium<sup>40</sup>.

Distinctly applicable measures are the national rules which limit the free movement of goods by providing restrictions on the either imported or exported goods only because of the fact that they are imported or exported. Equally (indistinctly) applicable measures apply to both domestic foreign products equally<sup>41</sup>. Therefore, Article 34 does not only prohibit distinctly applicable measures, it also covers the national rules which on the face of it make no distinction between domestic and foreign products<sup>42</sup>.

## **4. Cassis de Dijon**

### **4.1 The Facts and the Case**

The Cassis de Dijon case is one of the fundamental case laws in EU law, and its main focus is the free movement of goods which is an aspect of the substantive law of the EU. With the decision made by the ECJ in this case, the concept of the internal market deepened in terms of the recognition of produced goods among all member states, and the recognition of different composition procedures among member states. The ECJ introduced two new concepts as the mandatory requirements, and the mutual recognition principle which are used in the regulation process of the free movement of goods in the internal market of the EU.

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<sup>39</sup> Case 249/81 [1982] ECR 4005.

<sup>40</sup> Case 261/81 *Walter Rau Lebensmittelwerke v de Smedt Pvbva* [1982] ECR 3961.

<sup>41</sup> *Oliver and Navarro*, 'Free movement of goods'.

<sup>42</sup> TFEU Article 34.

In the case, there was a blackcurrant liqueur that was made in France, according to the production procedures of that member state. The German retail cooperative group Rewe-Zentral AG wanted to import that French-made liqueur and to market in the German internal market however, the product was in dispute with the composition requirements of the German law. According to the national law in Germany, a good could be counted as an alcoholic beverage, if that good contained 25% of alcohol in it. In other words, in Germany, there was a minimum alcohol requirement for disposable alcoholic beverages. On the other hand, the Cassis de Dijon contained 15% to 20% of alcohol in it.<sup>43</sup> As a result of this non-compliance with the German minimum alcohol requirement, German authorities rejected the Rewe-Zentral AG's request as the marketing of that French made liqueur.

After the decision of the German authorities, Rewe-Zentral AG did not accept the decision of Germany and it took this decision before the national court.<sup>44</sup> According to the Rewe-Zentral AG, this requirement in the national law was in breach of Article 30 and Article 37 of the EEC Treaty.<sup>45</sup> The provision in Article 30 regulated the free movement of goods, and it stated that;

*Article 30 of the EEC Treaty:*

*“Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between the Member States.”<sup>46</sup>*

It can be seen in the provision that all forms of quantitative restrictions and all of the measures having equivalent effect on importation shall be prohibited among member states of the EU. The German national court could not decide whether the plaintiff, Rewe-Zentral AG, was right or not in the sense of the arguments, it suspended the case and went to the ECJ for preliminary rulings procedure. By doing so, the German court asked two questions to the ECJ for a detailed interpretation. In the first question, the national court asked whether Article 30 of the EEC Treaty saying that all measures having equivalent effect to quantitative restrictions on imports shall be prohibited also contained the German law regulating the minimum alcohol requirement for potable spirits in order to be sold in the German market. Besides this, the national court also asked a second question to the ECJ for the interpretation of Article 37 of the EEC Treaty.<sup>47</sup> The ECJ found that the first question was valid, and it was open to

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<sup>43</sup> Case 120/78 *REWE-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, para 3.

<sup>44</sup> *REWE-Zentral* ('*Cassis de Dijon*'), para 1.

<sup>45</sup> *REWE-Zentral* ('*Cassis de Dijon*'), para 1.

<sup>46</sup> Treaty establishing the European Economic Community [1957] Article 30.

<sup>47</sup> *REWE-Zentral* ('*Cassis de Dijon*'), paras 5-7.

interpretation, but the second question was irrelevant with the case as it was provision regulating the commercial practices in the internal market of the EU.

In the preliminary rulings procedure, the ECJ answered the first question which was relevant to the case. The ECJ stated that the question of concern was not regulated by the EU before, and due to this absence of a common-law related to the production and marketing of alcohol and alcoholic beverages, the member states would be the ones who would regulate this field in their territories.<sup>48</sup> After this statement, the ECJ went further and introduced an exception and a general principle as the mandatory requirements and the mutual recognition principle which will be explained later in more detail. After the interpretation of the ECJ and the establishment of these two concepts, the German authorities responded and argued that this 25% alcohol containment requirement was in favor of protecting public health since this limitation prevents the proliferation of low-alcohol-containing beverages which resulted in more readily induced tolerance towards alcohol on the individuals.<sup>49</sup> Besides this protection, they stated that this minimum alcohol limitation protects the consumers against unfair commercial practices as well. The prohibition of this requirement could create an advantage in favor of low alcohol beverages over the high alcohol contained ones since alcohol is the most expensive constituent of these products. These two arguments in the sense of protection were the responses of the German authorities to the ECJ.<sup>50</sup>

The ECJ found that both of these arguments were not valid and it rejected both of them. It stated that German people could get any low alcohol beverages they want, and in Germany, there were many choices of low alcohol beverages. However, high alcohol beverages were often preferred by the citizens. In the sense of consumer protection against unfair commercial practices, the ECJ ruled that this could be done by displaying the origin and the alcohol content of the beverages, and the raised issue was just an issue of packaging of products.<sup>51</sup> With these answers given by the ECJ, the claim of the Rewe-Zentral AG was found right, and the German rule restricting alcohol containment was found in breach of Article 30 of the EEC Treaty.<sup>52</sup> Today, the Cassis de Dijon case is counted as one of the cornerstone case laws in EU law, since with that case, the EU was introduced by two new concepts as the mandatory

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<sup>48</sup> Catherine Barnard, *The substantive law of the EU: the four freedoms* (5<sup>th</sup> edn, Oxford University Press).

<sup>49</sup> *ibid* 92.

<sup>50</sup> *ibid* 93.

<sup>51</sup> *REWE-Zentral ('Cassis de Dijon')*, paras 11-13.

<sup>52</sup> *REWE-Zentral ('Cassis de Dijon')*, para 15.

requirements and the mutual recognition by the ECJ.<sup>53</sup> Even today, these two concepts shape the internal market of the EU and the free movement of goods which is one of the four components of the substantive law of the EU.

#### **4.2. Mutual Recognition Principle**

With the case of the Cassis de Dijon, the ECJ introduced a new principle that will be applied in the territories of all EU member states, called the mutual recognition principle. By today, this principle is in force in the EU, and it shapes the whole idea of the free movement of goods.

According to the ECJ, the principle of mutual recognition means that any product which is lawfully produced and ready for sale in a member state shall be marketed in another member state without any further restriction.<sup>54</sup> In other words, a member state must recognize the other member states' production standards as equivalent to its own.<sup>55</sup> So, in the case of the Cassis de Dijon, this blackcurrant liqueur was lawfully produced and marketed in France which is a member state of the EU. This means that the mentioned liqueur had to be sold in Germany without the minimum-alcohol restriction of 25% as well.<sup>56</sup> With that decision of the ECJ, the free movement of goods idea in the union was deepened, and the dual regulation of a product by both home and host member states was replaced with the single regulation which is in the authority of the home state only.

After the establishment of this principle by the ECJ, the German authorities raised two arguments in the sense of freedom of establishment and lobbying in governments. By the freedom of establishment, they argued that with the mutual recognition principle, a firm has an opportunity to move and set up in another member state where the requirement is lower than Germany and can also sell its products in Germany. In the sense of lobbying, German authorities stated that, with this principle, German producers might lobby their government for lower standards, which would result in a domino effect by lobbying governments in each member state. This issue may create a race to the bottom about the minimum alcohol requirements in member states.<sup>57</sup> The ECJ responded to these arguments by saying that the

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<sup>53</sup> Barnard (n 22) page 92.

<sup>54</sup> *REWE-Zentral ('Cassis de Dijon')*, para 8.

<sup>55</sup> Eva-Maria Strobel, "Cassis de Dijon and other Foodstuffs - The Revised Swiss Federal Law on Technical Barriers to Trade" [2010] EFL 288-291.

<sup>56</sup> *REWE-Zentral ('Cassis de Dijon')*, para 14.

<sup>57</sup> Barnard (n 22) page 94.

mandatory requirements are intended to place a brake on any of these races to the bottom. With these requirements, a host state can regulate its internal market, and that host state has a chance to restrict the firms to comply with its national rules.<sup>58</sup>

### **4.3. Mandatory Requirements**

Besides the introduction of mutual recognition by the ECJ in the case of the *Cassis de Dijon*, it also introduced an exception to this new principle, called the mandatory requirements. These mandatory requirements are still in force in the EU today, and they are used in the regulation of the free movement of goods together with Article 36 of the TFEU.

In the sense of the mandatory requirements, the ECJ stated that there has to be a mutual recognition among member states regarding production standards in order to protect the internal market and the free movement of goods. However, a member state has the right to reject the marketing of a good in its internal market, if that member state proves that this marketing creates an issue in its state.<sup>59</sup> These reasons for the mentioned issue must be one of the mentioned mandatory requirements such as the effectiveness of fiscal supervision, the fairness of commercial transactions, the defense of the consumer, and the protection of public health.<sup>60</sup> In other words, a member state might reject the marketing of a good, if that good could create a situation for the member state regarding the mandatory requirements. Later, the ECJ developed its explanation about this exception in the case of *Rau*, and it added that the measures taken by the member states as to the non-marketing of goods in its territory should be proportionate. Member states have various measures to reach their objectives, and they have to choose the one which least restricts the free movement of goods in the internal market of the EU.<sup>61</sup>

As it is stated in the paper before, in the *Cassis de Dijon* case, Germany claimed that the marketing of this liqueur created a dispute in terms of the protection of public health and the protection of consumers against unfair commercial practices, which is under the defense of the consumer, and these mentioned claims were counted by the ECJ as the mandatory requirements. However, the ECJ did not accept both of these arguments. It found that the protection of public health claims was not valid, and the defense of the consumer could be

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<sup>58</sup> *REWE-Zentral* ('*Cassis de Dijon*'), para 12.

<sup>59</sup> *REWE-Zentral* ('*Cassis de Dijon*'), para 14.

<sup>60</sup> *REWE-Zentral* ('*Cassis de Dijon*'), para 8.

<sup>61</sup> Case 261/81 *Walter Rau Lebensmittelwerke v de Smedt Pvbva* [1982] ECR 3961, para 12.

solved by another measure as a packaging measure. So, the measure as non-marketing the goods was seen as not proportionate by the ECJ. With that decision, the claims of Germany as the mandatory requirements were found not valid, and these arguments could not change the decision of the ECJ in terms of the breach of Article 30 of the EEC Treaty.

### **5. After the Cassis de Dijon Decision**

With the Cassis de Dijon decision, the ECJ drew a wide path about the implication of free movement of goods in the internal market of the EU. It established the mutual recognition principle, and the mandatory requirements which are the exceptions of that principle. As it is mentioned before, with the decision of Rau, the ECJ also added the proportionality requirement to the usage of the mandatory requirements and with that, it deepened the mutual recognition principle.

In the decision of Keck in 1993, the ECJ detailed the scope of its mutual recognition principle, and it divided the measures mentioned in the founding treaty into two as product bound measures which consist of the inherent characteristics of the products like designation, form, composition, etc., and measures relating to selling arrangements.<sup>62</sup> As to the inherent characteristics, it did not change its former stance in the Cassis de Dijon, but as to the selling arrangements, it stated that the measures which discriminate against imports were in breach of Article 30 of the EEC Treaty.<sup>63</sup> These violating selling arrangement measures were price controls,<sup>64</sup> restrictions on where or by whom goods may be sold,<sup>65</sup> restrictions on when goods may be sold,<sup>66</sup> and advertising restrictions.<sup>67</sup> The criticism of this decision was the division between these two groups. A measure that was not categorized as either product measure or selling arrangement was not subject to a discrimination test and it was found to be in breach whether it was discriminatory or not.

Later, in 2009, the ECJ made an interpretation again in the case of Trailers; however, that interpretation did not add much to the pre-existing knowledge in the principle of mutual recognition and the measures having equivalent effect. The ECJ stated that any other measures that hinder market access are also counted as measures having equivalent effect, but

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<sup>62</sup> Case 267/91 and Case 268/91 *Keck and Mithouard* [1993] ECR 6097.

<sup>63</sup> *ibid*, para 15.

<sup>64</sup> *ibid*, para 16.

<sup>65</sup> Case 391/92 *Commission v Greece* [1995] ECR 1621.

<sup>66</sup> Case 401/92 and Case 402/92 *Heuske* [1994] ECR 2199.

<sup>67</sup> Case 292/92 *Hünermund* [1993] ECR 6787.

this interpretation was broad and did not add a new aspect or did not address the criticisms of the Keck decision.<sup>68</sup>

Today, the mutual recognition principle is still in force, and it is used in the regulation of free movement of goods in the internal market of the EU. Since the EEC Treaty no longer is in force, Article 30 of the EEC Treaty is also not in force. However, as it is mentioned in the beginning of the paper, Article 34 of the TFEU is the provision that regulates the importation. This article was essentially the same with Article 30 of the EEC Treaty. Article 34 of the TFEU also prohibits any quantitative restriction or any measure having equivalent effect on imports. Besides Article 34, in Article 36 of the TFEU there are several situations when a member state can maintain its restrictions on importation. Some of these situations are public morality, public policy, and public security.

In the sense of the mandatory requirements, which are the counted exceptions for the mutual recognition principle, they are still in force. Besides the mentioned situations in Article 36 of the TFEU, these requirements are also counted as exceptions for the prohibition of a quantitative restriction or a measure having equivalent effect on importation. At first, these mandatory requirements that the ECJ stated were aimed at harmonization among member states of the EU. However, several technical obstacles to the free movement of goods in the EU remained, even though the ECJ strongly explained what is the concept in the Cassis de Dijon case. Therefore in 2007, the European Commission made a regulation as 764/2008 Regulation, also known as “Mutual Recognition” Regulation, and by this regulation, the aim of the EU in terms of the mandatory requirements became uniformity, rather than harmonization.<sup>69</sup> There are two aspects of this regulation. In its first aspect, it lays down a procedure for the member states that shall be used in the banning and modifying processes. By doing it, the member states have to give the economic operator the reason why that kind of action is taken and provide sufficient support for that action. In the other aspect, the regulation deals with the establishment of contact points providing information on technical issues in each member state<sup>70</sup>. With the “Mutual Recognition” Regulation, some of the obstacles in the Cassis de Dijon decision were solved by reaching uniformity in the internal market.

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<sup>68</sup> Barnard (n 22) page 96.

<sup>69</sup> Barnard (n 22), page 95.

<sup>70</sup> COM (2007) 35.



## **6. Conclusion**

As an economic integration of the member states, the main idea of the EU was to create an internal market where goods, workers, services, and capital move freely. This aim can be seen in the Treaty of Rome II, also known as the EEC Treaty. In Article 2 of the treaty, the EEC's aim was mentioned as an establishment of an internal market by providing the free movement of goods, services, workers, and capital. In terms of the free movement of goods, this concept is one of the aspects of the EU's substantive law, and the definition of the good was defined by the ECJ as products which have a monetary value and are a subject of commercial transaction. By providing the free movement of goods, the EU prohibits both tariff and non-tariff barriers and also all of the measures having equivalent effect in imports and exports.

The Cassis de Dijon case is one of the case laws of the free movement of goods, since it is an issue of measure having equivalent effect. In the case, the plaintiff was the Rewe-Zentral AG which is a retail cooperative group, and the defendant was the German authorities. The dispute emerged from the importation and marketing of a French made liqueur called "Cassis de Dijon" which did not comply with the German national law that restricted the minimum alcohol requirement to 25%. Rewe-Zentral AG went before the national court and argued that this minimum alcohol requirement was in breach of Article 30 of the EEC Treaty which stated that quantitative restrictions and measures having equivalent effect on imports shall be prohibited. The national court could not decide and went to the ECJ for preliminary rulings procedure to ask whether this German requirement was also counted as a measure having equivalent effect.

As a result of the ECJ's decision, the minimum alcohol requirement was found in breach of Article 30, and the ECJ introduced two new concepts as the mutual recognition principle and the mandatory requirements. The mutual recognition principle means that a product which is lawfully produced and marketed in a member state shall be marketed in another member state as well. By this, the internal market of the EU wanted to be kept as a whole. By the mandatory requirements, the ECJ means that the marketing of a good can be rejected by the host state, if that state proves that this marketing creates an issue in its territories. The mentioned requirements by the ECJ are effectiveness of fiscal supervision, the fairness of commercial transactions, the defense of the consumer, and the protection of public health.

Today, the EEC Treaty is no longer in force, and these mentioned issues are regulated in the TFEU. Quantitative restrictions and measures having equivalent effect are prohibited among all member states by Article 34 of the TFEU, and besides the mandatory requirements, in Article 36 of that treaty, there are numbered exceptions to reject the marketing of the product. In terms of the mutual recognition principle, and the mandatory requirements, both of them are still in force today and used in the regulation of the free movement of goods. In 2007, with the European Commission's launch, 764/2008 Regulation so-called "Mutual Recognition" Regulation was entered into force, and with its two aspects, the aim of the EU in that situation became reaching a uniformity in the internal market.

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