

# EU Internal Market Law

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## Session No 5 “What is an “obstacle” to free movement according to the CJEU's case law?”

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## Outline contents

- I. Preliminary Remarks: General Overview of the TFEU Provisions
- II. Definition of the concept of restriction on free movement
- III. The discriminatory model
- IV. Mutual recognition: the double burden test
- V. Going beyond the discrimination model?

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#### IV. MUTUAL RECOGNITION: THE DOUBLE BURDEN TEST

Prohibition on indistinctly applicable measures

Where disparities between national legislations result in obstacles to free movement

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Free movement of goods

CJEU 20 February 1979, Case 120/78  
*Rewe-Zentral*

##### 1) The 'Cassis de Dijon' case

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#### The problem with "technical standards"

Divergent national "technical standards", often reflecting the different local traditions (ex. Italian pasta, German beer)

How to remove the resulting obstacles in order to secure free movement of goods?

a) Harmonisation under now Art 114 TFEU → 'standardisation'

b) Is it necessary? What the law should be in the absence of harmonisation at EU level?

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### Cassis de Dijon: the case

- Cassis de Dijon, a blackcurrant fruit liqueur made in France has an alcohol content of 15-20 per cent. It complies with French rules relating to composition of fruit liqueurs and, thereby, it is lawfully marketed in France.
- German law requires fruit liqueurs to have a minimum alcohol content of 25 per cent, irrespective of where they are made. As a consequence, Cassis de Dijon cannot be sold in Germany as a fruit liqueur in the same form as it is in France.

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### The issues at stake Arguments of the parties

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### Rewe-Zentral plaintiff in the main proceedings

- The national rule equally applies but differently affects domestic and imported products → **material discrimination** → breach of Art 34 TFEU
- Liqueurs as the "Cassis de Dijon" cannot be marketed in Germany in the same form in which they are known and marketed in their country of origin → obstacle to import
  - The manufacture of those liqueurs in a form specifically designed for the German market would make their importation more difficult and more costly in relation to the disposal of national products

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### German Government

No material discrimination against imported products → No breach of Art 34 TFEU

- Any obstacles to trade are due solely to the fact that the legal orders of Germany and France lay down different product requirements
- The mere fact that German law contains stricter requirements does not give national producers any material advantage and, therefore, does not lead to a material discrimination

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### A "race to the bottom"?

What if the German rule were to be disapplied?

- the marketing of imported products would be governed by the lower rules in the country of production
- in order to avoid discrimination against domestic products, the stricter rules in the host country could no longer be applied to them neither
- "the rules of the least exigent MS would be authoritative in all the others" → legislation for the whole EU would not be enacted by EU institutions (Council + PE) but by a single Member State without the consent of the others

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### Findings of the court

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### 1) States regulate their own market

- In the absence of harmonisation or of a system of equivalence, it is for the Member States
  - i. to regulate all matters relating to the production and marketing of goods on their own territory
  - ii. to define the conditions for the take-up and pursuit of economic activities
- However, Member States must respect the EU basic freedoms of movement

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### 2) A single market but different national applicable rules

What if the national laws provide for different requirements?

- In the Court's view, disparities between the applicable national rules may result in obstacles to free movement
- It is however less clear why and under what conditions

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### 3) The principle of mutual recognition

- "There is no valid reason why, **provided that they have been lawfully produced and marketed in one of the MSs**, alcoholic beverages should not be introduced into any other MS" (para. 14)
- When an economic activity already satisfies similar conditions laid down by the law of another MS, applying rules of the Host State results in an obstacle to free movement → Host MS must recognize Home MS's standards as (presumed to be) equivalent to its own

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Some years later on... 1991  
 Case C-288/89 *Gouda*  
 Case C-76/90 *Säger*

2) A similar approach to free movement of services

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- Persons providing services in a Member State other than that where they are established
- They already have to satisfy the requirements of that State's legislation
- The application of Host Member State's rules which affect any person established in its territory may result in a restriction on the freedom to provide service → *prima facie* breach of Art 56 TFEU

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Obstacles resulting from differences between national indistinctly applicable rules

The cumulative application of the laws of different countries owing to the crossing of the frontiers

3) The dual-burden theory

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### One market, different laws

- The mere fact that Member States apply different rules does not amount to an hindrance to free cross-border movement
- Case C-475/11 *Konstantinides*: "rules of a MS do not constitute a restriction ... solely by virtue of the fact that other MSs apply less strict, or economically more favourable, rules to providers of similar services established in their territory"

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### The problem: cumulative application

Rules **equally applicable to, but differently affecting**, domestic and imported products insofar as they not take into account that the latter already comply with the rules of the country of production →

- a) A double regulatory burden on imported goods, which have to satisfy 2 sets of rules (those of the Home and Host MSs)
- b) A single regulatory burden on domestic products, which have to satisfy only one set of rules (those of the Host MS)

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### The solution: a single set of rules

Two possible ways:

- I) **Harmonisation**: different national laws are replaced with common EU rules
- II) **Mutual recognition** (*Cassis de Dijon* doctrine): Dual regulation of cross-border situations (Home MS + Host MS) is replaced with a single regulation (Home MS) to be recognized by other MSs

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## Mutual recognition & Regulatory competition

As a result of the *Cassis de Dijon* approach

- ⇒ Harmonisation is confined to areas where MSs legitimately invoke a mandatory requirement
- ⇒ Outside those areas of harmonisation, the principle of mutual recognition applies and goods lawfully produced in one MS will enjoy access to the market in other MSs
- ⇒ Different regulatory traditions and different products will continue to coexist and will compete with each other

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The application of the rules of the Host country create a dual regulatory burden

A true conflict between national laws arises

4) the realm of the “Cassis de Dijon approach”

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Disparities between national laws only hamper free movement when applying the rules of the Host MS imposes a dual regulatory burden on the cross-border situation

- ‘Double burden’ → two sets of rules apply to economic activities carried on across the borders (host MS + home MS)
- A double burden occurs only where the economic activity pursued abroad is still governed by the rules of the country of origin
- Only in such a case a ‘true’ conflict of laws (Host MS versus Home MS) arises

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1993: Joined Cases C-267/91 and C-268/91 Keck  
2009: Case C-110/05 Commission v. Italy (trailers)

#### 4.a) In the field of goods

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Almost 20 years after *Dassonville*, and 14 after *Cassis de Dijon*, in view of the increasing tendency of traders to invoke Art 34 TFEU 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 MSs, CJEU found it necessary to re-examine and clarify its case on this matter, i.e. to point out some limitation to the reach of the notion of restriction on free movement of goods

Accordingly, an apparently formal distinction is drawn between:

- a) Product requirements
- b) Selling arrangements

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#### What are "product requirements"?

Rules regulating products themselves, which lay down requirements to be met by goods in order to be lawfully produced and marketed

Some examples:

- Rules relating to composition, presentation, labelling, packaging of products
- requirements concerning the (generic) designation of a product (beer, chocolate)
- rules relating to "production conditions"

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### Cassis applies to product requirements

- Goods are manufactured in conformity with the product requirements laid down by the State of production
- Such rules do not cease to be applied when the product crosses the frontiers, but they **"move with the product"** (Ex. Italian beer sold in Germany has been produced according to the Italian standards)
- If similar requirements of the Host country were also applied → a true conflict of laws would arise → dual burden → restriction caught by Art 34 under the Cassis doctrine

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Requirements as to holding particular authorisations, qualifications or licences create a double burden on migrants

### 4.b) In the field of persons

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CJEU 9 July 1997, Case C-222/95 Parodi

Requirement for administrative authorisation

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### The main proceedings

- de Bary Bank, a company established in the Netherlands where it is authorised to pursue banking activity, grants a mortgage loan to Parodi, a company established in France.
- Before the French courts the borrower claims for declaring the contract to be void since the Dutch lender has not been authorised in France (as required by French Law).

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### The question referred to the CJEU

- Does Art 56 TFEU preclude a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory?
- The requirement for administrative authorisation applies without distinction to national banking services provider and those of other Member States

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### The Court's rulings: The general principle

Art 56 requires the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other MSs, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another MS where he lawfully provides similar services

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### The Court's rulings: the concrete application of the dual-burden theory

Even if it is not discriminatory, the French rule creates a restriction

- it makes it more difficult for a credit institution established in another MS and authorized by the supervisory authority of that MS to grant a mortgage loan in France
- in so far as it requires that institution to obtain a fresh authorization from the supervisory authority of the State of destination (dual regulatory burden)

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ECJ 7 May 1991, Case C-340/89  
*Vlassopoulou*

Requirement for  
professional qualification

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### The main proceedings

- The Ministry for Justice Land Baden-Wuerttemberg refuses to grant to Mrs Vlassopoulou, a Greek lawyer registered with the Athens Bar, admission as a Rechtsanwaeltin (lawyer), on the ground that she has not the qualifications laid down by German Federal law for the holding of judicial office, which are necessary for admission to the profession of Rechtsanwalt
- Those qualifications are acquired by studying law at a German university, passing the First State Examination, completing a preparatory training period and then passing the Second State Examination

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## The question referred to the CJEU

Mrs Vlassopoulou appeals against that decision

- The Bundesgerichtshof (Federal Supreme Court) asks to the CJEU whether Art 49 TFEU on freedom of establishment is infringed if a EU national who is already admitted and practising as a lawyer in her country of origin can be admitted as a lawyer in the host country only in accordance with the rules of that country

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## The Court's reasoning (dual burden test)

- Host MS law: access to a profession (lawyer) depends upon the possession of a diploma or a professional qualification
- No discrimination on the basis of nationality
- Nonetheless Host MS qualification requirements may hinder the right of establishment guaranteed to nationals of the other MSs
- This is the case if the Host MS rules create a **double burden** on migrants...
- Since they **take no account of the knowledge and qualifications already acquired by the migrants in their country of origin**

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Direct effect of Art 49 TFEU  
Principle of sincere cooperation - Art 4(3) TEU

What do the authorities of the Host MS are required to do?

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### 1) Assessment of the equivalence of the qualifications

- Take into consideration the diplomas, certificates and other evidence of qualifications which the migrant has acquired in order to exercise the same profession in another MS
- By making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules
- Thus, authorities of the host MS should be enabled to verify whether the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma

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### 2) mutual recognition of qualifications

- a) If the knowledge and qualifications certified by the foreign diploma **fully** correspond to those required by the national provisions, the Host MS must recognize that diploma as fulfilling the requirements laid down by its national provisions
- b) If they correspond **only partially**, the Host MS is entitled to require the migrant to show that he has acquired the knowledge and qualifications which are lacking
- c) If completion of a period of preparation or training is required by the Host MS rules, it must be determined whether professional experience acquired in the MS of origin may be regarded as satisfying that requirement in full or in part

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Application of the rules of the Host country to cross-border situations and internal situations alike

⇒ indirect discrimination (different situations treated in the same way)

### 5) The Dual-burden theory and the discrimination model

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### The cross-border situation

Due to the fact that

- 1) MSs regulate trade in their own territory and
- 2) they do not take into account rules set out by other countries (which they do not recognise),

economic activities carried on across the frontiers, may have to comply with more than one set of rules:

- a) the one of the country of origin (i.e. where the good is manufactured or where the service provider is established) and
- b) the other(s) of the country(ies) of destination (i.e. where the good is marketed or where the service is provided)

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### To treat different situations alike

- Cross-border activities already satisfy the rules set out by the Home MS → different situation than activities carried out in the Host MS
- Rules of Host MS indistinctly applied to both situations = without taking into account that the cross-border activity is lawfully carried on in accordance with the rules of another State → same treatment to different situations → a covert discrimination against cross-border activities

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