PEVS
EUROPEAN LAW II
THE INTERNAL MARKET
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I. The Internal Market: General Aspects

A. Background

Unification and pacification of Europe was made on the basis of the functionalist theory: the economy is to function as vehicle for political achievements. Originally, the economic types of integration were limited and had to be improved by additional forms.

B. Forms of Economic Integration

Free trade areas and customs union were available, but are confined basically to the *trade in goods* only. The common market added the factors of production *labour* and *capital* to these traditional forms of economic integration.

The **Free Trade Area** is defined as „a group of two or more customs territories in which the duties and other restrictive regulations of commerce...are eliminated on substantially all the trade between the constituent territories in products originating in such territories“ (Article XXIV para 8 b. GATT). The main problem of a FTA is to determine what is meant by "products originating in such territories" if a good is composed of elements coming from third countries. The "Rules of Origin" are the core of any FTA-Agreement.

The **Customs Union** (CU) is a combination of two or more States within a single customs area establishing a common external tariff (CET or CCT-Common Customs Tariff).

C. Common Market and Internal Market

The Treaty of Rome of 1957 envisaged the gradual removal of trade barriers between the original six Member States of the European Economic Community (EEC, after 1993 just EC). After a transitional period the customs union was completed in 1968. The Community, however, did not succeed in achieving the common market in all its components: free movement of goods, persons, services and capital. Political sensitivities stood in the way of adopting measures to secure the right of establishment and the liberalization of air transport, public procurement, capital movements etc. The accession of new members, budgetary

disagreements and economic recession produced *euro-sclerosis*, bringing the achievement of a common market to a standstill.

The turnaround was achieved through the initiative of the Commission under its leadership of President *Jacques Delors* from France. It developed the concept of the "internal market" which in June 1985 was presented, at the European Council's request, in the legendary White Paper entitled "Completing the Internal Market". It has set out an extensive programme with a view to eliminating all remaining barriers. This concept was subsequently introduced in the „Single European Act" of 1986, the first revision of the basic treaties of 1951 and 1957 (Paris and Rome). This instrument was designed to remove the flaws of the common market. These still existing obstacles to trade among the Community Member States were divided by the Commission into physical (frontier checks), technical (different standards for health and safety reasons, see the *German Beer* Case of 1987 below) and fiscal barriers. Their removal required some 300 legal acts (regulations and/or directives). The deadline for the completion of the Internal Market was the 31st of December 1992.

During that period practically all of the then existing barriers had been eliminated. They also included, *inter alia*, protective national measures in the field of public procurement and the absence of competition in civil air transport.

Therefore, compared with the original common market, the internal market is historically its further development. While the common market still presupposes internal frontiers which have to be opened, the internal market comprises an area **without internal frontiers**. Thus the internal market is a more ambitious concept.

A definition has been included in Article 26 para. 2 TFEU:

"The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured...".

It had indeed been completed by 31 December 1992. Through the abolition of internal frontiers the TFEU no longer seeks to attain merely an open market but an "area". The use of this term makes it clear that integration is not confined to economic factors of production, but extends to the whole life in society. For instance, EU nationals must not be economically active in order to enjoy the right to free movement and residence. At first, any student had been declared to enjoy such rights. Now any EU citizens may assert such rights.

From January 1, 1993 checks at internal borders in principle disappeared, as far as **goods** are concerned. The abolition of border controls in the case of free movement of **persons** was originally left to intergovernmental agreements. The first **Schengen Agreement** is a treaty signed on 14 June 1985 at the border triangle Germany, France and Luxembourg near the town of Schengen in

Luxembourg, between five of the ten member states of the then European Economic Community. In 1990, it was supplemented by the **Convention implementing the Schengen Agreement**. Together these treaties created Europe's borderless Schengen Area, which operates very much like a single state for international travel with external border controls for travelers travelling in and out of the area, but with no internal border controls.

The Schengen Agreements and the rules adopted under them were, for the EU members of the Agreement, entirely separate from the EU structures until the 1997 Amsterdam Treaty, which incorporated them into the mainstream of European Union law. The borderless zone created by the Schengen Agreements, namely the Schengen Area, currently consists of 26 European countries, including the non-EU States Switzerland, Liechtenstein, Norway, Iceland, but not the EU Members Ireland, the UK, Romania, Bulgaria and Cyprus.

As contained in Article 26 para. 2 TFEU above, the definition of the internal market expresses the so-called **"four freedoms"**. This doctrine, comprising the four freedoms of *goods, persons, services and capital* was developed by the rulings of the European Court of Justice (ECJ) and by the science of European Law. They are also called "fundamental freedoms". The concept of "common market" has been abolished by the Treaty of Lisbon.

II. The Free Movement of Goods

The first freedom is aimed at the creation among the EU Member States of a single market, free of customs duties and of all charges having equivalent effect, as well as of a market free of quantitative restrictions (quotas) and of all measures having equivalent effect. Thus all measures constituting a barrier to trade are divided into **fiscal** or **pecuniary barriers** and **non-fiscal measures**, i.e. physical and technical barriers on imports and exports.

A. Fiscal barriers

1. Relevant Treaty Provisions

The relevant treaty provisions are contained in Articles **28**, **29**, **30, 31, 32** and **110** TFEU.

Article 28

> "1. The Union shall comprise 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".

That rule applies both to products originating in Member States as well as to products coming from third countries which are in free circulation in Member States (Art. 28 para.2 TFEU).

Article 29

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duty or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

Chapter 1
THE CUSTOMS UNION

Article 30

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.

Article 31

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission

Article 32

In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:
(a) The need to promote trade between Member States and third countries;
(b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings,

Article 110 (ex 90)

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.
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.

On the ground of Article 32 TFEU the Commission may propose to the Council anti-dumping charges on products from third countries which were found to be sold under the costs of production. Thus mainly Chinese but also Japanese products were often found to flood the European market. Such a measure, also called countervailing duty, by the EU may cause problems relating to the **rules of origin.**

2. Rules of Origin

Strictly speaking, this is more a problem of a free trade area (FTA), and not of a customs union such as the EU. Here third country producers intend to enter the FTA *via* the lowest tariff gate. Therefore any product circulating in the area must be accompanied by a **certificate of origin**, in the European Union called "movement certificate". Problems occur when goods are produced in the FTA with components stemming from third countries and imported *via* the lowest tariff country (see the *Honda Case* US v. Canada 1996). The individual elements, cheaply imported from different countries *via* the lowest tariff FTA Member State, are just assembled in the FTA. The question arises as to whether such a product is still a product "originating in the area", according to the WTO (GATT) definition. In order to assess the character of origin the **value added criterion** is widely applied: more than 50% of the value of the product must be added to the product in the free trade area.

But such a "screwdriver-factory syndrome" may also affect a customs union, such as the European Union. (see the Rules of Origin Regulation 802/68). The leading case is ***Brother International v. Hauptzollamt Giessen*** (Case 26/88 [1989] ECR 4253). After the Council had imposed anti-dumping duties against Japanese typewriters the German company Brother International has imported type writers from Taiwan. The German customs authorities maintained that Brother International should pay 3 million DM import (anti-dumping) duties because in reality these products were not of Taiwanese, but of Japanese origin. The Court followed that argument. Most of the components stem from Japan. The manufacturer in Taiwan has added only 10% to the value of the products. That does not sufficiently qualify for a product originating in Taiwan.

3. The notion of "goods" and of "charges having equivalent effect"

As was said before, free movement of **goods** comprises the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect (Art. 30 TFEU). The notion of "goods" is not defined in the Treaty. What are "goods" and what are "charges having equivalent effect" (CEE)? The answer was given in the

Italian Arts Case of 1968[1].

Facts. In that case Italy imposed a tax on the export of artistic, historical, and archaeological items. The Commission brought an action for infringement

[1] Case 7/68, *Commission v. Italy* [1968] ECR 427.

under Article 226 EC Treaty (now Article 258 TFEU) against Italy alleging that this was in breach of Art. 25 (now Article 30 TFEU).

Italy, however, argued that

- these items are not goods for the purpose of the rules on the customs union, and that
- the purpose of the tax was to protect the artistic etc. heritage of the country.

The Court did not follow these arguments. It held:

> "Under Article 23 (now 28 TFEU) of the Treaty the Community is based on a customs union 'which shall cover all trade in goods'. By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions. Therefore, the rules of the Common Market apply to these goods…"
>
> "Article 25 (now 30 TFEU) of the Treaty prohibits the collection of dealings between Member States of any customs duty on exports and of any charge having an equivalent effect, that is to say, any charge which, by altering the price of an article exported, has the same restrictive effect on the free circulation of that article as a customs duty. That provision makes no distinction based on the purpose of the duties and charges of which it requires. The disputed tax falls within Article 25 (now 30 TFEU) by reason of the fact that export trade in the goods in question is hindered by the pecuniary burden which it imposes on the price of the exported articles".

Bresciani v Amministrazione Italiana 1976 is another case: Italian authorities imposed a charge for the compulsory veterinary inspection on imported raw cow hides. The Court: "any pecuniary charge which is unilaterally imposed on goods imported from another Member State by reason of the fact that they cross a frontier, constitutes a CEE..".

4. The prohibition to introduce new customs duties

This rule was contained in the original Article 12 E(E)C (now 30 TFEU) Treaty and is also called a "standstill" provision.

It gave rise to the ground-breaking judgment of the Court of Justice of the European Communities (European Court of Justice, furthermore: "ECJ") in the **Case *Van Gend en Loos*** in 1963[2].

Facts: The Van Gend en Loos Company had imported a quantity of chemical substance from Germany into the Netherlands. It was charged by the Dutch Customs authorities with an import duty which had been increased since the entry into force on 1 January 1958 of the E(E)C Treaty, contrary to its standstill provision of (former) Art. 12. An appeal against payment of the duty was launched by the Company before the Dutch *Tariefcommissie* which, in turn, referred the case to the ECJ for preliminary ruling, according to Art. 234 EC Treaty (now Article 267 TFEU). The principal question the Court had to answer was, as to whether Article 12 EC Treaty has direct effect[3] "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 to individual rights which the courts must protect".

Observations in the case were submitted to the Court by Belgium and The Netherlands.

Belgium argued that the question was one of whether a national law ratifying an international Treaty would prevail over another law, and this was a question of national constitutional law which lay within the exclusive jurisdiction of the Dutch courts.

The **Dutch government** argued that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who have created the Treaty, namely the six original Founding Members of the Community. Since individuals are not parties to the Treaty, they could only invoke its provisions if national law such provides which is not the case.

The Court, however, did not share those opinions. It held:

> "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 of the Treaty which refers not only to

[2] Case 26/62, NV *Algemene Transport-en Expeditie Onderneming van Gend an Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

[3] At that time the Dutch Court and the ECJ used the term „direct application" which, in the meantime, has been changed into "direct effect".

> governments but to peoples[4]. 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 then functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee…
>
> 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 Member States and upon the institutions of the Community…".

As far as the conditions of direct effect are concerned the Court held in this Case:

> "The wording of Article 12 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 is ideally adapted to produce direct effects in the legal relationship between Member States and their subjects…
>
> It follows from the foregoing 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".

It follows from this ground-breaking judgment that whenever a provision of Community law is clear. Unconditional and intended to confer rights upon an individual (or company) that individual may invoke that provision before the national court which, in turn, is to follow the rules of Article 234 EC Treaty (preliminary ruling). This applies not only to primary law, the Treaty, as in this case, but also to secondary law, namely to regulations and non-implemented directives.

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[4] „His Majesty the King of the Belgians……..determined to lay the foundations of an ever closer union among ***the peoples of Europe***…..". Preamble, EC Treaty, para.1 (emphasis added).

5. The Common External Tariff

The power to establish the common external tariff (CET or CCT) lies with the EU Council and, by way of executive legislation, by the European Commission. The present common customs law in force is based on the Council Regulation (EEC) No 2658/87 of 23 July 1987 "on the tariff and statistical nomenclature and on the Common Customs Tariff", which was amended by Commission Regulation (EC) No 2031/2001 of 6 August 2001.

6. Taxation

The rules on the customs union are supplemented by Art. 110 TFEU (formerly 90 EC Treaty), according to which 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.

The leading case is the ***Wine/Beer*** Case of 1978 (Case 170/78, *Commission v. United Kingdom*).

The Facts: The United Kingdom levied an excise tax on certain wines which was five times that was levied on beer. The UK produced considerable amounts of beer, but very little wine.

The Court held*, inter alia*: "It is clear, that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmark of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typically produced domestic beverage. 28. "It follows from the foregoing considerations that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom have failed to fulfil its obligations under para.2 of Article 90 EC Treaty. (now Article 110 TFEU)."

A similar issue is shown in the ***Italian Banana Case*** of 1987 (ECJ 7.5.1987, Case 184/85, Commission v. Italy [1987] ECR 2013. Italy imposed and maintained a tax on the consumption of fresh and dried bananas from other Member States, in particular on bananas from the French Overseas Departments. The Court compared bananas with table fruit typically produced in Italy, such as apples, pears,

peaches, plums, apricots, cherries, oranges etc. They are differently taxed. Bananas do afford an alternative choice to consumers, the Court held, and the

"difference in taxation influences the market by reducing the potential consumption of the imported products. That being so, the protective nature of the tax system clearly emerges".

Thus Italy has failed to fulfil its obligations under the second paragraph of Article 95 (now 110 TFEU).

B. Non-Fiscal (physical and technical) Barriers to Trade

The free intra-EU flow of goods can be hindered not only by duties and other pecuniary burdens, but also by total (bans) or partial restraints on certain imports or exports. These are **quantitative restrictions** and **all measures having equivalent effect.**

1. Relevant Treaty Provisions

Article 34 TFEU (ex Article 28)

> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35 TFEU (ex Article 29)

> Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between Member States.

Article 36 TFEU (ex Article 30)

> 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 a disguised restriction on trade between Member States.

This Article is often regarded as an "**escape clause**", on which, as in the following case, Member States had relied on.

An example is the famous *German Beer* Case (Commission v. Germany 1987).

ICJ: the German Foodstuffs Act of 1974, in reference to the "Biersteuergesetz" ("Purity Law") of 1952 provided for a ban on the marketing of a product called "Bier" which contained additives. The name "Bier" could be used only for

products brewed using **malted barley, hops, yeast, and water alone**. The use of other ingredients such as maize and rice did not preclude the marketing of the finished product in Germany, but it could not be sold as "Bier". Germany justified the ban for reasons to protect the health of consumers, according to Article 36 TFEU. The Court, however, held that this is contrary to the principle of proportionality and not covered by Article 36. The Court used the findings of the WHO according to which the additive does not present a risk to public health and meets a real need, especially a technical one. A specific additive used in another Member State must be authorized in the case of a product imported from that Member State. The German Foodstuffs Act ("Purity Law") is considered by the Court as a disguised restriction on trade between Member States and is not covered by the exceptions contained in Article 36 TFEU. As a result, beverage from other Member States can be sold in Germany under the title "Bier", without the obligation to comply with the purity requirements of the German legislation, while German beer manufacturers have to follow restrictive purity rules. The result of this ruling is an accidental reverse discrimination (*Inländerdiskriminierung*) of German breweries.

2. Quantitative Restrictions (Quotas)

They are not defined in the Treaty. It was therefore up to the Court to develop the content of this notion as contained in Article 34 TFEU. By its case law, the ECJ has transformed this **Article 34 (previously 30, then 28 EC Treaty) into a provision of immense significance** as an instrument for the creation of a market in which the free circulation of goods is ensured.

In the case 2/73 *Geddo v. Ente* [1973] ECR 865 it held:

> "The prohibition of quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports and goods in transit".

Inactivity by a Member State may also cause an infringement of Article 34 TFEU. The classic case is that of ***"Spanish Strawberries***". (Case C-265/95. ***Commission v. France*** [1997] ECR I-6959.

Facts. The Commission initiated proceedings against France and finally brought an action under Article 226 EC Treaty (now Article 258 TFEU) because of the alleged passive approach of the French authorities in the face of actions by French farmers such as the interception of lorries transporting Spanish fruit and vegetables in France and the destruction of their loads, violence against lorry drivers, and threats against French supermarkets selling imported agricultural products from Spain.

The Court held:

> "Article 30 (now 34 TFEU) provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. 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. It also applies where a Member State abstains from adopting measures required in order to deal with obstacles to the free movement of goods which are not caused by the State....The Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in the 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 from committing and repeating them".

As a result of such incidents the **Council Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods** was adopted, equipping the Commission with special powers in cases of serious obstacles to intra-Community trade.

3. Measures having equivalent effect

These measures are more difficult to define. Both the Commission and the ECJ have made such attempts.

a. The Definition by the European Commission: Directive 70/50 EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions

This famous Commissions' Directive[5] provides a non-exhaustive list of measures having equivalent effect to quantitative restrictions. They are divided into

- ***measures, other than those applicable equally to domestic and imported goods,*** i.e. distinctively applicable measures, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production. They include minimum or maximum prices for imported products; discriminatory payment conditions for imported goods; conditions in respect of packaging, composition, size, weight, etc. which only apply to imported goods, etc. (Article 2 Directive);
- ***measures, which are equally applicable to domestic and imported goods***, i.e. indistinctively applicable measures. They are only contrary to Arts. 28 and 29 (Article 34 and 35 TFEU) "where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to

[5] OJ 1970 L 13, 29.

trade rules" (Article 3 Directive). Thus, indistinctively applicable rules are acceptable provided that they comply with the principle of proportionality.

b. The definition and judgments by the ECJ: The Dassonville, Cassis and Keck formulas

In the celebrated ***Dassonville*** Case of 1974[6] the ECJ developed its own definition, known as Dassonville-formula.

The facts: Belgian law provided that goods bearing a designation of origin could only be imported if they were accompanied 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 requisite certificate from the British authorities. Such a certificate would have been very difficult to obtain in respect of goods which were already in free circulation in a third country, namely France. Dassonville successfully argued that the Belgian rule is a forbidden **measure having equivalent effect.**

The ***Dassonville*** formula reads as follows:

"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 a effect equivalent to quantitative restrictions" (para. 5 Judgment).

In applying the Dassonville formula the Court did not distinguish between ***distinctly and indistinctly applicable measures*** and ignored the ***proportionality test***, as foreseen in the Directive 70/50. This wide *Dassonville* definition was, therefore, criticised as to "boring too harshly on Member States" (Josephine Steiner). It was subsequently mitigated by the *Cassis* formula.

The facts: The Case *Rewe v. Bundesmonopolverwaltung*[7] concerns the import of the liqueur "***Cassis de Dijon***" into Germany from France. The relevant German authorities refused to allow the import 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. Thus although the German law was indistinctly applicable, the result of the measure was effectively to ban French cassis from the German market. *Rewe* successfully argued that the German law was a measure of having equivalent effect, since it prevented the French version of the drink from being lawfully marketed in Germany.

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[6] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

[7] Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

The Court held:

" In the absence of common rules relating to the production and marketing of alcohol…it is for the Member States to regulate the 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 recognised 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" (para 8. Judgment).

This **"first Cassis principle",** that certain measures, though within the *Dassonville* formula, will not breach Article 34 TFEU (Article 28 EC Treaty) if they are **necessary to satisfy mandatory requirements**, has come to be known as the "rule of reason", a concept borrowed from American anti-trust law. Prior to *Cassis,* it was assumed that any measure falling within the *Dassonville* formula would breach Articles 34 or 35 TFEU and could be justified only on the ground provided by Article 36 TFEU (ex Article 30 EC Treaty). Since *Cassis,* at least where **indistinctly applicable measures** are concerned, courts may apply a rule of reason to Articles 34 TFEU. If the measure is necessary in order to protect mandatory requirements, it will not breach the latter Article. **Distinctly applicable** measures on the other hand will normally breach Articles 34 and 35 TFEU, but may be justified under the escape clause of Article 36 TFEU (see above).

The **"second Cassis principle"** is formulated in the judgment as follows:

"There is…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 another Member States; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcoholic content lower than the limits set by the national rules" (para.14 Judgment).

In general terms it means that goods which have been lawfully produced and marketed in one Member States may be introduced and marketed in any other Member State.

In view of the Court, Germany had in that case also violated the principle of proportionality by prohibiting the import of the French product. That measure went too far: "…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 the products" (para.13 Judgment).

A somewhat milder position towards measures having equivalent effect is shown in the Judgment in ***Keck*** in 1993[8].

The facts: Keck and Mithouard were prosecuted in French courts for selling goods from other Member States at a price which was lower than their actual purchase price (resale at loss), contrary to a French law of 1963 as amended in 1986. Keck and Mithouard submitted that the French law forbidding such practices 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 28 EC Treaty (now Article 34 TFEU)..

The Court held:

> "However, 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 as such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment…. provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States" (para. 16 Judgment).

The Court made in this case a distinction between measures affecting the product as such, like labelling, packaging etc., and **sales modalities**. The latter do not constitute a measure having equivalent effect.

III. The Free Movement of Persons

A. The Principle of Non-Discrimination (Equal Treatment)

It is the **over-all principle** governing the fundamental freedoms.

Article 18 TEU stipulates:

"Any discrimination on grounds of nationality shall be prohibited".

According to ECJ rulings, Article 18 TEU applies independently only to situations governed by EU law for which the Treaty lays down **no specific prohibition of discrimination.**

[8] Cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

B. The Free Movement of Workers

It is the second fundamental freedom. The idea of an internal market does not only require the abolishment of frontiers for the movement of products or goods, but also for the movement of physical and juridical persons (companies). They must be entitled to do business in all Member States without any discrimination on grounds of nationality. Hence it follows, that this freedom is twofold: the movement of **workers** and other individuals on the one hand, and that of **self-employed**. Self-employed are **not only individuals**, but also **legal persons**, such as companies, firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law (Article 54 TFEU). This is the **freedom or right of establishment**.

Originally, only persons **doing business in another EC Member State** have enjoyed this freedom which was later **extended to all nationals** of a Member State.

1. Relevant Treaty and Other Provisions

a. Treaty Provisions

Article 45
(ex Article 39 EC Treaty)

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the **abolition of any discrimination based on nationality between workers of the Member States** as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, **subject to limitations justified on grounds of public policy, public security or public health:**
(a) to accept offers of employment actually made;
(b) to **move freely within the territory** of Member States for this purpose;
(c**) to stay in a Member State** for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) **to remain** in the territory of a Member State **after having been employed** in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall **not apply to employment in the public service.**

Article 46
(ex Article 40 EC Treaty)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:
(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47
(ex Article 41 EC Treaty)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

b. Secondary Law Provisions

1. Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community.

This Regulation substantiates the particular rights of workers under the free movement regime. They include

- The right to move freely between Member States,
- To take up employment with the same priority as nationals of the host State,
- To enjoy non-discriminatory labour conditions, and
- To have access to social protection once installed in the host State.

This Regulation stipulates that the right of **freedom of movement** also means that **obstacles to the mobility** of workers shall be **eliminated** in particular as regards the **worker's rights to be joined by his family** and the **conditions for the integration of that family into the host country**. It granted particular rights upon the members of the worker's family.

This Council Regulation 1612/68 was amended by

2. Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 229, 35.

In force since 30 April 2006. It is commonly called "**Residence Directive**".

This directive takes into account the concept of citizenship of the European Union, as had been introduced by the Treaty of Maastricht since 1993. Its beneficiaries are no longer only workers, but **all nationals** of a Member State.

It also defines the term "family members" (Article 2) in a wider sense, as including

- The spouse,
- The partner in a registered partnership,
- The direct descendents under the age of 21, and
- The dependent direct relatives in the ascending line.

They are all beneficiaries of the Directive 2004/38 EC.

It establishes a right of residence on the territory of another Member States **for a period of up to three months** without any formalities and conditions. It does not, however, include a right to social assistance (Article 6 Directive).

After three month it distinguishes between

a. Workers and self-employed persons including their families: they are entitled to stay on, even if they have lost their status through unemployment or accident; and
b. Students and self-funding migrants: they are entitled to stay on provided they have **sufficient resources** not to become a burden on the social assistance system of the host Member state and have **comprehensive sickness insurance** cover in the host Member State (Article 7 Directive).

> ***French Roma*** Case of 2010: In 2010, the expulsion of thousands of Roma people from France was based on Article 7 this Directive. France could convincingly show that these Romanian nationals were lacking sufficient means of subsistence and thus became a burden on France's social assistance system.

Union citizens and their family members acquire a right to **permanent residence** after having legally resided in the host State for a **continuous period of five years.**

The **Residence Directive 2004/38 EC** repealed and replaced **Directive 64/221 EEC** which referred to the measures concerning the **movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health**.

Restriction on the right of entry and the right of residence in grounds of public policy, public security or public health

Article 27
General principles

1.....Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on the grounds of public policy or public security shall comply with the **principle of proportionality** and shall be based on the **personal conduct of the individual concerned**. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The **personal conduct** of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society..

Article 28
Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take into account of considerations such as how long the individual concerned has resided in the territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member state and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on **serious grounds** of public policy or public security.
3. An **expulsion decision may not be taken against Union citizens**, except if the decision is based on **imperative grounds** of public security, as defined by Member States, if they:
   (a) have resided in the host Member States for the previous 10 years; or
   (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Thus Articles 27 et seq. of Directive 2004/38 contain **derogations** from the basic principle of free movement of Union citizens and their family members (**"escape clauses"**) and **restrictions** of expulsion.

Although the free movement of persons is the most important right under EU law for individuals, the **Accession Treaties of 2003** regarding the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and of **2005 regarding Bulgaria and Romania** provide for a **transitional period of up to seven years** during which certain conditions may be applied that restrict the free movement of workers from, to and between the Member States.

2. Case Law

The term "worker" is not defined in the Treaty. Early findings of the Court made it clear that it has a supranational (now Union) meaning and that it must not be interpreted by the legislation of each Member State. A leading case is

a. Levin v. Staatssecretaris van Justitie of 1982[9]

Facts and Findings. Ms Levin, a British citizen was married to a third country national. She applied for a permit of residence in the Netherlands. This was refused on the ground that Ms Levin was not engaged in a gainful occupation in the Netherlands and therefore not a "favoured EEC citizen" who must be accorded the privilege of free movement according to Article 39 EC Treaty. Ms Levin appealed to the Staatssecretaris van Justitie, arguing that he has taken up a part-time occupation in the meantime. The Staatssecretaris countered that her part-time occupation was not covered by the "worker"-definition of Article 39 EC Treaty because she does not even earn the minimum wage. The Court found that the concept of "worker includes part-time jobs, provided they cover **effective and genuine activities** (and not only marginal and ancillary). Furthermore a worker must be under the **direction of another person** and he or she must receive **remuneration**.

The following case raised the question about the concept of "public policy": is it a discretionary matter for the Member States to decide or are there legal limits? The above mentioned Council Directive 64/221 was intended to limit such discretion. This Directive had, however, not properly been implemented by the United Kingdom (UK) at the time when the case occurred. Just like the *Van Gend* Case, it gave rise to a ground-breaking judgment.

b. Case ***Van Duyn v.Home Office***[10]

Facts: This case concerned Ms Van Duyn, a Dutchwoman who wanted to enter the UK to take up a post with the Church of Scientology, a religion disapproved by the more established religious bodies. The British government, therefore, had reached the conclusion that Scientology was harmful to the mental health and, *inter alia,* refused immigration permissions to known Scientologists. This also happened to Ms Van Duyn on the basis of a public policy proviso. She, however, challenged this decision before English courts, invoked Article 39 para. 3 EC Treaty (now Article 45 TFEU)) and Directive 64/221 limiting the Member States' discretion as regards the public policy proviso: Such measures must be based **exclusively on the personal conduct of the individual concerned**. Miss Van Duyn contended that mere membership of the Church of Scientology did not constitute „personal

[9] Case 53/81 1982].
[10] Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337.

conduct“ within the meaning of the Directive, which, however, had not been properly implemented in Britain by that time.

The Court followed Van Duyn's arguments and held, *inter alia*:

> "By providing that measures taken on the grounds of public policy shall be based on the personal conduct of the individual concerned, Article 3(1) of Directive No. 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals….The problem in this case was that the UK Government had done nothing to implement the relevant Article 3 para. 1 of the Directive. If this had been done..."Ms Van Duyn could have relied on the British provision. In effect, therefore, the UK Government was seeking to deny her a right on the ground of its own failure to implement the directive".

The principle of equity in English law, namely „No one should profit from its own wrongdoing“, appears in this ruling as well as the doctrine of "estoppel". This is to say that the Member States' failure to fulfil the Treaty obligations to implement a directive properly or on time precludes them from refusing to recognize its binding effect in cases where it was pleaded against them.

The Court furthermore held:

> "Where the Community authorities have, by directive imposed on Member States an obligation to pursue a particular course of conduct, the useful effect (*effet utile*) of such an act would be weakened if individuals were prevented from relying on it before their national courts". It concluded that where a provision exists which is **not subject to any condition and which does not require the intervention by Community institutions or Member States, it may be relied on by individuals**."

This case did not only throw some light of the restrictions (public policy proviso!) to the freedom of movement of workers but also established for the first time the **doctrine of direct effect of non-implemented directives** by stating their requirements.

However, as a result the Court found, that the British authorities are allowed to deny entry to Ms. Van Duyn on the grounds of her intention (**personal conduct**!) to take up work with an organization that is considered socially harmful.

c. Case ***Belgian National Railway Company*** of 1982[11]

This case relates to the exceptions of the freedom of movement of workers, according to Article 45 para 4 TFEU (ex Article 39 para. 4 EC): "employment in the public service".

[11] Case 149/79, *Commission v. Belgium* [1982].

Facts and Findings. The European Commission instituted proceedings against the Kingdom of Belgium under Article 258 TFEU in which it challenged various job announcements made by the national railway company because it required Belgian nationality. The Court found that the exception of Article 45 para. 4 TFEU only applies to those fields of public service which are entrusted with the **exercise of powers conferred by public law** and with **responsibility for safeguarding the general interests of the State.**

Thus employment in police administrations, armed service, judiciary, tax authorities, diplomatic service, etc. is not subject to such liberalisation. On the other hand, the Court ruled, that private security services may not be reserved to nationals of the particular Member State[12].

C. Individuals other than workers: Citizenship of the Union

1. Relevant Treaty Provisions

The fundamental freedoms are granted to economically active persons (workers, self-employed, service-providers and –receivers) who participate in the common market. The concept of the "Citizenship of the Union" which was introduced by the Treaty of Maastricht in 1992 applies to everybody. The Union was meant to become a "Citizen's Union" where there exists a general right to free movement and residence.

Article 20 TFEU (ex Article 17 EC Treaty)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

   (a) The right **to move and reside freely** within the territory of the Member States;
   (b) the right to vote and to stand as candidates in elections to teh European Parliament..
   (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State...

Article 21 TFEU (ex Article 18 EC Treaty)

[12] Case C-114/97 *Commision v. Spain* [1998] I-6717.

1. Every citizen of the Union shall have the **right to move and reside freely within the territory of the Member State**s, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.
2.

2. The *Habsburg* Case

After Austria's accession to the EU these rules became relevant in the long lasting *Habsburg* Case of 1996.

The facts: Felix Habsburg-Lorraine, the son of the last Austrian Emperor Charles I, who died in 1922, is Austrian citizen living in Brussels, Belgium. As many others of his family, he was issued an Austrian passport containing the reservation „Valid for all States except for the entry of and passage through Austria". That reservation was based on the Habsburg Law, a constitutional law enacted on 3 April 1919 (BGBl. 1919/209), which provided for the banishment of all members of the House of Habsburg from Austria, which after World War I became a Republic. All members of the former ruling House of Habsburg were affected by that Law, unless they renounced their membership in the House of Habsburg and expressly declare themselves to be faithful citizens of the Republic of Austria. Felix' brother Otto has made such a waiver and became even a German representative in the European Parliament prior to Austria's EU accession.

He was allowed to travel to Austria at any time if he so wishes. Felix, on the other hand, and his brother Carl-Ludwig were not prepared to renounce their membership out of a feeling of loyalty *vis-à-vis* their family which has successfully ruled large parts of Europe for over six centuries. Felix and Carl-Ludwig who were still very active applied at Austria's Embassy in Brussels for a new passport without the discriminatory reservation, because they wanted to move to Austria.

The government of Austria was, for the first time, confronted with the problem of a conflict between Austrian constitutional law and (the new) Community law. Which legal system would prevail? The answer of the ECJ is clear. Since the ground-breaking Judgment in *Costa v. ENEL* in 1964 the doctrine of absolute supremacy of Community law *vis-à-vis* national law has been established.

Applied to the Habsburg case it meant that the rules on Union citizenship (the Habsburgs were citizens of the Union!) would prevail over Austrian law. For these reasons the Austrian government realized that it would lose the case before the ECJ and issued passports to the Habsburgs without the discriminatory reservation.

D. The Freedom or Right of Establishment

1. Relevant Treaty Provisions and Secondary Legislation

Article 49 TFEU (ex Art. 43 para. 1 EC Treaty

"…restrictions of the freedom of establishment of nationals of a Member State in the territory of another Member States shall be prohibited. This prohibition shall also apply to restrictions on the **setting-up of agencies, branches or subsidiaries** of nationals of any Member state established in the territory of any Member States.

Article 51 TFEU (ex Art. 45 EC Treaty):

"The provision of the chapter shall not apply... to activities which in that State are connected, even occasionally, with the **exercise of official authority**".

Article 52 TFEU (ex Art. 46)

"The provision of this chapter...shall not prejudice the applicability of provisions laid down by law…providing for special treatment for foreign national on ground of **public policy, public security or public health".**

Article 54 TFEU (ex Art. 48)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be **treated in the same way as natural persons who are nationals of Member States.**

Secondary legislation include

- Directive 98/5/EC on the establishment of **lawyers**
- **Residence** Directive 2004/38/EC
- Directive 2005/36//EC on the **recognition of professional qualifications.**

2. Case Law

a. Gebhard

The leading case for the **definition of establishment and for the distinction of establishment and services** is ***Gebhard*** (C-55/94 [1995]).

Facts. Mr. Gebhard, a German lawyer, works and lived in Italy. Initially, he worked as an assistant attorney for different Italian law firms, later he opened his own chambers. A complaint was lodged against his using the title "avvocato" and his setting up of a permanent "studio legale" at the Milan Bar Council. Mr. Gebhard

applied for entering the roll of members of the Bar. The Bar suspended Gebhard for six months and – implicitly – rejected his request of enrolment, Mr. Gebhard appealed. An Italian law allowed the temporary activity of foreign lawyers as the provision of services, but prohibited the opening of an office.

The Court held:

> "The provider of services may equip himself in the host Member State with the infrastructure necessary for the purposes of performing services in question...A national of a Member State who pursues a professional activity on a **stable and continuous basis in another Member** State where he hold himself out from an established professional base falls under the freedom of establishment and not under the free movement of services...Member states must take account of the **equivalence of diplomas and of other qualifications** that a non-national has acquired in another Member State".

The Court also developed herein generally the so-called **"Gebhard formula**" according to which Member States may hinder the exercise of fundamental freedoms only under **four conditions.**

- They must be applied in a **non-discriminatory manner**,
- They must be justified by **imperative requirements** in 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 /principle of proportionality).

b. Reyners

The leading case for the **exception to freedom of establishment** according to Article 51 TFEU (**exercise of official authority)** is ***Reyners*** (Case 2/74 [1974]).

Facts. Reyners, a Dutchman holding a doctorate in Belgian law, was refused admission to the Belgian bar as he did not have Belgian nationality. Belgium argued that the profession as *avocat* does not come within the scope of Article 49 TFEU because it is "organically connected with the public service of the administration of justice".
The **Court** declared that the restriction of Article 51 TFEU had to be **narrowly** interpreted. It applies only to those activities which have a "direct and specific connection with official authority". This is not true for the legal profession where contacts with the courts, although regular and organic, do not constitute the exercise of official authority because it is possible to separate tasks involving the exercise of official authority from the professional activity taken as a whole.

In the Case ***Commission v. Belgium*** (Case C-355/98) the Court went so far as to declare that also **security system firms** and internal security services do not fall under the restriction of Article 51 TFEU, because their activities are merely private.

IV. The Freedom to Provide and Receive Services

A. Relevant Treaty and Other Provisions

Article 56 TFEU contains the principle:

"….restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than of the person for whom the services are intended".

What are "services"?

Art. 57 TFEU stipulates:

" Services shall be considered to be 'services' …where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.."

Service is a **residual category** because when the Rome Treaty was enacted trade in goods was – unlike today – the predominant factor in European and world economy.

Services include: Activities of an **industrial** or **commercial** character, activities of **craftsmen** and of the **professions**. It includes also the freedom to **receive services**, according to ECJ case law (see ***Donatella Calfa*** Case 1999, C-348/96: expulsion for life from Greece is against EU law), and secondary legislation.

Article 57 TFEU has a very broad scope. Examples are household support services, help for the elderly, tour guides, sports centres, amusement parks, legal advice, management consultancy, advertising, etc. Important is the cross-border element, the remuneration, the temporary nature and the self-employed element.

Secondary legislation include the

- Lawyers' Services Directive 77/249, the
- Residence Directive 204/38, the
- Directive 2005/36 on the recognition of professional qualifications, and the
- Services Directive 2006/123

B. Difference to the Right of Establishment

The difference between the right of establishment and the right to provide services is one of degree rather than of kind (Josephine Steiner). Both apply to

business. A right of establishment is a right "to set up a shop" in another Member State. The right to provide services connotes the provision of services in another State by a person established in another State. It is not necessary to reside, even temporarily, in the State in which the service is provided. See also the Gebhard case above.

C. Exceptions and Limitations

The Articles 51 and 52 TFEU apply also to services, according to Article 62 TFEU. Also the person providing a service may do so only under the same conditions as are imposed by that State on its own nationals, provided that no harmonization has been taken place.

V. The Freedom of Movement of Capital and Payments

Article 63 TFEU

stipulates that"..all restrictions on the movement of capital between **Member States** and between **Member States and third countries** shall be prohibited". The same applies to **payments**.

Exceptions: They are to be found in Article 65 TFEU and relate to taxation and to measures which are justified on ground of public policy or public security (money laundering, etc.).

See, however, the provisions regarding capital transfer to and from third countries:

Article 64 para 3 TFEU:

"…only the Council...may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries".

Article 66 TFEU:

"Where, in exceptional circumstances, movement of capital to and from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary".