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Third-Country Goods in the EU Internal Market

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I Introduction

With regard to third-country goods, the EU Treaties have chosen a seemingly simple rule. Founded on the idea of a customs union, they decreed that – unlike in a free trade area – third-country goods were simply assimilated to Member State goods once they had lawfully entered the common market.[1] From the very start, Article 28 TFEU therefore stated that the provisions on the elimination of customs duties as well as the prohibition of quantitative restrictions 'shall apply to products originating in Member States *and to products coming from third countries which are in free circulation in Member States*'.[2] The Treaties thereby defined the concept of 'free circulation' in Article 29 as follows:

> 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 duties 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.[3]

The idea behind the provision was straightforward: while direct exports into the Union would, constitutionally, not enjoy free movement rights,[4] once a third-country good had crossed the Union's customs barriers, it

[1] On the distinction between a 'customs union' and a 'free trade area', see: R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press 2017), ch. 1.

[2] Art. 28(2) Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202 (TFEU), (emphasis added).

[3] Art. 29 TFEU (emphasis added).

[4] These goods could, however, enjoy substantially similar rights once the Union had so decided by means of legislation (Commission Regulation 260/2009 on the introduction into the [Union] of personal consignments of products of animal origin [2009] OJ L84/1); or on the basis of an international agreement. In the past, the Court has nonetheless emphasised that not all of the internal market jurisprudence would be applied to these external market provisions. See 270/80 *Polydor*, EU:C:1982:43, esp. para. 18:

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was entitled to circulate freely within the internal market. Indirect imports of third-country goods from one Member State to another were consequently protected under European Union law, and in particular Articles 30 and 34 TFEU.[5] But would both provisions apply in the very same way, and to the same extent, to third-country goods once in free circulation? And when exactly would goods be considered in 'free circulation'? This small contribution in honour of our jubilarian explores these questions. We shall see below that the Union legal order has – constitutionally – not completely subscribed to the full-assimilation rule but has rather added a number of unwritten qualifications to the free movement rights of third-country goods.

II Direct Imports and Goods 'in Free Circulation in a Member State'

Under Article 29, third-country goods are considered to be 'in free circulation in a Member State' once 'the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied *in that State*'.[6]

But what exactly did this formulation mean? Was it implicitly based on the idea that, within a customs union, all customs matters were to be centrally harmonised by the Union? Or did Article 29 operate even in the absence of a common customs code? And, if the latter, did the formulation imply that Member States remained free to erect fiscal barriers for direct imports of third-country goods from outside the Union; yet once a first national customs border had been successfully crossed these goods

> The considerations which led to that interpretation of Articles [34 and 36] of the Treaty do not apply in the context of the relations between the [Union] and Portugal as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the [Union] and Portugal, such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the [FEU] Treaty, inasmuch as the latter, as has been stated above, seeks to create a single market reproducing as closely as possible the conditions of a domestic market.

[5] Art. 30 TFEU states: '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.' By contrast, Art. 34 TFEU states: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

[6] Emphasis added.

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were entitled to move freely in all other Member States? This – federal – reading of Article 29 is proposed by its wording, which – on a black-letter reading – suggests that the customs rules of the state of entry will have to be mutually recognised by all other Member States. And despite the exclusive competence of the Union over the 'customs union' and its 'common commercial policy',[7] the Union legal order has indeed – for a long time – emphasised these federal elements within Article 29. The Union has thus traditionally deferred to the law of the first-entry Member State; and, as a corollary, Member States were relatively free to impose charges having an equivalent effect to customs duties (CEECDs) or customs formalities on direct imports from third states.

A good illustration of this solution is offered by *Sociaal Fonds voor de Diamantarbeiders*.[8] The case concerned a national charge that had been levied on the import of rough diamonds coming from third countries. The Union's common customs tariff had been introduced by Regulation 950/68 and the question arose 'to what extent, the Member States may introduce or maintain, after 1 July 1968, charges having an effect equivalent to customs duties, levied on goods imported directly from third countries, and under what conditions they may be required to eliminate them'.[9] The lengthy answer by the European Court of Justice was as follows:

> [T]he customs union involves the establishment of a single customs tariff for the whole [Union], as envisaged at [Articles 30–33 TFEU]. This common tariff is intended to achieve an equalization of customs charges levied at the frontiers of the [Union] on products imported from third countries, in order to avoid any deflection of trade in relations with those countries and any distortion of free internal circulation or of competitive conditions ... The Common Customs Tariff was introduced, for the [Union] as originally constituted, by Regulation No 950/68 of the Council, which came into force on 1 July 1968. Although that Regulation does not expressly allow for the elimination or equalization of charges other than customs duties as such, it is nevertheless clear from its objective that under it Member States are prohibited from amending, by means of charges supplementing such duties, the level of protection as defined by the Common Customs Tariff ... It follows therefore that

[7] Art. 31 TFEU equivocally states: 'Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.' And according to Art. 3(1) (a) and (e) TFEU, the Union enjoys an exclusive competence for the 'customs union', as well as its 'common commercial policy'.

[8] 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders*, EU:C:1973:165.

[9] 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders*, para. 3.

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> subsequent to the introduction of the Common Customs Tariff all Member States are prohibited from introducing, on a unilateral basis, any new charges or from raising the level of those already in force. *As regards charges already in existence, prior evaluation by the [Union] authorities is necessary in order to establish their incompatibility with the Treaty and the obligation to eliminate them. It follows that such charges may only be considered to be incompatible with [Union] law pursuant to provisions adopted by the [Union].*[10]

The judgment presented a nuanced solution with regard to the powers left to the Member States vis-à-vis third-country goods. In the absence of a constitutional prohibition for CEECD for direct imports from third countries, the case was governed by Union legislation in the form of its Common Customs Tariff Regulation. But since the latter only outlawed newly introduced CEECDs, the elimination of already existing customs barriers vis-à-vis third-country goods was left to the political discretion and rhythm of the (future) Union legislature. For direct imports, there was thus – in the absence of Union legislation – no absolute prohibition on existing customs barriers.

This constitutional lenience towards external customs barriers was confirmed in *Simmenthal*.[11] The Italian authorities had levied charges in respect of health inspections to which consignments of frozen beef, imported from a third country, had been subjected. In the course of a preliminary ruling, the question arose whether these charges constituted an illegal CEECD, and whether the same principles that characterised the Court's jurisprudence under Article 30 would also apply to direct imports from third states. The Court did not think so:

> Where the elimination of charges having an effect equivalent to customs duties is applied to trade with third countries, its objectives and legal basis are different from those which underlie and justify the prohibition of such charges in intra-[Union] trade. In so far as intra-[Union] trade is concerned, the prohibition is laid down in Article [28 TFEU] itself, and is unconditional and absolute because it is designed to establish free movement of goods within the [Union].
>
> On the other hand, in so far as trade with third countries is concerned, the question whether it is necessary to abolish, maintain, amend or introduce charges having equivalent effect must be related both to the requirements of the common commercial policy and to the requirements, consequent upon the introduction of the Common Customs Tariff, of

[10] 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders*, paras. 8–10, 12 and 13 and 18–20 (emphasis added).
[11] 70/77 *Simmenthal*, EU:C:1978:139.

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> harmonization of conditions of importation from third countries... *It follows from the same considerations that the prohibition is not absolute in so far as trade with third countries is concerned, and that when they impose that prohibition the Council or, where appropriate, the Commission may make exceptions or derogations from it.*[12]

The Court consequently held that the constitutional principles governing Article 30, developed for Member State goods, were not applicable to imports from third countries. Instead of an absolute and unconditional prohibition, Union law did allow pecuniary charges in addition to the (harmonised) Union customs duties. Yet the Court here insisted that 'the intrinsic effect of such charges on the relevant trade with third countries must be uniform in all the Member States';[13] and it therefore explored to what extent the Union had harmonised the area with regard to health inspections at the external borders of the European Union.[14] And indeed: once all matters were harmonised, the Member States would be pre-empted from regulating within this field.

III Article 34 and the Existence of a 'Common Commercial Policy'

That special considerations would also apply to Article 34 when it came to goods coming from third countries had been clear ever since *International Fruit*.[15] But for third-country goods in free circulation, the leading case is *Donckerwolcke*.[16] Belgian traders had exported foreign textile products into France. The textiles originated in Lebanon and Syria but had lawfully entered the Belgian market and consequently were in free circulation within the Union. However, according to French customs legislation, third-country goods were required to be accompanied by a certificate of origin so that French customs authorities could monitor trade flows of non-Union goods. Yet when the Belgian traders had exported their textiles into France, they had not declared the original origin of the goods; and the French authorities therefore issued the traders with a fine equal to the value of the imported goods.

[12] 70/77 *Simmenthal*, paras. 21–3 and 26 (emphasis added).
[13] 70/77 *Simmenthal*, para. 27.
[14] 70/77 *Simmenthal*, paras. 29–55.
[15] 51–54/71 *International Fruit*, EU:C:1971:128.
[16] 41/76 *Donckerwolcke*, EU:C:1976:182.

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Was that possible in light of Article 28 TFEU and the assimilation principle? According to the text of the provision, it was clearly not and the Court thus held as follows:

> According to Article [28] of the Treaty the [Union] shall be based upon a customs union which shall cover all trade in goods between Member States. According to Article [28 (2)] the provisions adopted for the liberalization of intra-[Union] trade apply in identical fashion to products originating in Member States and to products coming from third countries which are in 'free circulation' in the [Union] ... It appears from Article [28] that, as regards free circulation of goods within the [Union], products entitled to 'free circulation' are definitively and wholly assimilated to products originating in Member States. *The result of this assimilation is that the provisions of Article [34] concerning the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the [Union] and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products.*[17]

But having dutifully recited the ordinary constitutional principles governing the free movement of goods generally,[18] the Court nonetheless made this – theoretical – solution '*conditional* upon the establishment of a common commercial policy'.[19] In the unmistakably clear words of the Court, the following additional qualification would thus be required:

> The assimilation to products originating within the Member States of goods in 'free circulation' *may only take full effect if these goods are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective of the State in which they were put in free circulation*. Under Article [207] of the Treaty this unification should have been achieved by the expiry of the transitional period and supplanted by the establishment of a common commercial policy based on uniform principles. The fact that at the expiry of the transitional period the [Union] commercial policy was not fully achieved is one of a number of circumstances calculated to maintain in being between the Member States differences in commercial policy capable of bringing about deflections of trade or of causing economic difficulties in certain Member States.[20]

[17] 41/76 *Donckerwolcke*, paras. 14–18 (emphasis added).
[18] The Court here gave a definition of the scope of Art. 34 TFEU, as defined by 8/74 *Procureur du Roi* v. *Dassonville*, EU:C:1974:82; and 51–54/71 *International Fruit*, paras. 19 and 20; and it then referred to the 'Movement Certificate DD1' that had been established.
[19] 41/76 *Donckerwolcke*, para. 24 (emphasis added).
[20] 41/76 *Donckerwolcke*, paras. 25–7 (emphasis added).

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The Court here constitutionally linked the free circulation of third-country goods within the European market to the 'unification' of the Union's common commercial policy (CCP); and since the goods in question did not yet come within the CCP,[21] the Member States were '*not* prevented from requiring from an importer a declaration concerning the actual origin of the goods in question *even in the case of goods put into free circulation in another Member State*'.[22] However, as in *Dassonville*,[23] the Court subjected this freedom to a rule of reason.[24] Or, to put it in *Cassis*-like terms: in the absence of Union 'harmonisation' with regard to third-country goods, the Member States were entitled to adopt 'reasonable' unilateral measures that were necessary to fulfil imperative requirements. The Court thus confirmed that, in the absence of a CCP, there existed a temporary – and thus, relative – suspension of the constitutional demand underlying Article 28 (2) TFEU.

This relative qualification of Article 28 TFEU was confirmed in *Tezi*.[25] The case concerned textile products from Macao, which were imported into the Union. This time, the Union had adopted a number of commercial policy measures. Not only were the goods covered by a Multi-Fibre Agreement (concluded pursuant to 1947 GATT), there also existed an internal Union measure that specified quantitative limits to such textile imports.[26] However, upon a special request from the Benelux countries, the Union had granted them special permission to impose a system of import licences.[27] Tezi challenged this national system by arguing that since there was 'a genuine common commercial policy' the national

[21] 41/76 *Donckerwolcke*, para. 6.
[22] 41/76 *Donckerwolcke*, para. 33 (emphasis added).
[23] 8/74 *Dassonville*.
[24] 41/76 *Donckerwolcke*, para. 35: 'Nevertheless the Member States may not require from the importer more in this respect than an indication of the origin of the products in so far as he knows it or may reasonably be expected to know it.'
[25] 59/84 *Tezi*, EU:C:1986:102.
[26] Council Regulation (EEC) 3589/82 on common rules for imports of certain textile products originating in third countries [1982] OJ L374/106.
[27] These special authorisations could originally be given by means of ex-Art. 134 Consolidated Version of Treaty Establishing the European Economic Community [2002] OJ C325/33: 'In order to ensure that the execution of measures of commercial policy taken in accordance with this Treaty by any Member State is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more of the Member States, the Commission shall recommend the methods for the requisite cooperation between Member States. Failing this, the Commission shall authorise Member States to take the necessary protective measures, the conditions and details of which it shall determine.'

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import licences violated Article 34 as the third-country goods were now fully subject to the provision.[28]

The Court found otherwise. Referring to *Donckerwolcke*, it instead held 'that under the system of the Treaty the full application of the principle of free movement of goods imported from non-Member countries *is conditional upon the establishment of a common commercial policy*'.[29] And the latter would only come into existence when Union legislation 'led to the creation of *uniform conditions of importation*'; and while the relevant textile regulation was 'undoubtedly a step towards the establishment of a common commercial policy', it had not brought about '*complete uniformity as regards the conditions of importation*'.[30] In essence: solely complete uniformity under the CCP would lead to the complete assimilation of third-country goods under the principles of the internal market, including Article 34.[31]

This was a high – yet still relative – qualification. But, as it turned out, it was not the only dent in the assimilation theory for third-country goods in the context of Article 34. For the Court came to also think that there existed an – absolute – substantive qualification to Article 28 (2) TFEU.

IV Article 34 and the Substantive Limits to Full Assimilation

Would the assimilation of third-country goods, requested by Article 28, apply to all types of measures that came within Article 34? The

[28] 59/84 *Tezi*, para. 14.
[29] 59/84 *Tezi*, para. 30 (emphasis added).
[30] 59/84 *Tezi*, paras. 35–7 (emphasis added).
[31] See also: 212/88 *Levy*, EU:C:1989:400, paras. 8–9:

> It must be borne in mind that the provisions of Article [34] of the Treaty on the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the [Union] and those which have been put into free circulation in any of the Member States, regardless of where those products first originated. Furthermore, Article [28 (2)] of the Treaty prohibits any administrative procedure which is designed to establish different rules concerning the movement of products according to whether they originate in the [Union] or they originate in a non-member country but have been put into free circulation in one of the Member States, since the two categories of products are both included without distinction in the same system of free circulation. However, under the system established by the Treaty, the application of those principles is conditional on the introduction of a common commercial policy. In its present incomplete state, differences in commercial policy between the Member States are likely to continue and, in some of those States, may lead to deflections of trade or economic difficulties.

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Donckerwolcke Court had dealt with an easy case: a customs formality. But would the assimilation principle really apply to all categories of national measures? Doubts emerged with *EMI*.[32] The case involved the question of whether the Court's free movement jurisprudence on intellectual property rights could be applied to goods coming from third countries in free circulation. And the answer of the Court was here a clear 'no':

> According to Article [29 (1)] of the Treaty 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 duties or charges having equivalent effect which are payable have been levied in the importing Member State. According to Article [28 (2)] of the Treaty the provisions of [Article 30 and Chapter 3 of this Title] shall apply to products coming from third countries which are in free circulation in Member States.
>
> *Since those provisions only refer to the effects of compliance with customs formalities and paying customs duties and charges having equivalent effect, they cannot be interpreted as meaning that it would be sufficient for products bearing a mark applied in a third country and imported into the [Union] to comply with the customs formalities in the first Member State where they were imported in order to be able then to be marketed in the common market as a whole in contravention of the rules relating to the protection of the mark.*[33]

The Court consequently held that the assimilation concept within Article 28 was a 'customs concept': only those national measures that were 'border measures' would be prohibited when they hindered the free movement of third-country goods. And from this – customs – perspective, the judgment in *Commission* v. *Ireland* came as no surprise.[34] Ireland had adopted an order according to which any potato import from a country other than a Member State of the European Union was prohibited unless the Minister for Agriculture had granted an import licence.[35] An Irish trader had been refused such a licence for potatoes originating from Cyprus (then not a Member State) but in free circulation within the United Kingdom.[36] The Commission considered this a violation of Articles 28, 29 and 34 of the Treaty; and the Court followed suit. For not only had the Union concluded an Association Agreement

[32] 51/75 *EMI*, EU:C:1976:85.
[33] 51/75 *EMI*, paras. 14–16 (emphasis added).
[34] 288/83 *Commission* v. *Ireland*, EU:C:1985:251.
[35] 288/83 *Commission* v. *Ireland*, para. 2.
[36] 288/83 *Commission* v. *Ireland*, para. 4.

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with Cyprus and thereby adopted a common policy towards this third country,[37] the import licence was clearly a border measure. The Court – paying homage to the 'wholly assimilated' theory[38] – had thus little difficulty in finding a breach of Article 34.[39]

But what about 'internal measures', such as product requirements? Would third-country goods in free circulation also benefit from the *Cassis* presumption that non-discriminatory obstacles to trade arising from legislative disparities between the Member States fall within the scope of Article 34?[40] Would the Court, in other words, extend the – federal – philosophy of mutual recognition to goods not produced by one of the Member States? The wording of the *Cassis* judgment militated against this view. For the Court had textually insisted that mutual recognition was dependent on goods being 'lawfully produced and marketed in one of the Member States'.[41] This seemed to exclude third-country goods from the *Cassis* jurisprudential line; and, as a consequence, from the free circulation rule.

[37] For a brief overview of the Association Agreement, see: Opinion of AG Darmon in 288/83 *Commission* v. *Ireland*, EU:C:1985:121, para. 1.

[38] 288/83 *Commission* v. *Ireland*, para. 24:

> In accordance with those principles, laid down in Articles [28, 29 and 34 TFEU], the measures intended to free intra-[Union] trade are applicable, as the Court pointed out in its judgment of 15 December 1976 (*Donckerwolcke,* cited above), without distinction to products originating in the Member States and to those coming from non-member countries which have been put into 'free circulation' in the [Union]. Once the latter products have been duly imported into the [Union] in accordance with the provisions in force relating to tariffs and trade, they are, as the Court emphasized, 'definitively and wholly assimilated to products originating in Member States' (judgment cited above, paragraph 17).

[39] 288/83 *Commission* v. *Ireland*, para. 27. Interestingly, the Association Agreement had established a special tariff and quota system but the Court found this immaterial (288/83 *Commission* v. *Ireland*, para. 27): 'It is of little importance whether that measure concerns products subject to the general rules laid down in the applicable provisions relating to tariffs and trade or products subject to special rules under an agreement, such as the tariff quota accorded to the Republic of Cyprus. The Irish measure thus constitutes, as such, a quantitative restriction prohibited by Article [34] of the Treaty.'

[40] For a closer analysis of this question, see L. Ankersmit, 'What If "Cassis de Dijon" were Cassis de Quebec?: The Assimilation of Goods of Third Country Origin in the Internal Market' (2013) 50 CMLRev. 1387.

[41] 120/78 *Rewe-Zentrale* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, EU:C:1979:42, para. 14.

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This theoretical result has been powerfully defended by Eric White.[42] Emphasising that the GATT provisions do not require a customs union to adopt a *Cassis*-style approach towards third countries,[43] he has argued:

> Why, therefore, should Article [34], in conjunction with Article [28(2)], prohibit the application of indistinctly applicable measures of the *Cassis de Dijon* kind to products imported from third countries via another Member State? Such an interpretation would allow third country goods to enter the [Union] via the Member State with the least restrictive rules and then be entitled to be imported into any other Member State without the goods of those Member States being given reciprocal treatment by the third country involved. It is also contrary to the philosophy behind the prohibition of indistinctly applicable measures of the *Cassis de Dijon* kind ... [namely:] that producers should be free to take advantage of the legal and economic environment prevailing in a Member State without the access of their products to the market of another Member State being hindered as a result.[44]

The idea that Article 28(2) TFEU is confined to *distinctly* applicable (border) measures only has nonetheless received severe criticism. For some academics, including our jubilarian, the *Cassis* reference to goods 'being lawfully produced *and* marketed in one of the Member States' is simply a 'famous mistake'. For what the Court really meant to say was that all goods 'lawfully produced *or* marketed in one of the Member States' would benefit from free circulation via the principle of mutual recognition.[45] According to this view, mutual recognition 'almost

[42] E. L. White, 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev*. 235, 259ff.

[43] White points in particular to Art. XXIV 8(a) (i) General Agreement on Tariffs and Trade, 30 October 1947; 61 Stat. A-11 UNTS 55: 194 (GATT), which only insists that, within a customs union, the latter must eliminate duties and other restrictive regulations of commerce 'with respect to substantially all the trade between the constituent territories of the Union or at least with respect to substantially all trade in products originating in such territories'.

[44] White, 'Limits to Article 30', 263.

[45] L. W. Gormley, 'Free Movement of Goods and Their Use: What Is the Use of It?' (2011) 33 *Fordham ILJ* 1589, 1611: 'As is well known, this paragraph makes the famous mistake of using the term "lawfully produced and marketed" instead of "lawfully produced *or* marketed" that the scheme of the free movement within the European Union requires.' And see: P. Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Clarendon Press 1994), 272:

> In the *Cassis de Dijon* example, if the liquor imported into Germany had been American, but previously imported and marketed in France in accordance with French regulations, it would also have benefited from the mutual recognition rule. It is true that the *Cassis de Dijon* judgment speaks of products

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certainly extends to goods produced outside the EU, at least if it is lawful to produce and market them in the Member State where they were first put into free circulation'.[46] Article 34, in combination with Article 28, would consequently cover all third-country goods that are lawfully marketed (or marketable) in at least one Member State of the Union.[47]

What has the European Court of Justice said? For a long time, there were no perfect judicial authorities for the constitutional proposition that a Member State must recognise the products of a third state lawfully marketed in another Member State; yet the Court came close to it in a (small) number of cases. Leaving aside casual references,[48] the Court seemed to implicitly extend its *Cassis* jurisprudence to third-country goods is *Nijman*.[49] A Dutch trader had been prosecuted on the ground that he had sold a third-country good – called 'Improsol' – without having complied with the Dutch legislation concerning prior product approval. In a preliminary ruling, the Court here simply held:

> 'lawfully *produced and* marketed in one of the Member States', at first sight excluding products imported from third countries. But in view of the above-mentioned fundamental and unequivocal language on the assimilation – with respect to free movement – of imports to domestic goods, there seem to be no reasons for not also extending the rule of mutual recognition. Submitting the opposite would produce insurmountable difficulties.

[46] P. Oliver, 'Free Movement of Goods', in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford University Press 2014), 325 and 344. Oliver, however, admits that he found no direct judicial authority to back up his view (ibid., fn. 142). For an even more liberal position, see Ankersmit, 'Cassis de Quebec', who argues that the view that insists on the actual marketing of a product in a Member State would be 'overly formalist' (ibid., 1399); and that the decisive criterion should therefore be that the third-country goods are 'lawfully *marketable* in another Member State' (ibid., 1401 (emphasis added)). In essence (ibid., 1401): 'The advantage here over the "lawfully marketed" standard is that it is less formalist, and does not require the actual offering for sale by a trader or an actual transaction as long as the trader can demonstrate that the product can legally be put on the market in another Member State.'

[47] This reading received some indirect – legislative – reinforcement by Regulation 764/2008 laying down procedures relating to the application of technical rules to products lawfully marketed in another Member State [2008] OJ L218/21. For the Regulation places exclusive emphasis on the marketing – not the producing – within a Member State of the Union.

[48] Cf. 27/80 *Fietje*, EU:C:1980:293, para. 10 (emphasis added): 'Although the extension to imported products of an obligation to use a certain name on the label does not wholly preclude the importation into the Member State concerned of products originating in other Member States *or in free circulation in those States* it may none the less make their marketing more difficult, especially in the case of parallel imports.'

[49] 125/88 *Nijman*, EU:C:1989:401.

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> As to whether the national legislation meets the requirements of Articles [34] to 36 of the Treaty, it must first be borne in mind that those provisions apply without distinction to products originating in the [Union] *and to those admitted into free circulation in any of the Member States, whatever the real origin of such products*. It is therefore subject to those reservations that Articles [34] to 36 of the Treaty apply to the product 'Improsol'. In the present case, the prohibition, enforced by penalties in criminal law, of selling, storing or using any plant-protection product not authorized by a national law is capable of affecting imports from other Member States where the same product is admitted wholly or in part and thus of constituting a barrier to intra-[Union] trade. Such rules therefore constitute a measure having an effect equivalent to a quantitative restriction.[50]

The Court here appeared to extend its *Cassis* logic to goods produced in non-Member States that are in free circulation within the Union.[51] However, free circulation still required that the product had been lawfully marketed in at least one Member State. In the words of Eeckhout:

> [I]t would seem that there first has to be some degree of marketing in one Member State, before the benefit of mutual recognition in another Member State can be invoked. To give an example, if a German importer of a beer brewed in the United States, which does not conform to the *Reinheitsgebot*, but which does conform to the relevant Belgian regulations, wishes to sell that beer in Germany, he can only invoke the mutual recognition rule in case it has first been marketed in Belgium.[52]

This reading appears to have been – relatively – recently confirmed in *Commission* v. *Czech Republic*.[53] The Commission had brought

[50] 125/88 *Nijman*, paras. 11 and 12 (emphasis added).

[51] Similarly, in C-216/01 *Budvar*, EU:C:2003:618, paras. 97–8 (while not dealing with a product requirement as such but national legislation restricting the use of a geographical name), the Court stated:

> National legislation prohibiting the use of a geographical name for goods originating in a non-member country which are admitted into free circulation in other Member States where they are lawfully marketed does not, it is true, absolutely preclude the importation of those products into the Member State concerned. It is, however, likely to make their marketing more difficult and thus to impede trade between Member States. It is therefore necessary to examine whether that restriction on the free movement of goods can be justified under [Union] law.

This solution seems to have been confirmed in C-244/06 *Dynamic Medien Vertriebs*, EU:C:2008:85; and more recently: C-95/14 *Unione Nazionale Industria Conciaria*, EU:C:2015:492.

[52] Eeckhout, *European Internal Market*, 275.

[53] C-525/14 *Commission* v. *Czech Republic*, EU:C:2016:714.

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infringement proceedings on the ground that Czech legislation on the hallmarking of precious metals violated Article 34 because it did not mutually recognise the hallmarks of WaarborgHolland – an independent assay office established in the Netherlands with branches in third countries. In the course of the proceedings, the Czech Republic counterclaimed 'that precious metals *hallmarked in a third country* do not benefit from the free movement of goods guaranteed by Article 34 TFEU'.[54] For even if the third-country goods had been hallmarked in accordance with the legislation of a Member State, they had not been marketed in that Member State and for that reason could not benefit from the free circulation rule under Article 29 TFEU.[55] And while the Court ultimately found the Czech legislation to breach Article 34,[56] it nevertheless confirmed the following general proposition:

> [P]lacing on the market is a stage subsequent to import. Just as a product lawfully manufactured within the EU may not be placed on the market on that ground alone, the lawful import of a product does not mean that it will automatically be allowed onto the market. A product coming from a third country which is in free circulation is thus assimilated to products originating in the Member States as regards the elimination of customs duties and quantitative restrictions between Member States. Where, however, there is no EU legislation harmonising the conditions of marketing of the products concerned, the Member State in which they are put into free circulation may prevent their being placed on the market if they do not satisfy the conditions laid down for that purpose under national law in compliance with EU law . . . *[I]t follows from the above that, contrary to the Commission's argument, the principle of mutual recognition established by the case-law . . . cannot apply to trade within the EU in goods originating in third countries and in free circulation where they have not, before being exported to a Member State other than that in which they are in free circulation, been lawfully marketed in the territory of a Member State.*[57]

With regard to product requirements, the extension of Article 34 to third-country goods therefore appears to rest on an additional – substantive – qualification that must be read into to Article 29. Third-country goods would not only have to comply with the relevant customs

[54] C-525/14 *Commission* v. *Czech Republic*, para. 28 (emphasis added).
[55] C-525/14 *Commission* v. *Czech Republic*, para. 29.
[56] The Court held that the Czech legislation applied to all Waarborg Holland hallmarks, regardless of whether they had been lawfully marketed in the territory of the Netherlands or in that of another Member State or in the territory of a third state (C-525/14 *Commission* v. *Czech Republic*, paras. 43 and 64); and it was this general application that the Czech measure fell victim to.
[57] C-525/14 *Commission* v. *Czech Republic*, paras. 38 and 39 (emphasis added).

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rules, they would also have to conform to one set of national marketing rules within the European Union! And by insisting that a product be in compliance with the technical requirements of at least one Member State, the closer social and economic homogeneity within the – closer – regional market of the European Union is not excessively diluted. The extension of the principle of mutual recognition will here not undermine the 'closer union' of the Member States within their federal market.

V Conclusion

This chapter has explored a number of special qualifications to the free movement of goods provisions with regard to third-country goods. Theoretically, these goods should be fully assimilated to EU goods once they have been put into free circulation within a Member State of the Union. Yet already the constitutional concept of 'free circulation' showed a – surprisingly – open character. As we saw above, in the absence of Union secondary law on customs and commercial matters, the Union here originally deferred to the law of the first-entry state, while imposing a – federal – duty on the other Member States to mutually recognise that decision. And with regard to the question whether the 'ordinary' constitutional principles that govern Article 34 apply to (indirect) imports of third-country goods, we saw that full assimilation would not automatically take place. For the Court has, in the past, made assimilation dependent on the existence of a completely 'unified' position under the common commercial policy; and it has equally insisted on substantive limits to complete assimilation. The internal market in third-country goods is thus not as 'complete' as the internal market in EU goods. This incompletion is a result of the federal structure of that 'common' market – a structure that cannot be fully applied to goods coming from outside the Union. The principle of mutual recognition will thus only apply to third-country goods in free circulation once they conform to at least one marketing standard of a Member State of the Union. And: it is still an open question how use restrictions, which extend to third-country goods, will be dealt with by the Court.[58]

[58] On use restrictions and Art. 34 TFEU generally, see of course: Gormley, 'Goods and Their Use'.

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