

## Chapter 11 The Internal (or Common, or Single) Market

### Context for this chapter

From: [distro@belfastfizz.co.uk](mailto:distro@belfastfizz.co.uk)

To: [hq@belfastfizz.co.uk](mailto:hq@belfastfizz.co.uk); [legal@belfastfizz.co.uk](mailto:legal@belfastfizz.co.uk)

Hi Seamus,

Update on what I'm sure you've heard bits and pieces of, but here it is in full. Recent shipments of Breezeblox have been stopped at several borders of EU countries. Here's what we know so far, but we obviously need legal to investigate what is actually happening.

- a) Spain: got hit with a ban by the Spanish Ministry of Health because some of the Breezeblox are shaped like spheres, and they're arguing that there's been instances of people swallowing those accidentally. We tried to argue that people don't really swallow ice-cubes spontaneously, and so Breezeblox (as a plastic ice-cube alternative) aren't likely to be swallowed either, but the law says they can't be sold—they're apparently a choking hazard.
- b) Romania: stopped at the border there because a new law requires any products that may be used to consume alcohol contain a warning that drinking alcohol during pregnancy may negatively affect the pregnancy and harm the foetus. Breezeblox don't have that warning on them, so can't go on the Romanian market.
- c) Italy: two different stumbling blocks here! First, the authorities made us pay for the goods to be inspected as they'd not seen anything like them and wanted to ensure they were safe for use. Then, when we delivered the shipments, we were told that they were going to be subject to a 5% sales tax on 'cooling agents'—unlike ice cubes, which are excused from sales taxes altogether!

I also just got off the phone with Marketing and they've got their own issues. Apparently, in Belgium, it's now illegal to sell Breezeblox online as part of a campaign to curb excessive drinking. The theory goes that, in store, someone buying a lot of hard liquor and associated Breezeblox will be warned by retailers that this may harm their health—but that kind of advice isn't going to be given through an online check-out service, and so it's more dangerous to the public to have Breezeblox sold online.

And, even more bizarrely, our advertising campaign in Slovakia has been met with an injunction because we show both adults and kids using Breezeblocs. The kids are using them to keep apple juice cool, but that doesn't matter—the Slovakian advertising regulator tells us we can't have an ad that encourages consumption of alcohol to minors, and this

**Commented [SdM1]:** Internal regulation – product requirement (shape of product) – indistinctly applicable – indirectly discriminatory as affect market access/double regulatory burden.

**Commented [SdM2]:** Product requirement – indistinctly applicable – indirectly discriminatory or double burden of regulation

**Commented [SdM3]:** Inspection at the border – external taxation

**Commented [SdM4]:** Discriminatory internal taxation

**Commented [SdM5]:** Internal regulation – selling arrangement

**Commented [SdM6]:** Selling arrangement – advertising restriction

*does that by suggesting that, something they're putting in juice, Mommy and Daddy might put in a gin and tonic!*

*I'm Cc-ing in legal, obviously, but thought I should keep you posted of what we're running into. Customers love what we're doing—reusable ice-cube alternatives that don't water down drinks!—but boy, are we facing a lot of issues trying to get our stuff to market in other countries.*

*Hope everything well,  
Aoife*

**Aoife Loughlin**  
**Head of Distribution**  
**Belfast Fizz Ltd**

### Discussing the scenario

Use the material in this chapter in order to write a response to Aoife on behalf of the legal department of Belfast Fizz Ltd. Treat each of the countries mentioned in her email as setting out a specific scenario, and explain how EU law applies to that scenario.

### Approaching the scenario

This scenario takes the form of a fairly standard law exam question at university: it describes a factual scenario that has legal repercussions, and in your answer, you are expected to give 'advice' (in this case to Aoife, on behalf of her company's legal department) on what those legal repercussions are.

What you are required to do is go through the scenario, paragraph by paragraph, and see what the *facts* are and what *law* applies to those facts. Assessing that combination of *law* and *facts* will enable you to demonstrate that you not only understand how the law works in the abstract, from having read Chapter 11 in the book, but you are able to apply it to a particular situation that you have not seen before.

The majority of the work you need to do in order to give Aoife accurate advice will have been done as you answered the 'Discussing the scenario' boxes throughout Chapter 11. They are addressed here in turn—with a small conclusion at the end on how to summarize this as advice to Aoife (per country).

### Discussing the scenario

Are any of the measures alluded to by Aoife in the scenario at the start of the chapter prohibited by Articles 28-30 TFEU?

The first step in answering a problem question about any of the four freedoms is determining *which* Treaty provisions apply to that scenario. From reading Chapter 11, you will know that Articles 28–30 TFEU deal with *external taxation*—e.g. charges that arise at the border. Going through each of the countries that Aoife mentions in her scenario, you should arrive at the conclusion that **Italy** *may* be applying external taxation that is contrary to Article 28 TFEU. The health inspections there should not be charged for, unless they

are covered by the specific exemption for inspections that are required under EU law—and if they are not, they should be reimbursed.

### Discussing the scenario

Are any of the situations set out by Aoife in the scenario at the start of the chapter captured by Article 110 TFEU? If so, do you think that a tax is being applied to *similar* products or products that are in *competition* with each other?

Article 110 TFEU regulates internal taxation—or taxes applied to products once they have passed a country's border and are ready to enter its market. Looking at the different country scenarios again, there is only one country that is charging *taxes* on Breezeblox in a way that may be contrary to the Treaty. **Italy** is thus once again the potential culprit here.

The first tax for 'inspections' was charged at the border, but a *sales tax* on 'cooling agents' is an internal tax. Internal taxation is not prohibited by Article 110 TFEU *unless* it is directly or indirectly discriminatory. A little more work is therefore required here to determine if Italy is doing anything contrary to EU law.

The facts inform you that Breezeblox are being subjected to this 'cooling agents' tax, but ice cubes are not. This prompts you to consider if Breezeblox are *similar* to ice cubes, and if not, if they are perhaps in *competition* with ice cubes. And what we care about here, when marking an answer, is that you are *considering* these issues in full. It does not matter what your conclusion is as long as you are able to apply relevant case law and make a coherent argument. Do you think ice cubes and Breezeblox are 'similar'? Use *Johnny Walker* to explain why, unlike in that case, these products are highly interchangeable. Alternatively, if you do not think they are interchangeable (for example, because Breezeblox don't *melt* and thus have different qualities even if the products do share a purpose), consider if they may be in competition with each other. For example, if ice is difficult to come by, would people purchase Breezeblox?

End your consideration by making clear whether or not you think Italy's 'cooling agent' tax is contrary to Article 110 TFEU because it treats imported products differently than similar/competitive products produced domestically. Then explain what the effects of finding a violation of paragraph 1 or 2 of Article 110 TFEU requires Italy to do with its tax, as you may have also picked up from Chapter 11.

### Discussing the scenario

Do you think any of the measures taken by Spain, Romania, Belgium, or Slovakia (as described in Aoife's email in the scenario at the start of the chapter) are quantitative restrictions? Are any of them MEEs?

Quantitative restrictions would be simple product 'bans' or product quotas. From looking at the facts of the scenario, it may appear that Spain and Romania are engaged in quantitative restrictions of the simple 'ban' variety—and I would not penalize a student who came to that conclusion about either situation.

However, after reading the chapter, you should be able to recognize that these scenarios are similar to ones the CJEU has considered—and it considered them as MEEs. The distinction the CJEU makes is that the measures in Spain and Romania do not allow the products to be *sold* as they are in those countries. That is different from an import prohibition altogether, and so the CJEU is likely to treat it as an MEE rather than a ‘quota’ or ‘ban’. If you look at its case law over time—for example *Mars* and *Rau*—it becomes clear that issues that affect packaging or product shape, for instance, are likely to be treated as MEEs under *Dassonville* rather than as quantitative restrictions outright.

The measures adopted by Belgium and Slovakia are different, however. They do not stop Breezeblox from fully entering the market, but they preclude them being sold in specific ways, or they prohibit advertising campaigns intended to *help* sell them. These are the types of measures that are caught by the *Dassonville* definition of MEE: they will hinder intra-EU trade.

### Discussing the scenario

Reconsider the measures that you identified as MEEs before. Which of them are product requirements under *Keck*, and which are selling arrangements? Are the ones that are selling arrangements *discriminatory* or *not discriminatory*? Why does the distinction matter?

This is where distinctions become clearer between Spain and Romania’s measures, on one hand, and Belgium and Slovakia’s on the other.

The reason Spain and Romania’s measures look like quantitative restrictions is because they are MEEs that directly affect *the nature of the product*. Requiring Breezeblox to be a different shape, or requiring their packaging to be changed, requires the product to be remanufactured before it can be sold in Spain or Romania. We know from *Cassis* that EU free movement of goods law precludes a double regulatory burden like that unless it can be justified—and *Keck* does not change that finding. These two measures are thus product requirements, and remain contrary to Article 34 TFEU.

The Belgian and Slovak measures, on the other hand, do not affect the *nature of the product*. They affect *where the product can be sold*, and *how the product can be advertised*. These are, under *Keck*, selling arrangements.

The Belgian measure requires Breezeblox to be sold in-store and not online so that specific health advice can be extended to consumers. Is that a discriminatory or non-discriminatory measure? This requires a little bit of further thinking after reading about CJEU case law in this area. It might sound like Breezeblox are treated in the same way as are all domestic products—but does that make this measure non-discriminatory? Or does it affect imported products more than it would domestic products? If you can make a case for the latter, it is an indirectly discriminatory measure. If you cannot, then this is a non-discriminatory measure. Key here is that the facts *are* distinct from the CJEU case law, such as *Doc Morris*, considering the requirement of a *physical presence* in another Member State. This does not require Belfast Fizz to set up an office in Belgium, but requires Breezeblox (much like any other product that can be put in alcohol?) to be sold *in a shop*. If you analyse that in your answer, it does not matter what conclusion you reach.

Similarly, the Slovak advertising regulation appears to apply to all products, whether imported or exported, and so appears non-discriminatory. However, can you make a case that an advertising ban affects imported products more than it does domestic products? If so, this may be an indirectly discriminatory measure.

Why does this matter? *Keck* has excluded non-discriminatory selling arrangements from the scope of Article 34 TFEU. Therefore, if you conclude that the Slovak measure is *not* discriminatory, you are hereby excused from considering if it can be justified, and should simply find that it is not contrary to the EU Treaties.

### Discussing the scenario

Consider the Slovak advertising rules described in the scenario. Would these be caught by a *Keck* examination? What about by a 'market access' examination? Which is easiest to demonstrate, do you think?

We did the *Keck* examination in response to the previous '**Discussing the scenario**' prompt. You could find here that the Slovak advertising rules are indirectly discriminatory, because they may affect imported products more than they do domestic products. Breezeblox are new—and, without encouragement, Slovak people may not wish to buy them.

However, the CJEU case law on this type of advertising seems to consistently apply the 'market access' test, which seems significantly simpler. If we consider cases like *Gourmet* and *De Agostini*, we find that the CJEU did not examine if these advertising regulations were discriminatory, but focused on how they would make market access for imported products significantly more complicated.

After reading the entirety of Chapter 11, therefore, you *should* be concluding that, under current CJEU case law, the Slovak advertising measures are contrary to Article 36 TFEU because they impede market access for imported products (regardless of whether you thought they were discriminatory!).

### Discussing the scenario

Consider the taxes applied by Italy in the scenario at the start of the chapter. Do you think any of these can be justified? If so, on what grounds?

The Article 28 TFEU-violating border tax *cannot* be justified, as Chapter 11 explained. As per *Chemial Farmaceuti*, discriminatory internal taxation can potentially be justified, where Member States explain that they are pursuing a legitimate policy aim, and the design of their internal taxes does not expressly 'protect' domestic industry. Can you think of a legitimate policy aim for the tax on 'cooling agents'? It seems unlikely to be motivated by environmental concerns *or* financial ones, since the primary competing product excluded from the tax appears to be *ice cubes*—of which there is no shortage!

You are welcome to get creative here and argue that the policy can be justified, and we do not expect you to be an expert on anything like the Italian ice cube market or its water supplies. Your primary job here is to consider what we know about the CJEU's requirements from the case law, and to then apply that to *this* scenario.

### Discussing the scenario

Consider the actions of Spain, Romania, and Belgium as set out in Aoife's email. Do you think they can be justified under Article 36 TFEU?

Article 36 TFEU sets out three, finite exemptions that can be used to justify both directly and indirectly discriminatory measures: **public policy**, **public security**, and **public health**.

The Romanian and Belgian measures are clearly taken in light of **public health** concerns. The Spanish measure is a little more tenuous—is 'stopping people from choking' a legitimate public health concern, or might it instead be a **public policy** goal? Regardless, you should be able to fit all three of these measures into one of the Article 36 TFEU exemptions fairly easily. (We will revisit whether that makes the measures justifiable or not!)

### Discussing the scenario

Which of the national measures highlighted in Aoife's email do you think are caught by Article 34 TFEU but are *indirectly* discriminatory? Can you think of a mandatory requirement that may justify them?

In practice, *all* the measures discussed in the scenario (bar Italy's) are at most indirectly discriminatory. None set out to specifically target imported goods—but where they have negative effects, those are likely to be felt more strongly by imported products than they are by domestically produced products. All of these measures thus qualify for a 'mandatory requirement' defence.

As we already determined that the majority of these measures can be justified under **public health**, your main job here is to indicate whether you think that the measures are directly or indirectly discriminatory—public health is both an Article 36 TFEU and a mandatory requirement justification, and as discussed in Chapter 11, the CJEU does not tend to specify which of the two it is deciding a measure under. You could also suggest that the Spanish measure may be justifiable under a mandatory requirement of **consumer protection**, and that this is a little more persuasive than a public health argument.

### Discussing the scenario

Consider all the scenarios in Aoife's email that entail violations of Article 34 TFEU but that you think can be justified (via Article 36 TFEU or mandatory requirements). Are the measures taken by these Member States proportionate? Consider possible alternatives that could have been taken.

Here, you can start summarizing your findings per country.

Spain adopted an indirectly discriminatory measure that violates Article 34 TFEU—but it may be justifiable by a **public health** defence (whether Article 36 TFEU or mandatory requirement), or a **consumer protection** (mandatory requirement) defence. However, CJEU case law on proportionality (such as the *German Beer Purity Law* case, or *Rau*) suggests that, rather than *banning* Breezebox, consumers could be warned about

Breezeblox via additional information provided with the product, such as a label. As such, this measure is likely to be seen as disproportionate and unjustifiable.

Romania adopted an indirectly discriminatory measure that violates Article 34 TFEU, but it may be justifiable by a **public health** defence (whether Article 36 TFEU or mandatory requirement). A proportionality assessment here is slightly different, because the requirement set by Romania *is* to label. Can you think of a less trade-restrictive way to provide the relevant information? If not, this measure is likely to be seen as proportionate and justifiable.

Belgium, if you conclude that the measure is *not* a non-discriminatory selling arrangement, has adopted an indirectly discriminatory measure that violates Article 34 TFEU, but it may be justified by a **public health** defence (whether Article 36 TFEU or mandatory requirement). Much like the Spanish measure, however, the CJEU may find that something like an online warning at check-out would achieve a similar aim to having a retailer comment on the dangers of excessive drinking, and this would be less trade-restrictive for product manufacturers in a different Member State.

Slovakia adopted an indirectly discriminatory measure that violates Article 34 TFEU—but, again, it may be justifiable by a **public health** defence (whether Article 36 TFEU or mandatory requirement). Is this total advertising ban of commercials that may encourage children to want to drink alcohol proportionate? Here, it may be possible to think of alternatives, such as time-restricted advertising hours, or warnings *around* the commercial that children should not drink. Alternatively, you might think that the total ban is an appropriate way to achieve the Slovak government's goals. What matters most of all is not your conclusions but that you address the issue of proportionality in some way.

### Summary

As Aoife's legal team, you should be telling her the following:

- The Spanish measure is an indirectly discriminatory product requirement that is contrary to Article 34 TFEU, and if challenged, it is likely to be seen as disproportionate for the aim of protecting public health. A challenge should be pursued and should succeed.
- The Romanian measure is an indirectly discriminatory product requirement that is contrary to Article 34 TFEU, but can be justified on public health grounds. Determine if you think that the measure is proportionate—and whether a challenge is likely to succeed.
- The Italian measures are both external taxation contrary to Article 28 TFEU, and internal taxation that is contrary to Article 110 TFEU. Violations of Article 28 TFEU cannot be justified. Determine if you think the internal taxation is discriminatory against *similar* products or *products in a competitive relationship*, and whether it can be justified. A challenge against Italy should in any event be started, as the external taxation measure is contrary to EU law.
- The Belgian measure may be found to be an indirectly discriminatory selling arrangement that is contrary to Article 34 TFEU, and a public health justification for it is unlikely to succeed as it is disproportionate. However, you can also make a case for it being a non-discriminatory selling arrangement, as it does *de facto* apply

to all products in the same way, and is distinct from domestic measures that require a *physical presence* in a country (which have been found to be indirectly discriminatory).

- The Slovak measure is an indirectly discriminatory selling arrangement that is contrary to Article 34 TFEU, but may be justified under public health grounds *if* it is seen as a proportionate measure. If you think it is, the measure cannot be challenged; but if you think less trade-restrictive measures can achieve the Slovakian goal, the measure should be challenged.