

European Economic Law

Correction Scheme

	Maximal Points	Points obtained
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Part 1 – The Fundamental Freedoms

Question: Is there a violation of the rules on the free movement of goods?

<p>Art. 34 TFEU The free movement of goods rules contain several prohibitions. Here it is not about customs duties (Art. 30 TFEU) but about measures having an equivalent effect to a quantitative restriction on imports, Art. 34 TFEU.</p> <p><i>The two points shall be given if the student finds Art. 34 TFEU and if he/she sees that the case is about the restriction of imports (it is not wrong though, to find likewise a restriction of exports). It is not necessary to explain the difference between an 'infrastructure use charge' and a 'customs duty' (Art. 30 TFEU). It is not necessary at this stage either to enter into the details of measures having an equivalent effect.</i></p>	2	
<p>Goods Art. 34 TFEU only applies to goods.</p> <p>Concept in Art. 28(2), 29 TFEU</p> <p>Definition: "All products which can be valued in money, and which are capable, as such, of forming the subject of commercial transactions"</p> <p>Subsumption: Here it is about all kinds of physical products which may be transported in passenger vehicles weighing up to 3.5 tonnes. These are goods in the sense of this definition.</p>	1 2 1	

<p>EU Harmonization Measure Member States are only allowed to take restrictive measures if the subject matter has not been regulated by the EU legislature. According to the Question, Sentence 2, there are no pertinent EU harmonization measures.</p>	1	
<p>Art. 34 TFEU</p> <p>Starting Point: There has to be a state measure. Purely private behaviour is subject to competition law, but not to the fundamental freedoms.</p> <p>Subsumption: Here, we have a legal framework for the introduction of a charge for the use by passenger vehicles of federal roads, including motorways: the 'infrastructure use charge'. Legislation is always a 'state measure'.</p> <p>Quantitative restriction or MEQR</p> <p>Quantitative restriction: There is no restriction with respect to the volumes which may be imported into Germany, hence no quantitative restriction.</p> <p><i>Dassonville</i>-Definition of measures having an equivalent effect to a quantitative restriction (MEQR): "any measure of a Member State that is capable of hindering, directly or indirectly, actually or potentially, intra-Union trade is to be considered as a measure having an effect equivalent to quantitative restrictions." (an approximative version of this definition is sufficient)</p> <p>Subsumption: Even though the 'infrastructure use charge' is not levied on goods carried as such, it is nonetheless capable of affecting goods that are delivered using passenger vehicles weighing up to 3.5 tonnes registered in a Member State other than Germany, on the crossing of the border. This makes access to the German market more burdensome, thus constitutes a MEQR in the sense of the <i>Dassonville</i> formula.</p>	2 2 2 2 3	
<p>Keck and Cassis: Exceptions for indistinctly applicable measures</p> <p>Do we have an indistinctly applicable measure here?</p> <p>Although the infrastructure use charge is formally</p>		

<p>applicable both with respect to goods delivered using vehicles registered in Germany and with respect to goods delivered using vehicles registered in a Member State other than Germany, it turns out that, because of the relief from motor vehicle tax, applicable with respect cars registered in Germany, that charge is capable of affecting, in fact, only the latter category of goods (i.e. transported in cars registered in other Member States). Consequently, the goods coming from other Member States are treated less favourably than goods delivered using vehicles registered in Germany.</p> <p>Hence, it is not an indistinctly applicable measure</p> <p>According to the Question, Sentence 3, Keck and Cassis have to be examined in any event, even if the student finds a discrimination (which normally would exclude the application of Keck and Cassis).</p> <p>Keck: Art. 34 TFEU does not apply to "selling arrangements".</p> <p>The concept of 'selling arrangements' covers only provisions of national law that regulate the manner in which goods may be marketed. Here, it is about rules concerning the manner in which goods may be transported. Hence, these rules are not 'selling arrangements'.</p>	<p>2</p> <p>1</p> <p>2</p>	
<p>Treaty Exception: Art. 36 TFEU</p> <p>Health protection? Here it is about the financing of the road infrastructure. The principle 'polluter pays' may improve health conditions, but only very indirectly. Here, it is about environmental protection which is not mentioned in Art. 36 TFEU (and cannot be attributed to 'public policy' in the sense of Art. 36 TFEU).</p>	<p>2</p>	
<p>Cassis: Can "mandatory requirements" of public interest justify the import restriction?</p> <p>The German government pleads protection of the environment. Indeed, environmental protection is recognized as a mandatory requirement of public interest.</p> <p>Is the new system <i>capable</i> of protection the environment? Yes, it is conceivable that the transition to the 'polluter pays' principle has positive aspects on the environment.</p>	<p>2</p> <p>1</p>	

<p><i>Note:</i> The opposite opinion is very well defensible: A different treatment between domestic and foreign cars is rather counter-productive for the environment</p> <p>Is the new system <i>necessary</i> in order to protect the environment? Are there no less invasive means to reach the goal with the same efficacy?</p> <p>It is not necessary to treat domestic and foreign cars differently in order to protect the environment. To the contrary: It would be much better for the environment if domestic car owners in Germany would be charged with a real financial burden.</p> <p>Therefore, the discriminating 'infrastructure use charge' cannot be justified by "mandatory requirements".</p> <p>The points will be awarded if relevant reflections on the respective mandatory requirements are made.</p>	2	

<p>Result</p> <p>The 'infrastructure use charge' constitutes a MEQR which cannot be justified, neither by Art. 36 TFEU nor by the Cassis formula. Hence, there is a violation of the rules on the free movement of goods.</p>	no points	
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Good Structure and Argumentation	2	
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Total Score	32	
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