# Measures having equivalent effect to quantitative restrictions within the meaning of Article 34 of the Treaty on the Functioning of the European Union


## Summary

Free movement of goods continues to play a key role in the European Union's internal market. It is not only essential for European integration in economic terms, but also tends to impact heavily upon the interpretation of other free movement provisions and on internal market law in general. The scope of these freedoms relies significantly on the interpretation of the notion of "measures having equivalent effect to quantitative restrictions in imports" (MEQRs), provided by Article 34 of the Treaty on the Functioning of the European Union (TFEU).

Despite its significance, the scope of Article 34 of the TFEU is not clearly defined, neither in the Treaty, nor by the Court of Justice of the European Union (CJEU). The *Dassonville*, *Cassis de Dijon* or *Keck* formulas derived from case law are widely known, but their interpretation still arouses controversy at both the national and supranational level. Therefore, this publication focuses on the interpretation of the notion of MEQRs in Article 34 TFEU, and more specifically on the criteria of considering a measure adopted by a Member State as prohibited by said provision.

In the first chapter, the research problems are defined and the choice of subject is justified. Moreover, the author presents the general historical, economic and legal context of stipulating this prohibition within the EU's legal framework. Additionally, the author briefly discusses the less controversial aspects concerning the scope of application of the prohibition of MEQRs.

Chapter Two discusses the CJEU's case-law development with respect to interpretation of the notion of MEQRs. In this regard, the judicial "milestones" are discussed in detail, i.e. *Dassonville*, *Cassis de Dijon*, *Keck and Mithouard,* as well as *Commission v Italy* and *Mickelsson & Roos*. After discussing the meaning of a "measure", more attention is paid to the remaining part of the notion, i.e. "having equivalent effect to quantitative restrictions". It allows one to conclude that according to this line of case law, the definition of MEQRs is broad and sometimes inconsistent. The notion embraces both discriminatory and non-discriminatory measures, as well as containing the principle of mutual recognition. In the latter regard, it is shown that this principle was developed within the regulation of free movement of goods to become one of the major principles of EU law, also finding its application in the mutual recognition of qualifications, diplomas, documents or judgments.

The author criticizes the "Keck formula", according to which a category of certain selling arrangements (i.e. rules on who, when, where or at which price goods may be sold) do not belong to the scope of MEQRs. In this regard, more recent developments of the formula are traced in the chapter, which confirms, however, the conclusion that Keck case law is not consistent and its practical application value may be questioned in a number of instances. Therefore, the author proposes abandoning this line of case law in the course of applying Art. 34 TFEU. The Court seems to provide for such a possibility in *Commission v Italy* and *Mickelsson & Roos*, in which it refused to introduce another category excluded from the scope of MEQRs and applied the "market access" test instead.

Given this background, in the third chapter the author scrutinizes the most recent case law of the Court in order to identify the currently applied definition of MEQRs. This allows the conclusion that the Court's approach is still inconsistent in this regard. In a number of cases, the Court directly applies the Keck formula, whereas in others it does not. However, one can identify a growing tendency to apply the "market access" criterion as independent from hitherto developed formulas, including *Dassonville* and *Keck*. This also applies to "classical Keck" examples, like minimum or fixed pricing regulations.

In that regard, the author identifies forms of market access hinderance in national laws. These include blocking or making less effective certain distribution channels (e.g. prohibition of Internet sales for certain products); restrictions on the use of products, which influences consumers' behavior and makes imports less attractive in a given market; depriving certain goods of their competitive advantage (e.g. by setting a minimum price per unit); providing for an obligation of stocking up in a certain category of suppliers, which may lead to the prohibition of purchases from all the other market players; providing certain import certificates or other formal requirements. In one example, the market access criterion was also directly invoked within the context of the infringement of the principle of mutual recognition.

The fourth chapter firstly contains a comparative analysis of how the market access test is applied in other legal contexts, mainly other Treaty freedoms. Secondly, the author critically reviews the positions towards the market access test taken in the literature. This allows usefulness of the hitherto achievements to be assessed and the author's own propositions for a definition of MEQRs to be formulated.

Thus, the author concludes that the market access test may and should constitute the sole and independent criterion of MEQRs. This does not contradict the earlier *Dassonville* case law, since both discuss the same phenomena, but adopt different perspectives. While *Dassonville* is more macroeconomic and focuses on the supply side, the market access test takes into account the (microeconomic) position of an individual entity seeking access to the market of a hosting Member State. This conclusion reaffirms the proposition to abandon post-Keck case law. In most instances, the discussed formula is superfluous. However, it still may play an auxiliary role in deciding whether national regulations on selling arrangements do or do not hinder market access. In order to avoid too broad a definition of MEQRs, hinderance of market access shall be individually and significantly appreciable for the entity invoking their right.

The sixth chapter discusses justifications (exceptions) to the infringement of Article 34 TFEU. There are two categories of such exceptions: (1) those contained in a closed catalogue in Article 36 TFEU (e.g. protection of public health) and (2) those developed in the Court's case law within the doctrine of overriding the (mandatory) requirements of public interest (e.g. environment or consumer protection). It was necessary to cover this question in this work, because some scholars claim that justifications derived from the mandatory requirements doctrine are applied "within" Article

34 TFEU. Therefore, they would be part of the notion of MEQRs. That would lead to different conclusions depending on the category of underlying justification. Should this be Article 36 TFEU, the conclusion would be that MEQR exists and there is a breach of Article 34. However, it is justified on the basis of Article 36, and is therefore not prohibited. The very same exercise based on the mandatory requirements doctrine would lead to the conclusion that there is no MEQR and therefore no violation of Article 34. The author argues against such a dichotomy. Moreover, the author concludes that both legal bases (Article 36 TFEU and mandatory requirements) should allow for justification of both non-discriminatory and discriminatory measures. This position is still not widely shared among the Court and academia, where, according to the predominant view, only non-discriminatory measures are embraced by mandatory requirements. .