Free Movement of Goods and the Czech Republic with Emphasis on Environmental Protection

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Abstract:

After the accession to the European Union, the Czech Republic became a part of the largest market in the world, the Single European Market. The Czech Republic has to keep the single market rules as set in the Treaty and secondary legislation. The corestone of the single market is the functioning of the four freedoms – free movement of goods, services, capital and persons. The article is focused on the functioning of the single market in the Czech Republic – the aim is to analyze two particular cases of breach of the principle of free movement of goods – the case of waste imports and the case of second hand cars imports. Both cases deal with the conflict between environmental protection and free movement of goods.

Key words: free movement of goods, non-discrimination, measures having equivalent effect to quantitative restrictions, Czech Republic

Introduction

Following the accession of the Czech Republic to the European Union, the Czech Republic has to keep the rules on the functioning of the single market. These are based on the functioning of the four freedoms – free movement of goods, persons, services and capital. Basic principle of the functioning of the single market is the principle of nondiscrimination. Discrimination may be however justified in the situations set in the Treaties. Measures that hinder the trade between member states must be proportionate.

In the few years after the accession, the Czech Republic already brached the rules of the internal market. The paper analyses two casis that were intensly discussed in Czech media: the case of illegal import of waste from Germany and the case of ban on import of cars. The case of waste was never brouth to justice but helps as interesting analysis of the functioning of the exemptions. It shows the current balance between liberalisation of trade and protection of environment, and illustrates situations when it is legal to restrict or impose ban on imports. The case of car imports is a clear case of discriminatory measure in the single market. Such measure is, though aimed at protection of environment, against the functioning of the single market.

Before the explanation of the very cases, the paper presents basic principles of functioning of free movement of goods. Deeper analysis is however not possible due to restricted scope of the paper[1].

[1] If interested, please consult any book related to the four freedoms, e.g. Barnard, C. The Substantive Law of the EU. The Four Freedoms., Cambridge ISBN 0-19-925135-5

Free movement of goods

The free movement of goods is based on the abolition of barriers to interstate movement of goods within the Community. Basic principle of the free movement of goods is the principle of non discrimination which is the corestone of the four freedoms.

Legal adoption of the free movement of goods is set in the Treaty on the European Communities, articles 23- 30. The basic principle is the abolition of the following barriers: customs duties and charges having equivalent effect, quantitative restrictions and measures having equivalent effect, discriminatory taxation (A. 90 and following).

The Treaty itself doesn't define the term „goods". Therefore, the meaning of this term is set by the case-law of the Court of Justice of the European Communities. The leading case that gave definition of goods is the case Commission vs. Italy[2]. In this case, the ECJ stated that goods are: "p*roducts which can be valued in money and which are capable, as such, of forming the subject matter of commercial transaction"*. The mere fact that goods are considered immoral in at least one member state doesn't mean that they are not goods in the meaning of the Treaty.

Quantitative restrictions and measures having equivalent effect

In article 28, the Treaty states that: *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*[3].

Measures having equivalent effect (MEE) are explained in vast and dynamically evolving case – law. First definition of such measures was given by the directive 70/50[4]. Main importance, however, carry the definitions of the ECJ in its case – law. Following the broad definition of MEE in Dassonville[5], the perception of MEE by the ECJ was altered by the case known as Cassis[6]. The Cassis case gave two important rules: the rule of reason and mandatory requirements. The rule of reason states that .. *in the absence of common rules relating to the production and marketing of alcohol …it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.* However, this concept is amended by the mandatory requirements, such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer. In the non harmonized sphere, these requirements justify the obstacles to movement within the community. These have, however, to be proportionate.

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[2] Case 7/68 Commission vs. Italy

[3] Treaty Establishing the European Community

[4] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, the directive is not in force anymore

[5] Dassonville formula: …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 an effect equivalent to quantitative restrictions

6 Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Brantwein

Other breakthrough was the case Keck and Mithouard[7] that stated that national provisions restricting certain selling arrangements are not discriminatory, if they apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, marketing of domestic products and of those from other MS.

Derogations

Derogations to the ban of restrictions on imports and MEE are adopted in article 30 of TEC. Exemptions are 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.
These derogations apply to the distinctly applicable measures. They have to pass the proportionality test as set by the Treaty.

Mandatory requirements are a type of derogation that applies to indistinctly applicable measures[8]. They were defined since the breakthrough case Cassis de Dijon. The mandatory requirements cover also the protection of environment, as stated in the case Danish Bottles[9].
It has to be emphasized that high level of protection and improvement of the quality of the environment is among Community tasks as set in A. 2 of the EC Treaty.

Case 1 – „illegal import of waste“

The Czech Republic faced in recent years unauthorized imports of waste originating from the Federal Republic of Germany, mainly for illegal disposal. The declared destination of the waste was, however, incineration plant. A Czech environment ministry inspection team recently uncovered that no less than 15,000 tones of illegal waste were smuggled into the Czech Republic and stored at various locations around the country in recent months[10].
In this case, we are searching for the balance between the principle of free movement of goods and protection of environment (i.e. prohibition of waste imports). Though this case wasn't brought before the Commission, the answer to this question is vital for future relations between EU states.

To explain the functioning of "free movement of waste", we have to analyze EC environmental legislation, first. Environmental protection is covered by the A. 174 (130r) of the TEC: **environmental damage should as a matter of priority be remedied at source.** This rule shall also apply on the interstate transport of waste. Shipment of waste is also governed by secondary law of the EC. Following the Wallon waste decision[11], the EC adopted a regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community. The regulation deals with the notification system in case of waste shipment. In the scope of secondary legislation, relevant national authorities are able, in

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[7] Joined cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1991] ECR I-6097.

[8] Though this concept was somehow breached in the case 113/80, see Oliver, P. Free movement of goods in the European Community. P. 112

[9] See case 302/86 Commission vs. Denmark

[10] See http://www.radio.cz/en/news/76309#2

[11] Which is explained below

the framework of the detailed notification system, to prohibit shipments of hazardous waste. The waste management is further dealt with in several directives, mainly in the framework directive on waste[12]. In the case of the Czech Republic, the directive is mainly implemented in the Act on waste[13].

When solving this case, we have to consider whether **"waste" can be considered as "goods"**. The court stated already in its earlier cases[14] that waste, both recyclable and irrecyclable, has to be considered as "goods" in the scope of article 23 of the TEC. There is no dispute that recyclable waste has economic value and can form a subject of commercial transaction. The question was whether nonrecyclable waste, as non reusable, may be regarded as goods, because it had no interesting commercial value. The ECJ stated[15] that objects which are shipped across a frontier for the purposes of commercial transactions are subject to A. 30, whatever the nature of those transactions. Moreover, the distinction between recyclable and non recyclable waste is particularly difficult to apply in practice. It also depends on the costs of the recycling process. Therefore, this classification is subjective.

Being "goods", waste should move freely within the Community. This means, no restrictions on imports or exports shall be imposed, unless provisions of A. 30 or mandatory requirements apply. In case C-2/90 (Commission vs. Kingdom of Belgium), the court solved similar situation. Under Belgian law, storage, tipping or dumping in Wallonia of waste originating in another member state or in a region of Belgium other than Wallonia was prohibited.

The court defined both recyclable and nonrecyclable waste as "goods" (see above). The rule that prohibits all import of waste may be therefore regarded as obstacle to free movement. To justify the restrictions on the movement of waste, we may argue with protection of health as imperative requirement[16]. The very accommodation of waste constitutes danger to the environment. To apply the mandatory requirements rule, the rule has however to be indistinctly applicable. The regulation of waste import may therefore fall within the scope of mandatory requirements[17]. In the contested case, however, the total prohibition on waste imports was contrary to the fact that in the Wallonia region, however, waste is being produced and stored or recycled. As Commission stated:
…those imperative requirements cannot be relied upon in the present case, given that the measures in question discriminate against waste originating in other Member States, which is no more harmful than waste produced in Wallonia.

The Court declared that *by imposing an absolute prohibition on the storage, tipping or dumping in Wallonia of hazardous waste originating in another Member State and thereby precluding the application of the procedure laid down in Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, the Kingdom of Belgium has failed to fulfill its obligations under that directive.*

12 Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste

[13] Law 185/2001 Coll., on waste.
[14] See the below discussed case C-2/90
[15] In the famous "Wallon waste" case, C-2/90
[16] See the above explanation of the functioning of the free movement of goods
[17] See Oliver, P. Free movement of goods in the European Community. P. 113

Total restrictions of waste import are therefore not justifiable. The procedure set in the directive, that enables prohibition of import of hazardous waste on the basis of prior notification, seems to keep the proportionality principle. Total restriction on import would exclude even the recycling of waste in the state. And, naturally, waste is produced in any market economy and its creation cannot be precluded. Total ban on waste import is therefore disproportionate.

Other relevant case-law is the case C-203/96[18]. Here, the **principle of proximity** was explained. The principle says that waste should generally be managed as near as possible to its place of production, mainly because transporting waste has a significant environmental impact. The principle of proximity doesn't apply on shipments of waste for recovery (though in its earlier "Wallony" case, the court stated that it is hard to distinguish between recyclable and nonrecyclable waste[19]):

Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community cannot be interpreted as meaning that the principles of self-sufficiency and proximity are applicable to shipments of waste for recovery. Article 130t of the EC Treaty does not permit Member States to extend the application of those principles to such waste when it is clear that they create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of derogations provided for by Article 36 of that Treaty.

Therefore, measures of the Czech Republic that prohibited some waste shipments from Germany shouldn't be found discriminatory. It is however not possible to ban all waste imports. When considering the acceptability of the exemption (i.e. the possibility of ban on import), we have to distinguish between waste for recovery and waste for disposal. The Commission is however trying to open the market of recyclable waste in the future directive. In the draft of the new European Waste Directive the European Commission attempted to achieve a maximum liberalisation of international transport of waste to incineration plants. The directive, approved by the Council of Ministers, allows a ban at the national level, but it only makes it conditional on compliance with the National Waste Management Plans.[20] Nevertheless, the directive as secondary law must be in compliance with the principles set in the Treaties.

As proven above, though considered as "goods" the free movement of waste within the Community is a very complex issue that demands deeper analysis. As we see, not all goods can move freely without limits. The fundaments of the freedom are set in the EC Treaties. These are explained in consequent secondary legislation, which sometimes reacts on the case-

[18] C-203/96, Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer

[19] *distinction between recyclable and non-recyclable waste is particularly difficult to apply in practice, especially with respect to controls at frontiers. That distinction is based on factors which are uncertain and liable to change in the course of time according to technical progress. Furthermore, whether waste is recyclable or not also depends on the cost of the recycling process and consequently on whether its proposed reutlization is viable, with the result that classification of waste is necessarily subjective and depends on variable factors* – case 2/91

[20] See http://www.env.cz/AIS/web-news-en.nsf/9ab6596b5dac8075c1256662002b0723/07539456f05f1416c125730c004da941?OpenDocument

law of the ECJ. Total ban on waste imports is not covered neither by the treaty exemptions nor mandatory requirements.

Case 2 – ban on import of cars

Second case is a clear explanation of prohibited state measure. Again, we are talking about environmental protection and, maybe, also about waste (older cars may be imported to the Czech Republic due to costs of disposal in the state of origin).
The Czech Republic banned import of used vehicles older than eight years. Even newer cars had to pass special test in order to be allowed to Czech roads. Similar system, however, didn't apply to cars that have already been in use in the Czech Republic. The European Commission launched proceedings in the matter against the Czech Republic in March 2005.

From the point of view of free movement of goods, the prohibition of import of cars older than 8 years, whilst no similar prohibition applies to cars of same age that are already in use in the Czech Republic, constitutes discrimination on grounds of nationality.
Exemptions to prohibition of discrimination are set in A. 30. These include the protection of health and life of humans, animals or plants. The exemptions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

In the discussed case, the aim of the ban of imports is based on the grounds of protection of road safety, the life and health of humans and the environment. However, the proportionality test needs to be applied. The measure must achieve the desired goal and go no further than is necessary to do so. In Henn and Darby, the ECJ stated that restriction on trade that might be justifiable under A. 30 should not be diverted from their proper purpose.

If we discuss the proportionality and arbitrary discrimination test, we must state that the aim of the protection of road safety may be achieved by prohibition of use of cars older than 8 years. The aim is however not achieved in the situation when, though imports are prohibited, the use of older cars in the Czech Republic is legal.

Therefore, we must state that the ban on import of older cars may not be justified on grounds of A. 30. The mandatory requirements may not apply since the measure is not indistinctly applicable.

Conclusion

The free movement of goods as one of the fundamental freedoms is not contrary to environmental protection. Though waste is regarded as being "goods", we must bear in mind the derogations set in the Treaties, as well as mandatory requirements, that cover environmental protection, too. The exemptions shall be applied in a strict sense and be proportionate. Therefore, real aim and effect of the state action shall be considered, such as in the case of car imports. The aim of protection is not fulfilled when prohibiting actions of nationals of other member states whilst allowing such actions to nationals.

References:

1. Catherine Barnard. The Substantive Law of the EU. *The Four Freedoms.*, Cambridge ISBN 0-19-925135-5 Part II

2. Dauses, M. A. Příručka hospodářského práva EU. (Základy vnitřního trhu, ochrana životního prostředí a ochrana spotřebitel). ASPI Publishing, s. r. o., Praha, 2002 776 str. ISBN 80-86395-32-4
3. Davies, Gareth. European Union internal market law. 2nd edition. Cavendish Publishing. Great Britain. 2003. ISBN 1-85941-878-3
4. Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste
5. http://www.radio.cz/en/article/50962
6. Oliver, P. Free movement of goods in the European Community. London: Sweet & Maxwell, 2003 (4th Edition), ciii
7. *Paul Craig, Gráinne de Búrca; EU Law. Texts, cases and materials. Third edition. Oxford university press. New York. 2003 ISBN 0-19-924943-1 Chapter 14*
8. http://www.env.cz/AIS/web-news-en.nsf/9ab6596b5dac8075c1256662002b0723/07539456f05f1416c125730c004da941?OpenDocument
9. TICHÝ, L., et al. *Evropské právo*. 2. vydání. Praha: C. H. Beck, 2004. 919 s. ISBN 80-7179-449-X.
10. TÝČ, V. *Základy práva Evropské unie pro ekonomy.* Praha: Linde Praha, 2004. ISBN 80-7201-478-1.
11. Treaty Establishing the European Community
12. Woods, L. Free Movement of Goods and Services within the Community. USA: Ashgate Publishing Company, 2004.
13. Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty
14. Case 7/68 Commission vs. Italy
15. Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Brantwein
16. Joined cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1991]ECR I-6097.
17. case 302/86 Commission vs. Denmark
18. Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste
19. Law 185/2001 Coll., on waste.
20. C-203/96, Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer