A Comparison of the Jurisprudence of the ECJ and the EFTA Court on the Free Movement of Goods in the EEA: Is There an Intolerable Separation of Article 34 of the TFEU and Article 11 of the EEA?

JARROD TUDOR*

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* © 2015 Jarrod Tudor. Interim Dean and Chief Administrative Officer, Kent State University. He holds Master of Arts and Juris Doctor degrees from the University of Toledo, and Master of Law degrees from both Cleveland State University and the University of Akron. In addition, Tudor received a Master of Public Administration, a Master of Business Administration and a Ph.D. from Kent State.

I. ABSTRACT

Article 11 of the European Economic Area ("EEA") and Article 34 of the Treaty on the Functioning of the European Union ("TFEU") prohibit quantitative restrictions on the free movement of goods. The EEA is monitored by the European Free Trade Area Court ("EFTA Court") and the TFEU is monitored by the European Court of Justice ("ECJ"). In theory, the EFTA Court and the ECJ should interpret Article 11 and Article 34 in the same manner in order to promote harmonization of the law on the free movement of goods and allow for further economic integration between EFTA and the EU. However, as this work reveals, there are some significant differences in the jurisprudence on the free movement of goods between the EFTA Court and the ECJ that threaten the legal harmony of the EEA and could potentially lead to an uncertain trade climate between the two trade groups.

II. INTRODUCTION

A. The EU and EFTA

Although the beginnings of the European Union ("EU") can be traced to an earlier time, it was the Treaty of Rome signed in 1957 by six European countries that began the path toward economic integration in the form of a common market.[1] The EU, formerly the European Economic Community ("EEC"), which currently consists of 28 member-states, is a common market that requires that all member-states maintain a common import policy (i.e., customs union), in conjunction with an agreement for the free flow of goods, services, capital and labor.[2] The goal behind the creation of the EU/EEC was to create a larger, politically unified, economic area.[3]

1. W. RAYMOND DUNCAN ET AL., WORLD POLITICS IN THE 21ST CENTURY 211 (2006).
2. THEODORE H. COHN, GLOBAL POLITICAL ECONOMY: THEORY AND PRACTICE 141 (4th ed. 2008).
3. RICHARD BALDWIN & CHARLES WYPLOSZ, THE ECONOMICS OF EUROPEAN INTEGRATION 45–46 (4th ed. 2012).

The European Free Trade Area ("EFTA") was founded as a "reaction" to the EU/EEC.[4] The principal aim of the Framers of EFTA was to prevent the EU/EEC from becoming a powerful, protectionist customs union that could dominate the continent.[5] EFTA, like the EU, has created much integration across borders by elites, business groups, and trade unions.[6] There is comment that the citizens of the member-states of EFTA preferred a lesser form of integration in comparison to that of the EU/EEC.[7] The trade group was founded by way of the Stockholm Convention signed in 1960.[8] EFTA was created by a set of member-states that were not comfortable with the higher level of integration found in the EEC.[9] In contrast to the EU/EEC, EFTA had no political goals and comprised a mere one institution.[10] The EFTA member-states at the time of its formation were wealthy, developed, and would seemingly have no trouble making adjustments to integrate along the lines of a free trade arrangement.[11] Given its status as a free trade association, and not a customs union, external trade policy does not have to be collectively decided.[12] However, EFTA was an immediate boon to its smaller states while the United Kingdom alone provided well over 50% of the trade group's population.[13] University of Illinois Professor Larry Neal argues that EFTA was birthed largely due to the United Kingdom's recognition that the EU member-states were enjoying export-led growth and it wanted to enjoy the free movement principles without the restrictions of the remaining parts of the agreement.[14]

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4. MARTIN DEDMAN, THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION, 1945-2008: A HISTORY OF EUROPEAN INTEGRATION 116 (2d ed. 2010).
5. ANDREW GLENCROSS, THE POLITICS OF EUROPEAN INTEGRATION: POLITICAL UNION OR A HOUSE DIVIDED? 48 (2014).
6. WOLFRAM KAISER, *Transnational Networks in European Governance: The Informal Politics of Integration*, *in* THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72, at 26 (Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen eds. 2009).
7. GLENCROSS, *supra* note 5, at 225.
8. JOHN MCCORMICK & JONATHAN OLSEN, THE EUROPEAN UNION: POLITICS AND POLICIES 64 (5th ed. 2014).
9. GUY TRITTON ET AL., INTELLECTUAL PROPERTY IN EUROPE 38 (3d ed. 2008).
10. MCCORMICK & OLSEN, *supra* note 8, at 64.
11. *Id*. at 81.
12. BALDWIN & WYPLOSZ, *supra* note 3, at 15.
13. DEDMAN, *supra* note 4, at 97.
14. LARRY NEAL, THE ECONOMICS OF EUROPE AND THE EUROPEAN UNION 275 (2007).

B. The EEA

There is some evidence that less formal integration between the EU and EFTA was taking place before the EEA Agreement's adoption.[15] During EFTA's infancy (1960-1966), free trade among its member-states was built in stages.[16] At one time, EFTA had more members than did the EU/EEC.[17] However, during the 1960s, 1970s, and 1980s, firms within the EFTA member-states started pushing their governments to form closer ties with the EU/EEC.[18] There is some evidence that firms located outside the EU/EEC were suffering from diminished relative competitiveness due to the strength of the EU/EEC trade group.[19]

For many of the EFTA countries, EFTA membership itself was seen as a mere stepping-stone to the EU/EEC.[20] The push to form the European Economic Area ("EEA"), a free trade association comprising both EU and EFTA member-states, made sense in the early 1990s given that 55% of EFTA exports went to the EU.[21] Three of the four EFTA member-states, including Norway, Iceland, and Liechtenstein (Switzerland, an EFTA member but not an EEA member), found the advantages of the EU common market too tempting and joined the EU in forming the EEA in 1992.[22] Ironically, most of the EFTA member-states had applied to become members of the EU by the time the EEA Agreement came into effect on January 1, 1995.[23] Switzerland most likely rejected membership in the EEA because of its cultural tradition of neutrality, despite the fact that it sends one-third of its exports to, and receives two-thirds of its imports from, the EU.[24] Nevertheless, the 1992 negotiations did not lead to a larger EU due to a lack of confidence in the political position of EFTA countries on the part of the EU member-states.[25] In 2009, Iceland applied

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15. Kristian Steinnes, *Socialist Party Networks in Northern Europe: Moving Towards the EEC Applications of 1967*, *in* THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-62, *supra* note 6, at 93 (Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen eds. 2009).
16. DEDMAN, *supra* note 4, at 97.
17. ANDREAS STAAB, THE EUROPEAN UNION EXPLAINED: INSTITUTIONS, ACTORS, GLOBAL IMPACT 31 (2d ed. 2011).
18. BALDWIN & WYPLOSZ, *supra* note 3, at 25.
19. *Id*. at 17.
20. DEDMAN, *supra* note 4, at 118.
21. MCCORMICK & OLSEN, *supra* note 8, at 81.
22. TRITTON ET AL., *supra* note 9, at 39.
23. TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 6 (7th ed. 2010).
24. NEAL, *supra* note 14, at 318.
25. DEDMAN, *supra* note 4, at 117.

to become a member-state of the EU due to the instability of its financial system, but has recently recanted its desire to join the EU.[26]

The EU is the world's largest single market alone with an estimated 496 million consumers, and thus, following the addition of the three EFTA countries, the 30 member-states of the EEA would clearly be considered the largest single market.[27] Countries in Europe not belonging to the EEA will suffer as their citizens and firms will feel the effects of tariffs and quotas.[28] Such an impact may serve as an incentive to join the EU or EFTA and later the EEA.[29] Other applicant and candidate countries to the EU such as Albania, Bosnia-Herzegovina, Macedonia, and Montenegro as well as other possible EU-candidate countries such as Armenia, Azerbaijan, Belarus, Georgia, and Ukraine could further enlarge the EEA.[30]

The EEA has both a general objective and an economic objective. The general objective is to work toward continuous economic relations aided by the development of a common set of rules for trade and competition.[31] The economic objective is to extend the EU's common market rules to the three EFTA member-states that are part of the EEA.[32] Thus, the provisions that ensure non-discrimination with regard to the origin of goods traded from one member-state of the EEA to another member-state are of great importance.[33]

Although the EEA can generally be considered an extension of the EU, the professionals working in this field should constantly review the jurisprudence of the ECJ and the EFTA Court to make sure that the rules of the common market are being interpreted harmoniously.[34] The EEA's enactment gave birth to the EFTA Court, a separate court from the ECJ, which has a mission to determine whether an EFTA member-state has violated its obligations under the EEA and to provide advisory opinions

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26. STAAB, *supra* note 17, at 41. Anna Molin, *Iceland Says It Has No Plans For EU Membership*, WALL ST. J. (Mar. 12, 2015, 6:11PM), http://www.wsj.com/articles/iceland-says-it-has-no-plans-for-eu-membership-1426198286?KEYWORDS=iceland+european+union.

27. THOMAS OATLEY, INTERNATIONAL POLITICAL ECONOMY 31 (5th ed. 2012).

28. NEAL, *supra* note 14, at 43.

29. *Id*.

30. RONALD H. LINDEN, ROLE OF INTERNATIONAL ACTORS 137–38 (Sharon L. Wolchik & Jane L. Curry eds. 2011).

31. TRITTON ET AL., *supra* note 9, at 39.

32. *Id*. at 39, 41.

33. *Id*.

34. CHRISTOPHER STOTHERS, PARALLEL TRADE IN EUROPE: INTELLECTUAL PROPERTY, COMPETITION AND REGULATORY LAW 423 (2007).

to national courts on the same subject.[35] The EFTA Court maintains similar rules of procedure to those of the ECJ.[36] For example, both EFTA Court and ECJ do not allow for dissenting opinions.[37] At one time, there existed a proposal for an all-competent "EEA Court" but in 1991 the ECJ found that provision of the EEA Agreement in violation of EU law.[38] The ECJ's greatest concern was that the EEA Court would have sole jurisdiction to interpret the EEA Agreement.[39] This reality leads to the possibility that EEA law and EU law may not be harmonized.[40]

The ECJ should, with some exceptions, interpret the EEA as it would TFEU.[41] There is really no one court that maintains the competence to determine the proper interpretation of the EEA Agreement.[42] It is generally accepted that EEA law, through EFTA Court decisions, does not impact the case law of the ECJ.[43] It is unclear, however, what impact the ECJ has on the case law of the EFTA Court when the ECJ interprets the EEA Agreement.[44] When the ECJ and the EFTA Court interpretations differ, the EEA Joint Committee, which is entrusted to constantly monitor the development of case law on both sides, can take action to promote consistency in the EEA.[45] However, the EEA Joint Committee cannot alter the case law of either the ECJ or the EFTA Court.[46] The EFTA Surveillance Authority is also empowered to avoid legal imbalances between the EFTA and EU member-states.[47] The Surveillance Authority operates much like the European Commission for reasons of homogeneity and credibility with its counterpart.[48]

C. Article 11 of the EEA and Article 34 of the TFEU

Article 11 of the EEA is a mirror image of Article 34 (ex 28, 30) of The Functioning of the European Union ("TFEU"), which prohibits a member-state of the EEA from imposing regulations that create quantitative restrictions

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35. TRITTON ET AL., *supra* note 9, at 45.
36. NIELS FENGER ET AL., EUROPEAN FREE TRADE ASSOCIATION (EFTA) AND EUROPEAN ECONOMIC AREA (EEA) 115 (2012).
37. *Id*. at 115–16.
38. HARTLEY, *supra* note 23, at 5.
39. *Id*.
40. *See* FENGER, ET AL., *supra* note 36, at 59.
41. *See id*. at 75.
42. *Id*.
43. *Id*. at 60.
44. *Id*. at 75.
45. *See id*. at 76.
46. *Id*.
47. *Id*. at 57.
48. *Id*. at 58.

on imports or any measure that has the equivalent effect.[49] Likewise, Article 13 of the EEA is a mirror image of Article 36 (ex 30, 36) of TFEU. Article 13 modifies Article 11 in that it allows for quantitative restrictions on grounds such as public morality or public policy, for example, but in any case, cannot constitute a means of arbitrary discrimination.[50] In other words, Articles 13 and 36 serve as a set of permissible exceptions to the bars put forth in Articles 11 and 34 of the EEA and the Treaty, respectively.

III. PURPOSE OF THIS WORK

The goal of this work is to determine whether the EFTA Court is meeting its obligations by interpreting the EEA in accordance with the existing jurisprudence of the ECJ with regard to quantitative restrictions on imports. This work will present case law that reflects a condition of differing jurisprudence on the same topics. If such a condition does exist, the law of the EEA and the law of the EU become separated, leaving member-states, lawyers, government officials, and businesses to question the status of the law within the EEA, generally. More narrowly, these

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49. Article 10 and Article 11 of the EEA states: "Quantitative restrictions on imports and all measures having equivalent effect, shall be prohibited between the Contracting Parties"; "Without prejudice to the arrangements in Protocol 5, this shall also apply to customs duties of a fiscal nature." Article 34 (ex 28, 30) of the TFEU states: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Member States." Consolidated Version of the Treaty on the Functioning of the European Union art. 34, Mar. 30, 2010, 2010 O.J. (C83) 61 [hereinafter TFEU].

50. Article 13 of the EEA states:

> The provisions of Articles 11 and 12 shall not prelude prohibitions or restrictions on imports, exports or goods in transit 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 disguised restriction on trade between the Contracting Parties.

Article 36 (ex 30, 36) of the TFEU reads:

> the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit 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.

TFEU art. 36.

individuals and entities will be left to question the law on quantitative restrictions on imports, specifically, in Europe. Another purpose of this work is to explore some of the arguments that a member-state might put forth in an attempt to maintain a quantitative restriction in an effort to promote its own interests.

IV. CASE LAW ON THE FREE MOVEMENT OF GOODS FROM THE ECJ

A. Certificate of Authenticity

The decision by the ECJ in *Procureur du Roi v. Dassonville* serves as one of the early, bedrock cases showing little tolerance for any attempt by a member-state to enact regulations that limit trade under the TFEU.[51] Although the ECJ's opinion was short, its holding was concrete: a member-state's requirement that an importer obtain a certificate of authenticity before importing goods into a member-state that were already in free circulation in another member-state was a violation of Article 34's (ex 28, 30) prohibition against quantitative restrictions on imported goods.[52] In *Dassonville*, importers were criminally charged by the Belgian government after importing (into Belgium) Scotch whisky they had acquired in free circulation in France, without first obtaining a certificate of authenticity.[53] The required certificate would have, according to the Belgian government, served as a source of consumer protection as potential buyers would know what exactly they were purchasing.[54] The Court's rationale in striking the Belgian rule focused on the difficulty that the trader would have in obtaining the certificate, which, in this case, would have to come from the British government.[55]

B. Pricing

The ECJ in *Criminal Proceedings Against Keck* offered to support domestic legislation and stated that its rulings in *Dassonville* and *Rewe-Zentral* did not apply to a French law that prohibited the resale of goods at a level below cost.[56] In *Keck*, two supermarket retailers that sold both beer and coffee products at below cost argued that Article 34 (ex 28, 30)

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51. Case C-8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837.
52. *Id.* ¶ 9.
53. *Id.* ¶ 3.
54. *Id.* ¶ 6.
55. *Id.* ¶ 4.
56. Case C-267/91 and 268/91, Criminal Proceedings Against Keck and Mithouard, 1993 E.C.R. I-6097, 6131.

and Article 18 (ex 12, 6) should prohibit application of the French law.[57] They argued that the French law limited the free movement of goods by removing a sales strategy, thereby limiting the traders' competitiveness, as traders in other member-states did not have to contend with such laws.[58]

Although admitting that the French law might indirectly cause a reduction in cross-border trade, the ECJ upheld the law, stating that TFEU applies only to the *movement* of goods, not marketing, and the French law permissibly dealt only with the marketing of goods within a member-state.[59] Moreover, the ECJ did not find that the French law went as far as meeting Article 34's "equivalent effect."[60] The Court felt that there was a need to clarify its jurisprudence since the ECJ was concerned that retailers and traders were relying on Article 34 too often to attack domestic rules that interfered with their commercial freedom.[61] Thus, the ECJ stated that domestic rules that address selling arrangements do not violate Articles 34 and 18.[62]

C. Product Contents, Composition, and Licensing

The ECJ has also held that a member-state's requirement that imported alcoholic beverages have a minimum alcohol content violates Article 34.[63] In *Rewe-Zentral*, the ECJ entertained three arguments put forth by the German government as to why a 1922 statute requiring minimum alcohol content for imports did not violate TFEU. First, Germany argued that the requirement advanced public health by limiting the spread of low-level alcohol products, which actually tend to induce greater alcohol tolerance in comparison to their high-level alcohol counterparts.[64] Second, the German government contended that its domestic rule was necessary in order to guard against unfair competition; because alcohol is the most

57. *Id*. at I-6124.
58. *See id*. Article 18 (ex 12, 6) of the TFEU states: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination." TFEU art. 18.
59. *Id*. at I-6129.
60. *Id*. at I-6131.
61. *Id*.
62. *Id*.
63. *See* Case C-120/78, Rewe-Zentral v. Bundesmonopolverwaltung fur Branntwein, 3 C.M.L.R. 494, 510 (1979).
64. *Id*. at 509.

expensive ingredient in an alcoholic beverage, low-level alcohol producers would have a comparative advantage in the marketplace without the rule.[65] Third, Germany argued that if member-states must allow imported alcoholic beverages with any alcohol content into circulation, the real regulation would come from the producing countries that are permitted to adopt domestic production rules.[66] Thus, an EU-wide importation standard of minimum alcohol content would inevitably develop based on the member-state with the lowest minimum alcohol content level for purposes of production.[67]

The ECJ dismissed Germany's arguments, and emphasized the use and value of consumer protection law to combat Germany's marketplace fears.[68] As the ECJ stated, consumer protection law requires an indication of both origin and alcohol content on the exterior packaging.[69] Accordingly, the Court held that once alcoholic beverages are legally produced and marketed in one of the member-states, barriers must not preclude inter-member-state trade of those products.[70] Although the ECJ did not address the point specifically, it should be noted that part of the plaintiff's argument was that if the German law were upheld, member-states could decrease the likelihood through domestic regulation that traditional goods such as those unique to a member-state and produced in that one member-state will cross borders.[71]

The ECJ has recognized that the protection of the environment is a credible cause that can lead to a viable quantitative restriction on imports by a member-state.[72] However, in *Re Disposable Beer Cans*, the ECJ held that any such restriction must strike a proportionate in a balance between policies encouraging free trade and a concern for environmental health.[73] Here, the ECJ struck down a Danish law requiring that importers of both beer and soft drink cans to package their products in a pre-approved reusable container, holding that it violated Article 34 (ex 28, 30).[74] The ECJ's rationale in this case was similar to its decision in *Rewe-Zentral,* as

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65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*. at 509–10.
70. *Id*. at 510–11.
71. *Id*. at 496. Additionally, it should be added that the 1922 law did not apply to low-alcohol beverages that were produced in Germany. *Id*. at 494.
72. *See generally* Case C-240/83, Ass'n de Defense des Bruleurs D'Huiles Usagees, 1985-2 1 E.C.R. 531.
73. Case C-302/86, Comm'n v. Denmark (*Re Disposable Beer Cans*), 1988 E.C.R. 4607 (1989).
74. *Id*. at 632. The Danish law did allow the first 3,000 hl of beer or soft drink product per producer to be imported in a non-approved container. *Id*. at 630.

it focused on the additional expense that an importer would have to incur by choosing a Danish government pre-approved container.[75] Although the ECJ sympathized with the Danish government's attempt at preserving the environment, the ECJ found that there were other, less restrictive ways to accomplish the same goal.[76] For example, the law could simply require importers to show that their containers could be reused without forcing them to use a preapproved container.[77]

The arguments supporting the "public health" clause of Article 36 (ex 30, 36) were likely exhausted by the German government in *Re Purity Requirements for Beer*, where the ECJ struck down a combination of German laws that made it difficult for foreign beer producers to import into Germany under the designation of "Bier" and thus are a violation of Article 34 (ex 28, 30).[78]

The German law imposed numerous requirements on beer producers before any beer product could become eligible for sale in Germany. For example, German beer production regulation required specific ingredients for both "bottom-fermented" beers, (malted barley, hops, yeast, and water) and "top-fermented" beers (malts, pure cane sugar, and other sugars).[79] In addition to the required set of ingredients, another body of German law prohibited the use of additives in products that were to be sold as "Bier."[80] However, it was possible for the German government to grant an exception based on a specific list.[81]

The German government defended this collection of purity laws on several grounds. First, the government argued that the ban on additives was necessary to ensure public health—the ECJ found this argument hollow, as Germany put forth virtually zero limits on additives in soft drinks.[82] In response, Germany contended that additives in beer pose a greater danger for Germans because beer is consumed in such large quantities, compared to soft drinks, and that the long-term health effects

75. *Id*. at 631.
76. *Id*. at 632.
77. *Id*. at 632.
78. Comm'n v. Ger. (*Re Purity Requirements for Bee*r), 1 C.M.L.R. 780, 801–03, 811 (1988).
79. *Id*. at 801.
80. *Id*. at 802. The German law also defined the term "additive." *Id*.
81. *Id*. at 801. The list of exceptions included the manufacture of special beers, beers for export, and beer intended for scientific experiments. *Id*.
82. *Id*. at 805, 808.

of these additives, especially in conjunction with alcohol, is unknown.[83] Although the ECJ seemed more sympathetic to this latter argument, it found the rule in question to be disproportionate since the German government did not ban the use of the additives in other food products.[84]

The second argument put forth by the German government was the more traditional consumer protection argument. The government asserted that the German population attaches the term "Bier" to a specific product made with specific ingredients identified by German law.[85] The ECJ rejected this argument by stating that labeling requirements could adequately protect consumers and allow them to make an informed choice.[86] Again, the German government countered. Germany argued that not all beer containers could adequately fit a label that includes all of the ingredients and further, that products sold on draft the labels would actually require the labels to be located on the taps.[87] The ECJ found that such a system would be adequate and that German law could be developed as to give consumers the necessary information in other ways.[88]

The ECJ returned to cost concerns for manufacturers to strike down domestic law in the face of Article 34 (ex 28, 30) in *Re the Use of Champagne-Type Bottles*.[89] Here, the case concerned the importation into Germany of Petillant de Raisin, which is an alcoholic beverage with an alcohol content of rarely more than 3%, but was sold in a champagne-style bottle in violation of Germany's Wine Act.[90] The German government argued that by allowing the importer to sell this product in Germany packaged in such a bottle, consumers would be easily confused into believing they are were purchasing champagne.[91] The ECJ rejected the government's argument by stating that producers of Petillant de Raisin, which is traditionally packaged in a champagne bottle in the country of origin, would face higher costs in that they would have to choose a bottle that would fit only the German market.[92] As well, the ECJ contended that simple labeling requirements would be adequate to protect against consumer confusion.[93] The Court did not believe Article 36 (ex 30, 36) permitted

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83. *Id*. at 808–09.
84. *Id*. at 810.
85. *Id*. at 807.
86. *Id*. at 807–08.
87. *Id*. at 808.
88. *Id*.
89. Case C-179/85, Comm'n v. Germany (*Re the Use of Champagne-Type Bottles*), 1 C.M.L.R. 135, 144 (1988).
90. *Id*. at 141–42.
91. *Id*. at 143.
92. *See id*. at 142–43. One could only imagine the additional costs for importers that forced into using a separate designed bottle for each and every member-state.
93. *Id*.

Germany's request that the producer/importer of Petillant de Raisin prove that it could not afford the additional costs of a different bottle.[94]

In *Ahokainen and Leppik*, the ECJ stated that it was up to national courts to decide whether a Finnish rule requiring a license to import beverages with alcohol content above 80% could be justified under Article 36 (ex 30, 36).[95] Specifically, the ECJ stated that national courts should have the ability to determine whether the licensing system was the least restrictive measure a member-state could employ to mitigate the public health concerns associated with high rates of alcoholism in Finland, especially among youths.[96]

Nevertheless, the ECJ had no trouble finding that the alcohol import licensing system employed by Finland was indeed a violation of Article 34's (ex 28, 30) prohibition on regulations limiting the free movement of goods.[97] When discussing the balance between Articles 34 and 36, the ECJ acknowledged that the mere imposition of an import licensing system on goods that are legal and made and marketed within the EU member-states could impose a cost to the importer that serves as an obstacle to the free movement of goods.[98] However, according to the ECJ, in order to support a restriction under Article 36, a member-state must put forth evidence that the restrictive measure is proportional to the objective sought and that there is no discrimination between imported and domestically produced goods.[99] The ECJ did not find Finland's alcohol import licensing scheme to be per se discriminatory.[100]

While the ECJ left open the possibility that Finland's alcohol import policy would stand (by leaving the question to the member-state national courts), the ECJ remarked that the domestic court could take into consideration particular social circumstances unique to the regulating member-state.[101] The ECJ made these findings despite case law cited by the ECJ that previously held that such licensing systems could be

94. *Id*. at 144.
95. Case C-434/04, Jan-Erik Anders Ahokainen and Mati Leppik v. Finland, 2006 E.C.R. I-9171, ¶ 39.
96. *Id*. ¶¶ 25, 39–40.
97. *Id*. ¶ 22.
98. *Id*. ¶ 35.
99. *Id*. ¶¶ 29, 31.
100. *Id*. ¶ 30.
101. *Id*. ¶ 32.

disproportionate to a member-state's goals, even with regard to the protection of human health.[102]

The ECJ has held that a member-state cannot prohibit the marketing of foodstuffs containing added vitamins and minerals when those same foodstuffs are lawfully produced and marketed in other member-states unless there is proof of a public health risk by the prohibiting member-state pursuant to Articles 34 (ex 28, 30) and 36 (ex 30, 36).[103] In the case at bar, Denmark prohibited the importation of enriched foodstuffs unless the importer's product(s) were shown to include nutrients that were needed by the Danish population.[104] First, the government of Denmark defended the prohibition by contending that the safety of the vitamins and minerals that served to enrich the imported foodstuffs could not be determined with sufficient certainty.[105] Second, the Danish government argued that the imported foodstuffs are not necessary because they do not meet a real dietary need in Denmark.[106] Third, while not disputing the fact that the ban would serve as the equivalent to a quantitative measure, the Danish government argued that a member-state need not establish a real risk associated with the relevant product because doing so, according to the government, would be impossible.[107] More narrowly, Denmark contended that ingesting great amounts of the enriching vitamins and minerals could be severe enough that the danger to human health could not be *excluded* even if scientific research was not able to clearly identify risk or the absence thereof.[108]

The European Commission, which brought the complaint, believed that the Danish prohibition was an "unjustified obstacle," pursuant to Articles 34 and 36, because a lack of nutritional need was not a sufficient basis for prohibition.[109] Rather, the European Commission argued, a prohibiting member-state should have the burden of showing that such products pose a real threat to public health.[110] According to the European Commission, the prohibiting member-state must present scientific data supporting the existence of a real threat to public health as a basis for prohibition.[111]

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102. *Id*. ¶ 34.
103. Case C-192/01, Comm'n v. Den., 2003 E.C.R. I-9724, ¶¶ 48, 57.
104. *Id*. ¶ 1.
105. *Id*. ¶ 14. However, the Danish government did cite that the mix of vitamins A, D, and B6, even in low doses, could have a toxic effect. *Id*. ¶ 32.
106. *Id*.
107. *Id*. ¶ 16.
108. *Id*. ¶ 29.
109. *Id*.
110. *Id*. ¶¶ 13, 15.
111. *Id*. ¶ 15.

Moreover, without such proof, Article 36 could not support such a ban.[112] The European Commission also contended that any such prohibition on the importation of enriched foodstuffs should be necessary for the protection of public health.[113]

The ECJ began its decision with the traditional language that the free movement of goods is fundamental to TFEU and that any quantitative restrictions, or their equivalents, would violate Article 34.[114] After quickly holding that the Danish law has the equivalent effect of a quantitative restriction on the free movement of goods under Article 34, the ECJ stated that member-states have significant discretion in determining what is necessary for public health, especially in cases where EU law has not been harmonized.[115] Regardless, according to the ECJ, strict compliance with Article 36 requires member-states to narrowly tailor prohibitions so that they prohibit only that which is absolutely necessary to maintain public health, and show that less restrictive alternative measures are insufficient.[116]

The ECJ set the burden of proof bar at a level whereby the prohibiting member-state must show that international scientific research involving the member-state's nutritional habits reflects a need to for the prohibition of such foodstuffs.[117] Furthermore, such proof requires a detailed assessment of the risks maintained associated by with the foodstuffs' entry into the member-state's marketplace.[118] As well, the scientific research must be current to show that the prohibition was needed at the time the ban was enacted.[119] However, the ECJ did give member-states room to evaluate the addition of foodstuffs into the current national diet, the varying quantity of added nutrients, the various sources of nutrients and their cumulative effect (despite whether they are from a natural or unnatural source), and the actual dietary needs of the population.[120] While finding that the Danish law was disproportionate to the perceived need to protect public health, the ECJ stated that the law should fail largely due to the fact that

112. *Id.* ¶ 20.
113. *Id.* ¶ 24.
114. *Id.* ¶¶ 38–39.
115. *Id.* ¶¶ 40, 42–43.
116. *Id.* ¶¶ 45, 46.
117. *Id.* ¶ 46.
118. *Id.* ¶ 47.
119. *Id.* ¶ 48.
120. *Id.* ¶¶ 48, 50, 54.

the government did not specify the risks associated with each vitamin and minerals to public health.[121]

In a case that reflected Italy's love for pasta, the ECJ held in *Criminal Proceedings Against Zoni* that a member-state cannot prohibit the importation of pasta that is made from raw ingredients that are not normally used in that member-state on the grounds of consumer protection and unknown health effects.[122] At the time the case arose, the law on pasta in Italy provided that dry pasta made from common wheat or a mixture of common wheat and durum wheat could not be imported into Italy.[123] However, common wheat pasta could be used for export and small-scale preparation of fresh pasta (for immediate consumption).[124] Zoni, the defendant, after being charged with importing pasta made from a combination of common wheat and durum wheat in Germany, argued the Italian law violated the free movement of goods requirement under Article 34 (ex 28, 30) and could not be tolerated as derogation under Article 36 (ex 30, 36).[125]

Italy attempted to defend its pasta law on several grounds. First, the Italian government argued that common wheat pasta or pasta made from a mixture of different types of wheat is generally mixed with additives and colorants to create a particular color and flavor which, if ingested in large quantities, could create harmful effects on humans.[126] Second, Italy believed it to be necessary to require that all dry pasta be made from durum wheat in order to protect Italian consumers by maintaining a superior quality of pasta.[127] Third, Italy believed that requiring labels reflecting the raw ingredients in the marketed pasta would not suffice since, in Italy, the term "pasta" presupposes that the pasta purchased is made from durum wheat.[128] Fourth, Italy stated that even with labeling requirements, it would not be possible for Italian consumers to actually check the accuracy of the labeling.[129] Fifth, the Italian government argued that by requiring dry pasta to be made from durum wheat, the government was guaranteeing income for durum wheat growers who might otherwise only grow common wheat and consequently eliminate durum wheat from the marketplace.[130]

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121. *Id.* ¶ 55.
122. Case C-90/86, Criminal Proceedings Against Zoni, 1988 E.C.R. I-4285, ¶¶ 20, 28.
123. *Id.* ¶¶ 1, 2, 4.
124. *Id.* ¶ 3.
125. *See id.* ¶¶ 2, 6.
126. *Id.* ¶ 12.
127. *Id.* ¶ 16.
128. *Id.* ¶ 19.
129. *See id.* ¶ 21.
130. *Id.* ¶ 23.

After quickly finding that the Italian law constituted an equivalent to a quantitative restriction pursuant to Article 34, the ECJ turned its attention to the many arguments put forth by Italy as the government attempted to save its pasta law.[131] First, the ECJ noted that Italy had no evidence that common wheat pasta or mixed pasta would contain additives or colorants.[132] Second, the ECJ found the Italian pasta law violated the principle of proportionality because it was not necessary to ban common wheat or mixed pasta in an attempt to protect human health.[133] Third, the ECJ gave much more credence to the ability of labels, a less restrictive alternative, to inform Italian consumers of the contents of dry pasta when they make purchasing decisions.[134] The ECJ also commented that Italy could require highly detailed labels.[135] Finally, the ECJ remarked that differences in pasta should exist in the marketplace and that consumer preferences should be allowed to dictate the winning pasta through competition and not the fear of loss of a specific type of wheat grown in Italy.[136]

In a similar case, the ECJ found that a German law prohibiting the importation and domestic sale of meat products that contained ingredients other than meat infringed upon Articles 34 (ex 28, 30) and 36 (ex 30, 36).[137] In the case at bar, the German government attempted to defend its importation ban on such products as it was necessary to protect the health of German consumers by making sure that the population ingests sufficient amounts of protein.[138] Moreover, the German government argued that vegetable proteins, presumably added to meat products, have a lower nutritional value than strict meat proteins in all-meat products.[139] Third, Germany stated that German eating habits, which have existed for several decades, require strict meat products and that this is what German consumers have come to expect.[140] Lastly, the German government contended that

131. *Id.* ¶ 11.
132. *Id.* ¶ 13.
133. *Id.* ¶ 14.
134. *Id.* ¶ 16.
135. *Id.* ¶¶ 17, 20. Such a label could be "pasta made from durum wheatmeal." *Id.* ¶ 17. The ECJ also commented that the Italian government also uses pasta in a generic form so that pasta does not infer that it is made from only durum wheat. *Id.* at ¶ 20.
136. *Id.* ¶ 27.
137. Case C-274/87, Comm'n v. Ger., 1989 E.C.R. 229, ¶¶ 2, 23.
138. *Id.* ¶ 7.
139. *Id.* ¶ 10.
140. *Id.* ¶ 12.

the ban was necessary in order to protect producers and distributors of meat products from unfair competition as some meat-product traders may market meat products that have non-meat ingredients and will undercut higher-grade producers and that consumers would not readily see the differences.[141]

The ECJ, while acknowledging the primacy of a member-state's obligation and duty to protect human health, first cited the German government's own reports detailing that the protein intake of the German population was more than adequate.[142] The ECJ also stated that importation bans such as Germany's ban on meat products with non-meat ingredients cannot be justified under Article 36 on grounds that the imports will have a lower nutritional content than what is currently on the market, since consumers should be able to maintain choices regarding nutritional value.[143] Next, the ECJ contended that any consumer confusion as to the true content of meat products could be removed through the compulsory requirement of labels on the products' packaging.[144] In regard to the protection of German meat producers and distributors, the ECJ again believed that compulsory labeling of meat products would be ample to inform consumers.[145]

D. Obscenity

Conegate Limited v. HM Customs forced the ECJ to address geographical differences within the same member-state on the subject of public morality.[146] In *Conegate Limited*, a German-based importer challenged a British restriction on the importation of inflatable sex dolls and other sexual items that were deemed indecent or obscene.[147] Although the ECJ articulated that a member-state is free to dictate its own standards when defining public morality, the United Kingdom—comprised of England, Northern Ireland, Scotland, and Wales—maintained different rules as to whether those same inflatable sex dolls were lawful.[148]

The question for the ECJ was whether a member-state could exercise a restriction on the importation of indecent or obscene items when, at the same time, no general prohibition existed on the manufacture or sale of those same items within the member-state, even when the regulation of

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141. *Id.* ¶ 17.
142. *Id.* ¶¶ 6, 8.
143. *Id.* ¶ 10.
144. *Id.* ¶ 13.
145. *Id.* ¶ 18.
146. Case C-121/85, Conegate Ltd. v. HM Customs, 1986 E.C.R. 1007.
147. *Id.* ¶ 2.
148. *Id.* ¶¶ 8–10, 12.

those items varied by political region.[149] The ECJ answered the question in the negative and stated that Article 36 (ex 30, 36) would not support public morality derogation in such circumstances even when, despite the differences in regulation across political regions, there did exist a general prohibition on some forms of advertising.[150] Moreover, the ECJ reminded the litigants that under no circumstances could a member-state impose regulations on imports that are stricter than those imposed on domestically produced goods.[151] However, the ECJ did state that once the goods from Germany were imported into the United Kingdom, the same general restrictions on marketing and advertising would apply to the imported goods as they apply to the domestically produced goods.[152]

E. Advertising

In *Lucien Ortscheit GmbH v. Eurim-Pharm GmbH*, the ECJ upheld, pursuant to Article 36 (ex 30, 36) (and specifically on public health grounds), a German advertising ban on pharmaceuticals imported into Germany whereby the same pharmaceuticals that were not authorized in Germany could be imported into Germany.[153] In the case at bar, one pharmaceutical firm, Lucien Ortscheit, attempted to block the importation of pharmaceuticals advertised by Eurim-Pharm, another pharmaceutical firm, using a German law that prohibited the advertising of such unauthorized pharmaceuticals.[154] Interestingly enough, the German ban on advertising applied to pharmaceuticals that were authorized for sale in another member-state but were not authorized in Germany.[155] Eurim-Pharm, for several years, had been marketing pharmaceuticals in Germany that were not authorized by the German government in advertisements, which specifically identified which pharmaceuticals were not authorized in Germany, directed at healthcare professionals.[156]

Although not specifically identified in the case, but revealed in the ECJ's description of the Advocate General's position, the German government

149. *Id.* ¶ 13.
150. *Id.* ¶ 20.
151. *Id.* ¶ 12.
152. *See id.* ¶ 21.
153. Case C-390/23, Lucien Ortscheit GmbH v. Eurim-Pharm GmbH, 1994 E.C.R. I-5257, ¶¶ 12, 20–21.
154. *Id.* ¶¶ 5–7.
155. *Id.* ¶ 4.
156. *Id.* ¶ 6.

defended the advertising ban on public health grounds; more specifically, that individual importation of unauthorized pharmaceuticals would remain infrequent and manufacturers could not gain approval for such pharmaceuticals in member-states where fewer requirements existed.[157] While supporting the German advertising ban, the ECJ made note that given the lack of harmonization in the area of pharmaceutical advertising, member-states maintained much more discretion in crafting regulations on the marketing and advertising of pharmaceutical products.[158] This position taken by the ECJ coincided with the reminder that the protection of human health is among the most important interests protected by Article 36 despite the acknowledgement that such an advertising ban would limit the ability of healthcare providers to have access to information about the existence and availability pharmaceuticals that can actually be used in Germany.[159]

F. Health Screening

Whether a member-state can impose a higher standard for public health than what is established by EU law pursuant to Article 36 (ex 30, 36) was the question presented in *Austria v. Hahn*.[160] EU law on the marketing of fish products was found in Directive 91/493/EEC, which required that such products caught in a natural environment would be subject to various health checks, including organoleptic, parasite, chemical, and microbiological evaluations.[161] Additionally, Directive 91/493/EEC required that these checks take place in any place whereby fish products were "prepared, processed, chilled, frozen, packaged, or stored."[162] However, despite this specificity, the Directive did not identify standards for member-states to follow.[163] EU Decision 94/356, which compliments Directive 91/493/EEC, however, did specify that potential hazards associated with fish products would include unacceptable contamination through biological organisms, chemicals, other raw materials, other final products, and/or contamination through a production line.[164] Moreover, Decision 94/356 provided that multidisciplinary teams should consider what control measures to put in place and that such control measures should be employed to prevent health hazards.[165]

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157. *Id.* ¶ 19.
158. *Id.* ¶ 18.
159. *Id.* ¶¶ 10, 16.
160. *See* Case C-121/00, Austria v. Hahn, 2002 E.C.R. I-9210, ¶¶ 20, 21.
161. *Id.* ¶¶ 3–4.
162. *Id.* ¶ 5.
163. *Id.* ¶¶ 3–6.
164. *Id.* ¶ 8.
165. *Id.* ¶ 9.

Austrian law, however, was much more specific on the topic of fish related products. Austrian law prohibited the marketing of foodstuffs and products intended for human consumption that are likely to endanger or harm human health.[166] More specifically, Austrian law provided a "zero tolerance" policy in regard to contamination of food products by way of listeria monocytogenes in that if this form of contamination was detected at greater than 25 grams, the fish products could not be marketed in Austria, as they would be deemed harmful to human health.[167]

Nordsee GmbH, the defendant in the case, was charged with violating the Austrian standards on fish products.[168] Nordsee contended that Austria's identification of fish products as harmful to human health if they contained listeria monocytogenes at 25 grams or more (per sample size) was the equivalent to a quantitative restriction in violation of Article 34 and could not be saved by Article 36 since the restriction was not proportionate even in cases where EU law had not been harmonized.[169] Nordsee cited a 1996 U.S. Center for Disease Control study finding that very few persons that ingested even low levels of listeria monocytogenes became ill and thus the Austrian standard was too strict, and therefore, an equivalent to a quantitative restriction existed.[170]

The Austrian government, in contrast, stated that EU law, including Directive 91/493 and Decision 94/356 did not fully harmonize EU law on the topic of safety in fish products but merely set objectives for member-states to follow given the terms "unacceptable contamination" and "acceptable levels."[171]

Ironically, the Austrian court that referred the case to the ECJ could not find a scientific basis for a zero tolerance policy for listeria monocytogenes in that such a form of contamination is wide spread in the environment generally and in food production specifically. Even in good food production conditions, few clinical cases of harm were realized, and it would be almost impossible to remove listeria monocytogenes from the food production process.[172]

166. *Id.* ¶ 10.
167. *Id.* ¶¶ 16–18.
168. *Id.* ¶ 2.
169. *Id.* ¶¶ 22–23.
170. *Id.* ¶ 25.
171. *Id.* ¶¶ 26–27.
172. *Id.* ¶ 19.

The ECJ held that Austria was within its power under Article 36 to impose stricter standards to protect human health in the area of fish products, even at a "zero tolerance" level.[173] The ECJ agreed with the plaintiff that Directive 91/493 and Decision 94/356 harmonized EU law in a way that could prohibit member-states from setting high standards for human health when not justified.[174] Although the ECJ commented that Articles 34 and 36 do not immunize a member-state's strict standards for protecting human health, the doctrine of proportionality must apply to such restrictions. The effect of the Austrian law would be to limit the trade in fish products between member-states, and any such limitation must be based on scientific research. The ECJ cited several health problems that current international scientific research has identified in regard to human consumption of listeria monocytogenes.[175] As well, the ECJ stated that current research did not identify a specific level of listeria monocytogenes that would be safe for human consumption.[176]

Differences in climate can determine whether food protected with pesticides can be blocked from importation between member-states.[177] In *Mirepoix*, the ECJ allowed France to block the import of fruit and vegetables once covered with a pesticide, maleic hydrazide (a synthetic chemical), which were grown in the Netherlands due to a French law that prohibited the use of the pesticide because of toxic residue likely to be found on such treated products.[178] The defendant contested his prosecution by the French authorities, arguing that the French ban on the pesticide was a violation of the free movement of goods under Article 34 (ex 28, 30) and the ban did not fall into the exceptions found in Article 36 (ex 30, 36). According to the defendant, (i) there was no certainty that the pesticide could harm humans, (ii) the French law went beyond what was necessary to protect human health, and (iii) other methods associated with food safety could have been implemented.[179]

The ECJ found that the French pesticide ban did constitute the equivalent of a quantitative restriction on the free movement of goods, but since the quantities ingested by consumers could not be predicted, the ECJ held that member-states could prohibit food protected with a banned pesticide from entering its borders.[180] The ECJ went as far as to comment

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173. *Id.* ¶ 47.
174. *Id.* ¶¶ 32–33.
175. *Id.* ¶¶ 34, 36, 39–41. The ECJ specifically identified risks to pregnant women and the elderly. *Id.* ¶ 41.
176. *Id.* ¶ 45.
177. Case 54/85, Ministere Public v. Xavier Mirepoix, 1986 E.C.R. 1074, ¶¶ 15, 18.
178. *Id.* ¶¶ 2–3, 8.
179. *Id.* ¶ 7.
180. *Id.* ¶¶ 12, 14.

that a member-state can take into consideration its own climate, the normal diet of its citizens, and the general state of health of its citizens.[181]

However, the ECJ did place limitations on banning products treated with a banned pesticide. Any member-state blocking the importation of such food products must first consider any reasons as to why the ban is no longer necessary.[182] Second, the member-state must allow for exceptions whereby the importer may contest that the pesticide is dangerous to human health.[183]

The ECJ in *Humanplasma GmbH v. Austria* stated that "human health ranks foremost among the assets or interest protected by Article 36 (ex 30, 36)."[184] As one can imagine, the possibility of tainted blood moving from one member-state to another in the stream of commerce would pose a substantial risk and therefore member-states might have the greatest leeway for regulation. However, in *Humanplasma*, the ECJ found that Austria's requirement that all traders in blood and blood products supply proof that all blood donors received no compensation violated Article 30's (ex 28, 30) prohibition against regulations that possess the equivalent effect of a quantitative restriction and could not be saved by Article 36 (ex 30, 36).[185]

In a rare instance, the defending member-state—here, Austria—agreed that the requirement that all traders in blood related products have proof that all blood donors received no compensation was a restriction that could limit trade in goods between member-states.[186] However, the ECJ did not find that the Austrian regulation on trade in blood products was discriminatory.[187] As well, the ECJ found that virtually all parties included in the case at bar agreed that the true mission of the Austrian regulation was to ensure that blood products were safe and of high quality and encouraging voluntary, unpaid donations to which the ECJ stated were potentially grounds for saving the regulation under Article 36.[188]

The ECJ, however, kept to its case law that required, even in the case of blood products moving between and among member-states, that any

181. *Id.* ¶ 15.
182. *Id.* ¶ 16.
183. *Id.* ¶ 17.
184. Case C-421/09, Humanplasma GmbH v. Austria, 2010 E.C.R. I-2389, ¶ 32.
185. *Id.* ¶ 46. The Austrian law prohibited the importation of blood products from compensated donors and required proof of such from importers. *Id.* ¶¶ 8–10, 15.
186. *Id.* ¶ 30.
187. *Id.* ¶ 28.
188. *Id.* ¶ 33.

restriction on the free movement of goods must be proportional and necessary to achieve the objective sought by the regulating member-state.[189] The ECJ stated that in the area of human health protection, member-states are afforded discretion in determining how much protection is needed, that the level of protection needed may vary from member-state to member-state, and the variation in protection from member-state to member-state does not create a presumption that the more restrictive regulation is not in compliance with EU law.[190] Regardless, the fact that other member-states do compensate blood donors for their costs and the fact that EU law otherwise requires that blood and blood components be tested before entering the stream of commerce, the need for traders in blood products to obtain blood from uncompensated donors and supply proof that donors were not compensated was not necessary to achieve the objective of protecting human health.[191]

V. CASE LAW ON THE FREE MOVEMENT OF GOODS FROM THE EFTA COURT

A. Product Contents, Composition, and Licensing

The EFTA Court relied heavily on the ECJ's decision in *Criminal Proceedings Against Keck* in adjudicating a Norwegian law requiring a license, to be granted from a Norwegian municipality, to sell videograms.[192] In *Ullensaker*, Nille AS, a nationwide chain of videogram sales stores, contested the Norwegian law was a violation of Article 11 of the EEA as a quantitative restriction on imports after a total of seven of its 120 stores were collectively denied licenses by five different Norwegian municipalities.[193] The Norwegian government argued that the licensing system, which would grant a license to a "specialized dealer," was necessary in order to prohibit the sale of illegal videograms and also could be justified on cultural grounds under Article 13 in that the individual municipalities could make sure that there exists a diversity of videograms for sale when granting licenses.[194] The Norwegian government also contended that the licensing system did not distinguish between domestically and foreign-produced videograms.[195] In

189. *Id.* ¶ 34.
190. *Id.* ¶¶ 39–40.
191. *Id.* ¶¶ 43–45. Many member-states provided donors with refreshments and compensation for travel costs. *Id.* ¶ 44.
192. Ullensaker kommune and Others v. Nille AS, Case E-5/96, EFTA Ct. Rep. 30, ¶ 3 (May 14, 1997), *available at* http://www.eftacourt.int/uploads/tx_nvcases/5_96_Advisory_Opinion_EN.pdf.
193. *Id.* ¶ 5.
194. *Id.* ¶¶ 6, 18.
195. *Id.* ¶ 17.

contrast, Nille AS argued that the licensing system violated Article 11 because it limited the number of retail outlets for videograms and thus constituted a quantitative restriction on videogram sales since many videograms sold in Norway are imported.[196] Nille AS also argued that the licensing system allowed Norwegian municipalities to arbitrarily determine who could sell videograms.[197]

Although the EFTA Court put forth a strong endorsement of the intent of Article 11 of the EEA Agreement and its companion Article 34 (ex 28, 30) of TFEU, the Court found that neither article prohibits a domestic law that regulates selling practices as long as there is no dissimilar treatment between videograms produced domestically or abroad, which they found to be the situation here.[198] Although the EFTA Court referred the case back to the national court for fact-finding, it held that in the event that the national court did find a quantitative restriction in violation of Article 11, the licensing system could not be upheld under Article 13 since "cultural policy" is not a means for exemption and that Article 11 must be "interpreted strictly" as is the case with its counterpart Article 36 (ex 30, 36) of the TFEU.[199]

In a case that involved several provisions of the EEA, the EFTA Court held that Article 11 was not violated by the practice of Iceland's State Alcohol and Tobacco Company (the "ATVR"), a government monopoly which serves as the sole customer of imported alcohol and has the exclusive right to the retail sale of alcohol, whereby imported alcohol sold to the ATVR must be placed on a specific ATVR-authorized pallet and the price of the alcohol must include the price of the pallet.[200] The plaintiff, HOB-vin, argued that such a policy discriminated against importers since domestic producers of alcohol were not obligated to use the required pallet nor did they have to include the cost of a pallet in the cost of the alcohol, which gives domestic producers an advantage in the marketplace.[201] In opposition, the Icelandic government argued that the pallets were required in order to keep uniformity in terms of both warehouse operation and price control due to the fact that if different importers used different

196. *Id.* ¶ 20.
197. *Id.*
198. *Id.* ¶ 23.
199. *Id.* ¶¶ 33, 37.
200. HOB-vín v. Ice., Case E-4/05, EFTA Ct. Rep. 4, ¶¶ 38 (Jan. 17, 2006), *available at* http://www.eftacourt.int/uploads/tx_nvcases/4_05_Judgment_EN.pdf.
201. *Id.* ¶ 28.

pallets, different cost structures would potentially cause discrimination among importers.[202]

Instead of applying Article 11 of the EEA, the EFTA Court centered its decision on Article 16, which requires member-state granted monopolies to adjust their practices so that discrimination does not exist regarding the procurement and marketing of goods made in member-states of the EEA.[203] The EFTA Court held that Article 16 is not violated unless a national court finds that the policy of the monopoly is designed to treat importers differently from domestic producers.[204]

In *Tore Wilhelmsen v. Oslo Kommune*, the EFTA Court found that Norway's licensing system that favored domestic beer producers over their foreign counterparts, and a state monopoly's sole control over beer with a certain alcohol by volume level was in violation of Articles 11 and 16 of the EEA.[205] The plaintiff first challenged Norway's beer classification system following the denial of an application for a license that included three classifications of beer whereby beer with an alcohol by volume percentage of 4.75% or greater could only be sold by the Norwegian state-granted monopoly.[206] However, pursuant to the classification system, no license was necessary to sell beer with an alcohol by volume percentage below 2.5%, and beer with an alcohol by volume percentage of between 2.5% and 4.75% could be sold by anyone who met the general rules for trading eligibility under Norwegian law.[207] The Norwegian state-granted monopoly, which by statute was not permitted to discriminate between suppliers and products based on country of origin, could not produce alcoholic beverages and was therefore dependent upon seeking suppliers for its retail outlets.[208]

The EFTA Court held that the 4.75% designation could be a violation of Article 11 if the national court could find that trade patterns between domestic and foreign producers of beer were different, even though the EFTA Court found that the designation was set in order to develop two separate tax schemes and not for the purpose of discriminating against

202. *Id*. ¶ 30.
203. *Id*. ¶¶ 27–38.
204. *Id*.
205. Tore Wilhelmsen v. Oslo Kommune, Case E-6/96, EFTA Ct. Rep. 53, ¶ 111 (June 27, 1997), *available at* http://www.eftacourt.int/uploads/tx_nvcases/6_96_Advisory_Opinion_EN.pdf.
206. *Id*. ¶ 2.
207. *See id*. ¶ 3.
208. *See id*. ¶¶ 5, 7.

foreign beer producers.[209] However, the EFTA Court did state that if the designation could be justified on public health grounds, Article 13 may allow for the designation in an attempt to combat alcohol abuse.[210] Regardless, the EFTA Court did not find the 4.75% designation permissible under Article 13 in light of the ECJ's decision in *Criminal Proceedings Against Keck*.[211] Additionally, the EFTA Court stated that the Norwegian state-granted monopoly and the rules that govern its operation could still be in violation of Articles 11 and 16 despite the fact that, by statute, it was designed not to treat domestic and foreign beer producers differently.[212] Indeed, the EFTA Court found Article 11 to be specifically violated since foreign beer producers were denied a license to sell 4.75% beer while domestic producers did not have to apply for such a license.[213]

Norway's ban on the importation of fortified cornflakes was at issue in *EFTA v. Norway*.[214] Here, the Norwegian Food Control Authority, exercising its power under Article 13, attempted to prohibit the importation and marketing of Kellogg's Corn Flakes due to the fact that the flakes were fortified with four vitamins and minerals including thiamine, riboflavin, niacin, and iron despite the fact that the flakes had been widely manufactured, sold, and marketed in other EEA member-states.[215] Norway put forth several reasons justifying its ban, including that only authorized nutrients were needed by the Norwegian population's diet, that extensive use of fortification would lead to an unbalanced level of nutrients, that it would put consumers at risk if the fortified nutrients were advertised without providing the total nutritional value of the product, that basic foodstuffs should be manufactured only with high-nutritional value raw materials, and that the addition of nutrients to cereals was not obligatory in any Nordic country.[216] The Norwegian Health Ministry

209. *See id*. ¶ 56–57. The Court labeled the designation a "legally neutral dividing line" but believed that this same designation should be measured against the patterns of beer production in different states. *Id*.
210. *Id*. ¶¶ 85, 111.
211. *See id*. ¶ 49–50.
212. *See id*. ¶¶ 65–66.
213. *See id*. ¶ 62.
214. EFTA Surveillance Authority v. Kingdom of Nor., Case E-3/00, EFTA Ct. Rep. 73, ¶ 1 (Apr. 5, 2001), *available at* http://www.eftacourt.int/uploads/tx_nvcases/3_00_Judgment_EN.pdf.
215. *See id*. ¶ 1–2.
216. *Id*. ¶ 2.

added that free fortification practices could lead to additional products on the market that would create a risk to public health, and that the principle of non-discrimination in the trade in goods would require a member-state to allow the importation of all fortified food items if just one were allowed.[217]

The EFTA Surveillance Authority brought a complaint against Norway pursuant to Article 11, stating that in order for the fortified cornflakes ban to be upheld under Article 13, Norway would have to demonstrate that the product created a health risk.[218] In reply, Norway stated that it could produce scientific research to show that by eating fortified goods in an uncontrollable and unforeseen amounts, a health hazard could exist, but not that any one product alone gave rise to health hazards.[219] Finally, the Norwegian government contended that the precautionary principle could be applied to such products because less restrictive measures, such as labelling, would not work since consumers are unlikely to have the knowledge necessary to calculate health effects associated with the nutrients found in all dietary sources.[220]

The EFTA Court made mention that the European Commission and the EFTA Surveillance Authority agree that nutritional need alone is not a justification to block a product's importation and marketing on public health grounds.[221] The Surveillance Authority also contended that the cornflakes ban is inconsistent, since Norway has allowed other fortified goods to be produced and marketed within its borders and that such a ban can only be justified by way of international scientific research and the prevailing eating habits of the member-state.[222]

Ultimately, the EFTA Court found that Norway's ban on the importation and marketing of fortified cornflakes was a violation of Article 11 and was not permissible under Article 13.[223] The EFTA Court, while determining that the food product and its associated marketing in the case at bar was covered under EEA Agreement, stated that an EEA member-state is authorized to ban the importation and marketing of fortified foodstuffs so long as Article 13's requirements are met, which can include an assessment of the Norwegian diet.[224] The EFTA Court stated that the member-state imposing a ban based on public health should be granted leeway in doing so, but must balance that ban with the fundamental requirements of EEA law and

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217. *See id*. ¶ 3.
218. *See id*. ¶ 4.
219. *Id*. ¶¶ 5, 7.
220. *Id*. ¶ 5.
221. *See id*. ¶ 15.
222. *Id*. ¶¶ 16, 21.
223. *See id*. ¶ 43.
224. *See id*. ¶¶ 10–11.

scientific research. Further, the EFTA Court concluded that any such decision to ban goods should be subject to judicial review.[225] Moreover, the scientific evidence must be proportionate, non-discriminatory, transparent, and consistent with other measures taken to protect public health in that member-state.[226] According to its view of the proportionality principle, the EFTA Court agreed with the Surveillance Authority and the European Commission that the lack of a nutritional need cannot support an import ban under the EEA Agreement, a particularly restrictive measure, especially when the banned good is freely available in the EEA.[227]

Regarding scientific research, the EFTA Court held that insufficient, inconclusive, and imprecise scientific conclusions cannot be used to support the precautionary principle, and thus less restrictive measures would have to be taken by the member-state, and further, a zero-risk policy cannot be pursued except under the most exceptional circumstances.[228] However, although the EFTA Court found no reason to believe that Norway's ban was motivated by economic protectionism, it did find that the reason for the ban was based chiefly on the lack of need in the Norwegian diet for fortified nutrients and that if one such fortified food product were allowed entry into Norway, others must be made eligible for import.[229] It was the EFTA Court's belief that both grounds were faulty since the concern over lack of need for nutrients does not address the essential elements of Article 13 and that any application for importation into a member-state can be evaluated only on the merits of that specific good.[230]

EEA member-states that require building materials used in government contracts are manufactured in that member-state also run afoul of Article 11 and Article 13.[231] In *Fagtun ehf*, the EFTA Court found that Iceland's requirement that building materials (in this case, roofing elements) to be used in a government contract to construct school buildings be approved by the Icelandic government was an unlawful regulation serving as the equivalent effect of a quantitative restriction that could not be saved. The EFTA Court concluded this on the grounds that public safety concerns mandate

225. *See id*. ¶¶ 24–25.
226. *Id*. ¶ 26.
227. *See id*. ¶ 28.
228. *See generally id*. ¶¶ 30–32.
229. *See id*. ¶¶ 33, 35–36.
230. *See id*. ¶¶ 35, 37.
231. Fagtun ehf v. Government of Iceland, Case E-5/98, EFTA Ct. Rep., ¶ 37 (May 12, 1999), *available at* http://www.eftacourt.int/uploads/tx_nvcases/5_98_Advisory_Opinion_EN.pdf.

that the Icelandic government supervise the construction of those materials given the unique weather conditions in Iceland.[232]

In reaching its decision, the EFTA Court first had to deal with the preliminary issue of whether a "building committee," which set the parameters for the public works contract, was operating on behalf of the government for the purposes of Article 11.[233] Although the Icelandic government tried to argue otherwise, the EFTA Court believed that the building committee was operating on behalf of the Icelandic government, the City of Reykjavik, and the Municipality of Mosfellsbaer, since all three forms of government selected the members of the building committee and all three levels of government owned the school buildings that were subject to the regulations at bar.[234]

In finding that an Article 11 violation existed, the EFTA Court took notice of several facts. First, there was no determination on the part of the Icelandic government as to whether the roofing materials, made in Norway and imported into Iceland, would meet the standards set by Iceland's building regulations, nor was there an evaluation as to whether the roofing materials would qualify for an exemption.[235] Second, the EFTA Court noted that the EFTA Surveillance Authority and the European Commission both believed that any such regulation that requires materials to be used in public works contracts be manufactured in the member-state that establishes the public works project is a form of discrimination against foreign production.[236] Third, the EFTA Court cited case law from its own jurisprudence, as well as the ECJ, holding that any such restrictions on the free movement of goods, direct or indirect, actually or potentially, would serve as an unlawful limitation of Article 11 of the EEA Agreement and Article 34 (ex 28, 30) of TFEU.[237] In the end, the EFTA Court found the Icelandic building regulation to be a blatant form of discrimination in that the regulation expressly favored national production and excluded all possible use of imported goods.[238]

The EFTA Surveillance Authority and the European Commission decided that Article 13 could not save the Article 11 infraction because the discrimination was so overt.[239] Adding to that sentiment, the EFTA Court also found that the Icelandic government should have the burden of proof to show that only the domestically produced roofing elements could

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232. *Id*. ¶¶ 25–26, 33, 37.
233. *See id*. ¶¶ 20, 23–24.
234. *Id*. ¶ 23.
235. *Id*. ¶ 25.
236. *Id*. ¶ 28.
237. *Id*. ¶ 29.
238. *Id*. ¶¶ 30, 32.
239. *Id*. ¶¶ 35–36, 38.

provide the necessary protection in Iceland's weather, which the government failed to achieve.[240]

B. Advertising

The enforcement of a copyright, even in an attempt to protect the health and safety of potential users of a pharmaceutical, cannot be justified under Article 13.[241] In *Astra Norge*, the namesake plaintiff brought proceedings against the Norwegian government to prohibit the latter from issuing Summaries of Product Characteristics ("SPC") on Astra Norge's products that were brought into Norway through parallel import.[242] Specifically, Astra Norge stated that it had a national copyright on the SPC it prepared that could not be duplicated by the Norwegian government as was Norway's practice in an attempt to comply with its own Medicinal Products Act, which required an SPC on all imported medicinal products.[243] It is implied, but not specifically stated in the case, that if Astra Norge could enforce its copyright on the SPC it created and prevent the Norwegian government from applying it to parallel imports, the parallel importer would be prohibited from operating in the Norwegian market.

The EFTA Court's opinion largely focused on the issue concerning a potential limitation on the free movement of goods in violation of Article 11 through an assertion of a copyright, instead of the public health concern that might justify an exception to Article 11 through Article 13.[244] Both the EFTA Surveillance Authority and the European Commission contended that the enforcement of a copyright on behalf of Astra Norge would be a violation of Article 11's free movement guarantee and could not be saved under Article 13's set of exceptions.[245]

According to the EFTA Court, and pursuant to European Union Directive 83/570/EEC, the purpose of an SPC was to protect a consumer's health through an authorization system whereby any medicinal product would have to possess an SPC to be eligible for sale in a member-state, and while the manufacturer of the drug product can write the SPC, the

240. *Id.* ¶¶ 37–38.
241. Norwegian Government v. Astra Norge AS, Case E-1/98, EFTA Ct. Rep. 140, ¶ 26 (Nov. 24, 1998), *available at* http://www.eftacourt.int/uploads/tx_nvcases/1_98_Advisory_Opinion_EN.pdf.
242. *Id.* ¶ 4.
243. *Id.* ¶¶ 2–4, 15.
244. *Id.* ¶ 14.
245. *Id.* ¶ 15.

contents of the SPC are dictated by EU law.[246] This position was in contrast to that of Astra Norge, which argued that the SPC was largely a function of marketing and advertising.[247] While finding that Article 13 could not save the assertion of copyright by Astra Norge, the EFTA Court stated that without the ability to allow the Norwegian government to use the SPC from the original manufacturer/importer and place it on the equivalent drug that is brought into Norway by way of a parallel import, the parallel importer would be faced with the costs of drafting a new SPC, applying for approval of the SPC, and hiring a qualified pharmacist to participate in the process.[248] Moreover, the EFTA Court stated that it might be impossible for the parallel importer to draft an SPC that is sufficiently new and different so as to not infringe on the manufacturer-direct importer's copyright.[249] The EFTA Court also contended that since the drug was the same, regardless of whether it was directly imported or imported in a parallel fashion, the same SPC on both sets of drugs would be desirable from a public health standpoint.[250] In the end, the EFTA Court believed that the assertion of a copyright in such fashion would be incompatible with EEA law.[251]

The link between advertising and the use of tobacco was the subject of *Phillip Morris Norway AS v. The Norwegian State*.[252] In *Phillip Morris*, the Norwegian government had instituted a ban on advertising tobacco products as far back as 1973, but in the case at bar, the issue was whether the 2009 ban on visual display advertising constituted an unlawful quantitative restriction on imports given that, although the ban applied to all tobacco products, importers of tobacco products would be at a disadvantage since firms that at one time produced tobacco products in Norway would have an unfair advantage due to brand loyalty.[253]

The EFTA Court, in routine fashion, sought to address two questions. The first question was whether the prohibition on the visual display of tobacco products constituted an illegal measure having the equivalent effect of a quantitative restriction on the free movement of goods pursuant

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246. *Id*. ¶¶ 18–19. The EFTA Court did state that a member-state governmental authority could also write the SPC. *Id*. ¶ 19.

247. *Id*. ¶ 20.

248. *Id*. ¶ 22.

249. *Id*.

250. *Id*. ¶¶ 20, 22.

251. *Id*. ¶ 22.

252. Philip Morris Norway AS v. The Norwegian State, Case E-16/10, Judgment, European Free Trade Area Court, EFTA Ct. Rep. 330, ¶ 4 (Sept. 12, 2011), *available at* http://www.eftacourt.int/uploads/tx_nvcases/16_10_Judgment_EN.pdf.

253. *Id*. ¶¶ 2–5. The 1973 advertising ban covered all advertising of tobacco products in all forms of media. *Id*. ¶ 2. The 2009 visual display ban had one exception for "dedicated tobacco boutiques." *Id*. ¶ 5.

to Article 11.[254] Phillip Morris, the plaintiff, put forth several arguments as to why the EFTA Court should find a violation of Article 11. First, the plaintiff stated that, although no tobacco production existed in Norway by 2009 and the visual display ban was designed to apply to all products both domestic and imported, the visual display ban would favor domestic products over imported products since consumers would be more familiar with the former and this form of discrimination would be more punitive toward imported products.[255] Second, and related, since a complete media advertising ban existed, the only way in which to communicate information to consumers was to utilize a visual display in a retail outlet.[256]

Norway contended that the purpose of the visual display ban was to reduce tobacco consumption, recognizing a link between the advertising of tobacco and tobacco use, especially in regard to young persons and children.[257] Norway also argued that neither EU, nor EEA law (although both addressed the advertising of tobacco) addressed visual displays, and thus EEA member-states have the ability to impose stricter rules.[258] Third, Norway stated that the visual ban is not discriminatory in that it does not affect the free movement of goods and is instead the mere regulation of a selling arrangement.[259]

The EFTA Surveillance Authority stated that Norway's visual display ban was a regulation on a selling arrangement that applied to all traders, both domestic and foreign, and thus no discrimination existed.[260] The European Commission felt that the visual display ban was a "more radical form of an advertising ban" and since no tobacco production exists in Norway, there was no quantitative restriction despite recognizing that imported brands would have a much more difficult pathway in penetrating the Norwegian market for tobacco products.[261]

The EFTA Court stated that Article 11 prohibits EEA member-states from imposing regulations that treat imported goods differently than domestic goods, regulations that affect both domestic and imported goods, and regulations that hinder access to markets.[262] The EFTA Court noted

254. *Id.* ¶ 14.
255. *Id.* ¶¶ 16–17.
256. *Id.* ¶ 19.
257. *Id.* ¶ 21.
258. *Id.* ¶ 22.
259. *Id.* ¶ 25.
260. *Id.* ¶ 35.
261. *Id.* ¶¶ 36–37.
262. *Id.* ¶ 41.

that the intent of Norway's visual display ban was not to regulate trade among EEA member-states, but that the ban is capable of making market entry very difficult for new products.[263] However, the EFTA Court noted that if the ban were to be treated as a mere selling arrangement regulation that covered both domestic and imported goods, then a quantitative restriction is not present.[264] Although the EFTA Court found that the visual display ban was a selling arrangement regulation, the EFTA Court held that the visual display ban would have a discriminatory effect on imported tobacco products that were continuously imported into Norway in contrast to those tobacco products that were previously manufactured in Norway.[265] The EFTA Court acknowledged directly that tobacco brands formerly produced in Norway would have an advantage, and suggested that tobacco could at some point be manufactured once again in Norway.[266] The EFTA Court also stated that national courts, when addressing such an issue, must consider the relevant characteristics of the market and any effects of a visual ban on products that are new to the market.[267]

The second question for the EFTA Court was whether the Article 11 restriction could be allowed pursuant to Article 13.[268] Phillip Morris contended that the visual display ban was not suitable for reducing tobacco consumption and that Norway had an obligation to adopt a less-restrictive approach to achieving that goal.[269] Norway justified the visual display ban on public health grounds, asserting that the ban was proportional in that it was suitable to reduce tobacco consumption.[270] The EFTA Court stated that the burden of proof in such a matter should rest with the member-state government. However, Norway contended that a member-state should not be forced to prove that no other conceivable measure could be implemented to meet the proportionality requirement.[271]

The EFTA Surveillance Authority believed that the visual display ban could be justified on public health grounds pursuant to Article 13 and that EEA member-states should be granted a wide level of discretion on such matters.[272] The European Commission agreed that the visual display ban was acceptable under Article 13 as not only necessary, but also proportionate,

263. *Id.* ¶¶ 41–43.
264. *Id.* ¶ 44.
265. *Id.* ¶¶ 47–48, 51.
266. *Id.* ¶ 48.
267. *Id.* ¶ 49.
268. *Id.* ¶ 53.
269. *Id.* ¶ 56.
270. *Id.* ¶¶ 57, 59.
271. *Id.* ¶¶ 59, 62.
272. *Id.* ¶¶ 71–72.

further concluding that member-states should maintain wide discretion in such matters.[273]

On the second question, the EFTA Court agreed that on the issue of whether a regulation is proportionate, a member-state should be granted a wide level of discretion to determine what degree of protection to give its citizens in the field of public health.[274] Moreover, the EFTA Court acknowledged that this level of discretion could lead to varying levels of protection across the member-states, but the fact that varying levels exist does not make any one member-state's level of protection disproportionate.[275] However, contrary to the beliefs of the EFTA Surveillance Authority, the European Commission, and Norway, the EFTA Court stated that any restriction on a fundamental freedom can only be justified if the restriction is appropriate for obtaining the objective.[276] According to the EFTA Court, the area occupied by uncertainty in public health should allow a member-state to act to reduce threats to public health. Further, each EEA member-state should be given a presumption that it is doing what it can to protect human health, even if the member-state maintains the burden of proof.[277] Although the EFTA Court believed that the visual display ban was acceptable under Article 13, the EFTA Court stated that such an issue should be resolved by a member-state's court to determine whether a less-restrictive measure is possible to achieve the public health goal.[278]

C. Health Concerns

Articles 11 and 13 prohibit EEA member-states from requiring importers to gain permission from a member-state created alcohol monopoly before importing alcohol.[279] In *Restamark*, the EFTA Court entertained a challenge by an importer wishing to bring several bottles of whiskey and wine into Finland that already existed in commerce within the EEA.[280] The importer was required to seek, but was refused, authorization by Oy Alko Ab

273. *Id.* ¶¶ 75–76.
274. *Id.* ¶ 80.
275. *Id.*
276. *Id.* ¶ 81.
277. *Id.* ¶¶ 82–83, 85.
278. *Id.* ¶ 88.
279. Ravintoloitsijain Liiton Kustannus Oy Restamark, Case E-1/94, EFTA Ct. Rep. 15, ¶ 61 (Dec. 16, 1994), *available at* http://www.eftacourt.int/uploads/tx_nvcases/1_94_Judgment_EN_03.pdf.
280. *Id.* ¶ 2.

("OAA"), an entity created by the Finnish government maintaining a monopoly on the manufacture, sale, and export of alcohol in Finland.[281] The importer argued that such a permission-based restriction in the form of a license on the importation of alcohol in Finland was a violation of Article 11's prohibition on quantitative restrictions on the free movement of goods and not permitted as an exception pursuant to Article 13.[282] In contrast, the Finnish government argued that its licensing system was necessary to promote its general health and social policy by attempting to mitigate the harmful effects of alcohol.[283]

The EFTA Court held that the licensing system had the same effect as a quantitative restriction and was thereby prohibited under Article 11.[284] According to the EFTA Court, the licensing system could be an impediment to trade among the EEA member-states and could create conditions of delay and abuse by the member-state imposing such a system.[285] Moreover, the EFTA Court believed that the ECJ has consistently held the same position even when the licenses sought were granted automatically.[286]

The next question was whether the alcohol import licensing system was permissible under Article 13 as a public health exception to Article 11.[287] The EFTA Court did not doubt Finland's argument that the alcohol licensing system was designed to promote social and health concerns, but stated that even in cases of public health concerns, any such restriction on the free movement of goods must be proportionate to the goal of reducing alcohol consumption.[288] The EFTA Court did not find evidence that the goal of reducing alcohol consumption could only be met by entrusting the total control to alcohol to one state-granted monopoly.[289] The EFTA Court believed that the alcohol licensing system was too restrictive and thus a violation of Article 11 and not permitted by Article 13.[290]

In *Restamark*, the EFTA Court also addressed the question of whether entrusting total control over alcohol to a state-created monopoly was a violation of Article 16 of the EEA Agreement, which prohibits the creation of state-granted monopolies that engage in discrimination based on country of origin in regard to the sale of goods.[291] Most of the content in Article

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281. *Id.* ¶¶ 3, 60.
282. *Id.* ¶ 44.
283. *Id.* ¶¶ 53–54.
284. *Id.* ¶ 50.
285. *Id.*
286. *Id.* ¶ 49.
287. *Id.* ¶ 52.
288. *Id.* ¶¶ 57–59.
289. *Id.* ¶ 60.
290. *Id.* ¶ 61.
291. *Id.* ¶ 62. (Article 16 of the EEA Agreement states:

16 of the EEA Agreement mirrors Article 37 of the TFEU.[292] Specifically, Article 16 requires that any existing state-created monopolies be altered in a way that their operations do not discriminate against goods coming from other member-states.[293] The EFTA Court held that Finland's alcohol authority as the guardian of the alcohol licensing system must be adjusted to allow the importer in such a case to import alcohol products.[294]

An argument could be made that a member-state's gravest public health concern, whereby its stance that Article 13 should allow for restrictions, is in the area of pharmaceuticals. However, in *Grund, elli-og v. Icelandic Medicines Agency*, the EFTA Court held that a member-state cannot require parallel importers of medicines to submit manufacturing control reports.[295]

In the case at bar, the plaintiff was an Icelandic nursing home operator that purchased pharmaceuticals from a Norwegian wholesaler that purchased

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1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States. 2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegate by the State to others).

292. TFEU art. 37. (Article 37 (ex 31, 37) of the TFEU reads:

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others. 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States. 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned).

293. Restamark, EFTA Ct. Rep. 15, ¶ 65.

294. *Id*. ¶ 74.

295. Case E-7/11, Grund, elli- og hjúkrunarheimili v. Icelandic Medicines Agency (Lyfjastofnun), EFTA Ct. Rep. 1, ¶ 68 (Mar. 30, 2012), *available at* http://www.efta court.int/uploads/tx_nvcases/7_11_Judgment_EN.pdf.

the pharmaceuticals from another manufacturer.[296] However, in order to bring pharmaceuticals into Iceland, the Icelandic government required proof that such pharmaceuticals fulfilled the requirements of an Icelandic marketing authorization which according to the Icelandic government, the invoice and SPC failed to meet, meaning that the nursing home should have provided a control report as required by Icelandic law.[297] According to the Icelandic government, an SPC is not the equivalent of a control report.[298]

The key question posed to the EFTA Court was whether the Icelandic government could deny a parallel importer's ability to bring into Iceland pharmaceuticals that have marketing authorizations from a fellow member-state (here, Norway), on grounds that the Norwegian marketing authorization does not meet the requirements of the Icelandic marketing authorization for pharmaceuticals having the same name.[299] Second, the EFTA Court had to determine how a parallel importer without access to the original manufacturing control report could satisfy the concerns of the Icelandic government if the first part of the question is answered affirmatively.[300]

The provision for a marketing authorization is embedded in EU Directive 2001/83/EU, which mandates that no pharmaceutical product can be placed in the marketplace of an EEA member-state unless it has secured a marketing authorization that is designed to indicate that the benefits of using the pharmaceutical outweigh the associated risks.[301]

The EFTA Court was primarily concerned with the fact that the member-state requiring a unique marketing authorization for a pharmaceutical subject to a parallel import, when the pharmaceuticals have the same name, is likely to have all of the necessary information associated with the pharmaceutical, thereby making concern for the health and safety of its citizens unnecessary.[302] Requiring that a parallel import submit a manufacturing control report, which was not in the possession of the parallel importer and was likely submitted previously by the domestic seller of the same pharmaceutical, constituted an unnecessary measure having the effective equivalent to a quantitative restriction under Article

296. *Id.* ¶ 14. In such a case, the nursing home is the parallel importer since the pharmaceuticals in question were already available in Iceland with Icelandic authorization. The wholesaler is merely an exporter.
297. *Id.* ¶ 15.
298. *Id.* ¶ 16.
299. *Id.* ¶ 22.
300. *Id.* ¶ 23.
301. *Id.* ¶ 51.
302. *Id.* ¶ 58.

11 and not subject to a derogation under Article 13 since clearly less-restrictive measures are possible.[303]

The EFTA Court did prescribe solutions to member-states such as Iceland. According to the EFTA Court, member-states can engage in less restrictive maneuvers such as requiring manufacturers to provide control reports to the public, using existing information held by the member-state and other member-states, instituting a rebuttable presumption of conformity between the pharmaceutical already available in the member-state and that which is subject to a parallel import, and allowing the parallel importer to provide other information in an effort to prove conformity between the domestically available pharmaceutical and its parallel import counterpart.[304]

The EFTA Court further discussed the merits of parallel importing in that such importers work in the pharmaceutical sector in a way that allows the price of pharmaceuticals to drop to the benefit of both patients and national health care systems.[305] Moreover, the presence of parallel importers avoids "unnecessary partitioning" of the EEA marketplace by member-state and avoids monopolies.[306]

VI. ANALYSIS OF THE ECJ'S JURISPRUDENCE ON ARTICLE 34

There are seven prevailing themes found in the ECJ's jurisprudence. First, according to the ECJ, any possible restriction posed by a member-state must be proportionate to the member-state's goal.[307] In *Re Disposable Beer Cans*, the ECJ stated that there must be a proportional balance struck between a member-state's concern for the environment and a restriction on the free movement of goods pursuant to Article 34.[308] However, the ECJ found the requirement that any imported beer be placed in reusable cans to be an unlawful quantitative restriction while stating that there would exist other, less restrictive measures that could be employed to meet the member-state's concern for its environment.[309] Likewise, in a case that most would agree incorporates a more serious set of facts than beer cans, the ECJ held in *Humanplasma* that member-states must allow those

303. *Id.* ¶¶ 62–63, 66.
304. *Id.* ¶ 67.
305. *Id.* ¶ 64.
306. *Id.* ¶ 65.
307. Comm'n v. Den. (*Re Disposable Beer Cans*), 1988 E.C.R. 4607, ¶ 13.
308. *Id.*
309. *Id.* ¶ 21–22.

importing human blood to show proof that the blood is untainted and safe instead of a blanket rule that prohibits the import of human blood without proof that the donor was unpaid for the donated blood.[310] The ECJ found Austria's ban unpalatable given its proportionality test and further provided methods member-states could employ to make sure donated blood passing national boundaries is safe.[311]

A second and related theme in the *Disposable Beer Cans* and *Humanplasma* cases is the strong preference by the ECJ to force member-states to allow private parties to prove that they can meet the concerns of the member-states. In *Disposable Beer Cans*, the ECJ suggested that Denmark allow importers to prove that the beer cans they use could be reusable instead of being forced to purchase a particular type of beer can.[312] In *Humanplasma*, the ECJ suggested that Austria could require that blood be tested before importation.[313] Thus, any member-state considering a restriction on the free movement of goods in the form of a quantitative restriction should anticipate that, if the restriction is challenged, the ECJ will force the member-state to prove that a private party itself cannot show means to meet the goal of the member-state that supports the restriction.

A third major theme depicted in this survey of cases is that member-states must be uniform in their health concerns when defending a regulation that amounts to a quantitative restriction. In *Criminal Proceedings Against Zoni*, the ECJ found intolerable, in the face of Article 34, an Italian law that prohibited the importation of pasta made of either common wheat or a mix of durum wheat and common wheat, partially on grounds that Italy had supplied no evidence that the imported pasta would contain any harmful additives or colors.[314] Similarly, the ECJ stated in *Commission v. Denmark* that its ban on foodstuffs containing added vitamins and minerals was a violation of Article 34 largely due to Denmark's inability to provide scientific proof that the ban was necessary to protect human health.[315] The ECJ provided a related result in *Humanplasma* stating that since other member-states allow for blood donors to be compensated and EU law requires testing of such blood donations, the Austrian government could not enforce its ban on imported blood coming from member-states that allowed for donor compensation.[316] Likewise, Germany could not enforce its ban on imported meat products that included non-meat elements against

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310. Humanplasma GmbH, 2010 E.C.R. I-2389, ¶¶ 42, 46.
311. *Id.* ¶¶ 43–45.
312. Comm'n v. Den. (*Re Disposable Beer Cans*), 1988 E.C.R. 4607, ¶ 19.
313. Humanplasma GmbH, 2010 E.C.R. I-2389, ¶¶ 43–45.
314. Case C-90/89, Criminal Proceedings Against Zoni, 1988 E.C.R. 4285, ¶¶ 13, 20, 28.
315. Comm'n v. Den., 2003 E.C.R. I-9724, ¶¶ 48, 55, 57.
316. Humanplasma GmbH, 2010 E.C.R. I-2389, ¶¶ 43–46.

Article 34 since, although Germany attempted to justify the ban on grave concerns for health, the ECJ found that Germany's own research purported that Germans were receiving sufficient amounts of protein in their diets.[317] In a second case from Germany, *Re Purity Requirements for Beer*, the ECJ found fault with Germany's ban on imported beer products not meeting its requirements, in part due to the fact that Germany prohibited certain additives in beer yet allowed many of those additives to remain in its soft drinks.[318]

The fourth major theme is the almost uniform faith the ECJ possesses for warning labels as a means to allay fears among member-states that consumers will not be protected from imported products in which they are not familiar. In *Criminal Proceedings Against Zoni*, despite fears on the part of the Italian government that Italians would not be able to check the accuracy of labeling, the ECJ endorsed the potential labeling requirement as a means to meet Italy's consumer protection concerns so that consumers would know the contents of their purchased pasta.[319] In a similar fashion, the ECJ contended that labeling requirements in lieu of an absolute ban would suffice to protect consumers from purchasing the wrong kind of alcoholic beverage despite the similarity in bottle design in *Re the Use of Champagne-Type Bottles*.[320] The result was the same in *Re Purity Requirements for Beer*, in which the ECJ stated that labeling requirements could allow purchasers of beer to know the beverage's contents.[321] Ironically, the ECJ rejected a Belgian requirement that Scotch whisky imported into that member-state be accompanied by a certificate of authenticity, which seemingly would serve the same function as a warning label.[322]

The fifth major theme exhibited by these cases is the trust that the ECJ has in consumers to make their own choices and choose their own risks. The fourth major theme, the faith in warning labels, alone reflects an ECJ belief that consumers *will* read those espoused warning labels. However, the ECJ has gone further. In *Criminal Proceedings Against Zoni*, the ECJ

317. Comm'n v. Ger., 1989 E.C.R. 229, ¶¶ 2, 6, 8, 23.
318. Comm'n v. Ger. (*Re Purity Requirements for Beer*), 1987 E.C.R. 1227, ¶ 38.
319. Zoni, 1988 E.C.R. 4285, ¶¶ 1, 2, 4, 16, 17, 20.
320. Case C-179/85, Comm'n v. Ger. (*Re Use of Champagne-Type Bottles*), 1986 E.C.R. 3879, ¶¶ 13–15.
321. Comm'n v. Ger. (*Re Purity Requirements for Beer*), 1987 E.C.R. 1227, ¶ 33–35.
322. Case C-8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, ¶ 4. The ECJ's focus was more so on cost to the importer rather than consumer protection. *Id.* ¶¶ 4, 6.

specifically endorsed consumer preference by stating that it was desirable to have many kinds of pasta available for purchase and consumers should be able to use their purchasing power to choose a pasta.[323] Likewise, in *Commission v. Germany*, the ECJ contended that consumers should be allowed to maintain choices as to the nutritional value of meat products available for purchase.[324]

There are three cases surveyed in this work that exemplify the sixth major theme, which is the ECJ's insistence on equal treatment. In *Conegate v. HM Customs*, the ECJ found a British ban on imported sex dolls incompatible with Article 34 since the various political units in the United Kingdom had different standards and the import ban itself was more restrictive than any of those standards.[325] The ECJ commented similarly in *Ahokainen and Leppik*, stating that Finland's requirement that alcohol importers must maintain a license to do so violates Article 34 when the goods being imported (alcohol) are legal, made, and marketed in Finland and elsewhere.[326]

The last major theme revealed in the case law is the lack of support the ECJ maintains for member-state regulations that may increase costs to the importer. In *Dassonville*, the ECJ immediately picked up on Belgium's requirement that imported Scotch whisky be accompanied by a certificate of authenticity, which would increase the cost to the importer and make the importer's product more expensive.[327] The ECJ was equally concerned with additional costs that could be extended to the importer in *Re Disposable Beer Cans* in that the mandatory use of the government-required beer cans could be an additional expense for the importer and possibly pricing the importer out of the Danish market.[328]

However, there are two cases that do not fit the ECJ's strict prohibition on quantitative restrictions in the face of Article 34—*Lucien Ortscheit* and *Hahn*. The facts of *Lucien Ortscheit* make it the most troublesome in light of the dominant disposition of ECJ jurisprudence: the ECJ allowed Germany to engage in an advertising ban of pharmaceuticals being imported into Germany, but did not ban the pharmaceuticals themselves despite the fact that the pharmaceuticals were available in other member-states.[329] Although it is difficult to rationalize the ECJ's decision in *Lucien Ortscheit*, it likely rests with the fact that the ECJ itself stated that EU law was not

323. Zoni, 1988 E.C.R. 4285, ¶ 27.
324. Comm'n v. Ger., 1989 E.C.R. 229, ¶10.
325. Conegate Ltd., 1986 E.C.R. 1007, ¶¶ 8–10, 12.
326. Ahokainen, 2006 E.C.R. I-9171, ¶¶ 35, 39.
327. *Dassonville*, 1974 E.C.R. 837, ¶ 4.
328. Comm'n v. Den. (*Re Disposable Beer Cans*), 1988 E.C.R. 4607, 4631–32.
329. Lucien Ortscheit GmbH, 1994 E.C.R. I-5243, ¶¶ 12, 20–21.

harmonized on this topic.[330] However, the facts of *Hahn* seem less than compelling. Here, the ECJ allowed Austria to impose health-screening standards above what EU law already required.[331] In other words, and perhaps making the decision in *Lucien Ortscheit* more difficult to rationalize, EU law had clearly been harmonized in the form of both a directive and a decision on fish contamination.[332]

The lack of jurisprudential fit is perhaps strongest in *Ministere Public v. Mirepoix*. In that case, the ECJ allowed France's ban on imported agricultural products that were sprayed with a banned pesticide.[333] It could certainly be argued that of all the cases surveyed in this work from the ECJ, this case has the best set of pro-member-state regulation facts in that the quantitative restriction was based on a dangerous and banned pesticide, but the facts do not seem as compelling as those in *Humanplasma*, where the Austrian ban was based on a concern that contaminated blood might flow across member-state boundaries. Regardless, the facts of *Humanplasma* seem more compelling than a concern for tainted fish crossing international lines, as was the case in *Hahn*. Most likely, the ECJ's decision in *Hahn* can be justified on grounds that the ECJ found international scientific research finding adverse health effects associated with the chemical by which the Austrian government had attached a zero tolerance level.[334]

VII. SEPARATIONS AND SIMILARITIES IN THE JURISPRUDENCE OF THE ECJ AND EFTA COURT AND ANALYSIS

The first separation in jurisprudence between the ECJ and the EFTA Court can be found by examining *Ullensaker Kommune v. Nille*. In *Ullensaker*, the EFTA Court upheld a Norwegian regulation against an Article 11 attack requiring sellers of videos to maintain a license that would be granted by Norwegian municipalities.[335] The focus on the EFTA Court's decision was not on the ability of videos to make their way into

330. *Id.* ¶ 18.
331. Case C-121/00, Austria v. Hahn (Criminal Proceedings Against Walter Hahn) 2002 E.C.R. I-9193, ¶¶ 45–47.
332. *Id.*
333. Case C-54/85, Ministere Public v. Xavier Mirepoix, 1996 E.C.R. I-1067, ¶¶ 14, 16.
334. *Hahn*, 2002 E.C.R. I-9193, ¶¶ 34, 36, 39–41.
335. Ullensaker Kommune v. Nille AS, Case E-5/96, EFTA Ct. Rep. 30, ¶ 23 (May 14, 1997), *available at* http://eftacourt.int/uploads/tx_nvcases/5_96_Advisory_Opinion_EN.pdf.

Norway, but instead the potential impact for unequal treatment once the videos made their way inside Norway despite the fact that most videos sold in Norway come into the country as imports.[336] Although the EFTA Court relied on the ECJ's decision in *Criminal Proceedings Against Keck* to reach a conclusion that the licensing regime should be upheld, the EFTA Court's ruling seems to part ways with the ECJ's decision in *Ahokainen and Leppik*. In the latter case, the ECJ found disfavor in light of Article 34 with Finland's requirement that alcohol importers have a license to do so.[337] The ECJ's decision reflected a greater concern that the importer would suffer increased costs associated with its product in comparison to the EFTA Court's lack of concern that the Norwegian video sales license requirement would raise prices associated with imported videos.[338] What is also very noticeable when comparing the two licensing cases is that the ECJ maintained its proportionality requirement while the EFTA Court took a more deferential approach and stated that a national court could better measure balance between Article 11 and Article 13.[339]

As stated above, the ECJ has been continuously concerned with the extra costs that an importer may suffer because of a member-state's regulation on goods coming in from another member-state. Here lies the second instance of separation between the ECJ and the EFTA Court. In *HOB-vin v. Iceland*, the EFTA Court upheld Iceland's requirement that all imported alcohol come into the country on a government-authorized pallet.[340] Despite the plaintiff's chief arguments that the authorized pallet requirement would force additional costs to be assessed against its alcohol product, the EFTA Court found that Article 11's prohibition against quantitative restrictions on imports did not apply to regulations applicable to the procurement and marketing of products.[341]

The EFTA Court's approach is quite different than the theory espoused by the ECJ in the *Dassonville*, *Ahokainen and Leppik*, and *Re Disposable Beer Cans* cases. In these three cases, the ECJ found that the requirement of a certificate of authenticity, the mandate that importers of alcohol have an import license, and perhaps more to the point, the requirement that importers of beer used government-approved reusable cans to be an

336. *Id.* ¶ 20.
337. Ahokainen, 2006 E.C.R. I-9171, ¶¶ 22, 39.
338. *Id.* ¶ 35.
339. *Ahokainen*, 2006 E.C.R. I-9171, ¶¶ 29, 31; *Ullensaker*, EFTA Ct. Rep. 30, ¶¶ 33, 37.
340. HOB-vín v. Ice., Case E-4/05, EFTA Ct. Rep. 4, ¶ 38.
341. *Id.* ¶¶ 27–38.

infringement of Article 34 based at least in part on the idea that importers would suffer increased costs.[342]

The decision in *Wilhelmsen v. Oslo kommune* is a reflection of the third ideological split between the EFTA Court and the ECJ. In *Wilhelmsen*, the EFTA Court supported Norway's requirement that a state-granted monopoly maintain control over imported beer possessing an alcohol content above a certain level.[343] However, more importantly, the EFTA Court upheld this level of member-state control based on public health grounds (preventing alcohol abuse) thus allowing for a quantitative restriction based on both Article 11 and Article 13 grounds.[344] The approach by the ECJ in *Re Purity Requirements for Beer* was quite different because it expressly rejected Germany's concern that its beer purity laws be upheld in the face of Articles 34 and 36 on public health grounds and instead decided to allow consumers to make their own choices pursuant to labeling requirements.[345] Similar comment could be made in regard to the ECJ's holding in *Rewe-Zentral*. Here, the ECJ found Germany's minimum alcohol content requirements for imported beer, that were based in part on Germany's concern that lower-level alcoholic products could create greater health risks, to violate Article 34 as a quantitative restriction.[346]

The ECJ's decision in *Ahokainen and Leppik* decision is much closer to the EFTA Court's decision in *Wilhelmsen* because the ECJ was willing to defer to a national court at least to a degree in regard to a regulation that limited the consumption of alcohol.[347] Regardless, the ECJ still found the Finnish restriction to violate Articles 34 and 36 on grounds that such a restriction is likely to increase costs to the importer and there are other, less restrictive means to achieve the public health goal of limiting access to alcohol instead of a mandatory licensing system.[348]

Although there are some jurisprudential disconnections between the ECJ and the EFTA Court, there are some strong jurisprudential likenesses.

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342. Case C-8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 854; *Ahokainen*, 2006 E.C.R. I-9171, ¶ 35; Comm'n v. Den. (*Re Disposable Beer Cans*), 1988 E.C.R. 4607.

343. Wilhelmsen, EFTA Ct. Rep. 53, ¶111.

344. *Id*. ¶¶ 55, 87, 111.

345. Case C-178/84, Comm'n v. Den. (*Re Purity Requirements for Beer*), 1987 E.C.R. I-1227, 1 C.M.L.R. 780, 801–03, 807–08, 811 (1988).

346. Case C-120/78, Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 3 C.M.L.R. 494, 510 (1979).

347. Wilhelmsen, EFTA Ct. Rep. 53, ¶ 57; Ahokainen, 2006 E.C.R I-9171, ¶¶ 39–40.

348. Ahokainen, 2006 E.C.R I-9171, ¶¶ 29, 31, 35.

The first can be found in the EFTA Court's decision in *EFTA Surveillance Authority v. Norway*, where it found Norway's ban on the importation of cornflakes (due to the fact they were fortified with several vitamins and minerals) to be a violation of Article 11 above the member-state's concerns that the Norwegian population did not need such additives.[349] In three cases—*Commission v. Denmark* (enriched foodstuffs), *Criminal Proceedings Against Zoni* (common wheat and durum wheat), and *Commission v. Germany* (meat products with non-meat elements), the ECJ found prohibitions on the importation of foodstuffs based on nutritional or consumer protection concerns to be violations of Article 34.[350] In *Criminal Proceedings Against Zoni* and *Commission v. Germany*, the ECJ once again found greater faith in consumers to make the correct choice based on the content of a warning label.[351] However, in *Commission v. Denmark*, the ECJ was much more heavy-handed and demanded that a member-state prohibiting imported foodstuffs based on content grounds must have scientific research to support such a ban.[352]

A second connection in jurisprudence can be found in the *Ahokainen and Leppik* and *Restamark* cases. The EFTA Court in *Restamark* found that a Finnish regulation that required permission from a state monopoly to import alcohol was an unjustified quantitative restriction under Article 11 and Article 13.[353] The EFTA Court's language in Restamark was much stronger because it required a finding of proportionality to justify a restriction on Article 13 grounds allowing for public health regulations.[354] The EFTA Court also did not believe a system in which control of alcohol was vested in a state-granted monopoly was the best means to achieve Finland's goal of reducing alcohol consumption.[355] *Ahokainen and Leppik* is another case originating in Finland in which the ECJ likewise found the Finnish requirement of a license from a state-granted monopoly inexcusable under Articles 34 and 36.[356] Similar to the EFTA Court in *Restamark*, the ECJ required a finding of proportionality between the regulation and the member-state goal, which, according to the ECJ, did not exist.[357]

The decision by the EFTA Court in *Fagtun ehf v. Byggingarnefnd Borgarholtsskóla* reflects jurisprudence closer to that of traditional ECJ

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349. EFTA Surveillance Authority, EFTA Ct. Rep. 73, ¶ 43.
350. Comm'n v. Den., 2003 E.C.R. I-9724, ¶ 57; Zoni, 1988 E.C.R 4285, ¶¶ 12, 20, 28; Comm'n v. Ger., 1989 E.C.R 229, ¶¶ 2, 7, 10, 23.
351. Zoni, 1988 E.C.R 4285, ¶¶ 14, 16; Comm'n v. Ger., 1989 E.C.R 229, ¶ 13.
352. Comm'n v. Den., 2003 E.C.R. I-9724, ¶¶ 46–48.
353. Restamark, EFTA Ct. Rep. 15, ¶¶ 50, 61.
354. *Id.* ¶¶ 57–59.
355. *Id.* ¶ 60.
356. Ahokainen, 2006 E.C.R I-9171, ¶¶ 22, 30.
357. *Id.* ¶¶ 29, 31.

decisions and represents a third example of agreement between the two European courts. In *Fagtun ehf*, the EFTA Court stated that Iceland's requirement that all building materials to be used on school buildings be manufactured in Iceland violated Article 11.[358] Of important note in *Fagtun ehf* was the EFTA Court's comment that no proof existed that the imported school building materials could not have met the standards set by the Icelandic government and that the regulation was a blatant form of discrimination favoring national production of such materials as no imported materials could possibly be manufactured under the supervision of the Icelandic government.[359] Furthermore, the EFTA Court stated that Iceland should maintain the burden of proof to show that other imported materials could not meet the standards set by Iceland.[360]

Two cases from the ECJ identified in this work are similar to the *Fagtun ehf* decision by the EFTA Court. The ECJ's decision in *Re Disposable Beer Cans* similarly required the Danish government to relinquish its requirement that beer importers use preapproved beer cans in contrast to a more preferable system whereby the beer importer could show that its beer cans could pass muster against Danish public health standards.[361] As well, the ECJ in *Humanplasma* made several suggestions serving as alternatives to the Austrian government as to how it could protect its citizens against the risks associated with tainted, imported blood while recognizing a heightened level of authority for member-states to set restrictions based on public health grounds.[362]

Perhaps the most unusual jurisprudential connection between the EFTA Court and the ECJ can be found while examining the former's decision in *Phillip Morris* and the latter's decision in *Lucien Ortscheit*. The link between these cases is unusual due to the fact that *both* courts found tolerable a restriction affecting imports. In *Phillip Morris*, the EFTA Court upheld in the face of an Article 11 challenge an all-encompassing ban on tobacco advertising which included both domestic and imported brands despite the fact that the domestic tobacco brands would have an advantage over the imported rivals since Norwegian consumers would naturally be more

358. Fagtun ehf., EFTA Ct. Rep. 51, ¶¶ 30–32
359. *Id.* ¶¶ 25, 30, 32.
360. *Id.* ¶¶ 37, 38.
361. Comm'n v. Den.,(*Re Disposable Beer Cans*), 1988 E.C.R. 4607.
362. Humanplasma GmbH, 2010 E.C.R I-2389, ¶¶ 39–40, 43–45.

familiar with the brands formerly produced in Norway.[363] The EFTA Court found the Norwegian advertising ban to be more of a regulation on selling arrangements.[364] In *Lucien Ortscheit*, the ECJ upheld (in the face of Articles 34 and 36) an advertising ban on pharmaceuticals imported into Germany while still allowing for the importation of these pharmaceuticals.[365] In contrast to the EFTA Court, the ECJ found the German ban tolerable under Article 36 as a limitation on imports to protect human health.[366]

VIII. CONCLUSION AND THE THREAT TO EEA HARMONY

Some scholars have commented that the international legal system is becoming fractured in its jurisprudence.[367] Admittedly, this work only explores a few cases that highlight some of the differences in jurisprudence between the ECJ and the EFTA Court on the subject of the free movement of goods in an attempt to gauge the level of, and momentum for, the harmonization of law only in Europe and only on the topic of free movement of goods. However, it should be noted that these are not the only prominent European courts charged either expressly or impliedly with the harmonization of law in Europe. Professor Ernst-Ulrich Petersmann argues that the jurisprudence of the European Court of Human Rights should be part of any calculus to gauge the level of harmonization of law in Europe, especially on the topics of economic rights and taxation on which both the TFEU and EEA comment.[368] Regardless of the reason for the jurisprudential difference, the difference presents several risks to the legal efforts toward harmony in the EEA common market.

The first risk is that the EEA will evolve into a "two-speed" trade association whereby the EU countries will be harnessed by tighter restrictions on any attempt to enact rules that will limit the cross-border trade of goods in comparison to the countries of Norway, Liechtenstein, and Iceland. Over time, the uncertainty over the interpretation of common market law could cause trade distortions as some traders will be more comfortable trading within the EU and thus, in order to reduce the risk of being blocked

363. Philip Morris Norway AS v. The Norwegian State, Case E-16/10, EFTA Ct. Rep. 330, ¶¶ 16, 35–37, 51, 86, 88 (Sept. 12, 2011), *available at* http://www.eftacourt.int/uploads/tx_nvcases/16_10_Judgment_EN.pdf.

364. *Id*. ¶¶ 43–45.

365. Lucien Ortscheit GmbH, 1994 E.C.R I-5243, ¶¶ 12, 20–21.

366. *Id*. ¶¶ 10, 16.

367. Ioana Cismas, *The Integration of Human Rights in Bilateral and Plurilateral Free Trade Agreements: Arguments for a Coherent Relationship with Reference to the Swiss Context*, 21 CURRENTS INT'L TRADE L.J. 3, 5 (2013).

368. Ernst-Ulrich Petersmann, *Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law*, 30 LOY. L.A. INT'L & COMP. L. REV. 367, 417–18 (2008).

by a domestic regulation, those same traders will concentrate on the markets of the 28 EU member-states to the detriment of the remaining EEA member-states. As stated above, it was a chief concern among firms located in countries outside the EU/EEC during the 1960s, 1970s, and 1980s that forged a stronger relationship between the EU and the EFTA countries resulting in the EEA. A return to a two-speed Europe would expose firms outside the EU, but within the EEA, to risks that they become relatively less competitive in comparison to the firms within the EU.

This two-speed Europe would also expose the citizens of the three EFTA countries to a reduction in the level of competition among firms producing goods. If the EFTA Court continues to find ways to allow member-states in the EEA, but not in the EU, to enact restrictions even in the face of an Article 11 attack, those citizens will face higher prices and potentially poorer quality. Thankfully, the EFTA Court found some limits on the ability of a member-state to enact restrictions in *EFTA Surveillance Authority* and *Fagtun*. Regardless, the *Ullensaker*, *HOB-vin*, and *Wilhelmsen* cases are still good law.

A second risk is that with continuing differences in common market law interpretation, the EEA dissolves. It is foreseeable that if the disparity in jurisprudence continues, at some point in time the EU government will take action to push the EFTA Court, and the EFTA member-states, to adopt a stricter interpretation of common market law. In turn, if the EFTA countries do not find this palatable, these three member-states may exit the alliance. The potential for a split is not motivated by jurisprudential differences alone. As mentioned above, Iceland is no longer seeking entry into the EU. At the time of this writing, the United Kingdom, a current EU member and former EFTA member, is contemplating a referendum on maintaining member-state status.[369]

A third risk is the worst imaginable. Given the current momentum toward protectionist measures being adopted by all countries (albeit largely due to political winds that have been produced by poor economic conditions), many of the EU countries could become more comfortable with the EFTA Court's jurisprudence and push the ECJ, and the EU government in general, to adopt the EFTA Court's jurisprudence. Although

369. Nicolas Winning, *U.K.'s Tony Blair Attacks David Cameron EU Referendum Plan*, WALL ST. J. (Apr. 7, 2015, 9:13 AM), http://www.wsj.com/articles/u-k-s-tony-blair-slams-david-camerons-eu-referendum-plan-1428411875?KEYWORDS=United+Kingdom+referendum.

it would most certainly be viewed as shortsighted and politically motivated, but if domestic politicians see a gain by pushing for greater restrictions on imports, the EU's common market itself could be in jeopardy.

One explanation for the jurisprudential differences between the EFTA Court and the ECJ, aside from the cultural differences discussed throughout this work, could rest on reality that the EFTA Court's jurisdiction is more limited in comparison to the ECJ's jurisdiction, despite the fact that both courts are charged with interpreting the EEA uniformly.[370] Currently, the EFTA trade group is in negotiations with several other countries in various areas of the world including other non-EU, non-EEA countries, Central Asian countries, and even East Asian countries.[371] However, there is comment that trade negotiations on the part of EFTA have focused more on general guidelines instead of specific rules which leads one to believe that the trade group is still not ready for more integrative economic relations.[372] It will be very interesting to see if the EFTA changes its trade focus towards greater integration over time reflective of a common market or continues to maintain a less integrative path akin to traditional free trade agreements.

370. Lior Zemer & Sharon Pardo, *Justice & Foreign Affairs: Taking the European Neighborhood Partner Countries to the European Court of Justice*, 14 CARDOZO J. INT'L & COMP. L. 1, 9 (2006).

371. Cismas, *supra* note 367, at 4–5.

372. *See* Ryan Farha, *A Right Unexercised is a Right Lost?: Abolishing Antidumping in Regional Trade Agreements*, 44 GEO. J. INT'L L. 211, 215 (2013).