UNIVERSITY OF TURKU
Faculty of Law

Assessment of the Compatibility of Section 17 of the Alcohol Act with the Free Movement of Goods

The Law of the EU Internal Market (OT00BE42)
Bachelor's thesis

Author:
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Abstract page

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The thesis examines the legality of the recently amended Finnish Alcohol Act. The author argues that despite its bearing on the Finnish alcohol monopoly, Alko, it should not be examined under the special provision of Article 37 TFEU. Instead, it should be subjected to review under the general Article 34 TFEU. The author uses traditional legal method, by examining case law of the Court of Justice of the European Union and relevant prior legal research and textbooks in EU internal market law. The thesis follows the framework of prior legal research regarding State monopolies, which has argued for the dismissal and abolition of Article 37 TFEU. Prior research has, however, focused mainly on the alcohol monopoly of Sweden, while the thesis approaches the subject from a Finnish perspective. The author concludes that Article 37 TFEU causes legal uncertainty and is not appropriate for the legal assessment of Section 17 of the Alcohol Act. The approach under the light Article 34 suggests that the Finnish amendment is in its current state not compatible with EU rules on the free movement of goods. The author proposes that the amendment be modified in a way, which does not distinguish between different methods of production.

Key words: state monopolies, free movement of goods, internal market, European union law

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Opinnäytetyö tarkastelee lähiaikoina muutetun alkoholilain EU-oikeuden mukaista laillisuutta. Kirjoittaja väittää, että alkoholiyhtiöön kytkeytymisestä huolimatta muutettua 17 §:ä ei tule tarkastella Artikla 37 SEUT nojalla. Sen sijaan, sen laillisuutta tulisi tarkastella Artiklan 34 SEUT näkökulmasta. Opinnäytetyön metodina on lainoppi. Keskeisinä lähteinä kirjoittaja käyttää Euroopan unionin tuomioistuimen ratkaisukäytäntöä sekä olennaista aikaisempaa oikeustieteellistä tutkimusta ja argumentointinsa tukena EU:n sisäiseen markkinaan keskittyviä oppikirjoja. Opinnäytetyö kytkeytyy olennaisesti valtiollisista monopoleista tehtyyn aikaisempaan kriittiseen tutkimukseen, joka on kuitenkin keskittynyt lähinnä Ruotsin alkoholimonopoliin. Kirjoittaja tarjoaa siis uuden, suomalaisen perspektiivin aiheeseen. Keskeisimpänä johtopäätöksenä kirjoittaja väittää, että Artikla 37 SEUT aiheuttaa oikeudellista epävarmuutta, ja että Artikla 34 SEUT tarjoaa paremman työkalun alkoholilain muutoksen laillisuuden tarkastelulle. Tarkastelun seurauksena vaikuttaa vahvasti siltä, ettei alkoholilain 17 §:n muutos ole EU-oikeuden mukainen. Kirjoittaja ehdottaa, että alkoholilain 17 §:stä poistetaan valmistustaparajoitus.

Avainsanat: valtiollinen monopoli, tavaroiden vapaa liikkuvuus, EU:n sisäinen markkina, EU-oikeus

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Case C-198/14, Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio - Tullihallitus, EU:C:2015:751.

EFTA Court

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List of Abbreviations

ABV	(Ethyl) Alcohol by volume
TFEU	Treaty on the Functioning of the European Union
the Court	Court of Justice of the European Union
EEA	Agreement on the European Economic Area
AG	Advocate General

1 Introduction

1.1 Background and purpose

Alcohol is often subject to governmental control due to its detrimental health effects. The Finnish system for controlling the consumption of alcohol rests on two main pillars, the State-controlled alcohol monopoly, and the licensing scheme for the sale of alcoholic products sold outside the monopoly. Section 6 of the Alcohol Act (Alkoholilaki, 1102/2017) grants Alko an exclusive right for the sale of alcohol in the region of Finland, which establishes the monopoly. An exception to the exclusive right is the licensing scheme, which grants duly authorised licensees the right to sell certain beverages containing alcohol.[1]

The Finnish policy on government control seems to have progressively shifted towards becoming more lenient, beginning with the reform that ended the prohibition era in 1932. The development has not concluded, as Finnish legislation on alcohol has been through extensive reform in recent years. Most notably, the amended Alcohol Act (Alkoholilaki, 1102/2017), which extended the licensing scheme to cover both distilled and fermented products containing up to 5,5 percent ABV. The intention for further reform, particularly regarding distance and retail sales, was outlined in the Programme of Petteri Orpo's Government.[2] The resulting amendment narrowed the scope of the monopoly, resulting in expanded market access for certain products.

The Nordic system of substance control through state monopolies is a curiosity in the European sense.[3] The amendment thus offers an opportunity to examine the often-overlooked Article 37 TFEU.[4] The thesis aims to clarify the legal uncertainty concerning the recent amendment to Section 17.1 of the Alcohol Act. Furthermore, it attempts to tackle the elusive principle of separability, established by *Cassis de Dijon.*[5]

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1 Section 17 of the Alcohol Act.
2 A strong and committed Finland: Programme of Prime Minister Petteri Orpo's Government, The Finnish Government, 2023, p. 118-119.
3 Nordic in this context excludes Denmark. The only other EU Member State to operate an alcohol monopoly is Sweden (Systembolaget). Norway, Iceland and the self-governing territory of the Faroe Islands also operate alcohol monopolies. On Nordic alcohol monopolies, see Nordic alcohol monopolies: understanding their role in a comprehensive alcohol policy structure and public health significance. World Health Organization. Regional Office for Europe. 2025, p 2.
4 Butler, Graham, State Monopolies and the Free Movement of Goods in EU Law: Getting Beyond Obscure Clarity. Legal Issues of Economic Integration 48 (3), 2021, pp. 285–308, p. 288.
5 Case C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, EU:C:1979:42, para 7.

1.2 Methods, research questions, and structure

The research topic shall by examined by using the following research questions:

Should Section 17.1 of the Alcohol Act be examined in the light of Article 34 TFEU or Article 37 TFEU?

Is Section 17.1 of the Alcohol Act compatible with the applicable Treaty Article?

The research questions shall be answered using traditional legal method, by interpreting and systemising the relevant Treaty Articles. The most relevant material for the purposes of this thesis is the case-law of the Court of Justice of the European Union (the Court). As regards previous research into the subject, articles by Graham Butler concerning the Swedish alcohol monopoly,[6] and State monopolies in a broader sense,[7] have been profoundly influential for the purposes of this paper.[8] *EU Law, Text Cases and Materials* by Paul Craig and Gráinne de Búrca, and respectively *The Substantive Law of the EU* by Catherine Barnard have been helpful starting points regarding the free movement of goods. Regarding delimitation, the thesis concentrates on the restriction to imports, thus leaving the implications of applying Article 35 TFEU on export restrictions outside its scope.

The second chapter examines the applicability of the special provision Article 37 TFEU. It argues for why the amendment should be seen as separable from the inherent function of the alcohol monopoly. The third chapter examines the amendment in the light of Article 34 TFEU. It covers the mutual recognition principle established by case law beginning with *Cassis de Dijon*. Furthermore, it establishes why the amendment should not be considered a ‘selling arrangement’ in the meaning of *Keck*.[9] It also examines whether the amendment could be justified under Article 36 TFEU. The fourth chapter presents the conclusions of the thesis.

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6 Butler, Graham, Sweden and the Free Movement of Alcoholic Goods in the EU Internal Market. European Public Law 29 (1) 2023, pp. 75–114.
7 Butler, Graham, 2021.
8 In a brief but insightful correspondence Professor Graham Butler contributed, by affirming that my preliminary views were not unfounded and thus, by indirectly influencing the direction for this paper. For that he has my most sincere gratitude. However, the insights of the correspondence have not influenced the findings below, although the ideas discussed are present in the two articles mentioned above.
9 Joined cases C-267/91 and C-268/91 Keck and Mithouard, EU:C:1993:905.

2 The applicability of Article 37 TFEU

2.1 The national provision

The amended Section 17.1 of the Alcohol Act (1102/2017) entered into force in June 2024. The amendment permitted fermented beverages, in particular beers, wines, and ciders, containing up to 8 per cent alcohol to be sold by duly authorised licensees. Prior to the amendment, the sale of beverages containing over 5,5 per cent alcohol was reserved for the wholly State-owned alcohol retail monopoly Alko. The amendment thus limits the scope of the Finnish alcohol monopoly. However, distilled beverages, such as "alcopops", which may for the purposes of this thesis be defined as flavoured sodas or juices mixed with alcohol, produced through distillation and aimed at young consumers, were left outside the scope of the amendment.[10] According to the government proposal the discrepancy was a necessity due to the way sweet alcopops appeal to young consumers, particularly girls and young women.[11]

The discrepancy ought to be considered, however, discriminatory by nature. However, for a provision to be considered as discriminatory under EU law, the goods involved must be a part of the same market, in other words, they must compete. In *United Brands,* a competition law case concerning the import of bananas, the Court found bananas to be sufficiently distinct from other fruits, namely oranges and apples, to be considered as having its own market. Features which made the banana distinct include appearance, taste, softness, easy handling and so on.[12] In other words, the Court looked at whether the banana could easily be substituted by apples or oranges. If the price of bananas rose dramatically, would consumers switch to apples? By analogy, do fermented alcoholic beverages compete with distilled beverages? Without delving deeply into economic analysis and outside the scope of this paper, the author believes the Court would likely find them to be substitutable and competitors of each other. However, if the Court were to find them sufficiently distinct, then they could be subjected to different rules.

Certain manufacturers, those producing fermented products will benefit, while others are put at a disadvantage. The amendment thus impacts the consumption, sale and trade of alcoholic beverages. However, the government proposal contends that manufacturers most likely to be

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[10] On the definition of alcopops, see Case E-9/00, EFTA Surveillance Authority v The Kingdom of Norway, 2002, para 31.
[11] HE 7/2024 vp., p. 37.
[12] Case C-27/76, United Brands v Commission, EU:C:1978:22.

affected negatively by the amendment are domestic, and thus, that producers from other EU Member States should be considered beneficiaries of an increasingly open market in fermented alcoholic goods.[13] The amendment does, however, raise some serious concerns. The main issue is whether, national governments are prohibited by European Union law from imposing measures, which in practice result in the differential treatment of certain products, based on the method used to manufacture a product.

Generally, it could be stated that EU rules on the free movement of goods impact national measures which give preferential treatment to domestic goods, resulting in a competitive advantage over imported goods.[14] Whether the provision in fact imposes the same burden on both domestic and imported products is discussed in Chapter 3.1.

The distinction of fermented and distilled products has wide-ranging effects on the market of alcoholic beverages in Finland. As a result of the amendment, fermented products have access to a substantially larger distribution network and market compared to distilled products, which must distribute through the alcohol monopoly.[15] Thus, the amendment must be seen as having at least a potential effect on inter-state trade.

2.2 Complex, obscure, and special

It could be argued that the amended Section 17.1 concerns the existence of the Finnish alcohol monopoly, and that therefore, it must be examined under Article 37 TFEU.[16] It is a fair argument to make, as the scope and overlap of Articles 34 and 37 has been a matter of debate for decades.[17] The Court itself noted the complex nature of Article 37 in *Costa v ENEL*.[18] Furthermore, it could be said, that the applicability of Article 37 TFEU has been shrouded by obscurity since its very inception.[19] Article 37 TFEU provides that Member States are obligated to adjust any State monopolies, which conduct commerce, so that nationals of Member States are not subject to any discriminatory measures. Furthermore, Member States may not impose new measures which are contrary to this. In other words,

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13 HE 7/2024 vp., p. 37.
14 Craig, Paul – De Búrca, Gráinne, p. 685.
15 The government proposal notes that the distribution channels available for fermented products could increase by a factor of 17, p. 12.
16 Snell, Jukka, asiantuntijalausunto hallituksen esityksestä HE 7/2024 vp., Sosiaali- ja terveysvaliokunta, 23.04.2024.
17 Butler, Graham, 2021, p. 288.
18 Case 6/64, Flaminio Costa v. ENEL, EU:C:1964:66.
19 Butler, Graham, 2021, p. 287.

State monopolies may be considered legal under European Union law, if they do not apply discriminatory practices towards nationals of Member States.

It is considered accepted within European legal tradition, that a more specific rule overrides a general rule, if the two provisions legislate over the same subject.[20] Therefore, if Article 37 TFEU is more specific than Article 34 TFEU, and it governs over the same subject, it is to be considered *lex specialis*.[21] The aim of Article 34 TFEU is undoubtedly to ensure that the free movement of goods within the single market is protected. It has been considered that the aim of Article 37 TFEU is to ensure that governments are not able to bypass the free movement provisions by establishing or maintaining State monopolies, in a way that limits trade more than is necessary for the purposes of the monopoly.[22] Article 34 requires the fundamental abolition of quantitative restrictions and measures having equivalent effect. Article 37 TFEU derogates from this principle, granting State monopolies the right to apply some restrictions of free movement, when it is inherent in their existence.[23] Therefore, Article 37 TFEU acts as an exception to the more general rules found in Articles 34-36 TFEU, and thus it may be regarded as *lex specialis,* when examined in relation to the provisions on free movement.[24]

The main issue, which the Court established in *Cassis de Dijon,* and which is discussed in Chapter 2.3, concerns the separability of national provisions relating to the monopoly.[25] For the purposes of approaching the issue of separability the thesis will consider the meaning and scope of "State monopoly", whether all rules relating to a State monopoly must be examined in the light of Article 37 TFEU, and if not, which rules must. Chapter 2.4 argues that despite Article 37 TFEU being considered *lex specialis* in relation to Article 34-36, it is not applicable to Section 17.1 of the Alcohol Act.

2.3 Separability

The scope of Article 37 TFEU is not unlimited, rather the Court has found rather strict limitations on its application. National rules relating to a State monopoly do not always fall

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20 Lex specialis derogat legi generali.
21 Hancox, Emily, A Normative Case for the Principle of Lex Specialis in EU Law, pp. 81-104 in Lonardo, Luigi – Loxa, Alezini (ed.), The Reasoning of the Court of Justice of the EU: A Normative Assessment, 2026, Oxford University Press.
22 Butler, Graham, 2021, p. 288.
23 Case C-189/95, Criminal proceedings against Harry Franzén, EU:C:1997:504, para 39.
24 On Article 37 TFEU being considered lex specialis, see e.g. Commission notice C (2021) 1457, Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU), The European Commission, 2021, p. 61.
25 Case C-120/78; Butler, Graham, 2021, p. 290.

under Article 37 TFEU, despite it being considered *lex specialis*. It is considered established case law of the Court of Justice of the European Union that “rules relating to the existence and the operation of a monopoly must be examined in the light of the provisions of Article 37 TFEU”. The principle of separability provides that rules, which have a bearing upon but are not inherent to the monopoly’s existence, must be examined under Article 34 TFEU.[26] What constitutes as rules relating to the existence and the operation of a monopoly has, however, not been adequately decided by the Court.[27]

In the controversial *Franzén* judgment,[28] the Court found that only restrictions which are “inherent in the existence of the monopolies in question” are compatible with the free movement of goods.[29]The Court did however not conclude how the essence of State monopoly could be captured.[30]The vague conclusions of the Court part in *Cassis de Dijon*, *Franzén* and subsequent case law, primarily the failure of defining what is part of the existence and operation of the monopoly result in legal uncertainty. This could be seen as reason for why the Court has seemingly avoided interpreting Article 37 in recent case law.[31]

In *EFTA Surveillance Authority v Norway,* the EFTA Court found Norway to be in breach of the Agreement on the European Economic Area.[32] The provisions of note in the case were Article 11 EEA and Article 16 EEA. The case is relevant, as the wording of the Articles coincides closely with the wordings of Article 34 TFEU and Article 37 TFEU. The Court found that Norway had breached Article 16 EEA by reserving *Vinmonopolet* the exclusive right to the retail sale of alcopops, which were mostly imported, in contrast to beer, which was mainly produced in Norway and could be sold outside the monopoly.[33] Norway was also found to have breached Article 11 EEA, by imposing more restrictive licensing requirements to undertakings, that wished to serve alcoholic beverages other than beer, mostly manufactured in other EEA countries, compared to beer manufactured primarily in Norway.[34]

26 See inter alia cases Franzén para 36, Rosengren and others para 18, ANETT para 23, Visnapuu para 87.
27 Butler, Graham 2021, p. 292-293.
28 Case C-189/95, Criminal proceedings against Harry Franzén, EU:C:1997:504; for a critique of Franzén, see Butler, Graham 2023, pp. 90-91.
29 Case C-189/95, Franzén, para 39.
30 Butler, Graham, 2021 pp. 293-294.
31 Butler, Graham, 2021 p. 306.
32 Case E-9/00, EFTA Surveillance Authority v The Kingdom of Norway, 2002.
33 Ibid. para 47
34 Ibid. para 58

EFTA Surveillance Authority v Norway makes it a clear case in favour of the application of Article 37 TFEU. The Court is however, not bound by the rulings of the EFTA Court, and furthermore, the recent case-law of the Court seems to suggest, that the Court has repeatedly refrained from applying Article 37 TFEU, and instead, has opted to examine national provisions in the light of the general provisions Articles 34-36 TFEU. In fact, the European Court of Justice has not applied Article 37 TFEU after *Hanner* in 2005.[35]

In *Rosengren*, the Court had to rule on the legality of a provision of the Swedish Alcohol Act, which prohibited the import of alcoholic beverages by individuals if they did not personally transport them. The Court found that provisions relating to the methods of retail sale and selection of goods are regarded as regulating the operation of the monopoly.[36] The Court, however, avoided the interpretation of Article 37 TFEU by claiming that the import of goods did not “concern the monopoly’s exercise of its specific function” and was not essential to its existence.[37]

The sentiment of *Rosengren* was largely repeated in *ANETT*, where the Court was asked to rule on the legality of a provision of Spanish law, which prohibited tobacco retailers from importing manufactured tobacco products from other Member States. The Court found that the national measure in question was separable from the operation of the monopoly, since it did not concern selling arrangements or product selection.[38] Conversely, if a national measure relates to the methods of retail sale of alcoholic beverages or the organisation of product selection, it should to be seen as regulating the operation and existence of the monopoly. However, the Court avoided dealing with the interpretation of Article 37 TFEU once again, by concluding that the prohibition at issue was separable because it affected the upstream market of tobacco products instead of the retail market.[39]

In *Visnapuu* the Court had to rule whether Finnish provisions imposing tax duties on distance sales of alcohol from other Member States constituted an infringement on the free movement of goods.[40] The Court concluded that alcoholic beverages which form part of Alko’s exclusive

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35 Case C-438/02, Criminal Proceedings against Krister Hanner, EU:C:2005:332; Butler, Graham 2023, pp. 92-93.
36 Case C-170/04, Rosengren and others v Riksåklagaren, EU:C:2007:313 para 24.
37 Ibid. para 22.
38 Case C-456/10, Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado, EU:C:2012:241, para 23.
39 Ibid. para 29.
40 Case C-198/14, Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio - Tullihallitus, EU:C:2015:751.

right to retail, governed by Section 13 of the Alcohol Act (1143/1994), should be considered under Article 37 TFEU.[41] It thus seems that the Court is stating that if alcoholic beverages are not covered by the licensing scheme, they are inherently part of the monopoly. The Court referred the question of the monopoly's legality back to the national court, narrowly avoiding the application of Article 37.

However, the Court agreed with the suggestion of the Finnish Government that the licensing scheme, provided by Section 14 of the Alcohol Act (1143/1994), and thus the distance sale of goods not subject to the alcohol monopoly, must be considered as being separable from the existence and operation of the monopoly. Therefore, it must be examined in the light of Article 34 TFEU.[42] The licensing scheme permitted duly authorised licensees to engage in the retail sale of fermented alcoholic beverages containing no more than 4,7 per cent ABV. The Court stated that since the licensing scheme permits persons other than Alko to engage in retail sale, Paragraph 14 of the Alcohol Act (1143/1994) does not govern the operation of Alko, or the use of its exclusive rights. The licensing scheme laid down by Section 17 of the Alcohol Act (1102/2017) corresponds closely with Section 14 of the repealed Alcohol Act (1143/1994). It follows, according to the judgment in *Visnapuu*, that Section 17 of the Alcohol Act should be seen as separable from the monopoly.

2.4 Separable from the operation of the monopoly?

Paragraph 17 of the Alcohol Act distinguishes fermented beverages from distilled ones, granting one method of manufacture preferential access to the market. Thus, if a product "passes the requirement", meaning that it is manufactured a certain way, it gets preferential treatment. The amendment accomplishes this by reserving the sale of alcoholic beverages containing 5,5-8 per cent alcohol to the monopoly. This section examines whether such a provision is separable from or inherent to the monopoly and demonstrates why Article 37 TFEU has not been applied by the Court for over two decades.

The main effect of the amendment is not on traders at the retail level, rather it limits wholesalers and manufacturers. The distinction between fermented and distilled incentivizes marketing and manufacturing fermented products, as they gain access to a larger market. Assuming the wholesalers and manufacturers are operating rationally, they would prefer a

41 Ibid. para 90
42 Ibid. para 91

larger market, as more customers generally generates more profit. Under *ANETT*, a national provision which imposes a restriction on manufacturers and the wholesale market, rather than a selling arrangement of the retail market, should be seen as separable from the monopoly.[43] Therefore, it must be examined under Article 34 TFEU.

Following the reasoning of *Rosengren* and *ANETT*, however, where the Court concluded that a national provision governing the retail sale and product selection of the monopoly, if the amendment is seen as merely organizing the methods of retail sale in Finland, then it must be considered in the light of Article 37. Admittedly, the amendment does have a bearing on retail sale. However, as the Court found in *Visnapuu*, the licensing scheme itself is separable from the operation of the monopoly. Furthermore, anything under the licensing scheme is outside of Alko's exclusive rights.[44] Therefore Paragraph 17, which governs the licensing scheme for the retail sale of alcohol outside of the State monopoly, could be seen as separable from the monopoly, in which case it must be considered under Article 34 TFEU.

The function of Alko is to execute the retail sale of alcoholic beverages, unless those beverages are governed by the licensing scheme. The purpose for the alcohol monopoly could be seen as the control of alcohol and the consequent preservation of public health. If it is seen such, it follows that Alko's existence and operation do not depend upon whether it maintains the exclusive right to sell distilled alcoholic beverages containing between 5,5 to 8 per cent ABV. The distilled beverages are just as harmful to human health as their fermented counterparts, unless other evidence is provided. The only evidence provided by the government relates to studies showing that alcopops are preferred among the youth. Therefore, the core function of Alko in limiting the availability of spirits and other beverages subject to abuse would remain, and thus the measure does not concern the monopoly's specific function. Following the reasoning of *Rosengren,* it could thus be argued that Paragraph 17 of the Alcohol Act should be seen as separable from the existence of the monopoly.

Article 37 TFEU has largely been seen as necessary, because it does not require the abolition of State monopolies and thus reconciles State monopolies with the common market, however, in response to that argument the following should be noted.[45] State monopolies that are

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43 Case C-456/10, ANETT, para 29.
44 Case C-198/14, Visnapuu, para 89.
45 Case C-189/95, Franzén, para 39.

beneficial could still be justified on the grounds of Article 36 TFEU, discussed in depth in Chapter 3.3. Alcohol monopolies such as *Alko* or *Systembolaget* could thus still be compatible with the free movement of goods, if they are deemed suitable and necessary for the protection of public health. If their aims could be achieved through means that are less restrictive on the internal market, then that would be a net positive. State monopolies, which are neither suitable nor necessary to achieve their purported aims, are not beneficial for the economy of the European Union or its citizens.

The issue of separability is, as is evident from the different outcomes the case law provides, intrinsically uncertain. The lack of a clear definition of what constitutes as sufficiently inherent in the monopoly's existence to be considered in the light of Article 37 TFEU creates legal uncertainty. Therefore, it could be argued that greater legal certainty would be achieved, if monopolies were subject to the broader market access test of Article 34 TFEU.[46] The recent developments in case law seem to support this proposal. The Court has repeatedly refrained from interpreting Article 37 following *Hanner*. Furthermore, it seems unlikely that the Court would revert to applying it. A more likely scenario would be that the Court would find a new way to avoid interpreting Article 37 TFEU, as it did in *Rosengren, ANETT,* and *Visnapuu*. Consequently, the chapter below proposes that the legality of Section 17 of the Alcohol Act should be examined in the light of Articles 34 and 36 TFEU and discusses the implications of doing so.

46 Butler, Graham, 2021, p. 307.

3 The applicability of Article 34 TFEU and Article 36 TFEU

3.1 The burden of Section 17 of the Alcohol Act

Is the distinction drawn between fermented and distilled products a dual-burden rule or an equal-burden rule?[47] Dual-burden rules are, as the name implies, rules that impose additional burdens on imports, and which must be objectively justified by the State.[48] The imported good must comply with both the laws of where it is manufactured (the home State) and where it is sold (the host State). Equal-burden rules apply similarly to both domestic and foreign goods and may in certain cases be considered under Article 34 TFEU.[49] An example of an equal-burden rule would be a national provision which restricts at which time a product may be purchased.

Section 17.1 of the Alcohol Act applies equally to domestic and foreign manufacturers and makes no distinction between foreign and domestic goods. However, a product which contains between 5,5 to 8 per cent ABV and is manufactured through distillation in an EU Member State, would be subject to a substantially narrower market, than would be the case, if the distinction between fermented and distilled products did not form part of the law. Therefore, in practice, the distinction could be seen as applying a dual-burden on imported products, as it impedes market access to Finland for goods produced through distillation, after the product has already complied with the laws of the home State. The implication of the distinction between dual-burden and equal-burden rules for the purposes of examining the legality of Section 17 of the Alcohol Act is further developed when discussing *Keck* below.

The restriction or burden in question is largely a matter of market access. The narrower scope of distribution channels for distilled products directly leads to a restriction in the volume of trade. The implications of this, and the market access test established by the Court in *Trailers* will also be discussed in further detail below.[50]

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47 On the distinction between equal-burden and dual-burden rules, Weatherill, Stephen – Beaumont, Paul, EU Law, 3rd ed., Penguin 1999, pp. 608-609.
48 Craig, Paul – De Búrca, Gráinne p. 713.
49 Ibid.
50 Case C-110/05, Commission v Italy, EU:C:2009:66.

3.2 Product requirement or selling arrangement?

The provision under examination in this chapter is Article 34 TFEU, which prohibits governments from imposing quantitative restrictions and measures of equivalent effect on inter-state trade. The provision prohibits restrictions which have a direct or indirect, and actual or potential, effect on inter-state trade[51]. Rules imposing such restrictions or measures may, however, be justified on the grounds of Article 36 TFEU, if they are necessary and proportionate and achieve venerable causes, such as the protection of the health and life of humans. A State's responsibility to care for the public health of its citizens is not merely accepted as a justifiable ground for derogation, it may be considered mandated by Article 168 TFEU. However, such a derogation would have to comply with the principle of proportionality.

I consider it only fitting to begin by examining one of the most famous cases of the Court, *Cassis de Dijon.*[52] For those unfamiliar, Germany had imposed a minimum alcohol content requirement for spirits, which prevented goods legally in circulation within France from being imported to Germany. The Court found this to be a measure having equivalent effect to a quantitative restriction. Furthermore, such a requirement could not be justified on the grounds of protecting public health and safety or consumer protection. *Cassis de Dijon* established the principle known as mutual recognition, which provides that products legally produced and marketed within a Member State, must be considered as legal within the territory of the common market, despite contrary domestic rules, unless those rules are justifiable under Article 36 TFEU.

The principle of mutual recognition established by *Cassis de Dijon*, provides that national rules, which apply certain requirements, in particular, but not limited to; designation, form, size, weight, and composition,[53] to be met by imported goods lawfully manufactured in a Member State, constitute measures of equivalent effect prohibited by Article 34 TFEU. It follows, that if a Member State were to apply requirements, which apply differential treatment to products based on their means of production, such a requirement would have to be considered a measure of equivalent effect, capable of having a direct or indirect, actual or

51 Case 8-74, Procureur du Roi v Benoît and Gustave Dassonville, EU:C:1974:82, para 5.
52 Case C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, EU:C:1979:42.
53 Joined cases C-267/91 and C-268/91 Keck and Mithouard, EU:C:1993:905, para 15.

potential, effect on inter-state trade. Thus, it would have to justified on the grounds of Article 36 TFEU.

The counterargument could be made, that the amendment does not concern a product requirement, but that it constitutes a selling arrangement, as the amendment merely provides for where goods may be legally marketed within the State. The implication would be, that the State would not be required to justify the amendment.[54] The Court developed the principle of selling arrangements in *Keck,* which shall be examined subsequently.[55] *Keck* concerned a French provision, which prohibited the sale of alcohol at a loss. The resulting precedent provides that measures "regarding the way in which goods are sold",[56] do not constitute measures of equivalent effect, because they do not have a detrimental effect on inter-state trade. It could be said that the judgment in *Keck* rests on the presumption that selling arrangements apply equally to domestic and foreign products, which is not always the case.[57]

Firstly, the selling arrangement principle established by *Keck* hinges in part on the fact that undertakings operating in the market are all subject to the same burden.[58] It could also be formulated as the principle of universality.[59] Section 17.1 of the Alcohol Act provides extended market access to undertakings that produce fermented products in comparison to undertakings that produce alcopops, even when those products have identical ethanol content, and thus identical effects on health. Therefore, it cannot be seen as applying the same disadvantage to all undertakings on the market of alcoholic beverages containing between 5,5 to 8 per cent ABV. This could be seen as having a dual-burden on imports, as they have already had to comply with the laws of the home State. Furthermore, in *Visnapuu*, the Court found that the Finnish provision did not comply with universality, as the requirement to hold a license did not apply to Alko.[60] Consequently, the amendment could not be seen as a selling arrangement in the meaning of *Keck* and would instead be considered an MEE under Article 34 TFEU.[61]

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54 Weatherill, Stephen, p. 333.
55 Joined cases C-267/91 and C-268/91 Keck and Mithouard, EU:C:1993:905.
56 Davies, Gareth in Koutrakos, Panos – Snell, Jukka (ed.), p. 17.
57 Ibid., p. 18.
58 Davies, Gareth, p. 22; Craig, Paul - de Búrca, Gráinne, p. 716.
59 Barnard, Catherine, p. 128.
60 Case C-198/14, Visnapuu, para 107; Barnard, Catherine, p. 128.
61 Barnard, Catherine, p. 129.

One might make the argument that, in fact, Section 17 of the Alcohol Act does not impose a dual-burden on imports, as the location where goods are sold is the same for domestic and imported products. However, as Advocate General Jacobs noted in *Leclerc-Siplec*, even rules that impose the same burden on both domestic and imported goods may have a significant impact on market access. AG Jacobs further stated that if goods need to be altered in any manner to gain access to the market of the host State, it will amount to a substantial barrier of access.[62] To gain access to the whole alcohol market in Finland, producers and wholesalers would have to shift to fermented goods. This shift would be an alteration that significantly impacts market access. So even if, the rules are not seen as having a dual-burden on imported goods, they would still be caught by Article 34 TFEU by the market access test, which will be discussed further below.

Secondly, the result of the presumption in *Keck* is seen in *Ker-Optika,* where the Court found while citing *Keck*, that selling arrangements fall under Article 34 TFEU, if they in practice apply a restriction on inter-state trade, by restricting market access, in other words, preventing imports from entering the market of the host state.[63] Thus, if the amended Section 17.1 of the Alcohol Act is seen as preventing market access, then following the reasoning of *Ker-Optika,* it constitutes a measure of equivalent effect, regardless of it being seen as a selling arrangement. The Court's reasoning in *Ker-Optika* is not, however, without fault. Barnard points out that the Court seemingly reversed the most important finding of *Keck*, that selling arrangements are to be presumed legal, unless the opposite is proven.[64] The scope of *Keck* is further limited by the decisions in *Commission v Italy (trailers)*, which will be discussed subsequently.[65]

It could be argued that "all undertakings which engage in legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market"[66] In *Commission v Italy (trailers),* the Court provided the market access test, which added a third category alongside distinctly and in-distinctly applicable measures. In-distinctly applicable measures were split between product requirements and rules concerning market circumstances, or

62 Opinion of AG Jacobs in C-412/93 Leclerc-Siplec, EU:C:1994:393, para 44.
63 Case C-108/09, Ker-Optika, EU:C:2010:725; Davies, Gareth, p. 17.
64 Case C-110/05, Commission v Italy, EU:C:2009:66; Barnard, Catherine, p. 139.
65 Ibid., p. 142.
66 Opinion of Advocate General Jacobs in Case C-412/93, para 41.

measures hindering market access.[67] The notion of market access has notably been criticized by Snell, as a catch-all provision, which may be freely used by the Court according to its own conjecture.[68]The author shall attempt to avoid falling into this trap.

The market access test in *Commission v Italy* could be stated as follows: Any measure, which has the effect of hindering access to a market of a product, which is lawfully produced and marketed in another Member State, is a measure of equivalent effect to a quantitative restriction.[69] Limiting the amount of available retail locations certainly affects market access. However, there are some cases to consider. In *LPO*, the Court ruled that limiting distribution channels by granting exclusive rights to opticians constituted an indistinctly applicable MEE.[70] However, several cases list provisions concerning the place and times of sale to be certain selling arrangements.[71] Although, Barnard notes that in uncertain cases the Court is more likely than not to consider the national measure an MEE. Furthermore, national measures which imposed a requirement to alter the contents of a periodical have been deemed product requirements.[72] By analogy, having to alter the methods of manufacture should be viewed as a product requirement.

In conclusion, the amended Section 17 of the Alcohol Act does indeed regulate where alcoholic goods may be sold within the State of Finland. However, it is not a pure selling arrangement, as it would have to meet the two limbs of Keck, universality and equal burden. Alcoholic beverages must be manufactured using a certain method to gain access to the whole market. This is a product requirement, which is a measure having equivalent effect to a quantitative restriction. It could also be considered a measure that limits market access. Such a measure has equivalent effect to a quantitative restriction. Thus, both roads lead to the measure being a breach of Article 34 TFEU.

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67 Barnard, Catherine, pp. 118-119.
68 Snell, Jukka, The notion of market access: A concept or a slogan?, 2010, Common Market Law Review vol. 47, pp. 437-472.
69 Case C-110/05, Commission v Italy, para 58.
70 C-271/92, Laboratoire de Prothèses and Groupement d'Opticiens Lunetiers Détaillants, EU:C:1993:214.
71 C-391/92, Commission v Greece, EU:C:1995:199; C-71/02, Karner, EU:C:2004:181.
72 C-368/95, Familiapress, EU:C:1997:325.

3.3 Article 36 TFEU

Derogations from the free movement of goods should generally be interpreted narrowly.[73] Possible grounds of derogation are exhaustively listed in Article 36 TFEU,[74] and among them is crucially the protection of the health and life of humans. The effects of alcohol use have generally been shown in research to be detrimental to human health and life span, although light drinking has been shown to have some cardiovascular benefits.[75] It goes thus without saying, that the promotion of public health through limiting alcohol consumption and alcohol associated mortality is a cause which is justifiable under Article 36. (also mandatory requirements?)

A derogation is however subject to the principle of proportionality. A derogation must be both suitable and necessary to achieve its purported aims.[76] In other words, that the means taken by the State should not burden the internal market more than is strictly necessary.[77] The justification will thus not be allowed, if the end goal could have been achieved through less restrictive means.[78]

Thus, the issue could be described as follows. Is the distinction between fermented and distilled products, suitable and necessary, for the attainment of the aim of protecting the health of the youth, in particular girls and young women?[79]

Firstly, the government proposal itself notes that according to research it seems likely that the demand for alcoholic beverages increases as supply increases.[80] It seems thus contradictory to claim that the distinction and consequent differential treatment of products based on their process of manufacture protects the health of the youth, when the amendment itself increases the supply and subsequently the consumption of alcohol.

Secondly, instead of subjecting alcopops to the exclusive right of the monopoly, far less restrictive measures could have been taken. These include effective age-limit control and surveillance of duly authorised licensees to ensure that underage people cannot consume

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73 Weatherill, Stephen, p. 306.
74 Ibid. p. 307.
75 see in particular Wakabayashi, Ichiro - Groschner, Klaus, Alcohol and life expectancy, Chapter 2.
76 Weatherill, Stephen, p. 307, 312.
77 Ibid. p. 307.
78 Ibid. p. 312.
79 HE 7/2024 vp., p. 37.
80 HE 7/2024 vp., p. 12.

alcohol. The sanctions for the failure of ensuring age-limit control are already in place, and if the issue of underage drinking persists, it must be subjected to stricter enforcement, not through a measure capable of restricting imports.

Finally, although the government proposal contends that there is research which supports that alcopops are a cause of underage drinking,[81]there is an argument to be made that sweet ciders and certain types of wine could serve as effective substitutes for alcopops. Even alcopops themselves can be produced through fermentation,[82] which leaves the distinction between fermented and distilled products utterly pointless from the perspective of limiting the availability of alcopops.

In conclusion, the distinction between fermented and distilled products, when examined under Article 36 TFEU is neither suitable nor necessary to achieve its purported aim. Therefore, the distinction could not be justified under Article 36 TFEU.

81 HE 7/2024 vp. p. 37.
82 As an example, the Otto long drink, produced by Hartwall, is manufactured through fermentation.

4 Conclusion

The Court could examine Section 17 of the Alcohol Act in the light of Article 37 TFEU. Given the recent development in case law, it seems however unlikely that this would be the case. The far more likely scenario, provided by the judgments in *Rosengren, ANETT* and *Visnapuu,* is that the legality of the amendment would be examined under Article 34 TFEU. This has a few benefits. Firstly, the legal uncertainty arising from the separability test can be completely avoided. Secondly, it would subject State monopolies to the more comprehensive restrictions test of Article 34, compared to the discrimination test applied by Article 37.

The amendment seems to result in a dual-burden on imports. The provision is not merely a selling arrangement in the meaning of *Keck.* It should rather be seen as a product requirement, which restricts market access for certain producers and wholesalers, by restricting the available locations for retail sale. The distinction between fermented and distilled beverages results in an effect on inter-state trade, which is equivalent to that of a quantitative restriction. It follows, that the amendment would be caught by Article 34 TFEU.

Furthermore, it seems unlikely that the amendment could be reasonably justified under Article 36 TFEU. Firstly, the amendment is not suitable to achieve the aims which it claims to protect. In contrast, the inaptitude of the distinction in achieving its aims makes the distinction's purpose and relevance seem rather intangible or non-existent. Secondly, the exclusion of distilled alcoholic beverages from the market provided to fermented products would likely not be seen as the least restrictive measure the State could have taken. Based on that, it seems that the amendment, in its current state, is incompatible with the free movement of goods within the Single Market. An easy solution to make the amendment compatible with EU law, is to remove the distinction between fermented and distilled products.[83]

The findings do not suggest that State monopolies would be inherently incompatible with Article 34 TFEU. For products containing high percentages of alcohol, it seems completely reasonable to argue that a State monopoly is both suitable and necessary for the protection of public health. Thus, it could be argued that if the reasoning in *Franzén* is to be followed, Article 37 TFEU is without purpose, as it is not necessary for the reconciliation of monopolies with free movement. The inherent purpose and existence of a monopoly, which is suitable and

83 Kuoppamäki, Petri, asiantuntijalausunto hallituksen esityksestä HE 7/2024 vp., Sosiaali- ja terveysvaliokunta,15.03.2024.

necessary for the attainment of important aims could still be justified, while the legal uncertainty created by Article 37 TFEU is avoided.

Therefore, the paper seems to support the suggestions that Article 37 TFEU should be repealed.[84] The examination of the legality of Section 17 of the Alcohol Act also seems to support the findings made by Butler in *State Monopolies,*[85] that subjecting State monopolies to the general provisions of Articles 34-36 would result in greater legal certainty and should therefore be preferred.

84 See e.g. Butler, Graham 2021; Butler, Graham 2023.
85 Butler, Graham 2021, pp. 306-307.