

# [Chloe 25.01.18 firstly, in this scenario, there](https://assignbuster.com/chloe-250118-firstly-in-this-scenario-there/)

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CHLOE MITCHELL16003865EU LAW HYPOTHETICAL CASE SCENARIOS2500WORDS – DUE DATE 25. 01. 18 Firstly, in this scenario, there isquestion as to whether there is a restriction to the ‘ Freedom of Circulation ofGoods’1. Byapplying Article 34 of the TFEU2, andby following the ‘ Quantitative Restriction’ definition made by Geddo3 (whichstates that Quantitative Restrictions amounts to a restraint to thecircumstances of imports or exports of goods in transit4), atrade restriction can be identified. Estonia’s national legislation prohibitsan individual from using fireworks and allows only public authorities thepermission to use them on public holidays or special occasions. In this sense, therestriction made is not due to competition – it is a barrier on the Freedom ofthe Circulation of Goods5.

Quantitative Restrictions prohibit only a certain percentage of goods, butEstonia is not prohibiting the import or export of these goods, so it cannot bea quantitative restriction. However, they are setting a restriction on who isallowed to buy them but also there is not a restriction on how many can bebought by the public authorities running the firework displays. Under Article 36 of the TFEU, restriction can be justified on the grounds of “ protection for the health andlives of humans, animals and plants” 6. However, understanding that there is not a particular reason that Estonia hasput in place this restriction, it can be argued that this is not justificationenough as there is no violation of human health if there is a continuation tosell and import these items internally. However, for Estonia, this could bedependent on their figures for lives and animals put at the risk of danger orland being destroyed during or due to the use of fireworks. Estonia’s restriction on purchasingfireworks can be questioned as to whether it is an obstacle to market access.

Referringto the Keck (C-267 and 268/91 Keck7), thetest of this suggests that even with unclear legal requirements, CertainSelling Arrangement (CSA) arranged by a government, can be regarded asdiscriminatory if it effects the importation of goods. This is also a breach ofArticle 34 TFEU8. The Keck test is passed and there are no breaches of the test as it does notaffect the importation of goods, but it is definitely an obstacle to the marketas there is a limitation on who can buy the fireworks and hinders access to themarket – and this will affect the amount of product bought in Estonia, respectively. For Article 34, the main issuewould be to consider the effect rather than the purpose. If the effect of ameasure, which in this case would be the prohibition of private individualsorganizing firework displays, effects or hinders the free movement of goods inthe UK, then this what is seen as the important factor and is the reason whyrestrictions are not allowed under Article 34. In this particular scenario, ignoring the purpose of the restriction, the restriction itself doesn’tnecessarily hinder the freedom of movement of goods, but what it will impact isthe quantity and the amount of product that will be wanted in Estonia and soeventually, will impact the movement of goods.

Although this is not necessarilyon the same path, it could be said that the restriction on who can usefireworks will affect who will buy them, which in turn will massively affecthow many need to be imported based on how many are being bought at a time. Thiswould be a relevant argument to refer to Article 34 and to focus on Tallinncompany. Similar to this, you can apply thecase of C-110/05 Commission V Italy (2009)9. Inthis, Italy banned the use of motorcycles towing trailers. The court, in thiscase, stated that ‘ measures having equivalent effect’ refer to both thediscriminatory national rules and also to any measure which hinders access tothe market. The court in Commission v Italy based ruled that, on the grounds ofpublic safety, it was a fair restriction to make in accordance with Article 24EC (now renamed and known as Article 34 TFEU). This could be brought into thisscenario very similarly as, for the safety of the public, animals and thesurroundings, the Estonian government have decided simply to restrict the useof fireworks of private individuals to public authorities only.

ApplyingC-110/05 and Article 34 here works neatly to form a strong argument in favourof the Estonian government. To be specific, there is nospecific restriction on fireworks being bought, only on who can buy them/usethe and on the specific days they may be used. The restriction is not there asa prohibition of fireworks being imported or exported, the restriction issimply on the person buying or using them, not on the fireworks themselves.

Finally, by applying the test ofproportionality, it will be determined; whether the object of a measure isimportant enough to justify ‘ the limitation of a protected right’, whether themeasure is logically connected to the objective, whether a measure lessinvasive could have been made, and, whether the measure’s effects on the rightsof the persons whom it applies to is proportionate to the measure10. Themeasure made by the Estonian government, to allow only public authorities theuse of fireworks is due to an unknown reason, however on the grounds of healthand safety or for the protection of human, animal, and plant life, this iseasily justifiable and definitely worth the cause with statistics of injury ordamage made by fireworks in Estonia to prove why such drastic measures have totake place. Also, the restriction made by Estonian government doesn’t directlyaffect the rights of the company nor does it directly effect their rights toimport goods into the state. Unfortunately, there is also no objective statedas to why the measure has been put in place, but it can be said and supportedthat the measure and the objective are not logically connected as there isn’t aban on the importation of goods, however, there may be a drop in how manyfireworks will be used after importation or how many fireworks will be neededfor importation. Finally, the measure more closely effects the rights of thecitizens of Estonia who will be denied the purchase of fireworks and the rightto use them on days other than the set days given, if at all. However, thislimit does not affect their statutory rights and is not a good enough basis fora relevant argument to fight against using them – especially with the beliefthat Estonia has a good enough reason to implement this restriction in thefirst place.

In conclusion, Estonia haven’tdirectly affected the importation of products from the Tallinn company, nor hasit taken away their right to import/export goods either. Estonia’s measure willhave a knock-on effect to how many products will be brought into Estonia, however, seeing that there will be fewer firework displays throughout the year, it could be said that the number of fireworks bought will not be too much of amassive difference as only certain events will use them and so will be specialfor having fireworks in the first place. The reasoning from Estonia as to whythey have implemented this restriction on private parties is unknown, but withthe belief that they have a good enough reason to inflict such changes throughouttheir country is enough to support their decision, with the hope that they willsupport their decision in the future.

Overall, I think that Estonia is okay toimplement this change and that their decision will be supported by the courtsas they could be seen to have passed all the right tests, and there are nobreaches to Article 36 TFEU, but most importantly no breaches to Article 34TFEU. It is immediately clear in thisscenario, that there is a breach of competition law between each of thecompanies involved; Trixi, Fixi, Flo and Razzor. According to Article 102 TEFU, Razzor holds a dominant position due to the new Occam technology which only theRazzor’s batters are suitable for. No other batteries on the market are deemedas suitable enough for the Occam technology to be used on.

This technologywould equally increase the competition between other makes if used on them all, respectively. However, this puts all other battery companies in a vulnerableposition due to the dominance Razzor batteries have over them (rising from 30%of the worldwide market in household batteries, to a staggering increase offthe share to 59%). Razzor can be seen as abusing their dominant position byallowing their product to use this special technology and also by increasingthe price of this product to 62% more expensive than other batteries as theyknow consumers will buy them. The share of the other companies being Trixi (at28% of the worldwide market) and Fixi (being at 20% of the worldwide market)still even after the increase of price in Razzor’s batteries shows the dominantposition they hold and that the price of the batteries does not affect theincrease of the decrease of their market. The Razzor team confirmed, through development and research, that using Occam on other batteries istechnologically impossible. This does not necessarily mean that there is anexclusionary abuse from Razzor batteries, but by allowing their product to usethis technology knowing that it is impossible on other products could be seenas exclusionary practise.

Also, by abusing this dominant position, increasingthe price of their batteries and allowing the market of other batteries tofall, Razzor is definitely performing an exclusionary practise. Also, this canbe linked to British Leyland v Commission (1986)11due to the abuse of dominant position shown through imposing unfair prices andtrading conditions. In this case Leyland increased the prices and charged extrafor left-handed cars than they did for right-handed cars because of theirknowledge that people would pay for them, if they needed them – in the same waythat Razzor is abusing their dominance by increasing the price for betterbatteries as they know that people will pay for them, if they need them.

The relevant market for thisproduct is the worldwide range of household batteries. However, depending onhow the courts want this ruling to go, they may change the relevant marketproduct-wise, like such in United Brands v Commission (1978)12or geographical-wise like such in Napier Brown-British Sugar (1988)13. Shares in this market can give an indication of the monopolistic situationwhich is the one in which the company can increase the price without having anegative effect on the consumers. Razzor definitely holds a monopolistic market14as it is the only battery that can offer the product and service of an Occamtechnology-based battery to the public. Alongside this, Razzor isdenying other companies access to the technology by; immediately dismissingthem, because ‘ they are not suitable’ for it and also by turning down Trixi, and Fixi when approached with the request for them to be able to see and usethe technology themselves, to eventually make their batteries just as powerfulas Razzor’s. By denying other companies access to the technology can also bethe same as denying them access to the market which is essentially disallowingthem from selling their product at an equivalent level. This could be similarlylinked to the case of Volvo v Eric Veng (1988)15in which Volvo didn’t release details on how parts were made for their cars andso this limited access to the market for second hand and used car parts.

EricVeng, a car technician, wanted to fix Volvo cars and was denied access to themarket due to Volvo abusing their dominant position. However, Razzor offeredTrixi and Fixi a ‘ fair compensation’ for the denial, to which they complaineddue to abuse of its dominance of their position. It is stated that Razzor refusedto supply ‘ FLO’ – a longstanding customer – access to their AA and AAAbatteries due to a ‘ failure to comply with the newly prescribed standards ofhandling the goods’ that the Occam technology comes with. Unfortunately, noimmediate conclusion can be made about this particular situation as there is nodefiance in the scenario about what the standards were that were set, who setthem or how legally binding the standards were, however it is enough of anoncompliance to the standards for there to be a refusal of shipment or arefusal of access to batteries containing Occam technology. In conclusion, Article 102prevents abuse of a dominant position in the market. It requires undertakings, market dominance, an abuse of this dominant position and an effect on the tradebetween MS.

It is clear that in this scenario, all of these have been displayedand that Razzor has breached Article 102 TFEU. Through applying case law andthe relevant EU law, it is clear that there are similarities and very few differences– meaning that when Razzor gets taken to court, they are very highly likelygoing to fail all the tests given onto them. Therefore, I think that Razzorstands very little chance of succeeding and I believe that the Occam technologywill have to be shared as equal to the other companies.

I also believe thatthere are parts of the scenario which can be supported but it is mostly abreach to article 102 TFEU. 1 file:///C:/Users/Owner/AppData/Local/Packages/Microsoft. MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/new\_guide\_en. pdf 2 http://www.

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