

Chloe 25.01.18 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 is question as to whether there is a restriction to the ' Freedom of Circulation of Goods'<sup>1</sup>. By applying Article 34 of the TFEU<sup>2</sup>, and by following the ' Quantitative Restriction' definition made by Geddo<sup>3</sup> (which states that Quantitative Restrictions amounts to a restraint to the circumstances of imports or exports of goods in transit<sup>4</sup>), a trade restriction can be identified. Estonia's national legislation prohibits an individual from using fireworks and allows only public authorities the permission to use them on public holidays or special occasions. In this sense, the restriction made is not due to competition - it is a barrier on the Freedom of the Circulation of Goods<sup>5</sup>.

Quantitative Restrictions prohibit only a certain percentage of goods, but Estonia is not prohibiting the import or export of these goods, so it cannot be a quantitative restriction. However, they are setting a restriction on who is allowed to buy them but also there is not a restriction on how many can be bought 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 and lives of humans, animals and plants" <sup>6</sup>. However, understanding that there is not a particular reason that Estonia has put in place this restriction, it can be argued that this is not justification enough as there is no violation of human health if there is a continuation to sell and import these items internally. However, for Estonia, this could be dependent on their figures for lives and animals put at the risk of danger or land being destroyed during or due to the use of fireworks.

Estonia's restriction on purchasing fireworks can be questioned as to whether it is an obstacle to market access.

Referring to the Keck (C-267 and 268/91 Keck<sup>7</sup>), the test of this suggests that even with unclear legal requirements, Certain Selling Arrangement (CSA) arranged by a government, can be regarded as discriminatory if it effects the importation of goods. This is also a breach of Article 34 TFEU<sup>8</sup>. The Keck test is passed and there are no breaches of the test as it does not affect the importation of goods, but it is definitely an obstacle to the market as there is a limitation on who can buy the fireworks and hinders access to the market - and this will affect the amount of product bought in Estonia, respectively. For Article 34, the main issue would be to consider the effect rather than the purpose. If the effect of a measure, which in this case would be the prohibition of private individuals organizing firework displays, effects or hinders the free movement of goods in the UK, then this what is seen as the important factor and is the reason why restrictions are not allowed under Article 34. In this particular scenario, ignoring the purpose of the restriction, the restriction itself doesn't necessarily hinder the freedom of movement of goods, but what it will impact is the quantity and the amount of product that will be wanted in Estonia and so eventually, will impact the movement of goods.

Although this is not necessarily on the same path, it could be said that the restriction on who can use fireworks will affect who will buy them, which in turn will massively affect how many need to be imported based on how many are being bought at a time. This would be a relevant argument to refer to Article 34 and to focus on Tallinn company. Similar to this, you can apply <https://assignbuster.com/chloe-250118-firstly-in-this-scenario-there/>

the case of C-110/05 Commission v Italy (2009)<sup>9</sup>. In this, Italy banned the use of motorcycles towing trailers. The court, in this case, stated that 'measures having equivalent effect' refer to both the discriminatory national rules and also to any measure which hinders access to the market. The court in Commission v Italy based ruled that, on the grounds of public safety, it was a fair restriction to make in accordance with Article 24 EC (now renamed and known as Article 34 TFEU). This could be brought into this scenario very similarly as, for the safety of the public, animals and the surroundings, the Estonian government have decided simply to restrict the use of fireworks of private individuals to public authorities only.

Applying C-110/05 and Article 34 here works neatly to form a strong argument in favour of the Estonian government. To be specific, there is no specific restriction on fireworks being bought, only on who can buy them/use them and on the specific days they may be used. The restriction is not there as a prohibition of fireworks being imported or exported, the restriction is simply on the person buying or using them, not on the fireworks themselves.

Finally, by applying the test of proportionality, it will be determined; whether the object of a measure is important enough to justify 'the limitation of a protected right', whether the measure is logically connected to the objective, whether a measure less invasive could have been made, and, whether the measure's effects on the rights of the persons whom it applies to is proportionate to the measure<sup>10</sup>. The measure made by the Estonian government, to allow only public authorities the use of fireworks is due to an unknown reason, however on the grounds of health and safety or for the <https://assignbuster.com/chloe-250118-firstly-in-this-scenario-there/>

protection of human, animal, and plant life, this is easily justifiable and definitely worth the cause with statistics of injury or damage made by fireworks in Estonia to prove why such drastic measures have to take place. Also, the restriction made by Estonian government doesn't directly affect the rights of the company nor does it directly effect their rights to import goods into the state. Unfortunately, there is also no objective stated as to why the measure has been put in place, but it can be said and supported that the measure and the objective are not logically connected as there isn't a ban on the importation of goods, however, there may be a drop in how many fireworks will be used after importation or how many fireworks will be needed for importation. Finally, the measure more closely effects the rights of the citizens of Estonia who will be denied the purchase of fireworks and the right to use them on days other than the set days given, if at all. However, this limit does not affect their statutory rights and is not a good enough basis for a relevant argument to fight against using them - especially with the belief that Estonia has a good enough reason to implement this restriction in the first place.

In conclusion, Estonia haven't directly affected the importation of products from the Tallinn company, nor has it taken away their right to import/export goods either. Estonia's measure will have 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 a massive difference as only certain events will use them and so will be special for having fireworks in the first place. The reasoning from Estonia as to why they have implemented this

restriction on private parties is unknown, but with the belief that they have a good enough reason to inflict such changes throughout their country is enough to support their decision, with the hope that they will support their decision in the future.

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

This technology would equally increase the competition between other makes if used on them all, respectively. However, this puts all other battery companies in a vulnerable position due to the dominance Razzor batteries have over them (rising from 30% of the worldwide market in household batteries, to a staggering increase of the share to 59%). Razzor can be seen as abusing their dominant position by allowing their product to use this special technology and also by increasing the price of this product to 62% more expensive than other batteries as they know consumers will buy them. The share of the other companies being Trixi (at 28% 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 dominant position they hold

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and that the price of the batteries does not affect the increase of the decrease of their market. The Razzor team confirmed, through development and research, that using Occam on other batteries is technologically impossible. This does not necessarily mean that there is an exclusionary abuse from Razzor batteries, but by allowing their product to use this technology knowing that it is impossible on other products could be seen as exclusionary practise.

Also, by abusing this dominant position, increasing the price of their batteries and allowing the market of other batteries to fall, Razzor is definitely performing an exclusionary practise. Also, this can be linked to British *Leyland v Commission (1986)*<sup>11</sup> due to the abuse of dominant position shown through imposing unfair prices and trading conditions. In this case Leyland increased the prices and charged extra for left-handed cars than they did for right-handed cars because of their knowledge that people would pay for them, if they needed them - in the same way that Razzor is abusing their dominance by increasing the price for better batteries as they know that people will pay for them, if they need them.

The relevant market for this product is the worldwide range of household batteries. However, depending on how the courts want this ruling to go, they may change the relevant market product-wise, like such in *United Brands v Commission (1978)*<sup>12</sup> or geographical-wise like such in *Napier Brown-British Sugar (1988)*<sup>13</sup>. Shares in this market can give an indication of the monopolistic situation which is the one in which the company can increase the price without having a negative effect on the consumers. Razzor definitely holds a monopolistic market<sup>14</sup> as it is the only battery that can

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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 use the technology themselves, to eventually make their batteries just as powerfulas Razzor's. By denying other companies access to the technology can also be the 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)<sup>15</sup>in 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 no defiance 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 trade between MS.

It is clear that in this scenario, all of these have been displayed and that Razzor has breached Article 102 TFEU. Through applying case law and the 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 likely going to fail all the tests given onto them. Therefore, I think that Razzor stands very little chance of succeeding and I believe that the Occam technology will have to be shared as equal to the other companies.

I also believe that there are parts of the scenario which can be supported but it is mostly a breach to article 102 TFEU. 1

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