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Perspectives on European Union Law



*Janja Hojnik**

Our First: Legality of Public Measures to Enhance Consumer Ethnocentrism from the EU and WTO Perspective

1. Introduction

Trade liberalisation contributes to better allocation of resources, economic prosperity and a higher standard of living. Hence, it is perceived as a positive development by most countries of the world that are members of the World Trade Organization (WTO).¹ However, domestic producers call for governmental support, and governments often embrace economic protectionism to this end, thereby restraining free trade. The current post-crisis period is no exception in this respect. In the present circumstances and despite general globalisation trends, product nationality is becoming one of the crucial marketing, legal and macro-economic policy aspects. In such circumstances, consumer ethnocentrism is a highly desired behaviour on the (domestic) market. To enhance its economic advantages, commercial entities, their associations and state authorities take advantage of available mechanisms to boost it. In this respect, various advertising techniques are used which rely on consumer patriotism, such as *buy domestic* and *buy local* campaigns, as well as quality marks assigned to products of domestic origin to attract the attention of consumers. Such campaigns and quality marks imply that domestic products are generally of better quality than imported ones and should thus be preferred by the consumers, without corresponding tests that would prove this to the consumers.

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¹ See e.g. Perišin, FREE MOVEMENT OF GOODS AND LIMITS OF REGULATORY AUTONOMY IN THE EU AND WTO (2008), pp. 1–2.

The consumers' support of domestic products in supermarkets will, in turn, improve their own position as workers, guaranteeing them jobs and prosperity. These campaigns and quality marks result in the establishment of two classes of products—domestic and foreign—and are hence openly discriminatory since they indirectly refer to the high (domestic) and low quality (imported) of products.

But how does the above come into line with free trade agreements signed by most of the contemporary states? The WTO General Agreement on Tariffs and Trade (GATT) provides that products of the territory of one Member State that are imported into the territory of any other Member State must be accorded treatment that is no less favourable than that accorded to like products of national origin (Article III:4 GATT). Do the *buy domestic* campaigns not place imported products at a disadvantage prohibited by this very provision? Furthermore, Article 18 of the Treaty on Functioning of the EU (TFEU) states that any discrimination on the grounds of nationality is prohibited within the EU. Further, Article 21 TFEU proclaims that it is an aim of the EU to establish and ensure the functioning of the internal market, which is defined as an area without internal frontiers in which free movement of goods, persons, services and capital is ensured. If one or several EU Member States promote the purchase of domestic products, is it still possible to claim that there are no internal frontiers on the “single” market? What about European Commission's promotion campaigns of European and local?

The article discusses the consistency of publicly sponsored *buy domestic* campaigns that have widely spread in the past years, with the WTO and EU legal principles that have been adopted by the respective governments. These campaigns are in many aspects discriminatory. Furthermore, the promotion of negative stereotypes concerning foreign goods does not differ very much from discrimination or even racism against individuals who do not possess the nationality of a particular country. The purpose of the article is to assess the legality of this form of discrimination concerning two multilateral economic treaties: GATT and the TFEU.

2. Product Nationality and Consumer Ethnocentrism

The functions of product nationality (or country of origin) and the nationality of individuals are quite similar. While the authorities learn about individuals by inspecting their passports, consumers similarly learn about product nationality from product labelling, advertisements, word-of-mouth and based on their own experiences with particular product categories.² In the field of marketing science, various theories have been developed assessing the significance of this information, such as the categorisation theory

² Dmitrovic, Vida, *Consumer Behaviour Induced by Product Nationality: The Evolution of the Field and Its Theoretical Antecedents* (2010), pp. 145, 151.

and the halo effect theory.³ Evaluations based on product nationality are often driven by consumers' stereotypes about a product category. Consumers make use of such generalisations to simplify their efforts in the selection procedure or when they are unable to get sufficient information about the quality of the product prior to purchasing. Product nationality thus serves as a concept that represents the consumers' accumulated knowledge of the brands from that country.⁴ Bruning argued that providing consumers with information about a product's nationality invokes specific socio-psychological processes that stem from various consumer ideologies.⁵ As found by Askegaard and Ger, consumer knowledge of the nationality of the product may evoke powerful imagery of the country, its people, their culture, etc.—images that may positively or negatively influence their purchasing attitude.⁶ Individuals' identification with their social "in-group" (family, nation, etc.) and their emotional attachment to it often results in discriminatory behaviour towards the "out-group".⁷ Consumer rejection of products from a specific country may be the result of some negative historical experiences (e.g. wars), political relations, etc., irrespective of the quality judgements attributed to its products. Such rejection may also be the result of general public opinion that domestic/imported products are of superior/inferior quality. Positive stereotypes about domestic products and negative stereotypes about foreign products are usually referred to as "consumer ethnocentrism".

Ethnocentrism reflects a belief that an individual's ethnic group is centrally important and all other groups are measured by the standards of their own culture.⁸ The term ethnocentrism was introduced by the American sociologist Sumner who defined it as "the technical name for (the) view of things in which one's own group is the centre of everything, and all others are scaled and rated with reference to it".⁹ He further characterised it as often leading to pride, vanity, beliefs of one's own group's superiority and contempt of outsiders. In the research of consumer opinion towards foreign products a concept of consumer ethnocentrism evolved, describing the latter as "beliefs accepted from the consumer about the appropriateness, that is, morality of the purchase of foreign

³ Starting with E Dicher, 'World Customes' (1962) 40 Harvard Business Review 113. For a literature overview see Dmitrovic, Vida, *Consumer Behaviour Induced by Product Nationality: The Evolution of the Field and Its Theoretical Antecedents* (2010).

⁴ See e.g. Dinnie, *Country-of-Origin 1965-2004: A Literature Review* (2004), p. 165; Ahmed and others, *Does Country of Origin Matter for Low-involvement Products?* (2004), p. 102.

⁵ Bruning, *Country of Origin, National Loyalty and Product Choice: The Case of International Air Travel* (1997), p. 59.

⁶ Askegaard, Ger, *Product-Country Images: Towards a Contextualized Approach* (1998).

⁷ Dmitrovic, Vida, *Consumer Behaviour Induced by Product Nationality: The Evolution of the Field and Its Theoretical Antecedents* (2010), p. 154.

⁸ Andersen, Taylor, *SOCIOLOGY* (2008), p. 67 et seq.

⁹ Sumner, *FOLKWAYS – A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* (2013), p. 13.

products”.¹⁰ Shimp defines consumer ethnocentrism as a concept under which consumers believe in

“the superiority of their own countries’ products. This perception is postulated to transcend mere economic and functional considerations, and, instead, to have a more noble foundation rooted in morality. That is, consumer ethnocentrism is intended to capture the notion that some consumers believe it is somehow wrong to purchase foreign-made products, because it will hurt the domestic economy, cause the loss of jobs, and, in short, because, from their view, it is plainly unpatriotic”.¹¹

It is for these reasons that consumer ethnocentrism negatively influences the appraisal of foreign products and willingness to buy them.

Although the concept of consumer ethnocentrism was introduced and used for the first time in studies relating to American consumers, it was later revealed that it is by no means limited to a single culture or single scientific discipline. It was researched according to the size of individual markets (small versus large markets), the gender of the consumers, their degree of education, etc.¹² Additionally, consumer ethnocentrism is rapidly taking centre stage in the field of market law research. In contrast with marketing research, legal research does not concentrate on positive stereotypes about domestic goods that are the result of consumers’ direct cognitive processes and their past experience with domestic goods, nor on experiences which are the result of consumers’ general social opinion, but rather on consumer ethnocentrism that is the result of domestic companies’, trade associations’ and state authorities’ promotional campaigns emphasising positive attributes of domestic goods, thereby building positive stereotypes among domestic consumers. In this respect, one must foremost distinguish between private and public campaigns. In the recent economic crisis, both forms were considerably widespread.

¹⁰ Shimp, *Consumer Ethnocentrism: The Concept and a Preliminary Empirical Test* (1984), p. 285.

¹¹ *Ibid.*

¹² See e.g. Chasin, Holzmueller, Jaffe, *Stereotyping, Buyer Familiarity and Ethnocentrism: A Cross-Cultural Analysis* (1989), p. 9; Han, *The Role of Consumer Patriotism in the Choice of Domestic versus Foreign Products* (1988), p. 25; Klein, *Us versus Them, or Us versus Everyone? Delineating Consumer Aversion to Foreign Goods* (2002), p. 345; Küçükemiroğlu, *Market Segmentation by Using Consumer Lifestyle Dimensions and Ethnocentrism* (1999), p. 470; Moon, *The Roles of Consumer Ethnocentricity and Attitude toward a Foreign Culture in Processing Foreign Country-of-Origin Advertisements* (1996); Supphellen, Rittenburg, *Consumer Ethnocentrism When Foreign Products Are Better* (2001), p. 907; Watson, Wright, *Consumer Ethnocentrism and Attitudes toward Domestic and Foreign Products* (2000), p. 1149.

3. Campaigns Promoting the Purchase of Domestic Goods

3.1. *Private Campaigns Promoting Consumer Ethnocentrism*

In almost any state, one can find private campaigns, run by workers' or companies' associations encouraging consumer ethnocentrism. They all share very similar reasoning.

In 1977, when unemployment rates in Canada were the highest since the 1930s, workers across the country pressed the government to lend a helping hand. Using radio programmes, textile workers in Quebec were convinced that at the heart of the matter was buying Canadian—claiming that Canadians must help one another by buying goods made by their neighbours.¹³ In 2008, when the latest economic crisis evolved, an association *Buy Canadian First* was established. Its mission was to promote Canadian companies, their services and products. Although the associations' goal was initially to create a website informing consumers which products are made in Canada and where they can be purchased, nowadays the company has evolved into a Marketing and Advertising agency specialising in *Made in Canada* campaign. In addition to emphasising the positive effects of buying Canadian for the Canadian economy, environment, health, labour standards and the community, the movement also stresses:

“Love of Country shouldn't stop at flying a flag or wearing red and white. We have every reason to be proud of our country, including the wonderful products we make here. Some consumers buy Canadian over foreign-made as a matter of principle alone. We see a 'Made in Canada' label as a badge of honour; one we're proud to contribute to and want others to know about. Buying products made in Canada makes us proud!”¹⁴

In Ireland, a company *Guaranteed Irish* is presently conducting a campaign “to increase awareness of, and demand for, Irish products and services”. The explicit goal of the campaign is to maximise employment and prosperity in Ireland. The campaign is run by “like-minded business people as a non-profit organisation to educate, network, innovate and support our members and consumers”. At the same time, it is trying to boost consumer interest, awareness and passion for the *Guaranteed Irish* ethos and symbol and consequently assist their members in increasing their market share. The campaign emphasises that Irish consumers

“feel good about buying Irish and the Guaranteed Irish symbol helps them to do this while regular PR and Advertising campaigns remind them. Through schools we are hoping a whole new generation of consumers who are proud to buy Irish.”¹⁵

¹³ See URL: http://archives.cbc.ca/economy_business/consumer_goods/topics/3692/.

¹⁴ See Why Buy Canadian First?, URL: <http://www.buycanadianfirst.ca/why-buy-canadian-first>.

¹⁵ Guaranteed Irish, URL: <http://www.guaranteedirish.ie>; see also: Guide to Enterprise in Dublin City – Guaranteed Irish, URL: <http://www.dceenterprise.com/directory/Guaranteed-Irish>.

Since 2008, the Slovenian Chamber of Agricultural and Food Enterprises has been conducting a campaign *I buy Slovenian*. The purpose of the campaign is to “remind Slovenian consumers of the possibility to choose when standing before the supermarket shelves and of the importance of buying domestic, Slovenian products for growth and stability of the domestic economy.”

The campaign is founded on five main pillars: quality, safety, taste, tradition and job preservation. The Chamber emphasises that Slovenian consumers and companies must be aware of the fact that a successful and stable domestic economy is a *conditio sine qua non* for operations on the global market; this, among other things, requires the preservation of jobs and purchasing power—“a consumer must first earn to spend”, they say. Additionally, the Chamber points out that encouragement to buy Slovenian food is also important for the preservation of certain Slovenian values, customs and traditions, but foremost for the preservation of the Slovenian national identity.¹⁶

3.2. Public Campaigns to Promote Consumer Ethnocentrism

From the perspective of market law, ethnocentric consumer campaigns that can be ascribed to public authorities are of much greater importance than the private ones. For centuries, states have intervened in cross-border exchange to limit import and boost export to gain trade surplus.¹⁷ They intervene on the market to optimise the income section of their respective national budgets. States hold various direct and indirect tools to increase domestic demand. The most common way for public authorities to protect domestic production is through protectionist public procurement legislation and/or practice. In this respect, states themselves behave in an ethnocentric manner when playing the role of the purchaser on the market. Two such examples are the Buy American Act¹⁸ passed in 1933 by Congress and signed by President Roosevelt, which required the United States government to give preference to the U.S.-made products in its purchases. More recently, “Buy American” provisions have been included in the American Recovery and Reinvestment Act of 2009. Section 1605 of Title XVI provides that unless one of three listed exceptions applies (non-availability, unreasonable cost, and inconsistency with public interest) and a waiver is granted accordingly, none of the funds appropriated or otherwise made available by the Act may be used for a project for the

Likewise, e.g. Danish furniture is promoted by a campaign “Buy Danish”, URL: <http://www.buydanish.dk/>.

¹⁶ More in Hojnik, Promotion of Agricultural and Food Products in Slovenia: Enhancing Consumer Ethnocentrism (2011), p. 269.

¹⁷ Appleyard, Field, INTERNATIONAL ECONOMICS (2016), pp. 19–26.

¹⁸ BAA - 41 U.S.C. §§ 10a–10d.

construction, alteration, maintenance, or repair of a public building or public work unless all the iron, steel, and manufactured goods used are produced in the United States.¹⁹

Furthermore, even when governments are not buying goods or services directly, they can influence private entities to purchase in an ethnocentric manner. Such influence can be either formal or informal. Formal influence is portrayed as a legal requirement to purchase certain domestic goods. The EU Court case-law provides an example of the Irish minister for industry and energy, who demanded, under powers conferred to him under the Fuels Act, that any importer of any of the various petroleum products to purchase a certain proportion of its requirements of petroleum products from the INPC at a price to be determined by the minister. The share capital of the INPC was owned by the Irish state who was, in turn, the sole owner of the only refinery in Ireland.²⁰ Another form of formal (coercive) encouragement to buy domestic goods is a legal requirement for the goods on the domestic market to hold a *country of origin label*. As the EU Court held in the UK “*made in*” case:²¹

“It has to be recognized that the purpose of indications of origin or origin-marking is to enable consumers to distinguish between domestic and imported products and that this enables them to assert any prejudices which they may have against foreign products. [...] Within (the common) market, the origin-marking requirement not only makes the marketing in a Member State of goods produced in other Member States in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as the result of a division of labour between Member States.”

On the other hand, *informal (non-coercive) influence on consumers* includes recommendations (rather than obligations) of domestic purchase using various ethnocentric market campaigns. State measures to encourage consumer ethnocentrism are particularly widespread in harsh economic times when states abjure their free-trade commitments.

In this respect, the U.S. Department of Agriculture (USDA) has launched the *Know Your Farmer, Know Your Food* initiative. Its agenda is to give local foods more prominence on the dinner plates of American citizens in line with the then President Obama’s commitment to strengthen local and regional food systems.²² In this regard, farm to school programmes were launched in 48 states while agricultural branding programmes, such as *Jersey Fresh*, *Simply Kansas*, or *Local First Utah*, were introduced in all the U.S. 50 states. The campaign *Local First Utah*, for instance, emphasises that “when you buy locally in your Utah community, more of your dollar remains in that local community, making it more sustainable, diverse, and dynamic”.²³

More recently, the current U.S. President Donald Trump launched a booming campaign *America First*, where it has been pointed out that “the President understands how critical it is to put American workers and businesses first when it comes to trade” and

²³ See Local First, URL: <http://www.localfirst.com>.

that “by fighting for fair but tough trade deals, we can bring jobs back to America’s shores, increase wages, and support U.S. manufacturing.”²⁴ This policy was supplemented with *Buy American* policy, thereby signing a *Buy American, Hire American* executive order aimed at cracking down on skilled worker visa abuse and forcing the US government agencies to buy more domestically produced products. The order calls for the federal government to strengthen its various *Buy American* provisions that give preference to domestically produced products.²⁵

Several measures and campaigns to promote domestic production can also be found throughout Europe, although they have not been as booming as the American ones. Information provision and promotion measures for agricultural products on the EU internal market and in third countries are regulated by a special Council Regulation No. 3/2008.²⁶ Based on this Regulation, the EU co-finances promotional campaigns that highlight the quality, nutritional value and safety of the EU farm products and food. The campaigns can be run inside the EU or beyond its borders to open up new markets for the EU farmers. Even though the Regulation prohibits the promotion of products based on their (national or regional) origin,²⁷ in its 2011 Green Paper on promotion measures for agricultural products, the Commission emphasised that:

“Regional and local markets are an essential meeting place for producers and consumers. They enable the former to receive the rewards for their labours more efficiently and the latter to contribute to the development of their local areas, reduce the environmental impact of their consumption habits and access a wide variety of products rooted in their traditions and ways of life.”²⁸

The Commission stressed that the quality of Europe’s agricultural and agri-food products is widely acknowledged, emphasising that as a result of tradition, know-how and innovative abilities of producers, the European model is also the legacy of a strong Common Agricultural Policy and of standards of production unmatched anywhere in the world. It furthermore added that the EU has a culinary heritage of great diversity that

²⁴ America First Foreign Policy, URL: <https://www.whitehouse.gov/america-first-foreign-policy>.

²⁵ Waldmeir, Donnan, Donald Trump Signs ‘Buy American, Hire American’ Order, URL: <https://www.ft.com/content/fa3f6cc4-246e-11e7-8691-d5f7e0cd0a16>.

²⁶ Council Regulation (EC) No 3/2008 on information provision and promotion measures for agricultural products on the internal market and in third countries, OJ 2008 L3/1.

²⁷ See Article 1(2) of the Council Regulation (EC) No 3/2008 on information provision and promotion measures for agricultural products on the internal market and in third countries, OJ 2008 L3/1 and Article 4(2) of the Commission Regulation (EC) No 501/2008 laying down detailed rules for the application of Council Regulation (EC) No 3/2008 on information provision and promotion measures for agricultural products on the internal market and in third countries, OJ 2008 L147/3.

²⁸ European Commission, Green Paper on promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe (2011), para. 3.1.

should be exploited to the full. Taking into consideration, on the one hand, that these advantages of the EU products have not yet been sufficiently promoted and the surfacing of new competitors in the traditional EU and emerging markets on the other, the Commission endorsed a new promotion and information strategy to promote Europe's agriculture sector "which delivers food security, a sustainable use of natural resources and more dynamic rural areas". Because *buy domestic* campaigns are conducted in the EU trading partners, the EU does not want to fall behind. It is thus the Commission's responsibility to strengthen the EU agricultural production on the global market:

"Consumption of European products needs to be encouraged, on the one hand, by promoting the image of the products and, on the other, by raising awareness of Europe's quality systems among consumers and among producers [...] Europe must use all of its energy to promote its specialities and its production methods in the same way as its main trade partners (United States, Australia, Canada, etc.) are doing".²⁹

Moreover, in 2016, The Commission launched *Enjoy, it's from Europe* promotion programme, offering funds to support promotion of European products on international markets.³⁰ The Commission presents it as a promotion policy that helps producers sell their EU farm products in an increasingly competitive global marketplace, at the same time as delivering jobs and growth at home.³¹ Although the EU internally promotes the "single market having the characteristics of a domestic market",³² boosting consumer ethnocentrism is still a considerably widespread practice in the EU Member States. The most famous campaign in the EU territory was that of the Irish Government, run thirty years ago, which established the Irish Goods Council responsible for the encouragement of all classes of purchasers within Ireland to choose Irish products over the imported ones. In this respect, a wide-ranging advertising campaign was conducted, in which purchasers were encouraged to give preference to goods bearing the *Guaranteed Irish* label. Around the same time, the Greek government also launched a *Buy Greek* campaign. Its aim was to cut down the flow of luxury imports, thereby reducing unemployment and a huge trade deficit. A press and television campaign launched by the Greek Goods Promotional Board was followed by special discount offers in stores selling Greek-made consumer goods.

Based on the German law on the creation of a central fund for the promotion of German agricultural, forestry and foods sector (*Absatzfondsgesetz – AFG*), a central body (*Centrale Marketing-Gesellschaft – CMA*) adopted a special quality label (*Markenqualität*

²⁹ Ibid., para. 3.2.1. and 4.1.

³⁰ European Commission – Press release, "Enjoy, It's from Europe": Over €100 Million to Promote European Agriculture in 2016, URL: http://europa.eu/rapid/press-release_IP-15-5804_en.htm.

³¹ See Promotion of EU farm products, URL: https://ec.europa.eu/info/food-farming/promotion_en.

³² Case C-207/83, Commission v United Kingdom, ECLI:EU:C:1985:161, para. 17.

aus deutschen Landen) in 1993, the use of which was reserved for products which were produced in Germany. Similarly, the Austrian Agrarmarkt Marketing GmbH (known as *AMA Marketing*), established by the Austrian Ministry for Agriculture, nowadays issues a quality seal *AMA-Gütesiegel – Geprüfte Qualität Austria*, which guarantees that the food was produced in Austria. Similar state-sponsored quality marks can also be found in Hungary (*Kiváló Magyar Élelmiszer – KME, Quality Food from Hungary*) and in the Czech Republic (*KLASA značka*). Last but not least, in March 2011 the Slovenian Parliament adopted a special statute on the promotion of agricultural and food products.³³ The Slovenian minister for agriculture explained that the Act strives to achieve four aims:

“[A] buyer, who buys Slovenian food gives work to our farmer and worker; this way the state budget is being filled; high food safety is being guaranteed, and an important step towards climate change prevention is being done.”³⁴

Enhanced promotion of local agricultural and food products is expected to lead to greater consumption of the promoted categories of products, thereby indirectly positively affecting the development of domestic agriculture and food industry, as well as the eating habits of the population. Moreover, the Slovenian government introduced traditional Slovenian breakfast to children in kindergartens and primary schools, consisting exclusively of Slovenian food—in this way, children learn about the importance of healthy eating, as well as about the significance of domestic food.³⁵

Because none of these campaigns, private or public, have any binding effects for the consumers, but “merely” endeavour to convince the consumers to buy domestic products, it is usually believed that they do not breach legal principles protecting free trade. Nevertheless, it must be recognised that even though the *buy domestic* campaigns are voluntary, they genuinely interfere with free trade—that is, in fact, their explicit purpose. Although the objective of restricting import is not always accomplished, neither states nor private associations would invest money in such campaigns without expecting restrained selling of imported goods and consequently protected domestic production. The sections below investigate the correlations between the WTO and the EU rules on free movement of goods, *buy domestic* campaigns and quality marks based on product origin of private and public entities.

³³ Promotion of Agricultural and Food Product Act (ZPKŽP), Official Gazette of the Republic of Slovenia, No. 26/11 and 57/12.

³⁴ See Svet za promocijo kmetijskih in živilskih proizvodov na svoji ustanovni seji, URL: <http://www.mkgp.gov.si/nc/si/splosno/cns/novica/article/16589/>.

³⁵ See Tradicionalni slovenski zajtrk, URL: <http://tradicionalni-zajtrk.si/>.

4. WTO Law Perspective: National Treatment Rule for Imported Goods

The WTO is a worldwide organisation for the liberalisation of trade. According to 2016 data, the WTO has 164 members, including all the countries that have been mentioned above in the context of *buy domestic* campaigns, such as the U.S. and Canada. The EU as an international organisation is *per se* a WTO member, and the 28 EU Member States are the WTO members in their own right, although the European Commission speaks for all the EU Member States at almost all WTO meetings.

4.1. National Treatment Rule—The Applicable Test

Article III of the General Agreement on Tariffs and Trade (GATT) requires that the WTO Members provide national treatment to all other Members. Trade measures that have an impact on competitive conditions of imported products on the internal market are prohibited.³⁶ The provision of Article III:4 is known as the national treatment rule. In the *Korea – Various Measures on Beef* decision, the Appellate Body explained the three elements of a violation of Article III:4, which must also be ascertained when deciding on the legitimacy of *buy domestic* campaigns:

“For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are ‘like products’; that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.”³⁷

4.2. Applicability of The Test to Buy Domestic Campaigns

4.2.1 First element: The Likeness of Products

In the *EC – Asbestos* case, the Appellate Body explained that in endeavouring to ensure ‘equality of competitive conditions’, the general principle in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship in the marketplace between the domestic and imported

³⁶ Paragraph 4 of Article III of GATT (hereinafter Article III:4) provides: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.

³⁷ *Korea – Various Measures on Beef*: Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, 2000, adopted as modified by Appellate Body 10 January 2001. DSR 2001:I, 59, para. 133.

products involved “so as to afford protection to domestic production”. It continued by stating that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”³⁸ Following from this, the Appellate Body acknowledged that its interpretation resulted in giving Article III:4 “a relatively broad product scope”. *Buy domestic* campaigns interfere with competitive conditions of the like domestic and imported products: presenting products of domestic origin as products of a generally higher quality harms like products of foreign origin. From the perspective of *buy domestic* campaigns, it should furthermore be pointed out that in the *India – Autos* case the Panel declared that when the origin is the sole distinguishing criterion, it is correct to treat products as “alike” within the meaning of Article III:4.³⁹

4.2.2. Second Element: Requirements Affecting Competitive Conditions on the Market

When considering the “laws, regulations or requirements” condition of the national treatment rule, first, it should be emphasised that in the *India – Autos* case the Panel recalled that GATT jurisprudence suggests two distinct situations, which satisfy the term ‘requirement’ under Article III:4: (i) obligations which an enterprise is ‘legally bound to carry out’; and (ii) obligations which an enterprise voluntarily accepts in order to obtain an advantage from the government.⁴⁰ From the *buy domestic* campaigns perspective, it is of particular importance what the Panel stated in the *Japan – Film* case⁴¹ that even non-binding actions “can potentially have adverse effects on competitive conditions of market access”:

³⁸ European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Appellate Body Report and Panel Report – Action by the Dispute Settlement Body, WT/DS135/12, 11 April 2001.

³⁹ India – Autos, Dispute DS146: Panel Report, India — Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R, 2001, adopted 5 April 2002. DSR 2002:V, 1827, para. 7.174. The Panel in the Canada – Wheat Exports and Grain Imports case confirmed this jurisprudence – Panel Report, Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276/R, 2004, adopted as upheld by Appellate Body 27 September 2004. DSR 2004:VI, 2887.

⁴⁰ India – Autos, Dispute DS146: Panel Report, India — Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R, 2001, adopted 5 April 2002. DSR 2002:V, 1827, para. 7.190–7.191.

⁴¹ Japan – Measures Affecting Consumer Photographic Film and Paper – Panel Report – Action by the Dispute Settlement Body, WT/DS44/5, 23 April 1998, para. 10.49.

“[A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits [...]”⁴²

Furthermore, in the *Canada – Autos* case, the Panel took a broad approach to the question of whether the *action of private parties* was subject to Article III:4. It examined the compatibility of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government, referring to the increase of Canadian value-added in the production of motor vehicles, with GATT, and found that

“[n]either legal enforceability [n]or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a ‘requirement’.”⁴³

Nevertheless, purely private campaigns cannot be considered to fall within the scope of Article III:4 GATT when there is no subsequent governmental measure to protect domestic producers. As the Panel noted in the *Japan – Film* case, the WTO Agreement is an international agreement signed by national governments and the prohibition of restrictive measures “refers only to policies or actions of governments, not those of private parties”.⁴⁴ It follows that only publicly sponsored *buy domestic* campaigns should further be assessed under Article III:4.

In this respect, next one must establish the causal link between a campaign and internal sales conditions for the imported goods. The former must “affect” the latter. In this regard, the Panel in the *Canada – Autos* case interpreted the term “affecting” as having a broad scope of application and as referring to measures that have an effect on imported goods:

“The word ‘affecting’ in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products”.⁴⁵

⁴² See also Panel Report on *Canada – Autos: Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R*, adopted 19 June 2000, DSR 2000:VI, 2995, para. 10.73.

⁴³ *Ibid.*, para. 10.106–10.107.

⁴⁴ *Japan – Measures Affecting Consumer Photographic Film and Paper – Panel Report – Action by the Dispute Settlement Body, WT/DS44/5*, 23 April 1998, para. 10.52.

⁴⁵ Panel Report on *Canada – Autos: Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R*, adopted 19 June 2000, DSR 2000:VI, 2995, para. 12, referring to the Appellate Body Report on *EC – Bananas III*, Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 220.

Boosting consumer ethnocentrism on domestic markets indeed modifies the conditions of sale in a way that is condemned by importers, even though the share of consumers that will respond to the campaign is uncertain.

4.2.3. Third Element: Less Favourable Treatment

Finally, Article III:4 GATT prohibits only measures that generate less favourable treatment of imported products. The panel report on the *US – Section 337* explains this condition in the following terms:

“The words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis”.⁴⁶

Although *buy domestic* campaigns certainly do not grant equal opportunities to imported products, proving (econometrically) that such campaigns cause actual damage to imported products on the export market can be quite a challenge. In the *US – FSC* case, the Appellate Body declared that the examination of whether a measure involves “less favourable treatment” of imported products within the meaning of Article III:4 cannot rest on a simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace.⁴⁷ Even so, in the *Korea – Various Measures on Beef* case, the Panel held that:

“Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.”⁴⁸

This finding effectively supports the view that publicly sponsored campaigns that promote consumer ethnocentrism give an unfair advantage to domestic products by generally presenting them as being of a higher quality and by implicating that their

⁴⁶ *US – Section 337*: Panel Report, United States – Section 337 of the Tariff Act of 1930, BISD 36S/345 (1990), adopted 7 November 1989, para. 5.11.

⁴⁷ Appellate Body Report, *US – FSC*, Panel Report, United States – Tax Treatment for “Foreign Sales Corporations”, WT/DS108/R, 1999, adopted as modified by Appellate Body 20 March 2000. DSR 2000:IV, 1675, para. 215.

⁴⁸ *Korea – Various Measures on Beef*: Panel Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/R, WT/DS169/R, 2000, adopted as modified by Appellate Body 10 January 2001. DSR 2001:I, 59, para. 627.

purchase is a morally correct one. Consequently, such publicly sponsored campaigns, due to their protectionist nature, breach the national treatment rule.

4.3. *Exceptions to the National Treatment Rule*

Although national treatment is a fundamental principle under GATT, the latter provides for certain exceptions that justify trade restrictions. The general exceptions are described in Article XX GATT and include *inter alia* measures that are necessary to protect public morals, human, animal or plant life or health, measures required to secure compliance with laws or regulations in fields such as protection of patents, trademarks and copyrights, and the prevention of deceptive practices, as well as those that are related to the conservation of exhaustible natural resources. These measures are interpreted widely (e.g., public morals could be interpreted as covering anything that benefits the community). Furthermore, legitimate regulatory purposes can also be assessed within Article III, either within the “likeness” analysis or as an independent element of Article III.⁴⁹

Nevertheless, as a matter of principle, the exceptions are only acceptable provided they are not applied in a manner that would constitute a means of unjustifiable discrimination or a disguised restriction. As held by the Appellate Body in the *US – Gasoline* case, the latter has been worded to prevent the abuse of the exceptions under Article XX. Furthermore, in the *US – Shrimp* case, the Appellate Body found that “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members”.⁵⁰

Concerning the *buy domestic* campaigns, it is essential to point out that consumer protection that is often claimed to be the rationale behind the campaigns is generally accepted as a legitimate exception under the measures “necessary to secure compliance with laws or regulations”.⁵¹ Consumer protection has also been evoked by the U.S. in the country of origin labelling case.⁵² The U.S. argued that providing information about the origin of products and thereby preventing consumer confusion are legitimate objectives and that there is furthermore strong evidence about the existence of the U.S. consumers demand for the country of origin information of the kind covered by the stated objective. The U.S. also claimed that leading consumer organisations have expressed support for the country of origin labelling for consumer information purposes and as a means of

⁴⁹ Perišin, *FREE MOVEMENT OF GOODS AND LIMITS OF REGULATORY AUTONOMY IN THE EU AND WTO* (2008), p. 193.

⁵⁰ *US – Gasoline*: Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, in para. 156.

⁵¹ Article XX:1(b).

⁵² *US – Certain Country of Origin Labelling (COOL) Requirements, DS384, United States – Certain Country of Origin Labelling (COOL) Requirements – Communication from the European Union WT/DS384/39, WT/DS386/40*, 11 December 2015, Panel Report, para. 7.651.

preventing consumer confusion. The Panel referred to the Panel's statement in the *Korea – Various Measures on Beef* case that

“there can be good reasons – apart from any protectionist motives – why a WTO Member might want information to be provided as to the origin of products, and particularly meat products, at the retail level”.⁵³

Based on this, the Panel concluded that “providing consumer information on origin is a legitimate objective”.⁵⁴ By contrast, Canada submitted that the intent of the COOL measure was to protect the U.S. ranchers from foreign competition by recapturing the market share for the U.S. cattle. Mexico also highlighted statements by Members of the the U.S. Congress in the context of the 2002 Farm Bill allegedly showing protectionist intent, such as: “U.S. origin labelling is important because it will allow consumers to vote with their wallets to support U.S. farmers, ranchers, and fishermen” or that “Country of Origin Labelling for fresh meats, fruits, vegetables and fish will help Oregon's producers”. Although the Panel did not grant much importance to such statements, it agreed with the complainants that the country of origin labels under the U.S. COOL measure can provide consumers with inaccurate or misleading information and concluded that “the mandatory labelling scheme under the COOL measure falls short of providing consumers with information on the country of origin of meat products in an accurate and clear manner”, which is why the measure did not fulfil the identified objective of consumer information.

One may conclude that *buy domestic* campaigns are even less justified by consumer protection goals than the country of origin labelling requirements, taking into account their general nature with regard to the products that are promoted, lack of any quality criteria and explicit protectionist objectives that stem from the majority of *buy domestic* campaigns. Protection is extended to domestic producers and not the consumers. Consequently, it is difficult to imagine how such campaigns could be justified based on the legitimate exceptions provided in Article XX GATT.

On the other hand, however, Article III:8(a) GATT permits governments to purchase domestic products preferentially, making government procurement one of the exceptions to the national treatment rule. This exception is tolerated because the WTO Members recognised the role of government procurement in national policy, i.e. it is legitimate to develop and purchase products domestically for security reasons or to use government procurement as a policy tool to promote smaller businesses, local industry or advanced technologies. Although the recently re-negotiated Agreement on Government Procurement mandates signatories to offer national treatment in their government pro-

⁵³ Korea – Various Measures on Beef: Panel Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/R, WT/DS169/R, 2000, adopted as modified by Appellate Body 10 January 2001. DSR 2001:I, 59, para. 655.

⁵⁴ US – Certain Country of Origin Labelling (COOL) Requirements, para. 7.651.

curement and provides for market access opportunities, the WTO Members are under no obligation to join the Agreement.⁵⁵ Therefore, in the context of government procurement, the national treatment rule applies only to those Members who have acceded to the Agreement, while for the rest the traditional exception is still in force. In this respect, it is *a fortiori* difficult to imagine that the WTO Members would initiate disputes against each other concerning the non-binding campaigns promoting consumer ethnocentrism, which considerably less intensively and only indirectly hinder foreign trade, claiming a breach of the Members' obligations under the WTO Agreements.

It follows that challenging the *buy domestic* campaigns sponsored by public authorities (be it state or supranational authorities, such as the EU) as a breach of GATT national treatment rule is rather problematic, since no decisions of the WTO Dispute Settlement Body have so far been adopted that would enable predictability with regard to the result of such a challenge. Even though there are other cases, with which one could draw parallels and conclude on their basis that protectionist campaigns breach Article III:4 of GATT, and even though all the elements of the national treatment rule, as interpreted by the WTO panels and the Appellate Body, are met, a problem which arises from the perspective of legal certainty is that GATT does not contain an exhaustive list of justifications through which national measures might be upheld. Any non-protectionist aims (economic or non-economic) could thus be invoked to save the challenged measure. A further hardship is that engaging panels and the Appellate Body in an analysis of the proportionality of national measures would be overly intrusive concerning national regulatory autonomy and is hence left up to the contracting parties of the WTO Agreements. It can hardly be expected that the latter will consider *buy domestic* campaigns a disproportional barrier to free trade, considering some other legitimate aims that may, within the WTO, be of an either economic or a non-economic nature. Finally, one must take into account the toothless nature of the WTO dispute settlement system: a fundamental problem is that the remedy that tends to be proposed by the panel is vague and does not involve any compensation for the loss incurred by a firm or industry. The government that is found to be in violation is simply ordered to bring its measures into compliance with the WTO rules⁵⁶ and the complainants need to use threat and/or imposition of countermeasures to induce compliance. As Pascal Lamy, the former EU Commissioner responsible for international trade issues, illustrated: "As long as you pay the penalties,

⁵⁵ At present, the Agreement has 19 parties and 29 observers – see: Agreement on Government Procurement – Parties, Observers and Accessions, URL: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁵⁶ Reimbursement of paid duties – i.e. a limited form of financial compensation – has only been recommended in the case of a few antidumping related cases prior to the creation of the WTO. See PALMETER, MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* (2004).

you can go on as you are”.⁵⁷ Until the WTO Members see profits in any protectionist measure they will thus continue to apply them.

5. The EU Law Perspective

In contrast to the WTO system, the legality of *buy domestic* campaigns is considerably more straightforward within the EU, primarily due to the homogeneity of the EU Member States’ legal systems and the established internal market, which the EU institutions prefer to consider as a market of a single state. The following section analyses the way certain ethnocentrism boosting campaigns contravene the principles of the EU internal market. In this respect, Article 34 TFEU plays a vital role, prohibiting quantitative restrictions on imports and all measures having equivalent effects between the Member States.

5.1. *Prohibition of Measures Having an Equivalent Effect to Quantitative Restrictions*

Article 34 TFEU has been interpreted in numerous decisions of the EU Court of Justice. Among the most important ones is the decision in the famous *Dassonville* case, where the Court declared the following definition of measures having an equivalent effect to quantitative restrictions:

“All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”⁵⁸

5.1.1. All Trading Rules Enacted by the Member States

For a measure to be prohibited by Article 34 TFEU as a barrier to the free movement of goods, it must foremost be attributed to the state. The sponsor of *buy domestic* campaigns is thus just as important and an equally distinguishing feature under Article 34 TFEU as it is under Article III:4 GATT. According to the *Dassonville* formula, it is only state campaigns designed to enhance consumer ethnocentrism that are caught by Article 34 TFEU—including campaigns by central (e.g. ministries) and regional authorities.⁵⁹ In the before-mentioned *Buy Irish* campaign from the 1980s, the EU Court supported the opinion of the Commission, who was suing Ireland because of the campaign, claiming that ethnocentric motions of private entities are also caught by Article 34 TFEU, provided they can be attributed to the state—be it because they were established by

⁵⁷ Pascal Lamy, Press and Communication Service Brussels, No 3036, 2000.

⁵⁸ Case C-8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82, para. 5.

⁵⁹ See Case C-45/87, *Commission v Ireland*, ECLI:EU:C:1988:453 and Case C-1/90, *Aragonesa de Publicidad v Departamento de Sanidad*, ECLI:EU:C:1991:327.

the state, financed mainly by the government or through obligatory contribution of companies in specific sectors, and/or have members that are appointed or controlled by public authorities.⁶⁰ For this reason, the campaign of the Irish Goods Council, a private company promoting Irish goods, was found to be in breach of Article 34 TFEU, as it was financed by the Irish government. *A fortiori*, the actions of the German Fund for quality marking were also found to be in breach of Article 34 TFEU.⁶¹ In more recent case law, the Court went as far as to declare that states are responsible for public statements of their officials which reflect the state's official point of view, regardless of whether they have a binding effect or not.⁶² Understandably, ethnocentric market campaigns are full of such public statements.

By contrast, entirely privately owned entities escape the grasp of Article 34 TFEU (ex 28 EC).⁶³ In this respect, the Court in *Sapod Audic*⁶⁴ held that a contractual obligation to label packages with a Green Dot logo does not constitute a barrier to free trade as guaranteed by Article 34 TFEU (ex 28 EC), as this obligation was not imposed by the state, but agreed between private contractual parties. It should nevertheless be highlighted that in *Commission v France*, the Court held the State responsible for activities of private individuals (farmers) as it had not “manifestly and persistently abstained from adopting appropriate and adequate measures” to assure free movement of goods.⁶⁵ Although the EU Court held that the Member States are obliged “to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory”⁶⁶ it nevertheless recognised that Member States “unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation”.⁶⁷ As the issue of severity of private actions and the appropriateness of national response to such measures can only be judged on a case-by-case basis, one can only wonder whether the EU Court or a national court applying EU law would hold Ireland's government responsible for the recent *Guaranteed Irish* campaign conducted by private entities or for that matter any other Member State for tolerating private *buy domestic* or *buy local* campaigns. As the Court does not recognise horizontal direct effect of Article 34 TFEU, promotional campaigns

⁶⁰ Case C-249/81, *Commission v Ireland*, ECLI:EU:C:1982:402.

⁶¹ Case C-325/00, *Commission v Germany*, ECLI:EU:C:2002:633; for a case note see Jarvis, Case C-325/00, *Commission v. Germany*, Judgment of the Court of Justice of 5 November 2002. Full Court (2003).

⁶² Case C-470/03, *A.G.M.-COS.MET Srl v Suomen valtio in Tarmo Lehtinen*, ECLI:EU:C:2007:213.

⁶³ For a comment see Cruz, *Free Movement and Private Autonomy* (1999), p. 608.

⁶⁴ Case C-159/00, *Sapod Audic v Eco-Emballages SA*, ECLI:EU:C:2002:343, para 74.

⁶⁵ Case C-265/95, *Commission v France*, ECLI:EU:C:1997:595, para. 65.

⁶⁶ *Ibid.*, para. 32.

⁶⁷ *Ibid.*, para. 33, see also Report from the Commission to the Council and the European Parliament on the application of Regulation (EC) No 2679/98, COM (2001) 160 final.

sponsored by private entities, such as the *Guaranteed Irish* initiative, have never actually appeared before the Court.

When applying Article 34 TFEU, it is thus not insignificant, whether it is the Slovenian Parliament, who adopts an act to promote Slovenian goods, or an Austrian limited company (GmbH) established by the Ministry for Agriculture promoting quality labels or an association of Irish businessmen and workers promoting *Guaranteed Irish*, or a British TV reality show star wearing a *Buy British* T-shirt. In legal terms, we are speaking of vertical and horizontal direct effects of Article 34 TFEU. Polemics around this issue arose precisely around *buy domestic* and quality label cases. As a matter of principle, Article 34 TFEU only prohibits state measures that limit free movement of goods between Member States.⁶⁸ Hence, only state campaigns designed to enhance consumer ethnocentrism are caught by Article 34 TFEU. Understandably, these also include campaigns by central (e.g. ministries) and regional authorities. When the *Buy Irish* case came before the Court it was, therefore, not surprising that Advocate General Capotorti found that:

“it would be going too far if, through the inclusion in the concept ‘measures’ of initiatives taken at a level not involving the exercise of public authority, an indirect link with the State were recognized in addition to the potential and indirect nature of the obstacle to imports resulting from advertising in favour of domestic products.”⁶⁹

By contrast, the Court took a different stance and as a result ethnocentric motions of private entities are also caught by Article 34 TFEU, provided they can be attributed to the state—be it because they were established by the state, primarily financed by the government or through obligatory contribution of companies in specific sectors, and/or have members that are appointed or controlled by public authorities.⁷⁰ For this reason, the campaign of the Irish Goods Council, a private company promoting Irish goods, was found to be in breach of Article 34 TFEU, as it was financed by the Irish government. *A fortiori*, the actions of the German Fund for quality marking were also bound by Article 34 TFEU.⁷¹ In a more recent case law, the Court went as far as to declare that states are responsible for public statements of their officials which reflect the state’s official point of view, regardless of whether they have a binding effect or not.⁷² Ethnocentric market campaigns are full of such public statements.

⁶⁸ Case C-8/74, *Procureur du Roi v Dassonville*, ECLI:EU:C:1974:82.

⁶⁹ Case C-249/81, *Commission v Ireland*, ECLI:EU:C:1982:402.

⁷⁰ See e.g. Case C-227/06, *Commission v Belgium*, ECLI:EU:C:2008:160. Similar to this was also a WTO panel’s finding in the case *Japan – Film* (WT/DS44/R, 1998, para 10.56).

⁷¹ Case C-325/00, *Commission v Germany*, ECLI:EU:C:2002:633, para 18.

⁷² Case C-470/03, *A.G.M.-COS.MET Srl v Suomen valtio in Tarmo Lehtinen*, ECLI:EU:C:2007:213.

5.1.2. Capable of Hindering, Directly or Indirectly, Actually or Potentially, Intra-Community Trade

In 1982, when the Commission brought an action against Ireland before the EU Court, the latter held that the implementation of a programme defined by the government of a Member State, affecting national economy as a whole by intending to control the flow of trade between the Member States by encouraging the purchase of domestic products, was to be regarded as a measure having an effect equivalent to quantitative restrictions.⁷³ The Court condemned the campaign because it reflected the Irish government's desire to achieve "the substitution of domestic products for imported products and was liable to affect the volume of trade between Member States".⁷⁴ Even though the sale of domestic products dropped by six per cent during the campaign, this did not convince the EU Court to change its decision about the campaign breaching Article 34 TFEU. The decision in the *Buy Irish* case should be distinguished from the decision in the *Apple and Pear Development Council* case,⁷⁵ from which one may conclude that state-sponsored promotion of national goods is generally illegitimate if merely the national origin of goods is highlighted, while on the other hand, the promotion of specific goods having distinctive qualities besides those of national origin, is permissible.⁷⁶ The line delimitating the two types of promotion is a very fine one. To clarify questions, the Commission issued in 1986 Guidelines for Member States' involvement in the promotion of agricultural and fisheries products. In this document, the Commission emphasised that:

"[The] references to national origin should be subsidiary to the main message put over to consumers by the campaign and not constitute the principal reason why consumers are being advised to buy the product".⁷⁷

The Commission added that references to quality control should only be made when products are subject to a genuine and objective system of quality control.

These principles were toughened by the EU Court in 2002 when ruling about the before-mentioned German quality label for domestic agricultural produce. The Court found that the contested scheme had, at least potentially, restrictive effects on the free movement of goods between the Member States.

"Such a scheme, set up in order to promote the distribution of agricultural and food products made in Germany and for which the advertising message underlines

⁷³ Case C-249/81, *Commission v Ireland*, ECLI:EU:C:1982:402, para. 29.

⁷⁴ *Ibid.*, para. 25.

⁷⁵ Case C-222/82, *Apple and Pear Development Council v K.J. Lewis Ltd*, ECLI:EU:C:1983:370.

⁷⁶ Barnard, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2013), p. 83; Gormley, *EU LAW OF FREE MOVEMENT OF GOODS AND CUSTOMS UNION* (2009), p. 420; Oliver, *OLIVER ON FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION* (2010), p. 168.

⁷⁷ Commission communication concerning State involvement in the promotion of agricultural and fisheries products, OJ C 272, 28.10.1986, p. 3–5, para. 2.3.1.

the German origin of the relevant products, may encourage consumers to buy the products with the CMA label to the exclusion of imported products”,

ruled the Court, adding that “(t)he fact that the use of that quality label is optional does not mean that it ceases to be an unjustified obstacle to trade”.⁷⁸ This ruling is in line with the Court’s decision in the *Commission v UK (made in case)*⁷⁹ in which it was held that national legislation requiring indication of origin is in practice and by its nature intended to enable the consumer to distinguish between domestic and imported products, which may prompt him to give his preference to national products, holding that “no imperative reason relating to consumer protection justifies such legislation”. The Court pointed out that

“the purpose of indications of origin or origin-marking is to enable consumers to distinguish between domestic and imported products and that this enables them to assert any prejudices which they may have against foreign products”.

Moreover, it stated that within a single market having the characteristics of a domestic market, which is set as the goal of the EU,

“the origin-marking requirement not only makes the marketing in a Member State of goods produced in other member states in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as the result of a division of labour between Member States.”⁸⁰

Origin marking is therefore considered by the Court with severe suspicion and afforded no tolerance unless affecting the actual quality of the goods.

5.2. *Justifying State Campaigns That Enhance Consumer Ethnocentrism*

Similarly to the GATT provisions, national measures that *prima facie* hinder free movement may nevertheless be justified under the EU internal market rules, thereby prevailing over free movement of goods, as long as they serve important interests recognised by the EU and are proportionate. Nevertheless, in its case law regarding campaigns that boost consumer ethnocentrism, the Court did not consider the possibilities that could justify such campaigns in depth. In the *Buy Irish* case, the Court entirely overlooked this possibility, finding only that the Goods Council measures were caught by Article 34 TFEU and were indeed measures having an equivalent effect to quantitative restrictions. In the *German Quality Label* case, this approach had not changed significantly. The Court did not show much hesitation when dismissing the German Government’s

⁷⁸ Case C-325/00, *Commission v Germany*, ECLI:EU:C:2002:633, para. 23-24; thereby referring to Case C-13/78, *Eggers*, ECLI:EU:C:1978:182, para. 26.

⁷⁹ Case C-207/83, *Commission v UK*, ECLI:EU:C:1985:161.

⁸⁰ *Ibid.*, para. 17.

argument that the quality label constituted an exception within the meaning of Article 36 TFEU for the protection of industrial and commercial property in so far as it constituted a geographical indication of provenance. In that regard, the Court reasoned that since the quality label defined the provenance as the extent of the German territory and applied to all agricultural and food products fulfilling certain quality requirements alike, it could not be considered as a geographic indication capable of justification under Article 36 TFEU.⁸¹

Promoters of campaigns and quality marks in the Member States offer numerous policy reasons as a way of their justification: filling the national budget, job preservation, consumer protection, national tradition and culture, food self-sufficiency and aversion of hunger, environmental protection etc. Considering the established case law of the EU Court, it is reasonable to expect that in potential actions against such campaigns, the EU Court would not accept any of them. That being said, it should be emphasised that the consumer protection goal has been accepted as a “mandatory requirement” capable of justifying barriers to free trade already in 1979 in the *Cassis de Dijon* case. Consequently, the majority of national campaigns rely on the quality of goods, to which consumers are entitled to, as a means of their justification. An impartial observer may find, however, that these campaigns, in fact, promote the country of origin. In this way, sponsors of campaigns count on consumers’ ethnocentric sentiments to ensure the purchase of domestic goods. It may well be that Austrian meat is of excellent quality, but is it possible that meat of such same quality is not to be found anywhere else in the EU?! If the answer is negative, why can this particular meat also not get the Austrian label of quality for Austrian consumers to recognise that although it is of, e.g. Slovenian or British origin, it is of the same quality as the domestic one? Promoters probably rely on the fact that consumers will not give such questions much thought. This suggests that the motives of campaigns run deeper than purely providing quality information. As H.E. Beaudeaulais found in relation to the *Buy Canadian* slogan from 1961, buying domestic is “a plea made to us, and not a reason given to us as to why to favour Canadian products.” Undoubtedly, the consumers want quality goods, but quality cannot merely be guaranteed by a product originating from a specific state, much the same as inferiority cannot be ascribed to products originating from another state. What sponsors of campaigns rely upon is the fact that consumers are also workers and entrepreneurs and that ethnocentric campaigns will aid in development of their negative stereotypes towards foreign goods.

6. Conclusions

Buy domestic campaigns, as a formula to protect and isolate a respective economy, seem very straightforward: raising consumer ethnocentrism increases consumption of

⁸¹ Case C-325/00, *Commission v Germany*, para. 27.

domestic goods, preserves domestic jobs and fills the state budget; it additionally gives incentive to domestic farmers to produce domestic food and limits long-distance transport of goods from other parts of the world, protecting the environment and assuring food self-sufficiency in the process. Nevertheless, this formula is based on two important assumptions, i.e. that consumers respond to the campaigns and that the state manages to conceal this win-win formula from the other states, thus keeping export markets open. The first assumption is dependent upon the awareness of the domestic brands among the consumers (if Americans believe that LEGO bricks are of American origin, when they are in fact Danish, *Buy American* slogans actually benefit the importers) and upon their (positive) general opinion of the quality of domestic production. As an (obviously non-patriotic) Greek financial economist stated in respect of the 1985 campaign *Buy Greek*:

“This effort to brainwash Greeks into buying local goods simply won’t work because, on the whole, goods imported from the West are cheaper and of superior quality to locally manufactured products.”⁸²

Surely not all consumers are this xenomaniac, but if domestic production had not convinced the consumers about its quality and competitive prices before the *buy domestic* campaigns even started, the latter might well be money poorly spent. In times of globalisation, it is difficult to expect consumers to turn their backs to specialisation of labour and the economies of scale—the two most important advantages of free trade. Additionally, it is unreasonable for governments to believe that they are the ones who have invented protectionist campaigns and that the thought had crossed no other government’s mind. Consequently, it hardly seems realistic that this *double jeu*—closing the domestic market for imports while counting on export markets to stay open—can be played for a very long time. The recent U.S. *Buy American* policy, which instantly led to some of the U.S. major trading partners to consider adopting similar policies, clearly demonstrates that it cannot.

This paper points out that by encouraging consumers to behave ethnocentrically, governments in fact withdraw from their free trade commitments (either under the WTO Agreements, the EU Treaties or other regional trade agreements). The WTO and the EU have quite similar provisions concerning non-pecuniary restrictions on the free movement of goods, a form of which are also *buy domestic* campaigns. These provisions, however, have been interpreted in a very different way in each system. The relevant WTO provisions, therefore, affect the national regulatory autonomy to a much lesser extent than their EU counterparts. The two systems’ differences reflect in the terms of their aims, structure, homogeneity, etc.—despite the ever increasing convergence between

⁸² ‘Buy Greek’ Campaign Launched to Cut Down Flow of Luxury Imports, URL: http://articles.latimes.com/1985-01-28/business/fi-10296_1_greek-market.

en the two systems.⁸³ Regardless of the differences in the two systems, however, they both share a common denominator—prevention of protectionism. Even though the purpose of Article 34 TFEU is much more complex than simply removing protectionism, the latter is nevertheless seen as the most severe form of trade barriers and is as such prohibited. Within GATT, on the other hand, Article III must *primarily* be interpreted as an instrument preventing measures with protectionist intent. The more or less direct and evident protectionist purpose of *buy domestic* campaigns thus contravenes the WTO and EU principles prohibiting non-pecuniary obstacles to free trade. Even so, both trade liberalisation systems contain certain shortcomings that prevent the effective removal of consumer ethnocentrism promotion campaigns as a means of economic protectionism. Within the WTO system, these drawbacks are legal uncertainty concerning legitimate exceptions to the national treatment rule and a rather robust dispute settlement system.

On the other hand, the EU Court judgments, confirming that *buy domestic* campaigns and national quality marks contravene free movement principles, and a relatively efficient enforcement system, enable not only other Member States and the European Commission to bring actions before the EU Court against the protectionist Member State, but also private individuals and companies (e.g. importers), placed at a disadvantage by measures encouraging the purchase of domestic products, to bring an action for breach of EU law before the national courts and tribunals. Nevertheless, in recent years, markets have witnessed numerous cases of consumer ethnocentrism boosting in contravention with EU law. However, the European Commission has not brought any action against the violating Member States. Quite to the contrary, the Commission itself is encouraging the shortening of distribution channels and openly showing support for the marketing of local products in the form of financing basic services for the creation of commercial centres, local shops or multi-purpose convenience stores, building of covered and uncovered markets, etc.⁸⁴ With these measures, the Commission is changing the traditional principles on which the EU internal market is founded as well as supporting the closure of local markets for imported products.

Regardless of the legal principles on free trade, potential judgments or legal sanctions, authorities boosting consumer ethnocentrism should carefully consider whether these campaigns are truly to their benefit. Because a single state cannot conceal such campaigns from its trading partners, protectionism is like a rolling snowball shattering the advantages of free trade that have proved to benefit the consumers.

⁸³ Perišin, FREE MOVEMENT OF GOODS AND LIMITS OF REGULATORY AUTONOMY IN THE EU AND WTO (2008), p. 3.

⁸⁴ European Commission, Green Paper on promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe (2011), para. 3.1.2.

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ZBORNIK ZNANSTVENIH RAZPRAV

LXXIX. LETNIK, 2019, PERSPEKTIVE PRAVA EVROPSKE UNIJE, STRANI 79–106

Janja Hojnik

Najprej naše: zakonitost javnih ukrepov za krepitev potrošniškega etnocentrizma z vidika EU in STO

Članek razkriva, ali so različne javne kampanje in pravila, ki krepijo potrošniški etnocentrizem, na nacionalni ravni ali ravni EU, skladna s prostotrgovinskimi sporazumi. Pri tem razpravlja o skladnosti javnih kampanj »kupuj domače«, ki jih podpirajo države, vključene v Svetovno trgovinsko organizacijo (STO), in načelom prostega pretoka blaga v EU. Te kampanje pogosto podpirajo državni organi in so v številnih pogledih diskriminatorne. Poleg tega je podpihovanje negativnih stereotipov o tujem blagu zelo podobno diskriminaciji tujcev. Svetovna trgovinska organizacija in EU imata podobne določbe o nefinančnih omejitvah prostega pretoka blaga. Med te spadajo tudi kampanje »kupuj domače«. Vendar pa te določbe Sodišče EU in mehanizmi reševanja sporov v STO razumejo drugače. To vodi v zelo različno razumevanje zakonitosti ukrepov »kupuj domače«.

Ključne besede: EU, Svetovna trgovinska organizacija, potrošništvo, etnocentrizem.

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ZBORNIK ZNANSTVENIH RAZPRAV

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Janja Hojnik

Our First: Legality of Public Measures to Enhance Consumer Ethnocentrism from the EU and WTO Perspective

Post-crisis economy on both sides of the Atlantic faces various protectionist strains. The paper investigates how various public campaigns and rules that boost consumer ethnocentrism, both at the national and EU level, come into line with free trade agreements signed by most of the contemporary states. The paper discusses the consistency of *buy domestic* campaigns supported by the states with the World Trade Organisation (WTO) and European Union (EU) legal principles on free movement of goods. These campaigns, especially when sponsored by public authorities, are in many aspects discriminatory. Furthermore, the promotion of negative stereotypes with respect to foreign goods does not differ very much from discrimination of foreigners. The paper finds that the WTO and the EU have quite similar provisions with respect to non-pecuniary restrictions on the free movement of goods, a form of which are also *buy domestic* campaigns. These provisions, however, have been interpreted in a very different manner by the EU Court and WTO dispute settlement bodies that leads to important differences in respect of the legality of publicly supported *buy domestic* campaigns under the respective legal systems.

Keywords: EU, World Trade Organisation, consumerism, ethnocentrism.