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Efficient Restrictions of Trade in the EU Law of the Internal Market: Trust, Distrust and the Nature of Economic Integration

Ioannis Lianos*

Introduction

The tension between the "integration"-focused cosmopolitanism of the European project and communautarian understandings of the common good, as these have evolved in the context of the nation-state, has always been inherent in the evolution of the European Internal Market[1]. Its source lies on the wide variety of citizens' and consumers' preferences that national regulation aims to satisfy, compared to the relatively narrow scope of what has been considered as the core of the Internal Market project: to constitute "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"[2]. The objective pursued by the Internal Market project has always been perceived to be the unfettered movement of products and services as well as that of factors of production, such as labour and capital, between Member States.

This functional definition of the Internal Market objective missed nevertheless an important dimension of its perceived contribution to the wider political project of European integration, as this was clearly spelled out in the Schuman Declaration, and later described in the preamble of the Treaty of the EC (TEC): to "lay the foundations of an ever closer union among the peoples of Europe". Such a narrow definition did not integrate adequately the Internal Market within the array of other objectives followed by the Community, and the European Union (EU), formulated in the preamble of the constitutive treaties and given legal texture in former Article 2

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1 For an historical overview of the development of the Internal Market, see, Laurence W. Gormley, 'The Internal Market : history and evolution', in Niamh Nic Shuibhne (ed.), Regulating the Internal Market (Cheltenham :Edward Elgar, 2006), pp. 14-28. ; Paul Craig, 'The evolution of the single market', in Catherine Barnard & Joanne Scott (eds.), The Law of the Single European Market : Unpacking the Premises (Oxford : Hart Publishing, 2002), pp. 1-40.

2 Article 26(2) of the Treaty on the Functioning of the European Union (TFEU). Ex Article 14 of the Treaty of the European Communities (TEC).

TEC[3]. It is clear that the political necessity of completing the "common market" in schedule led to a detached (from other objectives) and mostly functional interpretation of the negative and positive market integration provisions of the Treaty. All attention was dedicated to the task of removing "existing barriers" to integration. Indeed, the European Commission and the European Court of Justice (ECJ) had no intention to gamble their newly acquired political capital by challenging directly national understandings of the common good. Technocracy and loyalty to the completion of the specific task of removing barriers to trade was the winning strategy, especially if the task was broad enough to extend their capacity to act. The objective was not to look democratic but technocratic. The decoupling of the economic dimension (a matter for experts or problem-solvers) from the social sphere (considered as a terrain for the "political" and mostly the generalists' playground) was the cornerstone of the technocratic approach. Insulating the Internal Market project from popular political pressure preserved the capacity of the European Institutions to affirm their independence and perform their task of eliminating barriers to trade quietly and without scandal.

The task followed by the European institutions in establishing the Internal Market was, however, far from being secluded to the economic dimensions of the European integration project. "Non-market values" or "public interest objectives" have always been present, not only in Internal Market related EU legislation[4], but also in the various derogations to the free movement provisions of the Treaty[5]. Nonetheless, the narrative of economic integration was profoundly inspired by the imagery of the removal of national barriers to trade and paid little attention to other values. This oversight has certainly been one of the main reasons for the uneasiness created by the expansionist application of the negative integration provisions of the Treaty by the

[3] Article 2 TEC: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States".

[4] Stephen Weatherill, 'Supply and demand for Internal Market regulation : strategies, preferences and interpretation', in Niamh Nic Shuibhne (ed.), Regulating the Internal Market (Cheltenham :Edward Elgar, 2006), pp. 29-60, at 52 ; Bruno de Witte, 'Non-market values in Internal Market legislation', in Niamh Nic Shuibhne (ed.), Regulating the Internal Market (Cheltenham :Edward Elgar, 2006), pp. 61-86.

[5] Catherine Barnard, 'Derogations, Justifications and the Four Freedoms : Is State Interest Really Protected ?', in Catherine Barnard & Okeoghene Odudu (Oxford : Hart Publishing, 2009), 273-305.

Court in the area of goods as well as by the proposal of the Services directive[6], both met with the battle-cry of the "erosion of national sovereignty".

These difficulties essentially lie on the narrowness of the conception of "economic integration" that remains dominant in the sphere of the Internal Market. Integration has been equated to the elimination of barriers to free movement or the potential restriction of interstate trade. There is no need for elaborate analysis to understand the hollowness of this approach. In the national context, public authorities often adopt measures that suppress the possibility of trade: licences, bans on sale or use, inspections, registration, authorisation or licensing requirements, various sorts of prohibitions. Their aim is to satisfy the "preferences" of their citizens and/or the consumers on a high degree of environmental protection, the promotion of the cultural heritage of the community, to ensure public health and respond to market failures such as informational asymmetry in the case of consumer protection[7]. Public authorities also recognize that the promotion of trade has positive effects on allocative, productive and dynamic efficiency: consumers should be able to purchase products or services at the lowest prices and benefit from a wider consumer choice and innovative products/services. The aim of public authorities in this context is not to promote trade but to promote efficient trade. I take a broad view of efficiency and I consider that it reflects a state of affairs where the preferences of the specific community are satisfied, whatever these preferences might be.

If we transpose the same regulatory problem at the EU context, one could run to a number of difficulties. The first is to determine the actors, whose preferences should be considered. This might take place at the individual level: a regulation will be efficient if it reflects the preferences of every one affected, directly or indirectly, by it, which will be close to a Pareto efficiency standard. The aggregation might take place at the level of the community: nation-state or the EU level (a Kaldor-Hicks standard). The result might be different in each circumstance, but the constant is that a restriction of trade can be efficient, unless the promotion of trade is the only value pursued by the entity (the value of trade). This is not the case at the national level, but what about the EU level?

[6] Directive 2006/123/EC of the European Parliament and of the Council on services in the Internal Market [2006] OJ L 376/76.
[7] The term "preference" refers to how people rank or order states of the world.

The value of (inter-state) trade has certainly a particular significance in EU law, for the reasons previously explained. Nonetheless, I will argue that this is not the only value that is reflected in the EU legal system: other values are increasingly taken into account, either in the enforcement of negative integration rules, or in the legislative activity of the EU. The more holistic approach the European Commission has recently embraced in the regulation of the Internal Market is a telling illustration of this trend. The aim of the EU is not to promote interstate trade but efficient interstate trade. The integration in the Treaty of the Charter of fundamental rights and the extension of the powers of the EU to act in a variety of non-strictly economic areas indicate that the time of the seclusion to the economic sphere is over.

This evolution raises a number of questions as to the meaning of "economic integration". This term cannot be defined simply as the process of eroding national regulatory barriers to trade; such a narrow definition would jeopardise the promotion of efficient interstate trade. It cannot also be restricted to that of curbing national protectionism. Protectionist measures are clearly inefficient, because they do not take into account foreign interests that might be affected by the measure. However, the characterization of protectionist measure emphasizes revealed national preferences and does not take into account a possible transformation of national preferences, which might be a consequence of the Internal Market project. That denies to the Internal Market its transformative effect: it is more a project of "market building" than one of "market maintenance"[8]. The integration of efficiency considerations in the analysis of restrictions of interstate trade challenges the current understanding of the "integration" concept. The study attempts to sketch a different theoretical framework for the concept of integration that would be compatible with the broader efficiency approach.

I will first explore the meaning of economic integration, by opposing a process versus an outcome view of this concept. I will then argue that the outcome view of integration that initially prevailed was particularly narrow, as this is illustrated by the application of the negative integration rules of the Treaty on the free movement of goods (Art. 34 TFEU), with the result that efficient restrictions of trade were subject to

[8] Indeed, in contrast to the "market maintenance" logic, "market building" intervenes at the level of preference formation in an attempt to break up past path-dependencies and established national habits. Contrast Donald Regan, 'The Supreme Court and State Protectionism : Making Sense of the Dormant Commerce Clause', (1986) 84 Michigan L Rev 1091 with Miguel Poiares Maduro, We, The Court (Oxford: Hart Pub., 1998), at 98.

strict scrutiny. The evolution of the jurisprudence of the Court in the interpretation of Article 34 TFEU as well as the more inclusive to other non-trade values perspective recently embraced by the Commission in the positive integration program indicate, however, a turn towards a more holistic approach that accommodates efficient restrictions of trade. I will conclude that this evolution raises important challenges to the traditional concept of "economic integration" and suggests the need for a different conceptual framework.

I. The meaning of "economic" integration: Process versus outcome views

In introducing the Florence Project on "Integration through law", Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler observed that its scope was "to examine the role of law in the process of European integration, as seen against the American federal experience"[9]. They noted that "integration is fundamentally a political process", which "is largely determined by political actors and political will"[10]. The authors underlined the main "existential dilemma" facing the process of European integration, "inherent in most forms of social organizations":

> "the dilemma of reaching an *equilibrium* between, on the one hand, a respect for the autonomy of the individual unit, freedom of choice, pluralism and diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony and, at times, unity"[11].

They also observed that

> "(t)he desire for this equilibrium is the product not only of a quest for a functional optimization of economic and social welfare, but also of the more profound and *never-ending* search for a peaceful order which is at the same time consonant with the ideals of liberty and justice"[12].

The comparative perspective followed and the emphasis given on the principles of federalism brought to the authors' attention the tensions between the centre and the periphery, between the federal/Community level and the State level, which was a

[9] Mauro Cappelletti, Monica Seccombe & Joseph H.H. Weiler, 'Integration Through Law: Europe and the American Federal Experience A general Introduction', in Mauro Cappelletti, Monic Seccombe & Joseph Weiler (ed.) Integration Through Law, Vol. 1, Methods, Tools and Institutions, Book 1, A Political, Legal and Economic Overview (de Guyter, 1986), at 3.
[10] Ibid., at 4.
[11] Ibid., Emphasis added.
[12] Ibid. Emphasis added.

common feature of the US federal system and that of the EC at the time. The authors took care not to identify integration with a strengthening of the centre at the expense of the periphery or with the tightening hold of the centre on the periphery. They viewed, instead, integration and federalism as "twin concepts". Both express "the societal philosophy and organizational principle which require a particular *balancing* of individual and communal interest- a *balance* between particular and general, peripheral and central, and between autonomy and heteronomy"[13]. The emphasis put on the method, the balancing of different interests, indicates that the equilibrium they had in mind was evolutionary. The process of balancing guarantees that at any point of time the equilibrium would be optimal and should be accepted as such, without any reference to an ideal or optimal state, other than one ensuring the viability of the entire frame. Making sure that the "union" functions "smoothly" is the only constraint imposed.

This "process" view is also reflected on the measure of the "success" of the legal integration advanced by the authors. For the operation of "legal integration", it is necessary to develop a "new federal system", itself based on a "new legal order"[14]. The success of the legal integration relates to the success of the new legal system. But how can one measure the success of a legal system? One of the possible measures of success is the acceptance by those subject to it, which in the case of federalism includes the constituent states and the "people". They noted that

> "(a)cceptance of the law could be an indication of the acceptance of the integration process. Instruments for enforcing compliance are of course essential; but unless compliance is largely voluntary and the use of force only exceptional, the system is likely to crack under the strain. Again very simplistically, compliance is obtained by securing the subjects' *confidence* in the system, principally – or so at least we believe in Western democracies – by allowing the subjects to participate both in the selection of the form of government and in the law-making process and by assuring through *procedural* means that substantially the laws reflect or *satisfy* the *common values of the society*. As for the concept of 'efficiency', in addition to normal connotations applicable to any system of governance, in a non-unitary system we may specifically ask whether the functions of government are indeed allocated as between the central authority

[13] Ibid., at 14.
[14] Ibid., at 25.

and the constituent units in the most efficient way. The test of efficiency is of course much more difficult to construct and is almost always value laden. For some it will be an economic notion of maximizing the utility of resources, for yet others it could represent a system which most successfully responded to the wishes of its constituents. The authors in this project have adopted different definitions of these concepts".[15]

What emerges from this excerpt is the emphasis put on the process, rather than on the end-result. The participation of the constituent parts to the law-making and the existence of procedural means to guarantee that the law reflects or satisfies the common values of the society is emphasized. When the discussion comes, however, to efficiency, the authors are adepts of value pluralism and argue that there is not one value that should shape its content.

The same volume included a chapter introducing the economic perspective on European integration. Jacques Pelkmans offered the standard definition of "economic integration" as "the elimination of economic frontiers between two or more economies"[16]. Here, the focus was different: outcomes matter. Pelkmans explained:

"(t)he fundamental significance of economic integration is that differences in prices of equivalent goods, services and factors of production be decreased to the irreducible minima arising from spatial differentiation. With the equalization of product and factor prices over the integrated 'economic area', no further resource savings can be made in respect of a given production which implies that the highest possible efficiency has been achieved. Of course, there is nothing inherently good in removing literally every economic frontier, as there will be, at any given point in time, social and non-material reasons for imperfections in mobilities. Economic integration might even collide with cultural or religious values. However, *assuming a minimum homogeneity of such values*, or at least *absence of fundamental value conflicts*, a case can be made that, under certain conditions, economic integration improves the 'welfare' of the integrating economies"[17].

[15] Ibid..
[16] Jacques Pelkmans, 'The Institutional Economics of European Integration, in Integration Through Law: Europe and the American Federal Experience A General Introduction', in Mauro Cappelletti, Monic Seccombe & Joseph Weiler (ed.) Integration Through Law, Vol. 1, Methods, Tools and Institutions, Book 1, A Political, Legal and Economic Overview (de Guyter, 1986), at 318.
[17] Ibid., at 319. Emphasis added.

The "welfare" gains brought by "economic integration" refer essentially to allocative and productive efficiency. There has been some effort to quantify these gains, although, as Dennis Swann has noted, the *Cockfield White Paper* published by the European Commission in 1985[18] did not estimate the benefits of completing the Internal Mand "instead, the Commission acted first and carried out the calculations later"[19]. The *Cecchini Report* proceeded to a more detailed evaluation of the benefits of the removal of trade barriers, barriers to production and the greater enjoyment of economies of scale and the reduction of costs[20]. The "welfare gains" referred to allocative and productive efficiency, as well as to the creation of millions of jobs. No detailed analysis was, however, provided on the possible benefits and costs of "economic integration" on other parameters of welfare (social protection, environment, quality of life indicators, equality). These were notoriously ignored.

The analysis of the concepts of "legal integration" and "economic integration" indicates an inherent tension between a "process" and an "outcome" view of the concept of integration. The implications of the process view are clear with regard to the participation of the Member States to the decision-making process: the constituent parts influence the norms adopted by the centre (positive integration). The process view would also require a continuous balancing of the competing interests of the centre and the periphery in the application of negative integration rules. The objective of balancing is not to uncover an efficient static equilibrium. The process view does not espouse a deterministic model, but one that relies on a stochastic process evolving over time, ignited by the random political shocks that might alter the preferences and values of the actors and thus the probable systemic outcomes. In contrast, the outcome view leaves no room for random variation of the preferences and the values of the actors, which are considered as a given.

An additional difference between the process and the outcome view is that they commend the involvement of different institutional actors, at least as a matter of

[18] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310, June 1985, available at http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.
[19] Dennis Swann, The Economics of the Common market, integration in the European Union (Penguin, 8th ed., 1995), at 134.
[20] Europe 1992 – The Overall Challenge (Cechini Report), 1988, at 17 (summary available at SEC (88) 524 final) identified a number of "cost-savings" from market integration: "the static trade effect" (possibility of buying from cheaper foreign suppliers), "the competition effect" (downward pressure on prices and improvement of productive efficiency as a result of the introduction of international competition), "the restructuring effect" (economies of scale and greater efficiency).

degree. The process view essentially requires constant political bargaining to uncover the evolving preferences and values of the actors. Consequently, it involves political personnel. The outcome view relies on the involvement of a different kind of personnel. As the systemic objective pursued is a given, there is more emphasis on coherence, effectiveness and delivery. "Experts" will run the show. A greater involvement of institutions composed by experts, as opposed to mainly political institutions, is an indicator of the prevalence of the outcome view of integration.

The political circumstances of the first decades of European integration inevitably led to the strengthening of institutions composed by experts, the Commission and the judiciary, as opposed to political institutions, such as the Council and the European Parliament. Faced with a blockage of the route of positive integration, through political consensus between the constituent States, after the Luxembourg compromise in 1966, the European Court of Justice (ECJ) stepped in with the aim to promote the interest of the centre in the process of negative integration and to facilitate the task of the European Commission in its legislative initiatives to harmonize the Internal Market (the so called "heroic period")[21]. Following the Court's intervention, the process of integration became "judicially constituted" – or at least judicially centred - and remained so, at least until the enactment of the Single European Act and the new approach of harmonization, also largely dominated by the European Commission, another body whose legitimacy lies on expertise[22].

The intervention of expert institutions, as opposed to political institutions, illustrates the prevalence of the outcome versus the process view of integration. But it had also implications on the kind of outcome view that has finally prevailed.

A distinction may be established between the "narrow outcome view" and the "broad outcome view", as each of them represents a different understanding of the concept of efficiency.

The narrow outcome view perceives that the overall aim of the integration is the promotion/facilitation of trade between Member States. Its immediate targets are barriers to trade, defined as impediments to intra-EU trade exchange. Efficiency is not the only reason to promote trade. It is also possible to advance non-economic considerations for facilitating trade between Member States, such as the idea that

[21] J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 The Yale L J 2403, 2428.
[22] J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Paul Craig & Gráinne de Búrca (ed.) The Evolution of EU Law (OUP, 1999), pp. 349-375, at 350.

economic interdependency increases the likelihood of political integration or that it is an indispensable step in the "market building" project[23]. Poiares Maduro explains:

> "(m)arket agents in Europe are, by contrast to the American market, used to operating in a context of national markets. Their path-dependence has been linked to those: they know their way across national rules and national political processes; they have planned their strategies according to national markets […] national political processes operate according to national accountability; and actors have constructed their networks around these national political and economic markets"[24].

Breaking the path-dependence on national economic and political processes becomes the aim of economic integration. The economic actors' preferences are not exogenously determined, but endogenously transformed by the operation of the integration principle. This can be achieved either by uniform regulatory standards that would shatter existing national political processes or by the deregulation of public and private barriers to intra-community trade that partition these national markets and thus create obstacles to the "Single market". Consequently, an approach that would only bring within the scope of an EU law prohibition measures that are discriminatory or protectionists would frustrate the "desire to attain a fully unified market"[25].

On the contrary, the broad outcome view of economic integration does not focus only on interstate trade facilitation, but includes other aspects of welfare, considered important not only by the Member States, but also by their citizens[26]. These include environmental and social protection, cultural diversity, equality, to cite but a few. Their maximization might conflict with the objective of trade facilitation.

The next section will examine the definition of a measure equivalent to a quantitative restriction (MEQR), prohibited by Article 34 TFEU, which is at the heart of the debate over the "narrow" and the "broad" outcome view of economic integration.

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[23] Miguel Poiares Maduro, We, The Court (Hart Pub., 1998), 88-102; Stephen Weatherill, 'Pre-emption , Harmonization and the Distribution of Competence', in Catherine Barnard & Joanne Scott (eds.), The Law of the Single European Market: Unpacking the Premises (Hart Pub. 2002), pp. 41-73, at 49.

[24] Ibid., at 98.

[25] Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', (2009) 68(3) Cambridge L J pp. 575-606, at 583.

[26] The latter became more directly involved in the process of integration, through the increasing role of the European Parliament and the constitution of the EU citizenship

II. The rise and fall of the "obstacles to (intra-Community) trade approach" in the definition of MEQR under Article 34 TFEU

The definition of MEQR under Article 34 TFEU is of great importance for determining the scope of the negative integration provisions of the Treaty. In *Dassonville*[27], the Court had to decide between two different approaches. One view supported the prohibition of only regulations that imposed discriminatory or protectionist obstacles to trade. Another view argued for the extension of the concept of MEQR to catch any restriction of inter-state trade, even if it was indistinctly applicable and had the same impact for both imported and domestic goods and even if it's main purpose was to promote efficient trade (obstacles to trade approach). The Court finally adopted the "obstacles to trade" approach[28].

The choice of this broad definition[29], confirmed and extended by subsequent case law[30], was later transposed to the interpretation of other freedoms of movement, notably in the area of services[31] and establishment[32]. It did not extend, however, to pecuniary restrictions of trade imposed by internal taxation that are found within the scope of the Treaty, only if the trader proves that they are discriminatory or protectionists[33]. J.H.H. Weiler noted the apparent incoherence of the approach of the Court:

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[27] Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837 (hereinfter *Dassonville).*

[28] Ibid., at para 5, holding that "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"

[29] However, this definition of MEQR is not as broad as to cover restrictions of trade in a wholy internal situation, which remain outside the scope of Article 34 TFEU. See, Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683, para 38. For an analysis see, Alina Tryfonidou, 'The Outer Limits of Article 28 EC : Purely Internal Situations and the Development of the Court's Approach Through the Years', in Catherine Barnard & Okeoghene Odudu (eds.), The Outer Limits of EU Law (Hart Pub., 2009), pp. 197-243.

[30] See, Case 268/8, *Oosthoek's* [1982] ECR 4575 (extending the obstacles approach to indistinctly applicable measures that affect just the marketing opportunities of foreign products) ; Joined Cases 60-61/84, *Cinéthèque* [1985] ECR 2605, para 22 (declaring that Article 34 TFEU covers non-discriminatory national measures that create barriers to intra-Community trade).

[31] Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd* [1991] I-4221, para 12, "(a)rticle [56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services".

[32] On Article 49 TFEU see, Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

[33] See, Catherine Barnard, The Substantive Law of the EU (Oxford: OUP, 2nd ed., 2007), 45-63.

> "(d)oes it make sense to apply the principle of non-discrimination and thereby give the state near total freedom to regulate through tax […] but to apply the principle of obstacles to any non-pecuniary regulation (even if non-discriminatory) and require the state to justify its regulatory choice […] by reference to some authorized list of exceptions each and every time its non-pecuniary regulation hinders the marketing of imported products?"[34].

One might also add the incoherence of applying a broad "obstacle to trade" approach for tax rules that affect, for example, freedom of establishment[35], while internal taxation is subject to a more restrictive test under Article 110 TFEU. Furthermore, the Court did not extend the "obstacle to trade" approach to restrictions on exports, which fall under Article 35 TFEU only if they are discriminatory against goods involved in cross-border trade[36].

The implementation of the "obstacles to trade approach", for non-pecuniary regulations, had important implications on the role of the Court and the dominant perspective of European integration. According to J.H.H. Weiler,

> "(i)nstitutionally, the Dassonville thrust the Court to the centre of substantive policy dilemmas. The Court, as a Community Institution had to become the arbiter of delicate social choices, reconciling trade with competing social policies. Constitutionally, as mentioned, Dassonville represented a massive expansion in the legislative competence of the Community"[37].

Any public barrier imposing a restriction of trade could fall under the prohibition principle. The new architecture included, nonetheless, a compromise making acceptable that change to the tenants of the process view. The autonomy of Member States in adopting measures that would restrict intra-community trade was limited, although they still had the choice to justify these measures for public interest objectives, under specific circumstances. The explicit exception to the prohibition principle, provided for in Article 36 TFEU, authorized Member States to maintain measures that were restrictive of trade by introducing a two-steps approach, where in

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[34] J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Paul Craig & Gráinne de Búrca (ed.) The Evolution of EU Law (OUP, 1999), at 358.

[35] See, Case C-168/01 *Bosal Holding BV v. Staatssecretaris van Financiën* [2003] ECR I-9409.

[36] Case C-205/07. *Criminal proceedings. Against Lodewijk Gysbrechts. and. Santurel Inter BVBA* [2008] ECR I-9947.

[37] J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Paul Craig & Gráinne de Búrca (ed.) The Evolution of EU Law (OUP, 1999), at 363.

the first step, the claimant proved the existence of a restriction of trade and, in the second step, the Member State provided justifications that the restriction of trade is efficient and thus did not fall under the scope of the Treaty prohibition.

The margin of discretion left to Member States is thus limited.

First, the "obstacles view" leads to an asymmetrical allocation of the evidential burden of proof between the Member States and the traders. The traders can easily argue that a specific state legislation could potentially restrict intra-community trade and is thus an obstacle to trade. The evidential burden of proof would then shift to the Member States in order to argue justifications, the standard of proof imposed on the Member States being particularly high.

Second, the list of objective justifications enumerated in Article 36 TFEU is limited to what constituted the thrust of state intervention in markets, the time the Treaty was drafted, and does not include new emerging terrains of state regulation: in particular, environmental, social and consumer protection. The Member States had not agreed to a more flexible scope for explicit objective justifications, as it was unclear at the time of the drafting of the Treaty, that the prohibition of Article 34 TFEU covered also non-discriminatory restrictions of trade. The risk of a political back-clash led the Court to enlarge the scope of objective justifications by a judicially-created exception, the mandatory requirements of general interest of *Cassis de Dijon*[38]. These did not, however, apply to state regulation that formally distinguished between domestic and foreign products (discrimination in law), which fell under Article 34 TFEU and could only be justified by the explicit Treaty-based justification of Article 36 TFEU.

Third, the Court maintains an allocation of the evidential burden of proof that is less favourable to Member States, by reinforcing the "obstacles approach" with a presumption of functional parallelism/equivalence of the regulation of the home country with that of the host country: "(t)here is […] no valid reason why, provided that they have been lawfully produced and marketed in one of the member States, (products) should not be introduced into any other Member State". The Member States can rebut the presumption by claiming mandatory requirements of general interest. In comparison, traders needed only to contend that the host state's

[38] Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* (hereinfter *Cassis de Dijon*) [1979] ECR 649. For an analysis see, Joanne Scott, 'Mandatory or Imperative Requiremements in the EU and the WTO', in Catherine Barnard & Joanne Scott (eds.) Catherine Barnard & Joanne Scott (eds.), The Law of the Single European Market: Unpacking the Premises (Hart Pub. 2002), pp. 269-292; Eleanor Spaventa, 'On Discrimination and the Theory of Mandatory Requirements', (2001) 3 CYELS, pp. 457-478.

regulation imposed an additional requirement, in comparison to the home state's regulation, in order to successfully bear the required standard of proof of a MEQR and thus shift the burden of proof to the Member States for objective justifications.

The application of the principle of functional parallelism/equivalence leads to a limited extraterritorial application of the home State rule. The host State is under the obligation to accept the standards, checks and control of the home State, unless it shows that these standards or measures do not conform to its own standards of protection of the specific public interest objective. If this is the case, the host State's regulation would apply, subject to the proportionality test. The latter operates in order to unveil opportunistic behaviour in the use of the equivalence principle. The conjunction of the market access principle with the principle of equivalence provides economic operators with a limited right to choose among different national regulatory regimes. However, it does not establish a regime of regulatory competition, as the host State is not obliged to accept the standards set by the home State, if these do not preserve the social and moral values that are protected by its regulation.

Fourth, the justification of the measure by the Member State is subject to a strict proportionality test. Proportionality is also a general principle of EU law, applying as such to all measures adopted by the EU institutions[39]. The test does not involve any effort of quantifying the costs imposed by the restrictions to trade and comparing them to the benefits of the public interest objectives advanced by the Member State. The test might resort to intuitive analysis but it does not require the identification of a specific result of the trade-off, as would a proper cost-benefit analysis test. In most cases, where the Court applied the proportionality test, it divided the analysis in three steps: (1) is the measure suitable to achieve the desired end? (finality test); (2) was it necessary to achieve this end? (necessity test); (3) did the measure impose a burden which was excessive? (excessive dis-proportionality test) or could the State have adopted alternative means that were less restrictive of trade? (least restrictive alternative test or LRA test).

The third step of the analysis might introduce a need for quantification, if taken literally. The examination of the least restrictive alternative theoretically requires the identification of the costs for inter-state trade of the specific state regulation and comparison with the costs of an alternative state regulation (the counterfactual) that

[39] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, para. 13.

is likely to achieve similar aims. Nevertheless, a comparative quantitative analysis of the specific state regulation and the counterfactual has never occurred in the jurisprudence of the Court. The public interest benefits brought by the state regulation and the counterfactual may be specified only in very few circumstances. For example, it might be possible to find the disparate impact on trade of different levels of environmental protection but it would be more difficult to perform for less precise public interest objectives, such as consumer protection, protection of social rights, cultural diversity, public health etc, where the identification of acceptable levels of risks is extremely complex and depends on local conditions (social, political, economic) and social norms. The analysis could only be a qualitative one in these circumstances.

The Court delegated the task of assessing the proportionality of the state regulation to national courts that are most likely to dispose of the required information on the local conditions and acceptable levels of risk (local preferences). The Court did not, however, proceed to a blank delegation but attempted to provide more detailed guidance on the LRA test. For example, the Court considered that a labelling requirement was an adequate less restrictive to trade alternative. This had important consequences on the level of acceptable risk. The level of risk to which consumers are subject because of the labelling requirement depends, of course, on a number of external factors and social norms, such as the level of overall consumer protection and thus consumers' incentive to be vigilant and read systematically the labels of the products, which might differ according to the circumstances in each Member State.

The relatively low standard of proof for the existence of a restriction of trade, because of the obstacles approach and the presumption of functional parallelism, as well as the difficulty to argue successfully public interest objectives, had profound implications on the reconciliation of the trade facilitation objective with other objectives of public action that would be favoured by the application of the "broad outcome view" of integration. The position of the Court led to "an inbuilt conservative bias, or at least presumption, in favour of free trade, creating an ethos that any obstacle to free trade is, in some ways, improper and has to be justified"[40]. The *Sunday trading* cases are often cited as an illustration of the excesses of the

[40] Ibid., at 363.

jurisprudence of the Court[41]. The 'pathological end-game[42]" to the "obstacles approach" became apparent and the Court took steps to redress the unbalance.

First, there was the attempt to narrow down the broad "obstacles approach" by introducing a causation test between the measure and the restriction of trade. Measures that were too uncertain and indirect to establish a restriction of inter-state trade were found to escape the prohibition of Article 34 TFEU (the "remoteness" test), even if they could have potential effects on trade[43]. The test was closer to proximate causation than to a but-for causality test, as the simple fact that the measure could have contributed to a barrier to trade would not be a sufficient trigger to the application of Article 34 TFEU.

Second, there has been an attempt to introduce some form of quantitative assessment in defining the existence of a restriction of inter-state trade. Advocate General Van Gerven in *Torfaen*[44] and Advocate General Jacobs in *Leclerc-Siplec*[45] argued for the quantitative test of a *de minimis* restriction excluding from the scope of the Treaty state regulations that would have a minimal effect on inter-state trade. However, the application of a *de minimis* test for Article 34 TFEU was rejected in *van de Haar*[46], although the terminology "insignificant effects" appears in some more recent cases[47].

The third option available to the Court was to re-allocate the evidential burden of proof between the traders and the Member State, by establishing a new classification of measures that escapes *prima facie* the prohibition of Article 34 TFEU. Some authors suggested a rationalization along the lines of rules on product requirements that would be presumed to fall under Article 34 TFEU and rules on

[41] For an analysis see, Catherine Barnard, 'Sunday Trading: a Drama in Five Acts', (1994) 57 MLR 449, pp. 449-460.
[42] J.H.H. Weiler, 'Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Paul Craig & Gráinne de Búrca (ed.) The Evolution of EU Law (OUP, 1999), at 369.
[43] See, Case C-69/88 *Krantz* [1990] ECR I-583, para 11; Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24; Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 22. On "remoteness" and its links with Keck, see Peter Oliver, 'Some further reflections on the scope of Article 28-30 (ex 30-36) EC", (1999) 36 CMLRev, pp. 783-806, at 788-789; Eleanor Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège', in Catherine Barnard & Okeoghene Odudu (Oxford : Hart Publishing, 2009), pp. 245-271.
[44] Opinion of AG Van Gerven, Case 145/88, *Torfaen Borough Council v. B & Q plc* [1989] ECR 3851.
[45] Opinion of AG Jacobs, Case C-412/93, *Leclerc-Siplec v. TF1 Publicité SA* [1995] ECR I-179. For academic support, see Stephen Weatherill, 'After Keck: Some thoughts on how to clarify the clarification', (1996) 33 CML Rev 885.
[46] Joined Cases 177 & 178/82 *Criminal proceedings against Jan van den Haar and Kaveka de Meern BV* [1984] ECR 1797.
[47] Case C-2-/03 *Burmanjer & Others* [2005] ECR I-4133, para 31.

market circumstances that would be considered outside the scope of the prohibition, provided imported goods enjoyed equal access to the market compared to national goods[48]. The classification was based on some experience on the restrictive effect of this type of measures in the previous case law of the Court and on the assumption that rules on product requirements were imposing more important costs on imported goods than marketing arrangements rules. The instrumental objective of the classification was not, however, spelled out clearly. What lacked from the proposal was a clear linkage between the category of measures falling outside the scope of Article 34 TFEU and the aim pursued by this provision.

The European Court of Justice adopted a modified version of the classification in *Keck and Mithouard*, where it distinguished between product requirements and selling arrangements[49]. The Court re-allocated more favourably to Member States the evidential burden of proof for measures qualified of "selling arrangements". Consequently, the presumption of functional parallelism does not operate for selling arrangements. The plaintiffs bear the burden of proof, even in presence of regulatory disparities between the home and the host state. The Court also abandoned the "obstacles approach" in the definition of a MEQR by requiring the plaintiffs to provide evidence that the rules on selling arrangements in question have a discriminatory impact (in law or in fact) on the imported goods. The Court explained that the prohibition of "discrimination in fact" precluded any measure that would be "by nature such as to prevent [the imported goods'] access to the market or to impede access any more than it impedes the access of domestic products"[50]. The classification between selling arrangements and product requirements was further refined by the distinction between pure selling arrangements and marketing methods employed by the trader that affect the nature, composition or packaging of the good, which are treated as product requirement rules[51].

At the aftermaths of the *Keck and Mithouard* judgement, the jurisprudence of the Court had restricted the scope of application of the "obstacles to trade approach" and had embraced explicitly a methodology that required evidence of the disparate impact of the state regulation on foreign products for the application of Article 34

[48] E. White, 'In search of the limits to Article 30 of the EEC Treaty', (1989) 26 CMLRev. 235.
[49] Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) [1993] ECR I-6097.
[50] Ibid., para 17
[51] Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923.

TFEU. This was not achieved without some degree of legal formalism. The Court introduced the classification of "product requirements" and "selling arrangements" with a view to provide a greater degree of administrability of the enforcement of Article 34 TFEU to national courts. However, the theoretical underpinnings of the dichotomy and its relation to the decision criterion, evidence of an obstacle to trade or discrimination, were left undetermined. The recent jurisprudence of the ECJ on restrictions on the use of products became an opportunity to reconsider the fragile equilibrium of *Keck and Mithouard* and to provide a unified framework for the interpretation of Article 34 TFEU.

III. The need for a unified framework for the interpretation of Article 34 TFEU: vagaries of the "market access" concept

In its most recent jurisprudence, the ECJ "fine-tuned" its approach in *Keck* by referring to the concept of "market access", alongside the product requirement/selling arrangement dichotomy[52]. The concept has attracted considerable criticism. It has been referred to as a slogan rather than a "workable legal concept"[53]. What is profoundly unclear, argues Jukka Snell, is how this concept contributes to the illumination of the "fundamental question for free movement law", that is "whether the law is about discrimination and anti-protectionism, in which case a relative or comparative test is based on a perceptible disparate impact is appropriate, or whether it is about economic freedom, in which case an absolute test not involving comparisons is necessary"[54]. The relation of the "market access" concept with the product requirement/selling arrangement dichotomy remains also a matter of theoretical speculation. Does the reference to market access aim to substitute the

[52] See, Dimitrios Doukas, 'Untying the Market Access Knot : Advertising Restrictions and the Free Movement of Goods and Services', (2006-2007) 9 CYELS 177, 178 (advancing an interpretation of the Court's case law based on a market access criterion); Robert Kovar, 'Dassonville, Keck et les autres : de la mesure avant toute chose', (2006) 42(2) Revue Trimestrielle de Droit Européen (RTDE) 213 ; Panos Koutrakos, 'On Groceries, Alcohol and Olive Oil : More on the Free Movement of Goods after *Keck'*, (2001) 26 EL Rev 391 ; Piet Eeckhout, 'Recent Case Law on Free Movement of Goods: Refining Keck and Mithouard', (1998) EBL Rev 267.

[53] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?', (2010) 47 CML Rev, pp. 437-472, at 471 observing that the notion of market access cannot serve as a basis for one unified approach across freedoms, because "it would introduce an inappropriate distinction into the field of persons, as it cannot be utilized in the context of non-economic free movers relying on Art. 21 TFEU […], who are not seeking to access any market".

[54] Ibid., at 470.

Keck distinction? Or, is it complementary to the categorical approach followed in *Keck*?

These are valid questions, but it is also important to recognize that the terminology of "market access" used by the Court is not fortuitous. The "obstacles to trade" approach focused on the existence of a potential (and abstract) impact on intra-community trade, without feeling the need to examine how the specific regulation affected the cost structures of the products and the decision of the entrepreneurs to enter a foreign market. The "market access" test re-focuses the analysis of the impact of the measure on specific products and entrepreneurial strategies. It makes also necessary the recourse to a certain degree of counterfactual analysis. Finally, as it will be argued in this section, it emphasizes the impact of the State measure on the competitive relationship between the foreign and the domestic product, which becomes the main focus of the first part of an Article 34 TFEU inquiry.

A. Criticism of the selling arrangement/product requirement dichotomy and the quest for a unified conceptual framework

The selling arrangements/product requirements dichotomy was subject to severe criticism, also within the ECJ.

In *Alfa Vita*, AG Poiares Maduro discussed the "practical difficulties" created by the *Keck and Mithouard* jurisprudence[55]. He argued that the classification of the measure as a selling arrangement or a product requirement was not clear enough to national courts and that it was not easily transposed into the fields of other freedoms of movement. The "pragmatic" approach developed by the Court could lead to inconsistencies:

> "(i)n some cases, it is difficult to distinguish selling arrangements from national rules relating to the characteristics of products, for the very reason that the existence of a restriction on trade is dependent on the method of application of a rule and its concrete effects. In other cases, it is impossible to include a measure within one or other of these categories because the variety of rules

[55] Opinion of Advocate General Poiares Maduro, Joined cases C-158-159/04, *Alfa Vita Vassilopoulos AE* (C-158/04) *and Carrefour Marinopoulos AE* (C-159/04) *v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135.

which may be called into question does not fit easily into such a restricted framework"[56].

These difficulties were not, however, a cause to abandon this case-law, but an opportunity to clarify it. The AG provided a consequentialist reading of the principle of free movement of goods, linking its protection to beneficial outcomes for producers, but also consumers: the fundamental objective of the principle of free movement of goods is "to ensure that producers are put in a position to benefit, in fact, from the right to carry out their activity at a cross-border level, while consumers are put in a position to access, in practice, products from other member State in the same conditions as domestic products"[57]. This is compatible with the "narrow outcome view" of trade facilitation, with the main difference that the focus is also now on the demand-side (consumers), and not only on the supply-side (foreign suppliers). He further observed that the freedoms of movement "represent the cross-border dimension of the economic and social status conferred on European citizens"[58], and that such status "requires going beyond guaranteeing that there will be no discrimination based on nationality" and requires also from the Member States to take into account "the effect of the measures they adopt on the position of all European Union citizens wishing to assert their rights to freedom of movement"[59].

From these principles AG Poiares Maduro derived three "concrete criteria". First, any direct or indirect discrimination based on nationality is prohibited as a MEQR. Second, measures that impose "supplementary costs on goods in circulation in the Community or on traders carrying out a cross-border activity[60]" create a barrier to trade, which needs to be duly justified. The AG noted that "not every imposition of supplementary costs is wrongful" and that "costs that arise from disparities in the laws of the Member States cannot be considered to be restrictions on freedom of movement"[61]. The factor distinguishing between legitimate and wrongful supplementary costs was the following:

"to be considered as a restriction on trade, the supplementary cost imposed must stem from the fact that the national rules did not take into account the

[56] Ibid., para 31.
[57] Ibid., at para 39
[58] Ibid., at para. 40.
[59] Ibid.
[60] Ibid., at para 44
[61].Ibid.

particular situation of the imported products and, in particular, the fact that those products already had to comply with the rules of their States of origin"[62].

This criterion clearly applies to rules relating to the characteristics of products and thus justifies the shift of the evidential burden of proof to the Member State, in case there is a cost imposed to the foreign product. It is less clear how it will apply for rules on selling arrangements, for which the evidential burden of proof is bore by the traders. For selling arrangements, the AG introduces the third criterion, which examines if the measure impedes to a greater extent the access to the market of products from other Member States[63]. From these three concrete criteria, the AG concluded that a "consistent approach emerges" which amounts "in substance to identifying discrimination against the exercise of freedom of movement"[64].

This conceptualization of the jurisprudence of the Court offers the opportunity to re-consider the "formal answer" of the Court in *Keck*, by demonstrating that "presumptions based on the character of these rules are not sufficient[65]" and that the measures must be examined in the light of the stated criteria. It also invites a more holistic analysis of the Court's approach on rules on product requirements and selling arrangements. AG Poiares Maduro continued to rely on the narrow outcome view of economic integration, but he adopted a broader criterion in the definition of a MEQR than the "obstacles of trade approach". The analytical method recommended is confined to examine if the regulation creates objectively more disincentives for engaging in foreign trade than in domestic trade. It is thus compatible with the "market building" role of the free movement rules, by including measures whose effect is to reduce opportunities of intra-community trade more than opportunities of domestic trade.

In *Commission v. Italian Republic*, AG Léger suggested a different approach[66]. The Court was referred a preliminary question on the application of Article 34 TFEU to a national rule prohibiting mopeds from towing trailers. The object of the national regulation was to impose a restriction on the use of the product. AG Léger considered that such rule constituted a MEQR, as it was imposing "a general and absolute prohibition on the towing of trailers by mopeds" and thus impeded the free

[62] Ibid.
[63] Ibid., para 45.
[64] Ibid., para 46.
[65] Ibid., para. 47.
[66] Opinion of Advocate General Léger, Case C-110/05, *Commission v. Italy* [2006] ECR I-519.

movement of trailers[67]. The link between the measure and the effect was that "the coupling of a trailer to a vehicle of that kind constitutes a normal and frequently used means of transport, particularly in rural areas"[68]. No statistics or other factual references were cited for such finding. The AG concluded that "such prohibition is liable to limit opportunities for trade between the Italian Republic and the other member States and to hamper imports and the marketing" in Italy of trailers manufactured and marketed in other States. It is noteworthy that AG Léger ignored the *Keck and Mithouard* dichotomy and proceeded to a qualification of the measure as a MEQR, based on its impact on the trade for trailers. His approach is thus different from that of AG Poiares Maduro, who did not insist on the effects on the trade of trailers but on the discrimination between Community trade and trade within the national market and did not abandon the *Keck* dichotomy.

The same case led to a second Opinion by AG Bot, as the Court re-opened the oral proceedings and referred the case to the Grand Chamber[69]. AG Bot qualified the measures as MEQR but attempted to sketch a different conceptual framework for Article 34 TFEU from that suggested by AG Léger. For AG Bot, the Court's case law in *Dassonville* brought within the scope of Article 34 TFEU "all forms of economic protectionism" practiced by the Member States. However, the Court has limited this "excessive recourse to Article 34 TFEU" in *Keck* in order to avoid an excessive encroachment on the regulatory powers of the Member States[70]. The AG explained that the product requirements/selling arrangements dichotomy is related to the impact each category of measures has on intra-Community trade. Rules on product requirements almost always impose additional costs to importers. Products must be exportable with their existing composition, name, form labelling and packaging to all Member States, provided that "they meet the requirements of the State of origin"[71]. But once these products get access to the market "they must be subject to the 'marketing rules' in force in that State" and "they must be on an equal footing with domestic products"[72]. Consequently, "the distinction between different categories of measures is not appropriate" as "the demarcation line between those different

[67] Ibid., para 39.
[68] Ibid., para 40.
[69] Opinion of AG Bot, Case C-110/05, *Commission v. Italy* [2008] ECR I-519.
[70] Ibid., at para 56.
[71] Ibid., at para 73.
[72] Ibid., at para 74.

categories of measures may be uncertain[73]" and "gives rise to differences in the way that restrictions on the free movement of goods are viewed by comparison with the rules applicable to other freedoms of movement"[74]. Referring to both "the requirements inherent in the construction of a single European market" and the "emergence of citizenship", AG Bot concluded that the common feature of the rules applicable to other freedoms of movement is based "on the single criterion" of "access to the market"[75].

Despite this criticism to the distinction between product requirements and selling arrangements, the AG did not suggest any significant departure from the *Keck* dichotomy. He noted that rules governing arrangements for the use of products should not be treated in analogy to selling arrangements and thus should not be excluded *prima facie* from the scope of Article 34 TFEU. The reason advanced is inspired by the "obstacles to trade" approach: measures governing the use of products can hinder the movement of the product within the common market and thus "create an obstacle to intra-Community trade"[76]. Excluding these measures from the scope of Article 34 TFEU would come to make it possible for member States "to legislate in areas which, on the contrary, the legislature wished to 'communautarize'" and would oppose "the course that European construction and the creation of a single European market should follow"[77]. By equating "the obstacles to trade approach" to the existence of an EU competence to prevent Member States from affecting intra-community trade, the AG restricts considerably the autonomy of Member States to regulate their economy and to pursue other public interest objectives. The objective is to subject to the judicial review of the Community courts any measure that may have the effect to restrict trade.

For the AG, the Court should apply the "criterion of access to the market"[78], and find a MEQR contrary to the Treaty, where the national measure "prevented, impeded or rendered more difficult access to the market for products from other member States"[79]. This unified test could apply to all freedoms and would not involve

[73] Ibid., para 81.
[74] Ibid., para 82.
[75] Ibid., para 83.
[76] The AG defends the view that "the term restriction should […] be viewed in broad terms". Ibid., at 100.
[77] Ibid., para 91.
[78] Ibid., para 107.
[79] Ibid., at para 111.

"any complex economic assessment"[80]. It will give rise to different presumptions: in situations of "overt discrimination" the obstacle to trade is clear and the measures should "be prohibited as such by Article 34 TFEU"[81]. The distinction selling arrangements/product requirements is thus perceived as aiming "to identify the conditions under which each of those categories may affect access to the market"[82]. The classification of the measure corresponds to a difference in the degree of probability that a certain type of measure will impede market access, "regardless of the aim pursued by the measure in question"[83]. In conclusion, AG Bot offered a unified conceptual framework for MEQR, based on the existence of an impediment to the market access of the imported good, but also advanced a differentiated rule with regard to the standard of proof for different categories of measures.

In *Ăklagaren v. Percy Mickelsson*, AG Kokott joined the debate with a different recommendation[84]. The issue in this case was a Swedish regulatory restriction over the use of personal watercrafts. AG Kokott found that such restrictions could "possibly deter people from purchasing" the goods in question, the same way a speed limit on a motorway would have deterred people from buying a particularly fast car because they could not use them as they wish[85]. However, she opted for treating these restrictions on use by analogy to the way selling arrangements, were treated under *Keck and Mithouard* and therefore excluded them from the scope of Article 34 TFEU. The characteristics of restrictions on use were found comparable to those of selling arrangements "in terms of the nature and the intensity of their *effects* on trade in goods"[86]. Being equivalent to selling arrangements, restrictions on use could fall under Article 34 TFEU if they did not affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. The absence of domestic production was, for the AG, irrelevant. She noted, however that the situation would have been different if national rules were protecting domestic production similar to products covered by the contested rule or in competition with those products[87]. This is an interesting statement indicating that for AG Kokott a

[80] Ibid., at para 116.
[81] Ibid., para 115.
[82] Ibid., para 129.
[83] Ibid., para 136.
[84] Opinion of AG Kokott, Case C-142/05, *Åklagaren v. Percy Mickelsson & Joakim Roose* [2006] ECR I- 0000 (not yet reported).
[85] Ibid., at para 45.
[86] Ibid., at para 52.
[87] Ibid., at para 61.

measure becomes suspect if it modifies the competitive relation between domestic and foreign products.

By analogy to selling arrangements, arrangements for use are not excluded from the scope of Article 34 TFEU when they prevent access to the market for the product in question. Preventing access includes, according to AG Kokott, not only rules which may lead to complete exclusion but also rules leaving only a "marginal possibility for using a product"[88]. The criterion of significant impediment of market access also excludes from the scope of Article 34 TFEU measures that have prevented access only for a negligibly short period[89].

The different positions of AG Poiares Maduro, Léger, Bot and Kokott on the interpretation of Article 34 TFEU illustrate the conceptual difficulties of reconciling the traditional "obstacles to trade" approach with the *Keck and Mithouard* dichotomy of product requirements and selling arrangements. The issue examined by all AG is the need, or not, to restrict the first step of the analysis under Article 34 TFEU, the finding of a restriction of intra-community trade, before the burden of proof shifts to the Member States for justifications under either the doctrine of mandatory requirements or the Treaty exceptions of Article 36 TFEU.

It is crucial to step back and examine critically the terminology employed by the AGs. The criterion of "market access", employed by almost all of them takes different connotations. For AG Poiares Maduro, it refers to situations where the national measure has a protectionist effect or makes intra-Community trade more difficult than trade within the national market. It is thus narrower than a simple impediment to trade. For AG Bot, it is a similar concept than "obstacle to trade" in the pure tradition of the *Dassonville/Cassis de Dijon* case law. For AG Kokott, it should indicate restrictions of trade that are significant enough to affect the competitive position of foreign products.

The different conceptions of the AG are linked to their position over the respective scope of the first and the second step of the analysis under Article 34 TFEU. If, for AG Poiares Maduro and to a lesser degree AG Kokott, the scope of the concept of restrictions of trade that triggers the assessment under Article 34 TFEU should be restricted, for AG Bot and AG Léger it should remain broad enough to bring within judicial control any measure that has the effect to impede inter-state

[88] Ibid., at para 67.
[89] Ibid., at para 70.

trade, irrespective of the existence of any evidence of protectionist intent or discrimination. Their position relates to their conception of the role of the judiciary in assessing the justifications proffered by the Member States. If, for AG Bot, there is no reason to depart from the existing analytical assessment by the judiciary of all state measures, AG Poiares Maduro is concerned with the possible disruptive effect that the judicial control of all measures that have the potential to impede trade might have on the pursuit of other public interest objectives that correspond to consumers and citizens' preferences (efficient restrictions of trade). I will examine the profound implications of his conception of the judicial control of justifications in the following section. Most immediately, I will challenge the interpretation of the "market access" criterion by the AGs and will offer an alternative conceptualization of the first step of the assessment under Article 34 TFEU, in line with the purpose of this provision.

B. A re-conceptualization of the "market access" criterion

The "obstacles to trade approach" emphasizes the additional regulatory burden imposed on the foreign good. A narrower view would focus on the differential effect of the measure on the market access of foreign products compared to national products. The differences between these two approaches will be clarified by looking to two definitions of the concept of barriers to entry in industrial organization theory. Each definition has important implications on the scope of the first step of the assessment under Article 34 TFEU[90].

Economist Joe Bain defends a broad definition of barriers to entry[91]. His assumption is that, in competitive conditions, entry will occur until price is equal to the average cost of production. The persistence of prices above this level indicates the existence of entry barriers. His analysis integrates a comparison between pre-entry profits of established firms (the incumbents) and the post-entry profits of entrants. Barriers to entry would exist each time the entrant cannot achieve the profit levels post-entry that the incumbent enjoyed prior to its arrival[92].

[90] Contra Juka Snell, 'The Notion of Market Access: A Concept or a Slogan?', (2010) 47 CML Rev, at 440.
[91] J. Bain, Barriers to New Competition (Harvard University Press, 1956), at 3
[92] Paul Geroski, Richard J. Gilbert, Alexis Jacquemin, Barriers to Entry and Strategic Competition (Harwood Academic Publishers, 1990), at 7

Economist George Stigler defines, in contrast, an entry barrier as "a cost of producing (at some or every rate of output) which must be borne by firms seeking to enter an industry but is not borne by firms already in the industry"[93]. The primary conceptual difference between Stigler's and Bain's definition is that, for Bain, the entrant and incumbent are compared post-entry: a barrier exists if the two are not equally efficient after the costs of entering the industry are taken into account. In contrast, Stigler considers an entry barrier to exist only if the conditions of entry were less difficult for established firms than for new entrants. The opposition between the Bainian and the Stiglerian definition of barriers to entry has been challenged by new industrial economics[94]. I think, however, that it can still provide a useful framework in order to understand the evolution of the definition of MEQR and the purpose of Article 34 TFEU, as well as to illustrate the differences between the "disparate impact approach" and the "obstacles approach".

If one considers that the aim of the prohibition of MEQR is to increase trade between Member States (the obstacles approach), the provision will strike down any state regulation that would have a negative effect on a credible opportunity of trade. For a credible opportunity of trade to arise, consumers should be able to have access to the good in question and importers/traders should have the incentive to bring it on the market. The rules on the free movement of goods underline the incentives of importers/traders to offer foreign products on the national market. This depends on the profitability of the import, which is a function of the competitive position of the product, in relation to other products already present in the national market, and of the eventual costs that might affect the foreign product's competitive position. It is clear that a product which is subject to two different state regulations, those of its home and host country (country of import), may incur higher costs than a product which is subject only to its home state regulation.

It is possible to think of two counterfactuals in order to conclude that a product is subject to additional costs. The first counterfactual relates to the costs the product would have incurred if it were not subject to the home state's regulation. That would be, in most cases, the regulation of its home country. Should one embrace this approach, any regulation enforced by the importing state that would have increased

[93] G.J. Stigler, The Organization of Industry (Homewood, Ill.: R. D. Irwin, 1968), at 67.
[94] See, R.P. McAfee, H.M. Mialon & M. Williams, 'What is a Barrier to Entry?' (2004) 94 American Economic Rev 461.

the costs of the imported products, in comparison to the counterfactual, would be found to impose an obstacle to inter-state trade. This is close to the methodology employed in the definition of Bainian barriers to entry, which requires a comparison of the pre-entry profits of the incumbents and the post-entry profits of entrants. In this case, we compare the post-market entry costs imposed by the home regulation on foreign products with the post-import costs resulting from the host regulation. If the latter exceed the former, an obstacle to trade will be found. Should this interpretation of Article 34 TFEU prevail, the practical result would be that the home state's regulation will apply extraterritorially to the host state, unless the latter argues public interest justifications[95].

The second counterfactual compares the costs incurred by the foreign products with those costs that a product would have incurred if it were a national product. The decision-maker would have to compare in this case the costs post-entry of the domestic good with the costs post-import of the imported good. It is only if the costs post-import of the latter will exceed the costs post-entry of the former that an obstacle to trade would be found. This is close to the methodology used for the Stiglerian definition of barriers to entry, according to which barriers to entry are found when the conditions of entry are less difficult for established firms (which would be domestic products in our case) than for new entrants (imported goods in our case).

The choice of the appropriate counterfactual depends on the aim followed by the specific economic integration project. If the overall objective is to enhance the economic freedom of suppliers or to facilitate intra-community trade, the Bainian definition would be more appropriate, as any state regulation that may reduce the potential of inter-state commerce would fall under the scope of the prohibition of MEQR. It follows that a regulation that imposes additional costs for the specific product to reach the consumers of the host country might limit the opportunities of intra-community trade, as higher costs would lead to higher prices and lower levels of output. If, nevertheless, the overall aim of economic integration is to enhance efficient trade, then only restrictions of inter-state trade that modify the competitive relationship between the imported goods and the domestic goods, in favour of the second, should be included in the first step of the analysis. The Stiglerian definition of barriers to trade would be more appropriate in this case.

[95] Simon Deakin, 'Regulatory competition after Laval', (2007-2008) 10 CYELS 581, 585-587.

The analysis will require from the decision-maker to examine if the domestic goods were also subject to the same additional costs. It is only if they have not been subject to those additional costs that the measure will be qualified to a MEQR. The application of the host state's measure will change the competitive relationship between the imported product and the domestic product. Accordingly, it is possible for Member States to impose additional costs to both domestic and imported products when these do not modify their competitive relationship. Indistinctly applicable measures may affect the competitive relation between domestic and imported products only when they have a disparate impact, because of the different pre-existing (the state regulation) market situation/economic context.

In what follows, I will show that the interpretation of Article 34 TFEU by some recent case law of the ECJ is compatible with the Stiglerian approach to barriers to trade. From this demonstration I will conclude that the Court should clearly abandon the "obstacles to trade" narrative in free movement of goods and should embrace instead "a disparate impact on market access" or discriminatory market access approach in the definition of MEQR.

III. The operation of the "disparate impact on market access" test (discriminatory market access)

The focus of the post-*Keck* case law of the Court on the disparate effect of the regulation on foreign products can be conceived as an important shift in the definition of a MEQR. This does not challenge the distinction between product requirements and selling arrangements. The re-allocation of the evidential burden of proof in a way which is less favourable to traders has always constituted the main function of the product requirement/selling arrangement dichotomy. This is compatible with the Stiglerian conception of barriers to trade. State rules on product requirements almost always impose on imported products costs that have not been incurred by the domestic products post-entry into the market. The reason is that the process of domestic production internalizes the constraints of the specific regulatory context, prior to any business decision made over the designation, form, size, weight, composition, presentation, labelling or packaging of the product. Imported products do not benefit from such internalization of the host state's regulatory framework, as their natural market is presumably that of their country of origin. Requiring the

imported products to incur such costs would thus almost automatically alter their competitive relationship with the domestic products, at least post-entry. This is not systematically the case for rules on selling arrangements, as domestic producers may also face the same uncertainties than importers as to their method of promotion or commercialisation in the domestic market.

The assessment of restrictions on advertising under Article 34 TFEU illustrates the new approach followed by the Court[96]. In *De Agostini* the Court found that a total advertising restriction, effectively preventing access to host state's market, would fall within the scope of Article 34 TFEU as "it might not be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States"[97]. In *Gourmet International Products* the Court explained the disparate impact of an indistinctly applicable restriction on advertising for imported and domestic products:

> "[…] in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products, with which consumers are instantly more familiar"[98].

The assumption is that conditions of access to the consumer market are less difficult for domestic products than for imported products. Imported products are less likely to be known to consumers than domestic products and also less likely to make extensive use of advertising to the consumers of the host country in order to compete in equal terms with domestic products. Restrictions on specific forms of advertising may have the effect to impose on the foreign product costs that would not be incurred by the domestic products. The importers would need to have recourse to less appropriate forms of advertising or, in case there is a total ban on advertising, to more costly methods for the promotion and successful commercialisation of their

[96] For an analysis of this case law see, Dimitrios Doukas, 'Untying the Market Access Knot : Advertising Restrictions and the Free Movement of Goods and Services', (2006-2007) 9 CYELS 177.
[97] Joined Cases C-34-36/95 *De Agostini* [1997] ECR I-3843, para. 42.
[98] Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, para 21. See also, Case C-322/01 *DocMorris* [2003] ECR I-14887, para 74

products. This is not, however, sufficient for the application of Article 34 TFEU[99]. The measure should also modify the competitive relation between the foreign and the domestic products[100].

The differential internalization of regulatory costs of rules on product requirements, compared to rules on selling arrangements, is a matter of degree, rather than a difference in kind. It is empirically true under specific circumstances, for example when there are established consumption trends for the domestic product. It is not always of general application[101]. However, categorical thinking is an abstract process that inevitably leads to situations of over-inclusiveness or under-inclusiveness. There are important advantages in developing analytical shortcuts and other decision procedures that limit decision costs.

The Court has also stressed the analysis of the competitive relation between the imported and the domestic product in its free movement of services case law. In *Mobistar*, the Court found that a municipal tax on transmission pylons, masts and antennae for GSM that applied without distinction to all owners of mobile telephone installations within a commune did not adversely affect, either in fact or in law, foreign operators more than national operators[102]. The Court concluded that the tax measures in question did not make cross-border service provision more difficult than national service provision[103]. Notwithstanding the Court's rejection of the product requirement/selling arrangements in its free movement of services case law[104], the comparative analysis of the effect of the measure on the competitive relation between the imported and the domestic product forms part of the judicial assessment of the measure. The Court moved also in this case to a "discriminatory market access test by noting that

[99] See the ECJ's analysis in Case C-441/04, *A-Punkt Schmuckhandlers GmbH v. Claudia Schmidt* [2006] ECR I-2093, para 23, where the Court acknowledged that "the fact that a marketing method is apparently more efficient and profitable is not a sufficient reason to assert that the national provision prohibiting it is caught by the prohibition laid down in Article 34 TFEU. Such a provision constitutes a measure having equivalent effect only if the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products".

[100] See, Opinion of AG Geelhoed in C-239/02 *Douwe Egberts* [2004] ECR I-7007 (suggesting that a general prohibition of advertising of the distinctive characteristics of a product should be falling per se under Article 34 TFEU as it discriminates against imports).

[101] For example, Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?', (2010) 47 CML Rev 437, 448 asks "whether the Court should make the assumption that advertising restrictions favour familiar domestic products and therefore fall within Article 34 TFEU, or should it require more evidence".

[102] Joined Cases C-544/03 & C-545/03, *Mobistar v. Commune de Fléron* [2005] ECR I-7723.

[103] Ibid., para 33.

[104] Case C-384/93, *Alpine Investments* [1995] ECR I-1141; Joined Cases C-369/96 & C-376/96, *Arblade* [1999] I-8453.

> "[…] measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between member States and that within one Member State, do not fall within the scope of Article [49] of the Treaty"[105].

One could also cite the recent trend towards "discrimination reasoning" in recent tax cases brought to the attention of the Court[106].

In its case law on restrictions on use in the free movement of goods the ECJ maintained the distinction between rules on selling arrangements and product requirements but also acknowledged the role of the dichotomy as a form of evidence-suppressing rule. In *Commission v. Italy* (prohibition on mopeds) the Court noted that settled case law on Article 34 TFEU

> "reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactures and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets"[107].

The Court referred to both the *Cassis de Dijon* and the *Keck and Mithouard* jurisprudence, signalling that both are good law. It also referred to the principles of non-discrimination, mutual recognition and market access, without, however, explaining the link between the three concepts.

In an ambiguously drafted paragraph, the Court observed, with regard to selling arrangements, that

> "[…] measures adopted by a Member State the object of which is to treat products coming from other member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU][108]",

It noted that the same principle applies to rules that lay down product requirements. In the final sentence, the Court added that "any *other* measure which hinders access

[105] Joined Cases C-544/03 & C-545/03, *Mobistar v. Commune de Fléron* [2005] ECR I-7723.
[106] Karen Banks, 'The application of the fundamental freedoms to Member State tax measures: guarding against protectionism or second-guessing national policy choices', (2008) EL Rev 482; Jochen Meulman & Henry de Waele, 'A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 Legal Issues of Economic Integration 207.
[107] Case C-110/05, *Commission v. Italian Republic*, [2009] ECR I-519 , para 18.
[108] Ibid., at para 37.

of products originating in other member States to the market of a Member State is also covered by *that concept*"[109].

The Court's analysis is enigmatic. It is clear that there is an attempt to establish a conceptual link between the standards applying to product requirements and those applying to selling arrangements. The Court reads directly the disparate impact standard into the rules applying to product requirements, thus indicating that paragraphs fifteen and sixteen of *Keck* do not refer to two distinct decision criteria: obstacle to trade and discrimination, but to the same one. The presumption of incompatibility to Article 34 TFEU of rules on product requirements should thus be understood as an evidence-suppressing rule. Rules on product requirements are presumed to produce a discriminatory impact on the access of imported goods to the market. The justification for this presumption is fully supported by the Stiglerian analysis on barriers to entry (or trade).

The last sentence of the paragraph presents more interpretative challenges, as the Court did not clearly explain to which "other" measures that hinder access of products originating in other member states" it was referring to, as well as to which "concept" covering "also" these measures it alluded. The Court might have intended to include in this third category restrictions on the use of goods, such as the prohibition for employing mopeds for towing a trailer. These should be treated according to the same standard than product requirements or measures (selling arrangements) that treat products coming from other member States less favourably than domestic products. By referring to "that concept", the Court essentially indicates that (discriminatory) hindrance of market access (for imported goods) constitutes the common conceptual framework for all categories of measures, even if a differential evidential burden might apply for each specific category.

It is easy to understand why rules on product requirements have a disparate impact on imported products, by employing the Stiglerian framework for barriers to entry, which was explained below. But the application of this framework for restrictions on use of products is challenging. The latter tend to be comparable "in terms of the nature and the intensity of their *effects* on trade in goods" to selling arrangements, as AG Kokott noted in her Opinion in *Percy Mickelsson*[110]. What thus

[109] Ibid.
[110] Opinion of AG Kokott, Case C-142/05, above, para. 53.

justifies the application of the same presumption of incompatibility to Article 34 TFEU than for rules on product requirements?

In *Commission v. Italy* (prohibition on mopeds), the Court examined the effect of the provision of the Italian Highway code prohibiting the use of a motorcycle and a trailer together and distinguished between the situation of trailers that were not specifically designed for motorcycles, but intended to be towed by automobiles and other types of vehicle, and that of trailers specifically designed to be towed by motorcycles. The Court found that the Commission had not established that the prohibition hindered access to the market for the first type of trailer[111]. The Court assumed that there was a weak causal link between the regulation and the alleged hindrance to market access, as it was possible to use the trailers for other vehicles and purposes. The situation was different for the trailers that were specially designed to be towed by motorcycles, as the possibilities for their use, other than with motorcycles, was found "very limited", "inappropriate", "insignificant, if not hypothetical"[112]. The Court did not, however, limit itself to presume the obstacle to trade from the restriction on the use of the product. It further explained that

> "(i)t should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the *behaviour of consumers*, which, in its turn, affects the access of that product to the market of that Member State"[113].

Indeed, "consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer"[114]. The prohibition in question had the effect to prevent demand "from existing in the market for such trailers and therefore hinders their importation"[115].

The reference by the Court to the effect of the restriction on the behaviour of consumers emphasizes the fact that between the two situations trailers are used, the difference is of qualitative not of quantitative nature. The Court did not focus on the effect of the restriction on the volume of imports of the product, as the volume affected might be more important in the case of trailers not designed to be towed by motorcycles, if these attract the largest part of the consumer demand for trailers, but

[111] Case C-110/05, *Commission v. Italian Republic*, para 51
[112] Ibid., at para 55
[113] Ibid., at para 56.
[114] Ibid., at para 57.
[115] Ibid.

on the ability of the measure to influence the behaviour of consumers and restrict consumers' choice. This has important implications as it includes, for the first time, in defining the existence of a MEQR a direct reference to the effects of the measure on the demand side, the consumers, and not only on the supply side, the importers/foreign suppliers. The aim of market integration is to ensure access of the product to the consumers. Any measure that might jeopardize this access would fall under the scope of Article 34 TFEU. As the ECJ noted in *Percy Mickelsson* this could happen if, because of the "scope" of the restriction on the use of the product, consumers, "knowing that the use permitted by such regulations is very limited", will "have only a *limited* interest in buying that product"[116]. AG Poiares Maduro also explained in *Alfa Vita* that "the fundamental objective of the principle of free movement of goods is to ensure that producers are put in a position to benefit, in fact, from the right to carry out their activity at a cross-border level, while consumers are put in a position to access, in practice, products from other member States *in the same conditions* as domestic products"[117]. This emphasis on consumer choice, as a constitutive part of the Internal Market project, can also be found in the most recent case law of the ECJ on the application of competition law and its interaction with the principle of market integration[118].

It is nevertheless unclear how this emphasis on the behaviour of consumers relates to the concept of the "disparate impact on market access test", which constitutes, as explained below, the cornerstone of the application of Article 34 TFEU. In its most recent judgement in *Commission v. French Republic*, the Court had no difficulties to find that a French measure imposing a prior authorization scheme, for precautionary reasons, by reference to the potential health risks of certain categories of processing aids, constituted in itself a MEQR[119]. The Court noted that the prior authorization scheme "makes it more costly and difficult, or, in certain cases,

[116] Case C-142/05, *Percy Mickelsson and Joakim Roos*, para 27. Emphasis added. Note the difference of language with Case C-110/05: limited interest versus practically no interest.
[117] Opinion AG. Poiares Maduro, Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopolos AE v. Elliniko Dimosio*, para. 39.
[118] Joined Cases C-468-478/06, *Sot. Lélos kai Sia A.E.*[2008] ECR I-7139, para. 66, noting that "there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of effective competition in terms of the supply and the prices that those exports would obtain *for final consumers* in the other Member States".
[119] Case C-333/08, *Commission v. French Republic* (January 28, 2010), available at http://www.curia.eu .

impossible, to market processing aids and foodstuffs in the preparation of which processing aids lawfully manufactured and/or marketed in other member States have been used"[120], thus continuing to rely on the Stiglerian framework of discriminatory barriers to trade. Is the consumer-oriented test of the case law on restrictions on use coherent with the discriminatory market access test that the Court applies for other types of measures?

A possible reconciliation of these two strands of case law requires again a consideration of the competitive situation to which the imported product is subject to.

First, the imported product might be in competition with a similar or competing domestic production. A MEQR would exist each time the host State regulates in a way that imposes to this economic operator (additional) costs that are not incurred by competing domestic production. Reference to additional costs raises of course the question of which comparator is adopted in order to consider that these costs are additional. Although the case law of the Court is not very clear on that, it seems that, for the application of Article 34 TFEU, at least since *Keck*, there is an implicit comparison made to the costs incurred by the domestic product, and not a comparison made to the cost structure of the foreign product when this is commercialized in the home State. This does not mean that the plaintiff should proceed to a concrete comparative analysis of the impact of the regulation on the costs of specific imported and domestic products. It is possible to perform a more abstract assessment of the costs imposed on the domestic production, the latter conceived as a distinct conceptual category. For example, there is no need to examine that a restriction on advertising would affect more imported products than specific competing domestic products. It is assumed that "domestic production" is generally better known to local consumers than the imported products. This is not always true, as some domestic products might be less known to consumers than imported products, but, in general, it is reasonable to make this assumption for the general category of "domestic products".

Second, the imported product might not be in competition with any similar or domestic production. Its access to the market would aim to satisfy an existing (but still unsatisfied) or potential consumer demand. It is possible that the importer would have to promote the product in a manner that will contribute to the emergence of this

[120] Ibid., para 76.

potential consumer demand. These situations of potential consumer demand enter into consideration in the enforcement of Article 34 TFEU, precisely because of the "market building" aim of the Internal Market project. All that matters is that an economic operator sees an opportunity to introduce a new product, lawfully commercialized in a home State. In this situation, it would be difficult to perform a comparative analysis of the additional costs imposed by the regulation on the domestic production in order to decide if the host state's regulation "prevents" market access or "impedes more" the market access of imported products. An option would be to employ a counterfactual test and assess the costs of the imported products in the absence of the specific host state's regulation. But it is mathematically certain in this case that the measure will always be qualified as a MEQR.

A possible way out would be to adopt a demand-oriented, as opposed to supply-oriented, test, which would look to a possible protectionist manipulation by the host Member State of the behaviour of the consumers. Host States may act with a protectionist intent either by raising the costs of the imported products or by limiting consumer demand for them. The result is the same: imports would be less than in the absence of these measures. But what constitutes protectionist manipulation of the behaviour of the consumers? If one adopts a broad interpretation of this term, there is the risk that policies that reduce overall consumer demand (e.g. salary or social benefit cuts, tax increases etc) in order to increase international competitiveness might fall within the scope of Article 34 TFEU. Undoubtedly, the effect of these measures would be to reduce consumer demand and consequently imports, compared to the situation that these measures were not adopted. Such a broad interpretation would restrict considerably the policy space for Member States and would extend the scope of the Internal Market provisions to areas of core economic policy (i.e. income tax system, regulation of labour wages), which have been carefully kept outside the scope of the negative integration provisions of the Treaty.

A restrictive interpretation of the term would focus instead on the existence of a significant impact of the measure on consumer behaviour and choice. Only measures which lead to a limited interest or "practically no interest" of the consumer for the imported product would fall, *prima facie*, within the scope of Article 34 TFEU and could lead to a reversal of the evidential burden of proof to the host Member States for justifications. These do not only include restrictions on the use of the products, but also rules on promotion strategies and other selling arrangements that

make it impossible or excessively difficult for imported products to enter the host member State's market. Of course, there should be a causal link between the measure and the limited interest of the consumers: the measure is likely to affect the behaviour of consumers. In my opinion, this should be a but-for causality test. Otherwise, the scope of the prohibition of Article 34 TFEU would be too broad and would include efficient restrictions of trade. The emphasis of the Court on the "*considerable* influence in the behaviour of consumers" supports this reading.

This interpretation is also compatible with the distinction established by the ECJ in *Keck and Mithouard* between measures that prevent market access and those that impede the market access of imported products more than they do for domestic products. Both criteria refer to the same concept: the existence of a discriminatory restriction on the market access of foreign products. If a measure imposes some costs on the imported product, this is not sufficient for the application of Article 34 TFEU. The claimant should prove that the regulation imposes costs on the imported product that are not (or have not been) incurred by the domestic product. If it is not possible to perform a comparative analysis of costs, because there is no similar or competing domestic product, the claimant should prove that the measure in question had a considerable impact on the behaviour of the consumers, as a result of which the latter have practically no interest or considerably less interest to purchase it. This analysis is not limited to situations where there is a restriction on the use of the product but applies also for rules on selling arrangements where there is no competing domestic production. I imply that use restrictions can have also the effect of influencing the production of these products in the host state at the first place, as it is unlikely that there would be domestic production for products consumers would find of little or of practically no use.

It is too early to conclude on the path followed by the jurisprudence of the Court. I attempted to demonstrate that my analytical framework is compatible with the most recent case law of the Court on the free movement of goods and could be also defended from a policy perspective. The Bainian definition of barriers to trade that was initiated by the Court's judgement in *Dassonville* and latter refined in *Cassis de Dijon* in order to accommodate efficient restrictions of trade has led to unacceptable policy consequences and transformed Article 34 TFEU to a deregulatory tool. The position of the Court in *Keck* marked the turn towards a different interpretation of the concept of MEQR, which I think can be better explained by reference to Stigler's

comparative burdens methodology. The focus is, like in the internal taxation (pecuniary measures) cases, on the effect of the measure on the competitive relation between the foreign and the domestic product[121]. In the context of Article 34 TFEU, the Court introduced a formalistic distinction between product requirements and selling arrangements. The dichotomy has the function to reduce decision making costs while ensuring that error costs are limited[122] and to achieve a sensible re-allocation of the evidential burden of proof, as explained below. The recent case law on the restrictions on the use of the products shows the limits of the comparative methodology, in the absence of domestic production, even conceived as an abstract category. Refocusing the analysis from the supply side to the demand side provides a workable tool that might also respond to the broader legitimacy concerns that are raised by the enforcement of the free movement provisions of the Treaty to state action and the quest for a more holistic approach in the interpretation of Article 34 TFEU.

A possible objection to the application of this framework is the relatively ambiguous position of the Court's jurisprudence on the application of the discriminatory market access test in other freedoms of movement. There is some recent case law on the free movement of services which supports this analytical framework[123], but also judgements that seem to take a different perspective.

In *Commission v. Italian Republic* (insurance) the Court of Justice considered that a national legislation imposing an obligation to contract with all vehicle owners for all insurance undertakings operating in the field of third-party liability motor vehicle insurance, constituted a restriction to the freedom to provide services[124]. But the conceptual framework employed did not provide adequate guidance. The Court certainly noted that "rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favorable rules to providers of similar services

[121] See, Case 170/78, *Commission v. UK* [1983] ECR 2265, para. 19-21 & 27.
[122] As it has been noted by Wouter Wils, 'The Search for the rule in Article 30 EEC: much ado about nothing?", (1993) ELRev, 475, 486, "(i)n general a full test, which takes all relevant factors into account, has the advantage of being more difficult to apply, thus imposing high administrative costs on the courts and parties involved. On the other hand a simplified test, as it does not take into account all relevant factors, engenders errors".
[123] See, Joined Cases C-544/03 & C-545/03 *Mobistar v. Commune de Fléron* [2005] ECR I-7723; Case C-134/03, *Viacom Outdoor Srl v Giotto Immobilier SARL* [2005] ECR I-1167.
[124] Case C-518/06, *Commission v. Italian Republic & Republic of Finland*, para. 71.

established in their territory"[125], an indication that the free movement provisions of the Treaty do not have a deregulatory aim. The Court explained that such rules render "access to the Italian market less attractive" and that, even if foreign undertakings obtain access to that market, it "reduces the ability of the undertakings concerned to compete effectively from the outset, against undertakings traditionally established in Italy"[126]. This clearly takes up the thesis defended in this study that the objective of the negative market integration rules is to sanction measures that have an impact on the competitive relation between the home State's products/undertakings and the host State's products/undertakings. The Court blurs nevertheless its analysis with a rights-based approach. The imposition by a member State of an obligation to contract is found to constitute "a substantial interference in the freedom of contract which economic operators, in principle, enjoy"[127]. I am unable to see what this rights-based approach offers to the Court's reasoning. The Court adds to this peculiar conceptual mixture a Bainian touch by insisting that the measure in question is likely to lead, "in terms of organization and investment, to significant costs for such undertakings", which will be required "to re-think their business policy and strategy"[128]. The fact that incumbent undertakings have also incurred these costs is simply not examined.

This raises concerns over the application of a coherent framework for all free movement rules. This topic is outside the scope of this study[129] but I would simply advance the view that the quest for conceptual coherence across the free movement rules is a quixotic exercise. The different levels of achievement of an integrated market in goods, services, persons, and capital, argues against a common conceptual framework that could jeopardize the important efforts that are still to be made in some freedoms of movement and would unnecessarily burden the more flexible approach that has to be adopted in other freedoms of movement[130].

IV. Towards a holistic approach of economic integration: implications for negative and positive integration

[125] Ibid., para 63.
[126] Ibid., para 70.
[127] Ibid., para 68
[128] Ibid., para 69.
[129] For some recent analysis see, Jukka Snell, 'And then there were two: Products and citizens in Community law', in Takis Tridimas & Paolisa Nebbia (eds.), European Union Law for the Twenty-first Century: Rethinking the New Legal Order. Vol II (Hart Publishing 2004), 49.
[130] See also, Miguel Poiares Maduro, Harmony and Dissonance in Free Movement, in Mads Andenas & Wulf-Henning Roth (ed.), Services and Free Movement in EU Law (OUP, 2001), 41, at 65-68.

The analysis of the first step of the definition of a MEQR, the finding of a restriction of trade, has shown the evolution of the case law of the Court from the broad "obstacles to trade" concept to a narrower discriminatory impact to market access approach. The theoretical underpinnings of the "discriminatory market access" test are not, however, settled. The main cause for this lack of conceptual coherence is a profound disagreement over the objective of the Internal Market project and consequently on the definition of what constitutes a trade restriction falling under the first step of Article 34 TFEU. The reference to the consumer/citizen in the most recent case law points towards the need for a "holistic" approach in the interpretation of Article 34 TFEU.

A. The case for a holistic approach in the interpretation of Article 34 TFEU

According to one view, the Internal Market project aims to promote intra-Community trade by imposing an equal regulatory burden to firms across the Union. This can be either achieved through negative integration, by striking down national rules that do not take into account the regulatory burden already incurred in the home state and by imposing additional costs to imported goods, or through positive integration, by agreeing uniform rules applying to both the home and the host state. Positive and negative integration are thus complements for achieving an equal level-playing field for undertakings, when engaged in intra-Community competition[131]. The principle of functional parallelism imposes a presumption broadening the scope of the negative integration provisions, while mandatory requirements subject to the proportionality principle are seen as an opportunity to refocus the positive integration process on the regulatory disparities that are most problematic, in the sense that they impose an unequal regulatory burden to undertakings.

The matrix includes only the pay offs of two actors of the integration process, their interests seen in opposition to each other. First, there are the Member States defending their wider public interest, which might also include protectionist economic measures or measures that suppress trade opportunities for the satisfaction of other preferences than trade facilitation. Second, there is the Union, which has its own

[131] This situation should be distinguished from purely internal situations, where there is no cross-border element.

utility function, that of establishing an Internal Market where suppliers or service providers will be subject to an equal regulatory burden, in case they decide to operate across the different national legal orders. This utility function is supply-oriented, not demand oriented, as consumers', and more broadly citizens', interests are not directly taken into account. The Union's interest in establishing an Internal Market takes precedence over the Member States' broader objectives in the EU legal order[132].

According to the "obstacles to trade approach", any national measure that has an effect on intra-community trade is subject to judicial control under the second step of the analysis. The exception to the prohibition principle in Article 36 TFEU creates a limited immunity for a specific and exhaustive list of public interest objectives. The proportionality test, which takes the form of a strict LRA test, ensures that intra-community trade is not affected more than what is strictly required for the accomplishment of these objectives. The existence of Article 36 TFEU constitutes, however, a serious conceptual challenge for the defenders of the view that the objective of economic integration is to promote intra-Community trade: if intra-community trade should be the first-order preference of the EU, why is it sacrificed in order to achieve second-order, in terms of the EU hierarchy of norms, preferences of Member States for public health, public morality, public security, protection of IP rights etc? A possible argument defending the conceptual coherence of Article 36 TFEU would be that protecting these objectives enhances intra-Community trade in the long run as it increases ultimately trade opportunities, because it boosts consumers' confidence (i.e. public health) and dynamic efficiency (i.e. intellectual property rights). It is nevertheless difficult to see how all the public interests listed in Article 36 TFEU might promote intra-community trade.

The principle of positive integration and the harmonization of the public interest requirement at the EU level attempt also to immunize from the application of the "obstacles to trade approach", those public interest objectives that are shared by a qualified majority or the unanimity of Member States. Nevertheless, the scope of the harmonization principle is circumscribed to the accomplishment of the utility function of the EU, the constitution of the Internal Market. As it has been explained by

[132] The Court observed in case C-169/91 *B & Q* [1992] ECR I-6635, para 15. concerning a national regulation restricting Sunday opening of shops, that the proportionality review involves "weighing the national interest in attaining [the aim pursued] against the Community interest in ensuring the free movement of goods".

the ECJ in the *Tobacco Advertising Directive* judgement, the Community does not have a general regulatory competence but an attributed competence to harmonize regulation, to the extent necessary to improve the conditions and functioning of the Internal Market and to prevent the emergence of future obstacles to trade[133]. In conclusion, according to this view, the complementary character of the negative and positive integration indicates that the objective of the Internal Market is to facilitate cross-border trade by reducing regulatory diversity. This is the main thrust of the process of economic integration through law.

This view presents a number of conceptual difficulties. Ironically, reducing regulatory diversity will not lead to greater volumes of trade, trade facilitation or increased part of imports and exports in commerce. Regulatory uniformity might lead to fewer imports, because the costs of the imported goods would be similar to those of the home state. For example, regulatory diversity in setting the price of pharmaceutical products leads to higher volumes of parallel imports and consequently trade between Member States, than in the absence of regulatory diversity. Regulatory diversity increases the opportunities of cross-border trade. This view does not also accommodate the fact that the Treaty prohibits measures and policies that may increase the volume of intra-community trade. For example, export subsidies are banned, despite the positive effect that these might bring to interstate trade. Restrictions of trade from pecuniary measures are also subject to a standard that does not extend the prohibition rule to internal taxation that is non-protectionist but could potentially reduce intra-Community trade and imports, for example, because it reduces income previously available for purchasing foreign products. A coherent interpretation of the constraints imposed by the Treaty to Member States' action would thus require aligning the standards applying to internal taxation with those applying to regulatory action. Of course, Member States' power in the area of internal taxation has been jealously preserved, because of the symbolic link between taxation and national or Parliamentary sovereignty in modern democracies. But, this power has also been seriously curtailed in the area of state aids, where no distinction has ever been made between taxation and regulation/service provision, with regard

[133] Case C-376/98, *F.R.G. v. Parliament & Council* (*Tobacco Advertising Directive*) [2000] ECR I-8419.

to the standards applied to the different types of state action, as long as the State confers a specific advantage to an industry and creates a distortion of competition[134].

It is submitted that Article 34 TFEU should cover only inefficient restrictions of trade. The objective of economic integration should be efficiency, broadly defined, not just a specific facet of efficiency, the promotion of intra-community trade. My conception of efficiency recognizes that the utility function of the EU should integrate a variety of preferences other than productive (or allocative) efficiency. A simple reference to Articles 2 and 3(3) TEU sufficiently illustrates how a narrow view of efficiency is incompatible with the text of the Treaty[135] and the concept of "social market economy"[136]. The "obstacles to trade approach" is thus ill-suited for the completion of the utility function of the EU, as it includes within the scope of Article's 34 TFEU prohibition, state measures that impose an efficient restriction of trade: i.e. a measure that reduces opportunities of intra-community trade but promotes, at the same time, the protection of the environment[137]. As explained in the previous section,

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[134] The concept of State aid does not only include tax exemptions but a variety of financial transfers by public authorities, including state guarantees, provision of goods or services at an undervalue or on preferential terms or indirect financial measure such as the waiver of public debts, exemption from obligations to pay fines etc. See, Kelyn Bacon, 'The definition of State aid', in Kelyn Bacon (ed.), European Community Law of State Aid (OUP, 2009), 23, at 27-28.

[135] According to Article 2 TEU,

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

According to Article 3(3) TEU,

> "The Union shall establish an Internal Market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

[136] Loic Azoulai, 'The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization', (2008) CMLRev 1335.

[137] Other authors have also been critical on the uni-dimensional approach followed by the Court, although they suggested a different route in order to narrow the scope of state measures that are subject to judicial scrutiny under the second step of the assessment of the proportionality of the justifications : see, Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', (2009) 68(3) Cambridge L J 575, 579, insisting that "the type of federalism that the Court of Justice is responsible for shaping must leave space for the sub-units (the states) to regulate and develop at least the matters which form the core of the welfare state, as well as social policy more generally, largely unhindered by the application of EC law. Failure to do so may well lead EU citizens blaming the EU for the failure of the European social model which is so dependent on national welfare policies for its

this approach requires a definition of MEQR that is narrower than the "obstacles to trade approach" and does not infer the existence of a MEQR from the simple fact that the state regulation in question imposes additional costs to foreign products. It is, however, crucial that the first step of the analysis of a restriction of trade under Article 34 TFEU is not seen in isolation, but forms part of a more global approach that integrates the different possibilities of justification of efficient restrictions of trade, available to Member States, the evidential arrangements introduced by the Treaty (Article 36 TFEU) and the case law (mandatory requirements, the product requirements/selling arrangements dichotomy) and positive integration.

B. The implications of the holistic approach on the judicial assessment of the justifications of efficient restrictions of trade

The evolution of the jurisprudence of the ECJ in the area of free movement of goods has been marked by the progressive inclusion of other considerations than the initial emphasis on cross-border trade facilitation. The possibility for the States to justify obstacles to trade and therefore to avoid to be found in infringement of Article 34 TFEU shows that deregulating trade has never been the aim of the free movement provisions, although the broad interpretation of the concept of MEQR by the Court has led AG Tesauro to ask in *Hűnermund* if the objective of Article 34 TFEU was "to liberalize intra-Community trade or if it was intended more generally to encourage the unhindered pursuit of commerce in individual Member States"[138]. But this was essentially a rhetorical question. Public interest objectives have always been integrated in the application of free movement rules through the doctrine of mandatory requirements of general interest or through the formal Treaty exceptions and can justify all forms of obstacles to trade, including directly discriminatory restrictions of trade in specific circumstances.

Furthermore, contrary to what is generally thought, the principle of mutual recognition does not aim to remove barriers to trade or to enable regulatory

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substance". Barnard argues that non-discriminatory national regulation should benefit from the presumption of legality, while discriminatory (in law or in fact) legislation should be examined under the broad "obstacles to trade" approach.

[138] Opinion of AG Tesauro in Case C-297/92, *Hűnermund* [1993] ECR I-6787.

competition. Kalypso Nicolaidis[139] and most recently Wolfgang Kerber with Roger van den Bergh have convincingly argued that mutual recognition should be seen as a conflict of law rule that aims instead to delineate the regulatory powers of jurisdictions and to test whether the traditional national regulatory autonomy is still defensible or if decentralization should be replaced by another allocation of regulatory powers that can either take the form of "centralization (including measures of harmonization) or a free market for regulations (free choice of law)"[140]. Commenting on the *Cassis de Dijon* judgement of the ECJ, Kerber and Van den Bergh note that "if the French and German regulations are assessed under the principle of mutual recognition as being equivalent for the consumers, why should domestic producers remain obliged to obey specific national rules? Why should domestic producers under a rule of mutual recognition not be allowed to produce according to regulations of other Member States and sell these products – appropriately labelled - on the domestic markets?"[141] The principle of mutual recognition is not aiming to facilitate trade but to provide direction as to the most adequate allocation of regulatory powers between the centre and the periphery. A wide divergence of regulatory preferences between Member States, because of different values, would make unmanageable the operation of the principle of mutual recognition. The mutual recognition principle does not oppose a holistic approach that would integrate the pursuit of other objectives of public interest than trade facilitation.

The possibility for Member States to justify obstacles to trade with mandatory requirements of general interest, even if these are directly discriminatory[142], illustrates the role that other public interests play in the Internal Market and support the holistic view on economic integration. How the integration of these other objectives takes place is of particular importance, as in case their role is ancillary to the principle of free movement, that could be an obstacle to the holistic view of economic integration defended in this study.

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[139] Kalypso Nicolaidis, Mutual Recognition of Regulatory Regimes : Some Lessons and Prospects, (Jean Monnet Working Paper, 1997), available at http://centers.law.nyu.edu/jeanmonnet/papers/97/97-07.html

[140] Wolfgang Kerber and Roger Van den Bergh, 'Mutual Recognition Revisited: Misunderstandings, Inconsistencies, and a Suggested Reinterpretation', (2008) 61 Kyklos 447, 448.

[141] Ibid.

[142] See, Case C-54/05 *Commission v. Finland* [2007] ECR I-2473 (examining how the mandatory requirement of road safety might justify a distinctly applicable measure).

The jurisprudence of the ECJ has long adopted a proportionality test in the examination of the public interest reasons argued by the States[143]. As it has been exposed below, this comprises a finality test, a test of suitability and a test of necessity. The finality test examines the general lawfulness of the alleged aim of the measure: is the objective among those that Member States have the power to pursue? With the exception of circumstances where there has been a complete transfer of the power to act by the Member State to the European Union, because of an exhaustive harmonization that pre-empts Member States' action, State regulation passes without any difficulty this first test. The suitability test requires some articulate relationship between the means chosen by the host State and the objective of public interest pursued: the means should be suitable or appropriate. The necessity test examines if the measure is no more restrictive than necessary to achieve a lawful end.

The enforcement of these tests does not lead to any balancing *stricto sensu*, in the sense that there is a weighing of conflicting reasons[144]. The analysis is closer to a means/end testing, where the courts examine only the capacity of the State measure to achieve the objective sought with the lower impact on the EU principle of free movement. The Court does not, in any case, take into account the costs and benefits of the national measure or those of the principle of free movement with regard to a third term. This approach guarantees the incommensurability of the principle of free movement, as the latter is not subject to any comparative quantitative analysis and is accepted as part of the "economic constitution" of the EU, which serves to provide the "framework of principles and ideals"[145] through which the economic system develops. Such approach would contradict the holistic view.

Another route usually followed by the jurisprudence of the Court is to recognize that the principle of free movement becomes a source of individual rights that are granted against public powers[146]. An individual has the right to exercise an

[143] See, Catherine Barnard, The Substantive Law of the EU – The Four Freedoms (Oxford: OUP, 2nd ed., 2007) 119-125.
[144] Joseph Raz, Practical Reasons and Norms (2nd ed. 1999), at 35 defining balancing as "[resolving] conflicts by the relative weight or strength of the conflicting reasons which determines which of them override the other")..
[145] David J. Gerber, 'Constitutionalizing the Economy : German Neo-Liberalism, Competition Law and the New Europe', (1988) 42 American Journal of Comparative Law 25, at 44-45.
[146] Ernst-Ulrich Petersmann, 'Proposals for a New Constitution of the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the E.U.', (1995) 32 CMLRev. 1123, at 1127. See, Case C-265/95, *Commission v. France* [1997] ECR I-6959, para. 24; Case C-320/03,

economic activity by selling products or services across the border. The constitutionalization process awards to the provisions on free movement a normative status equivalent to that of fundamental rights. Employing the terminology of fundamental "freedoms"[147] or rights might serve a dual objective.

First, it might indicate the elevation of the free movement rules to the status of fundamental freedoms/rights guaranteeing open markets that can be restricted by national measures only in exceptional circumstances. This constitutionalization transforms the free movement provisions into an economic due-process clause that restricts the regulatory activity of Member States. Recognizing these economic fundamental freedoms to individuals is perceived as a way to enhance the legitimacy of EU law and to achieve the objectives of the Internal Market project, in terms of unfettered inter-state commerce. The proportionality principle accommodates this rights-based approach by assessing each freedom on its own terms, without the need to compare incommensurable values. It operates as a means-end rationality review test: the focus of the judicial review is to examine the logical (suitability test) and empirical (necessity test) link between means and ends. The third step of the analysis, the Least Restrictive Alternative (LRA) test, does not require the court to make comparisons of value: a law will be invalidated only if there is an alternative that achieves all the benefits of the examined regulation at a lower cost for the protected right. The application of the proportionality test by the jurisprudence of the Court would thus be compatible with the perception of the freedom of movement as an incommensurable and inalienable right. Efficiency, broadly construed, would not be the aim of the Internal Market rules. Any exceptions to the protection of the right are strictly confined to exceptional grounds.

The conflict between the EU principle of free movement and fundamental rights protected by national constitutions has been the laboratory where this conception of the Internal Market has been tested. In *Schmidberger*[148]*,*

Commission v. Austria [2005] ECR I-7929, para. 63. Opinion AG Trstenjak, Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119, para 83.

[147] The term "fundamental freedom" should be considered as a synonym to that of "fundamental right", from the point of view of the hierarchy of norms. See the preamble of the TEU referring to fundamental freedoms and human rights and Article 53 of the Charter of Fundamental Rights of the European Union.

[148] Case C-112/00, *Schmidberger (Eugen), Internationale Transporte und Planzűge v. Republic of Austria*, [2003] ECR I-5659.

Familiapress[149], *Omega*[150], *Viking*[151], *Laval*[152] and *Rüffert*[153] the Court was confronted to the opposition between the principle of free movement, perceived as a "fundamental freedom", and different political and social rights, such as freedom of expression, the right of collective action, protected by the Constitutions of the Member States. In some of these cases the Court applied the proportionality test and indicated that it is for the national court to determine whether the specific state regulation was aiming to protect the fundamental right and whether this objective could have been attained by measures less restrictive for both intra-Community trade and fundamental rights[154]. The proportionality principle which applied in these cases is less concentrated on the imperative of free movement than the usual case law of the Court, which focuses only the protection of the freedom of movement.

The Court employs the language of "balancing" in order to explain how it reconciles the freedom of movement with the fundamental rights, through the proportionality test[155]. But qualifying the proportionality test to a form of balancing is misleading. The test does not require the comparison of the benefits and burdens imposed on each fundamental right by the specific state measure in order to decide where to strike the balance between the value of trade and other values. The value of trade is perceived as superior, simply because it is given a constitutional level protection by the Treaty, while the other values are national and thus inferior in the hierarchy of norms.[156] The integration of the Charter of fundamental rights to the Treaty on the European Union (TEU)[157], following the Lisbon Treaty might nevertheless have a transformative effect on the nature of the proportionality test and could establish a systematic review of the enforcement of the free movement rules

[149] Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.
[150] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.
[151] Case C-438/05, *International Transport Workers' Federation & Finish Seamen's Union v. Viking Line ABP and OŰ Viking Line Eesti* [2007] ECR I-10779.
[152] Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetarefőrbundet* [2007] ECR I-11767.
[153] Case C-346/06 *Rüffert* [2008] ECR I-1989.
[154] See, Case C-112/00, *Schmidberger (Eugen), Internationale Transporte und Planzűge v. Republic of Austria*, above, at para. 82 & 89.
[155] Case C-438/05, *International Transport Workers' Federation & Finish Seamen's Union v. Viking Line ABP and OŰ Viking Line Eesti* [2007] ECR I-10779, at para. 79.
[156] See also, Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', (2009) 68(3) Cambridge L J 575, 576, noting that "the ECJ's 'restrictions' analysis gives primacy to the economic freedoms […] and creates a presumption that the national rule is unlawful. This puts the defendant, usually the state, on the back foot, defending national social policy choices and showing that the legislation is proportionate".
[157] Article 6 TEU.

and their relation to fundamental rights and freedoms, guaranteed now an equal place at the EU level[158].

Second, the necessity to reconcile the freedom of movement rules with individual fundamental rights, and not just regulatory action, in the recent case law of the Court, has led to a re-conceptualization of the proportionality test as an interests-balancing exercise. In *Alfa Vita*, AG Poiares Maduro invited the Court to abandon the "classic approach" and to integrate the freedoms of movement into the "broader framework of the objectives of the Internal Market and European citizenship"[159]. According to AG Poiares Maduro, "it would be neither satisfactory nor true to the development of the case-law to reduce freedom of movement to a mere standard of promotion of trade between Member States"[160]. The freedoms of movement should "represent the cross border dimension of the economic and social status conferred on European citizens"[161]. Indeed, "the protection of such a status requires going beyond guaranteeing that there will be no discrimination based on nationality"[162]. It requires from Member States to take into account "the effect of the measures they adopt on the position of all European union citizens wishing to assert their rights to freedom of movement" and thus to consider "a broader scale than a strictly national context"[163]. Consequently, "the task of the Court is not to call into question as a matter of course Member States' economic policies", but to make sure that "those States do not adopt measures which, in actual fact, lead to cross-border situations being treated less favourably than purely national situations"[164].

His analysis, although confined to the first step of the assessment of MEQR, has implications on the kind of judicial control performed on the justifications proffered by the States, under the second step of the analysis. His position is explained by the "virtual representation" argument[165], he also defended in his work

[158] See, Article 52 of the Charter of Fundamental Rights of the European Union.
[159] Opinion AG Poiares Maduro, Joined cases C-158 and 159/04 *Alfa Vita Vassilopoulos AE v. Eliniko Dimosio* [2006] ECR para 40.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid, para 41.
[165] The assumption of the virtual representation argument is that in the national political process, foreign interests are not usually taken into account, as they are not adequately represented. This might lead to a Kaldor-Hicks inefficiency, in particular when the foreign costs are greater than the local benefits of the regulation or when the foreign costs are excessively more important than the local benefits. For example, an environmental regulation might impose high costs to some foreign producers in order to satisfy the preferences of local consumers for a cleaner environment. The

"*We, The Court"*, where he argued for an approach that would focus on the interests, not the rights, of the different economic actors and crucially "the position and interests of all market agents (both producers and consumers)", foreign and domestic[166].

This interest-balancing rhetoric has profound implications on the conception of European economic integration. States are left with the autonomy to perform cost/benefit analysis on the basis of different values and different measurement mechanisms. A certain degree of regulatory diversity is unavoidable. Indeed, as Poiares Maduro observes, "different institutions may reach different and equally legitimate and efficient balances of the values concerned"[167]. But crucially, this "national" cost/benefit analysis is subject to limits and constraints intended to introduce the interests of foreign nationals into the national making process[168]. These limits erode Member States' regulatory autonomy, when externalities imposed on foreign interests are not internalized and thus do not influence the regulatory choices of the host state. But how this misrepresentation of foreign interests should reflect on the judicial assessment of State justifications? According to Poiares Maduro, "the Court of Justice should not second-guess national regulatory choices, but should instead ensure that there is no under-representation of the interests of nationals of other member States in the national political process"[169]. If the specific regulation affects both cross-national and national interests, it will not *prima facie* fall within the scope of Article 34 TFEU, unless it is shown to be discriminatory. The Court of Justice will thus review national regulatory measures "where there is a suspicion of representative malfunction in the national political process with regard to nationals of

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assumption is that the production of the foreign good has negative externalities on the host state's environment. My assumption is that preferences are taken into account when they are "restricted", that is when they survive idealization and are self-interested, although I also accept that "existence values", for example the value of preserving an endangered species, might be included in the balancing : Matthew D. Adler & Eric A. Posner, New Foundations of Cost Benefit Analysis (Harvard Univ. Press, 2006), at 36-37. See also, on "existence values" in CBA, Kevin Boyle & Richard C. Bishop, 'Valuing Wildlife in 'Benefit-Cost Analyses' : A Case Study involving Endangered Species', (1987) 23 Water Resources Research 943.

[166] Miguel Poiares Maduro, We The Court – The European Court of Justice and the European Economic Constitution (Hart Pub. 1998), at 170 (emphasis added).

[167] Ibid.

[168] Ibid., at 169.

[169] Ibid., at 173.

other Member States"[170]. In all other cases, national regulatory choices will be reviewed by the EU political process (positive integration)[171].

These recommendations advance a narrower reading of the first step of the analysis, by introducing a requirement of discriminatory impact on cross-national trade for the State measure to be subject to judicial assessment. They also commend a specific form of judicial review at the second step of the analysis, which will examine if foreign interests were taken into account in the national decision-making process. Both strings of his theory are based on the virtual representation argument: the fact that the regulation produces a disparate impact on foreign trade is *prima facie* evidence of a misrepresentation of foreign interests in the process. Consequently, the evidential burden of proof is reversed to the State and national measures are subject to the scrutiny of the Court, under the second step of the assessment. The Court examines more closely if foreign interests were misrepresented. An efficient exchange would thus require from the Courts to intervene in order to virtually represent the omitted foreign "restricted" interests. This can take either the form of a proper balancing test that will *evaluate* the local benefits and the foreign costs and then assess their respective weight, or an "institutional malfunctions" test. Both rely on the operation of the discrimination test as a filter for subjecting state regulations to a degree of judicial scrutiny. An explicit domestic/foreign classification or the presence of a disparate impact on foreign competition might constitute evidence of discrimination. The use of means that are not the least trade restrictive might also be used as an indication that the purpose of the national measure is to discriminate against inter-state trade, in the second step of the assessment.

The virtual representation argument presents, however, many flaws. Donald Regan has shown how foreign interests are often accounted for by local interests in decision-making[172]. The interests of the local consumers might indeed be affected by a regulation that favours local producers and harms foreign producers/suppliers. But a strict environmental regulation that is indistinctly applicable will also affect local suppliers of products whose production is not compatible with the stricter environmental standards and who might be either obliged to increase their costs

[170] Ibid., at 174.
[171] Ibid.
[172] Donald H. Regan, Judicial Review of Member-State Regulation within a Federal or Quasi-Federal System : protectionism and Balancing. "da Capo", (2001) 99(8) Michigan L Rev 1853.

considerably and thus lose market share or to exit the market. It might also affect local consumers that are unable to buy the more expensive environmentally-friendly products. These local interests will oppose their home state's regulation, as its effect will decrease their welfare, and by doing so, they will represent the foreign interests in the domestic political process. There is a vicarious consideration of the foreign producers' interests by the integration in the analysis of local consumers' and/or some local suppliers' interests. The presence of such local interests leads to what Regan calls, "local/global equivalence", which completely undercuts the virtual representation argument[173].

It is also doubtful if courts have the competence to identify benefits and costs in practice and to decide how local benefits to the environment can be weighed against a foreign loss of jobs. As the main mechanism to identify citizens' preferences, the legislative power might be a more adequate institution than the courts to optimize over all interests[174].

It is thus crucial to examine the jurisprudence of the Court in order to unveil the approach followed. The consideration of the consumer interest in finding the existence of a MEQR has been an important *leitmotiv* of the most recent case law of the Court. But the consumer is also a citizen that has a variety of preferences that do not always relate to lower prices and wider choice. The protection of the environment, paternalistic regulation that aims to mitigate the behavioural biases of consumers and informational asymmetry, cultural diversity, a higher degree of public health and social protection, freedom of expression are some examples of broader preferences of the citizen/consumer that should also come into consideration. A trade exchange would be efficient, only if it integrates these multiple preferences and values.

The proportionality principle applied by the Court to review restrictions to trade, integrates, however, a LRA test that imposes strict conditions for a state measure to escape the prohibition of Article 34 TFEU, even if the aim and effect of the measure is to promote efficient trade. The Court examines if there is a least restrictive alternative measure that could achieve the public interest objective, as part of its analysis on the necessity of the measure. The Court has gone as far as to impose a procedural requirement to the authorities of home States to carry out a

[173] Ibid., at 1859-1860.
[174] But there is, however, some criticism on this omnipotence of the legislature as the perfect locus of representation of the different interests to be considered: see, Kenneth Arrow, 'A Difficulty in the Concept of Social Welfare', (1950) 58 Journal of Political Economy 328.

careful investigation on the existence of a less intrusive alternative in the context of the proportionality test[175]. This procedural dimension of the proportionality test takes different forms, such as the requirement of judicial review or the requirement for national authorities to give reasons for the decisions they adopt[176], both restricting any risk of arbitrariness (non-integration of foreign interests) in the national decision-making process. It is clear that the underlying objective of this case law is to respond to the virtual representation argument.

There are two versions of the LRA test[177]. A law could be invalidated if an alternative regulation achieves most of the benefits at lower cost for trade. This constitutes a "loose LRA test", which limits the Member State's discretion to fully satisfy other preferences than the expansion of trade. The regulatory discretion of the Member State will be compromised by the finding that a less restrictive to trade alternative would achieve some (not all) the benefits expected by the regulation. On the contrary, a "strict LRA test" would require that the regulatory alternative provides all the benefits brought by the regulation under examination as well as being less restrictive of trade[178].

The Court has generally applied the "loose LRA test". In *Familiapress*[179], it required from the national court performing the proportionality review of the prohibition of including prize competitions in magazines to examine whether national law could have required merely the simple removal of the page on which the prize competition appeared. In *Commission v. Germany*[180]*,* the Court suggested that the consumer interest could have been preserved by less restrictive to trade alternatives, such as the compulsory affixing of suitable labels giving the nature of the product sold, without any consideration that labelling might not have offered a similar level of protection of the consumer interest, in particular for consumers unable to read or used to such a high level of consumer protection in their jurisdictions that they do not systematically read labels. The Court has adopted a similar application of the LRA

[175] Case C-320/03 *Commission v. Austria* [2005] ECR I-9871.
[176] Sacha Pechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered', (2008) 35(3) Legal Issues of Economic Integration 201.
[177] Donald H. Regan, 'Judicial Review of Member-State Regulation within a Federal or Quasi-Federal System : protectionism and Balancing. "da Capo", (2001) 99(8) Michigan L Rev, at 1899-1900.
[178] Ibid., at 1900, notes that "strict LRA analysis is not stricter in the sense of invalidating more laws; it invalidates fewer. It is stricter in the sense of interpreting more strictly the basic notion of an eligible alternative".
[179] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags v. Heinrich Bauer Verlag* [1997] ECR I-3689.
[180] Case 178/84 *Commission v. Germany* [1987] ECR 1227

test in some of its Article 36 TFEU case law on the protection of public health[181]. In other cases the ECJ has put more emphasis on the wide discretion Member States dispose in the field of public health and the application of the precautionary principle[182] or it considered that the alternative measure should be "equally appropriate" in order to achieve the specific public interest, taking into account the monitoring costs and the difficulties of implementation[183].

An important difference between the "strict LRA" and the "loose LRA" is that the first does not require the courts to make comparisons of value, while this could be the case for the second one. As Donald Regan explains, the "loose LRA" test can be compared to a form of intuitive balancing or a proportionality review *stricto sensu*: balancing focuses on whether "the costs of preferring the actual law to the alternative are greater than the benefits" while proportionality *stricto sensu* on "whether the costs are disproportionate to the benefits"[184]. Indeed, the Court applied in some cases a covert "marginal balancing test" that balances the value of the national rule against the Community interest in free trade, and excluded considerations of public interest because the specific measure would have had an excessive effect on trade[185]. But a "loose LRA" test is not similar to a "total effects review", that is a proper balancing test that would evaluate and weigh the costs and the benefits of the state measure and would trade them off by implicitly taking as an alternative no state measure (rather than a less restrictive state measure)[186].

The most recent case law of the Court has cast doubt on the continuing relevance of the "loose LRA" test. In *Commission v. Italian Republic*[187], after finding a restriction of trade, the Court moved to consider if the specific measures were necessary for the purpose of ensuring road safety, which was the justification of

[181] See, Case 42/82, *Commission v. France* [1983] ECR 1013 (suggesting that random checks would have been a less restrictive alternative than systematic health inspections) ; Case 124/81, *Commission v. UK* [1983] ECR 203 (suggesting that a declaration signed by the importer would have been less restrictive than the requirement that UHT milk could be imported into the UK only by a license holder and marketed only by a licensed dealer who had packed the milk in a local dairy).
[182] Case 174/82, *Sandoz* [1983] ECR 2445, para 16; Case C-333/08, *European Commission v. French Republic* [2010] ECR I-000, para 85.
[183] Opinion of Advocate General Kokott, Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos* [2008] ECR I-000, para. 74 & 78.
[184] Donald H. Regan, 'Judicial Review of Member-State Regulation within a Federal or Quasi-Federal System : protectionism and Balancing. "da Capo", (2001) 99(8) Michigan L Rev, at 1900-1901.
[185] See, Jukka Snell, 'True Proportionality and Free Movement of Goods and Services', (2000) 11 European Business Law Review 50, 53-54.
[186] Donald H. Regan, 'Judicial Review of Member-State Regulation within a Federal or Quasi-Federal System : protectionism and Balancing. "da Capo", (2001) 99(8) Michigan L Rev, at 1900.
[187] Case C-110/05 *Commission v. Italian Republic* [2009] ECR I-519.

public interest advanced by Italy. It acknowledged that Member States must be recognized a margin of appreciation and should be free to determine the degree of protection which they wish to apply with regard to such safety concerns. The Court continued by noting that

> "(w)hilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions"[188].

The Court then observed that

> "Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities"[189].

The implications of this case law are not yet entirely clear. A possible interpretation is that the Court intended to share the evidential burden of the necessity part of the proportionality test between the Member States and the traders/plaintiffs. The Member State should not come forward with a complete analysis of why there is no available least restrictive alternative to achieve the degree of protection of the specific public interest sought, but could discharge its burden of proof by a *prima facie* case that the specific measure is empirically linked to the public interest objective. It would be on the claimants to establish that there is a plausible least restrictive alternative that would have provided an equivalent protection to the public interest. Alternatively, the Court might have intended to move away from a systematic application of a LRA test and to embrace a proper balancing analysis. The essence of the Internal Market rules would in this case be transformed, from a rights-based model that emphasizes freedom of trade to a framework that integrates the variety of preferences of the citizens/consumers for regulatory protection of public health, the environment and other "public interest" objectives.

[188] Ibid., para 66.
[189] Ibid., para 67.

In *Viking,* the Court explicitly embraced the balancing terminology (although one could have doubts on its effective application in this case) by noting that

> "(s)ince the Community has thus not only an economic but also social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy"[190].

The Court subjected collective action to the scope of the free establishment provisions by rejecting the view that the Community has no (positive integration) competence to regulate social rights and that, therefore, the negative integration provisions of the Treaty would not apply. It also rejected the view that collective action, perceived as a fundamental right, should exclude the application of a freedom of movement. The Court rightly insisted on the social function and the non-absolute character of this right, consistent with its previous case law on individual rights (not just collective), such as the right to property[191]. But the Court, unnecessarily in my view, took the position also embraced in *Schmidberger* and *Omega*, that freedom of establishment is a "fundamental freedom" that needs to be reconciled with the fundamental right of collective action[192], through the application of the proportionality principle.

Such an attempt to treat these two sets of values, social policy and freedom of establishment, as equivalent in terms of normative strength in the EU hierarchy of norms, is flawed[193]. First, this is not indispensable for their reconciliation and it might be counter-productive. In its previous case law the Court was able to reconcile the right to property with competition law, without being obliged to grant to the second a fundamental freedom status[194]. Second, the Court subjects only the fundamental right to the principle of proportionality (not the freedom of movement/establishment),

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[190] Case C-438/05, *International Transport Workers' Federation & Finish Seamen's Union v. Viking Line ABP and OÜ Viking Line Esti* [2007] ECR I-10779, para 79 (hereinafter *Viking*).

[191] Property is not an absolute right. European Union law emphasises the 'social function' of property, according to which, property rights can be restricted for reasons of public interest. See Case 265/87, *Herman Schräder HS Kraftfutter GmbH v Hauptzollamt Gronau* [1989] ECR 2237, para 15.

[192] For a similar approach see also opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [April 14, 2010], nyr in English, para. 187 (noting that the content of the fundamental freedoms of movement might be conceived as tantamount to fundamental rights protecting economic activity).

[193] See also, Diamond Ashiagbor, 'Collective Labor Rights and the European Social Model', (2009) 3(2) Law & Ethics of Human Rights 222.

[194] Competition law constitutes a 'general interest' objective that could justify a restriction on the scope of property rights. See Case T–65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECR II–4653, para 170.

thus implying that the freedom of movement would be of a higher order than fundamental rights in the hierarchy of norms[195]. Analyzing fundamental rights as a form of mandatory requirement would also preclude the possibility of justifying directly discriminatory measures, thus reinforcing the hierarchical nature of the relationship between fundamental rights and freedoms. Third, the rhetoric of the Court put aside, the test applied has nothing to do with a proper balancing exercise that would evaluate both costs and benefits for each value in conflict. The Court adopts a LRA test requiring the trade unions to bring evidence that they did not have other less restrictive to the freedom of establishment means at their disposal, and that "they had exhausted those means before initiating such (collective) action"[196].

One might wonder how it is possible for the Court to take a similar position when it comes to circumscribe the limitation of the freedom of movement by a State because of a public interest objective than when it is confronted to a conflict between a "fundamental freedom" and a "fundamental right". Certainly, prior to the integration of the Charter, fundamental rights were considered as a form of mandatory requirements/objective justifications, similar in their legal nature to public policies that are not a source for rights. Shouldn't the integration of the charter lead to a differentiation between normal mandatory requirements and fundamental rights? But more fundamentally, what does the recognition of the "fundamental" character of the right and freedom and the fact that both are of equal constitutional value[197] bring to the analysis, if the Court continues to apply a LRA test? Wouldn't a proper balance of interests be more adequate than a LRA test in the second case?[198].

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[195] See also, opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [April 14, 2010], nyr in English, para. 183.

[196] *Viking*, para 87. Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', (2009) 68(3) Cambridge L J 575, 599 notes that ("[…] the industrial action should be the last resort; and that national courts would have to verify whether the union had exhausted all other avenues […] before the industrial action was found proportionate". See also Viking, para. 81 which adds an implicit requirement that the jobs or conditions of employment that the industrial action was aiming to protect should have been jeopardised or under serious threat.

[197] See, the interesting analysis in the recent opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [April 14, 2010], nyr in English, available at http://www.curia.eu , para. 81 suggesting that *"(e)n cas de conflit entre un droit fundamental et une liberté fondamentale, il convient en effet d'admettre le principe que les deux notions juridiques ont un rang égal. Cette égalité de principe signifie, d'une part, que les libertés fondamentales peuvent être restreintes dans l'intérêt des droits fondamentaux. Mais elle implique aussi, d'autre part, que l'exercice des libertés fondamentales peut justifier une restriction des droits fondamentaux*". The Court did not, however, follow the AG's Opinion and rejected this double-edged balancing test suggested. See Case C-271/08, para. 44-49.

[198] The reason might lie in the different conceptions one might have of the historic origins and role of the proportionality test as opposed to a balancing test. If the proportionality test was developed in German administrative law as a means to control the public action of an authoritarian state in order to

This also contrasts with the Court's position on the interaction between competition law and social protection in *Albany*, where it excluded collective social purpose agreements between employers and employees from the application of article 101(1) TFEU[199]. The case concerned organisations representing employers and employees that had collectively agreed to set up a single pension fund responsible for managing a supplementary pension scheme and had made requests to the public authorities to make affiliation to the fund compulsory. The ECJ referred to article 2 TEC as well as to other Treaty provisions providing that the Commission had to promote a close cooperation between Member States in the social field and to enhance the dialogue between management and labour at the European level. Although the Court recognized that "it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers", it also held that "the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1)] of the Treaty when seeking jointly to adopt measures to improve the conditions of work and employment"[200]. It followed "from an interpretation of the provisions of the Treaty as a whole" that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 101(1)[201]. The value of competition had in this case to be sacrificed for the attainment of another value, that of social protection.

It is possible, however, to advance a more competition-friendly reading of this case. As AG Jacobs noted in his Opinion in this case "this conclusion in favour of a limited antitrust immunity for collective agreements between management and labour is not incompatible with the idea that there is no exception for the social field as a whole"[202]. The main difference is that in the case of collective bargaining, the exception is based not on the subject-matter of the agreement but mainly on the

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preserve individual rights, the balancing test was essentially used in US constitutional law in order to intermediate between conflicting individual rights by referring to the interests these rights encapsulated. See, Iddo Porat & Moshe Cohen-Eliya, 'American Balancing and German Proportionality: The Historical Origins', (September 23, 2008). Available at SSRN: http://ssrn.com/abstract=1272763

[199] Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textiel industrie* [1999] ECR I-5751.

[200] Ibid., para 59.

[201] Ibid., para 60.

[202] Opinion of AG Jacobs, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, above, para. 183.

framework in which it is concluded. These agreements contribute to a measure of equilibrium between the bargaining power on both sides, which helps to ensure a balanced outcome for both sides and for society as a whole. The countervailing bargaining power function of these agreements comes from the fact that the interests of employers and employees do not coincide: the obvious conflicting interests of the different parties further the public interest[203]. The Court did not exclude the application of competition law because the value of social protection was considered superior but simply adopted a decision procedure based on a serial or lexical order[204]. Social protection was considered by the Court as a first principle in the order of preferences that should not lead to the elimination of competition (perceived as efficiency). Because of the conflicting interests of the employers and employees and their self-restraining effect, the agreements were socially valuable (and thus efficient) in this case[205].

In *Viking*, the Court explicitly refused to follow a similar approach[206]. The reasons are not entirely clear, but it seems that in *Albany* the Court attached importance to the fact that the restriction of competition was inherent in the collective agreements, and thus the enforcement of competition law would have jeopardised their enactment, while this was not a risk to be incurred in *Viking* for the exercise of trade union rights. It was possible to exercise trade union rights without "prejudicing to a certain degree" the "fundamental" freedoms of movement[207]. However, it would be impossible to conclude collective agreements without producing effects on wages, output, prices etc and thus affect competition and consumers. This is a questionable generalization, as all depends on the content of the freedom of movement and in

[203] Ibid., para. 185.
[204] John Rawls, A Theory of Justice (Harvard University Press, 1971, 1999), at 38 defines lexicographical or serial/lexical order as following: "(t)his is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception. We can regard such a ranking as analogous to a sequence of constrained maximum principles. For we can suppose that any principle in the order is to be maximized subject to the condition that the preceding principles are fully satisfied".
[205] See, for an equivalent reading, the recent opinion of AG Trstenjak, Case C-271/08, *Commission v. Federal Republic of Germany* [April 14, 2010], nyr in English, para. 58-60. The AG noted that the "Albany exception" to the application of EU competition law should be interpreted restrictively: *"(c)eci implique évidemment un examen sur le fond de la question de savoir si les conventions collectives, ou leurs différentes dispositions, ont réellement été conclues en vue de l'amélioration des conditions de vie et de travail*".
[206] See also, Case C-271/08, Commission v. Germany, nyr [Juy 15, 2010], para. 45-49.
[207] *Viking*, above, para 52.

particular the type of restrictions of intra-community trade that fall under the first step of the assessment. If this includes any measure that imposes additional costs to traders and thus affects their market access (the "obstacles to trade" approach), then potentially collective action might lead to that result, the restriction of trade being in this case inherent to the exercise of the trade union's right. If only measures that have a disparate effect on the market access of foreign products/services/companies fall under the scope of the free movement provisions then the restriction is not inherent to the exercise of the collective right. *Viking* implies that the Court adopted the second approach.

In conclusion, the most recent case law of the Court may signal an evolution towards an interpretation of the second step of the assessment that would be more inclusive of public interest objectives and fundamental rights, although it is also true that the "balancing" rhetoric of the case law has not been followed so far by concrete results as to the reconciliation of the freedoms of movement with fundamental rights, despite the entry into force of the Lisbon Treaty, which explicitly sets out the "social market economy" as an objective for the Union and which provides for a binding effect of the European Charter of Fundamental Rights[208].

C. The implications of the holistic approach on the toolkit of positive integration: from "integration through law" to "integration through economics"?

The evolution towards a more holistic approach integrating consumer/citizen's interests is also emerging in the recent European Commission's review of its positive integration programme[209]. In the *Communication on the Citizen's Agenda*, the Commission noted the importance of economic integration "in making the EU stronger globally" but also emphasized the importance of the value of solidarity in

[208] See also, Mario Monti, A New Strategy for the Single Market – At the service of Europe's Economy and Society (May 9, 2010), at 70, arguing that "these elements (the Social Market Economy and the Charter) should shape a new legal context, in which the issues and the concerns raised by the trade unions should hopefully find an adequate response".

[209] On the importance of ensuring citizens' support for the project of the Internal Market and the need to reconcile the single market and the social and citizens' dimension in the context of the Treaty logic of "highly competitive social market economy", see Mario Monti, A New Strategy for the Single Market – At the service of Europe's Economy and Society (May 9, 2010), Chapter 3.

achieving the objectives of the Union[210]. In accordance with the objectives set by the Constitutive Treaties[211], the Union should aim to promote a higher quality of life, social cohesion, environmental protection, by ensuring "citizen's existing rights of access to employment, education, social services, health care and other forms of social protection across Europe"[212]. In order to achieve these aims, the Commission acknowledged that it has to work in partnership with national governments. The Commission explained in its Communication on a "single market for 21st century Europe" that the Internal Market must be "more responsive to the expectations and concerns of citizens", "continue to bring consumer benefits in terms of lower prices, quality, diversity, affordability and safety of goods and services" and fostering "the right conditions for small and medium-sized businesses"[213]. The Single Market policy goes "hand in hand with social and environment policies to contribute to sustainable development goals" and needs to "encompass a strong social and environmental dimension"[214]. As it is also explained in the Commission's Staff Working Document accompanying the Communication, the Single Market brought benefits to citizens "in the form of more choice, higher quality and lower prices" but "times have changed and Single Market policy should change accordingly, to ensure that it responds to the needs of today's citizens"[215].

The implications of this rhetorical shift are important. First, as the Commission notes,

> "(m)arket opening and economic integration have social and environmental impacts, which must be factored in - both in Europe and abroad. This requires a better assessment of the impact of decisions and a better collective capacity to anticipate, foster and manage changes implied by greater opening and technological developments. This also implies getting market prices to reflect their real costs on society and the environment, as well as making citizens

[210] Communication from the Commission to the European Council – A Citizen's Agenda, COM (2006) 211 final.
[211] Article 3(3) TEU (after Lisbon), former Article 2 TEU.
[212] Communication from the Commission to the European Council – A Citizen's Agenda., at 5.
[213] Communication for the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for the 21st Century, COM (2007) 724 final, at 3 (hereinafter Single Market for the 21st Century Communication).
[214] Ibid., at 3-4.
[215] Commission Staff Working Document, Instruments for a modernized single market policy, SEC(2007) 1518, at 5.

more aware of the social and environmental impacts of their consumer choices"[216].

It is further recognized that "the ultimate objective of all economic activity is to provide the goods and services that citizens require in the most efficient manner"[217]. The conception of "citizens as consumers" becomes "clearly central to the Single Market", which should take "more seriously" into account the distributional impact of the Internal Market policies, its social effects and the consumer/citizen side[218].

First, the new approach to positive market integration will be more evidence-based and "impact-driven", relying on a number of tools, also employed in competition policy, such as sector inquiries, or specific to the Single Market policy, such as the "consumer markets scoreboard" in order to provide information on how markets perform "in terms of economic and social outcomes for consumers, and where intervention may be needed"[219]. The Commission will use an "optimal mix of instruments", that would combine more flexible approaches to legislation (e.g. Lamfalussy process) and non-binding tools (e.g. codes of conduct), as well as competition law and policy tools (e.g. competition advocacy) in a "synergetic manner" to achieve greater welfare gains for the European citizens/consumers[220].

Second, there is a move from a "more legalistic approach to a more economic approach" that focuses on both static (consumer choice, lower prices, better environmental standards) and dynamic (innovation) efficiency[221]. As the Commission explained in the Staff Working Document accompanying the Communication,

> "(i)n the past, Single Market policy was mainly about 'integration through law'. The aim was to remove legal barriers to cross-border trade. This was achieved through 'negative' integration measures and 'positive integration measures' […] In today's context, legal integration can no longer be the Single Market's sole or primary ambition"[222].

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[216] Single Market for the 21st Century Communication at 10.
[217] Commission Staff Working Document, at 17.
[218] Ibid., at 17.
[219] Ibid., at 18.
[220] Ibid., at 8-15
[221] See Fabienne Ilzkovitz, Adriaan Dierx, Viktoria Kovacs & Nuno Sousa, European Commission DG Economic and Financial Affairs, *European Economy, Steps towards a deeper economic integration : the Internal Market in the 21st century A Contribution to the Single Market Review*, No 271, January 2007, at 17-18.
[222] Commission Staff Working Document, at 5.

The emphasis put on regulatory differences as a sign of success of the completion of the Single market is no longer the *leitmotiv* of the Internal Market project. For the Commission, "policies need to be rethought so as to ensure that markets are not only integrated but can function well – thereby improving consumer welfare and raising productivity"[223].

Third, the Commission recognizes the importance of developing an "inclusive" perspective that will consider the interaction of the Internal Market project with other EU "and national policies, among others to address adjustment costs"[224]. The interaction with other policies does not go one way only. Inge Govaere observes that "social, environmental, and public health policy instruments are drafted with due regard to the Internal Market principles of non-discrimination and market access", so as to avoid "an ex post interference of Internal Market law"; she cites the Commission's Communication on "Opportunities, Access and Solidarity: Towards a New Social Vision for 21st Century Europe", drawing "attention to issues of market access and non-discrimination in the social field" [225]. The Lisbon Treaty has also added a broad horizontal integration provision in Article 9 of the TFEU stating that "(i)n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health"[226]. Such a broad policy integration provision did not exist in the previous Treaties, albeit in some specific areas, such as environmental protection[227]. The inclusion of these provisions will inevitably lead the Commission and arguably the Courts to grant more importance to broader public interest concerns than the facilitation of intra-community trade.

The success of a holistic approach requires, however, important institutional changes in particular for the interaction between public authorities at the EU, at the national and local level. Enhancing administrative cooperation between the different players is a key priority in the Commission's new Internal Market strategy. Following a paradigm that has flourished in the enforcement of competition law, national

[223] Ibid., at 7.
[224] Ibid., at 20.
[225] Inge Govaere, 'The Future Direction of the E.U. Internal Market on Vested Values and Fashionable Modernism', (2009) 16 Columbia J Eur L 67, 77.
[226] Article 9 TFEU.
[227] Article 6 TEC, now Article 11 TFEU.

administrations are included in a variety of networks[228] in the area of goods, services, consumer protection, social policy area, where they exchange information with each other[229]. The Services Directive is a good example of this new approach that promotes cooperation, communication and exchange of information, by including an entire section, Chapter VI, on administrative cooperation between Member States, and by providing mechanisms for mutual assistance and joint monitoring[230].

There is the perception that national action is a complement to EU action. The idea of a "partnership" between Member States and the EU Institutions, of a "joint venture" in which Member States "have a shared stake" is the new rhetoric advanced by the Commission[231], in opposition to the prevalent perception in EU integration theory that Member States and the Union have antagonistic interests, in particular with regard to the enforcement of the Internal Market rules. This partnership approach "goes beyond the already established cooperation in a number of single market policy areas" and "requires establishing and maintaining closer cooperation within and between the Member States, and with the Commission, in all areas that are relevant for the single market" and "implies that Member States assume shared responsibility for and therefore a more proactive role in managing the single market"[232]. The Member States are thus encouraged to "carry out regular evaluation and assessment of national legislation to ensure full compliance with single market rules and in so doing keep under review any use of exemptions or derogations provided for in existing single market rules"[233]. A holistic approach also requires the broadening of the stakeholder's involvement in the management and monitoring of the Internal Market. The creation of European consumer centres, the points of single contact in the Services Directive[234], setting consumer complaints networks or Single

[228] See for an interesting survey, Commission Staff Working Document, Administrative Cooperation in the single market, SEC(2009) 881.
[229] See, for instance, the Internal Market Information System (IMI) which facilitates the cooperation between national administrations in the implementation of the Internal Market legislation in the area of services or the European Public Administration Network (EUPAN) that aims to support the continuous development of national public administrations with the task to conceive and implement the single market. On the practical arrangements for the exchange of information between national authorities in the Internal Market, see Commission Decision 2009/739/EC setting out the practical arrangements for the exchange of information by electronic means [2009] OJ L 263/32.
[230] Chapter VI of Directive 2006/123/EC of the European Parliament and of the Council on services in the Internal Market [2006] OJ L 376/76.
[231] Commission Staff Working Document, at 33.
[232] Commission Recommendation of 29 June 2009 on measures to improve the functioning of the single market [2009] OJ L 176/17, recital 5.
[233] Ibid., para 7.
[234] Article 6 of the Directive.

market centres or the inclusion of users in advisory panels increase considerably the possibilities of participation of consumers in the management of the Internal Market.

VI. Conclusion

The decoupling of the economic from the social dimension, as the choice of the term "*economic* integration" illustrates, has long been considered le "*pêché originel*" of the legal construction of Europe[235]. This has profoundly influenced the idea of "economic integration" and largely explains the dominance of technocratic over political institutions in the first decades of the European integration. But as the recent case law of the ECJ on fundamental freedoms and the Commission's Single Market for the 21st Century Communication illustrate, the embeddedness of the economic and the social dimensions[236] becomes increasingly recognized and is progressively shaping a different kind of EU law, from what we were used to, during the formative decades of the Internal Market project. This evolution sets important challenges to the traditional concept of "economic integration". Integration cannot refer simply to an erosion of regulatory differences by the application of negative integration rules or the European (federal) harmonization of national regulatory standards. I can identify two alternative but certainly not exhaustive meanings of the concept of integration. The concept of "economic integration" has been a marking element of post-war economic thinking over trade and international economic relations[237]. The concept suffered from an "abundance of mutually contradictory definitions"[238], perhaps because of its dual essence: integration can be conceived of

[235] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 Journal of Common Market Studies 645. See also, Christian Joerges, 'A New-Alliance of de-legalization and legal formalism? Reflections on responses to the social deficit of the European integration process', (2008) 19 Law Critique 235.

[236] Marc Granovetter, Economic Action and Social Structure : The problem of Embeddedness, (1985) 91(3) American Journal of Sociology 481.

[237] On the emergence of the theory of international economic integration see, Fritz Machlup, *A History of Thought on Economic Integration*, Macmillan Press, 1977), noting that the term was first employed in business economics. Economists in the inter-war era employed the negative noun of "disintegration" of the world economy, probably as a consequence of the national protectionist legislation that followed the economic crisis of 1929. The positive noun of "integration" was first employed after the Second World War in order to provide a conceptual vehicle for the efforts of "integration of the Western European economy", the substance of which "would be the formation of a single large market within which quantitative restrictions on the movements of goods, monetary barriers to the flow of payments and, eventually, all tariffs are permanently swept away": Fritz Machlup (above, at p. 11) referring to Paul Hoffmann's official pronouncement to the Council of the Organisation of European Economic Co-operation on October 31, 1949.

[238] Fritz Machlup, *A History of Thought on Economic Integration*, Macmillan Press, 1977), at 13.

as a process, encompassing "measures designed to abolish discrimination between economic units belonging to different national states", as well as a state of affairs, represented by "the absence of various forms of discrimination between national economies"[239]. Its meaning has been framed by the tensions between the "liberalist" (market friendly) and the dirigist (state intervention friendly) ideals that characterized the political landscape of the post-war era[240]. The development of the twin concepts of negative and positive integration, coined by Tinbergen in 1965[241], and seen as complementary tools to remove discrimination and restrictions of movement in order to enable the market to function effectively, while promoting other broader policy objectives, was seen as a necessary compromise in order to make "economic integration" acceptable to both camps. The different "stages of integration", identified by Balassa[242], as well as the distinction of the concept of "integration" from that of "cooperation"[243], were also inspired by the same narrative of removing barriers and achieving regulatory sameness to the point that they attracted the criticism that their final stage, the unitary state, was "misconceived" for being inspired "by a centralist rather than federal state model"[244]. Despite the absence of an authoritative definition of the term, Fritz Machlup noted in 1977 that a wide consensus existed as to the three essential conditions for economic integration: "economic integration refers basically to division of labour", "it involves mobility of goods or factors", "it is related to discrimination or non-discrimination in the treatment of goods and factors"[245].

The main difficulty with this conceptualization of integration is that it does not accommodate the need for diversity, which can improve the satisfaction of idealized

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[239] Bela Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd, 1961), at 1. For an extended analysis, see Bela Balassa, Towards a Theory of Economic Integration, (1961) 14 *Kyklos*1-17. For a more outcome-oriented definition see, Jan Tinbergen, *International Economic Integration* (Elsevier, 1954), at 95, defining integration as "the creation of the most desirable structure of international economy, removing artificial hindrances to the optimal operation and introducing deliberately all desirable elements of co-ordination or unification".

[240] Ibid., at 7-10.

[241] Jan Tinbergen, *International Economic Integration* (Elsevier, 1965), at 76-77. See also Pinder, Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC, (1968) 24 *World Today* 88.

[242] Bela Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd, 1961), at 2.

[243] Bela Balassa, Towards a Theory of Economic Integration, (1961) 14 *Kyklos* at 4-5, indicating that "(w)hereas cooperation includes various measures designed to harmonize economic policies and to lessen discrimination, the process of economic integration comprises those measures which entail the suppression of some forms of discrimination". See also the transformation of the title of Jan Tinbergen's work to *International Economic Integration* (in 1954) from *International Economic Co-operation* (1945).

[244] Jacques Pelkmans, *European Integration. Methods and Economic Analysis* (3ed OUP, 2006), 8-9.

[245] Fritz Machlup, *A History of Thought on Economic Integration*, Macmillan Press, 1977), at, at 14.

(not just revealed) preferences (efficiency). Efficiency is perceived here as going beyond allocative and productive efficiency. By bringing in the economics of federalism as an additional analytical tool valuing diversity, economic integration theorists attempted a re-conceptualization of the term that will make it more politically acceptable to the EU member States and to the expected aspirations of the newly formed European citizenry[246]. However, I argued in this study that this can be a risky analytical venture: once the need for diversity brings into the concept of economic integration a broader set of values than the more instrumental one of removing barriers to exchange, the concept loses its distinctive character and becomes confined to that of efficiency, broadly conceived. The question becomes then to identify a measure of success for this kind of "economic integration". One could possibly imagine integration as a continuous and never-ending *process* of balancing of the different interests in presence (integration as a process) but such a concept of integration will be devoted of purpose and thus semantically empty, not to mention unfit from a policy prescription perspective[247].

One could note the revolution brought to the conceptual edifice of "economic integration" by the principle of "mutual recognition", a major innovation of the European judiciary in *Cassis de Dijon*. Perceived initially as a tool of negative integration working alongside the broad "obstacles to trade" approach in defining restrictions of trade, the principle of mutual recognition has evolved towards a mechanism of re-allocation of jurisdictional authority, "a hybrid at the intersection of both processes" (market access and harmonization)[248]. Based on mutual trust, among regulators, mutual recognition becomes the "core paradigm" of "economic integration", the "starting assumption" before determining the need for "a policed national treatment" or "harmonization"[249]. This evolution displaces the uni-dimensional focus of integration theory on the erosion of barriers to exchange that

[246] Jacques Pelkmans, *European Integration. Methods and Economic Analysis* (3ed OUP, 2006), at 11-12. See also the analysis on optimal decision-making in Willem Molle, *The Economics of European Integration – Theory, Practice, Policy* (4th ed. Ashgate 2001), 23-25. The principle of subsidiarity enshrines this economic federalism view that a policy executed at the lowest level of government is thought more efficient because of higher participation, a greater ability to observe preferences, a higher degree of accountability and greater incentives for regulatory experimentation.

[247] The concept of "integration" denotes an action of combining parts into a whole. It has therefore a dynamic dimension towards the completion of a specific aim.

[248] Kalypso Nicolaidis, Mutual Recognition of Regulatory Regimes : Some Lessons and Prospects, (Jean Monnet Working Paper, 1997), available at http://centers.law.nyu.edu/jeanmonnet/papers/97/97-07.html, § 13.

[249] Ibid., at § 16.

underpinned the market access versus harmonization dilemma. Mutual recognition defies this paradigm and suggests a different perspective on economic integration, which is conceived as a process of building increased levels of "institutional-based" trust (or "system trust") between actors interacting across national boundaries[250]. The emphasis on the constitutive element of trust (always residual in a jurisdictional transaction) integrates some degree of marginalist thinking in integration theory that contrasts with the overall significance the classic integration theory accords to the erosion of barriers to exchange, to the point that the different stages of integration are conceived as a continuum going from the existence of barriers to the absence of barriers to trade. The implications of such an approach for understanding the current evolution of the EU law on Internal Market are substantial, as this study has illustrated with the analysis of the case law of the European Courts and the legislative efforts in the area of the free movement of goods.

[250] So that will include also circumstances where trust has been "delegated" from the Member States to private actors or standard setting bodies etc. On the theory of trust in economic integration see, Ioannis Lianos & Johanness Leblanc, 'Trust, distrust and economic Integration: setting the stage', in Ioannis Lianos & Okeoghene Odudu, *The Regulation of Trade in Services in Europe and the WTO: Trust, Distrust and Economic Integration* (Cambridge University Press, forth. 2011), Chapter 1.