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Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship ?

by

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Free Movement of Goods and Environmental Protection in EU Law: a Troubled Relationship?

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Introduction[1]

One of the main features of contemporary legal systems undoubtedly lies in the ever-increasing conflicts that arise between various rules or interests whose respective goals tend to clash. This is a great challenge for public authorities who are required to conciliate competing norms and values as far as possible. In this regard, the relationship between trade and environment figures prominently among these areas of potential contention. This paper aims at exploring how EU law handles the interplay between trade and environmental considerations.

At the outset, one should point out the paramount importance of the subject matter. Indeed, Member States of the EU are increasingly required or willing to take measures so as to alleviate the adverse effects which certain products have on the environment. Such measures are likely to have a restrictive impact on the circulation of goods within the internal market. This is even truer given the wide definition of the measures restricting the free movement of goods subscribed to by the CJEU. Therefore, it is essential to examine whether Member States are duly provided with legal avenues enabling them to take environmentally-related measures. On the other hand, ensuring the sound functioning of the internal market is a crucial obligation foreseen by EU primary law. These divergent requirements underline the need for rigorously designed environmental regulation. The essay will attempt to show to what extent EU primary law renders such regulation possible while striving to offer critical insight throughout the analysis. For this reason, the most contentious elements of this regime will be focussed on.

Article 11 TFEU requires environmental concerns to be integrated into the other EU policies. This topic presents a great opportunity to challenge the applicability of this rule. Whether the latter has been duly implemented or rather has been left in legal limbo will be examined.

To those ends, the relevant provisions of the TFEU will be analysed while giving a major emphasis on the approach of the CJEU as its case-law constitutes the most relevant resource to approach this subject.

The paper will first provide a brief description of the legal context (chapter 1). The evolution of the position of both trade and environment in EU primary law will be briefly outlined in order to better understand their respective status. This is appropriate to grasp the reasons underlying the current state of play in the ambit at stake. Gaining knowledge of the constitutional framework should also lead to some suggestions as to a possible way forward.

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Next, it will be necessary to take a thorough look at the regime prohibiting hindrances to the free movement of goods in accordance with the Treaty provisions (chapter 2). It appears that the Court has elaborated a sophisticated approach on this matter which is worth considering. The scope of the prohibition will thus be delineated (section 1) before addressing a controversial question that has given rise to recent landmark decisions (section 2).

The most substantive analysis will be devoted to the derogatory regime (chapter 3). The provision of the TFEU adopted in that regard will be dealt with (section 3) after a few introductory remarks (sections 1 and 2). Subsequently, the Court's case-law will be scrutinised as the EU judiciary has bridged, over time, the gap left by the drafters of the Treaty. In fact, it set out a new category of exceptions which requires a thorough case-by-case analysis (section 4). The distinction between the express grounds for derogations and the judge-made exceptions will be assessed with a particular emphasis.

Lastly, the study will focus on the proportionality principle (chapter 4). The latter seems to be an adequate legal tool in order to tackle conflicts of interests and value-laden issues under EU law. The CJEU resorts to the proportionality test *inter alia* where it wants to make sure that Member States have properly exercised their margin of appreciation without undermining a fundamental rule they are bound by. The proportionality principle is often portrayed as comprising two or three different tests which will be respectively described (sections 1, 2, 3).

Chapter 1. Description and evolution of the legal context: the position of trade and environment in EU primary law

The establishment of a common market has lain at the heart of the EU integration process. Since the very beginning, the main objective of the (then) European Economic Community has been the achievement of a common economic area.

Under the current EU legal framework, it is still provided that "The Union shall establish an internal market"[2]. The latter "shall comprise 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"[3]. The internal market mainly rests on those "four freedoms" which should ultimately lead to the elimination of all obstacles to trade. This is governed by the principle of negative integration. The latter aims at ensuring the setting up and the sound functioning of the common market through prohibition of restrictions to the four freedoms and the removal of barriers to trade[4].

The most important provision in this respect is article 34 TFEU which reads as follows: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". The same prohibition is extended to exports by article 35. Article 36, however, provides for a couple of specific exceptions to the free flow of goods.

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[2] Article 3 (3) TEU.

[3] Article 26 TFEU.

[4] *A contrario*, the positive integration entails the taking of measures in the form of regulations or directives which aim at approximating the laws of the Member States and eventually lead to a common policy within the EU.

Compared to trade, the emergence of environmental concerns in EU primary law is fairly recent. The Treaty of Rome did not contain any provision in this regard. The first significant environmentally-friendly step was made by the EU judiciary where it acknowledged that "environmental protection is one of the [EU] essential objectives"[5] which may, under certain conditions, restrict the scope of the principle of freedom of trade. The next major stage dates back to the entry into force of the Single European Act whose drafters decided to "constitutionalise"[6] the role of the environment[7]. More recently, the Lisbon Treaty went a major step further by enshrining the three pillars of sustainable development as well as the principle of a high level of protection and improvement of the quality of the environment in the Charter of Fundamental Rights[8].

Over the past 30 years, the authors of the EU Treaties have come a long way having regard to environmental protection. The objectives pursued by the EU are no longer restricted to economic matters but rather expand *inter alia* to environmental matters.

It remains to be seen whether a fair balance has been successfully struck while grappling with issues on trade and environment. The following developments will be devoted to the aforementioned legal regime on the free movement of goods as well as the provision allowing Member States to rely on specific circumstances to restrict the scope of the free flow of goods. Those provisions have remained unchanged since the Treaty of Rome. Consequently, it should be examined whether the EU judicature has taken due consideration of the changing values outlined above while construing the rules at hand. Incorporating new axiological issues into long-standing case-law may prove to be difficult, especially for the judiciary which is bound by legal certainty requirements and tends to be somewhat conservative.

Chapter 2. Prohibition of hindrances to the free movement of goods

The internal market has taken shape *inter alia* through the implementation of articles 34 and 35 which prohibit quantitative restrictions on imports and exports as well as all measures having equivalent effect to quantitative restrictions. These provisions represent the spearhead of the integration process. In view of their paramount importance, they have been recognised as having direct effect by the CJEU[9]. They confer rights on individuals which the national courts must protect[10]. It is first essential to delineate the scope of the prohibition.

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[5] Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* [1985] ECR 531, para. 13.

[6] G. Winter, "Constitutionalizing Environmental Protection in the EU", *YEEL*, 2002, 67. In this paper, the term "constitution" has to be understood in its substantive meaning as opposed to its formal one. Indeed, the EU does not have a formal constitution as it is not a sovereign state.

[7] See for more details about SEA and the environment: L. Krämer, "The Single European Act and the Environment Protection", *CMLR* 24 1987, p. 659 and f.

[8] See article 37 of the Charter which reads as follows: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

[9] Case 74/76 *Iannelli*, [1977] ECR 557 (article 34) and Case 47/90 *Delhaize frères* [1992] ECR 3669 (article 35).

[10] Case C-161/09 *Kakavetsos-Fragkopoulos* [2011], not published yet, para. 22.

Section 1. Scope of article 34 TFEU
A. Principle
1. The *Dassonville* formula

The notion of quantitative restriction is quite narrow and has never raised many problems[11]. The situation is much more complicated as far as measures of equivalent effect are concerned. For a long time, the CJEU has shown its willingness to interpret this notion very widely. The leading *Dassonville* case set the tone by stating that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[EU] trade are to be considered as measures having an effect equivalent to quantitative restrictions"[12]. As the *Dassonville* formula shows, the Court focuses its scrutiny on the effect of the measure rather than on the nature or the purpose thereof. Since then, this effect-based approach has pervaded the whole case-law related to the measures of equivalent effect[13]. It is striking that the Court has gone still further holding that "article [34 TFEU] applies (…) not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State"[14]. Likewise, it is not necessary that the measures should have a direct and appreciable effect on inter-state trade[15]. In so ruling, the Court set out an "all-encompassing principle"[16] which led it to subsume a broad range of domestic regulatory measures under article 34. Although the basic principle in *Dassonville* has survived over time, the Court has been criticised for "twisting and turning" thereby failing to maintain a real consistent case law[17].

In the field of environmental law, the Court has faced various measures which have been caught by article 34. In this respect, it has been considered that a legislation prohibiting lorries of over 7.5 tonnes, carrying certain goods, from driving on a road section of paramount importance constitutes a hindrance to free movement of goods in spite of the existence of alternative routes[18]. The requirement imposed on private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity falls within the scope of article 34[19]. The Court also ruled that restricting the import and sale of specimens of birds constitute a measure of equivalent effect[20].

However, the most contentious question surrounding article 34 did not arise in the course of the *Dassonville* case.

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[11] See Case 2/73 *Geddo* [1973] ECR 1981.
[12] Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, para. 5.
[13] See for a recent illustration: Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000.
[14] Case C-184/96 *Commission v. France* [1998] ECR I-6197, para. 17.
[15] Case 16/83 *Karl Prantl* [1984] ECR 1299, para. 20.
[16] A. Rosas, "Life after *Dassonville* and *Cassis*: Evolution but No Revolution" in *The Past and Future of EU Law*, M. Poiares Maduro, L. Azoulai (eds.), Oxford Hard Publishing, 2010, p. 437.
[17] L.W. Gormley, "The Definition of Measures Having Equivalent Effect" in *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs*, A. Arnull, P. Eeckhout, T. Tridimas (eds.), Oxford University Press, 2008, p. 189. See also: S. Enchelmaier, "The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions", *YEL* 2007, pp. 116-128.
[18] See: Case C-320/03 *Commission v. Austria* [2005] ECR I-3593.
[19] See: Case C-379/98 *PreussenElektra*, [2001] ECR I-2099.
[20] See: Case C-100/08 *Commission v. Belgium* [2009] ECR I-140.

2. The question of discrimination

The core question as to whether discrimination should play a role in the assessment of the measure was put under the spotlight of the Court a few years after *Dassonville* in the seminal *Cassis de Dijon* case[21]. The Court was called upon to decide whether the prohibition of restrictions on imports should also apply to an "indistinctly applicable measure", that is, measure which is applied in the same way to domestic and foreign producers. In line with its extensive approach, the Court came to the conclusion that such measures should fall within the prohibition laid down in article 34. The rationale for this ruling is that foreign producers may *de facto* encounter more difficulties than domestic producers to comply with national requirements[22].

A raft of decisions then confirmed this position holding that the concept of measures of equivalent effect only depends on whether the measure restricts imports as opposed to whether the measure discriminates against imports[23]. It comes as no surprise that the Court was flooded with references for preliminary rulings on national measures which sometimes were quite tenuously connected to imports[24].

Nevertheless, this trend was halted by the landmark judgment in *Keck & Mithouard*[25] where the Court decided to exclude from the scope of article 34 measures constituting "certain selling arrangements"[26].

B. Limits to the scope

1. Certain selling arrangements

Aware of the increasing tendency of traders to invoke article 34 TFEU "as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States"[27] the Court considered that it was necessary to re-examine and clarify its case-law on this matter. It did so in the *Keck & Mithouard* case where it drew for the first time the essential distinction between rules laying down requirements to be met by goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) and rules restricting or prohibiting certain selling arrangements. While the former category often referred to as "product requirements" or "product bound" is banned, the latter (selling arrangements) is deemed to be authorised provided that two conditions are satisfied. First, those rules must apply to "all relevant traders operating within the national territory"[28]. Second, they must "affect in the same manner, in law and in fact,

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[21] Case 120/78 *Rewe-Zentral AG* (Cassis de Dijon) [1979] ECR 649.

[22] C. Barnard, *The Substantive Law of the EU: The four freedoms*, Oxford University Press, 3rd ed, 2010, pp. 18-19.

[23] P. Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?", *FILJ* 33 2010, p. 1433.

[24] See for a particularly striking case in this respect: Case 60-61/84 *Cinéthèque SA* [1985] ECR 2605. The Court, in this decision, did not follow the recommendations of the AG who attempted to narrow down the scope of the notion of the measures having equivalent effect. Opinion of AG Slynn, Case 60-61/84 *Cinéthèque SA* [1985] ECR 2605. See for a similar trial by another AG in a case on Sunday trading: Opinion of AG Van Gerven, Case 145/88 *Torfaen Borough Council* [1989] ECR 3851.

[25] Case C-267-268/91 *Keck & Mithouard*, [1993] ECR 6097.

[26] See, infra,

[27] Case C-267-268/91 *Keck & Mithouard*, [1993] ECR 6097, para. 14.

[28] *Ibidem*, para. 16.

the marketing of domestic products and of those from other Member States"[29]. The *ratio legis* underlying this distinction is that measures on selling arrangements do not prevent foreign producers from accessing the market (or at least not more than they impede access for domestic products)[30]. Indeed, selling arrangements apply in principle only after a product has been imported.
However, one should not overstate the consequences of this ruling. As L. Gormley rightly indicated "the basic principle in *Dassonville* was not being thrown overboard, but its application was being nuanced"[31]. Furthermore, this dichotomous approach has been highly criticised[32]. Examining those objections would fall outside the scope of this paper. It is enough to point out that whereas the Court set out the new concept of "selling arrangements", it did not attempt to define it. Nevertheless, from the abundant case-law on this matter, it is now possible to clarify this concept. The following measures are equated to selling arrangements: restrictions on when goods may be sold, restrictions on where or by whom goods may be sold, advertising restrictions and price controls[33].

It is important to point out that the *Keck* judgment does not have particular incidence in the field of environmental protection given that environmental standards concern products rather than arrangements for their sale[34]. Thus, Danish legislation which prohibits the import of bees may not be considered a selling arrangement as it "concerns the intrinsic characteristics of the bees"[35]. A system seeking the re-use of packaging for products does not constitute selling arrangements[36]. In that connection, the Court cautiously distinguished, on the one hand, the obligation imposed on producer to use packaging meeting certain technical requirements and, on the other hand, "a general obligation to identify the packaging collected for disposal by an approved undertaking"[37]. Indeed, the latter is likely to fall under the *Keck* doctrine. Likewise, a measure whereby the sale of pesticides would be restricted to specific persons or require a prescription should be considered as a selling arrangement[38].

2. Is there a *de minimis* rule?

A significant question that has fed much discussion in the doctrine was whether measures whose effects are too indirect and remote should fall outside the scope of article 34. In very few cases, the Court has accepted that "too uncertain and indirect"

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[29] *Ibidem*.
[30] *Ibidem*, para. 17. See for a thorough analysis of the *Keck* doctrine: C. Barnard, *op. cit.*, pp. 123-130.
[31] L.W. Gormley, "Silver Threads Among The Gold…50 Years Of The Free Movement Of Goods", *FILJ* 31(6), 2008, p. 1657.
[32] See for an enlightening insight by an AG subscribing to a dynamic interpretation instead of clinging on a rigid distinction: Opinion of AG Poiares Maduro, Cases C-158-159/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135. See also: L.W. Gormley, "The Definition of Measures Having Equivalent Effect", *op. cit.*, pp. 195-202; Opinion of AG Jacobs, Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 where the AG proposed an alternative based on whether the measure contested constitutes a substantial barrier to market access.
[33] P. Oliver, S. Enchelmaier, « Free Movement of Goods: Recent Developments In The Case Law", *CMLR* 44, 2007, p. 673.
[34] N. Notaro, *Judicial Approaches To Trade And The Environment. The EC And The WTO*, Cameron & May, 2003, pp. 44-45; N. de Sadeleer, *Environnement et Marché Intérieur*, *op. cit.*, p. 371.
[35] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 21.
[36] Case C-463/01 *Commission v. Germany* [2004] ECR I-11705.
[37] Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paras. 70-73
[38] J.H. Jans, H.H.B. Vedder, *European Environemental Law*, Europa Law Publishing, 3rd ed., 2008, p. 239.

trade-restricting measures do not fall foul of article 34[39]. The above-mentioned Danish rule prohibiting the importation of bees from other Member States into a part of the country was held to have a "direct and immediate impact on trade" and thus constituted a measure of equivalent effect[40]. Denmark argued that the measure concerned a very small scale of the territory but the Court followed the argument put forward by AG Fenelly that "the slight effect of the Decision, in volume terms, cannot, in itself, prevent the application of article [34 TFEU][41]. Nevertheless, one should be very careful while applying the criteria of "uncertainty and indirectness" given that they are "difficult to clarify and thus do not contribute to legal certainty"[42]. Therefore, it is generally said that there is not *de minimis* as far as article 34 TFEU is concerned[43]. This is notwithstanding the situation of the rules affecting the use of goods to which it is now turned.

Section 2. Rules preventing or (severely) restricting the use of goods

The CJEU was recently confronted with new problems which further challenge the different categories set out throughout its case-law relating to article 34. Two cases were brought before the Court where the latter had to adjudicate whether restrictions on use of goods should be caught by article 34[44]. While tackling this situation, the Court faced a thorny choice between two options. This dilemma was epitomised by the two opposite opinions of the AG in those cases.

AG Kokott in *Mickelsson and Roos* advocated the extension of the *Keck* doctrine to restrictions on use unless the national rule prevented or severely restricted access to market, in which case article 34 should nonetheless apply[45]. In her view, characteristics of arrangements for use and selling arrangements "are comparable in terms of the nature and the intensity of their effects on trade in goods"[46].

In contrast, AG Bot in *Commission v. Italy* called for a narrow interpretation of *Keck*. He was mostly concerned with ensuring a convergence across the four freedoms and thus prompted the EU judicature to resort to a market access test. Strongly dissenting from AG Kokott's opinion, he declared that national rule is likely to constitute a measure of equivalent effect if it "impedes access for a product to the market, regardless of the aim pursued by the measure in question"[47]. Consequently, national rules governing the use of goods are considered as measures of equivalent effect if they hinder access to the market.

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[39] See the leading case: Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24.
[40] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 22.
[41] Opinion of AG Fenelly Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 10. See also: Opinion of AG Jacobs Case C-112/00 *Schmidberger*, ECR I 5659, para. 65.
[42] Opinion of AG Kokott Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000, para. 46.
[43] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 237.
[44] In the first case, Swedish authorities prohibited the use of jet skis on the waters designated by local authorities (Case C-142/05 *Mickelsson and Roos*). In the second case, the Court had to deal with an absolute ban on the use of trailers towed by mopeds (Case C-110/05 *Commission v. Italy* [2009] ECR I-519).
[45] Opinion of AG Kokott Case C-142/05 *Mickelsson and Roos*, paras. 55-56; 66-67.
[46] *Ibidem*, para. 52. See for a similar opinion: P. Wennerås, "Towards an Ever Greener Union? Competence in the Field of the Environment and Beyond", *CMLR* 45 2008, p. 1653.
[47] Opinion of AG Bot Case C-110/05 *Commission v. Italy* [2009] ECR I-519, para. 136.

The Court cut the Gordian knot by favouring AG Bot's approach although it did not entirely share his opinion[48]. It was stated that a non-discriminatory rule prohibiting the use of a product has a "considerable influence on the behaviour of consumers, which, in turn, affects the access of that market of that state"[49]. Therefore, such a rule constitutes a measure of equivalent effect within the meaning of article 34. Although the Court seems to have confirmed the three main pillars of its previous case-law (*Dassonville*, *Cassis de Dijon*, *Keck*), it went on to establish a new category of measures which is neither a product requirement nor a certain selling arrangement but rather indistinctly applicable measures which hinder "access of products originating in other Member States to the market of a Member State"[50]. A measure would fall into this category where it has the effect of preventing users from using products "for their specific and inherent purposes for which they were intended or of greatly restricting their use"[51]. As C. Barnard noted, those rulings "do not reverse *Keck* but suggest a narrow reading of the decision-that it should be confined to situations which concern arrangements for sale (*modalités de vente*) and should not be extended any further"[52].

In the light of the findings of these decisions, one could fear that the breadth and the vagueness of the criteria set out by the Court (e.g. *measure which greatly restricts the use of a product* or which *has a considerable influence*) could drive national authorities to reconsider a large array of measures intended to ensure *inter alia* environmental protection[53]. With such a line of reasoning, the Court continues to put a major emphasis on the effect of the measure rather than on its purpose, thereby complying with the spirit of its early case-law in *Dassonville*. More than ever the Court's approach further buttresses the primary role of the internal market in EU integration process.

Consequently, one might question whether the EU judicature has taken due account of the above-mentioned constitutional amendments affecting the hierarchy of values which should supposedly steer the evolution of EU law and its implementation[54]. In this respect, N. Bernard is of the opinion that "the only way to endow the [*Dassonville*] formula with any intellectual content and respectability is to adopt a neo-liberal reading of the Treaty designed to minimise public intervention in the market and maximise private commercial freedom"[55]. He further objects that "the problem […] is that neither the historical context nor the structure and wording of the Treaty, whether in its original form or following the amendments introduced by the Single European Act and the Maastricht Treaty, offer convincing support for a neo-liberal reading"[56].

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[48] The rejection of the approach proposed by the AG Kokot in *Mickelsson* was welcomed by some authors who have strongly disagreed with this opinion: P. Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?", *op. cit.*, pp. 1453-1459. On the other hand, the Court did not fully support AG Bot's opinion who was calling for the mere application of a "market access" test.

[49] Case C-110/05 *Commission v. Italy*, para. 56; Case C-142/05 *Mickelsson and Roos*, para. 26.

[50] *Ibidem*, para. 37.

[51] Case C-142/05 *Mickelsson and Roos*, para. 28.

[52] C. Barnard, *op. cit.*, p. 140. Examining the influence of these decisions on the *Keck* doctrine would fall outside the scope of this paper. Whether the Court intended to depart from it is unclear.

[53] N. de Sadeleer, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits", *JT*, 2009, p. 248.

[54] See, *supra*, Chapter 1.

[55] N. Bernard, "On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis de Dijon* Revisited", in *The Past and Future of EU Law*, M. Poiares Maduro, L. Azoulai (eds.), Oxford Hard Publishing, 2010, p. 462.

[56] *Ibidem*.

However, the authors of the TFEU as well as the EU judiciary have not overlooked the existence of other interests with which the principle of free movement of goods has to be conciliated. It is now time to address this second part of the debate. It will be considered whether the successive Treaties' modifications as regards environmental protection have been considered while applying the provision spelling out the exceptions to the free flow of goods. As already suspected in the cases outlined above, it seems that there may be very good environmentally-related reasons to interfere in the scope of article 34 TFEU.

Chapter 3. Derogations and justifications
Section 1. Overview

While considering thoroughly some particular provisions of the TFEU such as articles 34, 35 and 36, it is essential to bear in mind the fundamental objectives of the EU which are expressed in the TEU. The latter might constitute an appropriate guideline, albeit fairly general, for national authorities who are requested to strike a fair balance between the various stakeholders. In this perspective, article 3 (3) TEU provides that "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 follows from this provision that free trade – which is one the main linchpins of the internal market – is not an end in itself. Rather, it embodies an appropriate means to attain *inter alia* a "sustainable development (…) and a high level of protection and improvement of the quality of the environment". As a result of this provision read in conjunction with the integration principle and the above-mentioned article 37 of the Charter of Fundamental Rights, it could be argued that the protection of the environment ranks equally alongside the other principles such as that of free movement of goods[57].

More specifically, impediments to the free circulation of goods are likely to be allowed if they are based on specific justifications. The latter must belong to one of the two categories established for this purpose. Article 36 TFEU provides an exhaustive list of justifications which may be relied on by Member States to depart from the principle of free movement of goods[58]. This provision has remained untouched since the Treaty of Rome. However, new overriding interests have come into play prompting the EU judiciary to set out a new category of justifications known as the "mandatory requirements" or the so-called "rule of reason". This was decided in the well-known *Cassis de Dijon* case[59].

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[57] A similar reasoning could be made in the framework of the WTO and its core legal instrument, the GATT. This position is articulated in: G. Winter, "The GATT and Environmental Protection: Problems of Construction", *JEL* 15 2003, pp. 113-140.

[58] Article 36 reads as follows: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

[59] See the leading case: Case 120/78 *Rewe-Zentral AG* (Cassis de Dijon) [1979] ECR 649.

Both categories of justifications allow national authorities to adopt a measure impeding intra-EU trade for specific reasons, thereby ensuring that certain values may prevail over free trade. Yet a significant distinction exists. So long as there is no arbitrary discrimination or disguised restriction, measures of equivalent effects which are distinctly applicable (measures which treat in a different way, in law or in fact, domestic producers and foreign producers) may be saved by a ground expressly mentioned in article 36 whereas mandatory requirements may only justify equally-applicable measures[60]. Therefore, unlike *Cassis de Dijon* case-law, article 36 enables to take discriminatory measures protecting nature (animals or plants) and human health. Nevertheless, as it will be seen, this distinction has been somehow departed from since the *Walloon Waste* case[61]. This issue will be analysed in great detail below[62].

Section 2. Common requirement: absence of full harmonisation

Where a directive provides for full harmonisation of national legislation, Member States are deprived of recourse to article 36 or the rule of reason. If a matter has been fully harmonised at the EU level, measures of equivalent effects related thereto have to be assessed in the light of the framework outlined by the harmonising directive[63].

Therefore, the first step is to observe whether a harmonising rule applies in a given field. In case the measure contested falls within the scope of a directive, the EU legislative framework in question is considered as providing for exhaustive harmonisation[64]. This implies a thorough analysis of the scope of the EU directive. Next, it should be determined whether the directive leads to minimum or total harmonisation. Indeed, the question of the exhaustiveness of a directive has to be distinguished from that of the level of harmonisation[65]. It may be that a measure falls within the scope of a directive (exhaustiveness) which in fact lays down minimum requirements (level), thereby leaving Member States competent to enact stricter environmental standards than the EU ones[66].

It follows that the mere existence of a secondary legislative instrument does not preclude Member States from resorting to article 36 or a mandatory requirement. This is particularly true as regards environmental law which involves technical matters which are hardly fully harmonised. It may also be the case that a national measure be partly covered by a rule that fully harmonises a matter. Then, the Court has to carry out the appropriate checks in view of both article 36 or the rule of reason and the EU harmonising instrument[67].

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[60] See the *locus classicus* on this: Case 113/80 *Commission v. Ireland* [1982] ECR 1625.
[61] Case C-1/90 *Commission v. Belgium* (Walloon Waste) [1992] ECR I-4431.
[62] See, *infra*, This Chapter. Section 4.
[63] Case 5/77 *Tedeschi b. Denkavit* [1977] ECR 1555.
[64] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 88. See for two cases in the field of environmental law: Case C-169/89 *Gourmetterie v.d. Burg* [1990] ECR I-2143; Case C-309/02 *Radberger Getränkegesellschaft* [2004] ECR I-11763.
[65] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 89. See also on this question, the recent developments related to Directive 2005/29/EC (Unfair Commercial Practices Directive): C. Verdure, « L'harmonisation des pratiques commerciales déloyales dans le cadre de la Directive 2005/29/CE: premier bilan jurisprudentiel », *CDE* 3 2010, pp. 311 and f.
[66] See for instance: Case C-389/96 *Aher-Waggon* [1998] ECR I-4473.
[67] As it was made in: Case C-1/90 *Commission v. Belgium* (Walloon Waste) [1992] ECR I-4431.

Section 3. Article 36 TFEU
A. General observations

The prohibition of the measures of quantitative restrictions and the measures having equivalent effects within the meaning of article 34 may be derogated from in virtue of article 36 under the condition that they are justified by a specific interest listed therein. However, this legal avenue is somewhat narrow.

First, the grounds provided for in article 36 are fairly limited. They include "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property". It therefore does not contemplate the protection of environment. Second, even though environmental concerns may be partly subsumed under certain justifications mentioned in article 36, they are subject to a restrictive interpretation. Article 36 "is to be interpreted strictly since it constitutes a derogation from the fundamental principle of the elimination of all obstacles to the free movement of goods between Member States. It is not to be understood as authorizing measures of a nature different from those contemplated by articles [34 and 35]"[68]. Third, it is settled case-law that article 36 as well as the mandatory requirements may only be used for non-economic purposes[69]. This is corroborated by article 114, (10) TFEU which speaks of "the non economic reasons referred to in article 36". In the same vein, measures of equivalent effect may not be saved where they constitute "a means of arbitrary discrimination or a disguised restriction on trade"[70]. Fourth, the possibility for national authorities to adopt trade-restricting measures for the above-mentioned purposes is severely limited by the proportionality requirement. The proportionality test has proved to be the most significant hurdle to surmount while justifying a measure of equivalent effect[71].

The case-law dealing with article 36 and environmental concerns has shown that this provision is mainly invoked in relation to the grounds concerning the protection of health and life of humans as well as the protection of animals and plants.

B. Human health

In many cases, environmental protection and human health are closely intertwined. Thus, it is likely that a measure aiming at protecting human life results in safeguarding the environment while being saved by article 36. Indeed, the Court is of the opinion that the protection of the environment, on the one hand, and the protection of health and life of humans, animals and plants, on the other hand, are closely related objectives[72]. Therefore, the Court often examines those objectives together so as to assess whether the contested measure is justified. Some cases also suggest that the public-health derogation may include environmental protection[73].

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[68] Case 46/77 *Bauhuis* [1977] ECR 5, para. 12.
[69] Case 7/61 *Commission v. Italy* [1961] ECR 633.
[70] Article 36 TFEU.
[71] See, *infra*, Chapter 4.
[72] Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000, para. 33.
[73] See particularly: Case C-379/98 *PreussenElektra AG* [2001] ECR I-2099.

In the ambit of human health, Member States may rely on a wide margin of appreciation since the Court takes the view that "the health and life of humans rank foremost among the property or interests protected by Article 36 of the Treaty"[74]. Therefore, Member States have the right to determine the level of health protection desired for its citizens[75]. On the other hand, the Court makes sure that national authorities do not use health protection as a means of introducing a disguised restriction on trade[76].

Besides, the precautionary principle enshrined in article 191 (2) TFEU may play an important role where the Court examines the reasons raised by Member States. In the *Sandoz* case, the Court accepted trade-restricting measures given the uncertainties in scientific research about the products at hand[77]. In the event that the findings of a detailed scientific assessment raise scientific doubts as to a risk to human health, Member States are allowed to rely on the precautionary principle in order to "take protective measures without having to wait until the reality and the seriousness of [the] risks become fully apparent"[78].

C. Protection of animals and plants

In addition to human health, article 36 affords protection of animals and plants. Through this possibility of derogation, Member States may adopt measures interfering with the free movement of goods in view of their own policy on the protection of biodiversity. In the *Bluhme* case, Danish authorities prohibited the import of any bee onto its territory except one particular species (Læsø brown bee). The Court came to the conclusion that "measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned"[79]. Accordingly, this measure aimed at protecting the life of animals within the meaning of article 36. The close relationship between the preservation of biodiversity and the protection of health and life of animals has been recently reaffirmed by the Court[80]. However, if this ground for justification may save some measures bearing on nature conservation, the notion of environment does not properly fit into this category which is much narrower. The management of natural resources, for instance, falls outside the scope of article 36[81].

Section 4. The protection of the environment as a mandatory requirement

A. Early case-law

As mentioned above, in order to supplement the article 36 derogations, the Court established in *Cassis de Dijon* an open-ended list of justifications which is likely to underlie measures hindering the free flow of goods[82]. However, environmental protection was not contemplated yet by the European judicature. A few years later, the Court delivered the landmark *ADBHU* case where it ruled that the principle of free trade

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[74] Case C-473/98 *Toolex* [2000] ECR I-5681, para. 38.
[75] Case 54/85 *Ministère Public v. Mirepoix* [1986] ECR 1067, para. 15.
[76] C. Barnard, *op. cit.*, p. 158.
[77] Case 174/82 *Sandoz* [1983] ECR 2445.
[78] See the leading case in this respect: Case T-13/99 *Pfizer Animal Health* [2002] ECR II-3305, para. 139.
[79] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 33.
[80] Case C-100/8 *Commission v. Belgium* [2009] ECR I-140, para. 93.
[81] N. de Sadeleer, *Environnement et Marché Intérieur*, *op. cit.*, p. 387.
[82] Case 120/78 *Rewe-Zentral AG* (Cassis de Dijon) [1979] ECR 649, para. 8.

"is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the [EU] provided that the rights in question are not substantively impaired"[83]. Attempting to reconcile free trade and environmental protection, the Court went on to state that "the directive must be seen in the perspective of environmental protection, which is one of the [EU] essential objectives". Such a statement is tantamount to recognising that environmental protection can constitute a mandatory requirement. In a way, this decision conferred on environmental protection a constitutional status.

For the first time, the Court expressly held that the protection of the environment may constitute a mandatory requirement in the well-known *Danish Bottles* case[84]. The Court admitted that the protection of the environment is a mandatory requirement which might restrict the scope of article 34. This represented a major step towards a greater protection of the environment. By contrast, the Court departed from its settled case-law according to which Member States may not enact distinctly applicable measures where they are underpinned by a mandatory requirement as opposed to a justification laid down in article 36[85]. Indeed, the measure at hand discriminated against imports. The Court probably preferred to compromise its case-law consistency rather than to refuse measures of equivalent effect inspired by genuine environmental reasons.

A few years later, the Court was confronted with another crucial case with respect to the relationship between trade and environment in the *Walloon waste* case[86]. A Belgian legislation prohibiting the export of waste was challenged by the Commission. The Court held that measures related to a ban of non-hazardous waste could be "justified by imperative requirements of environmental protection"[87]. The Court then addressed the issue of discrimination by admitting that imperative requirements may only save indistinctly applicable measures. Nonetheless, it went on to state that, in assessing the discriminatory nature of the measure, "account must be taken of the particular nature of waste"[88]. In order to buttress this position, the Court - albeit entirely unsolicited - referred to the principle that environmental damage should as a matter of priority be remedied at source[89].

This line of argumentation is open to criticism. Whilst it is noteworthy that the Court heeds environmental principles in its reasoning, the Court's view is deeply inconsistent as it says that mandatory requirements may not apply to distinctly applicable measures, but goes on to do the very opposite. For this reason, the decision arguably runs counter to the crucial requirement of legal certainty.

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[83] Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* [1985] ECR 531, para. 12.
[84] Case 302/86 *Commission v. Denmark* [1988] ECR 4607.
[85] See among many cases: Case 119/78 *Peureux* [1979] ECR 985, para. 23; Case 113/80 *Commission v. Ireland* [1981] ECR 1625, para. 10; Cases C-l/90 and C-l76/90 *Aragonesa de Publiádad Exterior and Publivía* [1991] ECR 1-4151.
[86] Case C-2/90 *Commission v. Belgium* [1992] ECR I-4433.
[87] Case C-2/90 *Commission v. Belgium* [1992] ECR I-4433.para. 32.
[88] *Ibidem*, para. 34.
[89] See: article 191 (2) TFEU.

C. In the aftermath of Maastricht and Amsterdam

In *Dusseldorp*[90], the CJEU was requested to answer several questions regarding the compatibility of a Dutch legislation concerning the shipment of waste with EU rules. Although the measure a stake gave a particular advantage for national production, the Court approached the question of a possible justification on the ground of the rule of reason with respect to the protection of the environment. Nevertheless, the Court dismissed this argument pointing out that the measures were inspired by reasons of an economic nature[91]. Additionally, the Court contested that the measure was justified by the protection of the health and life of humans in accordance with Article 36 TFEU. It is striking that the Court clearly contemplated the possibility for the Member State to resort to a mandatory requirement whereas the measure at stake was manifestly discriminatory. In contrast to the *Walloon Waste* case where the Court concealed its approach of applying the rule of reason to distinctly applicable measure, in *Dusseldorp*, it implicitly envisaged to save such a measure on the basis of environmental reasons. Although the Court pointed to a desirable horizon, it left the matter open.

In the *PreussenElektra* case[92], the Court had to deal with a German legislation favouring renewable energy. The Court held that the measure contributed to the EU policy regarding the fight against climate change[93]. It furthermore noted that "that policy is also designed to protect the health and life of humans, animals and plants"[94]. The Court came to the conclusion that the German legislation in question did not fall foul of article 34. Again, the approach of the Court in *PreussenElektra* is not utterly convincing. Although the outcome was fairly desirable, it is doubtful whether the measure had much influence on the health and life of humans, animals and plants. Indeed, the connection with the protection of the environment is much more relevant. It seems that the Court preferred to have recourse to an unorthodox reasoning, instead of explicitly stating that the protection of the environment is capable of justifying an indistinctly applicable measure. Therefore, the Court further increased the legal uncertainty in the area of trade and environment. This decision mirrors once again the embarrassment of the Court while facing discriminatory measures that pursue environmental objectives[95].

D. The *Mickelsson and Roos* case

Whether the position of the Court has remained unchanged in recent cases may be observed in the above-mentioned *Mickelsson and Roos* ruling issued in 2009[96]. The Court had to deal with a measure adopted by Swedish authorities prohibiting the use of personal watercraft (jet skis) on specific waters designated by local authorities. The case arose only a few weeks after the adoption of the contested measures, when the waters had not yet been approved by local authorities. Consequently, the use of jet skis was subject to a total ban.

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[90] Case C-203/96 *Dusseldorp* [1998] ECR I-4075.
[91] *Ibidem*, para. 44.
[92] Case C-379/98 *PreussenElektra*, [2001] ECR I-2099.
[93] *Ibidem*, para. 73.
[94] *Ibidem*, para. 75.
[95] Similar comment could be made about the following judgments issued a few years later: Case C-463/01 *Commission v. Germany* [2004] ECR I-11705; Case C-309/02 *Radberger Getränkegesellschaft* [2004] ECR I-11763; Case C-320/03 *Commission v. Austria* [2005] ECR I-9871.
[96] Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000

The Swedish Government alleged that the measure under review was justified by the objective of environmental protection as well as the protection of health and life of humans, animals or plants. The Court considered that given that the two categories of justifications were closely related "they should be examined together in order to assess whether regulations such as those at issue in the main proceedings are justified"[97]. In spite of this, the Court subsequently focussed its attention only on the environmental justifications and came to the conclusion that the measure was justified by the aim of environmental protection. The Court, however, did not address the question as to whether the measure was distinctly applicable. Yet, it seems that the legislation under scrutiny did discriminate against foreign producers in that the personal watercrafts were not produced in Sweden[98].

Therefore, this decision did not shed a new light on the relationship between trade and environment in this regard. Once again, it appears that the Court refrained from holding a clear stand on whether environmental considerations may legally underpin a distinctly applicable measure, thereby leaving Member States with a blurred picture of this matter[99]. A couple of other recent decisions follow a fairly similar reasoning[100].

F. Critical assessment of the case-law and suggested way forward

In the light of the foregoing, one could raise serious doubts as to the consistency of the Court's approach. This case-law scarcely ensures legal certainty within the realm of free trade in the EU. Yet, articles 34, 35, 36 have been granted a direct effect by the CJEU and they thus are susceptible to application by national courts throughout the EU. For this reason, providing lawyers with an unambiguous guideline of those provisions is of a tremendous importance.

Going back to the first rulings on the case-law-based exceptions to the free movement of goods, *Cassis de Dijon* left open the question regarding the relationship between the mandatory requirements and article 36. Subsequently, two different interpretations were proposed[101]. According to the first school of thought, the mandatory requirements have to be weighed up within article 34, not article 36. Furthermore, they advocated that the rule of reason may not be invoked in case of a distinctly applicable measure. On the other hand, the second category of scholars equates the judicially-created justifications

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[97] *Ibidem*, para. 33.

[98] N. de Sadeleer, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits", *op. cit.*, p. 249 ; Opinion of AG Kokott Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000, paras. 58-60.

[99] In another recent ruling, the Court has considered whether a measure was justified on consumer protection grounds (mandatory requirement) after holding that the measure at issue was of an equivalent effect to restrictions on exports (article 35 TFEU). Although this argumentation led to a desirable outcome, one could regret that the Court did not expressly abandon its traditional approach. Case C-205/07 *Gysbrechts and Santurel* [2008] ECR I-9947. This was rightly pointed out in a case note: W.H Roth, *CMLR*, 2010 47 (2), p. 516.

[100] Case C-54/05 *Commission v. Finland* [2007] ECR I-2473; Case C-524/07 *Commission v. Austria* [2008] ECR I-187; Case C-443/10, *Philippe Bonnarde* [2011], not published yet. Nonetheless, the Court seems to have backtracked in a 2009 decision on the freedom to provide services where it clung to its traditional approach: Case C-153/08 *Commission v. Spain* [2009] ECR I-9735.

[101] P. Oliver, *Oliver On Free Movement Of Goods In The European Union*, Oxford Hart Publishing, 5th ed.,, 2010, p. 216.

to the catalogue of derogations spelt out in article 36. They contend that the mandatory requirements should be treated exactly in the same way as the express derogations.

The first theory is based on the premise that free trade of goods constitutes a fundamental principle of EU law whereas article 36 enshrines a few exceptions thereto which thus are to be interpreted narrowly. As seen above, the case-law of the Court dealing with free flow of goods is shaped according to this construction of broad principle and narrow exception[102]. This is supposedly the reason why the Court requires measures of equivalent effect inspired by a rule of reason to be equally-applicable. Since the seminal *Commission v. Ireland* case[103], the Court has clung to this strict approach notwithstanding *inter alia* the handful of cases explored above where it has somehow muddled the water in this regard. This view is still supported by some scholars who believe that it "represents good law"[104].

The authors advocating the second approach[105] have observed that it does not make sense to subject the mandatory requirements to a different treatment. Indeed, they have the same properties as the derogations listed in article 36. As AG van Gerven has noted "the conditions governing the applicability of the *Cassis de Dijon* doctrine and of article 36 are the same (absence of harmonisation, examination of the criteria of necessity and proportionality, prohibition of arbitrary discrimination or disguised restriction on trade)"[106]. What is more, the mandatory requirements do not represent less legitimate interests than those expressly contemplated by article 36. The nature of EU integration as on-going process has inevitably led to various concerns emerging long after its birth. Some interests were probably not envisaged by the drafters of the TFEU which are now deeply valued. Therefore, these new values should be endowed with a strong legal protection. Environmental protection undoubtedly ranks first among them. This is witnessed by the numerous constitutional amendments to which it has been referred earlier in this paper[107].

Moreover, it is worth pointing out that the measures restricting the free circulation of goods aiming at the protection of the environment inherently tend to differentiate products on the basis of the nature and origin of the cause of harm[108]. Consequently, it seems somewhat contradictory to require that trade-restricting measures adopted in order to protect the environment must be non discriminatory.

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[102] See: Case 46/77 *Bauhuis* [1977] ECR 5, para. 12.

[103] Case 113/80 *Commission v. Ireland* [1981] ECR 1625, para. 10.

[104] L.W. Gormley, "Silver Threads Among The Gold…50 Years Of The Free Movement Of Goods", *op. cit.*, p. 1686. See also: V. Hatzopoulos, "Exigences essentielles, impératives ou impérieuses : une théorie, des theories, ou pas de théorie du tout", *RTDE* 34 (2), 1998, p. 191-236 ; L.W. Gormley, "The Genesis of the Rule of Reason in the Free Movement of Goods" in *Rule of Reason. Rethinking another Classic of European Legal Doctrine*, A.A.M. Schrauwen (eds.), Europa Law Publishing, Groningen, 2005, pp. 30-33.

[105] See: N. de Sadeleer, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits", *op. cit.*, p. 249 ; J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 249 ; P. Oliver, *Oliver On Free Movement Of Goods In The European Union*, *op. cit.*, p. 217 ; J. Wiers, "The Rule of Reason in International Economic Law. Does the EC-WTO Parallel Make Sense?" in *Rule of Reason. Rethinking another Classic of European Legal Doctrine*, A.A.M. Schrauwen (eds.), Europa Law Publishing, Groningen, 2005, pp. 99-101.

[106] Opinion of AG van Gerven Case 62/79 *Cogitel* [1980] ECR 881.

[107] See, *supra*, Chapter 1. Section 2.

[108] This point has been made in: Opinion of AG Jacobs Case C-379/98 *PreussenElektra*, [2001] ECR I-2099, para. 233.

Additionally, one should bear in mind, as mentioned above, that the internal market is not an end in itself, but rather a means to the pursuit of overriding goals. The protection of the environment constitutes one of these goals[109].

The Court has been explicitly invited a few times by its AG to expressly declare that mandatory requirements deserve exactly the same legal treatment as the grounds provided for in article 36. AG Jacobs in the above-mentioned *PreussenElektra* case remarked that "special account must (…) be taken of environmental concerns in interpreting the Treaty provisions on the free movement of goods. Moreover harm to the environment, even where it does not immediately threaten - as it often does - the health and life of humans, animals and plants protected by Article 36 of the Treaty, may pose a more substantial, if longer-term, threat to the ecosystem as a whole. It would be hard to justify, in these circumstances, giving a lesser degree of protection to the environment than to the interests recognised in trade treaties concluded many decades ago and taken over into the text of Article 36 of the EC Treaty, itself unchanged since it was adopted in 1957"[110]. He went further stating that "the reasoning in *Walloon Waste* is flawed" and that "it is desirable that even directly discriminatory measures can sometimes be justified on grounds of environmental protection"[111]. Acknowledging the "fundamental importance of this question", he urged the Court to "clarify its position in order to provide the necessary legal certainty"[112]. As indicated, the Court preferred to subscribe to an unsatisfactory interpretation of article 36 rather than to subsume the measure at stake under the more appropriate environmental justification.

AG Geelhoed elaborated on this matter as well. He argued in favour of a more stringent control of the question as to whether the restricting effects flowing from a measure "are the necessary and inherent consequence of the environmental objective of the measure"[113]. If not, he regards such a measure as being eligible for justification on the basis of environmental protection.

Even more surprising is the positions recently articulated by two serving members of the CJEU who *expressis verbis* called for the recourse to the second approach (same treatment to both categories of justifications)[114].

Despite all these strong arguments, the Court refuses to cut the Gordian knot between the mandatory requirements and the express derogations. Such an approach falls far short of providing the legal certainty that one could expect from the Court. Yet, the latter should feel still more comfortable to give up this rigid distinction since the Treaty of Lisbon and the recognition of the principle of a high level of protection and improvement of the quality of the environment in the Charter on the Fundamental

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[109] See: article 3 (3) TEU. In that connection, the entire reasoning of the Court can be called into question. Indeed, the sound functioning of the internal market is mainly guaranteed through the free movement of goods which constitutes a principle according to settled case-law of the Court. Yet, as mentioned, free trade represents a means employed to reach overriding goals. By contrast, environmental protection constitutes an end in it self whereas it is only assured by means of an exception.

[110] Opinion of AG Jacobs Case C-379/98 *PreussenElektra*, [2001] ECR I-2099, para. 232.

[111] *Ibidem*, para. 225.

[112] *Ibidem*, para. 229.

[113] Opinion of AG Geelhoed Case C-320/03 *Commission v. Austria* [2005] ECR I-9871, para. 107.

[114] A. Rosas, *op. cit.*, p. 45; C. Timmermans, "Creative Homogeneity" in *Liber Amicorum in Honoour of Sven Norberg*, Brussels, Bruylant, 2006, p. 475.

Rights. Arguably one way to give substance to this core principle of the EU would be to explicitly allow Member States to adopt trade-restricting measures, whether distinctly or indistinctly applicable, where they aim at protecting the environment. This should be applied as long as the few other conditions are observed (absence of full harmonisation, prohibition of disguised restriction, proportionality principle). This opinion is further buttressed by the principle that environmental concerns are to be integrated in the other policies of the EU[115].

In view of all these reasons, it is hardly acceptable that environmental protection should be granted a less favourable treatment than other interests such as the protection of national treasures possessing artistic value or the protection of industrial and commercial property[116]. That said, the increasing tendency in the case-law to admit, albeit ambiguously, distinctly applicable measures grounded on environmental reasons means that the Court is probably prepared to cross the Rubicon.

In addition to the question concerning the validity of the ground for justification, national authorities ought to prove that the measure of equivalent effect is proportionate to the objective pursued. It is to this question that the following turns.

Chapter 4. Proportionality

In order to avoid derogations undermining the very substance of the free trade principle, the Court has set out a set of criteria aimed at checking the proportionality of the trade-restricting measure. Indeed, the disputed measure is to fulfil a couple of requirements shaped through the Court's case-law. Nevertheless, the test of proportionality as established by the EU judiciary falls far short of being clear-cut. Indeed, the different criteria appear to be flexible and evolutionary. It has to be noted, however, that the intensity of the review in the context at stake is quite strong since the principle is applied as a market integration mechanism[117].

The recourse to the proportionality principle in the framework of conflicts of values is of a primary importance. In fact, it empowers the judiciary to examine whether a fair balance between the conflicting interests has been struck. The proportionality test is resorted to where the EU judicature wants to make sure that Member States have properly exercised their margin of appreciation without undermining a fundamental rule they are bound by. This means that national authorities are required to conciliate environmental measures as far as possible with the internal market requirements.

More specifically, the principle is traditionally described as comprising two tests: a test of suitability and a test of necessity. However, some authors refer to a third test that one might term the test of proportionality *stricto sensu*. However, it has to be born in mind that this three-tier approach is not strictly followed by the Court. It is rather the result of an empirical approach whose findings reveal that the different stages of the Court's

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[115] Article 11 TFUE.
[116] Article 36 TFEU.
[117] T. Tridimas, "The Rule of Reason and its Relation to Proportionality and Subsidiarity" in *Rule of Reason. Rethinking another Classic of European Legal Doctrine*, A.A.W. Schrauwen (eds.), Europea Law Publishing, Groningen, 2005, pp. 112-113.

reasoning can be analysed as falling within three categories. These three tests will now be discussed.

Section 1. First test: suitability of the measure

The test of suitability refers to the relationship between the means and the end. Indeed, the means employed by the measure are to be suitable (or adequate or appropriate) to attain the ends (e.g. environmental protection, human health, public morality)[118]. In other words, the measure has to be capable of achieving the objective pursued. In order to ascertain that this reasonable connexion exists, it will be examined whether an existing situation (the state of the environment) or a risk of environmental degradation requires the taking of measures by public authorities. By way of example, a national measure which does not give rise to the reduction of a specific pollution that it seeks to prevent would be struck down[119].

In a context of scientific uncertainty, the Court accepts that Member States rely on the precautionary principle so as to justify a measure aiming at preventing a risk of damage[120]. This risk has to be examined on the basis of a "detailed assessment"[121]. In this regard, the Court may go into the details of a scientific debate by substantiating its position on the "latest medical research"[122]. In the same vein, national authorities are obliged to review a measure if it appears to them that the reasons which led to its adoption have changed, as a result of scientific research.[123]. Thus, as can be seen, the discretion on which national authorities may rely is not limitless and varies very much depending on the scientific context. In any case, Member States have to spell out the reasons underlying the measure contested.

In the *PreussenElektra* case, the Court stated that the purchase obligation imposed on electricity supply undertakings should be examined in view of the aim of the provision in question and of the particular features of the electricity market[124]. Furthermore, some elements may play an important role in favour of the measure such as the integration principle or the international commitments of the Member State in the fight against climate change[125]. The *Bluhme* ruling provides another good illustration of a first test's application. The Court came to the conclusion that the establishment of areas in which a population of a particular species of bees enjoys special protection is an "appropriate measure" as it ensures the survival of an endangered species[126].

The question of the appropriateness of a measure has to be distinguished from that as to whether the measure is necessary in relation to the objective pursued. That is why the Court resort to a second test is often referred to as the test of necessity.

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[118] C. Barnard, *op. cit.*, p. 171.
[119] N. de Sadeleer, *Environnement et Marché Intérieur*, *op. cit.*, p. 401.
[120] Case C-192/01 *Commission v. Danemark* [2003] ECR I-9693, para. 46.
[121] *Ibidem*, para. 47.
[122] Case C-473/98 *Toolex* [2000] ECR I-5681, para. 42-45.
[123] Case 94/83 *Heijn* [1984] ECR 3263, para. 18.
[124] Case C-379/98 *PreussenElektra*, [2001] ECR I-2099, para. 72.
[125] *Ibidem*, paras. 74-76.
[126] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 37.

Section 2. Second test: necessity of the measure
A. Past case-law

The principle of necessity requires first that national authorities compare the various measures which are likely to attain the aims pursued and second that they choose the measure which has the least trade-hindering effect. The EU judicature will consider a measure incompatible with the TFEU unless the measure "is necessary to achieve a legitimate aim and, further, that that aim cannot be achieved by other measures which are less restrictive to intra-[EU] trade"[127]. According to this "less restrictive alternative" test, the contested measure should be quashed where it appears that an alternative measure capable of achieving the same objective carries smaller burden with regard to the free movement of goods.

Grasping the very demanding nature of this test, some economic operators have challenged national measures on the ground that less restrictive measures were applied in other Member States. In that connection, the Court took the view that "it should be borne in mind (…) that the fact that one Member State imposes less strict rules than another Member State does not necessarily mean that the latter's rules are disproportionate and hence incompatible with [EU] law"[128]. However, given that the principle of free movement of goods is a fundamental principle of EU law, the Court is quite severe while resorting to this test.

A good illustration of this strict interpretation is provided by the *Crayfish* case[129]. According to German Federal law the importation of live crayfish for commercial purposes was in principle prohibited. Nevertheless, there was a special regime allowing public authorities to derogate from this ban. The Commission was of the opinion that the objective of protection of native species of crayfish could be achieved by less restrictive measures. In the Commission's opinion, the Member State could have made consignments of crayfish from other Member States or already in free circulation in the EU subject to health checks. They could have only carried out checks by sample if such consignments were accompanied by a health certificate issued by the competent authorities of the dispatching Member State certifying that the product in question presented no risk to health. Endorsing this argument, the Court ruled that the "Federal Government has not convincingly shown that such measures, involving less serious restrictions for intra-[EU] trade, were incapable of effectively protecting the interests pleaded"[130]. As reflected in this statement, the Court lays the burden of proof on the Member States who must show "convincingly" that less stringent alternatives such as those suggested by the Commission were not appropriate. Following this case, some commentators came to the conclusion that "there exists a presumption against total bans"[131]. In fact, "general prohibitions on imports of goods and products which will be

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[127] T. Tridimas, *op. cit.*, p. 111.
[128] Case C-294/00 *Gräbner* [2002] ECR I-6515, para. 46 and more recently: Case C-100/08 *Commission v. Belgium* [2009] ECR I-140, para. 95.
[129] Case C-131/93 *Commission v. Germany* [1994] ECR I-3303.
[130] *Ibidem.* Para. 26.
[131] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 257. See for an in-depth analysis of the Court's position regarding the range of possible steps that may be taken by national authorities (bans, licenses, authorizations, labelling): C. Barnard, *op. cit.*, pp. 171-184.

harmful to the environment or pose a threat to health will not easily pass the proportionality test"[132].

Some other decisions of the Court appear to be still more questionable. In the *Danish Bottles* case, one part of the legislation which was put under the Court' spotlight concerned the restricted use of non-approved containers. The Court admitted that "the existing system for returning approved containers ensures a maximum rate of re-use and therefore a very considerable degree of protection of the environment". However it went on to state that "the system for returning non-approved containers is *capable of protecting the environment* and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports"[133]. The Court came to the conclusion that the restriction imposed was disproportionate to the objective pursued.

It seems that the Court is setting here the level of environmental protection which should be reached since it considers that the system for returning non-approved containers is capable of protecting the environment. In so ruling, the Court arguably does not keep within the parameters of its judicial prerogatives. Relying on this extract of the decision, L. Krämer rightly came to the conclusion that the Court introduced the condition that only "reasonable" degree of protection of the environment should be accepted[134]. Such a line of argumentation is hardly compatible with the principle of a high level of protection as well as the integration principle[135]. In contrast with the Court's opinion, it is submitted that Member States, in the absence of full harmonisation, are entitled to set the degree of environmental protection they wish.

Likewise, in the *Dusseldorp* case[136], the Court dismissed the argument that an export ban on waste oil filters could be justified by environmental reasons such as enabling the use of the most environmentally friendly fuel. The Court considered that this legislation was only inspired by economical reasons although one might object that the economical goals were not manifestly the primary ones[137]. In so doing, the Court took the liberty of questioning the legitimacy of the legislation's objectives rather than the means employed. For this reason, the approach of the Court is disputable. It shows some reluctance to take due account of arguments inspired by environmental protection thereby overlooking the constitutional evolution of EU law[138].

Under the current EU legal framework, such a position would be still more hardly tenable in view of the status granted to the protection of the environment[139]. It is

[132] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 257. See also: L. Krämer, "Environmental Protection and Article 30 EEC Treaty", *CMLR*, 1993 (30), p. 125.
[133] Case 302/86 *Commission v. Denmark* [1988] ECR 4607, paras. 20-21. Emphasis added.
[134] L. Krämer, "Environmental Protection and Article 30 EEC Treaty", *op. cit.*, p. 123.
[135] Those principles were introduced in EU primary law as a result of the SEA. Therefore, they were already applicable by the time of the case in question.
[136] Case C-203/96 *Dusseldorp* [1998] ECR I-4075.
[137] See: N. Notaro, *op. cit.*, p. 93.
[138] However, some cases dating back to the same period appear to be more positive in this respect. See: Case C-341/95 *Gianni Bettati v. Safety Hi-Tech* [1998] ECR I-4355; Case C-389/96 *Aher Waggon* [1998] ECR I-4473.
[139] See, *supa*, Chapter 1. Section 2.

therefore necessary to observe whether the Court's approach has evolved according to the constitutional amendments adopted in this regard.

B. Recent case-law and suggested way forward

In the light of recent cases, it seems that the Court grants Member States the necessary leeway in order to weigh up environmental and free trade considerations. In the recent *Mickelsson and Roos* case, the Court took the innovative view that "although it is possible, in the present case, to envisage that measures other than the [contested ones] could guarantee a certain level of protection of the environment, the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities"[140]. National authorities could have enacted a less severe regime whereby the use of motorways would have been banned in sensitive areas such as nature reserves or bathing areas. Nevertheless, such a measure was not as effective as the one eventually opted for. In other words, the Court recognised that a Member State may adopt a trade-restricting measure whose aim is to preserve the environment although less restrictive measures are available but would carry heavier administrative burden[141].

In so ruling, the Court took due account of the need for the state to take effective measures in technical ambits such as environmental protection or public security. Indeed, it is fair to allow Member States to resort to the strictest measure for reasons of effectiveness and cost. However, the measure will only withstand the necessity test provided that the scope of the prohibition is mitigated by an exemption system[142]. In that connection, some have criticised the Court's traditional case-law for focussing its attention on the commercial damage caused by the measure rather than on the effectiveness thereof. Such an approach drives the Court to give priority to the most reasonable measure over the most effective one. This arguably runs counter to the principle of high level of environmental protection. According to N. de Sadeleer, the Court should restrict its comparison to the measures having a similar degree of effectiveness, thereby avoiding any subjective assessment between the various interests underlying the conflicting norms[143]. The *Mickelsson and Roos* case brings great prospects in this regard.

In the same vein, the Court seems to have accepted that Member States are better placed to consider whether technical measures such as those seeking to protect human health and the environment are necessary. In view of the complexity of those matters, it is appropriate that the Court shows self-restraint[144]. One way to do so would also be to limit its legal review to "manifest error of appraisal" as outlined in the *Safety Hi-Tech*

[140] Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000, para. 36.
[141] The same reasoning was followed in: Case C-110/05 *Commission v. Italy* [2009] ECR I-519, para. 67.
[142] Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-000, para. 39.
[143] N. de Sadeleer, *Environnement et Marché Intérieur*, *op. cit.*, p. 410.
[144] D. Simon, « le contrôle de proportionnalité exercé par la CJ », *LPA,* 46, 5th March 2009, p. 17.

case[145]. That said, it is evident that judges must condemn measures constituting a disguised restriction or an arbitrary discrimination as required by article 36 TFEU.

Furthermore, it is worth pointing out that in the *Mickelsson and Roos* ruling - unlike in the *Danish Bottles* one - the Court refrained from reviewing the objectives of the legislation themselves, thereby leaving Member States free to assess them.

In view of the foregoing, it seems that the Court is hurtling towards the right direction with respect to the application of the rule of reason. It is laudable that the Court has recently shown its willingness to provide Member States with the legal tools to carry out an ambitious environmental policy and seek a high level of protection. Nevertheless, some authors contended that the Court decided to relax its standard of review because the contested measure was a restriction on use[146]. The Court would have given Sweden a counterpart to its refusal to extend the *Keck & Mithouard* doctrine to the measures restricting the use of goods[147]. Therefore, it is hard to draw firmer conclusions from this ruling. It has to be hoped, however, that the Court will carry forward this position[148].

Section 3. Third test: proportionality *stricto sensu*

According to some authors, there is a third criterion to the application of the proportionality principle. A measure would breach article 34 in the event that the interference in intra-EU trade were not proportionate to the object intended or the result achieved[149]. Following this third test, the measure is examined in order to make sure that any resulting advantage is not disproportionate to the damage that it creates. In other words, Member States are required to prove that the cost of the measure does not *in globo* outweigh its benefits. Unlike the necessity test where the measure contested is compared to its possible alternatives, the measure is now individually assessed.

As a result it may be that a measure considered as necessary (indispensable to the objective pursued) is censured by the Court because its contribution to the objective pursued is too little in the light of its restrictive effect on trade. This amounts to applying a test of reasonableness which thus entails a subjective assessment. That is presumably the reason why the Court has rarely recourse to this third test. Although two AG suggested doing so in two major cases involving trade and environment issues, the Court condemned the contested measures on the ground that the necessity principle was disregarded[150]. Admittedly weighing up opposite interests constitutes a task reserved for the legislature. In addition, the rule of reason is only applied, by definition, where the

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[145] Case C-341/95 *Gianni Bettati v. Safety Hi-Tech* [1998] ECR I-4355, para. 35. See also the following cases where the Court recognised a margin of appreciation: Case C-394/97 *Heinonen* [1999] ECR I-3599, para. 43; Case C-141/07 *Commission v. Germany* [2008] ECR I-6935, para. 51.

[146] N. de Sadeleer, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits", *op. cit.*, p. 249. This view is not shared by some others: P. Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?", *op. cit.*, p. 1465.

[147] See for this question, *supra*, Chapter 2. Section 1. Point C.

[148] However, the Court has applied its traditional approach in the following case decided since then: Case C-333/08 *Commission v. France* [2010] not published yet. See also: Case C-443/10, *Philippe Bonnarde* [2011] not published yet.

[149] J.H. Jans, H.H.B. Vedder, *op. cit.*, p. 258.

[150] Opinion of AG Glynn, Case 302/86 *Commission v. Denmark* [1988] ECR 4607, Opinion of AG van Gerven, Case C-169/89 *Gourmetterie v.d. Burg* [1990] ECR I-2143.

European legislator has not taken any harmonising step. It follows that Member States must remain competent to set the level of environmental protection while balancing this against market integration requirements[151]. Indeed, it is fair to say that it is not for the Court to balance the different interests in fields where even the EU legislator did not agree on a specific protection. Therefore, the cautious approach adopted by the Court on this issue seems to be fairly reasonable.

Conclusion

The relationship between trade and environment is of a complex nature under the umbrella of EU primary law. Relying on the very few provisions laid down in the TFEU, the CJEU has shaped, over the last decades, a large and sophisticated body of case-law on the free movement of goods. At the same time, it has been noted that the fundamental legal instruments of the EU have been amended so as to increasingly contemplate environmental protection. It became therefore essential to observe how the Court has incorporated this constitutional evolution into its case-law dealing with the interplay between trade and environmental considerations. It is time to draw some final conclusions by summing up the most significant elements highlighted in this study.

First, one should bear in mind that the topic under examination in this paper is of a tremendous importance because it involves Treaty provisions recognised as having direct effect. They confer rights on individuals which national courts must safeguard. Therefore, the importance of the reflection that has taken place here shines well beyond the framework of EU fora.

Second, it is worth noting that the Court has construed the concept of measure of equivalent effect under article 34 TFEU very widely since its early case-law. Its effect-based approach – as reflected in the *Dassonville* formula - mirrored the strong economical goal which has oriented the EU integration process. The breadth of the notion drove many economic operators to challenge wide-ranging measures, sometimes with a tenuous trade-hindering effect. Aware of this, the Court decided to halt this trend by excluding “certain selling arrangements” from the scope of article 34. However, the latter still feeds hot debate in front of EU courts as witnessed by the 2009 *Mickelsson and Roos* case. In this judgment, the CJEU decided to expand the scope of the prohibition to embrace measures restricting the use of goods. The Court reformulated the concept of measure of equivalent effect, thereby calling into question a large spectrum of national measures intended to promote various public policies such as environmental protection.

Third, in spite of the importance of negative harmonisation for the establishment of a common economic area, the drafters of the TFEU have not overlooked the fact that a couple of specific essential values may prevail over free trade considerations. Although article 36 TFEU encompasses the protection of animals and plants, it does not envisage environmental protection as a ground for derogation. In the seminal *Cassis de Dijon* case, the Court paved the way for an extension of the derogatory regime to some “mandatory requirements” (rule of reason). A few years later, the Court felt that the protection of the environment may be subsumed under this judge-made category. Nevertheless, a

[151] This is pleaded for by several environmental lawyers: L. Krämer, “Environmental Protection and Article 30 EEC Treaty”, *op. cit.*, pp. 123-127; J.H. Jans, H.H.B. Vedder, *op. cit.*, pp. 259-261; N. de Sadeleer, *Environnement et Marché Intérieur*, *op. cit.*, p. 411.

significant distinction remains. Whereas article 36 may save measures treating domestic and foreign producers in a different way, the *Cassis de Dijon* doctrine is restricted to *de jure* or *de facto* equally-applicable measures. It is argued that this distinction is flawed and no longer tenable in view of the major profile conferred on EU environmental policy. By no means, environmental protection embodies less legitimate interests than those listed in article 36. Moreover, environmental measures constituting product requirements tend, by their very nature, to discriminate against imports. Although the Court seems to be inclined to depart from this rigid position in the realm of environmental protection, it has never explicitly declared that both categories are worthy of the same legal protection. Such an ambiguous stance is a source of concern in terms of legal certainty. It also led the Court to follow unorthodox or tortuous reasoning in some cases. The time is now ripe for the Court to cross the Rubicon and clearly acknowledge that distinctly applicable measures may be duly justified by the rule of reason. Alternatively, article 36 could be revisited in order to expressly foresee environmental protection.

Fourth, it has been observed that a measure of equivalent effect underpinned by environmental considerations will be accepted provided that it complies with the proportionality principle. This meta-principle is best suited to conciliate competing interests. The necessity test has proved to be the main stumbling block for Member States as the EU judiciary resorts to a strict interpretation thereof. In the light of some cases, one could question whether the Court has kept within the parameters of its judicial prerogatives. Indeed, the Court seems to have assessed the objective of the measure instead of confining itself to reviewing the means employed. Admittedly there is a fine line between both. By contrast, it is submitted that Member States are free to set the level of protection of the environment they want. This view is buttressed by, on the one hand, the principle of high level of environmental protection enshrined in the Charter of Fundamental Rights and, on the other hand, the integration principle embedded in the TFEU. On the same grounds, it was advocated that the Court should continue to apply very carefully the test of proportionality *stricto sensu*. According to the latter, a measure would only be held as proportionate if the benefits thereof outweigh the drawbacks. The Court would thus have to weigh up the different interests at stake, which entails a subjective assessment.

As can be seen, the proportionality principle is not as value-neutral as one might think at first glance. It is fairly flexible and open-textured. Whether a measure is proportionate or necessary to the aim pursued will largely depend on the prism through which it is viewed. National authorities might not envisage the relationship between trade and environment in the same way as economic operators. For this reason, it has been argued that Member States should be given the necessary discretion to carry out such an assessment. Although they must conciliate trade and environment as far as possible, a perfect reconciliation is out of reach. A choice thus has to be made. This choice, however, is not for the judiciary to make unless there is a manifest error of appraisal.

In that connection, the *Mickelsson and Roos* ruling has brought great prospects. The Court seems to have amended its position given that it granted national authorities the necessary leeway to opt for what they consider to be *effective* steps – rather than *reasonable* steps - with regard to environmental protection. While relaxing the necessity test, it has allowed Member States to achieve ambitious environmental objectives and

seek a high level of protection. This is assuredly corroborated by certain EU constitutional provisions related to environmental policy.

Last but not least, there seems to be a major loophole in the whole approach of the Court regarding the relationship between trade and environment. In fact, free movement of goods remains an essential vehicle for the sound functioning of the internal market. It constitutes a "fundamental principle" according to settled case-law of the Court although the internal market represents a means employed to reach overriding goals (article 3 (3) TEU). In contrast, environmental protection is ensured by means of an exception under this Court's jurisprudence whilst it constitutes an end in it self in virtue of this same constitutional provision. Therefore, the premise underlying the entire state of play is problematic. The Court's position is arguably inconsistent with the spirit of the EU constitutional framework in this regard. This is ultimately testament to the troubled relationship between trade and environment under EU law. There is no doubt that this discussion strongly deserves to be furthered.

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