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WHAT STANDARD AFTER *KECK*?

Free movement provisions and national rules
affecting consumer usage or trade access

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Restrictions on the use of products : a sustainable development perspective

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Introduction

Though free movement of goods and environmental, consumer and health law have developed in parallel, these subjects intersect with increasing frequency. Indeed, the quality of our life goes hand in hand with sustainable growth.¹ Although they were not mentioned in the 1957 Treaty of Rome, environmental, health and consumer concerns as well as sustainable development have, through the various Treaty reforms, gradually been able to establish themselves as significant values enshrined in the Treaties.

It is the aim of this chapter to demonstrate the extent to which a market access criterion interpreted too broadly could jeopardize the hierarchy of values stemming from the recognition of these different policies. It will start by considering the three-pronged approach to the concept of measures having equivalent effect (MEE), moving on to address the issue of restrictions on the use of products. In section 3, we explore whether the limits of national regulatory autonomy flowing from the two cases at hand are consistent with the hierarchy of values set out in Treaty law. Last but not least, whether the Court of Justice strikes a fair balance while grappling with issues on trade and societal concerns still remains to be seen. Therefore, the last section addresses the hurdles national authorities are facing in justifying their MEEs.

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I. – A three-pronged approach to the concept of MEE falling within the ambit of Article 34 TFEU

Since *Keck*, MEEs have been divided into two categories : product rules and selling arrangements. The rationale for this distinction is that both categories have a different impact upon intra-Union trade. The functioning of the internal market would be hindered if goods which comply with the legislation of the Member State of origin, also need to comply with product rules elsewhere in the Union. The impact of selling arrangements, on the contrary, is much more limited. Arguably, the latter measures do not impose extra costs on importers; their purpose is not to regulate trade.²

However, two judgments handed down by the grand chamber on 10 February 2009 (*Italian Trailers* case) and by the second chamber of the ECJ on 4 June 2009 (*Swedish Watercrafts*) made far-reaching changes to this two-pronged approach to the concept of MEE.³ These judgments are of a certain interest both from the point of view of the scope of Article 34 TFEU as well as the review of the necessity of the measures concerned. Of particular salience is the extent to which that provision restricts the hardcore of environmental and health policy : the ability of national authorities to regulate the use of hazardous products. In effect, in both *Trailers* and *Swedish Watercrafts* judgments, the Court of Justice had to assess the consistency of such measures.

What is more, the fact that three advocate generals delivered specific opinions on these two cases and that it took the ECJ four years to render the *Swedish Watercrafts* judgment, mirror the difficulties the highest European court has been facing in tracing the borders of national regulatory autonomy escaping the free movement of goods provisions.

In the two cases at hand, as well as in subsequent cases,⁴ the Court identified three categories of measures that will now be covered by Article 34 TFEU.

The first category involves measures which have the goal or effect of treating products originating from other Member States less favourably.⁵ It covers all national

² P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, 3rd ed. (Oxford : OUP, 2003) 648.

³ Case C-110/05 *Commission v. Italy* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos "Swedish Watercrafts"* [2009] ECR I-4273. As regard the first judgment, e.g. A. RIGAUX, "Définition des mesures d'effet équivalent" (2009) 4 *Europe* 158; C. BARNARD, "Trailing a New Approach to Free Movement of Goods?" (2009) *CLJ* 288-290; C. BARNARD, *The Substantive Law of the EU* (Oxford, OUP, 2010), above, 104-108; A. RIGAUX, "Définition des mesures d'effet équivalent" (2009) 4 *Europe* 158. As regard the second judgment, e.g. A. RIGAUX, "Restrictions à l'usage des produits" (2009) 4 *Europe* 19-22. See also P. OLIVER, *Oliver on Free Movement of Goods in the EU* (Oxford, Hart, 2010), above, 125-131. As regard the two judgments, see N. DE SADELEER, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits", 162 *J.D.E.* (2009) 247-250; T. HORSLEY, *CMLRev* 46 (2009) 2001-2019.

⁴ Case C-108/09 *Ker-Optika* [2010], §§ 48-51, noted by N. DE SADELEER (2011) 2 *EJCL* 435-444.

⁵ Case C-110/05 *Commission v. Italy*, § 36; and Case C-108/09 *Ker-Optika*, § 49.

measures which are directly or indirectly discriminatory. It follows that, whenever they have the effect of discriminating against foreign producers, all measures governing the characteristics of a product, its use as well as selling arrangements fall under this first category.

The second category concerns measures which, where national laws have not been harmonised, regulate the requirements which these products must satisfy, even if these rules are indistinctly applicable to all products (*i.e.* : double burden rules). This corresponds to the category of measures relating to the intrinsic characteristics of the products as defined under *Cassis de Dijon*.⁶ In contrast to the first category, the measures falling within the scope of the second category are not aiming at discriminating foreign products. By way of illustration, that would be the case of national regulations laying down technical standards on the placing on the market of pesticides or chemical substances. In fact, this second category is difficult to distinguish from the first, in any case as far as the “actual characteristics of the products” are concerned. Indeed, it is difficult to distinguish between measures tantamount to indirect discrimination and indistinctly applicable measures. What is more, the second category from this trilogy establishes an exception to “selling arrangements” within the meaning of the *Keck* jurisprudence,⁷ which led certain commentators to conclude that this case law had been superseded.⁸

The final category consists of “any other measure which hinders access of products originating in other Member States” to the market of a Member State.⁹ Vigorous debate ensued as to how to interpret these terms.¹⁰ We take the view that this category covers non-discriminatory measures, which do not fall within the scope of the first two categories, but which do prevent or impede access to the market for imported products. A measure falls into this residual category where it has the effect of preventing consumers from using products according to “the specific and inherent purposes for which they were intended or greatly restricting their use.”¹¹ As we shall see

⁶ Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR I-649.

⁷ Case C-110/05 *Commission v. Italy*, § 36.

⁸ A. ROSAS, “Life after *Dassonville* and *Cassis* : Evolution but not Revolution” in M. POIARES MADURO and L. AZOULAI (eds.), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome* (Oxford, Hart, 2010) 445; P. OLIVER, *Oliver on Free Movement of Goods in the EU*, 129-130; C. BARNARD, *The Substantive Law of the EU*, 3rd ed. (Oxford, OUP, 2010) 104-108; C. BARNARD, “Trailing a new approach to free movement of goods?”, *Cambridge Law Journal* (2009) 290 ; E. SPAVENTA, “Leaving *Keck* behind? The free movement of goods after the ruling in *Commission v. Italy* and *Michelsson and Roos*”, *ELRev* 34 (2009) 914.

⁹ Case C-110/05 *Trailers* [2009] ECR I-519, § 37; Case C-142/05, *Swedish Watercrafts* [2009] I-4273, § 24.

¹⁰ E. SPAVENTA, above, 921-922; T. HORSLEY, above, 2016. See also A. FROMONT and C. VERDURE, “La consécration du critère de l'accès au marché en matière de libre circulation des marchandises : mythe ou réalité?” 47 *R.T.D. eur* (2011) 716-748.

¹¹ Case C-142/05, *Swedish Watercrafts*, § 58.

below, this third category embraces authorisation requirements, restrictions on transport as well as the way in which the use of products is regulated.¹²

Needless to say that the inclusion of this third limb is a novel feature of the case law.¹³ In effect, the Court of Justice is placing emphasis on a market access criterion, independent of any discrimination test, thereby complying with its early case law in *Dassonville*. It follows that measures merely restricting and not just prohibiting the use of a product fall within the scope of Article 34 TFEU.¹⁴ Whether market access shall become the new yardstick against which national measures have to be assessed remains to be seen.¹⁵ Indeed, it is still unclear what the term “access” means. In particular, the question arises as to which degree the access of the national market must be hindered.¹⁶

The more recent *Ker-Optika* judgment certainly does not modify this arrangement.¹⁷ Paragraphs 49 and 50 of the judgment refer to the three categories of measures cited above. Accordingly, the two-pronged approach – on the one hand, national measures prescribing the characteristics of goods and, on the other, selling arrangements has been sidelined. As far as selling arrangements are concerned, the Court appears to consider that they operate as an exception to the *Dassonville* case, provided that the two requirements established in the *Keck* case are met (*i.e.* universality and neutrality).¹⁸ *Ker-Optika* also confirms that certain selling arrangements fall outside the scope of Article 34 TFEU.

That being said, there will continue to be squabbles over the approach adopted by the Court. On the one hand, rules relating to the sale over the internet only fall under the scope of Article 34 TFEU if their effect is discriminatory, even if they have a significant effect on access to the national market; on the other hand, a regulation that has no impact on the market will not fall foul of the discrimination test on the grounds that it applies to the product’s characteristics.

¹² E. SPAVENTA, above, 920.

¹³ A. ROSAS, above, 445; P. OLIVER, above, 129-130; C. BARNARD, *The Substantive Law of the EU*, 3rd ed., above, 105.

¹⁴ T. HOSLEY, above, 2007.

¹⁵ G. STRATEMANS, “Market Access, The Outer Limits of Free Movement of Goods and ... the Law?” in M. BULTERMAN *et al.* (eds.), *Views of European Law from the Mountain. Liber Amicorum P.J. Slot* (Alphen, Wolters Kluwer, 2009) 93.

¹⁶ See Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre* [2012], § 30.

¹⁷ Case C-108/09 *Ker-Optika bt c. Antsz Dél-dunántúli Regionális Intézet* [2010], nyr, noted by A. RIGAUX (2011) 2 *Europe* 19-22, N. DE SADELEER (2011) 2 *R.E.D.C.* 437. See N. DE SADELEER, “Restrictions of the Sale of Pharmaceuticals and Medical Devices such as Contact Lenses over the Internet and the Free Movement of Goods”, 19 *European Journal of Health Law* (2011) 1-27.

¹⁸ Case C-108/09 *Ker-Optika*, § 16.

Figure 1 shows how the three categories of measures commented on are likely to cover specific environmental measures.

TABLE 1.
Categories of environmental MEEs

Categories of MEEs	Features	Features of environmental MEEs	Legal effects
1st category	Measures discriminating directly or indirectly against foreign producers (measures "the object or effect of which is to treat products coming from other MS less favourably")	All measures governing the characteristics of a product, its use as well as selling arrangements	Falling within the scope of Article 34 TFEU
2nd category	Product requirements to be met by goods that have been "lawfully manufactured and marketed "in other MS, even if "those rules apply to all products alike"	Standards related to form, size, dimension, weight, trade description, composition, packaging, labelling and presentation of goods, safety requirements, thresholds of hazardous substances, dangerous properties	Falling within the scope of Article 34 TFEU
3rd category	"Any other measure which hinders access of products originating in other Member States"	This residual category covers non discriminatory measures that are neither product requirements nor selling arrangements. It encompasses prohibitions or restrictions on use of the goods, authorisation requirements, and restrictions on transport	Falling within the scope of Article 34 TFEU

Categories of MEEs	Features	Features of environmental MEEs	Legal effects
Certain selling arrangements		<p>Restrictions on when, where and by whom hazardous goods may be sold or under which conditions</p> <p>(e.g. restrictions on a trading game linked to the hunting season, restrictions to sell hazardous goods to qualified undertakings, advertising restrictions).</p>	<p>Falling outside the scope of Article 34 TFEU provided that the measures at issue apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States</p>

What is more, as discussed below, a broad interpretation of that test is likely to enlarge tremendously the scope of Article 34 TFEU. Needless to say that such case law is likely to impinge upon new features of national product policies.¹⁹ Attention should be drawn to the fact that hazardous products are subject to authorization in order to be placed on the market as well as to numerous restrictions regarding their use.²⁰ Recently, with the aim of promoting sustainable patterns of production and consumption, public authorities are keen on developing an integrated product policy that, as opposed to specific product policies, addresses the whole life-cycle of products, from the extraction of natural resources, through their design, manufacture, assembly, marketing, distribution, sale and use to their eventual disposal as waste.²¹ In addressing

¹⁹ See N. DE SADELEER, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 207-247.

²⁰ With respect to restrictions on use of chemicals already placed on the market, see Articles 67 to 73 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

²¹ At a Member State level few states, notably the Nordic countries, the Netherlands, and Austria have articulated at the beginning of the new millennium comprehensive policies on products and the environment. In addition, EU institutions have started to pay heed to a more comprehensive product-oriented environmental policy with the view to enhancing sustainable production and consumption.

the product's life-cycle, public authorities are aiming at a reduction of its cumulative environmental impacts – from the “cradle to the grave”. In effect, although a product can be designed to cause as little environmental impact as possible, inappropriate use and disposal is likely to cause significant environmental impacts. Indeed, consumers may still use them in an environmentally unfriendly way. By way of illustration, the use of energy-saving light bulbs brings considerable environmental benefits, but these advantages can be offset if the bulbs are not switched off when not in use.²² Accordingly, the life-cycle approach takes into consideration the whole product system from cradle-to-grave.²³ This may be illustrated by the following example. Under Article 29 of the Waste Framework Directive 2008/98/EC, Member States are called on to evaluate the usefulness of the examples of measures aiming at improving the environmental performance of products throughout their whole life cycle. As a result, Member States may be deprived of their right to conduct a genuine life-cycle policy focusing on the use of products.

II. – Measures governing the use of products are falling within the scope of Article 34 TFEU

In both the *Italian Trailers* and *Swedish Watercrafts* cases, the Court has assessed whether national measures governing the use of products fall outside the scope of Article 34 TFEU and can be treated on a par with selling arrangements.

In these two cases, the national measures at stake were neither product requirements to which the *Cassis de Dijon* case law applies nor selling arrangements in line with the *Keck* jurisprudence. What is more, the regulations concerned had the effect of discouraging consumers from purchasing the vehicles, either because their use was prohibited, or because it was heavily regulated. These cases had a further aspect in common : in the absence of any harmonization rules on a EU level, the Member States were entitled to set the level of protection which they considered appropriate, provided that the proportionality principle was respected.

These two cases gave the Court the opportunity to specify, for the first time, the extent to which national measures which have the effect of limiting the use of certain products should be reviewed according to Article 34 TFEU. Indeed, the ECJ has seldom had to deal with measures regulating the use of products.²⁴ In her opinion deliv-

²² Preamble of the Communication from the Commission to the Council and the European Parliament – Integrated Product Policy – Building on Environmental Life-Cycle Thinking, COM/2003/302 final.

²³ See for instance Commission Recommendation 2011/696/EU of 18 October 2011 on the definition of nanomaterial (5th recital) (O.J. L 275/38).

²⁴ Case 119/78 *s.a. des Grandes distilleries Peureux* [1975] ECR 975; and Case C-473/98, *Toolex* [2000] ECR I-5681.

ered on 14 December 2006 in the *Swedish Watercraft* case, AG Kokott proposed, based on the need for consistency, that the *Keck* case law should be applied by analogy and, therefore, that arrangements for use of products should not be brought within the scope of Article 34 TFEU.²⁵ In her opinion, the regulations governing arrangements for use and selling arrangements for products were comparable “in terms of the nature and the intensity of their effects on trade in goods.”²⁶ In fact, in contrast to technical prohibitions relating to the products, selling arrangements and arrangements for use in principle only produce their effects after the importation of the product. The regulation of these arrangements therefore only has an indirect impact on the sale of goods, insofar as consumers may be discouraged from purchasing them.²⁷

In sharp contrast, in their opinions delivered in the case *Commission v. Italy* in 2006 and 2008, AG Léger and AG Bot defended the opposing argument according to which arrangements for use cannot be removed from the scope of Article 34 TFEU.²⁸ Moreover, according to AG Bot, national rules were contrary to the Treaty, if they impede access for a product to the market, regardless of the aim pursued by the measure in question.²⁹ Having been invited by the ECJ in the first case to present their opinions on the question as to whether Article 34 TFEU could apply to selling arrangements, the positions adopted by the Member States were at the very least contrasting.³⁰

Two times, the Court held that a national measure regulating the use of a product has to be examined with reference to Article 34 TFEU. In *Commission v. Italy*, the Court found that the disputed provision of the Italian Highway Code constituted a MEE prohibited under Article 34 TFEU.³¹ It follows from this that the concept of MEE within the meaning of Article 34 TFEU covers all other generally applicable measures which impede the access to the market of a Member State for products originating in other Member States, where these have “a considerable effect on the behaviour or the consum-

²⁵ AG Kokott in Case C-142/05, §§ 55 and 56. This interpretation was supported by P. WENNERAAS, “Towards an Ever Greener Union? Competences in the Field of the Environment and Beyond” (2008) 45 *CMLR*, 1654. Other legal scholars discarded that view: P. OLIVER and S. ENCHELMAIER, “Free Movement of Goods: Recent Developments in the Case Law” (2007) 44 *CMLR* 678 and 679.

²⁶ AG Kokott in Case C-142/05, § 52.

²⁷ *Ibidem*, § 53.

²⁸ AG Léger and AG Bot in Case C-110/05, § 136.

²⁹ AG Bot in Case C-110/05, § 136.

³⁰ Pursuant to Article 44(4) of the Rules of Procedure, the Third Chamber, on 9 November 2006, decided to refer the case back to the Court in order that it might be reassigned to a formation composed of a greater number of judges. At a later stage, the Court ordered the re-opening of the oral procedure and the holding of a hearing. In addition, the Member States other than the Italian Republic were invited to answer the question of the extent to which and the conditions under which national provisions which govern not the characteristics of goods but their use, and which apply without distinction to domestic and imported goods, are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU.

³¹ Case C-110/05, *Commission v. Italy*, § 58.

ers.”³² In *Swedish Watercrafts*, the ECJ endorsed the same approach.³³ As a result, such measures cannot be reviewed in the light of the criteria laid down in *Keck*. In so doing, the ECJ placed greater emphasis on the effect that the measure had on access to the market than on the nature of the rules in question, which did not contain requirements relating to the characteristics of the product.³⁴ That being said, if the influence is not deemed to be “considerable”, the measure falls outwith the scope of Article 34 TFEU.

In our view, three categories of measures can be drawn from these two judgments : a) measures completely prohibiting the use of a product; b) measures preventing users from using products for the specific and inherent purposes for which they were intended; and c) measures greatly restricting their use (as fig. 2 shows).

The first category does not leave any room for discussion. In fact, where the authorities prohibit all use of a product, they indirectly prevent its commercialisation. Knowing that they are not permitted to use a given product, consumers have practically no interest in buying it.³⁵

As regards the second category, the inability of users to use a product for the “specific and inherent purposes” for which it was intended also amounts to a MEE on imports. In effect, such measures relate closely to the very definition of the product itself. With regard to the *Swedish Watercrafts* case, the possibilities for the use of the watercrafts were very marginal at the time the questions were referred to the ECJ.³⁶

Another case in point is the prohibition of the practice of motor cross by a Member State at all places and at all times. Such measure would have the effect of discouraging the practitioners of this sport from purchasing this type of vehicle. Riding around on tarmacked roads on a motorcycle with the intention of riding over obstacles hardly amounts to an interest. In this case, since the interest in riding a motor cross bike is rather restricted, the measure in question by definition is preventing motorbikers from using their engines for the specific and inherent purposes for which they were intended. Accordingly, such a measure constitutes a MEE.

As far as the third category – measures “greatly restricting” the use of the product – is concerned, it is capable of calling into question a broad range of measures which seek to guarantee public safety and health, or to protect workers, consumers or the environment. In contrast to the second category, the given product falling within the third category can still be used according its specific and inherent purpose. However, given

³² *Ibidem*, § 56.

³³ Case C-142/05, §§ 26-27.

³⁴ AG Bot in Case C-110/05, §§ 109-111. See also C. BARNARD, “Trailing a New Approach to Free Movement of Goods?”, above, 290.

³⁵ See, by analogy, Case C-265/06 *Commission v. Portugal* [2008] ECR I-2245, § 33, concerning the affixing of tinted film to the windows of motor vehicles.

³⁶ Case C-142/05, *Swedish Watercrafts*, §§ 25 and 28.

the restrictions placed on their use, consumers are likely to be discouraged to purchase them. Examples of this category are prohibitions on SUVs from driving outside roads specially equipped for their use or on sports vehicles from exceeding speed limits set at 120-130 km/h on motorways. Other measures which fall under this category are bans on smoking tobacco in public places or sowing GMOs outwith a limited number of plots. Similarly, measures preventing adolescents from using sunbeds due to the risk of skin cancer would also be likely to fall foul of the principle of the free movement of goods where these rules would have the effect of greatly restricting their use and accordingly will have “a considerable influence on the behaviour” of this category of consumers. Surely all these regulations are likely to “heavily restrict the use” of these products.

TABLE 2.

Categories of measures governing the use of products caught by Article 34 TFEU

1st category	Prohibition of all use of a product
2nd category	Inability of users to use a product for the “specific and inherent purposes” for which it was intended
3rd category	Measures “greatly restricting” the use of the product

III. – The expanding scope of Article 34 TFEU and the hierarchy of values

Needless to say that the nature of the criteria of “considerable influence” on the behaviour of consumers and “great restriction” of the use of the products are eminently fuzzy.³⁷ Indeed, one is left quite in the dark as to how to interpret these criteria. Heavy restriction on use is not the same as a total restriction on use. What thresholds should apply? Does a 25% reduction in sales amount to a “great restriction” on the use of the product? There is no doubt that a case-by-case analysis is called for. In any case, the *Perlata* test must apply :³⁸ a measure regulating the use of products the effects of which would be “too uncertain or too indirect” should in no case fall under the scope of Article 34 TFEU. That being said, when faced with these measures, will national courts elevate themselves to the status of experts or will they display their modesty by

³⁷ S. WEATHERILL, “The road to ruin : ‘restrictions on use’ and the circular lifecycle of Article 34 TFEU”, above.

³⁸ Case C-379/92 *Perlata* [1994] ECR I-3453, § 24.

requiring the submission of market studies, investigations, or even opinion surveys in order to determine the impact of the disputed regulation on consumer choice?

Moreover, one could fear that the breadth and the vagueness of the criteria set out by the Court of Justice could force national authorities to reconsider a swathe of measures aimed at protecting public goods. Admittedly, it is open to question whether such case law development is consistent with the numerous amendments brought to the Treaties which have modified the hierarchy of values.

Whilst for a long time, environmental, health and consumer law tried hard to stand out from the crowd, after the Lisbon Treaty there has been a genuine “decompartmentalisation” of the guiding concepts of sustainable development, integration, and a high level of protection. This requires a few words of explanation.

Firstly, though the concept of sustainable development has encountered difficulty establishing itself under Treaty law, it has finally been recognized later on as one of the main objectives pursued by the EU. The concept is currently enshrined in Article 3(3) and (5) TEU, Article 21(2)(d)-(f) TEU, Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU.³⁹ The underlying idea of sustainable development is to strike a balance between, on the one hand, the social and economic advantages of development projects providing jobs and amenities for the present generation and, on the other, the need to conserve a sufficient amount of natural resources for future generations.⁴⁰ Given that “environmental law and the law on development stand not as alternatives but as mutually reinforcing”,⁴¹ sustainable development requires trade law and environmental law to interact. Needless to say that since it is made up of three heads (social, environmental and economic), sustainable development represents a delicate bal-

³⁹ The third paragraph of Article 3(3) TEU runs as follows: “The Union ... 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.” Moreover, pursuant to paragraph 5 of that provision as well as Article 21(2)(d) TEU, sustainable development is one of the corner stones of EU external policy. In addition, sustainable development is also encapsulated in both Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU, without however being defined. Under these two provisions, sustainable development is set out as the objective the environmental policy must pursue. Article 11 TFEU (ex Article 6 TEC) provides that: “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.” By the same token, in virtue of Article 37 of the Charter “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.”

⁴⁰ Sustainable development has been defined by the WCED as “a development that meets the needs of the present without compromising future generations to meet their own needs.” *E.g.* WCED, *Our Common Future* (Oxford, OUP, 1987) 86.

⁴¹ *Arbitration Regarding the Iron Rhine Railway* (Belgium v. Netherlands), Arbitral Award of 24 May 2005, § 58.

ancing of the competing social, economic and environmental interests.⁴² In view of Article 3(3) TEU, sustainable development, and hence the objective of environmental, health and consumer protection, cannot be dissociated from the functioning of the internal market. Indeed, paragraph 3 of this provision places the objective of environmental protection, which encompasses health,⁴³ on an equal footing with economic growth. Consequently, they must be analysed more in terms of reconciliation than of opposition.

Secondly, pursuant to Article 3(3) TEU and Articles 114(3), 168, 169 and 191(2) TFEU, as well as Articles 35, 37 and 38 of the Charter of Fundamental Rights of the EU, the tasks of the EU include the requirement to attain a high level of environmental, health and consumer protection. Be it for workers, patients, consumers or the environment, the requirement to attain a “high level of protection” has scarcely attracted any attention and has been the object of only a few commentaries in the academic literature. These obligations often been classed under the category of declarations of intent, are considered at best as policy principles devoid of any binding force, or as a guarantee of legitimacy which is automatically placed on draft regulations, directives, and decisions. Moreover, there is a strong doctrinal resistance to the idea that the courts may control compliance with the requirement for a high level of protection irrespective of the subject matter. It is argued that it is not a matter for the courts to interfere with the margin of appreciation that is naturally reserved to the EU institutions. This is claimed to undermine the very idea of the separation of powers. Strictly speaking, institutions are called on to determine the optimal level of protection, not the courts. Nonetheless, these obligations to attain a high level of protection are likely to become interpretative principles where a conflict between economic and antagonist societal objectives arises.⁴⁴

Thirdly, a number of provisions of the TFEU (Articles 8 to 13; Articles 167(4), 168(1), 173(3), 175 and 208(1)(2)) proclaim the cross-cutting nature of the legitimate interests of EU citizens, whether it be in the area of culture, regional policy, animal welfare, industry, health, consumer protection or development cooperation. These different integration clauses require decision makers to take into account, as part of the decision making process, not only the full range of the interests affected by the decision but also a number of interests that so far have not been receiving a lesser degree of priority. It follows that the EU institutions must reconcile the various objectives laid down in both the TEU and the TFEU. Prioritizing one objective should not render the achievement of the other objectives impossible.

⁴² *GabCikovo-Nagymaros Project* (Hungary v. Slovakia) [1997] I. C. J. Reports 7, § 140. See also *Arbitration Regarding the Iron Rhine Railway* (Belgium v. Netherlands), Arbitral Award of 24 May 2005, § 222.

⁴³ Article 191(1) TFEU.

⁴⁴ See, for instance, Case C-434/02 *Arnold André* [2004] ECR I-11825; Case C-380/03 *Germany v. European Parliament and Council* [2006], §§ 40-41.

It follows that the case law of the Court of Justice on the free movement of goods should be consistent with the new hierarchy of values set out in the TEU and the TFEU. The vague nature of these three concepts does not mean that the obligations commented on above are shorn of legal effect. There is no doubt that they are obligations that the courts must take into account. Admittedly, these provisions may be used to interpret other provisions of the Treaties.

In construing the concept of MEE very broadly, the case law at issue mirrors a strong economic integration process that is likely, under some circumstances, to curtail the ability of national authorities to conduct genuine public policies contributing to sustainable development. The question arises as to whether such a broad interpretation of Article 34 TFEU is consistent with the hierarchy of values set out by the Treaty makers. In our view, only measures which significantly hinder market access of products originating in other Member States should fall within the scope of Article 34 TFEU. If this were not the case, the Court of Justice should reassess its mandatory doctrine.

In any case, the *Peralta* test must apply.⁴⁵ In this case, the captain of a ship accused of dumping harmful chemical substances at sea contrary to Italian environmental legislation had argued that the legislation was in breach of Article 34 TFEU, since it created an obstacle to the imports of those substances into Italy. The Court pointed out that the purpose of the Italian legislation was not to regulate trade in goods with other Member States and that the restrictive effects such environmental measure might have on the free movement of goods were "too uncertain and indirect" for the obligation with it lays down to be regarded as being an MEE. Accordingly, a measure regulating the use of products the effects of which would be "too uncertain or too indirect" should in no case fall under the scope of Article 34 TFEU.

IV. – Justifications of MEEs restricting the use of products

The eminently fuzzy nature of the criteria of "considerable influence" on the behaviour of consumers and "great restriction" of the use of the products could require national authorities to justify all measures regulating the use of products whenever these are likely to significantly discourage consumers from purchasing them.

That being said, the free movement of goods, though it constitutes "one of the fundamental principles of the Treaty", is not absolute.⁴⁶ It follows that national authorities may still justify their restricting measures on one of the public interest grounds set out in Article 36 TFEU or in order to meet imperative requirements.

⁴⁵ Case C-379/92 *Peralta* [1994] ECR I-3453, § 24.

⁴⁶ Case C-51/93 *Schmidberger* [2003] ECR I-5659, § 78.

However, in order to justify their measures restricting the use of a product the national authorities have to overcome a number of hurdles.

First, as far as environmental measures are concerned, it is somewhat difficult to define the line separating Article 36 TFEU from a mandatory requirement regarding environmental protection.⁴⁷ Drawing the line between the two categories of justifications is not a purely academic exercise. Indeed, an MEE can be justified by a mandatory requirement provided that the measure is applicable without distinction. However, as underlined by case law,⁴⁸ environmental measures have a tendency to *de facto* discriminate against foreign goods.⁴⁹ Although many authors⁵⁰ and some Advocates General⁵¹ consider that measures applicable without distinction for environmental protection should be justifiable on the basis of a mandatory requirement, the Court of Justice has been refusing hitherto to solve the duality between mandatory requirements and grounds of justification mentioned in Article 36 TFEU. With respect to the *Watercrafts* case, the Court reached the conclusion 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 and plants. Though the Court considered that the two justifications were closely related, it focussed its attention on the environmental justification. The restrictions on use at issue were justified irrespective of the fact they were likely to be distinctly applicable.

Second, these two derogations must be interpreted narrowly.⁵²

⁴⁷ While national legislation on pesticides was assessed by reference to Article 36 TFEU (Case 272/80 *Biologische Produkten* [1981] ECR 3277, § 13), the mandatory requirement was invoked for cases on waste management (Case 302/86 *Commission v. Denmark* [1988] ECR I-4604).

⁴⁸ Case 302/88 *Commission v. Denmark* [1988] ECR I-46; Case C-2/90 *Commission v. Belgium* [1992] ECR I-1; Case 203/96 *Düsseldorf* [1998] ECR I-4075, §§ 44 and 49; Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, § 19; Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, §§ 73 and 75. Case C-309/02 *Radlberger and Spitz* [2004] ECR I-11763; Case C-463/01 *Commission v. Germany* [2004] ECR I-11705, § 61.

⁴⁹ AG Jacobs in Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, § 233.

⁵⁰ P. OLIVER, "Some further reflections on the scope of articles 28-30 (ex-articles 30-36 CE)" (1999) *CML Rev.* 783, 804-806; A. ROSAS, "Life after *Dassonville* and *Cassis*", above, 445; N. DE SADELEER, *Commentaire Mégret*, above, 391. Moreover the ECJ invoked mandatory requirements in cases related to the protection of consumers where one could at the very least say that there was uncertainty regarding the "applicable without distinction" character of a national measure (see e.g. Cases C-34 to 36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, §§ 44 and 45; Case C-120/95 *Decker* [1998] ECR I-1831, §§ 36 and 39).

⁵¹ Opinion of AG Jacobs delivered on 26 October 2000 in Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, §§ 232 and 233; Opinion of AG Geelhoed delivered on 14 July 2005 in Case C-320/03 *Commission v. Austria*, § 107; Opinion of AG Trstenjak delivered on 16 December 2010 in Case C-28/09 *Commission v. Austria* [2011], § 89.

⁵² With respect to Article 36 TFEU, see Case 46/76 *Bauhuis* [1977] ECR I-5; Case 229/83 *Leclercq* [1985] ECR 35; Case 95/81 *Commission v. Italy* ECR I-2204; Case 113/81 *Commission v. Ireland* [1981] ECR I-1625; and Case 13/78 *Eggers* [1978] ECR I-1935.

Third, it is settled case law that these two derogations must pursue non-economic aims.⁵³ Indeed, expressing general interest, they indicate a supremacy of non-commercial values over free movement of goods. This is confirmed by Article 114(10) TFEU, which allows Member States to adopt more stringent protection measures in the framework of derogations only for “non-economic reasons referred to in Article 36.”

Finally, once an MEE has been justified under Article 36 TFEU or the rule of reason, the Member State is free to determine the level of protection it wishes to pursue. However, the Court does not give Member States invoking one of these exceptions absolute discretionary power as to the level of protection of these interests. To be justified under Article 36 TFEU, a restrictive measure must be proportionate to the pursued aim. The principle of proportionality allows one to assess means used – ban, prohibition, approval, authorisation, etc. – with reference to the objectives pursued – health or environment – to best take into account the legitimate interests of undertakings in freely trading their goods. As stakeholders necessarily adopt opposite stances regarding the adequacy of the level of protection in this field, one must stress that the proportionality principle is ideologically neutral and does not aim to favour environmental interests over economic interests nor to create such a hierarchy of values from nothing.

The Member States are not required to apply the lowest level of protection within the EU.⁵⁴ Hence, they may dismiss less restrictive alternatives⁵⁵ on the grounds that they would not secure the appropriate domestic level of protection. This raises the question whether less restrictive alternatives protect the Member State’s interests as effectively as the challenged measure. Given the complexities of environmental policy, this appreciation is rather delicate. In our view, the Member States should enjoy a margin of appreciation in determining, according to the specificities of the environmental issues and the importance they attach to the environmental values, the measures that are likely to achieve most efficiently concrete results.⁵⁶ In comparing the disadvantages of the contested measure and of alternative measures, there is a risk that the Court of Justice will always prefer a more reasonable measure to a more rigorous one; a choice that may take place at the expense of the aim pursued. Such a method clearly goes against the different obligations commented on in section 3, and in particular the principle requiring a high level of protection.

⁵³ Case 7/61 *Commission v. Italy* [1961] ECR 317; Case 288/83 *Commission v. Ireland* [1985] ECR 1761; and C-324/93 *Evans Medicals* [1995] ECR I-563.

⁵⁴ Case C-384/93 *Alpine Investment* [1995] ECR I-1141; and Case C-124/97 *Lärää* [1999] ECR I-6067, § 36.

⁵⁵ The consideration of alternative solutions could be seen as a prerequisite before taking draconian measures such as “a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States”. See Case C-320/03 *Commission v. Austria* [2006] ECR I-7929, § 87.

⁵⁶ See by analogy Case C-394/97 *Heinonen* [1999] ECR I-3599, § 43.

That being said, the Court has occasionally excluded the use of other measures on the grounds that the latter are less effective. In this respect, *Swedish Watercrafts* is illustrative of the manner in which the Court has dismissed the effectiveness of alternative measures.

As regards the Swedish ban on the use of watercrafts, the parties argued that the Swedish authorities could have chosen a less severe regime which in principle permitted the use of such watercraft, provided that they did not circulate in areas considered to be sensitive, such as a limited number of nature sanctuaries and bathing areas. However, the Court held that this alternative was not as effective as the prohibition ultimately put in place. By analogy to the *Italian Trailers* case, the Court therefore took the view that “Member States cannot be denied the possibility of attaining” the objective of protecting 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.”⁵⁷ In other words, the Court acknowledged that a Member State may maintain more stringent trade-restricting measures in as much as the compliance with less restrictive alternative measures would entail a heavier administrative burden. Put it simply, costs incurred by administrations may gather momentum.

In support of this latter view, attention should be drawn again to the fact that it is easier for the public authorities to control the restricted use of vehicles in certain specifically designated areas than the opposite. In addition, such measures appear to be much more effective. In *Swedish Watercrafts*, it was obvious that wild birds such as loons and shorebirds are better protected thanks to a general prohibition for the whole country of using watercrafts rather than the tedious designation of a patchwork of small nature sanctuaries.⁵⁸ Being found on every stretch of waters, shorebirds are indeed not restricted to a few nature sanctuaries. Returning to our motor cross example in which use is regulated in heavily populated Member States, like the Netherlands or Belgium, here too the practice of this sport is only authorised in specially designated locations, in order to reduce noise pollution and guarantee road safety. In this case, the addressees of the rule know precisely the places where they may practise their sport. Outside these areas, they are likely to be subject to administrative fines. In line with the previous judgment, the ECJ accepted the need for the more severe alternative on efficiency grounds. That said, the authorities are called on to flesh out this general proportionality assessment into concrete measures, such as the obligation to identify the sites in which noisy or dangerous sport activities could be carried out.⁵⁹

⁵⁷ Case C-142/05 *Swedish Watercrafts*, § 36.

⁵⁸ *Ibidem*, § 30.

⁵⁹ *Ibidem*, § 39. See E. SPAVENTA, above, 926.

Conclusion

Whereas institutional law has not ceased developing since the Single European Act, the same can be said of a number of societal concerns which, in the wake of the Treaty reforms have filtered into broader or even more cross-cutting concepts. Thus the consecration of sustainable development, the obligation to integrate health, consumer and environmental protection, the consolidation of the legal bases of new policies especially dedicated to environmental, health and environmental protection, and the assertion of the preventive and precautionary principles are elements mitigating in favour of the recognition of a number of fundamental values of the system of EU law. It follows that the increasing force of concerns associated with environment, health and consumers should result in the reinforcement of the essential nature of these and, accordingly, to relativize key economic freedoms.

Two conclusions may be drawn from our analysis of the judgments at hand.

First, the criterion of "considerable influence on the behaviour of consumers" which a national measure regulating the use of a product must have in order to be considered tantamount to a measure having equivalent effect must be interpreted narrowly. Such an interpretation is required in order to avoid entire areas of policing regulations being rendered nugatory.

Second, when applying the proportionality principle, the Court of Justice should display greater regard for the efficacy of the measures concerned. It should pay particular attention to the specific circumstances surrounding the fight against environmental degradation, health impairment and any obligations arising from international law. In addition, the costs and the technical difficulties of implementing the various facets of the alternative should be carefully weighed up. It is also advisable to take into consideration the limited capacities of the national administrations charged with the implementation of increasingly broad and complex regulations. Finally, it would appear that when EU lawmakers are incapable of setting a common protection threshold for the twenty-seven Member States, the Court of Justice should not substitute its own balancing of the interests for that made by the national authorities.