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RESTRICTING RESTRICTIONS: LESSONS FOR THE EU FROM THE US?

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I. INTRODUCTION

BMW challenges the 70 mph speed limit on British motorways as an obstacle to the free movement of goods. It also says that the requirement to comply with British labour laws when it employs staff at its Oxford plant is a restriction on its freedom of establishment, as is the fact that it must pay British taxes. Far-fetched? Well there is nothing in the ECJ's recent case law on free movement to prevent BMW from running such arguments. If BMW chooses to do so, the Court of Justice may find that the UK rules are "restrictions" or "obstacles" to BMW's freedom of movement, contrary to Articles 28, 39, 43 and 49 of the EC Treaty, and are thus *prima facie* unlawful. The burden would then shift to the UK both to justify its national rules, by pointing to good policy reasons taking precedence over free movement, and to show that its laws are proportionate.

Speed limits can of course be justified on the grounds of road safety.[1] But the problem lies with proportionality. While setting a speed limit might be a suitable means of achieving the public safety objective, it is not obvious that a 70 mph limit is no more restrictive than necessary to achieve that objective (why not 69, 68 or 71 or 72 mph?).[2] Employment laws can also be justified on the grounds of

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[1] Case C-55/93 *Criminal Proceedings against van Schaik* [1994] E.C.R I-4837; Joined Cases C-151/04 and C-152/04 *Nadin* [2005] E.C.R I-11203, para. [49].

[2] *Cf.* Justice Holmes in *Louiseville Gas & Electric Co.* v. *Coleman* 277 US 32, 41 (1938) "When a legal distinction is determined, as no one doubts that it may be between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." In the EU context the ECJ said in Case C-110/05 *Commission* v. *Italy (Italian trailers)* [2009] E.C.R I-000, para. [67] "Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities".

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worker protection,[3] but again they raise the question of whether the challenged rules can be considered proportionate. The taxation case is more difficult still: pure economic arguments, such as the loss of tax revenue[4] or the cost to the national exchequer,[5] are not even accepted as justifications by the ECJ and so the UK's case is likely to fail at this stage, even before the question of proportionality comes into play.

These examples highlight a more general problem facing parties when defending non-discriminatory national rules designed to protect "social" interests found to restrict free movement. As the trade unions found in *Laval*[6] and its sister case, *Viking*,[7] despite the Court's talk of balance between economic and social policy,[8] in fact the ECJ's "restrictions" analysis gives primacy to the economic freedoms (Articles 43 and 49) and creates a presumption that the national rule is unlawful. This puts the defendant, usually the state, on the back foot, defending national social policy choices *and* showing that the legislation is proportionate. Courts are also placed in the difficult position of having to make decisions about the legitimacy and proportionality of national policy choices when they lack the institutional capacity to gather and process the relevant economic/social/cultural information. The Sunday trading saga in the late 1980s[9] illustrated this point all too clearly: national courts reached different conclusions on the proportionality of a ban on shops opening on Sundays.[10] This litigation eventually led the ECJ in the (in)famous *Keck*[11] decision to carve out an area of national regulation – certain non-discriminatory selling arrangements – to which Article 28 would not apply. However, the 2009 decision of *Commission* v. *Italy (trailers)*[12] suggests that even the *Keck* settlement is being re-thought in light of the "restrictions" or

[3] Case 279/80 *Criminal Proceedings against Webb* [1981] E.C.R 3305, para. [19]; Joined Cases 62 & 63/81 *Seco* v. *EVI* [1982] E.C.R 223, para. [14]; Case C-113/89 *Rush Portuguesa* [1990] E.C.R I-1417, para. [18].

[4] Case C-464/02 *Commission* v. *Denmark (company vehicles)* [2005] E.C.R. I-7929, para. [45], citing the free movement of capital decision in Case C-319/02 *Manninen* [2004] E.C.R. I-7477, para. [49].

[5] Case C-109/04 *Kranemann* v. *Land Nordrhein-Westfalen* [2005] E.C.R. I-2421.

[6] Case C-341/05 *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet* [2007] E.C.R I-11767.

[7] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line* [2007] E.C.R I-10779.

[8] *Viking*, para [79]; *Laval*, para [105]. For a full discussion of these cases see (2007–8) 10 C.Y.E.L.S. chs17-22.

[9] See P. Diamond, "Dishonourable Defence: the Use of Injunctions and the EEC Treaty; Case Study of the Shops Act 1950" (1991) 54 M.L.R. 72; R. Rawlings, "The Euro-law Game: Some Deductions from a Saga" (1993) 20 J. Law and Soc. 309.

[10] *Cf.* Northcote J. in *B & Q* v. *Shrewsbury and Atcham BC* [1990] 3 C.M.L.R. 535 and Hoffmann J. in *Stoke on Trent City Council* v. *B & Q* [1990] 3 C.M.L.R. 31 with Allen J. in *Wellingborough BC* v. *Payless* [1990] 1 C.M.L.R. 773 and Mustill J. in *Smiths-do-it-all* v. *Peterborough BC* [1990] 2 C.M.L.R. 577.

[11] Joined Cases C-267/91 and C-268/91 *Keck and Vithouard* [1993] E.C.R I-6097.

[12] Case C-110/05 *Commission* v. *Italy (Italian trailers)* [2009] E.C.R I-000.

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"market access" analysis which is now the vogue in respect of free movement of persons, services and capital.

This article therefore seeks to address the question of whether there should be limits on the scope of intervention of EC law into national regulation. If so, what are they and what form might they take? This is not just a technical matter for black letter lawyers; it goes to the heart of the federal question – what sort of EU is the Court of Justice trying to shape? If, as generally accepted, Member States should retain some degree of regulatory autonomy how much space can there, and should there, be for Member State action unhindered by Community law? I do not wish to examine this question through the lens of positive integration (the adoption of Community measures), where the safeguards of power[13] (competence, subsidiarity and proportionality[14]) and process (e.g. Member State voting in the Council of Ministers[15]) go a long way to protecting (some) state autonomy. Instead, I will consider the question through the lens of negative integration (the use of Treaty provisions to strike down national law),[16] which is the area where I perceive there to be the greatest problem. Is there a way that the Court of Justice can combine its push to remove legislative dead wood at national level, and thus continue the dynamic process of creating a single market, with preventing a total free-for-all where all national legislation is potentially up for review as being incompatible with EC law?

To help answer this question I will compare the ECJ's favoured "restrictions" approach with the largely discrimination-based approach to the Dormant Commerce Clause adopted by the US Supreme Court. Superficially at least, the US is a good comparator for the EU.[17]

[13] This terminology is derived from E. Young, "Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism" (2002) 77 N.Y.U. Law Rev. 1612.

[14] See, in particular, G. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columb. L. Rev. 331 and "Proportionality and Subsidiarity" in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises*, (Oxford 2002).

[15] *Cf.* in the US context where the Supreme Court declared that "State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power": *Garcia* v. *San Antonio Metropolitan Transit Authority* 469 US 528, 552 (1985). See also the classic, but contested, work of H. Wechsler, "The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government" (1954) 54 Columb. L. Rev. 543.

[16] Of course, the Court's decisions in this area do have an impact on the reverse issue of Community competence to act: any area of Member State regulation falling under one of the four freedoms becomes fair game for harmonisation under Article 95 EC. See *e.g.* J. Snell "Who's Got the Power? Free Movement and Allocation of Competence in EC Law" (2003) 22 Y.E.L. 323; G. Davies, "Can Selling Arrangements be Harmonised?" (2005) 30 E. L. Rev. 370.

[17] See D. Kommers and M. Waelbroeck, "Legal Integration and the Free Movement of Goods: The American and European Experience", in M. Cappelletti, M. Seccombe and J. Weiler (eds.) *Integration Through Law*, vol. 1, book 3, (Berlin 1986): "The American federal experience seems particularly relevant to the European enterprise in light of the judiciary's contribution to the promotion of legal integration in the United States".

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Broadly speaking, both have similar sized economies. Both are based on a federal or quasi-federal structure[18] and both recognise that, in certain circumstances, "federal" law needs to control state activity where that activity interferes with interstate commerce and thus the unity of the Union or the single market.[19]

Yet, the parallels between the EU and the US are more apparent than real.[20] The US has been explicitly concerned with nation-building since its formation over two hundred years ago. Its experience – and thus its maturity – suggests that it is now at the "market maintenance" stage:[21] the federal regime has already reached the status quo which it wishes to maintain and this permits a lighter federal hand on the tiller. The US Supreme Court therefore takes the view that federal law will intervene only where the state law is discriminatory or unduly burdensome of interstate commerce (as we shall see, this latter category is contested[22]). The approach of the US Supreme Court has two consequences: first, it allows a much greater degree of deference to state actors and to state regulation; and second, it creates a stable, more certain situation which is not intended to alter market structures.[23]

[18] Of course the "F" word is a controversial term to be applied to the EU. Here, I use it in its most neutral sense to describe a situation where "a society seeks to divide power between a central government and its component units": E. Young, "Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism" (2002) 77 N.Y.U. Law Rev. 1612, 1614. K. Lenaerts describes federalism as whenever a "divided sovereign is guaranteed by a national or supra-national constitution and umpired by the supreme court of the common legal order" ("Constitutionalism and the Many Faces of Federalism" (1990) 38 Am. J. Comp.L. 205, 263.

[19] See Justice Jackson's views in *Hood & Sons* v. *DuMond*, 336 US 525, 539 (1949): the Commerce Clause embodies "the principle that our economic unit is the Nation", a "federal free trade unit". He continued: "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the very certainty that he will have free access to every market in the Nation, that no embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

[20] There is already a wealth of literature on this. For a starting point, see K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Government in the United States and the European Union* (Oxford 2001) including their introductory essay.

[21] M. Poiares Maduro, *We the Court*: *The European Court of Justice and the European Economic Constitution* (Oxford 1998), 88.

[22] D. Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems" (2004) 90 Virginia Law Rev. 731, 810: "the Court usually pursues only the anti-discrimination enquiry even when it purports to be doing more".

[23] Furthermore, because Congress has the power "to permit the states to regulate in a manner which would otherwise not be permissible" (*per* Chief Justice Stone in *Southern Pacific Co.* v. *Arizona, ex rel Sullivan* 325 US 761, 769 (1945)), a situation which is not permitted under EC law where the four freedoms apply equally to Community as well as to Member States measures (Case 15/83 *Denkavit Nederland* v. *Hoofdproduktschap voor Akkerbouwprodukten* [1984] E.C.R. 2171, para. [15]; Case C-51/93 *Meyhui* v. *Schott Zwiesel Glaswerke* [1994] E.C.R. I-3879, para. [11]), more attention is focused in the US on the political than the judicial level for resolving difficulties in inter-state commerce.

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If the US has reached a "comfortable middle age",[24] the EU is a "work in progress".[25] It finds itself at what Maduro terms the "market building" stage, focusing on "promoting the new set of rights brought by the larger integrated area and to break the path-dependence of actors from national systems".[26] Thus, in contrast to the US, the EU's situation implies a more activist intervention by "federal" law, one based on removing obstacles or restrictions to free movement i.e. eliminating national rules which have accumulated, often over the centuries.[27] This approach pays little heed as to whether the rule is discriminatory. It focuses instead on the (potentially) restrictive effect of the rule on the out-of-state trader wishing to gain a foothold on the market in another Member State.

While active judicial intervention, through the restrictions model, may generally be necessary in the EU to eliminate obstacles to free movement such as packaging requirements, rules on authorisation criteria and provisions on the recognition of qualifications, it creates problems when applied to non-discriminatory measures which structure the national market on which trade occurs, such as employment and taxation laws and other welfare measures, as the BMW example shows. This article therefore argues that the type of federalism that the Court of Justice is responsible for shaping must leave space for the sub-units (the states) to regulate and develop at least the matters which form the core of the welfare state, as well as social policy more generally, largely unhindered by the application of EC law. Failure to do so may well lead EU citizens blaming the EU for the failure of the European social model which is so dependent on national welfare policies for its substance.[28]

It is here that the ECJ could draw inspiration from the case law of the US Supreme Court under the Dormant Commerce Clause. Non-discriminatory state rules should enjoy a presumption of legality. Only if the trader can show that the rule particularly affects his or her market access, an effect which goes beyond simply incurring additional costs,

[24] J. Pfander, "Member State Liability and Constitutional Change in the United States and Europe" (2003) Am. J. Comp. L. 237, 239.

[25] *Ibid*, 261. As Young notes (above n.13, 1705), "To an American observer, the European Union looks a great deal like the American Articles of Confederation [Agreed to by Congress November 15, 1777; ratified and in force, March 1, 1781]. In particular, the central government during the Confederation period depended upon the constituent states for revenue and for enforcement of Congressional mandates".

[26] Above n.21, 88.

[27] See *e.g.* Case 178/84 *Commission* v. *Germany* [1987] E.C.R. 1227 concerning the sixteenth century beer purity laws.

[28] For example, in its White Paper on Social Policy (COM(94) 333, para. [3]) the Commission said that the "European Social Model" was based around certain shared values: "These include democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity" The German *Lisbon Treaty* decision BVerfG, 2BvE 2/08 of 30 June 2009, paras 249 and 259 would support the need for space for local action in the social field.

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will the rule's compatibility with the four freedoms be considered. In order to make this argument I shall start by examining the different degrees of intensity with which federal law can control state decision-making in the field of free movement.

II. Approaches by Federal law to Controlling State Law

I will suggest that there are four different levels by which federal law can control state law in this field. I shall describe these as the zero impact, the low impact, the high impact and the total impact approaches.

The zero impact approach would, as the name suggests, mean that federal law does not attempt to control state action in the commerce field in any way: that state and federal government action remain distinct, autonomous and supreme in their two separate spheres. This approach, which comes close to the system of dual federalism recognised in the US from 1789–1937, proved to be unworkable, in part due to the artificial categories that the Supreme Court was forced to draw,[29] and in part due to the practical difficulties of delimiting the two spheres of competence. It has now been discredited as a system of constitutional interpretation.

The total impact approach is the opposite: all state laws are subject to challenge as being potentially incompatible with federal law unless they can be justified. This would envisage a type of economic due process review,[30] as employed by the US Supreme Court during the *Lochner* era (c.1897–1937) under the Fourteenth Amendment.[31] However, by 1937 this approach had also been discredited.[32] This was subsequently confirmed in *Williamson* v. *Lee Optical of Oklahoma*[33] where Justice Douglas declared the Court no longer struck down "state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. … 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"[34]

In the EU, the Court of Justice also does not have general jurisdiction to review all state legislation: it has jurisdiction only where the rule under review has an effect, actual or potential, on inter-state

[29] Young, above n.13, 1667.
[30] M. Poiares Maduro, *We the Court*: *The European Court of Justice and the European Economic Constitution* (Oxford 1998), 59.
[31] The Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law …". The Fifth Amendment is drafted in similar terms but applies to the Federal government.
[32] *West Coast Hotel* v. *Parrish* 300 US 379 (1937). *Cf.* M. Tushnet, "Rethinking the Dormant Commerce Clause" (1979) Wisc. L. Rev. 125, 145–150, who argues that due process review has re-entered "through the back door of the balancing test under the dormant commerce clause".
[33] 348 US 483 (1955).
[34] 348 US 483, 488.

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trade/movement. Wholly internal situations, however disputed the category, remain outside the scope of EC law.[35] Therefore the ECJ has no competence to adjudicate on every state rule;[36] it can do so only where the state rule has some effect on inter-state trade.[37] For these reasons, I will not discuss the total impact theory further.

More nuanced are the high impact and low impact approaches. The former, which envisages careful scrutiny of most state rules by the federal tribunal, is more closely associated with the EU; the latter, which envisages less scrutiny of state rules, with the US. Since these two approaches are linked to two identifiable legal systems we shall consider them in detail in Sections III and IV below.

III. The Low Impact Approach

A. The Essence of the Approach

The low impact approach envisages a low level of intervention by federal law on the state rules. Only those rules which are discriminatory will be subject to challenge under federal law; all other state rules are lawful. So, under this model, a state can determine whether it should have a minimum wage and if so at what level. This decision will not be subject to challenge under federal law provided that, say, the state does not set a higher minimum wage rate for nationals than for migrants. Were it to do so, the discriminatory differential could be challenged (*i.e.* the higher wage rate) but not the substance of the underlying rule (*i.e.* the state's decision to impose a minimum wage).

Various, often closely related, rationales are offered for the prohibition of discrimination in the trade law context. First, discriminatory rules are considered unlawful because they allow irrelevant factors to be taken into account (*e.g.* the need to protect the insider from the outsider). This weakens the "concept of the union", whether a political union, as in the US, or a limited federal union, as in the EU.[38] More specifically, discrimination undermines the solidarity between the constituent elements of the polity. This argument is particularly

[35] Joined Cases C-64-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171, para. [23]. This has been confirmed in Case C-212/06 *Government of the French Community and Walloon Government* v. *Flemish Government* [2008] E.C.R. I-1683, para. [38]. For a full discussion, see A. Tryfonidou, "The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach Through the Years". in C. Barnard and O. Odudu (eds.), *The Outer Limits of EU Law* (Oxford 2009).

[36] At times it does come close to doing just this, especially when the rule under review is being challenged by a national of that state; *e.g.* Joined Cases C-321-4/94 *Pistre* [1997] E.C.R. I-2343. For criticism, see P. Oliver and S. Enchelmaier, "Free Movement of Goods: Recent Developments in the Case Law" (2007) 44 C.M.L.Rev. 649.

[37] For a recent important example of this point, see Case C-507/03 *Commission* v. *Ireland* [2007] E.C.R. I-9777, para. [34].

[38] D. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1985) 84 Mich. L. Rev. 1091, 1113.

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important in the EU where the principle of solidarity has long been recognised in both the EC and EU Treaties.[39] In the US such arguments more usually take the form that, absent the Dormant Commerce Clause's prohibition on discrimination, the federal system would face collapse due to growing resentment between the states which would ultimately lead to retaliation,[40] a very real concern for the drafters of the US Constitution in 1787.

A second rationale for the prohibition of discrimination is more economic than political: discrimination – and protectionism – are inefficient because they divert "business away from presumptively low-cost [foreign] producers [to high-cost (local) producers] without any colorable justification in terms of benefit that deserves approval from the point of view of the nation as a whole".[41]

A third rationale, and one strongly pushed by Justice Stone in the 1930s in the US,[42] concerns the operation of the political process: federal law should be used to invalidate discriminatory state rules because they are the product of a successfully functioning democratic process operating at state level in which the outsider most affected by the rules is not represented in that process.[43] Federal supervision is therefore necessary to inject a national perspective[44] or, putting it another way, to give out-of-state interests "virtual representation".[45]

Some criticise this argument on the grounds that in-state actors, particularly consumers, often share the interests of the out-of-state actors and so act as a proxy for them in the state legislative process.[46] Nevertheless this third rationale has particular force in the US because, as Halberstam explains,[47] the federal Constitution grants "each level of

[39] See also Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. [44] discussed in C. Barnard, "Solidarity and New Governance in the Field of Social Policy?" in G. De Búrca and J. Scott (eds.) *New Governance and Constitutionalism in Europe and the US* (Oxford 2006). In the US context see Justice Jackson's comments in *H.P. Hood & Sons* v. *Du Mond* 336 US 525, 535 (1949): "this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution" *i.e.* the recognition of the Dormant Commerce Clause.

[40] Regan, above n.38, 1114.

[41] Regan, above n.38, 1118.

[42] See Justice Stone in *South Carolina State Highway Department* v. *Barnwell Bros., Inc* 230 US 177 (1938): "Underlying the stated rule has been the thought … that when regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on state legislation where it affects adversely some interests within the state".

[43] This is sometimes referred to as the *Carolene Products* theory, taken from Justice Stone's opinion of the Court in *US* v. *Carolene Products Co.* 304 US 144 and, in particular, the famous "footnote 4".

[44] M. Tushnet, "Rethinking the Dormant Commerce Clause" (1979) Wisc. L. Rev. 125, 150.

[45] This phrase is taken from the classic work by J. Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Boston 1980).

[46] See *e.g. Minnesota* v. *Clover Leaf Creamery* 449 US 456, 473 (1981). On the other hand, because the consumer voice is dispersed it cannot compete with the power of industry which can mobilise lobbyists to push for discriminatory legislation: see L. Tribe, *American Constitutional Law* (New York 2000), 1057.

[47] D. Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems" (2004) 90 Virginia Law Rev. 731, 732–3.

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or unit of government a set of regulatory tools that may be used without regards to whether the exercise of these powers serves the system of democratic governance as a whole". He argues that it is less relevant in the EU because the dominant approach is one of fidelity which holds public institutions to a duty to act responsibly and to promote the well-being of the entire political system.[48] According to this view, it is less likely that EU states will adopt overtly discriminatory legislation because of their duties of loyalty and cooperation under Article 10 EC.[49] If this is correct it therefore makes more sense in the EU context to adopt the restrictions, rather than the discrimination, approach considered in section IV below.

Whichever rationale is favoured, it is clear that the discrimination model has a good and well respected pedigree. Its great advantage is that it leaves room for state action, largely unhindered by concerns that the federal level will intervene. State rules can therefore respond to the demands of the local electorate, so long as that electorate does not insist on discriminatory rules being put into place. This results in a diversity of rules between the states[50] and the creation of a space for states to experiment so that other states – and even the federal government – can learn from the experience without incurring the risks that might result from a nationwide experiment.

The weakness of the discrimination approach lies in the fact that non-discriminatory national rules are not subject to "federal" challenge even when they interfere with a trader's ability to provide services or goods. So the (non-discriminatory) transfer fees in *Bosman*[51] would remain on the rule book as would the (non-discriminatory) rule in *Commission* v. *Greece (opticians)*[52] that qualified opticians could operate not a chain but only one optician's shop in Greece. The desire to attain a fully unified market will therefore always be frustrated so long as the discrimination model is in place.

The discrimination approach also suffers from both technical and conceptual disadvantages. The technical drawbacks concern identifying the comparator. The model is premised on the fact that migrants and nationals are similarly situated when, by definition, they are not.[53] Even if this intellectual hurdle can be surmounted, the choice of

[48] *Ibid*, 734.

[49] For a general discussion of this provision see, in particular, J. Temple Lang, "The Duties of National Authorities under Community Constitutional Law" (1998) 23 E. L Rev. 109 and "Community Constitutional Law: Article 5 [10] EEC" (1990) 27 C.M.L.R. 645.

[50] N. Bernard, "Discrimination and Free Movement in EC Law" (1996) 45 I.C.L.Q. 82, 103.

[51] Case C-415/93 *Union Royale Belge de Société de Football Association* v. *Bosman* [1995] E.C.R. I-4921.

[52] Case C-140/03 *Commission* v. *Greece (opticians)* [2005] E.C.R I-3177.

[53] For a well-known discussion of this argument in the context of sex and race discrimination law, see P. Westen, "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537. In the context of free movement, see D. Wilsher, "Does *Keck* Discrimination make any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market" (2008) 33 E. L. Rev. 3.

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comparator is not always obvious and may be determinative of the outcome.[54] Even identifying the type of discrimination at issue is not straightforward.[55] For example, is a residence requirement imposed on a service provider a directly or indirectly discriminatory rule?[56]

Whatever its problems, it is the discrimination approach which has dominated the US Supreme Court's jurisprudence under the Dormant Commerce Clause and it is to this that we shall now turn.

B. The US Supreme Court and the Discrimination Approach

Federal intervention into state laws starts from a weaker base in the US than in the EU. While the EC Treaty contains provisions which expressly provide the basis for ECJ intervening in national systems (*e.g.* Articles 28, 29, 90, 39, 43, 49 and 56), no express equivalent exists in the US. Article 1, section 8, clause 3 of the US Constitution merely provides:

> The Congress shall have Power … to regulate Commerce with foreign Nations, and among the several States …

This "Commerce Clause" gives the federal government the power to *legislate* in respect of commerce (very broadly defined); it does not prohibit state-created restrictions on inter-state commerce.[57] However, "by interpreting 'these great silences of the Constitution' … the Supreme Court has limited the scope of what the state might do".[58] In other words, the Supreme Court has long[59] read into the commerce

[54] See *e.g.* Case 270/83 *Commission* v. *France (tax credits)* [1986] E.C.R 273. France granted tax credits to shareholders receiving dividends from a company with a registered office in France but not to those with only a branch or agency in France (and a registered office in another Member State). By applying the principle of equal treatment to this situation the Court required the French tax system to treat a branch or agency having no legal personality in the same way as a company registered in France. If, as Banks notes (K. Banks, "The application of the fundamental freedoms to Member State tax measures: guarding against protectionism or second-guessing national policy choices" (2008) 33 ELRev. 482, 488) the Court had selected the treatment of a branch or agency of a nationally based company as the appropriate comparator, the outcome might have been different.

[55] For a US example, see *Camps Newfound/Owatonna Inc.* v. *Town of Harrison* 117 S.Ct 1590 (1997) discussed in C. O'Grady, "Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause" (1997) 34 San Diego L. Rev. 571, 589–591.

[56] *Cf.* Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda* v. *Commissariaat voor de Media* [1991] E.C.R I-4007 (discrimination based on the fact that the service provider is established in another Member State is direct discrimination) *cf.* Case 39/75 *Coenen* v. *The Sociaal-Economische Raad* [1975] E.C.R 1547 (when the national rule is drafted in terms of requiring a service provider to be established and/or to have a residence in the host State this is indirectly discriminatory on the ground of nationality). See Case C-237/94 *O'Flynn* [1996] E.C.R. I-2617 para. 18 for a very broad definition of indirect discrimination.

[57] The Constitution does, however, explicitly limit interference with *foreign* commerce: Art. 1 section 10, cl.2.

[58] Tribe, above n.46, 1029 citing *HP Hood & Sons Inc* v. *Du Mond* 336 US 525, 535 (1949).

[59] *Gibbons* v. *Ogden* 22 US (9 Wheat.) 1 (1824); *cf.* Tribe, above n.46, 1030 citing *Colley* v. *Board of Wardens* 53 US (12 How) 299, 318 (1852).

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clause the negative power (the so-called "dormant"[60] or "negative"[61] commerce clause) to restrict "permissible state regulation of interstate commerce",[62] albeit that some Supreme Court justices, notably Justice Scalia[63] and increasingly Justice Thomas,[64] remain deeply suspicious about the implication of such a broad, and, in their view, illegitimate prohibition into the Constitution. Nevertheless, they remain in the minority on this point and most commentators accept that the US Supreme Court has developed a two-tiered framework of analysis of state laws under the dormant commerce clause: (1) the discrimination tier and (2) the non-discrimination tier. We shall examine these in turn.

1. The Discriminatory Tier

The discriminatory tier is, in fact, divided in two:[65] facially discriminatory measures and measures discriminatory in (practical) effect. *Facially discriminatory* (*i.e.* directly discriminatory) statutes are subject to a "strict scrutiny" review[66] which means the court checks whether the statute serves "a legitimate local purpose" *and*[67] whether there is an "absence of non-discriminatory alternatives".[68] In

[60] See *e.g. United Haulers Association, Inc* v. *Oneida-Herkimer Solid Waste Management Authority et al.* 127 S.Ct 1786, 1792–3.

[61] This usage is adopted by those who oppose its existence: see *e.g.* Scalia J's dissent in *Wyoming* v, *Oklahoma* 502 US 437, 461.

[62] *Wyoming* v. *Oklahoma* 502 US 437, 454–55.

[63] His approach is based on "textualism and originalism": S. Sachse, "United we Stand – but for How Long? Justice Scalia and New Developments of the Dormant Commerce Clause" (1999) 43 St. Louis U. L. J. 695, 703 citing Scalia J's remarks in *Tyler Pipe Indus.* v. *Washington State Dept. of Revenue* 483 US 232, 263 (1987), "historical record provides no grounds for reading the Commerce Clause to be other than what it says – an authorization for Congress to regulate commerce." See also the analysis of Justice Scalia's contribution in D. Day, "The Rehnquist Court and the Dormant Commerce Clause: The Unsettling of 'Well Settled Principles'" (1990–1) 22 U. Tol. L. Rev. 675. Chief Justice Rehnquist himself has also shown some support for their concerns: *Kassel* v. *Consolidated Freightways* 450 US 662, 689–90 (1981), considered below n.92. See also J. Chen, "A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause" (2003–4) 88 Minn. L. Rev.1764, 1767–8.

[64] Sachse, above n.63, 708. See especially *Camps Newfound/Owatonna Inc.* v. *Town of Harrison* 117 S.Ct 1590 (1997).

[65] J. Larsen, "Discrimination in the Dormant Commerce Clause" (2003–4) 49 S. D. L. Rev. 844, 859 suggests that there might be a third category – purposeful discrimination (*i.e.* the situation where the purpose behind the statute is discriminatory, citing *Kassel* v. *Consolidated Freightways Corp.* 450 US 662, 678–79 although *cf.* discussion below at n.92ff but she admits that it is less used because it is difficult to find evidence of purpose or motive.

[66] *Hughes* v. *Oklahoma*, 441 US 322, 337 (1979), 337. Discrimination under the dormant commerce clause nevertheless attracts a less demanding strict scrutiny test than under the Equal Protection and Due Process doctrines: *Grutter* v. *Bollinger* 123 S.Ct 2325, 2336 (2003) (equal protection) and *Reno* v. *Flores* 507 US 292, 302 (1993) (due process) both of which require a "compelling state interest" and that the statute be "narrowly tailored" to promote that government interest: J. Larsen, above n.65, 850.

[67] Both limbs are required: *City of Philadelphia* v. *New Jersey*, 437 US 617, 626 (1978) because "the evil of protectionism can reside in legislative means as well as legislative ends".

[68] *Chemical Waste Management Inc* v. *Hunt* 504 US 334, 342–3 (1992) (higher fee for disposal of out-of-state waste than in-state waste). See also *New Energy Company of Indiana* v. *Limbach* 486 US 269.

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practice, it is extremely rare[69] for any state legislation to satisfy this hurdle[70] so that the Supreme Court sometimes says that facially discriminatory rules are subject to a virtually *per se* rule of invalidity,[71] especially when economic protectionism is involved.[72]

Statutes which are *discriminatory in effect* (or "discriminatory impact") are also subject to strict scrutiny review, albeit of a somewhat more relaxed standard.[73]

2. The Non-discrimination Tier

In respect of so-called non-discriminatory rules the Supreme Court generally says that it adopts a balancing approach. The balancing test is set out in the now classic statement by Justice Stewart for a unanimous court in *Pike* v. *Bruce Church*:[74]

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless* the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. … If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach to resolve these issues.[75]

[69] One, possibly the only, example is *Maine* v. *Taylor* 477 US 131 (1986) where the Supreme Court upheld a law which prohibited the import of live baitfish to protect the state's waters from foreign species and parasites which may have affected the native population. As with the ECJ in Case C-67/97 *Bluhme* [1998] E.C.R I-8033, the Supreme Court upheld the state interest in protecting the environment from non-native species as legitimate and found no less discriminatory alternatives (but *cf.* Stevens J's dissent).

[70] *West Lynn Creamery Inc* v. *Healy*, 512 US 186, 192 (1984) "state statutes that clearly discriminate against interstate commerce are routinely struck down … unless discrimination is demonstrably justified by a valid factor unrelated to economic protectionism".

[71] *Oregon Waste Systems Inc* v. *Dept of Environmental Quality*, 511 US 93, 99 (1994) "if a restriction on commerce is discriminatory, it is virtually per se invalid", repeated more recently in *Granholm* v. *Heald* 544 US 460, 476 (2005).

[72] *Wyoming* v. *Oklahoma* 502 US 437, 454–5 (1992). See O'Grady, above n.55, 571 who strongly advocates a protectionist reading of the dormant commerce clause rather than a discriminatory one. See also C. Hilson, "Discrimination in Community Free Movement Law" (1999) 24 E.L. Rev. 445.

[73] *Dean Milk* v *Madison* 340 US 349 (1951). See also *Wyoming* v. *Oklahoma* 502 US 437 requiring Oklahoma coal fired electric generating plants producing power for sale in Oklahoma to burn a mix of coal containing at least 10% Oklahoma mined coal. The US Supreme Court said the Act discriminated both on its face and practical effect and could not be justified.

[74] *Pike* v. *Bruce Church Inc* 397 US 137 (1970) discussed in G. Haibach, "The Interpretation of Article 30 of the EC Treaty and the 'Dormant' Commerce Clause by the European Court of Justice and the US Supreme Court" (1999) 48 I.C.L.Q. 155, 163.

[75] Emphasis added. In respect of taxation cases, the Supreme Court in *Complete Auto Transit* v. *Brady* 430 US 274 (1977) laid down a four pronged test to evaluate state taxes (at p.279): the Court will "sustain a tax against Commerce clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State".

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There is much controversy over the meaning of this test. Blasi suggests that it embodies three threshold requirements: the measure must be (1) non-discriminatory (*i.e.* it regulates "even-handedly"); (2) it effectuates a legitimate local purpose; and (3) its effects on inter-state trade are only incidental.[76] If these conditions are satisfied the state measure is lawful and so no balancing needs to be undertaken. Therefore, he says that "the real bite in the *Pike* standard may lie in the threshold considerations, not the balancing formula". Yet for Day the emphasis is on the later components listed in *Pike* and the balancing contained therein, namely: (1) the burden imposed on commerce; (2) putative local benefits; and (3) whether the local interest could be promoted as well with a lesser impact on interstate activities.[77]

The uncertainty generated by the *Pike* formula is exacerbated by the fact that, as Regan argues in his seminal article on the Dormant Commerce Clause, most of the cases cited as examples of balancing, including *Pike* itself,[78] in fact concern "purposeful economic protectionism"[79] to which the rules on discrimination outlined above apply (presumption of illegality, justified only exceptionally).

Assuming *Pike* does genuinely embody a balancing test, the Supreme Court's approach appears to resonate with the methodology used by the ECJ in free movement cases like *Cassis*[80] and *Säger*[81]: (1) putative local benefits = mandatory/public interest requirement; (2) lesser impact on interstate activities = proportionality. However, there is a key difference between the Supreme Court and the ECJ's approach to balancing.[82] In *Cassis*, as (re)interpreted,[83] the ECJ starts with the

[76] V. Blasi, "Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce" in T. Sandalow and E. Stein, *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford 1982), 186–7. See also L. Henkin, "Infallibility under Law: Constitutional Balancing" (1978) 78 Columb. L. Rev. 1022, 1040.

[77] D. Day, "Revisiting *Pike.* The Origins of the Non-Discrimination Tier of the Dormant Commerce Clause" (2004) 27 Hamline L. Rev. 46, 56.

[78] The facts of *Pike* do not seem to support a finding of non-discrimination: Arizona state officials could refuse to allow fruit and vegetables to be taken out of the state for packaging. However, the outcome of unconstitutionality would have been the same in the EU: the Supreme Court found that the state interest in preserving the reputation of local products by ensuring they were not sold in substandard packaging was "minimal at best" and was outweighed by the burden on inter-state commerce.

[79] D. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1985) 84 Mich. L. Rev. 1091. He argues that the Court rightly has been exclusively concerned with preventing states from engaging in purposeful economic protectionism, which he defines to mean (1) the statute was adopted for the purpose of improving the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors; and (2) the statute is analogous in form to the traditional instruments of protectionism (the tariff, quota or embargo).

[80] Case 120/78 *Cassis de Dijon* [1979] E.C.R 649.

[81] Case C-76/90 [1991] E.C.R. I-4221.

[82] *Cf.* D. Geradin, "Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the Court of Justice" (1993) 2 J. Transnat'l L. & Policy 141, 191, citing Case 302/86 *Commission* v *Denmark* [1988] E.C.R 4607, 4629.

[83] It used to be thought that the mandatory requirements and Art. 30 derogations operated differently. If a national measure could be justified by a mandatory requirement then it did not

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presumption that the national regulation is unlawful. Only if the defendant can show the existence of a mandatory requirement and that the measure is proportionate will the measure be considered lawful. By contrast, the starting point of the US approach is the *legality* of the state regulation. As *Pike* puts it, an even-handed national rule will be upheld *unless* the burden imposed on such commerce is clearly excessive in relation to the putative local benefit. Where the claimant does manage to show that the burden imposed on inter-state commerce is clearly excessive then balancing must occur. However, we can see a further difference between the US and the EU approaches: *Pike* suggests that the balance occurs before the finding of illegality. This means that in the US the courts undertake a more genuine balance between the competing interests (*e.g.* economic and social), thereby avoiding the possibility of one policy interest (economic) immediately taking priority over the other, as happened in *Viking* and *Laval*. I will return to this point in Section V.

In this section I want to focus on the presumption of legality of the state rule. This point was emphasised in *Breard* v. *Alexandria*[84] where the Supreme Court upheld a ban on door-to-door selling without prior agreement of the householder. Having noted that the rule was non-discriminatory ("regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason"[85]), the Court concluded that "When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court, because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana".[86] In *Huron Portland Cement Co* v. *Detroit*[87] the Supreme Court dispensed altogether with the need for a balancing test. In upholding Detroit's Smoke Abatement Code, which set maximum limits on the amount of smoke that could be emitted into the atmosphere. The Supreme Court said that the "burden on interstate commerce needs no extended discussion".[88]

The general insulation of non-discriminatory national laws from attack under the Commerce Clause is important to maintaining the

breach Art. 28. This comes closer to a genuine balancing. If, on the other hand, the national measures could not be justified then there was a breach of Art. 28 and the Member State could in principle have recourse to the derogations in Art. 30 (see, *e.g.* Case 25/88 *Criminal Proceedings against Bouchara* [1989] E.C.R 1105, para. [11], and Case 298/87 *Smanor* [1988] E.C.R 4489, para. [15]). However, the Court no longer makes the distinction between mandatory requirements and Art. 30 derogations, simply saying that once a breach can be established, the national measure can be justified under both Art. 30 and the mandatory requirements (see *e.g.* Joined Cases C-34-36/95 *De Agostini* [1997] E.C.R I-3843, para.45).

[84] 341 US 622 (1951). cf in the EU context Case 382/87 *Buet* [1989] E.C.R 1235.

[85] *Ibid*, 638.

[86] *Ibid*, 641.

[87] 362 US 440 (1960).

[88] *Ibid*, 448.

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integrity of a federal system. As the US Supreme Court put it in *Huron Portland Cement*[89] "it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce, ... never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country".[90]

The willingness to uphold the constitutionality of non-discriminatory state rules without engaging in any form of balancing can be explained in part by the fact that some justices "abhor" the balancing test because, as Justice Scalia put it, the test allows judges limitless discretion.[91] In his dissent in *Kassel* v. *Consolidated Freightways*,[92] Justice Rehnquist, with whom Chief Justice Burger and Justice Stewart joined, complained that the balancing approach "arrogate[s] to this Court functions of forming public policy, functions which, in the absence of Congressional action, were left by the Framers of the Constitution to state legislatures".[93] They preferred a test which required that state interests be "demonstrably trivial while the burden on commerce is great"[94] before declaring a state measure unconstitutional.

Kassel concerned an Iowa law prohibiting the use of double-trailer trucks within the state, with the result that larger trucks had to drive greater distances to bypass Iowa. The majority (Powell, White, Blackmun and Stevens) found, under the balancing test,[95] that the state's arguments based on safety were illusory and that the Iowa law "substantially burdens interstate commerce".[96] However, Justices Brennan and Marshall, while concurring with the majority on the result and paying lip-service to the balancing test, in fact advocated a "rational purpose" test, a lighter form of review. They said "the only relevant evidence concerns whether the lawmakers could rationally have

[89] 362 US 440, 443–4 (1960).
[90] See also *Southern Pacific* v. *Arizona* 325 US 761, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it".
[91] Sachse, n.63, above, 704, citing *Morrison* v. *Olson* 487 US 654 (1988). See also Justice Scalia's views in *CTS Corporation* v. *Dynamic Corporation of America* 481 US 69, 95 (1987) *Pike*-style balancing is "ill-suited to the judicial function and should be undertaken rarely, if at all". In *Benedix Autolite Corp.* v. *Midwesco Enterprises* 486 US 888, 897 (1988) he said "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy". All he would require is that "the state regulation does not facially discriminate against inter-state commerce": *American Trucking Associations Inc* v. *Scheiner* 483 US 266, 304.
[92] 450 US 662 (1981).
[93] *Ibid*, 691.
[94] *Ibid*, 692.
[95] *Ibid*, 670–1.
[96] *Ibid*, 673.

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believed that the challenged regulation would foster those purposes [the lawmakers had for maintaining the regulation]".[97] This approach was also adopted by the US Court of Appeals 7th Circuit's decision in *Proctor & Gamble* v. *Chicago*,[98] which concerned a Chicago ordinance banning the use of detergents containing phosphates.[99] The Court said:[100]

> It is our view, however, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof. If it is determined that this presumption should be applied, no further balancing need by undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional.

Despite the multiplicity of approaches which fall under the umbrella of "balancing", it is two aspects of the Supreme Court's approach to non-discriminatory rules that I want to rely on in Section V to argue (1) that non-discriminatory EC rules which have only an incidental effect on free movement should also benefit from a presumption of legality; and (2) those that do have a substantial effect on free movement should be subject to a more genuine balancing. Before reaching this point, I want to consider the ECJ's current approach to its free movement case law which, as I will suggest, is currently based on a "high impact" approach to federal intervention.

IV. The High Impact Approach

A. Introduction

The high impact approach requires intense intervention by the federal authorities. All state rules which affect inter-state trade constitute a barrier or obstacle to "market access" or a "restriction" on free movement and so are presumptively unlawful; the burden rests on the state to justify the continued existence of the rule and to show it is proportionate. So, returning to the example of the minimum wage, the very existence of a law on the minimum wage could be challenged by employers or workers as a "restriction" on their ability to access the host state's market since, although non-discriminatory (and so any challenge would fail under the non-discrimination test), minimum wage

[97] *Ibid*, 680–1.
[98] 509 F.2d 69 (7th circ).
[99] *Ibid*, 72.
[100] *Ibid*, 76, emphasis added.

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legislation nevertheless interferes with the freedom of migrants to sell their services for less than the statutory minimum.[101]

The advantage of the high impact approach is that almost all state rules affecting inter-state trade can be challenged and thus need justifying by the state. This technique is therefore an effective way of removing decades of accumulated regulation which impedes the creation of a unified market. The disadvantage of this approach is that it is strongly deregulatory: the working presumption is that such national rules are unlawful unless justified and often it is hard for states to justify their legislation. And, if the national rules are struck down, it is only rarely that they are re-enacted at the federal level. This risks creating what Advocate General Tizzano describes as "a market without rules",[102] thereby threatening the legitimacy of both the federal system (what right has the federal government to intervene in decisions taken by democratically elected state governments?) and the state government (why should the state bother to regulate and thus to experiment when its rules are likely to be found contrary to federal law?).

The legal tool most closely associated with achieving the high impact is the controversial "market access" or "restrictions/obstacles" approach. This is the approach which has taken firm hold in the EU.

B. The ECJ and the Market Access Approach

1. Introduction

Although the original Treaty provisions, particularly those on persons, services and capital, suggested that the Treaty was underpinned by a prohibition against discrimination,[103] in fact, since *Säger*,[104] the "market access" or "restrictions" approach has been in the ascendancy. In *Säger* the Court said that Article 49 required "*not only* the elimination of all discrimination against a person providing services on the ground of his nationality *but also* the abolition of any *restriction*, even if it applies

[101] *Cf.* Case 167/73 *Commission* v. *France* [1974] E.C.R 353, paras. [44] and [45] "Article [39 (2)] entails the abolition of any discrimination based on nationality … the absolute nature of this prohibition, moreover, has the effect of not only allowing in each state equal access to employment to the nationals of other member states, but also … of guaranteeing to the state's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other member states of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited.

[102] Case C-442/02 *Caixa-Bank* v. *Ministère de l'Économie, des Finances et de l'Industrie* [2004] E.C.R. I-8961, para. [63].

[103] See *e.g.* Article 39(2) provides that freedom of movement of workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States"; Article 43(2) talks of freedom of establishment which occurs "under the conditions laid down for its own nationals by the law of the country where such establishment is effected"; Article 50(2) provides that the person providing a service may temporarily pursue his activity in the host state "under the same conditions as are imposed by the State on its own nationals". In the field of tax, Art. 90(1) is also drafted in the language of discrimination: "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."

[104] Case C-76/90 [1991] E.C.R I-4221, para. [12], emphasis added.

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without distinction to national providers of services and to those of other Member States, when *it is liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services". The Court continued that any such "restriction",[105] could be justified by imperative reasons relating to the public interest.[106] Despite controversy as to whether it was appropriate to apply this test beyond the field of services,[107] the Court has nevertheless done so: to the free movement of workers,[108] freedom of establishment,[109] free movement of capital,[110] and free movement of citizens.[111]

This market access approach also appears to be the driving force behind the earlier cases on free movement of goods such as *Dassonville* ("All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade")[112] and the principle of mutual recognition in *Cassis de Dijon*:[113] goods lawfully produced in one Member State should presumptively have free and unrestricted access to the market in another Member State. Although *Keck* appeared to send a strong message that the market access approach was being curtailed, at least in respect of national rules regulating certain selling arrangements, the test has recently received strong support from the ECJ in *Commission* v. *Italy (trailers)*.[114] There the Court identified three situations where a rule could be considered a measure having equivalent effect to a quantitative restriction and so breach Article 28: (1) measures adopted by a Member State the object[115] or effect[116] of which is to treat products

[105] The "restriction" or "obstacle" language is also reflected in the Treaty *e.g.* Articles 43 and 49 EC and the original Article 67 EEC talk not only of discrimination but of the progressive abolition of "restrictions" on free movement. Further, Article 3(c) EEC referred to "the abolition, as between Member States, of obstacles to freedom of movement for persons services and capital". The language of restrictions also pervades the free movement of goods. Articles 28 and 29 EC prohibit "Quantitative *restrictions"* on imports and exports and all measures having equivalent effect. Unlike the Treaty provisions on persons and capital, no reference is made to discrimination in these Treaty provisions.

[106] Para. [15].

[107] See *e.g.* L. Daniele, "Non-discriminatory Restrictions to the Free Movement of Persons" (1997) 22 E. L. Rev. 191.

[108] Case C-464/02 *Commission* v. *Denmark (company vehicles)* [2005] E.C.R I-7929, para. [45] (emphasis added).

[109] Case C-19/92 *Kraus* [1993] E.C.R I-1663, para. [32]; Case C-55/94 *Gebhard* [1995] E.C.R I-4165, para. [37].

[110] Case C-367/98 *Commission* v. *Portugal* [2002] E.C.R I-4731, paras [44–5].

[111] Case C-192/05 *Tas-Hagen* v. *Raadskamer WUBO van de Pensioen- en Uitkeringsrad* [2006] E.C.R I-10451, paras. 30–31.

[112] Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] E.C.R 837, para. [5], emphasis added.

[113] Case 120/78 *Rewe Zentrale* v. *Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")* [1979] E.C.R 649.

[114] Case C-110/05 *Commission* v. *Italy (trailers)* [2009] E.C.R I-000, para. [37].

[115] Eg Case 4/75 *Rewe-Zentralfinanz GmbH* v. *Landwirtschaftskammer* [1975] E.C.R. 843, (phytosanitary inspections of imported apples to control the spread of the apple disease San José scale breached Article 28).

[116] *E.g.* Case 45/87 *Commission* v. *Ireland (Dundalk Water)* [1988] E.C.R. 4929.

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coming from other Member States less favourably; (2) indistinctly applicable product requirements;[117] and (3) "*Any other measure* which hinders access of products originating in other Member States to the market of a Member State". While the first two limbs reflect a discrimination approach, the third limb contains a renewed commitment to the market access approach. It was this third limb that the Court relied on in *Trailers* where the Court said that "a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State".[118]

2. The Market Access Approach and the Problems it has Generated

(a) What is meant by market access?

While the "market access" test gives EC law broad supervisory power over national law, the problem is that it is based on an "inherently nebulous"[119] idea. Spaventa offers three possible interpretations.[120] The first, and narrowest, is that barriers to market access are those created by circumstances or legislation that make it "more costly for new firms to enter an industry".[121] There is some overlap between this approach and the discrimination model if it is construed to mean that the out-of-state trader has to incur greater costs than the in-state trader to gain access to the host state's market.

The second, and much broader, approach to market access is that "*any* regulation can be seen as a potential barrier to access, since *any* regulation imposes and implies compliance costs". This version of the market access approach comes close to allowing the complainant to object to the very existence of the national rule. This seems to be the view of the Court in the golden share case, *Commission* v. *UK (British Airports Authority (BAA))*.[122] BAA's Articles of Association prevented any person (other than a permitted person) from acquiring BAA shares carrying the right to more than 15% of the equity in BAA. The Court said that "Rules which limit the acquisition of

[117] This is the classic *Cassis de Dijon* situation concerning host state rules relating to designation, form, size, weight, composition, presentation, labelling, packaging Joined Cases C-267 & 268/91 *Keck* [1993] E.C.R. I-6097, para. [15].

[118] Para. [56]. The test has passionate supporters among the AGs: *e.g.* AG Bot in Case C-110/05 *Commission* v. *Italy* [2009] E.C.R I-000, para. [136]. See also AG Geelhoed in Case C-239/02 *Douwe Egberts NV* v. *Westrom Pharma NV* [2004] E.C.R. I-7007, para. [72].

[119] P. Oliver and S. Enchelmaier, "Free Movement of Goods: Recent Developments in the Case Law" (2007) 44 C.M.L.Rev. 649, 674.

[120] "Fron *Gebhard* to *Carpenter*: towards a (non-)economic European Constitution" (2004) 41 C.M.LRev. 743, 757–8. See also C. Barnard and S. Deakin, "Market Access and Regulatory Competition", in C. Barnard and J. Scott (eds.), *The Legal Foundations of the Single Market: Unpacking the Premises*, (Oxford 2002).

[121] Citing F.E. Foldvary, *Dictionary of Free Market Economics*, (Cheltenham 1998), 48.

[122] Case C-98/01 *Commission* v. *UK* [2003] E.C.R I-4641.

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shareholdings … constitute a restriction on the free movement of capital".[123] The Court added that although the restrictions were non-discriminatory "they affect the position of a person acquiring a shareholding as such and are thus liable to *deter* investors from other Member States from making such investments and, consequently, affect access to the market".[124] The answer to the question "What is the deterrence?" is presumably the very existence of the rule: had the rule not existed there would have been no breach. If this analysis is correct then it could be argued that rules laying down, say, a minimum school leaving age or a minimum age at which a person can drive a car or drink alcohol are liable to deter young people from exercising their rights of free movement. This very broad approach to a "restriction", as the UK warned in *BAA* itself, would lead to a repetition of the problems generated by *Dassonville* which the Court was forced to correct in *Keck*.[125] Nevertheless, the Court persisted with its "market access" jurisprudence.

The third approach is what Spaventa describes as "intuitive": rules which the Court intuitively feels interfere with intra-Community trade should be subject to judicial scrutiny while rules considered neutral as regards intra-Community trade should not.[126] Snell thinks this is the approach which predominates in the Court's case law. He argues that the notion of market access conceals rather than clarifies.[127] He says that the term covers a range of situations including discrimination against free movers or free movement,[128] substantial or direct obstacles to trade or free movement,[129] and substantial reductions in profitability.[130] He concludes "As the term lacks a clear content, the Court may use it freely either to approve or to condemn measures that it happens to like or dislike. Market access may simply provide a sophisticated-sounding garb that conceals decisions based on intuition."[131]

Laval[132] provides a good example of the Court's intuitive approach. The case concerned a Latvian company, which won a contract to

[123] Para. [44].
[124] Para. [47], emphasis added.
[125] Para. [28].
[126] See also A. Rosas, "*Dassonville* and *Cassis de Dijon*" 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 Rome Treaty* (Oxford 2009 forthcoming): "According to a somewhat cynical view, the circumstances of each case lead to a certain solution 'by instinct', which implies that the Court would by and large have arrived at the same result regardless of the conceptual tools chosen'.
[127] J. Snell, "The Notion of Market Access: A Concept or a Slogan?", paper delivered at CELS/UCL seminar on June 30 and July 1, 2009 on "The regulation of trade in services: trust, distrust and economic integration."
[128] See *e.g.* Advocate General Poiares Maduro in Case C-446/03 *Marks & Spencer* v. *Halsey* [2005] E.C.R. I-10837, para. [37] where he said national policies "must not result in less favourable treatment being accorded to transnational situations than to purely national situations".
[129] Case C-518/06 *Commission* v. *Italy (Motor Insurance)* [2009] E.C.R. I-000.
[130] *Cf.* Case C-518/06 *Commission* v. *Italy (Motor Insurance)* [2009] E.C.R. I-000 with Joined Cases C-544/03 and C-545/03 *Mobistar SA* v. *Commune de Fleron* [2005] E.C.R. I-7723.
[131] Snell, above n.127.
[132] Case C-341/05 *Laval un Partneri Ltd* [2007] E.C.R I-11767.

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refurbish a school in Sweden using its own Latvian workers. It faced ruinous industrial action by the Swedish trade unions when it refused to apply Swedish collectively agreed terms and conditions. Although the industrial action was permissible under Swedish law, Laval brought proceedings in the Swedish labour court claiming that the industrial action was contrary to Article 49 EC. The Court said "the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector … is *liable to make it less attractive, or more difficult*, for such undertakings to carry out construction work in Sweden, and therefore constitutes a *restriction* on the freedom to provide services within the meaning of Article 49 EC".[133]

But how, precisely, did the collective action impose costs which made it "more difficult" or "less attractive" for Laval to operate in Sweden? Deakin suggests that one answer might be "more difficult" in relation to the situation which would have prevailed had Latvian law and/or Latvian collective agreements applied".[134] If this is correct, it means that the effect of the restrictions analysis is to enable service providers to export their home country laws and have them applied extra-territorially. Another answer may be intuition: Laval was a Latvian company and it was having difficulty fulfilling a contract which it had legitimately won, largely due to its cheaper labour costs. The Swedish strike action therefore prevented it from doing the very thing that EU accession had promised to the new Member States, namely free access to the markets in services in other Member States; and that was enough to trigger Article 49.

But if the effect of *Laval* is to allow challenges to host state rules which differ from those which apply at home this suggests that a mere difference between the rules of two states is sufficient to constitute a restriction on free movement, an understanding that the Court has rejected in the past.[135] However, following *Laval* there is no reason why German tourists cannot now argue that the requirement of having to drive on the left hinders their free movement since British rules are different to those in Germany. Here, the Court's "intuition" might lead it to find that such rules are in fact neutral as regards intra-Community movement and so should not breach Community law.

This might explain why in *Burbaud*[136] the Court said that the requirement of passing an exam in order to take up a post in the public service could not "in itself be regarded as an obstacle" to free

[133] Para. [99], emphasis added.
[134] "Regulatory competition after *Laval*" (2007–8) 10 C.Y.E.L.S. 581, 585–7.
[135] Case C-177/94 *Criminal Proceedings against Gianfranco Perfili, civil party: Lloyd's of London* [1996] E.C.R. I-161, para. [17]; Case C-384/93 *Alpine Investments BV* v. *Minister van Financiën* [1995] E.C.R. I-1141, para. [27].
[136] Case C-285/01 *Burbaud* v. *Ministère de l"Emploi et de la Solidarité* [2003] E.C.R I-8219.

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movement.[137] Similarly, in *Deliège*[138] the Court said that, although selection rules for an international sports competition inevitably had the effect of limiting the number of participants in a tournament, such a limitation was inherent in the conduct of an international high-level sports event. Such rules therefore could not in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 49.[139] In *Graf*[140] the Court went further and equipped itself with a more substantive tool for rejecting cases whose effect on free movement it intuitively felt was insufficient. The case concerned an argument run by a former employee that, by resigning from a job, he lost his chance of claiming compensation when the employer dismissed him, and this breached Article 39. However, the Court said that the loss of a chance of being dismissed was "too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder free movement for workers"[141] and so there was no breach of Article 39.

These cases are, however, the exceptions, not the rule, and generally the Court, almost unthinkingly, applies the market access approach to most rules which come before it.[142] In more recent cases the Court tends to favour the language of "restrictions" or "obstacles"[143]

[137] Para. [96]. To emphasize the point, the Court said that inasmuch as all new jobs are subject to a recruitment procedure, the requirement of passing a recruitment competition could not "in itself be liable to dissuade candidates who have already sat a similar competition in another Member State from exercising their right to freedom of movement as workers" (para. [97]).

[138] Joined Cases C-51/96 & C-191/97 *Deliège* v. *Ligue Francophone de Judo et Disciplines Associés* [2000] E.C.R I-2549, para. [64].

[139] Para. [64]. It was also unsuccessfully argued in *Deliège* that judo was not an economic activity and so Community law did not apply. This argument has successfully been used in the past to exclude the application of Community law: Case 344/87 *Bettray* v. *Staatssecretaris van Justitie* [1989] E.C.R 1621, para. [17].

[140] Case C-190/98 *Graf* v. *Filzmozer Maschinenbau GmbH* [2000] E.C.R I-493. See C. Costello, "Market Access All Areas – the Treatment of Non-discriminatory Barriers to the Free Movement of Workers" (2000) 29 L.I.E.I. 267.

[141] Para. [25]. The Court applied the same test in Joined Cases C-418/93 to C-421/93 and C-460/93-C-464/93, C-9/94 to C-15/94, *Semeraro Casa Uno Srl and others* [1996] E.C.R I-1683, para. [32] concerning Art. 43. In Case C-212/06 *Government of the French Community and Walloon Government* v. *Flemish Government* [2008] E.C.R I-1683 AG Sharpston supported this approach (paras. [55–6]): "A national measure can potentially constitute a prohibited obstacle even if it is non-discriminatory. However, in order actually to constitute an obstacle, such provision must affect access of workers to the labour market *and* their effect on freedom of movement must not be too indirect and uncertain." On the facts, the Court found that the restrictive effects of the Flemish legislation – which confined affiliation to a care insurance scheme to those residing in the Dutch speaking region of Belgium and the bilingual speaking region of Brussels – were not "too indirect and uncertain for it to be impossible to regard that legislation as constituting an obstacle contrary to Articles 43 and 49" (para. [51]).

[142] The Court particularly uses the term "restrictions" in the establishment cases (*e.g.* Case C-250/95 *Futura Participations SA* [1997] E.C.R I-2471; Case C-446/03 *Marks & Spencer's* v. *Halsey* [2005] E.C.R I-10837, para. [34]) and the services cases (*e.g.* Case C-255/04 *Commission* v. *France (performing artists)* [2006] E.C.R I-5251, para. [38]). This reflects the language of the relevant Treaty provisions.

[143] The term "restrictions" or "obstacles" are synonymous: see *e.g.* Joined Cases C-388/04, C-359/04 and C-360/04 *Placanica* [2007] E.C.R. I-1891, para. [43]: "the restrictions imposed on intermediaries … constitute obstacles to the freedom of establishment". See also E. Johnson and

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rather than "market access",[144] especially in cases which are less obviously commercial,[145] but the terms are synonymous, a point the Court emphasised in *Commission* v. *Italy (motor insurance)*:[146] "the concept of *restriction* covers measures taken by a Member State which, although applicable without distinction, affect *access to the market* for undertakings from other Member States and thereby hinder intra-Community trade". In reaching this conclusion, the Court cited both *Alpine Investments*[147] and *Caixa-Bank*.[148] However, it was in *Caixa-Bank* that Advocate General Tizzano emphasised the risks associated with the Court's current pre-occupation with the "restrictions" approach. He said that "rather broad concept of restriction" in the case law covering all "national measures *liable* to hinder *or make less attractive the exercise of fundamental freedoms* guaranteed by the Treaty"[149] allows economic operators, both national and foreign, to abuse the Treaty to oppose any national measure that, solely because it regulated the conditions for pursuing an economic activity, could in the final analysis narrow profit margins and hence reduce the attractiveness of pursuing that particular economic activity.[150]

The risk of abuse lies in the fact that, in contrast to competition cases, there is a striking absence of analysis in the free movement cases of what that market is, the extent to which it has been screened off and whether there are other ways of gaining access to that market.[151] Rather, in most cases the Court contents itself with assertions, such as the one in *Bosman*, that the transfer fee rules, although non-discriminatory, still "directly affect players'" access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers".[152] Moreover, unlike competition cases, the

D. O'Keeffe, "From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994" (1994) 31 C.M.L.Rev. 1313.

144 A further disadvantage with the language of market *access* is that it risks downplaying the fact that rules which interfere with the *exercise* of a free movement right can have just as serious a consequence on free movement as the initial refusal of access, a fact the Court itself has recognized Case 197/84 *Steinhauser* v. *City of Biarritz* [1985] E.C.R. 1819. The Services Directive 2006/123 (OJ [2006] L376/26) addresses this problem by explicitly stating that the Directive applies to "requirements which affect access to *or* the exercise of a service activity" (9th Recital)).

145 See *e.g.* Case C-60/00 *Carpenter* [2002] E.C.R. I-6279.

146 Case C-518/06 *Commission* v. *Italy (motor insurance)* [2009] E.C.R I-000, para. [64].

147 Case C-384/93 *Alpine Investments BV* v. *Minister van Financiën* [1995] E.C.R. I-1141.

148 Case C-442/02 *Caixa-Bank* v. *Ministère de l'Économie, des Finances et de l'Industrie* [2004] E.C.R. I-8961.

149 Para. [39] (emphasis in the original) criticising, in particular, Case C-255/97 *Pfeiffer Grosshandel* [1999] E.C.R. I-2835.

150 Para. [62]. The Court itself acknowledged this in Case C-290/04 *FKP Scorpio* [2006] E.C.R. I-9461, [46] "the application of the host Member State's national rules to providers of services is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expense and additional administrative and economic burdens".

151 For criticism of the paucity of the Court's market access analysis, see E. Spaventa, Case note on Case C-442/02 *Caixa-Bank* (2005) 42 C.M.L.R. 1151. *Cf.* G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague 2003), 96–98 on the differences between the types of litigants in free movement and competition cases which necessitates a different approach to proof.

152 Case C-415/93 *Bosman* [1995] E.C.R I-4921, para. [103].

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market access test is not apparently subject to any *de minimis* or remoteness threshold,[153] despite the best efforts of certain Advocates Generals to introduce such a requirement.[154] This means that almost every national rule can be challenged because almost every rule has some effect on inter-state trade, even if that was never the intention of the rule and even though the effect on inter-state trade is very slight.[155]

(b) Justifications and Proportionality

An expansive reading of the Treaty provisions also means that the Court must then evaluate policy choices made by Member States in an ever-wider range of situations.[156] In the early goods cases, especially those concerning food, the ECJ confidently assessed the justifications put forward by the Member States – normally consumer protection and public health – and their proportionality. In these cases, Maduro argues, the Court was guided by the principle of majoritarianism: if a majority of Member States in the EU did not protect consumers in this way then the national law would not be upheld.[157] By relying on this

[153] See *e.g.* Case C-49/89 *Corsica Ferries* [1989] E.C.R. I-4441, para. [8]: "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited".

[154] Eg, Advocate General Cosmas said in Case C-134/94 *Esso Española SA* v. *Comunidad Autónoma de Canarias* [1995] E.C.R I-4223, para. [24] that there needs to be a "foreseeable restrictive effect on intra-Community trade" to breach Article 28. In the British courts, Walker LJ, as he then was, talked in *R. (on the application of Professional Contractors Group Ltd)* v. *Inland Revenue Commissioners* [2002] 1 C.M.L.R. 46 of a "direct and demonstrable inhibiting effect on the particular right which is asserted". He recognised that there was a need for some minimum standard otherwise "the UK Government would be in breach because of the poor state of this country's public transport infrastructure".

[155] There might be hints in the Court's case law that there is a sea-change in its approach. In Case C-353/06 *Grunkin-Paul* [2008] E.C.R I-000, paras. [23], [24] and [29] the Court talked of the "*serious* inconvenience" caused by a discrepancy in surnames which created an obstacle to free movement of citizens under Article 18(1). In Case C-110/05 *Commission* v. *Italy* (*Trailers)* [2009] E.C.R I-000, para. [56] the Court referred to the "*considerable* influence" that a prohibition on the use of a product has on the behaviour of consumers and in Case C-518/06 *Commission* v. *Italy (motor insurance)* [2009] E.C.R I-000, para. [66] the Court said that an obligation to contract constitutes a "substantial interference in the freedom of contract". In the context of positive integration, the Court has explicitly referred to a threshold criteria: Case C-376/98 *Germany* v. *Parliament and Council* [2000] E.C.R. I-8419, para. [107] "to interpret Articles 100a, 57(2) and 66 of the treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle … that the powers of the Community are those specifically conferred on it". See also H. Toner, "Non-discriminatory Obstacles to the Exercise of Treaty Rights – Articles 39, 43, 49, and 18 EC" (2004) 23 Y.E.L. 275, 285–6 who argues that there are two possible thresholds: direct *or* significant. If the obstacle is direct then its effect needs only be perceptible; if the measure is significant or substantial then the obstacle does not need to be direct.

[156] According to the orthodoxy, distinctly applicable rules breach the Treaty and can be saved only by the express derogations in the Treaty, and not the judicially developed mandatory (or public interest) requirements (Case 113/80 *Commission* v. *Ireland (Irish souvenirs)* [1981] E.C.R. 1625, para. [11]; Case 177/83 *Ringelhan* [1984] E.C.R. 3651, para. [19]) although this position is now changing (see *e.g.* Case C-54/05 *Commission* v. *Finland* [2007] E.C.R. I-2473 the Court permitted a Finnish requirement of import licences for vehicles, traditionally a distinctly applicable measure, to be justified by a road safety mandatory requirement).

[157] Above n. 21, 68, 72ff, citing cases such as Case 178/84 *Commission* v. *Germany* (*Beer Purity)* [1987] E.C.R 1227; Case 407/85 *3 Glocken* [1988] E.C.R 4233.

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majoritarianism approach, the Court avoided making significant policy judgments about national laws.

By contrast, more recent cases involving establishment and services have forced the Court to make complex policy assessments, often without being fully aware of the implications of the assessment it is making. Take the case of *Viking* as an example. There the Court found that the trade union's proposed strike action was a restriction on Viking's freedom of establishment. In their defence, the trade unions argued that the strike was justified in the name of worker protection, a position that the Court in principle accepted.[158] However, it then went on to curtail the circumstances in which that argument could be raised:

> [E]ven if that [industrial] action—aimed at protecting the *jobs and conditions of employment* of the members of that union *liable to be adversely affected* by the reflagging of the *Rosella*—could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.[159]

It also gave a narrow reading to the proportionality principle. When considering the necessity limb of the proportionality test, the Court said that industrial action should be the last resort; and that national courts would have to verify whether the union had exhausted all other avenues under Finnish law before the industrial action was found proportionate.

In reaching this conclusion the Court, apparently unwittingly, trampled over a range of social values. For example, it ignored the fact that the strike action was protected by the Finnish constitution; it seemed unaware that the criteria it prescribed for taking strike action (jobs and conditions of employment are under serious threat) limits the possibility of taking industrial action even in the UK where national laws are already strict; it certainly rules out political strikes which are protected by various national constitutions. And in its identification of the criteria for assessing the proportionality of a strike, criteria which national courts will have to apply in this politically sensitive domain, the ECJ has created the paradox that the more successful industrial action the less likely it is to be proportionate.[160] Thus, in its

[158] *Viking*, para. [77].

[159] *Ibid*, para. [81]. This is a reference to the fact that Viking, presumably on good advice, had given an undertaking that neither it nor companies in the same group would "by reason of the reflagging terminate the employment of any person employed by them."

[160] A. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ" (2008) 37 I.L.J. 126, 143. See also R. O'Donoghue and and B. Carr "Dealing with *Viking* and *Laval*: From Theory into Practice" (2008–9) 10 C.Y.E.L.S. forthcoming.

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prioritisation of freedom of establishment, the Court failed to see the impact of its decisions on a wide variety of industrial relations systems.

V. Non-Discriminatory Restrictions: Lessons From the US?

A. Introduction

The argument so far is that, by using the restrictions rather than the discrimination analysis, the ECJ has chosen to go down the high impact route, catching a range of discriminatory and non-discriminatory measures in the Treaty prohibition and then allowing defendants (often, but not always, Member States) to justify their rules and show that the national measures are proportionate. Often the defendants fail to defend their laws because the burden of proof is so high. While this approach may be justifiable in respect of discriminatory measures, this is not necessarily the case with some (but not all) non-discriminatory rules which merely structure the market on which trade is taking place, notably employment, tax and environmental laws. As we saw in section III, in analogous situations in the US such rules have benefited from a strong presumption of legality, an approach the Court of Justice experimented with in *Keck*.[161]

The ECJ is also showing signs of experimenting with a return to a discrimination approach in the field of tax, an area where state treasuries had expressed grave concern about the implications of the Court's "restrictions" analysis.[162] This shift was signalled in *Weigel*,[163] a case concerning the levy of a hefty tax when registering a car in Austria. The Court rejected the arguments raised by a German husband and wife, who transferred their residence to Austria where Mr Weigel had a job, that because this tax discouraged them from moving it breached Article 39(2). The ECJ noted that the Austrian rule applied "without regard to the nationality of the worker concerned to all those who registered a car in Austria and, accordingly, it is applicable without distinction".[164] The Court then added that "It is true that it is likely to have a negative bearing on the decision of migrant workers to exercise their right to freedom of movement".[165] Under the *Säger* formula, this

[161] Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] E.C.R I-6097.

[162] In Case C-168/01 *Bosal Holding BV* v. *Staatssecretaris van Financiën* [2003] E.C.R. I-9409, the Court found a breach of Article 43 due to its assessment that the Dutch tax rule merely "might dissuade" a parent company from carrying on its activities through the intermediary of a subsidiary established in another Member State". This decision cost the Dutch treasury millions.

[163] Case C-387/01 *Weigel* v. *Finanzlandes direction für Vorarlberg* [2004] E.C.R. I-4981.

[164] Para. [52]. For a US equivalent, decided under the Dormant Commerce Clause, *American Trucking Associations, Inc* v. *Michigan Public Service Commission* 545 US 429, 434 (2005): "The statute applies even-handedly to all carriers that make domestic journeys … Nothing in our case law suggests that such a neutral, locally focussed fee or tax is inconsistent with the dormant Commerce Clause."

[165] Para. [54].

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observation would have been enough for a finding of a breach of Article 39 which the Member State would then have to justify.[166] However, in *Weigel* the Court said that, provided that nationals and migrants were treated in the same way, the fact that the tax regimes of the different Member States were different was not enough to trigger the application of the Treaty: there needed to be something more for the Treaty to apply.[167]

Mobistar[168] confirmed that *Weigel* was not a one-off. It concerned a request for the annulment of taxes adopted by the Community of Fleron in Belgium on transmission pylons, masts and antennae for mobile phones on the grounds, inter alia, that the taxes contravened Article 49. Having cited the *Säger* market access test, the Court said:

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

These cases do suggest a move towards a more discrimination based approach. However, as Banks shows,[169] the Court is far from consistent: a year after *Mobistar*, the Court made no mention of the discrimination analysis in other tax cases such as *Commission* v. *Belgium*[170] and *Commission* v. *Finland*.[171] Yet, she argues subsequent Grand Chamber decisions, notably *ACT Group Litigation*[172] and *FII Litigation*,[173] "indicate a definite resurgence in discrimination reasoning in tax cases". If this is the general trend, then the Court appears to be taking an important step towards preserving perfectly neutral taxation systems from scrutiny under community law and thereby respecting Member States competence.

If the Court can change its mind about tax, I would like to suggest that the time has come for it to reconsider its approach in other areas, like social policy. One possibility would be for it to reintroduce a pure non-discrimination approach, as it has done in respect of tax. However, this would expose the ECJ to the criticism outlined in section III above of the weaknesses of a pure discrimination approach in the evolving

[166] See, by analogy the Art. 49 case, Joined Cases C-430 and 431/99 *Sea-Land Service* [2002] E.C.R. I-5235.
[167] See also Case C-392/05 *Alevizos* v. *Ipourgos Ikonomikon* [2007] E.C.R. I-3505, para. [76].
[168] Joined Cases C-544/03 and C-545/03 *Mobistar SA* v. *Commune de Fleron* [2005] E.C.R. I-7723. See V. Hatzopoulos and T. Do, "The Case law of the ECJ concerning the Free Provision of Services: 2000–2005" (2006) 43 C.M.L.Rev. 923, 958–960.
[169] K. Banks, "The application of the fundamental freedoms to Member State tax measures: guarding against protectionism or second-guessing national policy choices" (2008) E. L. Rev. 482, 504. See also J. Snell, "Non-discriminatory Tax Obstacles in Community Law" (2007) 56 I.C.L.Q. 339.
[170] Case C-433/04 *Commission* v. *Belgium (tax fraud)* [2006] E.C.R. I-10653.
[171] Case C-232/03 *Commission* v. *Finland* [2006] E.C.R. I-27.
[172] Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] E.C.R. I-11673.
[173] Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] E.C.R. I-11753.

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context of a single market. Another possibility, and my favoured approach, is to follow the lead of the US Supreme Court to say that other areas of non-discriminatory national regulation should benefit from the presumption of legality (discriminatory legislation would still remain subject to the full force of the restrictions approach). It is however a presumption only and one that can be rebutted by claimants showing that there is discrimination in fact or that they are substantially hindered from gaining access to the market in other Member States. I begin by making the case as to why the time is ripe for change and then to outline in more detail how the Court might apply the US approach to the EU context.

B. The Maturing of the EU's Single Market

It was emphasised earlier in this article that the US system is considerably more mature than the EU's. However, I would suggest that the due to the use of some innovative legislative techniques, the EU is maturing more rapidly than its relative youth might indicate. Two legislative tools have helped in this process. The first is the Technical Standards Directive 98/34,[174] given renewed vigour as a result of the decisions in *CIA*,[175] *Unilever*,[176] and *Sapod-Audic.*[177] It requires states to notify draft technical standards to the Commission which must then screen their compatibility with Community law.[178] The idea behind this approach is to ensure that fewer restrictive measures get on to the rule books of the Member States which then have to be challenged subsequently in *ad hoc* litigation. Since *CIA*, the number of notifications has risen significantly,[179] giving the Commission and the Member States far greater opportunity to scrutinise proposed national rules.

The second legal tool is the Services Directive 2006/123.[180] The establishment Chapter of the Directive contains a watered down version of the notification obligations under the Technical Standards Directive 98/34 in respect of new measures[181] and an even more dilute version in respect of services.[182] However, in respect of pre-existing measures, the

[174] Dir. 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations ([1998] OJ L204/37).
[175] Case C-194/94 *CIA Security International SA* v. *Signalson SA and Securitel SPRL* [1996] E.C.R. I-2201.
[176] Case C-443/98 *Unilever Italia SpA* v. *Central Food SpA* [2000] E.C.R. I-7535.
[177] Case C-159/00 [2002] E.C.R. I-5031.
[178] See also Council Reg. 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95 (OJ [2008] L218/21) as discussed in Editorial, "Institutionalization of Market Access" (2008) 35 L.I.E.I. 1.
[179] The number of notifications increased generally from twenty-nine in 1984 to 439 in 1995 and 710 in 2007 (albeit with an enlarged EU): http://ec.europa.eu/enterprise/tris/statistics07/en.pdf.
[180] OJ [2006] L376/26.
[181] Art. 15(7).
[182] Art. 39(5), second and third paras.

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Services Directive requires Member States to undertake an ambitious programme of screening of their legislation.[183] This legislative spring-clean, if done conscientiously by the Member States, should ensure the removal of a plethora of unjustified national rules by 28 December 2009.[184] Furthermore, the mutual evaluation process under Article 39 of the Directive should give Member States the opportunity to scrutinise any remaining national rules for their compatibility with Community law. If this legislative spring-clean has been done in good faith, all that should remain on the national rule books are (1) measures which can be justified and (2) non-discriminatory national rules which are too remote from freedom of establishment and free movement of services to be challenged. This second category reflects the rather obscure second sentence of the 9th Recital of the Services Directive which says that the Directive does not apply "to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity." If only justified national rules and national rules too remote from free movement are left on national statute books, there is an argument that the Court should adopt a more hands-off approach to scrutinising national legislation under Articles 43 and 49, at least in those areas covered by the Services Directive.

C. Why Can't the EU be More Like the US?

It may be naïve to think that these legislative techniques will be as successful as their proponents advocate and so there is still a role for the Court of Justice to play through its application of the Treaty provisions on the four freedoms. However, I would argue that these changes provide the pretext for the Court to back away from rigorously applying its restrictions approach in cases where the national rule is non-discriminatory. I would argue that, as in the US Supreme Court's

[183] The Directive contains a number of specific screening duties for the Member States, as well as professional bodies, organisations and associations: (1) to review their authorisation schemes under Article 9(1); (2) to identify and remove the prohibited requirements under Article 14; (3) to evaluate the requirements under Articles 15 and 16; (4) to screen national requirements restricting service recipients under Article 19; (5) to screen national legislation under Article 24 to remove any bans on commercial communications by regulated professions and justify any restriction as to content and conditions of advertising or adapt them where necessary; (6) to remove restrictions on multidisciplinary activities except in certain circumstances, justify those that remain and assess whether those that remain could be replaced by less restrictive means (Article 25).

[184] Other areas of law, particularly in the field of free movement of goods would also benefit from such an approach, as the Commission has now recognised in its documentation on a Single Market for the 21st century: Commission Staff Working document, "Instruments for a modernised single market policy" SEC (2007) 1518, 25.

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decision in *Pike*, such rules are presumptively lawful but leave open the possibility for market participants (and, in the case of Article 226 proceedings, the Commission) to rebut that presumption by showing that the rule nevertheless substantially impedes their market access. The burden of proof for claimants would be a stiff one: their case would have to be more than simply that the host state rules are different (and they would prefer to have their home state rules applied instead) and make life more expensive for the claimant than if they had not migrated.[185] Claimants should at least have to show that the host state rules "partition the market". The test for this might be that the national rules directly and substantially hinder market access: *i.e.* the national rules directly affects the claimants' ability to engage in their *specific economic activity* in the host state. So a challenge to a national speed limit would not satisfy this test because it does not just apply to, say, speeding opticians but to everyone in the state acting in a private as well as an economic capacity. (I think this is what the phrase "providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity" in the 9th Recital of the Service Directive was trying to achieve). By contrast, a limit on the number of opticians' shops an entrepreneur could open, using the facts in *Commission* v. *Greece*, or even possibly a restriction on who can own and operate a pharmacy, as in *Commission* v. *Italy*[186] does go to the heart of the entrepreneur's business model and so might satisfy the "directly and substantially hinder market access" test.[187]

Only if the claimants satisfy this test will the burden shift to the defendant state to justify the national rule; and even here there should be a more nuanced approach to justification based on a true balance of competing interests. Once again *Pike* might provide the necessary model: the starting point of the balance should not be the illegality of the national rule. Rather, the Court should recognise that the rule restricting opticians from running more than one shop in order to ensure the quality of care for each customer is on an equal footing with the need for entrepreneurs to have access to the Greek market. Only if the justification is a veneer or the restrictive effects of the measure are excessive would the measure contravene the Treaty.

I wonder whether it was this type of balancing that the Court, somewhat clumsily, tried to engage in, in the much criticised decision

[185] Adding "*significant* additional costs" may, however, be enough: Case C-518/06 *Commission* v. *Italy* [2009] E.C.R. I-000, para. [68].

[186] Case C-531/06, [2009] ECRI-000.

[187] For the test of "substantial" see n.155 above. See also Walker L.J. in *Professional Contractors Group Ltd and others* v. *Inland Revenue Commissioners*, [2001] EWCA Civ. 1945, Court of Appeal, [2001] S.T.C. 631 "What I derive from these authorities (and especially from *Graf*, which is particularly instructive) is that a neutral, non-discriminatory national measure will not contravene the articles relating to freedom of movement unless it has a direct and demonstrable inhibiting effect on the particular right which is asserted."

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in the Sunday trading case *Torfaen.*[188] The Court said that "Article [28] of the Treaty must be interpreted as meaning that the prohibition which it lays down *does not apply* to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind."[189] While, in recent years, there has been no appetite for this genuine balancing approach (at least in the context of Sunday trading where it has now been replaced by *Keck*[190]) it may still have a role to play in the more difficult cases – like *Viking* and *Laval* – where intuitively we might sense that there is an impact on interstate trade but there is a need to engage in a genuine balance of interests of equal value.[191] This exercise is by no means easy, which is why it should be undertaken only rarely, but at least it would give real meaning to the idea, expressed in Article 3 TEU-L, that the Union should work to establish a "social market" economy,[192] a term which underlines the link between economic and social policy to ensure greater coherence between the two.

VI. Conclusions

In this article I have argued that the time has come for a reconsideration of the blanket application of the "market access" or "restrictions" approach in respect of non-discriminatory measures. This approach threatens to undermine legitimate national regulation and, as *Viking* and *Laval* show, recourse to the justification/proportionality formula is insufficiently sensitive to local needs. I have therefore argued that, following the approach of the US Supreme Court in *Pike* under the Dormant Commerce Clause, such measures should benefit from a strong presumption of legality. Only if claimants can demonstrate that their access to the market has, nevertheless, been directly and

[188] Case C-145/88 *Torfaen Borough Council* v. *B & Q plc* [1989] E.C.R. 3851, as argued in C. Barnard, "Sunday Trading: A Drama in Five Acts" (1994) 57 *MLR* 449.

[189] Para. [17]. Some commentators suggest that the Court engaged in a similar kind of balancing in Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] E.C.R. I-2099, this time in the context of a discriminatory rule: A. Johnston, K. Neuhoff, D. Fouquet, M. Ragwitz and G. Resch, "The Proposed New EU Renewables Directive: Interpretation, Problems and Perspectives" (2008) 1 European Energy and Environmental Law Review 126, 134.

[190] See *e.g.* Joined Case C-69 & 258/93 *Punto Casa SpA* v. *Sindaco del Commune di Capena and others* [1994] E.C.R. I-2355. Arguably, the US Supreme Court also does not engage in balancing in *Keck* style situations: *Exxon Corporation* v. *Governor of Maryland* 437 US 117, 127–8: ban on petrol producers from operating petrol stations in Maryland was found to be non-discriminatory and not to burden commerce.

[191] See the observation by Chief Justice Roberts in *United Haulers Association* v. *Oneida-Herkimer Solid Waste Management Authority* 127 S.Ct 1786 (2007) who noted that "The Commerce Clause does not elevate free trade above all other values" (at 1795–6).

[192] For a discussion of this term, see C. Joerges and F. Rödl, "'Social Market Economy' as Europe's Social Model?", EUI Working Paper LAW No 2004/8, 19, who argue that "this concept contained an ordoliberal basis which was complemented by social and societal policies, whose aims and instruments were supposed to rely on market mechanisms". See also C. Joerges "Democracy and European Integration: A Legacy of Tensions, a Reconceptualisation and Recent True Conflicts", EUI Working Paper LAW No 2007/25.

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substantially infringed (as they might do if the facts of *Viking* and *Laval* were repeated today) will the Treaty be engaged and thereafter a genuine balancing of the competing interests should occur. The consequence of the proposed approach is that it recognises that there remain benefits, even in a single market, to maintaining a market with some national rules, particularly those which serve a social purpose. As Article 2 EC makes clear, the attainment of the four freedoms is not an end in itself but a means of achieving "the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." If the interpretation of the four freedoms leads to a reduction in the standard of living, due to the deregulatory effect of a blanket application of the restrictions approach, this is clearly not a result that the Treaty drafters envisaged. It is also an approach which also risks alienating EU citizens.[193]

Any change in position by the ECJ inevitably alters the balance of power between the centre and the states. The proposal put forward here is not intended to replace the EU's "high impact" approach with the "low impact" approach found in the US. Instead, it identifies problems with the wholesale application of the restrictions approach and proposes a way in which the model could be finessed by taking one aspect of the US approach and applying it, in the EU, to non-discriminatory national rules. At first sight, it might seem odd to draw on the US model to save the European social model from challenges under the restrictions approach, given that the legitimacy of the states in the US is much less closely associated with the achievements of the welfare state than in the EU.[194] Nevertheless, the balancing test in *Pike* has prevented the US courts from, in Justice Rehnquist's words in *Kassel*, arrogating to themselves public policy formation, functions which were left to the states by the Constitution. Much the same can be said of social and tax matters in the EU: these are largely areas for the Member States and only exceptionally should the ECJ use the Treaty provisions on the four freedoms to strike down any such non-discriminatory rules.

[193] In the first Irish referendum on the Lisbon Treaty the Technical Engineering and Electrical Union (TEEU) urged its 45,000 members to vote against the Treaty following the judgments in *Viking* and *Laval*: H. Mahoney, "EU Court judgments affecting the Irish treaty campaign", eu.observer.com, 6 May 2008.

[194] See F. Scharpf, "Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe differs from the US" in R. Howse and K. Nicolaides, *The Federal Vision*, (Oxford 2001), 356–7, noting that in the EU, the creation of the internal market succeeded, rather than preceded, the creation of welfare states. By contrast, in the US, the situation was reversed: the creation of the internal market preceded and thus largely precluded the development of a welfare state since regulatory competition among state governments practically prevented all of them from adopting regulations, such as those prohibiting the employment of child labour, that would have reduced the competitiveness of the local product. In the US, competence in welfare matters was subsequently transferred to the federal level following the New Deal.

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