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PAPERS

N° 2012/6

**TRAILING THE TRAILERS IN SEARCH FOR A TYPOLOGY OF BARRIERS:  
SKETCHING A SCALE OF RELATIVE GRAVITY AND EXPLORING ITS  
IMPLICATIONS**

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Mis en ligne/uploaded: 13 June 2012.

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ISSN 2034-6301

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Published in Belgium by:  
Université catholique de Louvain  
CeDIE – Centre Charles De Visscher pour le droit international et européen  
Collège Thomas More  
Place Montesquieu, 2 (boîte L2.07.01)  
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## RÉSUMÉ – ABSTRACT

(FR) En utilisant l'affaire des *Remorques italiennes* comme point de départ, les auteurs tentent de développer une typologie des entraves basée sur leurs effets et reflétant leur capacité respective à restreindre la libre circulation des biens, c'est-à-dire leur gravité relative au regard de l'objectif poursuivi par le marché intérieur. Ce faisant, ils s'attèlent à intégrer à cette typologie les entraves considérées comme restreignant le commerce intra-communautaire par leur « objet » (ou leur « nature ») en donnant à cette notion d'objet un contenu juridique propre, celui de créer une présomption d'effets restrictifs sur le commerce transfrontaliers. Les auteurs essayent ensuite d'articuler un lien souvent perçu mais rarement décrit entre la gravité relative des entraves et l'intensité du test de proportionnalité auquel la Cour de Justice les soumet pour apprécier leur compatibilité avec le marché intérieur. En d'autres termes, ils explorent l'existence d'une influence réciproque entre la capacité des réglementations nationales à entraver le commerce transfrontalier et la probabilité de leur compatibilité avec la libre circulation des biens au terme du raisonnement de la Cour. De la sorte, la typologie qu'ils proposent revêt une pertinence pour chacune des deux branches de l'analyse déterminant l'existence d'une violation de l'article 34 TFUE.

(EN) Using the *Italian Trailers* judgment of the European Court of Justice as an entry point, the present paper attempts to develop an effects-driven typology of barriers to cross-border trade in goods within the EU based on their trade-distorting potential, *i.e.*, their relative gravity. In so doing, it endeavors to make room for barriers that are deemed to have the “object” (or “nature”) of restricting the free movement of goods by ascribing legal significance to that notion of object as entailing a presumption of trade-distorting effects. In turn, it ambitions to substantiate an intuitive link between the relative gravity of barriers to trade and the intensity of the proportionality assessment carried out by the Court to determine their compatibility with the internal market. In other words, it ventures that the trade-distorting potential of a national rule or measure may influence (together with other factors) the probability that such measure would eventually be found compatible with the free movement of goods. Hence, it posits that the proposed typology could be relevant to the two branches of the bifurcated analytical pattern determining the existence of a breach of Article 34 TFEU.

## MOTS-CLÉ – KEYWORDS

Droit du marché intérieur – Libre circulation des biens – Objet/Effet – Typologie des entraves – Gravité – Capacité à restreindre le commerce intra-communautaire – Accès au marché – Discrimination – Règles de composition des produits – Modalités de vente – Limitations à l'usage – Compatibilité – Proportionnalité – Équivalence – Nécessité.

EU internal market law – Free movement of goods – Object/Effect – Typology of barriers – Gravity – Trade-distorting potential – Market access – Discrimination – Conditions concerning product characteristics – Selling arrangements – Usage restrictions – Compatibility – Proportionality – Adequacy – Equivalence – Necessity.

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## INTRODUCTION

Should “*arrangements for the use of goods*” be assessed “*in the light of Article [34 TFEU]*” or “*in the light of the criteria set out by the Court in its judgment in Keck and Mithouard*”, wonders Advocate General Bot in the opening statement of his Opinion in the *Italian Trailers* case.<sup>1</sup> While such a proposition might seem odd at first glance, it soon becomes clear from the introductory paragraphs of his assessment that Advocate General Bot essentially sought to contrast two approaches towards the treatment of usage restrictions under Article 34 TFEU: (i) one based on “*the effect of the measure on access to the market*”, applicable irrespective of the type of measure at stake;<sup>2</sup> and (ii) one based on the “*object of the rules in question*”, inherited from *Keck and Mithouard*,<sup>3</sup> which would favour equating the treatment of usage restrictions with that of selling arrangements. Advocate General Bot establishes himself as a proponent of the first “effects-based” approach and presents Advocate General Kokott as a proponent of the second “object-based” approach in light of her Opinion in the contemporaneous *Mickelsson and Roos* case involving limitations on the use of personal watercraft in Swedish waters.<sup>4</sup> These two approaches also reflect a split in opinion among the Member States who submitted observations to the Court: a majority considered that the Keck formula was applicable by analogy to a national provision restricting or prohibiting certain forms of use of a product, while others suggested avoiding rigid distinctions between categories of measures and argued that/put forward the intensity of the restriction on market access (w)as the determining factor.

The relevance of the object/effect dichotomy is not limited, in Advocate General Bot’s view, to the assessment of usage restrictions. Rather, he views it as a tension underlying the definition of the very notion of restriction to the free movement of goods. In turn, his preference for the effects-based approach is informed by the opinion that the “*distinction between different categories of measures is not appropriate*” and that “*the tests laid down by the Court in Keck and Mithouard have not clarified the scope of Article [34 TFEU] or facilitated the implementation of that article*”.<sup>5</sup> As shown by Advocate General Bot’s Opinion, the *Italian Trailers* case fundamentally calls into question the scope of Article 34 TFEU. Answering that call, the present contribution endeavours to revisit the definition of the notion of barrier to trade and attempts to reconcile the two sides of the dichotomy, while moving beyond the notion of discrimination in the determination of the existence of a barrier to trade. In effect, it postulates that the opposition between the effects- and object-based approaches is only apparent; while the decisive criterion ought indeed to be that of the effect on cross-border trade of the relevant State measure, legal

<sup>1</sup> Opinion of Advocate General Bot in Case C-110/05, *Commission/Italy* (“*Italian Trailers*”) [2009] ECR I-519, para. 1 (referred to hereinafter as “*Opinion of AG Bot*” and “*Italian Trailers*”, respectively).

<sup>2</sup> Opinion of AG Bot, para. 109.

<sup>3</sup> Joined cases C-267/91 and C-268/91, *Criminal proceedings against B. Keck and D. Mithouard* [1993] ECR I-6097 (referred to hereinafter as “*Keck and Mithouard*”).

<sup>4</sup> Case C-142/05, *Mickelsson and J. Roos* [2009] ECR I-4273 (referred to hereinafter as “*Mickelsson and Roos*”). In her Opinion, Advocate General Kokott favours “*excluding arrangements for use in principle from the scope of Article 28 EC, in the same way as selling arrangements, where the requirement set out by the Court in Keck and Mithouard is met*” (para. 47 – referred to hereinafter as “*Opinion of AG Kokott*”). That position is informed by three considerations: (i) “*the characteristics of arrangements for use and selling arrangements [...] are comparable in terms of the nature and the intensity of their effects on trade in goods*” (para. 52); they both apply “*only after a product has been imported*” and “*affect the marketing of a product only indirectly through their effects on the purchasing behaviour of consumers*” (para. 53); and (iii) they are “*not normally designed to regulate trade in goods between Member States*” (para. 54).

<sup>5</sup> Opinion of AG Bot, paras. 79 and 84.

certainty and decisional economy require a typology of barriers built around categories of measures. However, categories are informative to the extent that they reflect the trade-distorting potential of the type of rules to which they relate, *i.e.*, their relative gravity.

Hence, this contribution attempts to recast the object/effect dichotomy in line with the capacity of national rules to hinder market access and to articulate the notion of object as a presumption of restrictive effects.<sup>6</sup> It posits that this may have been the rationale underlying a core element of the Court's reasoning in its *Italian Trailers* judgment, namely that: "*measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU]*" (emphasis added).<sup>7</sup> In turn, the contribution hypothesizes that the suggested typology could carry meaning beyond the determination of the existence of a barrier to trade. To that end, it tries to substantiate an intuitive link between the relative gravity of the restriction in question and the intensity of the proportionality assessment carried out by the Court. In other words, it ventures that the trade-distorting potential of a measure could influence (together with other factors) the probability that such measure would eventually be found compatible with the free movement of goods. The relevance of the typology would therefore affect the two branches of the bifurcated analytical pattern determining the existence of a breach of Article 34 TFEU.

In view of the above, the present contribution is structured as follows: Section I develops an effects-driven typology of national rules based on their capacity of affecting the free movement of goods, *i.e.*, according to a scale of gravity, while Section II attempts to link that capacity with the intensity of the proportionality test determining the compatibility of such rules with Article 34 TFEU, with the view to objectivise certain variations observable in the implementation of that test. Before developing these ideas further, it goes without saying that the limitations associated with the format of this short essay do not allow for a comprehensive discussion of all relevant parameters and implications of the proposed typology, let alone of the extensive literature on the topics addressed herewith.<sup>8</sup> Yet, these limitations also have their advantages, notably the necessity to directly get to the heart of the matter and the freedom to sketch some albeit tentative ideas.

<sup>6</sup> The notion of object is therefore given a substance similar to the one it carries under Article 101 TFEU, which prohibits "*all agreements between undertakings, [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market*".

<sup>7</sup> *Italian Trailers*, para. 37 (it remains unclear, however, what the Court had in mind when stating that "[A]ny other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept"). For a similar formulation, see Case C-108/09, *Ker-Optika* [2010] ECR I-not yet reported, para 49 (referred to hereinafter as "*Ker-Optika*"). In *Mickelson and Roos*, interestingly, the Court phrased the same criterion slightly differently by referring to "*the aim or effect of treating goods coming from other Member States less favourably*" (paras. 24 and 26). For an example of reliance on the "*object or effect*" formulation in the field of the freedom to provide services, see, *e.g.*, Case C-565/08, *Commission/Italy* [2011] ECR I-not yet reported, para. 52.

<sup>8</sup> For a recent account, see L. Azoulai (ed.), *L'entrave dans le droit du marché intérieur*, Bruylant, Brussels, 2011, 362 p. Interestingly, various contributions to that edited volume convey the idea of a co-existence between different classes of trade restrictions and some do refer in that regard to the notions of "object" and "effect", though not necessarily in the same way as the present contribution does.

## I. AN EFFECTS-BASED TYPOLOGY OF BARRIERS TO TRADE

As noted, Advocate General Bot contends in his Opinion that in reviewing whether national rules constitute a restriction to the free movement of goods, “*it would be more consistent with the letter and spirit of the Treaty to assess specifically the effects of such rules on the market*”.<sup>9</sup> In his earlier Opinion in the same case, Advocate General Léger also asserted that “*although a measure may not be intended to govern trade in goods between Member States, the decisive factor is its effect on intra-Community trade, whether actual or potential*”.<sup>10</sup> The Court has embraced that formulation in a number of cases; in *Deutscher Apothekerverband*, for example, it held that: “[E]ven if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-Community trade”.<sup>11</sup>

Such a unifying effects-based approach fits conveniently with the case law of the Court, including with the *Dassonville* formula or the strand of cases dealing with hypothetical restrictions.<sup>12</sup> On its own, though, it appears epistemologically poor for it does not set any threshold governing the determination of a restriction to the free movement of goods and thus appears of little assistance to the Court (and *ex ante* to Member States and economic actors) in the case-by-case assessment of State measures deemed to affect trade in goods within the EU. Advocate General Bot indicates in that respect that the examination of the “*specific impact on patterns of trade*” of a particular national rule “*should not involve any complex economic assessment*”; in his view, it is the possibility for such rule to hinder trade between Member States that matters, not “*the magnitude of [its] effects*”.<sup>13</sup> However, that possibility would be “*clear*” for “*overt discrimination*” that ought to be “*prohibited as such by Article [34] TFEU*”.<sup>14</sup> Likewise, “*measures applying without distinction, that laid down conditions concerning product characteristics*” would also entail the possibility of “*having an effect equivalent to a quantitative restriction*”.<sup>15</sup> Paradoxically, thus, the Advocate General appears to recognize that categories of types of measures do carry some merits.

If one may not avoid relying on categories, the effects-based approach may still usefully inform the structuring thereof. Combining the reliance on effects and on categories leads in turn to shaping a typology of barriers according to “the extent to which” national rules are capable of hindering cross-border trade within the EU, *i.e.*, their relative gravity. Upon reflexion, such starting point appears more satisfactory than the loose lists of principles often presented by the Court as underpinning its analysis. In *Italian Trailers*, the Court referred in that regard to “*the*

<sup>9</sup> Opinion of AG Bot, para. 108.

<sup>10</sup> Opinion of AG Léger of 5 October 2006 in *Italian Trailers*, para. 32 (referred to hereinafter as “Opinion of AG Léger”). Advocate General Léger delivered an Opinion at the request of the Third Chamber of the Court, to which the case was assigned originally.

<sup>11</sup> Case C-322/01, *Deutscher Apothekerverband* [2003] ECR I-14951, para. 67 (referred to hereinafter as “*Deutscher Apothekerverband*”). See also, *e.g.*, Case C-244/06, *Dynamic Medien* [2008] ECR I-505, para. 27.

<sup>12</sup> See, *e.g.*, Case 379/92, *Matteo Peralta* [1994] ECR I-3453, para. 24; Case C-266/96, *Corsica Ferries France* [1998] ECR I-3949, paras. 29-32; Case C-96/94, *Centro Servizi Spediporto* [1995] I-2883, para. 41.

<sup>13</sup> Opinion of AG Bot, paras. 116-117. In that respect, the Court has held in various cases that “*the mere fact that an importer is deterred from introducing or marketing the products in question in the Member State concerned amounts to a hindrance to the free movement of goods*” (see, for a recent reference: Case C-443/10, *Bonnarde* [2011] ECR I-not yet reported, para. 26 – referred to hereinafter as “*Bonnarde*”).

<sup>14</sup> Opinion of AG Bot, para. 115.

<sup>15</sup> Opinion of AG Bot, para. 117.

*principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets*".<sup>16</sup> In *Mickelsson and Roos*, it started its analysis with a convoluted statement distinguishing State measures having: (i) "the aim or effect" of treating goods coming from other Member States less favourably, (ii) laying down requirements to be met by goods coming from other Member States; (iii) or hindering access of products originating in other Member States.<sup>17</sup> None of these formulations captures properly the analytical inquiry effectively carried out by the Court in assessing whether a regulatory measure amounts to a restriction of the free movement of goods.

Fundamentally, it is argued, the analysis conducted by the Court boils down to ascertaining whether the measure in question has the effect of restricting, at least potentially, the marketing in the territory of a Member State of goods originating in another Member State. Whether that measure has the "object" of causing such restriction is therefore *prima facie* irrelevant to the analysis. Yet, this would be so unless one were to ascribe legal significance to that notion of object, namely that of entailing a presumption of trade-distorting effects rooted in the heightened capacity of the relevant measure to affect cross-border trade, *i.e.*, its specific gravity.<sup>18</sup> In that way, the notion of object could find its way home under the unifying concept of effects and the object/effect dichotomy could be recast so as to match the evolution of the scope of Article 34 TFEU observable in the case-law of the Court, while contributing to legal certainty by clarifying the driving forces underlying it. Building on that hypothesis, the remainder of this section is devoted to fill in both the object and effect categories of the typology, knowing that "[T]he severity of the restriction imposed by different rules is merely one of degree" and therefore that a continuum exists between (and even within) the various categories explored hereinafter.<sup>19</sup>

## 1. RESTRICTIONS BY OBJECT

In the suggested typology, the object category would include rules restricting the access to the domestic market of goods originating in another Member State. Since they carry by nature the potential of hindering cross-border trade, these rules could be presumed to result in a restriction of the free movement of goods. Such a presumption would then relieve the plaintiff of the burden of establishing the likely trade-distorting effects of the measure at stake and would reverse that burden so that the proof of a lack of material effect would be borne by the State (entity or assimilated) that adopted it. Reversals being imaginable in exceptional circumstances only, the effective judicial review of the rationale underlying those measures would be guaranteed.

<sup>16</sup> *Italian Trailers*, para. 34. The same formula has been repeated since then in cases such *Ker-Optika* (para. 48) and C-484/10, *Ascafor* [2012] ECR I-not yet reported, para. 53 (referred to hereinafter as "*Ascafor*").

<sup>17</sup> *Mickelsson and Roos*, para. 24.

<sup>18</sup> For an early illustration of an apparent hierarchy in the gravity of restrictions by object ("*purpose*") and by effect, see Joined Cases 60 and 61/84, *Cinéthèque* [1985] ECR p. 2618, para. 21 (referred to hereinafter as "*Cinéthèque*").

<sup>19</sup> Opinion of Advocate General Jacobs in Case C-412/93, *Leclerc-Siplec* [1994] ECR I-182, para. 38.

While not necessarily comprehensive, these “to the market” rules would include at least three types of measures. The first type would correspond to rules resulting in what Advocate General Bot characterizes as a situation of “*overt discrimination*”, *i.e.*, the application of different marketing standards to substitutable products depending on whether they originate domestically or abroad. Equating discrimination based on nationality, that class of measure would cover, *e.g.*, higher quality requirements for non-domestic products than for domestic ones.<sup>20</sup> Likewise, it would encompass circumstances encountered in cases such as *Dassonville* because restrictions (*i.e.*, import formalities) affecting goods originating or “*put into free circulation in a regular manner*” in another Member State carry the same potential of affecting cross-border trade.<sup>21</sup> Similarly, it would also catch blunt prohibitions on the import of foreign goods,<sup>22</sup> as well as similar restrictions expressly favouring domestic products.<sup>23</sup> These situations present a specific gravity, it is submitted, which could explain why they fall within the scope of Article 34 TFEU even in purely internal situations.<sup>24</sup>

The second type would correspond to rules resulting in situations of indirect or constructive discrimination, including those historically characterized as laying down conditions concerning product characteristics. In effect, these rules bar the access to the domestic market to substitutable goods in the way they are marketed in another Member State, *i.e.*, in their original composition, shape, packaging, labelling, etc.<sup>25</sup> Put differently, they result in applying the same – “indistinctively applicable” – marketing rules or standards to goods that are substitutable yet in dissimilar situations on account of their origin. There is a long list of cases that could qualify under this sub-category, starting with the *Cassis de Dijon* and the beer purity requirement cases,<sup>26</sup> and extending to *Radlberger* and the change in the German management system for non-reusable packaging.<sup>27</sup> Given its breadth, one might even attempt to articulate a scale of gravity within that sub-category. In *Cassis de Dijon*, for example, the Court clearly conveyed the idea that labeling requirements were as such less restrictive of cross-border trade than the “*mandatory fixing of alcohol contents*”.<sup>28</sup> Conversely, it is not impossible that this category would exclude certain cases entailing “*additional costs*” for the marketing of certain substitutable products, which were approximated in the past with those dealing with product characteristics. The *Alfa Vita* case, for example, which involved a measure preventing the sale of “bake-off” bread on

<sup>20</sup> For a recent discussion, see *Ascafor*.

<sup>21</sup> Case 8/74, *Procureur du Roi/Dassonville* [1974] ECR p. 837, para. 9 (referred to hereinafter as “*Dassonville*”).

<sup>22</sup> See, *e.g.*, Case-2/90, *Commission/Belgium* (“Walloon Waste”) [1992] ECR I-4431 and Case C-265/95, *Commission/France* (“Spanish Strawberries”) [1997] ECR I-6959.

<sup>23</sup> Case 249/81, *Commission/Ireland* (“Buy Irish”) [1982] ECR p. 4005.

<sup>24</sup> See, *e.g.*, Joined Cases C-321,322, 323 and 324/94, *Criminal proceedings against Jacques Pistre* [1997] ECR I-2343. For the sake of comparison, consider the recent *Zambrano* case and the application of rights arising from EU citizenship to a purely internal situation involving a highly restrictive measure (Case C-34/09, *Zambrano* [2011] ECR I-not yet reported).

<sup>25</sup> For a discussion, see, *e.g.*, Opinion of Advocate General Jacobs in Case C-412/93, *Leclerc-Siplec* [1994] ECR I-182, para. 25.

<sup>26</sup> Case 120/78, *Rewe Zentral* (“*Cassis de Dijon*”) [1979] ECR p. 649 (referred to hereinafter as “*Cassis de Dijon*”); Case 178/84, *Commission/Germany* [1987] ECR p. 1227.

<sup>27</sup> Case C-309/02, *Radlberger* [2004] ECR I-11763, esp. paras 63-65 (referred to hereinafter as “*Radlberger*”); Case C-463/01, *Commission/Germany* [2004] ECR I-11705, esp. paras 60-62. In those cases, the Court found that the change in the management system would “*not affect the marketing of drinks produced in Germany and that of drinks from other Member States in the same manner*” because “*producers established outside Germany use considerably more non-reusable packaging than German producers*”.

<sup>28</sup> *Cassis de Dijon*, para. 13.

premises other than bakeries, might well have deserved an assessment of its effects on cross-border trade before being found restrictive of the free movement of goods.<sup>29</sup>

The third type would correspond to the rules at issue in *Italian Trailers*, namely those whereby a Member State imposes a general and absolute prohibition on the use of a particular product, thereby precluding “*the access of that product to the market of that Member State*”.<sup>30</sup> As Advocate General Bot underlined in his Opinion, such measures carry “*by their nature*” the capacity of raising an obstacle to cross-border trade within the EU.<sup>31</sup> In contrast, Advocate General Bot insisted that the rules on the usage of personal watercraft at play in the contemporaneous *Mickelsson and Roos* case “*differ from the measure at issue [...] because they limit the use of a product but do not prohibit its use outright*”.<sup>32</sup> Advocate General Kokott in that particular case still took the view that “[a] *situation where only a marginal possibility for using a product remains because of a particularly restrictive rule on use is to be regarded as preventing access to the market*”.<sup>33</sup> The bottom line is that rules prohibiting (almost) entirely the use of a particular good on the national territory necessarily restrict the marketing thereof as well as its access from another Member State, and can therefore be presumed to hinder cross-border trade. However, the latter rules differ significantly from those belonging to the two previous categories insofar as they do not (and by definition cannot) “*treat [...] goods coming from other Member States less favourably*”,<sup>34</sup> *i.e.*, they do not favour substitutable domestic products but apply to and affect equally local and foreign goods. For that reason, their gravity can be considered relatively lower, when appreciated against the *tèlos* of EU free movement principles.

## 2. RESTRICTIONS BY EFFECT

The effect category of the suggested typology would include rules regulating goods while on the domestic market. As they do not restrict the access of goods originating in another Member State but “*apply only after a product has been imported*”,<sup>35</sup> such rules can be deemed to limit cross-border trade only to the extent that they have the effect of putting foreign goods at a comparative disadvantage vis-à-vis domestic ones,<sup>36</sup> notably by influencing consumer purchasing behaviour. In turn, plaintiffs would bear the burden of establishing the actual or at least likely occurrence of that effect on patterns of trade,<sup>37</sup> irrespective of the magnitude thereof,

<sup>29</sup> Joined Cases C-158/04 and C-159/04, *Alfa Vita* [2006] I-8137 (referred to hereinafter as “*Alfa Vita*”). See to that effect the discussion reflected in the Opinion of Advocate General Poiares Maduro, para. 15. For a comparison with the field of services, see, *e.g.*, Joined Cases C-544 and 545/03, *Mobistar* [2005] ECR I-7723, para. 30.

<sup>30</sup> *Italian Trailers*, para. 56.

<sup>31</sup> Opinion of AG Bot, para. 104.

<sup>32</sup> *Idem*, para. 43.

<sup>33</sup> Opinion of AG Kokott, para. 67.

<sup>34</sup> *Mickelsson and Roos*, para. 26.

<sup>35</sup> Opinion of AG Kokott, para. 53.

<sup>36</sup> *I.e.*, of distorting the “*conditions of normal and effective competition*”, to use the terminology of some services case (see, *e.g.*, Case 565/08, *Commission/Italy* [2011] ECR I-not yet reported, para. 51 citing Case C-442/02, *CaixaBank France* [2004] ECR I-8961, paras. 13 and 14; Joined Cases C-94/04 and C-202/04, *Cipolla* [2006] ECR I-11421, para. 59; and Case C-384/08, *Attanasio* [2010] ECR I-2055, para. 45).

<sup>37</sup> Advocate General Bot refers in that respect to the term “*possible*”, which he contrasts with “*purely hypothetical*” and “*totally uncertain or indirect*” (para. 117). The term “*likely*” seems more appropriate to capture the need to substantiate concretely the risk of impact on the flow of foreign goods.

which would be for the national court to verify. The need to substantiate that effect then entails that the regulatory choices underlying the rules falling within this category may in various cases escape judicial review. Eventually, it is suggested, these “in the market” rules would include at least two types of measures, namely those regulating the marketing and those regulating the usage of goods. The former have been presented as limiting “*commercial freedom*”,<sup>38</sup> while the latter were recently depicted as constraining “*general freedom of action*”.<sup>39</sup> Both have been presented as “*comparable in terms of the nature and the intensity of their effects on trade in goods*”.<sup>40</sup>

The first type of rules would correspond to those known since *Keck and Mithouard* as “*limiting or prohibiting certain selling arrangements*”, i.e., regulating the exercise of commercial activity (sales promotions, types of establishments, opening hours, etc. or, generally, “*when, where, how, by whom and at what prices goods may be sold*”<sup>41</sup>). To the extent that they “*apply without distinction to all products*”, these rules would affect cross-border trade only insofar as they “*affect*” differently “*the marketing of domestic products and those from other Member States*”.<sup>42</sup> In the early 1990s, the Court had found in various cases that rules prohibiting the employment of workers on Sundays or shops from opening on Sundays were not such as to make “*more difficult*” the “*marketing of products from other Member States*” compared to the “*marketing of national products*”.<sup>43</sup> In *Keck and Mithouard*, a general prohibition on resale at a loss was considered to “*fall outside the scope of Article [34 TFEU]*” for the same reason.<sup>44</sup> In other cases, however, selling arrangements were considered trade distortive. Well-known examples include *Deutscher Apothekerverband* and, more recently, *Ker-Optika*, where a prohibition on the sale of medicines and contact lenses on the Internet and of their subsequent delivery by mail order was found “*not [to] affect the sale of domestic medicines [or contact lenses] in the same way as it affects the sale of those coming from other Member States*”.<sup>45</sup> In other words, this measure was deemed to have a “*greater impact*” respectively on “*pharmacies established outside German territory*” and on “*traders [in contact lenses] of other Member States*” than Hungary.<sup>46</sup> As noted, cases such as *Alfa Vita*, which involved the obligation to sell bread – including “*bake-off*” bread – in establishments holding a bakery licence, could also have been included in the marketing

<sup>38</sup> *Keck and Mithouard*, para. 14

<sup>39</sup> Opinion of AG Kokott, para. 48.

<sup>40</sup> Opinion of AG Kokott, para. 52.

<sup>41</sup> Opinion of Advocate General Jacobs in Case C-412/93, *Leclerc-Siplec* [1994] ECR I-182, para. 26. Interestingly, the Advocate General considered at the time that “[T]his type of legislation does not normally have such an obvious propensity to interfere with the free movement of goods as legislation of the type at issue in *Cassis de Dijon*”.

<sup>42</sup> *Keck and Mithouard*, para. 16. That paragraph illustrates well a recurrent tension between continuous references to the Dassonville formula – “*not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment*” – and the context in which that formula emerged at the time, i.e., in defiance to national measures embodying direct or indirect discriminations vis-à-vis foreign goods.

<sup>43</sup> See, e.g., Case C-169/91, *B&Q plc* [1992] ECR I-6654, para. 10 (other relevant cases include C-145/88, C-312/89 and C-332/89). For a similar reasoning developed in an earlier case, see *Cinéthèque*, paras. 21 and 24.

<sup>44</sup> *Keck and Mithouard*, para. 17. It is true, though, that in a reasoning twist probably attributable to the language of existing precedents, this paragraph refers to the “*nature*” of the rules in question rather than their effect.

<sup>45</sup> *Deutscher Apothekerverband*, para. 75; *Ker-Optika*, para. 55.

<sup>46</sup> *Idem*, respectively para. 74 and para. 54. Likewise, a measure conditioning the grant of an ecological subsidy for the purchase of energy-efficient vehicles to the production of a specific certificate that certain Member States did not issue was recently found in *Bonnarde* to “*affect such vehicles differently according to whether or not they come from a Member State that provides such a requirement in respect of registration documents*” (para. 29), and therefore likely to affect cross-border trade.

regulation class of rules, thus calling for an examination of the differential impact of that requirement on bread originating in other Member States. Conversely, it is questionable whether the mere fact that such requirement entailed “*additional costs*” or deprived “*bake-off*” bread of a competitive advantage, should be sufficient to establish a barrier to trade pursuant to Article 34 TFEU.<sup>47</sup>

The second type of rules in the effects category would correspond to those constraining the use of products, “*that is to say national rules governing how and where products may be used*”.<sup>48</sup> Such rules were at stake in *Mickelsson and Roos*, a case involving a restriction on the use of jet-skis on Swedish general navigable waterways, at least until the express designation of other waters as suitable for the enjoyment of that recreational activity. Eventually, the Court held that it was for the national court to ascertain whether the national rules governing the designation of navigable waters and waterways have “*the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use*”,<sup>49</sup> so that they could amount to measures equivalent to quantitative restrictions on imports. Interestingly, the language of the Court suggests that only actual or constructive usage prohibition rules (and not a mere usage limitation) could be capable of restricting cross-border trade. That view is comforted by the position adopted by Advocate General Kokott in her Opinion, where she “*assumed [...] that the Swedish rules constitute a barrier to access to the market*” but refrained from discussing the extent to which rules regulating the use of products could be deemed to entail a restriction on the free movement of goods.<sup>50</sup> Likewise, the Commission rooted its arguments in the opinion that the Swedish regulation resulted in a *de facto* prohibition on the use of personal watercraft during the transitional period leading to the designation of waters other than general navigable waterways as suitable for that activity.<sup>51</sup> The following question therefore arises: is it at all conceivable that a genuine limitation on the use of a particular product – short of a prohibition of such use and absent the application of a different set of rules to foreign goods – could affect the sale of products originating from another Member State in a different more restrictive manner?<sup>52</sup> In the affirmative, it is likely that these situations would remain exceptional, which would in turn justify placing rules regulating the use of products at the bottom of the gravity scale of possible barriers to cross-border trade in goods.

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This section has attempted to develop an “effects-based” typology of restrictions to the free movement of goods reflecting the trade-distorting potential, *i.e.*, the relative gravity, of various

<sup>47</sup> *Alfa Vita*, para. 19. This question touches in fact on a classic debate that cannot be addressed properly in the framework of the present contribution, namely whether the aim of Article 34 TFEU should be limited to ensure unrestricted cross-border trade or whether it should “*encourage a general deregulation of national economies*” (see Opinion of AG Poiares Maduro in *Alfa Vita*, para. 37 and, generally, Opinion of AG Tesouro in Case C-292/92, *Hünermund* [1993] ECR I-6787).

<sup>48</sup> Opinion of AG Kokott, para. 44.

<sup>49</sup> *Mickelsson and Roos*, para. 28.

<sup>50</sup> Opinion of AG Kokott, para. 71.

<sup>51</sup> *Idem*, para. 70.

<sup>52</sup> Generally, one may also doubt that expanding the scope of Article 34 TFEU to such rules would be desirable, for it could subject a formidably broad range of domestic regulatory choices to judicial review and force the Court to assess the necessity of these choices and thus to enter the hardly navigable waters of countermajoritarianism.

types of rules and construing object restrictions as embodying a presumption of effects on cross-border product flows. As noted, such typology has not only the potential of reconciling the two branches of the object/effects dichotomy in the determination of the existence of a barrier to trade but might also serve as an explanatory framework for variations in the subsequent assessment of the compatibility of these barriers with the internal market. To that end, the remainder of this contribution attempts to substantiate an intuitive link between the relative gravity of restrictions to the free movement of goods and the intensity of the proportionality assessment carried out by the Court.

## II. THE RELATIVE GRAVITY OF BARRIERS TO TRADE AS A FACTOR AFFECTING THEIR COMPATIBILITY WITH THE INTERNAL MARKET

Once a measure is found to fall within the scope of Article 34 TFEU and thus to affect cross-border trade, it may still be justified on the basis of one of the public interest grounds set out in Article 36 TFEU or of a so-called “imperative [or overriding] requirement”, provided it is found proportionate to the protection thereof.<sup>53</sup> That proportionality test requires the measure in question to be: (i) “*appropriate for securing the attainment of the objective pursued*” (test of adequacy); and (ii) “*necessary to attain it*” (test of necessity).<sup>54</sup> When relevant, the test also factors in the (lack of) equivalence of the regulatory framework in place in the country of origin of the goods in question (test of equivalence).<sup>55</sup> In practice, the intensity of the proportionality assessment carried out by the Court may vary from one case to another, though the criteria governing these variations remain largely unsettled. An attempt has been made to objectivise a criterion such as the sensitivity of the public interest at stake by referring to the absence of regulatory competence or lack of exercise thereof at EU level and, as a corollary, to the diversity of national regulatory solutions.<sup>56</sup> The present section endeavours to explore another hypothesis, namely that of a link between the trade-distorting potential of certain types of restrictions, *i.e.*, their relative gravity, and the probability that such restrictions would eventually be found compatible with the free movement of goods, *i.e.*, the intensity of the proportionality assessment carried out by the Court.<sup>57</sup> To substantiate that link, it discusses briefly the application of the proportionality test to each type of rules identified in the above typology.<sup>58</sup>

<sup>53</sup> Such bifurcated analysis, which is clearly apparent in the recent free movement case law, can be approximated with the analysis historically carried out under Article 101 TFEU in the field of competition law. Under Article 101 TFEU, the first step in the analysis aims to determine whether the agreement between undertakings falls within the scope of Article 101(1) TFEU, while the second step aims to assess whether it can be justified for efficiency reasons according to the criteria laid down in Article 101(3) TFEU.

<sup>54</sup> See, *e.g.*, *Italian Trailers*, para. 59.

<sup>55</sup> For reference purposes, see, *e.g.*, Case 27/80, *Fietje* [1980] ECR p. 3840, paras. 12-15; and Case 272/80, *Biologische Producten* [1981] ECR p. 3278, paras. 13-16.

<sup>56</sup> See, *e.g.*, D. Gerard, “Tracking the affirmation of pluralistic concerns in EU internal market law”, CeDIE Working Paper 1/2012, [www.uclouvain.be/cedie](http://www.uclouvain.be/cedie) (consulted May 4, 2012). Compare in that regard the situation prevailing in *Italian Trailers*, characterized by an absence of common EU rules or standards on the safety of trailers, and in *Mickelsson and Roos* where the interpretation of Directive 94/25 relating to recreational craft may have played a significant role in the solution of the case. Generally, one might also contemplate a link between the specific sensitivity of a certain public interest and the justification of a barrier of particular gravity.

<sup>57</sup> For an early illustration of the relationship between the relative gravity of trade restrictions and the relative intensity of the proportionality assessment, see *Cinéthèque*, paras. 21-24. In that case, the Court was hesitant

## 1. RESTRICTIONS BY OBJECT

As noted, restrictions by object possess by nature the potential of restricting access to the domestic market of goods originating in another Member State, and therefore of affecting cross-border trade. As a result, they are particularly serious, *i.e.*, they present a specific “gravity”. That “gravity”, it is argued, translates into a particularly severe assessment of their possible compatibility with the common market, *i.e.*, of their proportionality to the public interest they allegedly pursue. As far as cases of “overt discrimination” are concerned, that proposition is motivated by the relatively low likelihood that such measures would pass the test of adequacy insofar as the latter aims to control the consistent and systematic character of the pursuit of the alleged justification ground. In effect, if domestic substitutable goods are subject to different marketing standards than foreign ones, it is unlikely that the policy interest put forward to justify that difference of treatment could reflect a consistent strategy on the part of the relevant Member State.<sup>59</sup> In other words, the causal link between the interest whose protection is sought and the measure in question is likely to be missing or found insufficient, though it cannot be excluded as a matter of principle that discriminatory measures could sometimes be justified.<sup>60</sup>

The exposure to a stringent test of adequacy also characterizes situations of indirect or constructive discrimination associated with rules laying down conditions concerning product characteristics. In *Cassis de Dijon*, to take the most obvious example, the Court brushed aside the justification for the fixing of minimum alcohol content on public health considerations (*i.e.*, the allegation that alcoholic beverages with a low alcohol content were more likely to induce a tolerance towards alcohol than more highly alcoholic beverages) in view of the fact that “*the consumer can obtain on the [German] market an extremely wide range of weakly or moderately alcoholic products and furthermore [that] a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form*”.<sup>61</sup>

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to qualify as a barrier to trade a French rule establishing a mandatory one-year interval between the release of movies in cinemas and on video-cassette; without much reasoning, it then found that if it was to constitute such a barrier to trade, it would in principle be justified.

<sup>58</sup> The focus on the test of proportionality results from the fact that virtually any public interest can nowadays serve as a ground of justification, short of purely economic/financial ones. In particular, differences in the respective reach of public interest grounds found in Article 36 TFEU and of “imperative requirements” originating in the case law of the Court, notably in respect of the justification of discriminatory measures, have faded away in recent years (for an early discussion see Opinion of Advocate General Jacobs in Case C-379/98, *Preussen Elektra* [2001] ECR I-2099, para. 228 and references provided there).

<sup>59</sup> For references, see, *e.g.*, Case 121/85, *Conegate/HM Customs & Excise* [1986] ECR p. 1007, paras. 15-16. See also, in the area of services: Case C-274/96, *Criminal Proceedings/Horst Otto Bickel & Ulrich Franz* [1998] I-7837; Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl/Giuseppe Calafiori (ADC Servizi)* [2006] ECR I-2941; Case C-169/08, *Presidente del Consiglio dei Ministri/Regione Sardegna* [2009] ECR I-10821; Case C-169/08, *Commission/Austria* [2009] ECR I-9735; Case C-243/01, *Criminal proceedings/Piergiorgio Gambelli and Others* [2003] ECR I-13031.

<sup>60</sup> See, *e.g.*, Case 72/83, *Campus Oil* [1984] ECR p. 2730; Case-2/90, *Walloon Waste* [1992] ECR I-4431. In *Spanish Strawberries*, interestingly, the Court’s proportionality assessment also focused on adequacy considerations for it concluded ultimately that France had failed to adopt “*appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States*” (para. 65). Conversely, in *Schmidberger*, the Court conducted a more lenient proportionality assessment with respect to an obstruction of road traffic by a public demonstration whose “*purpose [in French, “l’objet”] was not to restrict trade in goods of a particular type or from a particular source*”, *i.e.*, toward a measure carrying a lesser propensity to affect cross-border trade and thus characterized by a relatively lower gravity (Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 86).

<sup>61</sup> *Cassis de Dijon*, paras 10-11.

However, contrary to situations of direct discrimination, the failure of measures causing indirect discriminations to pass the test of adequacy is circumstantial in essence and not inherent to the type of rules in question. Conversely, it is inherent to rules laying down product characteristics to be subject to a test of equivalence aimed to assess whether the measure at issue is proportionate to the public interest sought in view of the requirements conditioning the marketing of the relevant products in their Member State of origin. That specific test explains, to a significant extent, the particular intensity of the proportionality assessment applied to this type of rules. Indeed, though it may also reveal a discriminatory practice in the treatment of goods originating in other Member States (*e.g.*, in the delivery of marketing authorizations or quality certificates),<sup>62</sup> the test of equivalence has the main practical effect of tightening the test of necessity because it puts the Court (or the national referring court) in a position to compare the regulatory choices made in various (at least two) EU jurisdictions. For the same reason, rules laying down product requirements, insofar as they aim to regulate goods already marketed in another Member State, place the Court in a comparatively more comfortable position to second-guess national solutions and may therefore be exposed to a strict(er) necessity assessment.<sup>63</sup> The recent *Processing Aids* case, which involved a “*prohibition on marketing processing aids or foodstuffs in which processing aids have been used, which have been lawfully manufactured and/or marketed in other Member States*”,<sup>64</sup> illustrates these propositions. First, the Court began the proportionality assessment by highlighting that “*a decision to prohibit marketing*” constitutes “*the most restrictive obstacle to trade in products lawfully manufactured and marketed in other Member States*”, *i.e.*, by stressing the gravity of the measure in question.<sup>65</sup> It then set forth strict necessity requirements by holding that such a “*decision to prohibit marketing [...] can be adopted only if the real risk alleged for public health appears sufficiently established on the basis of the latest scientific data available*” and that, even discounting for the application of the precautionary principle, it was “*not sufficient to base justification on potential risks posed by the substances or products subject to authorisation*”.<sup>66</sup> Further on, the Court expressly acknowledged the relevance for the necessity assessment of “*the absence of a prior authorisation scheme with regard to the use of processing aids in the preparation of foodstuffs in all or nearly all of the other Member States*”.<sup>67</sup> At the end, the comparative character of the equivalence criterion appears to have induced the Court to tighten the necessity test, thereby increasing the intensity of the proportionality assessment applicable to rules affecting the composition/preparation of products/foodstuffs. Eventually, the French measure in question was found disproportionate to the potential health risks involved.

Intuitively, one might also anticipate that the third type of object restrictions, namely usage prohibitions, would be particularly exposed to a failure of that necessity test. After all, they

<sup>62</sup> For a discussion, see, *e.g.*, *Ascafor*, paras. 58-71 and, in the field of services, Case C-341/05, *Laval* [2007] I-11767, paras. 112-120.

<sup>63</sup> In the German packaging-waste collection system cases, for example, the Court found itself entitled to rule on the reasonableness of the transition period provided to producers to adapt to the new system and considered that the period of six months laid down in the German measure was insufficient to that effect and therefore disproportionate (see Case C-463/01, *Commission/Germany* [2004] ECR I-11734, paras. 78-83 and *Radlberger*, paras. 81-82).

<sup>64</sup> Case C-333/08, *Commission/France* [2010] ECR I-757, para. 88 (referred to hereinafter as “*Processing Aids*”).

<sup>65</sup> *Processing Aids*, para. 89.

<sup>66</sup> *Processing Aids*, paras. 89 and 95, respectively. In para. 88, the Court also referred to the need for “*an in-depth assessment of the risk alleged*”.

<sup>67</sup> *Processing Aids*, para. 105.

represent a radical way to obstruct market access, to such an extent that less restrictive solutions might be assumed to be available to protect the policy objective sought. This was the opinion of Advocate General Bot in *Italian Trailers*, who considered that the interest in road safety sought by the Italian legislation “*may be achieved by means that restrict freedom of trade to a much lesser extent*” (emphasis added), notably by limiting the towing of trailers by motorcycles to specific itineraries.<sup>68</sup> Interestingly, the Advocate General also challenged the adequacy of the measure for it applied only to motorcycles registered in Italy and not, apparently, to vehicles registered in other Member States, which would therefore be authorised to tow a trailer on Italian roads.<sup>69</sup> However, the Court refused to follow that path and, in contrast, carried out a particularly lenient proportionality assessment. First, it held that the measure was appropriate to ensure road safety in view of the absence of EU or national standard “*type-approval rules*” to test the risks of using a motorcycle with a trailer.<sup>70</sup> Second, when assessing the necessity of the prohibition, the Court acknowledged that “*it is possible, in the present case, to envisage that measures other than [a] prohibition [...] could guarantee a certain level of road safety*” but still held the measure compatible with the common market. To reach that conclusion, it relied on a combination of three considerations: (i) a margin of appreciation resulting from the freedom of Member States to determine the appropriate level of road safety applicable on their territory, and the proper means to achieve it;<sup>71</sup> (ii) a flexible proof requirement, whereby Member States do not have to demonstrate that “*no other [less trade-distorting] conceivable measure*” could achieve the same objective;<sup>72</sup> and (iii) an effectiveness criterion allowing Member States to rely on “*general and simple rules*” to reach their regulatory objectives, which can be easily understood by drivers and supervised by the competent authorities.<sup>73</sup> The reliance on these considerations, which is also observable in cases involving other free movement provisions,<sup>74</sup> may possibly be explained by a willingness on the part of the Court to limit the intensity of the proportionality assessment applicable to measures that do not have the effect of treating foreign goods less favourably than domestic ones and therefore display a relatively lower gravity than those creating situations of direct or indirect discrimination. It is of course not excluded that other factors may have influenced the Court’s assessment in *Italian Trailers*, including recitals of certain harmonisation directives providing expressly that they were not intended “*to oblige those Member States which do not allow two-wheel motor vehicles on their territory to tow a trailer to amend their rules*”,<sup>75</sup> as well as the complete absence of relevant guidance in international instruments such as the International Convention on Road Traffic.<sup>76</sup>

<sup>68</sup> Opinion of AG Bot, para. 170. See also the Opinion of AG Léger, paras. 59-61.

<sup>69</sup> Opinion of AG Bot, para. 169. See also the Opinion of AG Léger, para. 58.

<sup>70</sup> *Italian Trailers*, paras. 63-64.

<sup>71</sup> *Italian Trailers*, para. 65: “*in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved*” and “*consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter’s rules are disproportionate*”.

<sup>72</sup> *Italian Trailers*, para. 66.

<sup>73</sup> *Italian Trailers*, para. 67.

<sup>74</sup> Case C-518/06, *Commission/Italy* [2009] ECR I-3491, para. 84; Case C-137/09, *Josemans* [2010] ECR I-not yet reported, para. 81.

<sup>75</sup> See the sixth recital to Directive 93/93 on the masses and dimensions of two or three-wheel motor vehicles [1993] O.J. L 311/76 and the twelfth recital to Directive 97/24 on certain components and characteristics of two or three-wheel motor vehicles [1997] O.J. L 226/1. Both recitals are mentioned in the Court’s judgment.

<sup>76</sup> See in particular *Italian Trailers*, para. 68.

## 2. RESTRICTIONS BY EFFECT

As noted, restrictions by effect consist in rules that regulate goods on the domestic market and can be deemed to limit cross-border trade only to the extent that they have the effect of putting foreign goods at a comparative disadvantage vis-à-vis domestic ones. While they may entail a lower degree of gravity, do these rules benefit from a relatively more lenient assessment of their proportionality with the public interest they seek to protect? Following *Keck and Mithouard*, so-called “selling arrangements” fall outside the scope of Article 34 TFEU unless they affect differently the marketing of domestic and of foreign products. In other words, when they are found to create a barrier to trade, it is precisely because these measures do have the effect of treating foreign goods less favourably than domestic ones. At the same time, this is a result of a policy choice aimed at regulating the domestic marketplace and not designed to alter the characteristics of goods as they are marketed abroad. Can these specificities be traced in the assessment of the proportionality of the rules in question? The review of a limited sample of cases suggests that the test of adequacy is typically unproblematic for this type of rules and, as a result, that the Court does not generally dispute the causation link between the measure and its underlying regulatory objective. As far as the test of necessity is concerned, the Court has underlined in some cases the “discretion” that Member States ought to enjoy in the regulation of the exercise of commercial activity, thereby displaying a certain tolerance for regulatory diversity in that area.<sup>77</sup> In turn, when that discretion has been particularly emphasized, the measure in question has been found compatible with the common market,<sup>78</sup> or, at least, the Court has carefully endeavoured to find a compromise and to limit the reach of its decision,<sup>79</sup> even if sometimes at the end of a convoluted and questionable reasoning.<sup>80</sup> In other cases, however, the Court has exercised in full its power to review the necessity of the selling arrangement in question and found that the objective sought could be achieved altogether by less trade-restrictive measures.<sup>81</sup> At the end, it appears that the observation of a difference of treatment allows the Court to carry a test of necessity whose severity might well depend on other explanatory factors than the relatively lower gravity of measures regulating commercial activity (*e.g.*, the scope of the difference of treatment, the sensitivity of the public interest at stake, the existence or absence of a clear point of comparison, regulatory diversity, etc.). After all, even if these measures are of a different nature, they may still generate effects comparable to situations of indirect discrimination. The fact remains, though, that the threshold for such

<sup>77</sup> See, *e.g.*, *Ker-Optika*, para. 58; Case C-141/07, *Commission/Germany* [2008] ECR I-6935, para. 51 (“consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter’s rules are disproportionate”). It is not insignificant, though, that both cases relied on the protection of the health and life of humans, which was considered in *Deutscher Apothekerverband* to “rank foremost among the assets or interests protected by Article [36 TFEU]” (para. 103).

<sup>78</sup> See, *e.g.*, Case C-141/07, *Commission/Germany* [2008] ECR I-6935, paras. 51-63.

<sup>79</sup> See *Deutscher Apothekerverband*, where the Court drew heavily on the EU regulatory framework for the marketing of medicinal products and made a distinction between prescription and non-prescription medicines, upholding the mail-order delivery of the latter and not of the former.

<sup>80</sup> See, *e.g.*, *Ker-Optika*, where the Court entered into various considerations on the need to make the supply of contact lenses conditional on medical advice and on whether such advice was required only prior to the first order or also for subsequent ones (paras. 66-76).

<sup>81</sup> See, *e.g.*, Case C-531/07, *LIBRO* [2009] ECR I-3717, para. 35 (At issue was a rule prohibiting Austrian importers of German-language books from setting retail prices differing from the prices fixed or recommended by foreign publishers, and thus to adapt prices to the conditions of the import market, which placed them at a comparative disadvantage vis-à-vis domestic publishing houses). See also, *Bonnarde*, paras. 35-38.

measures to be found constitutive of a barrier to trade is relatively high(er) and therefore limits the review of their proportionality with the public interest that they seek to protect.

Rules regulating the usage of products lie at the bottom of the typology outlined above; indeed the question could be asked whether such rules, to the extent that they fall short of imposing a “*general and absolute prohibition*”,<sup>82</sup> could at all be constitutive of a restriction to EU cross-border trade.<sup>83</sup> If they do, it means that they would affect less favourably goods originating in another Member State, which in turn would expose them to a test of adequacy and necessity. In *Mickelsson and Roos*, to the extent this case can be viewed as involving a limitation (and not an outright prohibition) on the use of personal watercrafts, the Court started its proportionality assessment in a way similar than in *Italian Trailers*. Thus, after assuming the adequacy of the measure in question for the purpose of protecting the environment,<sup>84</sup> it admitted the possible existence of alternative measures to achieve that objective but opposed thereto an effectiveness criterion, namely the “*possibility [for Member States] of attaining [a public policy] objective [...] by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities*”.<sup>85</sup> That approach may be informative, as such, of a willingness on the part of the Court to apply the test of proportionality in a somewhat flexible manner. However, the Court also conditioned the justification of the measure to the existence of an obligation to designate specific waters other than general navigable waterways for the enjoyment of personal watercraft, and to the actual fulfilment of that obligation within a reasonable period of time.<sup>86</sup> In doing so, the Court can be considered to have sought a position of compromise whereas, in effect, it largely restated the conditions already provided for in Swedish law and ensured that the use of jet skis in that country would only be limited and not actually prohibited. Hence, in the absence of an effects-based distortion of competition between domestic and foreign goods, the central question appears to be that of the existence, or not, of an access restriction resulting from the general and absolute prohibition of the use on the relevant national territory of a particular product available in another Member States, as discussed in the above sections on restrictions *by object*. Eventually, if they are not considered capable of restricting cross-border trade within the EU, usage restrictions are effectively shielded from a review of their adequacy to and necessity for the protection of public policy.

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<sup>82</sup> Opinion of AG Léger, para. 55.

<sup>83</sup> It that regard, it is a fact that usage restrictions can affect cross-border flows of goods, in absolute terms, but their impact on the sales of products, and commercial activity in general, is at best indirect.

<sup>84</sup> *Mickelsson and Roos*, para. 34 (“[I]t is not open to dispute that...”).

<sup>85</sup> *Mickelsson and Roos*, para. 36.

<sup>86</sup> *Mickelsson and Roos*, paras. 38-39.

## CONCLUSION

While constrained by its format and limitations inherent to the casuistry, this contribution has attempted to sketch an effects-based typology of barriers to trade in goods based on their trade-distorting capacity, *i.e.* their relative gravity. That typology, it was suggested, carries the potential of solving the object/effect conundrum by ascribing legal significance to the notion of object as a presumption of restrictive effects, while moving beyond the notion of discrimination in the determination of the existence of a barrier to trade. In turn, one has tentatively endeavoured to substantiate a link between the relative gravity of trade restrictions as referred to in the typology, on the one hand, and the intensity of the proportionality assessment carried out by the Court when assessing the compatibility of these restrictions with the common market, on the other hand. The purpose of that attempt was to explore the aptitude of the gravity factor to (contribute to) explain observable variations in the intensity of that key aspect of the internal market test.

At the end, two additional considerations emerge. Firstly, an effects-based typology of barriers to trade could also enable a greater convergence in the internal market test applicable across all four freedoms, including in the variables underlying each step in the sequence of analysis. It would be particularly interesting, in future research, to try to duplicate the above typology in the field of services<sup>87</sup>. Secondly, to end on a reference to the *Italian Trailers* case, usage prohibitions embody an apparent contradiction between their particular gravity as a barrier to trade and the willingness of the Court to subject them to a relatively lenient proportionality assessment. In effect, while they carry the potential of preventing the cross-border flow of goods, they do not have the effect, presumably, of putting foreign goods in a competitively less favourable position than domestic substitutable ones. To the extent that such measures reflect trade-neutral policy choices, one may even wonder whether their judicial review does not fall beyond the mandate of the Court under Article 34 TFEU, if not outside of the scope of that provision altogether.

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<sup>87</sup> For example, one might attempt to devise a scale of relative gravity ranging from measures requiring service providers to be established in the host State, which have been considered disproportionate by nature (see, *e.g.*, Case C-180/89, *Commission/Italy* [1991] ECR I-709; Case C-518/09, *Commission/Portugal* [2011] ECR I-not yet reported), to 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*”, which have been found to fall outside the scope of Article 56 TFEU (see, *e.g.*, Joined Cases C-544 and 545/03, *Mobistar* [2005] ECR I-7723, para. 31).

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