DROIT INTERNATIONAL ET EUROPÉEN INTERNATIONAL AND EUROPEAN LAW

UCL Université catholique de Louvain

CAHIERS DU CeDIE WORKING PAPERS

N° 2012/01

TRACKING THE AFFIRMATION OF PLURALISTIC CONCERNS IN EU INTERNAL MARKET LAW

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Mis en ligne/uploaded : 20 February 2012.

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An earlier version of this contribution has been published in a chapter forthcoming in a volume edited by I. Lianos and O. Odudu (eds.), *Regulating Trade in Services in Europe and the WTO: Trust, Distrust and Economic Integration*, Cambridge University Press, 2011.

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ISSN 2034-6301

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) La présente contribution tente d'apprécier si et dans quelle mesure la jurisprudence récente de la Cour de justice de l'Union européenne en matière de marché intérieur révèle l'affirmation d'une « logique pluraliste », et ce malgré le positionnement historique de la Cour en tant que gardienne de l'unité du marché et du droit. A cet effet, elle se concentre sur le domaine de la libre prestation de services en ce qu'il a particulièrement illustré ces dernières années les tensions inhérentes au test du marché intérieur entre intégration, diversité normative et valeurs sociales sous-jacentes.

Cette contribution se situe dans le cadre d'un projet plus large visant à explorer le passage de l'unité au pluralisme en tant que modèle dominant de représentation de la relation entre l'Union et les Etats membres à la suite de l'achèvement du marché intérieur, de l'accroissement de la diversité de la composition de l'Union et de l'élargissement à la fois quantitatif et qualitatif de l'étendue de ses compétences.

(EN) The present paper aims to assess whether and to what extent a "logic of pluralism" has permeated nowadays the internal market case law of the EU Court of Justice, in spite of the latter's long-standing stance as the ultimate guardian of the unity of the market and that of the law. To do so, it focuses on the field of services insofar as it has particularly embodied in recent years those tensions between market integration, regulatory diversity and social values that lay at the core of the internal market test.

This paper forms part of a larger project exploring a move from unity to pluralism as the prevalent representation of the relation between the Union and Member States in the aftermath of the completion of the EU internal market, the increased diversity in EU membership and the quantitative and qualitative enlargement of the scope of EU competences.

MOTS-CLÉ – KEYWORDS

Intégration – marché intérieur – services – pluralisme – diversité normative – marge d'appréciation – proportionnalité.

EU integration - internal market – services – pluralism – regulatory diversity – margin of appreciation – proportionality.

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INTRODUCTION

The EU market integration program, both in its negative or positive dimensions, has long been viewed as a process of re-regulation entailing the replacement of national economic regulations with EU rules,[1] in pursuance of a functional logic of unity whereby the unity of the market and the unity of the law was to contribute to an overarching goal of political unity for Europe.[2] Thus, upon completion of the Customs Union in 1968, the Commission stated that the latter was to be followed by the achievement of an economic union, which required "*replac*[ing] *the old national policies with Community policies*", notably through the "*harmonization or unification in the commercial, fiscal, social, transport, and other fields, as provided for in the Treaties*".[3]

Negative and positive integration. In a context of economic crisis and political stagnation, the 1970's gave rise to the unfolding of a process of negative integration led by the Court of Justice. At the end of the transition period, the Court endowed successively the Treaty provisions guaranteeing the free movement of goods, persons and services, with direct effect,[4] thereby triggering a flurry of requests for preliminary rulings on the interpretation of those provisions. The most emblematical judgments of that period remain *Dassonville* and *Cassis de Dijon*, in relation to the free movement of goods, which established the sequence of analysis applied by the Court ever since, across all four freedoms: (i) a far-reaching definition of the notion of obstacle to trade, combined with (ii) the possibility to justify the said obstacle by means of mandatory requirements in the general interest applied in a proportionate manner, *i.e.*, appropriate, necessary and reflecting the (lack of) equivalence of the regulatory framework in place in the country of origin.[5]

Maduro has highlighted the institutional choice inherent to that sequence, "*namely that it leaves the ECJ to define the balance between free movement and regulatory aims and therefore to define the appropriate regulatory policy*".[6] In doing so, the Court complemented the market-building approach advocated by the Commission with the view to break the path-dependence of actors from national systems and to promote the emergence of a new European majoritarian view

1 See, *e.g.*, A. R. Young, "The Single Market – Deregulation, Reregulation and Integration" in H. Wallace et al. (eds.), *Policy-Making in the European Union*, Oxford Univ. Press, 2010, 6th ed., p. 107 et seq.

2 P. Pescatore, « Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice », in *Miscellanea W. J. Ganshof van der Meersch*, vol. 2, Bruylant, Brussels, 1972, p. 351. On the classic notion of the unity of the European market, see, *e.g.*, Case 14/68, *Walt Wilhelm*, para 5.

3 Declaration by the Commission on the occasion of the achievement of the customs union on 1 July 1968 [1968] *O.J.* 7/5.

4 See Case 74/76, *Meroni* [1977] ECR p. 557 (goods; in relation to tariffs, see already Case 26/62, *Van Gend en Loos*); Case 33/74, *van Binsbergen* [1974] ECR p.1299 (services) and Case 2/74, *Reyners* [1974] ECR p. 631 (establishment). In contrast, it is only in the 1990s that the Court of Justice granted direct effect to the provision on the free movement of capital (see Case C-484/93, *Svensson and Gustavsson* [1995] I-3955).

5 Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para 5 and Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649, paras 8-11 and 14-15.

6 M. P. Maduro, *We, the Court: the European Court of Justice and the European economic constitution: a critical reading of article 30 of the EC Treaty*, Hart Publ., Oxford, 1998, p. 59. On p. 62, the author illustrates his view as follows: "*After Cassis de Dijon, a stream of cases led the ECJ to adopt a policy of giving preference to labelling over mandatory requirements regarding the designation, composition or other characteristics of imported products, which led to a redefinition of many national regulatory policies on the characteristics and designation of goods*".

reflecting "*Community-designed values and concepts*".[7] In effect, even though it also triggered legislative action, negative integration worked – as it still does, if not with the same intensity – as a centralized mechanism of allocation of regulatory competence sheltered from the control of the EU political process.

With the endorsement by the European Council of the Commission White Paper - "*Completing the Internal Market*" and the introduction by the Single European Act of qualified majority voting for the adoption of approximation measures,[8] the positive integration process was revitalized in the mid-1980 with a view to completing "*a fully unified internal market by 1992*".[9] To achieve that objective, mutual recognition and equivalence was to be favored over the approximation of Member States' laws and regulations.[10] Yet, the Commission relied largely on the approximation provisions of the amended Treaty to achieve its ambitions. The vast majority of measures adopted in the framework of the single market legislative program took the form of directives.[11] In a decade, hundreds of them were adopted in a great variety of fields,[12] mainly covering large families of products and/or hazards and specifying minimum requirements to be met before being placed on the market, *i.e.*, "new approach directives".[13] Beyond its achievements in economic terms,[14] the internal market program transformed radically the way many businesses are conducted in Europe and the success of the venture in "*breaking through the old structures inherited from the past*",[15] did not come without traumatic consequences. Indeed, the enterprise was hardly politically neutral or value free: it inevitably involved choices between conflicting values that affected profoundly business cultures and consumer preferences across the EU.[16] In turn, the magnitude of those choices led to deep and lasting criticisms of the centralized process whereby they were achieved.

Criticisms and transformations. In essence, the criticisms directed at the market integration process, both in its negative or positive dimensions, are rooted in a hiatus between the nature of the means and the magnitude of the ends pursued. Maduro, again, associates four shortcomings with the centralized model of integration, as follows: (i) lack of consideration for national

7 *Idem*, p. 72. For Maduro, this is clearly apparent from *Cassis de Dijon* where the Court, by deciding that the German rule over minimum alcohol content failed the necessity test, replaced it with its own, namely that the minimum alcohol content of beverages ought to be left to the arbitration of supply and demand, *i.e.*, to the market.

8 See, respectively: (i) Conclusions of the Milan European Council of June 28-29, 1985, *Bull. of the Eur. Com.*, 1985, p. 6/13; and (ii) Single European Act [1987] *O.J.* L169/1.

9 Communication of the Commission of the European Communities, "Completing the Internal Market", June 14, 1985 (COM(85) 310 final), p. 4.

10 *Idem*, p. 6.

11 A. R. Young, *op. cit.*, p. 119.

12 The total body of Internal Market Directives amounted to 1291 in 1995 and increased to 1475 by 2002 (European Commission, *The Internal Market – Ten Years Without Frontiers*, 2002, p. 10, available at: http://ec.europa.eu/internal_market/10years/docs/workingdoc/workingdoc_en.pdf, last visited July 15, 2010).

13 *Idem*, p. 20. Conversely, product-specific directives aimed to harmonize fully performance requirements were almost abandoned after 1985.

14 For a review of the benefits associated with the Single Market, see European Commission, *The Internal Market – Ten Years Without Frontiers*, 2002 and European Commission Staff Working Document, *The single market: review of achievements*, SEC(2007) 1521.

15 Declaration by the Commission on the occasion of the achievement of the customs union on 1 July 1968 [1968] *O.J.* 7/5.

16 A. R. Young, *op. cit.*, p. 112 and M. P. Maduro, *We the Court*, *op.cit.*, p. 147: "*many obstacles to trade come from different assessments of what is the right policy, in terms of choice between regulation and free trade or the types of appropriate regulation*".

diversity, including cultural and regulatory traditions; (ii) risk of reduction in legislative innovation and experimentation; (iii) risk of evasion in the absence of a developed sense of community or complex enforcement system; and (iv) questionable assumptions as to the EU's ability to bring added value to the process of economic regulation in terms of efficiency and democracy.[17] Those shortcomings have become encapsulated over time in one heavy-weighted and multi-faceted notion: that of (lack of) legitimacy of the Union as a regulatory and political body, under its two "input" and "output" dimensions.[18] Ironically, by aiming to achieve one of the main objectives set forth in the Treaty of Rome, the internal market program also sowed the seeds of a profound transformation in policy-making at EU level. The acknowledgment of the shortcomings pointed to hereinabove triggered a progressive evolution in the design of EU policies towards new modes of governance reflecting a willingness to improve the inclusiveness of decision-making and the effectiveness of policy outcomes, as apparent, *e.g.*, from the White Paper on European Governance.[19]

It is postulated that such evolution, combined with increased diversity in EU membership and the quantitative and qualitative enlargement of the scope of EU competences,[20] can be associated with a move from unity to pluralism as the prevalent representation of the relation between the EU and the Member States, which defines the Union's "*register of self-understanding*".[21] In other words, the hypothesis underlying the present working paper is that of the affirmation of a narrative underlying the EU integration process – one of pluralism – from which insights can be derived to inform the design of its rules, the performance of its functions, the understanding of its ends and eventually the definition of its nature. In support of that view, the present paper aims to assess – in effect, to "track" – whether and to what extent the logic of pluralism has permeated the core of Union's legal foundation that is the internal market case law of the Court of Justice, in spite of the latter's long-standing stance as the ultimate guardian of the unity of the market and that of the law. To do so, it focuses on the field of services, which has particularly embodied in recent years those fundamental tensions between market integration, regulatory diversity and social values that lay at the crux of the internal market test.

Legal Pluralism. This is not the place for long developments on the notion of legal pluralism.[22] Yet, before turning to the examination of manifestations thereof at EU level, some clarifications are required. Even though it took a different turn immediately after,[23] the very early case law of the Court of Justice enshrines the basic premise of a pluralistic account of the EU system, namely

17 M. P. Maduro, *We the Court*, *op.cit.*, p. 114.

18 See, *e.g.*, K. Lenaerts and D. Gerard, "The Structure of the Union according to the Constitution for Europe: the emperor is getting dressed", *Eur. L. Rev.*, 2004, pp. 321-322: (i) input legitimacy relates to the direct legitimisation of political power through the democratic participation of the citizens or their elected representatives in transparent decision-making and constitution-making procedures; and (ii) output legitimacy relates to the extent to which citizens see their preferences mirrored in the outcomes of political processes and therefore accept and support the political order as "valid".

19 European Commission, "European Governance – a White Paper", COM(2001) 428 final (available at: http://ec.europa.eu/governance/white_paper/index_en.htm, last checked February 5, 2010).

20 On the link between quantitative and qualitative increases in diversity and policy adaptations, see, *e.g.*, E. Philippart E. and M. Sie Dhian Ho, "From Uniformity to Flexibility. The Management of Diversity and its Impact on the EU System of Governance", in de Burca G. and Scott J. (eds.), *Constitutional Change in the EU: from Uniformity to Flexibility?*, Hart Publ., Oxford, 2000, p. 300.

21 Walker N., "Legal Theory and the European Union : A 25th Anniversary Essay", *Oxford Journal of Legal Studies*, vol. 25, n°4, 2005, p. 600.

22 For a recent thorough discussion, see, *e.g.*, "Le Pluralisme" in *Archives de Philosophie du droit*, vol. 49, 2005.

23 Notably by promoting the idea of the integration of EU law into the laws of each Member State (see, *e.g.*, Case 6/64, *Costa v E.N.E.L.*, pp. 593, 594 and 596).

the recognition that "*the municipal law of any Member State* […] *and Community law constitute two separate and distinct legal orders*".[24] In effect, pluralism implies the coexistence of autonomous and valid sources of law, *i.e.*, of different legal orders, within one and the same social field, that is a territory or a population.[25] Pluralism therefore challenges the monopoly of the state as the unique and ultimate source of authority and enables the emergence of a transnational form of law resting on a disconnection between the concepts of state and constitution. In turn, the peace of such coexistence is guaranteed by cooperative features preventing conflicts between incompatible rules.[26]

Thus, while establishing "*institutions endowed with sovereign rights*",[27] Member States not only created a binding system of shared powers and responsibilities backed by "*a complete system of legal remedies*",[28] but also provided for a system of express and implied cooperation rules including, at primary level, the preliminary ruling procedure and the principles of precedence and direct effect and,[29] at secondary level, countless instruments determining the law applicable to a great variety of legal situations and organizing the mesolevel of governance where the EU and the Member States interact through their respective institutional structure in the implementation of common policies. In turn, that EU transnational legal system is confronted with the challenge of coordinating the laws of an increasing diversity of nation states, each embodying a specific political compact reflecting particular social choices and cultural traditions. Consequently, the hybrid nature of the EU system carries particular constraints in terms of legitimation, which mandate the EU to live with, embed and experiment that diversity into its actual *praxis*. The remainder of this paper aims to assess the extent to which the Union has endeavored in recent years to live by and deliver on that ontological requirement in the implementation of its historical commitment to market integration.[30]

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24 See the first preliminary ruling issued by the Court of Justice in Case 13/61, *van Rijn*, section A.

25 See, *e.g.*, R. Michaels, "Global Legal Pluralism", *Duke Public Law & Legal Theory Research Paper Series*, n°259, July 2009, p. 3 and R. Barents, *The Autonomy of Community Law*, Kluwer Law International, The Hague/London/New York, 2004, p. 267.

26 See, generally, M. Delmas-Marty, *Ordering Pluralism, op.cit.*.

27 Case 26/62, *van Gend & Loos*, p. 12.

28 Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, [1986] ECR p. 1339.

29 For a recent discussion of precedence as a conflict rule, see H. G. Hofmann, "Conflicts and Integration: Revisiting Costa v ENEL and Simmenthal II", in M. P. Maduro and L. Azoulai, *The Past and Future of EU Law*, Hart Publ., 2010, p. 62-66.

30 Already in the early 1990's, in introducing his essay on *New Directions in European Community Law*, Snyder contended that under a supranational umbrella, the Union "*increasingly recognises the validity of diverse national policies*" so that, in effect, "[C]*ommon market law, in a fragmented Europe, is thus mainly a co-ordinating device*" (F. Snyder, *New Directions in European Community Law*, Weidenfeld and Nicolson, London, 1990, p.18). Likewise, Mattera has presented on various occasions in the past the principle of mutual recognition as a means allowing for the accommodation of national diversities (see, *e.g.*, A. Mattera, L'article 30 du traité CEE, la jurisprudence « Cassis de Dijon » et le principe de la reconnaissance mutuelle – Instruments au service d'une Communauté plus respectueuses des diversités nationales, *Rev. March. Un. Europ.*, 1992, n°4, p.13 ; A. Mattera, « L'Union européenne assure le respect des identités nationales, régionales et locales en particulier par l'application et la mise en œuvre du principe de reconnaissance mutuelle », *Rev. Drt. U.E.*, 2002, n°2, p.217). Of course Snyder was right to point to early instances of instruments relying heavily on the coordination of national rules (for a glaring example, see also Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] *O.J.* L 149/2); yet the elaboration of those instruments remained centralized and coordination was arguably the result of regulatory constraints rather than the outcome of a conscious political choice. Likewise, mutual recognition, even though it carried the potential of giving transnational relevance to domestic requirements, was for a long time commanded centrally and poorly organized, with a consequent lack of certainty and effectiveness.

A. THE FORMATION OF THE INTERNAL MARKET TEST

As noted, it is postulated that the affirmation of pluralistic concerns has permeated nowadays the sanctuary of the logic of unity and of the one-dimensional imagery of market integration as entailing the removal of national barriers to trade, namely the internal market case law of the Court of Justice. To perceive a possible evolution in that case law, while remaining mindful of the limits inherent to the casuistry, it is useful to go back in history to the early 1970s, following the completion of the transitional period.

Then, in *van Binsbergen*, the Court endowed the equivalent of Article 56 TFEU, which prohibits "*restrictions on freedom to provide services within the Union*", with direct effect so that it "*may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided*".[31] At the time, the application of Article 56 TFEU was therefore premised on the existence of a direct discrimination, even though the Court hinted that an obstacle to trade could also derive from requirements "*which may prevent or otherwise obstruct the activities of the person providing the service*".[32] The Court then carved an exemption for those restrictions which "*have as their purpose the application of professional rules justified by the general good – in particular rules relating to organization, qualifications, professional ethics, supervision and liability – which are binding upon any person established in the state in which the service is provided*".[33] In turn, the assessment of such exemption was to be carried out "*taking into account the particular nature of the services to be provided*".[34] Like several of the early services cases, *van Binsbergen* involved a residence requirement, *in casu* for legal representatives other than attorneys, which was held contrary Article 56 TFEU "*if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service*".[35]

In the following years, in particular in the post-*Cassis de Dijon* era, *i.e.*, the 1980's, the Court of Justice endeavored to clarify the sequencing of its analysis and to broaden the scope of Article 56 TFEU, that is of the range of restrictions capable of falling within its ambit. In a stream of insurance cases, for example, residence and licensing requirements were found to "*constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided*".[36] Those restrictions may however be justified by "*imperative reasons relating to the public interest*" if they are "*applied to all persons or undertakings operating within the territory of the state in which the service is provided*", *i.e.*, in a non-discriminatory fashion, if they actually protect "*the interests which such rules are designed to safeguard*", if "*the public interest is not already protected by the rules of the sate of establishment*" and if "*the same result cannot be obtained by less restrictive rules*".[37] This presentation is somewhat misleading, though, as the sequencing was not as clear by the time, but at least all elements that came to constitute the internal market test were present. The notion of mutual

31 Case C-33/74, *van Binsbergen* [1974] ECR 1299, para. 27.
32 *Idem*, para. 10.
33 *Idem*, para 12.
34 *Idem*.
35 *Idem*, para. 16.
36 See, *e.g.*, Case C-205/84, *Commission v. Germany* [1986] ECR 3755, para 28 and references provided there.
37 *Idem*, paras 27-29.

recognition acquired particular significance in the late 1980's, both at the level of the definition of the restriction and of its possible justification. Thus in *Stichting Gouda*, for example, a restriction was found to arise out of the "*application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member States who already have to satisfy the requirements of that State's legislation*", *i.e.*, creating a so-called double burden.[38] In the same case, the Court came to exclude the possibility of justifying the national rules *a quo*, regulating advertising on cable television, "*if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established*".[39] The reasoning, which may appear cyclical at first sight, was later clarified in *Säger*.

Indeed, in the early 1990's, *Säger* confirmed the expansion of Article 56 TFEU to non-discriminatory restrictions, thus moving toward a market access standard, and induced thereby a convergence of the test applicable to services with the one applicable to goods at the time. Thus the prohibition of barriers to trade in services was to cover not only direct discrimination "*but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member States where he lawfully provides similar services*".[40] The question from then on would rest with the substance of the term "impede" or "impediment to" the cross-border supply of services. Would the application of any domestic requirement to foreign-based services providers amount to a restriction? Or does it have to display certain plus-factors and, in the affirmative, which ones? An increase in the costs of the supply of services, but then, in what proportion? Eventually, *Säger* also clarified the stages of the proportionality assessment applicable to the justification phase of the internal market test: the domestic requirement(s) must be "*objectively*" appropriate to ensure compliance with an imperative reason relating to the public interest (appropriateness) that is not protected by the rules to which the service provider is subject in its Member State of establishment (equivalence), and it must not exceed what is necessary to attain those objectives (indispensability).[41] Over the same period, the Court of Justice further confirmed that Article 56 TFEU covers restrictions, including of a fiscal nature, affecting not only the suppliers but also the beneficiaries of services if they "*operate to deter*" those seeking a particular service, such as pension, life invalidity or sickness insurance coverage, "*from approaching insurers established in another Member State*".[42] Again, the actual contours of that deterrence requirement would remain a source of endless questioning from then on.

The convergence between the internal market test applicable to goods and services will last but with one important exception. In 1995, the Court declined to extend to the area of services its *Keck and Mithouard* case law excluding non-discriminatory measures governing selling arrangements from the scope of the free movement of goods.[43] The case, known as *Alpine Investments*, pertained to the prohibition of cold calling for the purpose of selling investment

38 Case C-288/89, *Stichting Gouda* [1991] ECR I-4007, para. 12.
39 *Idem*, para. 13.
40 Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd* [1991] I-4221, para 12.
41 *Idem*, para 15.
42 See, *e.g.*, Case C-204/90, *Bachmann* [1992] ECR I-249, para 31 (at stake the deductibility of life insurance contributions). Along the same lines, see already Joined Cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR I-377, paras 10 and 16.
43 Joined Cases C-267 and 268/91, *Keck and Mithouard* [1993] ECR I-6097, para. 16.

products; contrary to selling arrangements, the Court found, the prohibition at issue actually did "*directly affect access to the market in services in the other Member States* [where customers are located] *and is thus capable of hindering intra-Community trade in services*".[44] Indirectly, the Court refused therefore to distinguish between the service and the way it is supplied, while at the same time expressly relying on the notion of "market access" that has come to qualify that of trade impediment. In passing, it also confirmed that restrictions to cross-border trade in services can emanate equally from the State of destination and from the State of origin of the supplier.[45] In the examination of the necessity of the prohibition on cold calling in light of the public interest in protecting investor confidence in the domestic financial markets, the Court upheld the measure and expressly allocated regulatory jurisdiction to the Member State from which the telephone calls were made by judging that it was "*best placed to regulate cold calling*".[46] In doing so, it insisted on the practical constraints relating to the control of calls emanating from another Member State and based its assessment on the effectiveness of such control.

This historical overview ends in the late 1990's/early 2000's with the *Smits & Peerbooms* case where the Court confirmed that "*the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement*" so that even social security rules – *in casu* a prior authorization scheme conditioning the benefit of the reimbursement of health treatments incurred abroad – are subject to the discipline of Article 56 TFEU.[47] The Court then examined the scheme both from the point of view of the beneficiary and the one of the potential suppliers and while confirming the association between the notions of restriction and deterrence in relation to the former, volunteered a rather ill-defined standard for the determination of the scope of Article 56 as precluding "*the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State*".[48] In retrospect, the question arises whether such statement does not represent the ultimate negation of regulatory diversity in so far as the cross-border supply of services would seem necessarily "more difficult" and/or to "involve additional costs" from a regulatory point of view, than doing so within a single Member State.

B. AFFIRMATION OF A PLURALIST APPROACH TO THE INTERNAL MARKET TEST

With the above background in mind, the following sections explore the latest case law of the Court of Justice in the area of services, with incursions beyond, with a view to highlighting an evolution in the application of the internal market test revealing the affirmation of a *praxis* of pluralism. The two main stages of the test are reviewed successively: first the interpretation of the notion of restriction to the freedom to provide services and second the assessment of the proportionality of the restriction(s) at stake in light of the alleged public interest to safeguard.

44 Case C-384/93, *Alpine Investments* [1995] ECR I-1141, paras. 37-38.
45 *Idem*, para 30.
46 *Idem*, para. 48.
47 Case C-157/99, *Smits & Peerbooms* [2001] ECR I-5473, para. 54.
48 *Idem*, para. 61 (and references provided there).

1. RESTRICTION CRITERIA

A study of the most recent services case law of the Court of Justice reveals a lasting ambiguity as to the content of the notion of "restriction" to trade. To be sure, those cases involving direct discrimination or poorly concealed protectionist measures are relative straightforward, especially when they are reminiscent of past practices such as residence requirements or discriminatory taxation.[49] Situations where the supply of a particular service is prohibited or entrusted in a single operator do not give rise to much controvery.[50] Cases pertaining to classic issues such as the posting of workers abroad have raised concerns related to the type of practice found to constitute a restriction, such as collective actions, but less as to the reasoning concerning the restrictive effects thereof.[51] Conversely, the circumstances in which a measure applicable without distinction may be deemed to amount to a restriction – *i.e.*, market access cases – continue to raise questions. Even if indicia of a possible "turn to pluralism" are more apparent in the review of the proportionality of requirements aimed to safeguard public policy interests, two developments are worth mentioning at this stage.

1.1. A margin of diversity?

The recent *Italian auto insurance* case, which involved the obligation for insurance provider to contract with any vehicle owners domiciled in Italy, offers a good starting point to illustrate the lasting ambiguity in the application of the market access criterion.[52] The Court starts with a now widespread formula according to which "*the term 'restriction' within the meaning of Article* [56 TFEU] *covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services*".[53] Interestingly, it then underlines that mere regulatory diversity, *i.e.*, "*the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory*", is not constitutive of a restriction.[54] Even though a similar affirmation can be found in earlier cases,[55] that gesture toward the acceptance of a coexistence of different regulatory standards across the EU implies logically that a "margin of diversity" ought to be left to Member States within which their domestic rules are not likely to be found restrictive of cross-border trade. Thus, only those measures found to "*affect access to the market for undertakings from other Member States*" would be deemed to hinder intra-Community trade.[56] In turn, the Court of Justice considers that

49 See, *e.g.*: (i) Case C-546/07, *Commission/Germany* [2010] ECR I-439, involving a residence requirement for those providers willing to conclude a works contract with Polish undertakings in order to provide services in Germany; and (ii) Case C-169/08, *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, involving a local tax for stopovers made by aircrafts or boats operated by persons having their tax domicile outside the territory of the region of Sardegna.

50 See, *e.g.*: (i) Case C-36/02, *Omega* [2004] ECR I-9609, para. 25, where the operation of a laser game "*lawfully marketed in the United Kingdom*" was prohibited in Germany; or (ii) the *Gaming cases* such as Case C-42/07, *Liga Portuguesa* [2009] ECR I-7633, para. 52 and Case C-258/08, *Ladbrokes/Lotto* [2010] ECR I-4757, para. 16.

51 See, *e.g.*, Case C-341/05, *Laval* [2007] ECR I-11767 and Case C-438/05, *Viking* [2007] ECR I-10779.

52 Case C-518/06, *Commission/Italy* [2009] ECR I-3491. See, also, *e.g.*, Case C-258/08, *Ladbrokes/Lotto* [2010] ECR I-4757, para. 15.

53 Case C-518/06, *Commission/Italy* [2009] ECR I-3491, para. 62.

54 *Idem*, para. 63.

55 See, *e.g.*, Case C-384/93, *Alpine Investments* [1995] ECR I-1141, para. 27, Case C-379/92, *Peralta* [1994] ECR I-34, para. 48 and for an earlier example, Case 185 to 204/78, *van Dam* [1979] ECR 1979 p. 2345, para. 10.

56 Case C-384/93, *Alpine Investments* [1995] ECR I-1141, para. 64.

market access is affected in the case *a quo* because, by "*oblige*[ing] *insurance undertakings which enter the Italian market to accept every potential customer, that obligation to contract is likely to lead, in terms of organisation and investment, to significant additional costs for such undertakings*".[57] In particular, they "*will be required to re-think their business policy and strategy, inter alia, by considerably expanding the range of insurance services offered*".[58] The margin of diversity left to Member States appears therefore particularly thin and the notion of restriction to market access to be more a matter of degree – of "*scale*" of "*changes and costs*"[59] - than kind. In turn, that criterion continues to leave the scope of Article 56 TFEU wide open, quite unsettled and, in effect, a matter of case by case appreciation for the Court of Justice, which seeks to retain thereby the potential for allocating regulatory jurisdiction.[60]

The notion of margin of diversity can be found in other recent cases relating, *e.g.*, to demographic limitations to the establishment of pharmacies in Spain.[61] In that case, the Court of Justice derived such margin from the "*power of Member States to organise their social security system*" and to "*determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved*".[62] Yet, the affirmation of that "*measure of discretion*" did not seem to affect the actual assessment of the notion of restriction, which involved, it is true, a classic system of prior authorization.[63] Moreover, in another case involving "*the power of the Member States to organise their social security systems*", the Court appeared to deny any margin of diversity by taking the view that Article 56 TFEU "*precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services entirely within a single Member State*".[64] That case related, however, to a difference of treatment in the coverage of patients authorized to receive hospital care in another Member State. The same terminology was used in a case involving a different recovery period for taxes due on assets held inside or outside the territory of The Netherlands, which was deemed to "*make it less attractive for* […] *taxpayers to transfer assets to another Member States in order to benefit from financial services offered there*".[65] Eventually, the "*more difficult*" standard was merged with that of market access in a case involving the prohibition of advertising on national television networks for medical and surgical treatments carried out in private health care establishments in Italy.[66] Earlier on, in *Rüffert*, the Court held that a mere difference in the minimum rates of pay imposed in the country of supply of services and in that of establishment was such as to impose "*an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State*".[67]

57 *Idem*, para. 68.
58 *Idem*, para. 69.
59 *Idem*, para. 70.
60 This is equally apparent from a recent establishment case, for example, in which the Court found that a rule making the opening of new roadside service stations in Italy subject to minimum distances requirements between service stations affected access to the activity of fuel distribution (Case C-384/08, *Attanasio* [2010] ECR I-2055, para. 45.)
61 Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gomez* [2010] ECR I-4629.
62 *Idem*, paras. 43-44.
63 *Idem*, para. 44.
64 Case C-211/08, *Commission/Spain* [2010] ECR I-5267, para. 55. The reason for such strict stance might lie with the similarities of the case with the earlier *Smits & Peerbooms* case (C-157/99, see above).
65 Joined Cases C-155/08 and C-157/08, *X and Passenheim-van Schoot* [2009] ECR I-5093, paras. 32 and 39.
66 Case C-500/06, *Corporacion Dermoestetica* [2008] ECR I-5785, para. 33: "*Those rules are, therefore, liable to make it more difficult for such economic operators to gain access to the Italian market*".
67 Case C-346/06, *Rüffert* [2008] ECR I-1989, para. 37.

Overall, the Court of Justice appears more inclined to give operational significance to the notion of margin of diversity, *i.e.*, tolerance for the coexistence of different regulatory systems across Member States, at the level of the proportionality review.[68] In contrast, at the prior level of the assessment of the existence of a restriction, references to regulatory diversity, notably in relation to measures applicable indistinctively, seem to have little impact on the interpretation of that term, which continues to be associated with the loose notion of market access. The indeterminacy of that notion is further illustrated by *Mobistar*, a case involving municipal taxes on mobile communications infrastructures (*e.g.*, masts and antennae), which the Court interpreted as falling outside the scope of Article 56 TFEU.[69] Its reasoning started with a classic reminder of the fact that measures indistinctively applicable may still amount to a restriction of cross-border trade if they are "*liable to prohibit or further impede the activities of a provider of services established in another Member State*".[70] It then resorted to a strict reading of Article 56 TFEU as precluding "*the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State*".[71] It further added a third premise to its reasoning, namely that "*measures, the only effect of which is to create additional costs in respect to 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* [56 TFEU]". That last statement appears difficult to reconcile with other cases, where the additional costs incurred by services providers due to domestic requirements in the host Member States were found constitutive of a restriction. Yet, the Court also held in *Mobistar* that there was "*nothing in the file to suggestion that the cumulative effect of the local taxes compromises freedom to provide mobile telephony services*", thereby hinting that, conversely, such cumulative effect could form the basis for a restriction. Then, again, the question arises of the magnitude of the cumulative costs necessary to form a restriction – *i.e.*, when does a measure loses its neutrality to become restrictive – and of the dissatisfaction of a solution leaving that assessment in the hands of the Court of Justice, on a case-by-case basis.[72]

At this stage, the above findings suggest the following three considerations. First, the Court of Justice appears unwilling to limit the scope of Article 56 TFEU and of its own power to review the opportunity of national regulations affecting the supply of services, in a context of alleged underdevelopment of the internal market in that important field of the economy. Second, the lack of established limitations to the scope of Article 56 TFEU, while allowing for the review of a

68 See, *e.g.*, Case C-42/07, *Liga Portuguesa* [2009] ECR I-7633, paras 58 et seq.

69 Joined Cases C-544/03 and C-545/03, *Mobistar/Commune de Fléron* [2005] ECR I-7723. Note, however, that the Court does not make an express reference to the notion of "access" in that case, even though it clearly involves a measure applicable "*without distinction to national providers of services and to those of other Member States*" (para. 29).

70 *Idem*, para. 29.

71 *Idem*, para. 30.

72 Another ground for dissatisfaction lies in the tension underlying the case law of the Court of Justice between the notions of "minor" and "indirect" restrictions. Thus, the Court considers, on the one hand, that "*the articles of the 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*" (see, e.g., Case C-34/98, *Commission/France* [2000] ECR I-995, para. 49 and Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, para. 8) but, conversely, that a domestic measure "*the restrictive effects which it might have on the free movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States*" (Case C-379/92, *Peralta* [1994] ECR I-34, para. 24; Case C-96/94, *Centro Servici Spediporto* [1995] ECR I-2883, para. 41; Case C-266/96, *Corsica Ferries France* [1998] ECR I-3949, para. 31).

broad range of national measures, shows the limits of an internal market test based on the objective of removing national barriers to trade, for it does not reflect the variety of circumstances, demands and contexts presiding over the enactment of domestic regulations. Third, it is often argued that the two parts of the internal market test are intertwined or even interdependent so that an allegedly "light" restriction would be more prone to justification, and vice-versa. Even if it may carry some truth from an empirical perspective, as apparent from some of the cases reviewed hereinafter, this truism remains problematic from a normative point of view because it does little to clarify the notion of obstacle to trade and is of little help in identifying a consistent narrative underlying the European economic integration process.

1.2. Taxing diversity?

In tracing signs of a greater tolerance of the Court of Justice for the coexistence of different regulatory standards, a second notable development in the recent internal market case law, with immediate consequences this time, relates to the Court's refusal to allocate regulatory jurisdiction in double taxation cases. Leaving the area of services to enter that of free movement of capital allows indeed for an interesting illustration of the pluralist hypothesis formulated above.

In essence, the Court was asked in various cases whether Article 63 TFEU prohibited the double taxation of dividends, *i.e.*, the taxation of the same income in the country of origin of the income, by deduction at source, and then in the country of residence of the taxpayer as part of his revenues without providing for the possibility of setting off the former against the latter.[73] Even though the cases involved situations of double fiscal burden, susceptible of affecting investment decisions, the Court refused to find a restriction on the movement of capital between Member States in the absence of "*any distinction between dividends from companies established in Belgium and dividends from companies established in another Member State*" as to the tax rate applicable in the taxpayer's country of residence.[74] Conversely, it considered that the situation resulted from the mere "*exercise in parallel by two Member States of their fiscal sovereignty*" and that preventing double taxation in those cases would "*amount to granting a priority with respect to the taxation of that type of income to the Member State in which the dividends are paid*",[75] which it was not prepared to do.

To justify its reluctance, the Court of Justice emphasized that direct taxation falls within the competence of the Member States, that it is for each Member State to organize its tax system and to define the tax base and the tax rate applicable to the taxation of dividends and,[76] in particular, that "*no uniform or harmonisation measure designed to eliminate double taxation has yet been*

73 See in particular: Case C-513/04, *Kerckhaert & Morres* [2006] ECR I-10967; Case C-128/08, *Damseaux* [2009] ECR I-6823. See also C-194/06, *Orange European Smallcap Fund* [2008] ECR I-3747.

74 Case C-513/04, *Kerckhaert & Morres*, *op. cit.*, para. 17. In contrast, the Court held that in earlier cases in which it found a restriction, "*the laws of the Member States at issue did not treat in the same way dividend income from companies established in the Member State in which the taxpayer concerned was resident and dividend income from companies established in another Member State, thereby denying recipients of the latter dividends the tax benefits granted to others*" (*idem*, para. 16, referring to Case C‑35/98 *Verkooijen* [2000] ECR I‑4071, Case C‑315/02 *Lenz* [2004] ECR I‑7063 and Case C‑319/02 *Manninen* [2004] ECR I‑7477).

75 See, respectively, Case C-513/04, *Kerckhaert & Morres*, para. 20 and Case C-128/08, *Damseaux,* para. 32.

76 Case C-128/08, *Damseaux, op.cit.,* paras 24 and 25.

adopted at Community law level",[77] with the consequence that "*Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation*".[78] In other words, in the absence of "*any general criteria* [provided for in Community law] *for the attribution of areas of competence between the Member States in relation to the elimination of double taxation*", it is "*for the Member States to take the measures necessary*".[79]

The solution adopted by the Court of Justice in those cases is somewhat surprising in view of its past internal market case law, which included various attempts at palliating for a lack of legislative activity. Likewise, it is common ground that no "*nucleus of sovereignty*" is beyond the reach of Union law.[80] Yet, the reasoning of the Court suffers little ambiguity: in the absence of any measure adopted at EU level with a view to preventing double taxation, generally, Article 63 TFEU does not require giving precedence to one regulatory solution, *e.g.*, taxation at source, over another, *e.g.*, taxation at the place of the taxpayer's residence. Is the Court suddenly stretching – *i.e.*, taxing – the boundaries of regulatory diversity? A comparison with the *Laval* case reveals a possible willingness to defer to the legislature those cases involving policy choices in areas where no consensus at EU level has emerged.[81] Thus, in *Laval*,[82] the Danish and Swedish Governments submitted that the right to take collective action in the context of negotiations with an employer fell outside the scope of Article 56 TFEU because, pursuant to Article 153(5) TFEU, the "*Community has no power to regulate that right*".[83] Yet, the Court held that the exercise of the right to collective action was to take place in compliance with EU law and therefore that it could not be excluded from the domain of freedom to provide services.[84] In effect, *Laval* involved alleged restrictions to the posting of workers abroad, a matter regulated by Directive 96/71/EC thus reflecting a consensus reached previously at EU level,[85] the interpretation of which was precisely at stake.

The hypothesis of a greater deference for diversity in areas where no regulatory competence has been conferred upon or exercised by the Union is further explored hereinafter. Arguably, that deference could be interpreted as a sign toward a greater tolerance in the core *praxis* of the Union for the coexistence of varying regulatory standards and thus with a pluralist account of the narrative underlying European economic integration.[86] It is unclear, however, whether that affirmation carries any systematic relevance.[87] Likewise, it is not excluded that it may be linked

77 Case C-513/04, *Kerckhaert & Morres*, *op. cit.*, para. 22.
78 Case C-128/08, *Damseaux, op.cit.,* para. 30.
79 Case C-513/04, *Kerckhaert & Morres*, *op. cit.*, paras. 22-23.
80 See, *e.g.*, K. Lenaerts, Constitutionalism and the Many Faces of Federalism, *American J. of Comparative L.*, 1990, p. 220.
81 As inspired by S. Francq, "Note sous C-128/08, *Damseaux*", *Journ. Drt. Int. (Clunet)*, 2010, p. 614-615.
82 Case C-341/05, *Laval* [2007] ECR I-11767.
83 *Idem*, para. 86.
84 *Idem*, paras 87-88.
85 Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] *O.J.* L 18/1.
86 The notion of tolerance can be approximated with that of margin of discretion as a means to palliate the hierarchical character of the internal market test in the sense that, eventually, the state measure at stake is necessarily found either restrictive of the fundamental freedoms, or compatible with it. Yet, it remains difficult to capture the criteria guiding the determination of the scope of that tolerance. The reference to the absence of regulatory competence or lack of exercise thereof may be one way to "objectivise" the perception that such determination varies according to the "sensitivity" of the policy area at issue.
87 *A contrario*, though, examples of strict interpretation of the notion of restriction to trade can be found in areas where competence has been conferred upon and exercised by the Union, such as broadcasting services

to a qualitative evolution in the nature of the questions put to the Court and a greater awareness of the possible implications of its rulings for Member States, including for their resources and, as a corollary, redistributive powers. Furthermore, it might be construed as a propensity for taking competences (more) seriously in echo to concerns voiced by various national actors over more than fifteen years, and thus as part of a response to challenges over the legitimacy of the Union as a regulatory and political body.

2. PROPORTIONALITY REVIEW

As noted, indicia of the affirmation of pluralistic concerns are more apparent from the proportionality branch of the internal market test, particularly at the level of the equivalence and indispensability assessments, which have historically involved an inquiry as to whether the public policy interest pursued by the restriction to trade: (i) is not already satisfied by the rules imposed on the supplier in his country of establishment; and (ii) cannot be achieved by less restrictive means. Even though it does not relate as such to the treatment of regulatory diversity,[88] the adequacy portion of the proportionality review has not lost its relevance either. To the contrary, recent case law testifies of a strict analysis of the "*consistent and systematic*" character of the pursuit of the alleged justification ground(s).[89] The application of that criterion appears to have been decisive in determining the outcome of various – including prominent – recent cases. For example, in *Rüffert*, the Court of Justice took issue with the fact that the higher rate of pay at issue was deemed necessary to protect construction workers when they are employed in the context of public works contracts but not in the context of private contracts.[90] In *Corporacion Dermoestetica*, it pointed to the inconsistency of rules prohibiting the advertisement of medical and surgical treatments on national but not on local television networks.[91] Likewise, in the area of establishment, the Court highlighted in *Blanco Pérez* the need to determine whether demographic limitations on the opening of pharmacies sought "*in a consistent and systematic manner to ensure that the provision of medicinal products to the public is reliable and of good quality*".[92] And in the recent stream of gaming cases, emphasis was clearly put on whether restrictions were suitable for achieving objectives, *e.g.*, of consumer protection,

(see, *e.g.*, Case C-429/02, *Bacardi* [2004] ECR I-6617, para. 35, which also involves the interpretation of Directive 89/552/EEC of October 3, 1989 on the coordination of [measures] concerning the pursuit of television broadcasting activities [1989] *O.J.* L 298/23).

88 In Case C-137/09, *Josemans* ([2010] ECR I-not yet reported), which involved restrictions to the access by foreigners to coffee-shops in the Maastricht area, the Court of Justice found that these restrictions could not be deemed inconsistent with the Dutch policy of tolerating the consumption of cannabis given that the latter was "*prohibited in all Member States from being offered for sale*", thereby disclosing a predisposition in favour of regulatory convergence.

89 In the past, the appropriateness requirement had already risen to prominence in cases involving public policy derogations to the free circulation of workers, notably prostitutes. In that regard, the Court of Justice consistently refused to consider the alleged public policy justification where the relevant Member State "*does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct*" (see, *e.g.*, Joined cases 115 and 116/81, *Adoui and Cornuaille* [1982] ECR p. 1665, para. 8; Case C-348/96, *Calfa* [1999] ECR I-11, para. 21; Case C-268/99, *Jany* [2001] ECR I-8657, para. 60).

90 Case C-346/06, *Rüffert* [2008] ECR I-1989, para. 40.

91 Case C-500/06, *Corporacion Dermoestetica* [2008] ECR I-5785, para. 39.

92 Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gomez* [2010] ECR I-4629, para. 95.

"*inasmuch as they must serve to limit betting activities in a consistent and systematic manner*".[93] Thus, while the Court of Justice appears to have displayed greater flexibility in the equivalence and indispensability inquiries, the test of adequacy has assumed particular prominence in various recent cases.

The starting point of the proportionality review in many recent services cases testifies of a willingness to depart from the fixed objective of Europeanization of regulatory law, that is of promoting the emergence of a new European majoritarian view aimed to break the path-dependence of actors from national systems.[94] Thus, in the *Italian auto insurance* case, for example, the Court of Justice made the following general proposition: "*it is not essential, with regard to the proportionality criterion, that a restrictive measure laid down by the authorities of a Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue*".[95] Whereas this case did not pertain to public policy, the language used by the court is clearly reminiscent of *Omega*, where the Court acknowledged that "*the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another*" and that "*it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected*".[96] In recent gambling cases, a similar finding to the effect that "[T]*he mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end*" was rooted both in the absence of harmonization at EU level in the field of games of chance with, as a corollary, the freedom "*for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected*", and in the "*significant moral, religious and cultural differences between the Member States*".[97]

Interestingly, those considerations displaying a principled tolerance for regulatory diversity beyond the realm of public policy are not limited to the area of services, but have also been found recently in establishment and free movement of goods cases. Thus, in *Blanco Pérez*, already discussed, the Court started its proportionality review with the observation that "*the fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms*" or at least "*is not decisive for the outcome of the cases before the referring court*".[98] Similarly, in the *Italian Trailers* case, the Court of Justice found that "[I]*n the absence of*

93 Case C-258/08, *Ladbrokes/Lotto* [2010] ECR I-4757, para. 21. See also Case C-42/07, *Liga Portuguesa* [2009] ECR I-7633, para. 61; Joined Cases C‑338/04, C‑359/04 and C‑360/04, *Placanica et al.* [2007] ECR I-1891, para. 53; and Case C-243/01, *Gambelli et al.* [2003] ECR I-13031, para. 67.

94 See, generally, M. P. Maduro, *We The Court*, *op. cit.*, p. 72.

95 Case C-518/06, *Commission/Italy*, *op.cit.*, para. 83.

96 Case C-36/02, *Omega* [2004] ECR I-9609, paras 31 and 37. This formula can be traced to earlier statements to the effect that Member States may differ in the way they define and address public policy issues and should be granted a margin of discretion in that regard so that those differences cannot as such be deemed disproportionate (see, e.g., Case 41/74, Van Duyn [1974] ECR p. 1337, para. 18; Case C-124/97, Läärä et al. [1999] ECR I-6104, para. 36). For recent cases involving public policy considerations and referring to the *Omega* formula, see in the area of free movement of goods, Case C-244/06, *Dynamic Medien* [2008] ECR I-505, paras 44 and 49; and in the area of EU citizenship, Case C‑208/09, *Sayn-Wittgenstein* [2010], para. 91.

97 Case C-42/07, *Liga Portuguesa* [2009] ECR I-7633, paras 57-58; Case C-258/08, *Ladbrokes/Lotto*, *op. cit.*, para. 19. For an earlier formulation, see, e.g., Case 275/92, *Schindler* [1994] ECR I-1078, para. 61.

98 Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gomez*, *op.cit.*, paras 68-69.

fully harmonising provisions at Community level, it is for the Member States to decide upon the level at which they wish to ensure road safety in their territory" and "*the way in which that degree of protection is to be achieved*", so that "*the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate*".[99]

The immediate consequence of the above premise is, again, the recognition of a "margin of diversity" to Member States in the exercise of their regulatory powers. As the Court stated in *Omega*, again: "*the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State*".[100] At the stage of the proportionality review, however, that margin of diversity translates immediately in the recognition that "[T]*he competent national authorities must [...] be allowed a margin of discretion within the limits imposed by the Treaty*",[101] or, stated otherwise, that the diversity of national preferences entails "*a margin of appreciation*" for Member States.[102] Even if the sequence of the internal market test embeds by essence a margin of discretion mechanism, providing for an additional national margin of appreciation in those cases characterized by the absence of regulatory consensus at EU level, as translated in EU-wide instruments, or by profound moral, religious or cultural considerations, as well as beyond those cases, discloses the existence of a diversity of review standards and thus allows for the affirmation of a pluralist approach to the management of regulatory diversity. As Delmas-Marty observes, "[P]*roviding for a national margin of appreciation is the key to ordering pluralism*" in so far as "[O]*n the one hand, it expresses the centrifugal dynamic of national resistance to integration*" and "[O]*n the other, since the margin is not unlimited but bounded by shared principles, it sets a limit, a threshold of compatibility that leads back to the centre (centripetal dynamic)*".[103] In practice, the grant of an additional margin of appreciation is reflected directly in the operation of the equivalence and indispensability inquiries embedded in the proportionality review of national restrictions to cross-border trade.

2.1. Equivalence in question

The possible impact on the operation of the equivalence inquiry of the recognition of a broad margin of appreciation for national authorities is particularly apparent from the series of recent cases involving the gaming/gambling sector. Thus, in the *Placanica* and *Ladbrokes/Lotto* cases, the Court takes as a premise that such margin ought to ensure Member States the freedom of designing "*their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought*".[104] In *Liga Portuguesa*, the Court

99 Case C-110/05, *Commission/Italy (Trailers)* [2009] ECR I-519, paras. 61 and 65. A similar formula can be found in earlier cases such as, *e.g.*, Case C-262/02, *Commission/France* [2004] ECR I-6597, para. 37 and Case 24/00, *Commission/France* [2004] ECR I-1306, paras 49-50.

100 Case C-36/02, *Omega* [2004] ECR I-9609, para. 38.

101 Case C-36/02, *Omega* [2004] ECR I-9609, para. 31. See also, *e.g.*, Case C-518/06, *Commission/Italy*, *op.cit.*, para. 84 and Case C-258/08, *Ladbrokes/Lotto*, *op. cit.*, para. 19.

102 Case C-110/05, *Commission/Italy (Trailers)* [2009] ECR I-519, para. 34.

103 M. Delmas-Marty, *Ordering Pluralism*, *op.cit.*, p. 44. As Delmas-Marty further explains (*idem*, p. 51): "*Well understood, a national margin of appreciation is no doubt the best way to avoid simply juxtaposing differences and, instead, progressively rendering practices compatible. ...its use must be rationalised by specifying the conditions that will enable it to order pluralism around shared guiding principles*."

104 Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica et al.* [2007] ECR I-1891, paras 47-48; Case C-258/08, *Ladbrokes/Lotto*, *op. cit.*, paras 19-20.

seems to have gone further by suggesting that the margin also ought to affect the implementation of the proportionality test in so far as the latter would then be carried out "*solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure*", thus based on a self-centred perspective focusing on the internal consistency of the domestic system.[105] In doing so, the Court appears to acknowledge that the public policy interests put forward in support of the restrictions at issue justify a particularly broad margin's width. In those circumstances, it is not difficult to anticipate the restrictive interpretation given to the principle of equivalence: "*A Member State is therefore entitled to take the view that the mere fact that an operator* […] *lawfully offers services in that sector* […] *in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, is not a sufficient assurance that national consumers will be protected against the risks of fraud and crime*",[106] as determined by the host Member State in accordance with its "*own scale of values*".[107]

Some commentators contend that the above reasoning amounts to a "*blanket rejection of the application of the principle of mutual recognition in relation to online gambling services*" and "*may potentially challenge the whole philosophy underlying* [the application of Article 56 TFEU]".[108] Others take the view that the condition of equivalence was simply not fulfilled, notably because of the extreme diversity of domestic legislations in the field of games of chance.[109] In a recent Opinion, Advocate General Mengozzi sheds some useful light on the tolerance shown by the Court of Justice for the lack of equivalence between the national regulatory frameworks at issue in the above cases.[110] In particular, while acknowledging a departure from the principle of equivalence as formulated in *Säger*,[111] he points to the exclusion of the gaming sector from the scope of the Services Directives and to the grant of off-shore gaming licences by the authorities of Malta or Gibraltar as expressions of a lack of mutual trust between Member States in that field, whereas such mutual trust is the precondition for the mutual recognition of gaming licences within the Union.[112] In other words, Advocate General Mengozzi implies that trust cannot be postulated but needs to be translated in operational and effective trust-building mechanisms of a cooperative nature in order to enable mutual recognition and the progressive convergence of national systems.[113]

105 Case C-42/07, *Liga Portuguesa (Santa Casa)*, *op.cit.*, para. 58; Case C-347/09, *Dickinger and Ömer* ([2001] ECR I-not yet reported, para. 97.

106 Case C-42/07, *Liga Portuguesa (Santa Casa)*, para. 69; Case C-258/08, *Ladbrokes/Lotto*, para. 54; Case C-347/09, *Dickinger and Ömer*, para. 96.

107 Case C-42/07, *Liga Portuguesa (Santa Casa)*, *op.cit.*, para. 57.

108 A. Dawes and K. Struckmann, "Rien ne va plus? Mutual recognition and the free movement of servicdes in the gambling sector after the Santa Casa judgment", *Eur. L. Rev.*, 2010, pp. 259 and 262.

109 S. Francq, *op.cit.*, p. 626. In Case C-347/09, *Dickinger and Ömer*, the Court expressly indicated that : "no duty of mutual recognition of authorisations issued by the various Member States can exist in the current state of European Union law" (para. 96).

110 Opinion of Advocate General Mengozzi of 4 March 2010 in Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, *Markus Stoß* [2010] ECR I-not yet reported.

111 *Idem*, paras 95-96.

112 *Idem*, paras 97-98 and 103-104.

113 *Idem*, paras 100-102. The Court of Justice decided eventually that "*in the current state of EU law*" there was no mutual recognition obligation for gaming licences across the Union (paras 108-116).

2.2. Necessity, burden of proof and effectiveness

Affirmations of a greater tolerance for regulatory diversity in cases involving policy areas characterized by the prevalence of domestic preferences over the expression of a consensus at EU level, aim particularly at the operation of the indispensability inquiry: "*the fact that some Member States have chosen to establish a* [regulatory] *system different from that introduced by* [another Member State…] *does not indicate that* [the system] *goes beyond what is necessary to attain the objectives pursued*".[114] The recognition of an additional margin of appreciation to Member States in reviewing the proportionality of justifications for domestic restrictions to trade impacts the inquiry at two levels: (i) the definition of the burden of proof borne by Member States; and (ii) the assessment of the practical constraints faced by Member States in guaranteeing the effectiveness of the protection of the public interest(s) sought. Overall, recent cases appear to testify of a relaxation of the necessity inquiry, *i.e.*, of a more lenient assessment compatible with enhanced discretion left to Member States.

a. The proof of the absence of less restrictive means

The performance of the indispensability inquiry, as the last step in the internal market test, is often perceived as the most extreme form of counter-majoritarianism at EU level and is naturally prone to controversies – who is the Court to second-guess the opportunity of the means set forth by the Member States in pursuance of public policy objectives? In preliminary ruling cases, the Court of Justice leaves to the national court the actual assessment as to whether the domestic rule does not go beyond what is necessary to achieve the objective sought. Yet, it does often provide guidance, more or less subtlety, to its national counterpart, at least as to the level of scrutiny to be exercised and, conversely, the burden of proof incumbent upon the relevant Member State.[115]

Precisely, the Court of Justice has adopted a particularly deferential position in some recent cases as to the intensity of the burden of proof carried by Member States. Thus, "*whilst it is true that it is for a Member State which relies on an imperative requirement to justify a restriction within the meaning of the [EU Treaties] to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions*".[116] While it is not exactly clear how that standard is supposed to translate in practice, it clearly indicates a willingness to refrain from questioning the means used to implement public policy objectives, to the extent that they appear "adequate", and the effectiveness thereof.

b. The effectiveness of the protection of the public interest(s) sought

A second notable evolution in the indispensability inquiry associated with the recognition of a margin of appreciation consists in a greater sensitivity displayed toward the effectiveness of the

114 See, *e.g.*, Case C-518/06, *Commission/Italy*, *op.cit.*, para. 85.
115 See, *e.g.*, Case C-438/05, *Viking* [2007] ECR I-10779, paras 87 to 89.
116 See, *e.g.*, Case C-518/06, *Commission/Italy*, *op.cit.*, para. 84 and, for a free movement of goods case, Case C-110/05, *Commission/Italy (Trailers)*, *op.cit.*, para. 66.

means deployed to ensure the protection of the public interest(s) sought. In the online gaming cases, for example, the Court of Justice pointed to the "*substantial risks of fraud*" caused by the "*lack of direct contact between consumer and operator*" to substantiate the practical difficulties for the Member State of establishment to police effectively the practices of games suppliers on a host market and, as a result, to uphold the grant of exclusive rights to operate games of chance via the internet to a single operator, subject to the supervision of its domestic public authorities.[117] This approach is of course evocative of the reasoning adopted by the Court in the *Alpine Investment* case, discussed above, as to the effective means to police cold calling practices.[118] Similarly, in recent free movement of goods cases, the Court also underlined, in its review of the proportionality of prohibition or restrictions on the usage of certain goods, "*that Member States cannot be denied the possibility of attaining an objective* […] *by the introduction of general and simple rules which will be easily understood and applied* […] *and easily managed and supervised by the competent authorities*".[119] Again, those considerations show a generous deference for Member States' discretion in devising the means adapted to the satisfaction of the level of protection set in accordance with domestic preferences.

CONCLUSION

This paper has attempted to identify signs of the emergence of a logic of pluralism in the core *praxis* of the EU system – economic integration, as driven by the ultimate guardian of the unity of the Union, namely the Court of Justice. At this stage, the following conclusion surfaces: in those cases involving indistinctively applicable measures pertaining to policy areas characterized by an absence of EU-wide consensus, as embodied in a legislative instrument adopted at EU level, the Court appears to display a principled tolerance for regulatory diversity, which translates in two interrelated phenomena: (i) a reluctance to proceed to a (re)allocation of regulatory jurisdiction and/or to define regulatory policy; and (ii) the recognition of a broad margin of appreciation to Member States in the exercise of their regulatory powers. In doing so, though, the Court seems to exhibit a preference, at least in the area of services, for a more lenient proportionality review over a limitation of the scope of the notion of restriction to cross-border trade, which remains unsettled but enables the Court to secure its prerogative of reviewing the opportunity of national regulations and/or to avoid creating safe harbors capable of creating or evolving into loopholes in the EU economic integration system. The above findings call however for three remarks.

First, they are contingent on limitations inherent to the casuistry – *i.e.*, on the nature, scope and timing of particular cases – and, at this stage, remain based on a review of a limited sample of about thirty-five recent cases. The ambition is therefore certainly not to express decisive conclusions but to highlight a tendency, which still carries meaning in view of the far-reaching positions held in the past by the Court of Justice, specifically in the field of market integration. The identification of the precise causes underlying that tendency is a subject for debate.

117 Case C-42/07, *Liga Portuguesa (Santa Casa)*, paras 69-70 and Case C-258/08, *Ladbrokes/Lotto*, paras 54-55.

118 Case C-384/93, *Alpine Investments*, *op.cit.*, paras 47-49.

119 Case C-110/05, *Commission/Italy (Trailers)*, *op.cit.*, para. 67; Case C-142/005, *Mickelsson and Roos* [2009] ECR I-4273, para 36. See also Case Case C-137/09, *Josemans* in which the Court of Justice dismissed a possible alternative less restrictive measure by underlining the difficulty "*to control and monitor* [it] *with accuracy*" (para. 81).

Overall, though, it appears to originate in an acknowledgment of existing limits to the interpretation of the market integration provisions of the EU Treaties in an enlarged a more diverse Union,[120] possibly informed by past experiences and a greater awareness as to their broad potential in affecting preference (re)formation and the design and implementation of redistributive policies.

Second, the above findings suggest an evolution toward a more holistic approach in the application of the market freedom provisions revealing greater attention paid to values other than the trade and, consequently, a willingness to move beyond the one-dimensional paradigm of the erosion of national barriers to trade and its corollary, the isolation of the economic and social spheres. They also suggest a move from a market-building into a "market-deepening" project conditional on mutually-agreed solutions, even if of a cooperative nature. In turn, they trigger a fundamental question: wouldn't that evolution both reveal and require a reformulation of the inner *èthos* of the European economic integration process and, from there, of the matrix of the whole EU system?

Third, there is no doubt that protectionist measures remain inefficient and that their removal (will) remain(s) a focus of the economic integration project. Yet the above findings reveal the complexity of the notion of efficiency and the difficulty of devising principles capable of harnessing that complexity. The notion of margin of appreciation constitutes an important tool in that respect, in that it allows for a gradation in the intensity of the review of national regulations depending on the nature thereof and policy interests enshrined therein. In essence, the sequence of the internal market test itself embeds a margin of discretion mechanism; hence, by granting Member States an express "margin of appreciation", the Court of Justice adds in fact width to that original or pre-existing margin of discretion. In turn, the Court reveals a practice of varying and adjusting the margin's width from case to case, *i.e.*, the existence of a plurality of review standards, and reveals thereby a pluralist approach to the management of regulatory diversity. Such an approach carries great potential but is not immune from risks in terms of legal certainty and thus for the formal validity of the market integration rules. For Delmas-Marty, operating a pluralist approach is indeed dependent on two methodological conditions: "*transparency, which requires* [international judges] *to elaborate on the criteria serving as filters; and discipline, which implies that they respect these filters*". This is an exacting process, in particular on the part of a jurisdiction composed of judges with very different backgrounds.[121] Still, the stakes are high for, according to Delmas-Marty, "*judicial transparency and discipline, reasoning and self-limitation are the ingredients for realising the European Union's motto, 'united in diversity'*".[122] Moreover, "[C]*ommitting to playing this game with determination and discipline"* is nothing less than *"a way of showing that the union of peoples, including in other regions and at other levels, is not necessarily synonymous with uniformity, and that the universalism of values can adapt to the curves in space and time*".[123]

120 For an acknowledgment of the increase in regulatory "disparities" following the enlargement of the Union through the accession of a large number of new Member States since 2004, see Case C-380/03, *Germany/Parliament and Council* [2006] ECR I-11631, para 47.

121 On the impact of the enlargement of the Court of Justice on the articulation of the legal reasoning supporting particular judicial decisions, see M. P. Maduro and L. Azoulai, "Introduction" in *Idem* (eds.), *The Past and Future of EU Law*, Hart Publ., Oxford/Portland, 2010, p. xix.

122 M. Delmas-Marty, *Ordering Pluralism*, *op.cit.*, p. 58.

123 *Idem*.

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