

## **On discrimination and the theory of mandatory requirements<sup>1</sup>**

### **1. Introduction**

According to the traditional view quantitative restrictions and discriminatory rules could be justified only according to the Treaty derogations contained in Art. 30.<sup>2</sup> On the other hand, most indistinctly applicable measures,<sup>3</sup> benefit also from other and broader grounds of justification, the mandatory (or imperative) requirements.<sup>4</sup> Treaty derogations may not be invoked to pursue economic interests, whilst economic considerations may be taken into account, although may not be the exclusive reason, in the case of mandatory requirements. In any case the measure must be necessary, i.e. the least restrictive means, to achieve the desired aim, and proportionate, i.e. the restrictive effect on intra-Community trade may not be out of proportion with the interest pursued.

In recent years the distinction between Treaty derogations and mandatory requirements has been occasionally disregarded by the Court: this has led to a certain degree of confusion as to the theoretical explanation of the mandatory requirements doctrine. In particular doubts have been raised as to whether the mandatory requirements should not in fact be considered as additional grounds of derogation to those listed in Art. 30.

The purpose of this article is to analyse the different conceptual explanations of the mandatory requirements doctrine and to analyse whether the distinction between mandatory requirements and Treaty derogations should be maintained. It is submitted that this distinction is important: to dispose of it would imply that the Court is amending the Treaty via judicial interpretation and would thus cast considerable doubts as to the legitimacy of the Court's doing.

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<sup>1</sup> I am extremely grateful to Michael Dougan and Stefan Enchelmaier for their comments and discussions. The usual disclaimer applies.

<sup>2</sup> See notably case 113/80 *Commission v. Ireland* (“Irish Souvenirs”) [1981] ECR 1625.

<sup>3</sup> Most but not all: see for instance case 207/83 *Commission v. UK* (Origin marking) [1985] ECR 1201.

<sup>4</sup> We will use the two terms indistinctly.

In order to maintain the distinction a different reading of the controversial cases will be suggested: if on one hand *Decker* may be reconciled with a strict interpretation of discrimination on grounds of nationality, a more generous interpretation of one of the derogations contained in Art. 30 may be of some help in cases involving environmental protection issues.

After having analysed the Court's rulings and having set out the reasons why mandatory requirements should not be considered as an extension to the Treaty derogations, we will analyse the other possible solutions for explaining the mandatory requirements doctrine.

Some authors have suggested that mandatory requirements are objective justifications for indirectly discriminatory provisions. We will analyse the concept of indirect discrimination and objective justifications and then their application to the mandatory requirements doctrine. The main obstacle to consider the mandatory requirements as objective justifications is that in order to share this view one must be persuaded that the scope of Art. 28 is indeed limited to a prohibition on discriminatory rules.<sup>5</sup>

The alternative solution is to consider mandatory requirements as internal to the definition of a measure having equivalent effect. This view, attractive because preserving the legitimacy of the Court's doing, is not entirely supported by the language used by the Court. However, it is submitted that this is the only conceptually satisfactory solution.

## **2. Discriminatory rules and mandatory requirements: the controversial cases.**

The Court has held fairly consistently that Member States may not rely upon the mandatory requirements in order to justify discriminatory restrictions. However in recent years the Court has referred to grounds not listed in Art. 30 when examining discriminatory rules. This has led some authors to argue that the distinction between mandatory requirements and Treaty derogations has been eroded and that mandatory

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<sup>5</sup> As a matter of terminology I will use the term “indistinctly applicable” rules to indicate those rules which apply to both imported and domestic goods; “indirectly discriminatory” rules to indicate those indistinctly applicable rules which affect imported goods more than domestic ones; “non discriminatory” rules to indicate those indistinctly applicable rules which are not indirectly discriminatory. I will use the term “objective justifications” in a narrow way to indicate only justifications for indirectly discriminatory provisions.

requirements should be considered as additional grounds to the Treaty derogations.<sup>6</sup> This, in particular, having regard to those cases in which directly discriminatory rules were found to pursue legitimate environmental objectives, and *Decker*,<sup>7</sup> a case in which an apparently discriminatory rule was assessed having regard to mandatory requirements. As we shall see, whilst *Decker* can, to a certain extent, be reconciled with the Court's strict interpretation of discrimination on grounds of nationality, the cases relating to environmental protection are more problematic. The legal conundrum faced by the Court in these cases is clear: measures pursuing environmental protection are likely to be discriminatory, however environmental protection is one of the principles informing Community policy. To hold them automatically incompatible with the Treaty because of lack of an express ground of derogation in Art. 30 would not necessarily be wise; however to justify them according to the mandatory requirements poses considerable problems both in terms of consistency of the Court's case law and of legitimacy of the Court's interpretation. It seems that the Court is unwilling to expressly extend environmental protection as a ground of derogation for directly discriminatory measures. We will first analyse *Decker*, and then the cases on environmental protection which can be divided in two groups, those in which the Court finds that the rule is to be considered non-discriminatory, and those in which discriminatory rules are assessed in relation to environmental protection. In the latter cases the Court usually fails, probably not by chance, to mention discrimination.

### 2.1 A difficult case: *Decker*

In *Decker*<sup>8</sup> the Court was called upon to assess the compatibility with Art. 28 of a Luxembourg rule which subjected reimbursement of spectacles purchased abroad to prior authorization, which was not required if the spectacles were purchased in Luxembourg. Reimbursement was in any case at a flat rate.<sup>9</sup>

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<sup>6</sup> See Oliver, P. "Some further reflections on the scope of Article 28–30 (ex 30-36) EC" 36 (1999) CMLRev 783, at 804 and ss.; Barnard, C. "Fitting the remaining pieces into the goods and persons gigsaw" 26 (2001) ELRev 35, at 54; and AG Jacobs' Opinion in C-379/98 *PreussenElektra AG v. Schleswag AG*, opinion of 26/10/00, judgment of 13/3/01, ny, para 226.

<sup>7</sup> C-120/95 *N Decker v. Caisse de Maladie des Employés Privés* [1998] ECR I-1831

<sup>8</sup> C-120/95 *Decker* above n 7.

<sup>9</sup> Personal imports (or imports for personal use) fall within the scope of application of Art. 28. Consistent case law since Case 34/79 *R v. Henn and Darby* [1979] ECR 3795.

The issue of discrimination was not discussed in the ruling, nor debated at the hearing. Not surprisingly the intervening governments (Luxembourg, Belgium, Germany, France, Spain, Netherlands and UK) concentrated in arguing that the legislation fell outside the scope of Art. 28 altogether, and if the Court disagreed, they contended that the rule would be justified according to the public health derogation. The Commission, on the other hand, found the measure to be caught because discriminatory and not justified by Art. 30 since economic in nature and pursuing a financial balance objective.<sup>10</sup> It is however not clear whether, having regard to the previous case law of the Court, the measure was to be classified as discriminatory.

The Court has found to be discriminatory mainly rules which distinguish on grounds of place of production, including rules which reserve the use of a name to home-produced goods,<sup>11</sup> rules which are applied only to imports,<sup>12</sup> or applied by reason of the goods crossing the frontier, and rules which reserve a percentage of public supply contracts to undertakings established in a particular part of the Member State's territory.<sup>13</sup> The rule at issue in *Decker* did not fall within any of these categories, since it provided for a different regime according to the place where the good was to be purchased, and not according to where the good had been produced. Indeed Luxembourg frames exported to Belgium and purchased there would have been subject to the authorization requirement, whilst spectacles imported into Luxembourg and purchased there were not.<sup>14</sup> It is difficult then to assess whether the rule was to be considered discriminatory according to the previous case law of the Court. To the author's knowledge only in the *French newspapers* case,<sup>15</sup> quoted by the Court itself in *Decker*, a similar issue had been analysed: in this case a French rule provided that newspapers publishers would not be granted tax advantages in respect of publications printed in other Member States. In this case, the Court did not discuss mandatory requirements; it also, however, failed to refer to discrimination.

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<sup>10</sup> The outcome of the case is hardly surprising having regard to the fact that when asked by the Court what would be the cost to the balance of the insurance scheme if the authorization requirement were to be disposed of, the Luxembourg Government recognised that the financial impact of such a change would be "insignificant".

<sup>11</sup> See, for instance, joined cases C-321 to 324/94 *Pistre and others* [1997] ECR I-2343, para 49.

<sup>12</sup> See, for instance, case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs-GmbH* [1983] ECR 1217, and case 72/83 *Campus Oil Ltd v. Minister for Industry and Energy* [1984] ECR 2727.

<sup>13</sup> See case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889.

<sup>14</sup> See Reports for the Hearing para 32.

<sup>15</sup> Case 18/84 *Commission v. France* [1985] ECR 1339.

In *Safir*,<sup>16</sup> a case relating to the free movement of services somehow reminiscent of the one here discussed, a rule which distinguished according to the place of establishment of the insurance company in granting tax benefits to insurance subscribers was examined in relation to reasons of fiscal policy (although without expressly referring to imperative requirements). In this case AG Tesauro's call for a clarification on whether the law was to be considered directly discriminatory or not, fell onto dead ears.

The Court's willingness to avoid the language of discrimination is not surprising; tax and welfare provisions are inherently territorial, thus more likely to be seen as discriminatory if the concept of discrimination is to be given a wide interpretation. These rules must however benefit from the possibility for the Member States to rely also (but not exclusively) on economic considerations, something which cannot be done under the Treaty derogations. Although both in *Decker* and *Safir* the measures were found not to be justified, the Court may not have wanted to set a precedent according to which this type of rules could not benefit from the broader grounds of justifications.

Admittedly, the Court has not been very helpful in developing a clear definition of direct discrimination; in the context of services it seems that the Court is keen to interpret direct discrimination in a narrow way: a residence requirement (or worse an establishment requirement), a criterion which national service providers automatically fulfil and the very negation of the freedom to provide services,<sup>17</sup> is not seen, in most cases, as directly discriminatory.<sup>18</sup> Thus, it could be argued that, if discrimination is to be interpreted in a narrow way, in the context of goods direct discrimination only encompasses rules which distinguish upon the place of production, and not those which distinguish upon the place of purchase. The ruling in *Decker* could then be seen as the consistent outcome of a narrow interpretation of direct discrimination. Furthermore the fact that direct discrimination is given a narrow

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<sup>16</sup> C-118/96 *J Safir* [1998] ECR I-1897. Also in this case the rule was found not to be justified; for another case which, had the concept of direct discrimination been given a wide interpretation, could have been seen as directly discriminatory, see C-55/93 *Van Schaik* [1994] ECR I-4837.

<sup>17</sup> Case 205/84 *Commission v. Germany* (insurance case) [1986] ECR 3755, para 52.

<sup>18</sup> Case 33/74 *Van Binsbergen* [1974] ECR 1299; 205/84 *Commission v. Germany*, above n 17; C-204/90 *Bachmann v. Belgium* [1992] ECR I-249; there are however few notable exceptions see Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955; case C-224/97 *Ciola v. Land Vorarlberg* [1999] ECR I-2517.

interpretation seems to be confirmed by the Court's analysis in *Aher Waggon*<sup>19</sup> in which, as we will see below, a rule distinguishing according to the place of registration of aircraft was considered not to be directly discriminatory.

## 2.2 A special case: environmental protection

In *Wallonian Waste*,<sup>20</sup> the Commission attacked a Belgian rule which prohibited the storage, tipping or dumping in Wallonia of waste originating in another Member State or in another Belgian region. The Commission argued that since the rule was directly discriminatory<sup>21</sup> it could not be justified on environmental protection grounds (which is a mandatory requirement). The Court, relying on the particular nature of waste, stated that “(...) having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory”.<sup>22</sup>

The scholarship has already stressed how the reasoning of the Court is unsatisfactory.<sup>23</sup> However, the very fact that the Court finds the measures non-discriminatory, militates against considering the case authority for the extension of the mandatory requirements to discriminatory restrictions.<sup>24</sup>

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<sup>19</sup> 389/96 *Aher-Waggon GmbH v. Germany* [1998] ECR I-4473.

<sup>20</sup> C-2/90 *Commission v. Belgium* [1992] ECR I-4431. It is interesting to note that this case was not referred to by the Court in the following environmental protection/free movement cases. See case C-389/96 *Aher-Waggon* above n 19, case C-203/96 *Chemische Afvalstoffen Dusseldorf and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordering en Milieubeheer* [1998] ECR I-4075, case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune* [2000] ECR I-3743, case C-379/98 *PreussenElektra AG v. Schleswag AG*, above n 6, all discussed below para 3.

<sup>21</sup> According to consistent case law a rule does not cease to be directly discriminatory because of the fact that it entails also discrimination against some of the national producers. See Case C-21/88 *Du Pont De Nemours Italiana* above n 13, para 12; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna, Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* [1991] ECR I-4151, para 24; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, para 37; Case C-67/97 *D Bluhme* [1998] ECR I-8033, para 20; Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-2487, para 27.

<sup>22</sup> Para 36 of the judgment. AG Jacobs in his first opinion (para 20, p. I-4457) had no hesitation in classifying the rules as distinctly applicable: in his second opinion he confirms his previous finding although finds that a measure which would require waste to be disposed of within its locality of generation, and which would apply to exports and imports could be considered indistinctly applicable (para 24, I-4467) and be justified according to mandatory requirements.

<sup>23</sup> See Bernard “Discrimination and Free Movement in EC Law” 45 (1996) ICLQ 85, at 94: and footnote n 24 below.

<sup>24</sup> This is fairly uncontested in the scholarship: see for instance Weatherill, S. and Beaumont, P. *EU Law* (Penguin, 1999, 3<sup>rd</sup> ed.), 591; and Weatherill, S. “Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation” 36 (1999) CMLRev 51; Craig, P. and De Burca, G. *EU Law* (OUP, 1998, 2<sup>nd</sup> ed.), 604; Arnall, A. *The European Union and its Court of Justice* (OUP, 1999), 272 and 273. Arnall suggests that the Court could have used the public policy derogation

The second case which is usually seen as applying the mandatory requirements to a discriminatory rule is *Aher Waggon*.<sup>25</sup> However this case seems to be consistent with the narrow interpretation given by the Court to direct discrimination.<sup>26</sup>

The case related to German rules on registration for aircraft: having taken advantage of the possibility to impose a stricter regime on noise pollution than that imposed by Community harmonising legislation, German law provided a different treatment for aircraft which were already registered in Germany at the date of enactment of the new rules. Thus the German registered aircraft could continue to operate till when they underwent technical modifications, even if unrelated to noise emission, or until they were withdrawn from service. Aircraft which sought to register for the first time had to comply with the stricter rules. Aircraft which had been registered in another Member State and wanted to be registered in Germany, had to comply with the stricter noise standards on seeking German registration for the first time. The Court found the rule to be a barrier to intra-Community trade, justified by consideration of public health and environmental protection.

There can be hardly any doubt that the *effect* of the rule was to impede noise polluting planes which had been registered abroad from registering in Germany, although noise polluting planes which were already registered in Germany at the time of entry into force of the legislation were able to keep on operating. However, this was the effect of the rule: the form of it was arguably non-discriminatory since it applied “to all aircraft, new or used, irrespective of their origin, and (...) [did] not prevent aircraft registered in another Member State from being used in Germany.” It can then be argued that although the rule was clearly indirectly discriminatory, it was not directly discriminatory.<sup>27</sup> Moreover, a finding that the rule was discriminatory

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instead: however, since public policy is translated in the other languages as public order (*ordre public, ordine pubblico*) this seems to be hermeneutically difficult, on this point see below.

<sup>25</sup> C-389/96 *Aher-Waggon* above n 19.

<sup>26</sup> See the discussion on *Decker* above para 2.1.

<sup>27</sup> Some authors have suggested that case 207/83 *Commission v UK* (origin marking), above n 3, is authority to hold that indirectly discriminatory provisions may not be justified on mandatory requirements. However, as we will see below, that case may be explained having regard to the fact that at an early stage the mandatory requirements were a means to bring the measure outside the scope of application of Art. 28. As for considering indirect discrimination as not being justifiable according to mandatory requirements, it is a difficult position to hold since there is little doubt that most product requirements are indirectly discriminatory, and that indirectly discriminatory selling arrangements might be justified according to mandatory requirements. See C-34 etc/95 *De Agostini* [1997] ECR I-3843, para 44 and 45, and maybe C-254/98 *Schutzverband gegen unlautere Wettbewerb v. TK Heimdienst Sass GmbH* above n 21, in which the Court found the rules at issue to be indirectly

would have not, in this case, caused a problem since the Court could have limited its analysis to the public health derogation.

In *Dusseldorf*<sup>28</sup> the Court analysed a restriction on export of waste which fell within Art.29. As is well known since Art. 29 is limited to a prohibition on discriminatory restrictions,<sup>29</sup> only the Treaty derogations may be invoked to justify measures falling therein: the Dutch Government tried however to rely on environmental protection in order to justify the measure. The Court found that “even if” the national measure could have been so justified, the fact that it pursued aims of a purely economic nature excluded the possibility of relying on any justificatory ground.<sup>30</sup> Similarly confusing is the reasoning adopted by the Court in *FFAD*,<sup>31</sup> another case relating to a restriction on exports. Here the Court held “... it must be pointed out that the protection of the environment *cannot* serve to justify any restriction on exports, *particularly* in the case of waste destined for recovery”.<sup>32</sup> Notwithstanding the absolute statement in the first part of the sentence, admittedly somehow weakened in the second part, the Court then proceeded to stress that in *those* circumstances a restriction could not be justified by the need to protect the environment. In the operative part of the judgment it then stated that a restriction cannot be justified on environmental protection grounds “in the absence of any indication of danger to the health or life of humans, animals or plants or danger to the environment”.

More recently in *PreussenElektra*,<sup>33</sup> a case which represents a striking example of tortuous reasoning, the Court scrutinised an obligation imposed upon electricity supply undertakings to purchase the electricity produced in their area of supply (thus in Germany) from renewable energy sources, so as to promote the use of it and reduce the emission of greenhouse gases. An obligation to purchase from a

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discriminatory not justified selling arrangements. There is only one other case to the author’s knowledge in which a selling arrangement was found to be indirectly discriminatory and thus needed to be justified: case C-405/98 *Konsumentombudsmannen v. Gourmet International Products AB*, judgement of 8/3/01, nyd. In this case the Court referred to Art. 30 since the Swedish Government relied on public health.

<sup>28</sup> C-203/96 *Dusseldorf*, above n 20.

<sup>29</sup> Consistent case law; see case 15/79 *PB Groenveld BV v. Produktschap voor Vee en Vlees* [1979] ECR 3409, Case 237/82 *J Kaas Bv at al. v Dutch Government Central Organ Zuivelkontrole* [1984] ECR 483; Case C-80/92 *Commission v Belgium* (radio-communication transmitters) [1994] ECR I-1019, and more recently, case C-388/95 *Belgium v. Spain* [2000] ECR I-3123.

<sup>30</sup> Para 44.

<sup>31</sup> C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune*, above n 20.

<sup>32</sup> Para 48, emphasis added

<sup>33</sup> C-379/98 *PreussenElektra*, above n 6.

national producer is, according to consistent case law,<sup>34</sup> a measure having equivalent effect to a restriction on imports, because it restricts the quantity of goods which might be purchased (or imported from) abroad. Since it directly favours domestic production to the detriment of imports is considered directly discriminatory. The problem was then, once again, whether the measures at issue could be justified on environmental protection grounds. AG Jacobs, partially relying on *Dusseldorf* and *Aher Waggon*, argued that even directly discriminatory measures should sometimes be justified on grounds of environmental protection, and urged the Court to clarify its position so as to provide legal certainty. In his opinion two reasons could be invoked in favour of a “more flexible approach in respect of the imperative requirement of environmental protection”; the Amsterdam Treaty amendments which show a heightened concern for the environment, and the fact that the principle that waste should be rectified at source implies that these type of measures are likely to be discriminatory.<sup>35</sup>

The Court follows a most unusual path,<sup>36</sup> finding the measures “not incompatible” with Art. 28, despite having also found them hindrances to intra-Community trade. It reaches this result by referring to international conventions, the Amsterdam Treaty and the relevant secondary legislation on environmental protection.

For our purposes however the most interesting part is the express reference to the fact that the German policy of encouraging the use of renewable energy “is also designed to protect the health and life of humans, animals *and* plants”.<sup>37</sup> In the French, Italian and Spanish translations the sentence reads slightly differently in that it is stated that “the policy is designed to protect the health and life of humans *and* of animals *as well as* the preservation of plants.”

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<sup>34</sup> The Court referred to cases 72/83 *Campus Oil* above n 12, and C-21/88 *Du Pont de Nemours Italiana*, above n 13: in both cases the measure, being discriminatory was assessed only having regard to Art. 30.

<sup>35</sup> AG Jacob’s opinion para 197-238.

<sup>36</sup> The court does not use the language of justification; at para 72 it says “in order to determine whether such a purchase obligation is nevertheless compatible with Article 30 [now 28] of the Treaty, account must be taken, first of the aim of the provision in question, and second, of the particular features of the electricity market”. This language is rather unusual, and it could be wondered whether the Court’s avoidance of a justificatory approach were not intentional. Also the lack of reference to some justification after having clearly stated that the measure constitutes a hindrance to intra-Community trade is conceptually unsatisfactory, and seems reminiscent of considering mandatory requirements as grounds which render Art. 28 not applicable by bringing the measure outside its scope of application (on this point see below). It is however totally unclear whether the Court is implying that some discriminatory measures may fall altogether outside the scope of application of Art. 28.

<sup>37</sup> Para 75, emphasis added.

It should be noted that, in the English version, the Court's language reproduces exactly one of the derogations listed in Art. 30 of the Treaty with a small but significant difference: the use of *and* as opposed to *or*. If read disjunctively, ie when each of these grounds is considered separately (protection of humans, protection of animals, protection of plants) their scope of application can be extended to protecting the environment at large only with great difficulty.<sup>38</sup> However when the grounds are read together, as it seems the case in the other versions of the ruling, they could well include the protection of the ecosystem, and environmental protection. It is debatable whether the language of the Treaty is an obstacle to read the grounds conjunctively: it is submitted that the Treaty derogation may be given such interpretation. A threat to the environment may be seen as a long term threat to the life of humans, *and/or* to the life of animals, *and/or* to the life of plants; in most environmental cases all three grounds, read together, will be satisfied.

This interpretation would allow the Member States to rely on environmental protection also in cases caught by Art. 29, where mandatory requirements cannot be invoked; it would however be partially inconsistent with the previous interpretation given by the Court to these derogations. It is submitted that a shift in interpretation is preferable both to tortuous reasoning and to judicial amendment of the Treaty. Furthermore, as suggested by those who consider that mandatory requirements should be considered Treaty derogations, the second sentence of Art. 30 would allow efficient policing of discriminatory measures.

### **3. Mandatory requirements as an extension to the grounds contained in Article 30.**

The cases analysed above have not surprisingly led some authors to argue that the mandatory requirements should be seen as an extension of the Treaty derogations.<sup>39</sup> If this were the case then mandatory requirements would be available also (and always) in the case of quantitative restrictions and discriminatory measures. The last sentence of Art. 30, which has been interpreted by the Court as encompassing the proportionality test, would ensure effective policing of discriminatory measures:

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<sup>38</sup> See Krämer, L. "Environmental protection and Article 30 EEC Treaty" 30 (1993) CMLRev 111, at 117.

<sup>39</sup> See above n 6.

these would be subject to a stricter proportionality test since their restrictive effect on trade between Member States is considerably greater. Also the last sentence would be of use when dealing with measures which also pursue an economic interest.

This solution is extremely attractive for its simplicity; as we have seen the concept of discrimination is not necessarily easy to apply. Moreover, this solution would provide us with consistent answers, especially in cases in which environmental issues are at stake. However, an analysis of the case law shows the Court's unwillingness to take such step: this is not surprising given the fact that such a solution, whilst desirable from a pragmatic view point, poses considerable problems in terms of legitimacy of the Court's action. The Court has consistently held that the Treaty derogations have to be interpreted restrictively, and are exhaustively listed. This is because they are derogations from fundamental freedoms granted to European citizens. Fundamental rights, be they enshrined in Constitutional or International Charters, can be derogated from only when a rule of equal rank so provides: otherwise the fundamental freedom would be at the mercy of the states' institutions, and would thus not be so fundamental. The Court's strict interpretation of the Treaty derogations is thus entirely consistent with fundamental rights theory. If this is so, for the Court to provide for further grounds of justification would entail a Treaty amendment via judicial action. This would raise considerable issues of legitimacy of the Court's doing.<sup>40</sup>

If the suggested interpretation of the controversial cases is accepted the distinction between mandatory requirements and Treaty derogations can be maintained. However, this does not shed any light on the conceptual explanation of the mandatory requirements doctrine: we will now analyse the possibility of considering the mandatory requirements as objective justifications for indirect discrimination, and then the theory according to which mandatory requirements are internal to the definition of a measure having equivalent effect.

#### **4. Mandatory requirements as objective justifications for indirectly discriminatory provisions.**

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<sup>40</sup> It is also not so obvious that such a development would be practically desirable having regard to the fact that it would probably have to be extended to Art. 29, and to the other free movement provisions.

### 3.1 Indirect discrimination and objective justifications

Discrimination is traditionally defined as different treatment of comparable situations (formal discrimination) or equal treatment of non-comparable situations (material discrimination), both falling within the concept of direct discrimination.<sup>41</sup> When discrimination is prohibited, the prohibition being contained usually in entrenched legislation, it may be justified only if a source of equal rank to that providing for the prohibition allows a derogation.

The courts have identified also a third type of discrimination, indirect discrimination, which occurs when rules, although neutral in their formulation, are likely to bear more heavily on a protected group. Thus, the fact that the rule is likely to affect one category more than the other is a first sign that there might be indirect discrimination: whilst in case of directly discriminatory provisions the form alone is relevant and sufficient, in the case of indirectly discriminatory provisions neither the form nor the intention matter, but rather the *effect* of the rules. However, a disparate effect alone is not conclusive: there might be an objective reason which justifies the different impact of the rule, a legitimate aim, ie an aim which is consistent with the values enshrined in a given system, that the rule seeks to pursue and which cannot be pursued otherwise but through that rule. Should this be the case the rule is not considered to be discriminatory,<sup>42</sup> since the fact that the rule affects a category more than the other is but a “side effect” of a legitimate regulatory choice. On the contrary, if there is no objective justification, then the fact that the rule affects one category more than another brings that rule within the scope of application of the prohibition of discrimination: the rule will then be upheld if, and only if, there is another rule of equal rank allowing such discrimination to occur.

The concept of objective justifications, should be distinguished, at least as a matter of theory, from the assessment of comparability of situations which is performed in order to assess whether there is discrimination (direct or indirect). In this

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<sup>41</sup> Some authors do not distinguish between material and indirect discrimination: whilst in practice it is often difficult to distinguish the two concepts, a theoretical difference exists. In order to establish material discrimination the courts must assess whether the situations treated equally are in fact different: thus the assessment, as in the case of formal discrimination, is in terms of comparability. In the case of indirect discrimination the disparate effect of the measure triggers the court's assessment of the legitimacy of the interest pursued. See also Lenaerts, K. “L'égalité de traitement en droit communautaire” 26 (1991) CDE 3.

<sup>42</sup> Some authors talk about justified discrimination, but it seems more appropriate to say that in the case in which there is an objective justification there is no discrimination although there is a disparate effect.

case the scrutiny is directed to establish whether there is an objective difference which brings the rule outside the scope of the prohibition on discrimination, which, as said above occurs when *comparable* situations are treated differently. An example may serve to illustrate the difference: a rule which provides that no woman may play in a men's championship is not discriminatory because women and men are in this context (sporting activity) not in comparable situations. If the situations were comparable the rule would be directly discriminatory and could be justified only if a provision of equal rank so allowed.

On the other hand a rule which provides that only people weighing more than 75 Kg. may perform a given job is likely to affect more women than men: it would then escape the provision prohibiting discrimination only if objectively justified, for instance because the job is a heavy lifting job and it could put small people at risk.

Admittedly the distinction between objective differences and objective reasons is more theoretical than real: this is because some indirect discrimination cases may also be solved having regard to an assessment in terms of comparability (in the above example we could say that people weighing less than 75 Kg. are objectively in a different situation); an objective difference is also an objective reason which explains the different impact of the rule. However the reverse is not true: in direct discrimination cases either the situations are comparable, and thus we have discrimination and have to have recourse to derogations, or the situations are not comparable and there is no discrimination. There is no space in this context for a side effect theory which allows broader public interests to be taken into account.

## 2.2 *Mandatory requirements as objective justifications for indirect discrimination*

The concept of indirect discrimination has been widely and aggressively used by the ECJ in the context of the free movement provisions in order to detect protectionist measures and correct traditions which arose with reference to national habits and values and which would *in fact* act to the detriment of foreign persons.<sup>43</sup>

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<sup>43</sup> Ellis, E. "The Concept of Proportionality in European Community Sex Discrimination Law" in Ellis (ed) *The Concept of Proportionality in the Laws of Europe* (Hart 1999), 166 notes that the concept of indirect discrimination is "a necessary part of the legal armoury if longstanding patterns of behaviour

Thus, objective justifications found their way also in the free movement of persons context.

As for goods, some authors who believed the scope of Art. 28 to be limited to a prohibition on discrimination, considered the mandatory requirements to be objective justifications for indirectly discriminatory measures. Thus indistinctly applicable rules would be caught by the prohibition contained in Art. 28 only when affecting imported goods more than domestic ones, if such effect could not be objectively justified.<sup>44</sup> In order to assess whether the disparate effect of the rule is a side effect of a legitimate regulatory policy of the Member State the courts have to assess the interests pursued, and the necessity and proportionality of the rules at issue.

The mandatory requirements could then be seen as a judicial codification of the interests which, on a case by case basis, were found not to be inconsistent with Community law (i.e. the relevant system) and thus “legitimate” regulatory policies of the Member States. However, the fact that a rule pursues an interest not inconsistent with Community law is not enough: since the rule affects imports more than domestic goods, in order to be objectively justified the rule must be necessary: should there be another less restrictive means to achieve the pursued interest then the restrictive effect of the rule cannot be considered a side effect of a legitimate regulatory policy, and would be considered indirectly discriminatory. The rule must also be proportionate, although it is far from clear whether the proportionality test can be distinguished from the necessity test.<sup>45</sup>

Whilst it is generally accepted that in the second half of the eighties the scope of Art. 28 went beyond a prohibition of discrimination, thus undermining the objective justifications theory, following *Keck*<sup>46</sup> this view may have regained some *raison d'être*. The fact that in principle selling arrangements are caught by Art. 28 only when they are directly or indirectly discriminatory, together with the fact that

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which damage particular groups are to be eliminated”. See also Byre, A. *Indirect Discrimination*, Report prepared for the Equal Opportunities Commission, 1.

<sup>44</sup> Marenco, G. “Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative” 19 (1984) CDE 291.

<sup>45</sup> The Court seems to refer to a traditional proportionality assessment in Case C-145/88 *Torfaen Borough Council v. B & Q plc* [1989] ECR 3851, operative part of the judgment, “Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind”.

<sup>46</sup> Joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

product requirements may be seen as inherently indirectly discriminatory since they impose a double burden on imported goods, has led some authors to argue that after *Keck* the scope of Art. 28 is limited to a prohibition on discriminatory measures.<sup>47</sup> Mandatory requirements could then be seen as objective justifications which bring the measure outside the prohibition on discrimination.

It cannot be denied that this interpretation has some merits: first of all, it poses fewer questions in relation to the fact that public health is now assessed only having regard to the Treaty derogations. If, in the case of indirectly discriminatory provisions, a side effect of a legitimate regulatory policy must be accepted, even more so the regulatory policy has to be accepted when authorised by a derogatory provision. To distinguish then between the two, but for the problem relating to the possibility of taking into account economic issues, becomes more of an academic exercise than a concern for the courts.<sup>48</sup>

Secondly, to classify mandatory requirements as objective justifications means to maintain the distinction between the two grounds of justification. This allows a certain degree of consistency having regard to the fact that the Court has constantly held that the Treaty derogations are exhaustively listed, must be narrowly interpreted and may not be invoked for economic purposes,<sup>49</sup> whilst economic reasons can find their way in the mandatory requirements although they cannot be the exclusive reason to impose them: this seems consistent with the side effect theory.

This notwithstanding in order to share this view one has to be convinced that Art. 28 is indeed limited in its scope to a prohibition on discriminatory restrictions. We are not going to enter the debate on the scope of application of, or the proper test for, Art. 28. However, it seems that there are some residual rules which are capable of being classified as measures having equivalent effect regardless of discrimination. In this context the Court has excluded some non-discriminatory measures from the scope of application of Art. 28 by referring to the fact that their effect on intra-Community trade was too uncertain and indirect. This would have not been necessary if the

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<sup>47</sup> See for instance Bernard, above n 23.

<sup>48</sup> See also Bernard, above n 23, at 93.

<sup>49</sup> However, in case 72/83 *Campus Oil Ltd* above n 12, esp. para 36, economic considerations ancillary to the purpose of the measure did not bring the measure outside the scope of application of Art. 30. The availability of resources, in a practical more than an economic meaning, is a relevant aspect of the public policy exception when relied upon in cases of threat of civil unrest; see case 231/83 *Cullet v. Leclerc* [1985] ECR 305, and case C-265/95 *Commission v. France* [1997] ECR I-6959.

measures fell in any case outside the scope of the Treaty because non-discriminatory.<sup>50</sup> Moreover, it is arguable that a measure which prevents access to the market is caught regardless of whether it is discriminatory.<sup>51</sup>

Thus, if we are not persuaded that the scope of Art. 28 is limited to a prohibition on discriminatory restrictions we must find an alternative explanation for the mandatory requirements doctrine.

#### **4. Back to the origin: mandatory requirements as internal to the scope of Article 28.**

Originally the satisfaction of the mandatory requirements brought the measure outside the definition of measure having equivalent effect (MEE):<sup>52</sup> if a measure likely to impede trade satisfied a mandatory requirement of public interest, the measure did not fall within the definition of a MEE.<sup>53</sup> Thus the Court, recognising that

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<sup>50</sup> See for instance case C-69/88 *H Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Staat der Nederlanden* [1990] ECR I-583; Case C-93/92 *CMC Motorradcenter GmbH v. P Baskiciogullari* [1993] ECR I-5009; Case C-372/92 *Criminal proceedings against M Peralta* [1994] ECR I-3453; case C-44/98 *BASF AG v. Präsident des Deutschen Patentamts* [1999] ECR I-6269.

<sup>51</sup> See case C-267 and 268/91 *Keck* above n 46, para 17, to which the Court is starting to expressly refer. See for instance case C-405/98 *KO v. Gourmet*, above n 27, para 18. As for measures which are not selling arrangements, total bans are considered quantitative restrictions regardless of discrimination; see Case 34/79 *R v. Henn and Darby* above n 9; but see case 216/84 *Commission v. France* (milk substitutes) [1988] ECR 793 in which a ban on imports was assessed having regard also to the mandatory requirement of consumer protection, and maybe case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647. It should also be noted that in some cases the Court refused to apply mandatory requirements to indirectly discriminatory rules. If mandatory requirements were objective justifications this would not be explainable. See, for instance, Case 207/83 *Commission v. UK* (Origin marking), above n 3.

<sup>52</sup> In the immediate aftermath of *Cassis* the scholarship was divided as to the nature of mandatory requirements. For the view considering the mandatory requirements an extension of the Treaty derogations, see for instance Masclet, J. C. “Les articles 30, 36 et 100 du Traité CEE à la lumière de l’arrêt ‘Cassis de Dijon’” 16 (1980) RTDE 611; Oliver, P. “Measures of Equivalent Effect: a Reappraisal” 19 (1982) CMLRev 217. For the view that mandatory requirements would bring the measure outside the scope of Art. 28, see Dashwood, A. “Cassis de Dijon: the line of cases grows” 6 (1981) ELRev 287; Barents, R. “New Developments in Measures Having Equivalent Effect” 18 (1981) CMLRev 271; Daniele, L. “Le restrizioni quantitative e le misure di effetto equivalente nella giurisprudenza della Corte di giustizia” 24 (1984) Riv. Dir. Eur. 147. For a more recent discussion of this issue see Weatherill and Beaumont, above n 24, at 575 and 576, and Arnall, above n 24, at 265-269.

<sup>53</sup> See for instance Case 130/80 *Kelderman* [1980] ECR 527 para 15 in which the Court states that it is apparent that the obstacle in question is not justified by public interest requirements and therefore the measure constitutes a MEE; Case 113/80 *Commission v. Ireland* (Irish souvenirs) above n 2, para 9 in which the Court implies that if the measures could be justified according to the mandatory requirements they would not be measures having equivalent effect; Case 220/81 *T F Robertson* [1982] ECR 2349, in which the Court found that “The answer to the question could be given only on the basis of Article 30 [now 28] of the Treaty” since none of the Art. 30 (ex 36) derogations applied; Case 72/83 *Campus Oil* above n 12, para 17 “(...) the Treaty applies the principle of free movement to all goods, subject only to the exceptions expressly provided for in the Treaty itself.”(emphasis added); Case C-

differences in regulatory practices between Member States were likely to create obstacles to intra-Community trade, held that such obstacles were not to be considered as measures having equivalent effect when the imposition of the rules on imports was justified by one of the mandatory requirements. This approach was conceptually important: it allowed the view that the Court was not amending the Treaty via judicial interpretation. It is for the Court to give a definition of measures having equivalent effect: thus the inclusion of the mandatory requirements as a criterion to determine whether a measure constituted a MEE was a legitimate exercise of the interpretative role of the Court. The Court, as active as it might have been, could then not be accused of overstepping its interpretative function in favour of a legislative one.

The fact that mandatory requirements were internal to the definition of MEEs, also allowed a certain consistency in the distinction mandatory requirements/Treaty derogations: thus, if the two were conceptually distinguished since the mandatory requirements were intrinsic to the definition of a MEE, whilst Treaty derogations were exceptions for a measure caught by Art. 28, it was natural that the Court would refuse to apply the mandatory requirements to quantitative and discriminatory restrictions which fell automatically within Art. 28. Moreover, this also explains why in some instances the Court found that some indistinctly applicable (although clearly indirectly discriminatory) rules could be justified only according to Art. 30. If the rule was clearly a measure having equivalent effect, as in cases in which the measure was

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210/89 *Commission v. Italy* (Cheese) [1990] ECR I-3967, para 16 in which the Court talks of measures which can be justified in the light of Art. 28; C-362/88 *GB-Inno-BM v. Confédération du Commerce Luxembourgeois* [1990] ECR I-667 para 18 “(...) Thus Article 30 [now 28] cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection. 19. In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection. They thus fall under the prohibition laid down in Article 30 [now 28] of the Treaty. The exceptions to the application of that provision contained in Article 36 [now 30] are not applicable”; Case C-239/90 *SCP Boscher, Studer and Fromentin v. SA British Motors Wright and others* [1991] ECR I-2023 in which the Court first assessed whether the measure satisfied mandatory requirements, and having found that it did not, and consequently was incompatible with Art. 28, went on to assess whether it could be justified according to Art. 30.

This is also supported by the fact that in the operative part of the judgements the Court, when the measure was found to satisfy one of the mandatory requirements, would say that Art. 28 would not apply (or would not preclude) the rules at issue. To this effect see: Case 6/81 *BV Industrie Diensten Groep v. JA Beele Handelmaatschappij BV* [1982] ECR 707; 220/81 *Robertson*, above; Case 286/81 *Oosthoeck's Uitgeversmaatschappij BV* [1982] ECR 4575; Case 60 and 61/84 *Cinéthèque SA and others v. Fédération Nationale des Cinéma Français* [1985] ECR 2605; Case 382/87 *R Buet and Educational Business Services v. Ministère public* [1989] ECR 1235 [the application of the law is not incompatible with Art. 28]; C-145/88 *Torfaen Borough Council v. B & Q plc* above n 45; C-332/89 *A. Marchandise et al.* [1991] ECR I-1027.

protectionist in nature,<sup>54</sup> then the Court would have recourse only to the Treaty derogations.

The fact that in the beginning mandatory requirements would bring the measure outside the scope of application of the Treaty, is further supported by the fact that originally the Court included public health in the mandatory requirements: but for this theoretical distinction, the repetition of a ground already contained in Art. 30 would have been meaningless.

However, with time mandatory requirements became something extrinsic to the definition of a MEE: thus, we increasingly find a two stage analysis in which the Court first states that the measure is a MEE, and then assesses whether it is “justified” by the mandatory requirements.<sup>55</sup> It is arguable that this change of approach stems more from the existence of a considerable bulk of case law, which would render the rule easily recognisable as falling within Art. 28, than from a conscious choice of the Court. Furthermore, public health starts to be referred to by the Court as a Treaty derogation;<sup>56</sup> this becomes an open and rational choice in *Aragonesa*:<sup>57</sup> in this case the Commission’s submission that if the rule were indistinctly applicable then it should be justified according to the public health mandatory requirement, was expressly disposed of by the Court which analysed the rule having regard to the Treaty derogation. Thereafter the Court, when faced with a public health justification will always refer to Art. 30. The significance of this shift is not clear: in order to apply Art. 30, Art. 28 must have been triggered; however if the rule is assessed directly in relation to Art. 30, it means that it should have first been found to be a measure having equivalent effect. If the rule is scrutinized directly in relation to Art. 30, and public health is not referred to anymore as a mandatory requirement, can we really hold the latter to be something internal to the scope of Art. 28?

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<sup>54</sup> See for instance case 207/83 *Commission v. UK* (origin marking), above n 3. For an example of a case in which a measure found to be measures having equivalent effect could not benefit of the mandatory requirements, see case 229/83 *Le Clerc v. Au Blé Vert* [1985] ECR 1. See also case 231/83 *Cullet v. Leclerc*, above n 49.

<sup>55</sup> See for instance C-298/87 *Smanor* [1988] ECR 4489 para 14 “National rules prohibiting the marketing, on national territory, under the name “deep-frozen yoghurt” of yoghurts which have undergone deep-freezing therefore constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty”; C-210/89 *Commission v. Italy* (cheese), above n 53 para 11 and ss.

<sup>56</sup> See for instance case C-196/89 *Nespoli and Crippa* above n 51, para 14 “Such rules are therefore permissible under the Treaty only if either, within the framework of Article 30, they are applicable to domestic and imported products alike and are intended to satisfy mandatory requirements relating, in particular, to consumer protection or fair trading, or they are justified on one of the grounds of general interest listed in Article 36 of the Treaty, such as the protection of public health.”

<sup>57</sup> Joined cases C-1/90 and 176/90 *Aragonesa* above n 21.

Moreover, there is a shift in the Court's reasoning which seems to suggest that mandatory requirements are additional grounds of derogation. The *Keck* formula is in this respect confusing.<sup>58</sup> *Keck* can be seen as the result of a slow but constant process of abstraction. Thus, *Keck* represents a move from a case by case approach to a "rule" based approach.<sup>59</sup> This is also mirrored in the language used by the Court which shifts from a presumption of legality of differences in regulatory policies of the Member States, reflected in the statement "differences in national rules must be accepted *in so far as* (or provided) they satisfy the mandatory requirement", to a presumption of non-applicability of national rules to imported products reflected in the amended formula "obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States (...), rules that lay down requirements to be met by such goods (...) constitute *measures of equivalent effect prohibited by Article 30*". This is so even if those rules apply without distinction to all products *unless their application can be justified* by a public-interest objective taking precedence over the free movement of goods."<sup>60</sup> Thus, it is not clear whether the satisfaction of a public interest aim brings the rule outside the scope of application of the Treaty provision since a *justified* measure is not a measure having equivalent effect, the change in the presumption being only a clarification for the benefit of national courts, or rather whether the change is more significant.

If the latter should be true, ie if the measure is first found to be a measure having equivalent effect, thus falling within the prohibition laid down in Art. 28, and then justified according to the mandatory requirements, then it is not clear why discriminatory measures and quantitative restrictions should not benefit also from the mandatory requirements doctrine. The limitation to the grounds provided for by the Treaty in the case of discriminatory restrictions was due to the fact that they are automatically considered as measures having equivalent effect. If indistinctly applicable product requirements are measures having equivalent effect then either

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<sup>58</sup> Joined cases C-267 and 268/91 *Keck* above n 46.

<sup>59</sup> See also Moore, S. "Revisiting the limits of Article 30 EEC" 19 (1994) ELRev 195.

<sup>60</sup> C-267 and 268/91 *Keck* above n 46, para 15, emphasis added; the same formula has been used *inter alia* in case C-315/92 *Clinique* [1994] ECR I-317, para 13; C-317/92 *Commission v. Germany* [1994] ECR I-2039, para 12; C-293/93 *L Neeltje Barbara Houtwipper* [1994] ECR I-4249, para 11; Case C-470/93 *Verein in Handel und Gewerbe Köln e V v. Mars GmbH* [1995] ECR I-1923, para 12; C-51/95 *Commission v. Germany* (Mayonnaise and Biscuits) [1995] ECR I-3599, para 29; C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689; C-217/99 *Commission v. Belgium*, judgement of 16/11/00, ny. The traditional *Cassis* formulation has been used in case C-448/98 *Guimont*, judgement of 5/12/00, ny.

they should benefit only from the Treaty derogations, since prohibited by Art. 28; or if they benefit also from the mandatory requirements, then these are additional derogations (and thus a Treaty amendment) and should also be available for discriminatory measures.<sup>61</sup>

The only viable solution seems then to go back to the origin and consider the mandatory requirements as something internal to the definition of a measure having equivalent effect, i.e. something the lack of which is necessary in order to trigger Art. 28. This is because the Treaty cannot be construed as having taken away the regulatory competence of the Member States in fields not harmonized by Community law. Thus reasonable measures, measures which are intended to protect interests which sometimes overlap with interests protected at Community level (e.g. environmental and consumer protection) whilst sometimes are consistent with interests recognized by the Community (broadly speaking welfare of the people in cases involving social and tax rules), must be construed as not creating an obstacle within the prohibition of the Treaty. The post-*Keck* reasoning of the Court may seem inconsistent with this interpretation: however, it should be stressed that in the operative part of the judgments the Court, in most cases, finds measures pursuing mandatory requirements “not incompatible” with Art. 28.

As for non discriminatory selling arrangements, there is a non-rebuttable presumption that they do not fall within the *Dassonville* formula regardless of the interest they pursue.<sup>62</sup> If they are indirectly discriminatory, i.e. equally applicable in law but not in fact, then they will be MEEs only if they do not pursue a legitimate public interest. In this context mandatory requirements could also be seen as objective justifications, in that the indirect discrimination if justified would be a side effect of a legitimate regulatory policy. The fact that the concept of mandatory requirements may be a multi-faceted one, i.e. that in some instances is akin to the concept of objective justifications, is supported by the case law in the other free movement provisions, and does not represent an insurmountable problem given that, as said above, an objectively justified rule does not fall within the prohibition of discrimination. Since the interests are the same in both cases, to distinguish between mandatory

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<sup>61</sup> See also Martin, D. “«Discriminations», «Entraves» et «Raisons Impérieuses» dans le Traité CE : Trois concepts en quête d’identité” 33 (1998) CDE 261 (part I), and 561 (part II), at 294.

<sup>62</sup> So far there is no case law on selling arrangements preventing market access, thus it is not clear whether in this case a discrimination requirement would be necessary. Such a development cannot however be excluded.

requirements and objective justifications for indirectly discriminatory provisions seems to be a non particularly useful academic exercise.<sup>63</sup>

A possible obstacle to this interpretation may arise following the Court's ruling in *Familiapress*. It might be recalled that in *Cinéthèque* the Court found that it had no power to assess the compatibility of the rules at issue with the European Convention on Human Rights (as part of the general principles of Community law) since it had found the measure to pursue legitimate interests and thus to fall "within the jurisdiction of the national legislator".<sup>64</sup> However, in *Familiapress* the Court found that overriding reasons of public interests relied upon by Member States "must also be interpreted in the light of the general principles of law and in particular of fundamental rights".<sup>65</sup> Arnulf has considered this statement further authority for the fact that mandatory requirements are now external to definition of a MEE.<sup>66</sup> However, mandatory requirements are but interests recognized as not being inconsistent with the Community legal system, and fundamental rights are an integral part of that system. The fact that mandatory requirements should be construed accordingly should not then come as such a surprise: a public interest inconsistent with fundamental rights should be considered also inconsistent with Community law and thus not a ground on which the Member States may rely upon in order to bring the measure outside the scope of application of the Treaty, which is to say an interest inconsistent with fundamental rights may never be relied upon as a mandatory requirement for the purposes of Community law.

On the other hand the fact that public health is not referred to as a mandatory requirement, and the fact that the Court often refers to rules which may be "justified according to Art. 30 or mandatory requirements" may considerably undermine the above interpretation. A way of solving this problem would be to read *Aragonesa* in a different light: *Aragonesa* could be read as authority for the fact that, pragmatically, the Court is not going to assess whether a measure is a MEE, before scrutinizing it in relation to Art. 30. Also it should be noted that the Court does not seem extremely careful about the structure of its reasoning, or the language used therein: this also

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<sup>63</sup> See also Weatherill and Beaumont, above n 24, at 575.

<sup>64</sup> Joined cases 60 and 61/84 *Cinéthèque*, above n 53, para 26. It is interesting to note that the Court does not, in this case as in all the Sunday trading cases, expressly refer to mandatory requirements.

<sup>65</sup> C-368/95 *Familiapress*, above n 60, para 24.

<sup>66</sup> Arnulf above n 24, at 269.

having regard to the fact that, especially when it finds a measure incompatible with the Treaty, it tends in most cases to discuss all the grounds invoked by the Member States, possibly in the order in which they were pleaded.

#### *Discriminatory measures and mandatory requirements*

Lastly is should be mentioned that through this interpretation, and having regard to the confused language used in *PreussenElektra*,<sup>67</sup> a further development might be possible: to allow Member States to rely on mandatory requirements in the case of distinctly applicable measures. As we said above the reason why distinctly applicable measures could benefit only from the Treaty derogations was because they were considered to fall automatically within the definition of measures having equivalent effect to a quantitative restriction on imports. Art. 28 does not mention discrimination (although the last sentence of Art. 30 suggests that Art. 28 must also forbid discrimination) and thus it could be argued that the Court may very well change its interpretation of a measure having equivalent effect so that whatever obstacle, discriminatory or non-discriminatory, is a measure having equivalent effect only to the extent to which it does not satisfy the mandatory requirements. The Court's statement in *PreussenElektra* in relation to the fact that the measures were "not incompatible" with Art. 28 could very well be seen in this light, and the fact that the Court avoided the use of any justificatory ground could point in that direction. This solution would avoid the legitimacy problems analysed above, since the Court would act within the limit of its hermeneutic power. Moreover such solution would not necessarily have to be extended to the other free movement provisions, where the need for such an extension is arguably less pressing.

However there are two reasons which may create an obstacle to such shift in interpretation: firstly, the prohibition on arbitrary discrimination contained in the last sentence of Art. 30, suggests that Art. 30 is a derogatory provision for non arbitrary discrimination, which in turn would suggest that discrimination, needing a derogatory provision, is prohibited. Secondly, it should be remember that Art. 12 prohibits any discrimination on grounds of nationality, which as we have seen above, translates in the case of goods on a prohibition of discrimination on grounds of where the good has

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<sup>67</sup> Case C-378/98 above n 6.

been produced. The Court has stated in many cases that the free movement provisions are a specific manifestation of the prohibition contained in Art. 12. For this reason it is not necessary to rest on Art. 12 when the situation falls within the scope of application of one of the free movement provisions. It is arguable that if the Court should exclude some discriminatory provisions from the prohibition contained in Art. 28 then the prohibition contained in Art. 12 would be triggered, and only the derogations contained in Art. 30, a provision of equal rank which is *lex specialis*, could be of use in justifying the discriminatory measure.

This unless a discriminatory measure imposed on imported goods, which is not considered to be a measure having equivalent effect because justified on mandatory requirements, would be considered as falling altogether outside the scope of the Treaty so as to exclude the application of Art. 12.

Even if we should so consider, there could be some policy reasons which could oppose the endorsement of this route: the application of Community law is a matter for national courts. The cases in which free movement provisions may be relevant are many and not necessarily involve considerable economic interests; most of the cases do not reach the higher courts and the application of Community law is left to national lower courts. It is thus important that non specialised courts would have some (however confused when examined in detail) clear guidelines: as it is now, the national courts know that discriminatory provisions will only very seldom be justified, and only on the grounds contained in Art. 30; that Art. 30 must be restrictively interpreted and thus the proportionality test is a strict one, and that broadly speaking the Member States may not rely on economic/protectionist considerations. To dispose of the distinction between discriminatory and non-discriminatory rules would then not necessarily be wise, especially in relation to the consumer protection mandatory requirement. Consumer protection is the most widely invoked ground of derogation: it is not self-evident that to allow Member States the possibility to rely on consumer protection in cases of directly discriminatory provisions, and thus to impose on the national courts the burden of a different application of the same derogation according to whether the measure is discriminatory, would enhance the uniform application of Community law and the efficient co-operation between national courts and ECJ (maybe is for this reason that the ECJ has got rid of the public health mandatory requirement).

## **5. Conclusions**

The above discussion has focused primarily on these cases in which discriminatory measures have been assessed in relation to mandatory requirements. It is submitted that *Decker* may be seen as not inconsistent with the previous case law of the Court on direct discrimination, especially similar cases which have arisen in the context of services, and that the environmental cases could be solved by a more generous interpretation of one of the Art. 30 derogations. The idea of considering mandatory requirements as a judicial extension to the Treaty derogations appears to be less attractive than it might seem at first sight, since it would pose legitimacy problems. On the other hand to consider mandatory requirement as objective justifications for indirectly discriminatory provisions one has to successfully prove that Art. 28 is indeed limited to a prohibition on discriminatory provisions.

The alternative solution, considering mandatory requirements as internal to the definition of measures having equivalent effect, is equally problematic in relation to the language used by the Court and to the fact that public health is now assessed only in relation to the Treaty derogations. However, the theory seems consistent both with the outcome reached in the case law of the Court, and with the Court's clear desire to keep the Treaty derogations separated from the mandatory requirements. Moreover it seems the most attractive solution from a conceptual viewpoint, not least since it can also be extended to the other free movement provisions.