Challenges in Keeping the Balance between the Member-State Competencies and Rules of the EU Single Market

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Abstract

The purpose of this paper is to examine restrictions and different types of discriminations in order to determine the ways national rules hindering interstate trade and movement, are in conflict with Treaty of the Functioning of the European Union (TFEU) provisions. Particular attention would be paid on intersection of the EU and Member States competencies as well as their division by the means of negative integration inevitably affecting regulatory powers of the Member States. Furthermore, we will study how Court using derogations to the free movement, endeavours to maintain the balance between exercising state competencies, mostly deriving from the State sovereignty and implementation of the EU Legislation necessary for effective functioning of the single market.

Keywords: derogations, EU Law, EU, reverse discrimination, single market.

Introduction

Foundations for common market were laid down by the Rome Treaty. Treaty of the Rome was considered as the "constitution of the European Community from which all other Community acts derive their formal validity and binding force" (Sideek Mohamed, 1999, p.32). The core idea and "the aim and the task of the Community Law is the integration of the national economies by means of the internal market and the Economic and Monetary Union" (Wolfgang Schon, 2000, p.90) The Common Market and the Monetary and the Economic Union establish the central political-economic instruments that are targeted to fulfil above-mentioned aims of the market integration (Wolfgang Schon, 2000, p.90).

The idea of the common market provided for trade area free from any tariffs or quotas between participating states, so that each member state produce basically goods in which it has comparative economic advantage. In the relationship with the third countries, states kept their tariffs varying from country to country, stimulating third countries to import through the state with the lowest customs tariff. This created trade barriers and distortions of competition. The problem was solved by establishing customs union introducing single customs tariffs towards third countries. (Paul Craig, 2002, p.2). Consequently, the concept of a customs union was to provide third country with the equal customs and commercial treatment, when they enter the EU as well as goods imported from the third countries and goods produced in the EU will freely move from one state to the other without tariffs, restriction or discrimination (Green, Hartley, Usher, 1991, p.3). Besides customs union, common market envisaged free movement of labor, goods, capital, establishment and services supported by relevant economic rationale. (Paul Craig, 2002, p.2).

Common market alongside negative integration by eliminating customs tariffs required positive integration by harmonization of different rules assisting free trade. On the same footing, measures prohibiting state aids were adopted in order to support level playing field. However, it was recognized that there would be areas where state regulation will continue to exist (Paul Craig, 2002, p.2).

It was also emphasized that one of the core attributes of the market integration is realization of the fundamental freedoms. The fundamental freedoms are recognized as directly effective prohibitions of the discriminations and restrictions (Wolfgang Schon, 2000, p.91). Are fundamental freedoms absolute?

Fundamental freedoms can be hampered by the limitation or breach of the right to freely cross the borders of the Member States or discriminate on grounds of nationality or origin (Paul Bater, 2000, p.8). First, we will look at indistinctly applicable restrictions[1] concerning free movement of goods and then we will discuss the reflection of these EU rules in terms of guaranteeing other fundamental freedoms bearing in mind peculiarities of each freedom. This will be followed by the examination of the discriminatory measures including reverse discrimination in most cases subject to the internal regulation. Finally, I will conduct a brief study on justification grounds of the national regulations breaching the Treaty of the Functioning of the European Union (TFEU) provisions on free movement.

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[1] Rules adopted by the Member States equally applying to both domestic goods and imports.

Journal of Social Sciences; ISSN: 2233-3878; Volume 4, Issue 1, 2015

Non-Discriminatory Obstacles on Free Movement and Trade

According to the Article 34 of the TFEU (ex. Article 28 of the Treaty Establishing the European Community (TEC)) quantitative restrictions and all measures that have equivalent effect are prohibited. Quantitative restrictions were broadly defined in the *Geddo*[2] case as the "measures which amount to a total or partial restraint of, according to circumstances, imports, exports or goods in transit". Snell claims that quantitative restrictions were not a major concern of the EU since it is relatively easy to detect and control them whereas measures having equivalent effect are more hardly definable and detectable (Jukka Snell, 2002, p.49). Quantitative restrictions as well as measures having equivalent effect were interpreted in Directive 70/50[3] . This Directive prohibits distinctly applicable measures hampering imports as well as equally applicable to domestic and imported products measures having restrictive effect on the free movement of goods and exceeding effects on the intrinsic to trade, namely where the restrictive effects are out of proportion to their purpose or where the same objective can be fulfilled by other means having less hindrance effect to trade (Green, Hartley, Usher, 1991, p.63). Measures having equivalent effect were further defined by the case law in *Dassonville*[4] as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions"[5]. In addition, it should be emphasized that according to notion derived from the definition, discriminatory intent is not required (Craig P., De Burca G.,2002, p.617). Later, in Cassis de *Dijon*[6] European Court of Justice (ECJ) recog-nized that Article 34 of the TFEU (ex. Article 28 TEC) could protect free movement of goods from restrictions which are not of discriminatory character (Craig P., De Burca G., 2002, p.617).

In *Cassis de Dijon* Court tried to solve the problem of disparity between national rules causing obstacle to the establishment of the common market. In fact disparity between the rules of different states although being equally applicable to imports and domestic products imposed dual burden on imported products since they have to comply with rules of states of import and origin at the same time. This forms obstacles to trade. In substance the rules of the state of import can be considered as discriminatory. *Dassonville* formula as a solution in this case refers to creation of principle of mutual recognition by one Member State lawfully produced and marketed goods in another Member State (Jukka Snell, 2002, pp 55-56). However, state regulation together with the obstacles to trade can be accepted, only if such rules are justified by the mandatory requirements deriving from general interest (Craig P., De Burca G.,2002, pp.638-639). It could be argued that *Cassis de Dijon* initiated gradual reduction of the regulatory powers of the Member States concerning free movement of goods and other freedoms as consequence of deregulatory harmonization. Thus, "the balance appeared to have been struck between the demands of the single market and the legitimate interests of Member States" (J. Steiner,1992, p.753).

Subsequent case law showed practical difficulties concerning utilization of the *Dassonville* principle, in particular, court must decide whether the measure is covered by Dassonville and hence would recognize it as prima-facie violation of the Article 34 of the TFEU (ex. Article 28 TEC) (Steiner J., 1992, p.754). Steiner particularly underlines the problem of interpretation of "hindrance" composing one of the core elements of *Dassonville* formula (Steiner J.,1992, p.753). Further, he explains that two situations should appear in which hindrance will occur: "Firstly, where the measure in question, although indistinctly applicable, operates to the advantage of the domestic product, usually by imposing some detriment on the importer, by making the importation of competing goods more difficult or burdensome or costly than the disposal of the comparable domestic product, or simply impossible. Such will be the case, when conditions are imposed, for example in respect of the quality or content or presentation or documentation which are different from or additional to those imposed in the state of manufacture" (Steiner J., 1992, p.754). Such measures do diminish total volume of trade (Jukka Snell, 2002, p.66). Snell believes that hindrance caused by equal burden rules[7] can be eliminated only by abolishing those rules. He does not concede even harmonization as a remedy (Jukka Snell, 2002, p.66). In addition he underlines that they "might be covered by the economic freedoms reading, but certainly not by the anti-protectionism model" (Jukka Snell, 2002, p.66). In *Cinetheque*[8] French Law was prohibiting the sale and renting videos within the year of their cinematographic release. The purpose of this law was to encourage people to go to the cinema and hence protect cinematographic business from losses. Advocate General Slynn suggested that this measure was not falling within the scope of the Article 34 of the TFEU (ex. Article 28 TEC): Where a national measure is not specifically directed at imports, does not discriminate against imports, does not make it any more difficult for an importer to sell his products than it is for a domestic producer, and gives no protection to domestic producers, than in my view, prima facie, the measure does not fall within Article 36 of the TFEU (ex. Article 30 TEC)[9].

[2] Case 2/73, Geddo v.Ente Nazionale Risi [1973] ECR 865)

[3] Directive 70/50, [1970] OJ L13/29 Articles 2,3

[4] Case 8/74 Procureur du Roi v. Dassonville [1974] ECR 837

[5] Dassonville, paragraph 5

[6] Case 120/78, Rewe-Zentrale AG v.Bundesmonopolverwaltung fur Branntwein [1979] ECR 649

[7] "Equal Burden Rules" are those rules applying to all goods, irrespective of origin, which regulate trade in some manner.

[8] Case 60.61/84 Cinetheque SA v. Federation Nationale des Cinemas Francais [1985] ECR 2605

[9] Case 60.61/84 Cinetheque SA v. Federation Nationale des Cinemas Francais [1985] ECR 2611

Journal of Social Sciences; ISSN: 2233-3878; Volume 4, Issue 1, 2015

However, court disagreed with opinion of Advocate General and took view that it was prima facie measure breaching Article 34 of the TFEU (ex. Article 28 TEC). For this purpose it required and then scrutinized the justification of the French Government.

According to Stainer *Cinetheque*[10] exemplified that "where the measure does not necessarily confer an advantage on the domestic product or disadvantage imports but nevertheless undermines the single market principle, as occurs for example, when industrial property rights or other rules are invoked perhaps for the quite legitimate purposes, to deny, or severely restrict marketing opportunities or advantages for the imported product in the state of the import or where the consumer prejudices, based on the national origin of goods, are encouraged or reinforced" (Steiner J., 1992, p.755). Finally, this decision considered equal burden rules within the scope of the Article 34 of the TFEU (ex. Article 28 TEC) and added to the list of the mandatory requirements another justification ground aimed to protect or enhance artistic works (Craig P., De Burca G.,2002, p.644).

The same issue of whether equal burden rules fall within the scope of Article 34 of the TFEU (ex. Article 28 TEC) was faced by the ECJ in Sunday *Trading* cases. *Torfaen*[11] is a typical example of Sunday trading cases. In this case B&Q was prosecuted for the violation of the Shops Act 1950, because of trading on Sundays. B&Q argued that these laws constituted the measure equivalent to the quantitative restrictions in violation of the Article 34 of the TFEU (ex Article 28 TEC). As a result of these laws, the total volume of the sales was reduced. Rule in question was pure equal-burden measure, not constituting any prohibition on imports (Jukka Snell, 2002, p.66). Court relying on *Cinetheque*, decided that trading prohibition prima facie was covered by the Article 34 of the TFEU (ex. Article 28 TEC).

The rule was caught by the Article 34 of the TFEU (ex. Article 28 TEC), however, it was justified from the perspective of the EU Law and was considered as proportionate (Craig P., De Burca G., 2002, p.645).This case is significant from the perspective of the relationship between regulatory competence of the Member States and the EU since regulatory powers of the Member States seemed to be diminished. Snell concerning this approach of the Court underlines: "A large number of national measures fell to be inspected by the Court, a central institution applying central law, and were brought within the scope of approximation provisions. Regulatory competition was potentially stifled as national laws could be struck down or harmonized, instead of being left to compete against each other" (Jukka Snell, 2002, p.67).

It is obvious now that the ECJ had thought concerning the propriety of strategy for dealing with the equal burden rules (Craig P., De Burca G., 2002, p.645). The *Keck*[12] can be considered as a sign of altering approach of the ECJ with respect to the equal burden rules (Craig P., De Burca G.,2002, p.646) by excluding so called 'selling arrangements rules' from the scope of the Article 34 of the TFEU (ex. Article 28 TEC). However, the later case law established a condition to this rule as 'selling arrangements' would fall outside the Article 34 of the TFEU (ex. Article 28 TEC) if they don't impede market access for imported products in general or with more degree of hindrance for imported goods rather than domestic products (Craig P., De Burca G.,2002, p.656). As we already mentioned general prohibition of non-discriminatory restrictions may affect regulatory powers of the Members States, imposing on the market participants, duty to comply with the national rules. This could be considered by the Court as a restriction to cross border free movement. However, the "restriction" other than in case of goods was not defined (Michael Tison, 1998, p.215). Tison submitted that broad Dassonville-formula was used by the Court when applying it to the other fundamental freedoms. Consequently, further he concludes that restriction can be defined as "all measures which directly or indirectly, actually or potentially affect cross border free movement will be caught by the prohibition" bearing in mind particular objectives of each freedom (Michael Tison, 1998, p.215).

With the respect of the services, the question is also, whether non-discriminatory measures are falling within the scope of Treaty provisions. In cases *Sager*[13] and *Schindler*[14] Court concluded that non-discriminatory measures with the respect of the freedom of the services fall within the scope of the Article 56 of the TFEU (ex. Article 49 TEC) and must be justified on the grounds of public interest (Chris Hilson, 1999, p.451). In Sager Court indicated that even restrictions equally applying to both resident and non-resident service providers may be inconsistent with the Article 56 of the TFEU (ex. Article 49 TEC), whenever such restrictions prohibit or otherwise impede service activities in another Member State and hence should be justified by imperative grounds of the general interest. In Schindler, the Court asserted the coverage by the Article 56 of the TFEU (ex. Article 49 TEC) of the non-discriminatory rules, if they prevent provision of service, whereas the person legally carries out the similar economic activity in the State of establishment (Luigi Daniele, 1997, pp.192-193). Consequently, non-discriminatory national rules are challenged, if they prevent a person from exercising his/her right (Paul Bater, 2000, p.11). The approach of the Court, with the respect of the non-discriminatory measures restricting freedoms of services, is similar to the freedom of goods, namely *Cassis de Dijon* rule, where such kind of legislation is considered to be under the relevant Articles prohibiting restrictions (Luigi Daniele, 1997, p.196). However, comparing restrictions of free movement of the goods and the services, "it could be argued the free movement of the goods was concerned with the economic freedom, while the provisions of services targeted only protectionism" (Jukka Snell, 2002, p.52).

[10] Case 60.61/84 Cinetheque SA v. Federation Nationale des Cinemas Francais [1985] ECR 2605, paragraphs 21,22

[11] C- 145/88, Torfaen BC v. B&Q plc [1989] ECR 3851

[12] Cases C-267 and 268/91, Criminal proceedings against Keck and Mithouard [1993] ECR I-6097

[13] Case C-76/90 Sager v. Dennemeyer [1991] ECR I-4221

[14] Case C-275/92 Schindler [1994] ECR I-1039

Journal of Social Sciences; ISSN: 2233-3878; Volume 4, Issue 1, 2015

As for freedom of establishment and free movement of the workers based on *Sodemare*[15] and *Bosman*[16] respectively, there is no doubt that non-discriminatory measures are falling within the scope of Treaty Articles (Article 49 of the TFEU (ex. Article 43 TEC) and Article 45 of the TFEU (ex. Article 39 TEC). In *Bosman* Court held that "such a rule[17] hinders the free movement of football players wishing to carry out their activity in a different Member State, since they are prevented or, at least, dissuaded from leaving the team by which they are employed" (Luigi Daniele, 1997, p.195).

Summarizing the case law we can conclude that ECJ takes broad view in determining what can be considered as a restriction breaching relevant provisions of the Treaty on free movement. It could be argued that such wide interpretation leads to centralization of the EU. However, centralization prevents competition between the legal systems and hence progress making learning processes. Consequently, decentralized approach may be more beneficial for the EU (Jukka Snell, 2002, p.70). Daniele echoes this view with respect of free movement of persons. He believes that so called "global approach" can be relevant only to goods and services other than persons arguing that case law utilizing this approach to persons does not seem to be solid (Luigi Daniele,1997, p.195). Hilson also shares this position and suggests applying 'selling arrangements' to workers and establishment indicating that single state rule can be true for workers and establishment (Chris Hilson,1999, p.451). Further he emphasizes that "if the single market suggests that in certain cases, the Court should closely scrutinize non-discriminatory measures, then issues of subsidiarity and national regulatory autonomy provide a possible reason for keeping court out" (Chris Hilson,1999, p.457).

Discrimination on the Grounds of Nationality or Origin

We can find harsher attitude of the Court concerning the discriminatory and protectionist measures. Craig and de Burca explain: "If a polity decides to embrace a single-market, then discriminatory or protectionist measures will be at the top of the list of those to be caught, since they are directly opposed to the single market ideal" (Craig P., De Burca G., 2002, p.625). It is notable that Craig and de Burca consider equally dangerous and subject to prohibition both discriminatory and protectionist measures. Thus, discriminatory (but not protective) and protective (but not discriminatory) also should be tackled by the TFEU. The latter was examined above when we discussed indistinctly applicable measures hindering free movement. As for discriminatory but not protective measure, if "the Court thinks it (discriminatory measure) was intended to serve another justifiable aim under the Article 34 of the TFEU (ex. Article 28 TEC), (or its equivalent with the other freedoms), then the discriminatory intent alone will not lead to the measure being found in breach" (Chris Hilson,1999, p.451). Consequently, Hilson concludes that the discriminatory rules should have protectionist intention in order to be caught by the relevant Treaty provisions (Chris Hilson,1999, p.451).

The Treaty explicitly prohibits any kind of discrimination on the grounds of nationality (Article 18 of the TFEU (ex. Article 12 TEC)). Furthermore, although, the wording of the Articles on free movement of goods, workers, establishment and services (except Article 45 on workers[18]) do not refer particularly to discrimination, ECJ tended to treat those Articles as prohibiting discrimination on the grounds of nationality or origin and even non-discriminatory measures (Chris Hilson,1999, pp.445-446), which were discussed above. Moreover, Court insisted that prohibition of discrimination based on nationality covers not only direct discrimination, but its indirect forms as well, in particular while applying other criteria of differentiation may amount to covert discrimination (Siofra O'Leary, 1999, pp.399-400). Among four freedoms goods are considered as a paradigm of discriminatory measures' treatment (Chris Hilson, 1999, p.446). The typical example of applying discriminatory rules for goods by the State is import or export restrictions. In case of import, the Article 34 of the TFEU (ex. Article 28 TEC), can bite, if national rule treats more favorably domestic product than imports. In *Rewe*[19] for example, phytosanitary inspections were required for the import of plants, while no similar examination was made to domestic products. This measure was considered discriminatory and caught by the prohibition provisions. The same approach is used concerning discriminatory export rules. In Bouhelier[20] quality examination was required on watches for export and not on those to be sold on the domestic market (Craig P., De Burca G., 2002, p.618). However, there is a difference between the import and export restrictions. According to Dassonville, judgement Court can tackle actual discrimination against imports, as well as restrictions hampering trade not originating in discrimination, while in case of export, without discriminatory aim, restrictive measures will not fall within the scope of the Article 34 of the TFEU (ex. Article 28 TEC). This was concluded based on Groenveld 21 judgment (Geert Van Calster, 2000, p.336).

[15] Case C-70/95 Sodemare v. regione Lombardia [1997] ECR I-3395 (In this case Italian legislation was restricting provision of old-people' homes to non-profit organizations).

[16] Case C-415/93, Union Royale Belge des Societes de Football Association v. Jean-Marc Bosman [1995] ECR I-5040

[17] In this case Belgian law required new club purchasing football player to pay first premium to the former club in order to compensate training given to that footballer.

[18] Article 39 of the EC Treaty prohibits discrimination based on nationality.

[19] Case 4/75, Rewe-Zentralfinanz v.Landwirtschaftskammer [1975] ECR 843

[20] Case 53/76, Procureur de la Republique Besancon v.Bouhelier [1977] ECR 197

[21] Case 15/79, PB Groenveld BV v. Produktschap voor Vee en Vlees, [1979] ECR 3409

Journal of Social Sciences; ISSN: 2233-3878; Volume 4, Issue 1, 2015

Discrimination against imports of the goods might occur in different ways. One of the clearest examples is case *Commission v. Ireland*[22] where State supports promotion of the sale of domestic comparing to imported goods[23]. Other forms of the discrimination are, when Member State protects domestic products by imposing rules on origin marking on certain goods or rules making import difficult to enter market or costly by imposing additional administrative procedures such as tests[24] or by price-fixing regulations rendering difficulties for importers to supply to the market their goods on the territory of the State of import (Craig P., De Burca G., 2002, pp.618-624).

The similar approach is used the with respect of the free movement of the services and persons, such that any national rule constituting direct or indirect discrimination based on nationality falls within the scope of the TFEU provisions and can be justified by the Member State only on the basis of exceptions allowed by the TFEU.

Reverse Discrimination

The discrimination in most cases do not fall within the EU competence, because of so called 'internal' situation is reverse discrimination, where for example: "national workers cannot claim rights in their own Member State, which workers, who are national of the other Member States could claim there" (Craig P., De Burca G.,2002, p.720). In *Sauders*[25] ECJ concluded since there is no connecting factor of the national worker to situations covered by the EU Law, she should not rely on protection provided in the Article 45 of the TFEU (ex. Article 39 TEC), and hence is excluded from its regulation (Craig P., De Burca G.,2002, p.720).

Summarizing "the Court located the objectives of the Article 45 of the TFEU (ex. Article 39 TEC) firmly within the ambit of the provision's, more predominant themes – movement and the protection of migrant, not home workers" (Niamh Nic Shuibhne, 2002,p.734). The wholly internal rule applies to goods as well. The typical example of reverse discrimination, here is a case of *Mathot*[26]. According to this case, Belgian producers were required to indicate their name and address on the butter packages, while importers were not required to do so. Belgian entrepreneurs argued that it was contrary to the Article 34 of the TFEU. However, court held that such kind of discrimination was not falling within the competence of the EU law (Chris Hilson, 1999, pp.459-460). The difference in this case between goods and persons that internal rule applies "…in the sense that intra-Community trade must be at issue before the relevant Treaty provisions will bite" (Niamh Nic Shuibhne, 2002, p.738).

It might be worth to think where this type of discrimination comes from? Do Member States establish less favorable regime for their citizens in the first place or was it a result from ultimate community protection of the persons moving from one Member State to another? According to Cannizzaro, reverse discrimination is a consequence of the existing overlapping competencies derived from the different objectives and values of the different legal systems so it should be analyzed based on domestic principle of equal treatment since reverse discrimination always occurs within the Member State (Enzo Cannizaro, 1997, pp.29-30). However, not-withstanding factors causing 'reverse discrimination', material difference in treatment remains and if this is recognized as a problem, the responsibility of its resolution should be taken by the EU (Niamh Nic Shuibhne, 2002, p.738).

The circle of exclusively internal situations for persons as not falling within the scope of the EU Law and hence not subject to its regulation was narrowed by the case law. For example in Terhoeve[27] it was established that worker will be able to use advantages envisaged in the Article 45 of the TFEU (ex. Article 39 TEC) against his/her own state, if the worker has been employed or resided in other member state (Craig P., De Burca G.,2002, p.720). This notion is enhanced by the concept of the EU citizenship. "The introduction of citizenship generalized for the benefit of all citizens, the right to enter and the right to reside in the territory of another Member State" (Craig P., De Burca G.,2002, p.761). However, in order to enjoy the benefits of the citizenship, first, person should have nationality of the Member State and secondly, the presence of essential element for EU regulation – actual movement of the person is still required (Niamh Nic Shuibhne, 2002,p.749). Shuibhne emphasized: "It is not so much that movement is problematic or redundant as a criterion in itself; it is more that the profound extent to which EU law can now bear on a person's life seems increasingly to devalue movement as a precondition for these advantages to adhere in the first place" (Niamh Nic Shuibhne, 2002, p.732). *In Martinez de Sala*[28] and *Grzelczyk*[29] rights to enjoy the same social benefits as citizens of the host state were derived from the EU citizenship of the migrant persons (Niamh Nic Shuibhne, 2002,p.750). In *Baumbast*[30] Court put this view even further directly applying right of the residence in another Member State other than home country without reference to one of the EU freedoms and concluded:

[22] Case 249/81, Commission v. Ireland, [1982]ECR 4005

[23] Case 207/83, Commission v. United Kingdom [1985] ECR 1201

[24] Case 50/85, Schloh v.Auto Controle Technique [1986] ECR 1855

[25] Case 175/78, R. v Sauders [1979] ECR 1129

[26] Case 98/86 Ministere Public v. Mathot [1987] ECR 809

[27] Case 18/95, F.C.Terhoeve v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland [1999] ECR I-345

[28] Case 85/96 Martinez Sala v. Freistaat Bayern [1998] ECR I-2691

[29] Case C-184/99 Grzelczyk v Centre public d'aide Sociale d'Ottignies-Louvain-la-Nauve [2001] ECR I-6193

[30] Case C-413/99 Baumbast and R v. Secretary of State for the Home Department Judgement of 17 September, 2002

Journal of Social Sciences; ISSN: 2233-3878; Volume 4, Issue 1, 2015

"…a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the Host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of the Article 18(1) EC [31]. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of the Community Law, and in particular, the principle of proportionality."[32]

Besides, it was considered that cross border element, as a precondition should be real and not potential or hypothetical (Niamh Nic Shuibhne, 2002, p.736). However, *Carpenter*[33] case exemplified the contrary. The Court held that:

"…the Community legislature has recognized the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed in the Treaty, as I particular apparent from the provisions of the Council regulations and directives on the freedom of employed and self-employed workers within the Community….

It is clear that the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and therefore, to the conditions under which Mr. Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse."[34]

Two major points should be made based on this case. First, despite that Mr. Carpenter actually did not leave his country of origin; he was still covered by protection of EU law since he was considered as a provider of cross-border services. It should be noted that, in such circumstances cross border element might not be always real. Secondly, potential obstacle ('family situation') to exercise EU freedoms was accepted and regarded by the court as a hindering free movement of persons and that Mr. Carpenter was deterred from exercising his fundamental rights. As a consequence, this situation might lead to the EU citizenship loosing element of cross border movement and hence imposing broader characteristics to its concept.

Exemptions Established by the EU Law

Member States within the regulatory powers establish restrictions on the free trade necessary in the public interest. However, regulations can fail to pursue public interest because of the political lobbing of the private interests other than public or in the context of the EU they may act as barriers to the cross border trade (Jukka Snell, 2002, p.171). Nevertheless, "interests of free trade cannot automatically override the interests protected by the national measure" (Jukka Snell, 2002, p.171). According to the case law, it is clear that Court tries to achieve the balance between the application and the effective implementation of the EU legislation and permitted restrictions. These derogations can be based on the Treaty provisions or prevailing interest of the general good (Andrea Biondi, 1999/2000, p.470). The letter was developed by the Court of Justice and "it is closely related to the court activism in widening the scope of the Treaty freedoms from mere non-discrimination principles to general prohibitions on all measures, whether discriminatory or not, which constitute a restriction on the free movement …" (Michael Tison, 1998, p.211). However, distinctly applicable measures can be justified only based on the Treaty provisions (Andrea Biondi, 1999/2000, p.470). In the field of goods, According to the Article 36 the TFEU (ex. Article 30 TEC) discriminatory restrictions on intra-EU trade can be allowed to the extent that there is no EU legislation on these matters (Paul Bater, 2000, p.9): public morality; public policy; public security; protection of the life and health of humans, animals or plants; protection of national artistic, historic or archeological treasures; and protection of the industrial and commercial property.

The similar provisions are provided for free movement of services and persons. According to Article 52 the TFEU (ex. Article 46 TEC) and Article 45 the TFEU (ex. Article 39 TEC) the differentiated treatment of foreign nationals can be allowed on the grounds of public policy, public security or public health.

The essence of those derogations is to protect certain interests deriving from the sovereignty of the State and other core areas important for its functioning and consequently to balance free trade against those interests. (Jukka Snell, 2002, p.172). It is notable, the concept of public policy could easily include wide range of issues (Jukka Snell, 2002, p.180). However, the Court interpreted that it may "be relied upon in the event of a genuine and sufficiently serious threat to the requirements of the public policy affecting one of the fundamental interests of society"[35].

As for equally applicable measures, in addition they may be justified based on the "principle of 'overriding public interest provided that four conditions are satisfied: they must apply in a non-discriminatory manner, they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it" (Andrea Biondi, 1999/2000, p.470). Two last conditions of the objective justification comprise proportionality test, which entails scrutinizing whether the aim could not be achieved by other less harming means (Craig P., De Burca G., 2002, p.816). The proportionality is

[31] Article 21 the TFEU (ex. Article 18 TEC)

[32] Baumbast paragraph 94

[33] Case C-60/00 Carpenter v .Secretary of State for the Home Department, judgment of 11 July, 2002

[34] Carpenter, paragraphs 38,39

[35] For example: Case C-348/96 Donatella Calfa[1999] ECR I-11, paragraph 21

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regarded as "the condition through which the arbitrage between the EU interest and the Member States' regulatory interests is effected" (Michael Tison, 1998, p.224). In addition, it should be noted that, proportionality is intended to protect interest in rationality making accent on incentives and motivations for using proportionality, rather than proportionality inquiry as such (George Bermann, 2002, pp.75-76). The principle applied for derogations foreseen by the TFEU, is also used for the objective justification, namely: if there is the EU legislation in place, Member States are not allowed to rely on general good justifications[36]. "The burden of proof rests with the party that invokes the exception" (Jukka Snell, 2002, p.186). However, derogation would not be considered as legitimately justified, if it pursues economic purpose (Craig P., De Burca G., 2002, p.816).

The general application of the justification seems to be similar for all freedoms, namely: "as long as the measure pursues a non-projectionist aim, it can be approved (unless it falls foul of the proportionality test)" (Jukka Snell, 2002, p.193). However, certain diversity still can be observed. Hilson concerning this point states that "…adopting a differential approach between the freedoms, there is also evidence that the Court applies a differential approach between the freedoms: with services, for example, state regulation of more important services such as insurance appears to be treated more leniently in terms of objective justification than "lesser" services such as tourism" (Chris Hilson, 1999, p.461).

In *Cassis de Dijon* Court introduced short list of mandatory requirements, but by using words "in particular" indicated that it is not exhaustive (Jukka Snell, 2002, p.191). In *Gouda*[37] and other subsequent cases Court broadened the list of overriding reasons related to public interest, such as prevention of fraud, protection of creditors, road safety etc. It could be observed that widening of the scope of free movement rules were accompanied by development of the justifications (Jukka Snell, 2002, p.185). This development can be seen as the balance of the guaranteeing free movement and preserving legitimate interests of the Member States. Summarizing Snell indicates three major theories on development of objective justification: "The first sees them as a *rule of reason*, which does not determine the substantive scope of the free movement provisions, but amounts to 'a recognition by the Court, on essentially equitable grounds, that certain interests or values are deserving of judicial protection of the EU level pending the intervention of the Community legislator'. The second view sees overriding requirements as a concrete *manifestation of residual competencies* left to Member States. According to this view, overriding requirements determine whether the suspect measure falls within the scope of the free movement provisions in the first place. The third view sees overriding requirements as a *general principle of the Community Law* protecting the general interest in connection with the achievement of the freedoms" (Jukka Snell, 2002, p.194).

Conclusion

The harmony on free movement and internal market has been established based on the positive integration and enforcement of fundamental freedoms by the ECJ known as "negative integration". Nowadays less and less issues related to free movement are falling within the competencies of the Member States. Thus, it is difficult to draw the precise line between EU and Member States competencies. From this point of view, Cassis de Dijon and *Dassonville* had significant regulatory consequences (Craig P., De Burca G., 2002, p.677). In fact the scope of the regulatory competence of the Member States was substantially reduced and the circle of spheres subject to EU intervention was broadened. Thus, most of the national measures hindering free movement or interstate trade can be caught by the EU Law. However, the question raised is: whether centralization through intensive judicial intervention or harmonization processes should further narrow regulatory powers of the Member States finally resulting in their complete deprivation? Based on the analysis conducted in this paper we can conclude that in terms of establishing single market Court should keep a burden of balancing free trade and free movement against other interests using system of justification (Jukka Snell, 2002, p.218). Consequently, we do believe that "an 'area without frontiers' requires no less, nor more, than that."

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[36] see Case 8/74 Procureur du Roi v. Dassonville [1974] ECR 837

[37] Case C-288/89 Collective Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 14 and 23 where justification on the grounds of cultural policy was added to the list.

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