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## MEMBER STATES' INTERESTS AND EU LAW: FILTERING, MODERATING AND TRANSFORMING?

### **Abstract:**

*This article investigates the engagement of EU law with the interests represented and pursued by the Member States within the framework of the European Union. In principle, because the interests which the Member States feed into the EU governance machinery are formulated in political processes at the national level, and thus possess paramount political legitimacy, EU law may only interact with those interests when a clear and sufficient mandate has been provided for doing so. Such mandates follow from Treaty provisions or EU legislation. They embody common political agreements among the Member States by which they commit themselves to realising the specific interests they share, as well as achieving related common policy objectives. In practice, however, the boundaries of EU law's mandate are difficult to determine with precision, and this may weaken the legitimacy of EU law's interventions. The weaker legitimacy of the law raises particular problems in the law of the Single Market, where the interests pursued by national governments are subjected to filtering, moderation, and even transformation by the Court of Justice.*

**Keywords:** EU obligations, legitimacy, Member State interests, proportionality

### INTRODUCTION

This article examines the ways in which Member State interests and EU law interact with each other. The former is understood here as the political basis of cooperation within the EU, while the latter was put in place – in part – to control the conduct of Member States. The article analyses in particular the legitimacy of EU law's engagement with the interests pursued by the Member States in the Union. The interests of the Member States are the products of national political processes and relate to locally-defined needs, and therefore they enjoy a robust political legitimacy. As a result, when

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EU law interferes with them it needs to rely, as a matter of principle, on a clear legally expressed mandate. Such mandates are provided by the Treaties and EU legislation; they express a previous political agreement among the Member States concerning their shared commitment to the implementation of common (policy) objectives. However, practice demonstrates – in particular in the domain of the Single Market, where the law interacts with local interests perhaps the most markedly – that defining that mandate and determining its boundaries may be difficult to achieve, which then raises questions about the legitimacy of the law, as applied by the Court of Justice, in filtering and moderating Member States' interests, and even transforming them.

Our analysis is structured as follows. The article begins by introducing Member State interests, on the basis of the legal and non-legal literature as well as the most relevant Treaty provisions, as a central politico-legal concept and component of inter-State cooperation in the EU. This provides the basis for the ensuing discussion concerning the mandate available to EU law when it engages with the local interests brought within the EU's framework. In its second part, the article examines legal developments in the domain of the law of the Single Market, in particular relevant cases before the Court of Justice, where the legal scrutiny applied to the interests pursued by the Member States raises issues as regards EU law's above-mentioned mandate and its boundaries. It analyses, in particular, how EU law separates legitimate Member State interests from illegitimate ones, and how it moderates and, potentially, transforms local interests under the requirements arising from the principle of proportionality. This article is not aimed at challenging the basic premises of the EU legal order as developed in the jurisprudence and accepted in legal scholarship. Rather, it suggests their re-examination from the analytical perspective offered by the political concept of Member State interests.

## 1. MEMBER STATE INTERESTS AND EU LAW

The core objective of EU law, as defined by the Court of Justice,<sup>1</sup> is to confine, under the framework of common policies, unilateral Member State actions pursuing territorially defined economic and social interests. In this framework, EU law may appear as superimposed, with nearly absolute force, over considerations of local interest. Its application and enforcement seems unaffected by questions of legitimacy raised with respect to the policing of the conduct of sovereign States. The formalism of EU law's doctrinal construction had, however, the consequence of disconnecting the interaction between EU legal obligations and the interests of the Member States from the historical and political circumstances of European integration. This, in our view, was a problematic development because, as has been forcefully argued, EU integration, as well as the creation and implementation of common policies and the legal obligations formulated thereunder, cannot be separated from the interests of the Member States

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<sup>1</sup> See Case 6/64 *Flaminio Costa v. E.N.E.L.*, EU:C:1964:66 and Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.*, EU:C:1978:49.

nor be examined without accepting their influence on those processes.<sup>2</sup> The direct linkage between Member State interests and the objectives of the Union,<sup>3</sup> and their overlaps as well as their potential mutuality, have been characterised as an essential condition of European integration,<sup>4</sup> whereby locally-defined interests dictate political and policy developments.<sup>5</sup> It has also been argued that the EU political process is driven by interests that emerge from the preferences, constraints, and opportunities presented in the national political arena,<sup>6</sup> and that its aim is, ultimately, to develop inter-State (supranational) responses to needs defined in the territories of the Member States.<sup>78</sup>

<sup>2</sup> See A. Milward, V. Sorensen, *Interdependence or Integration? A National Choice*, in: Alan Milward et al. (eds.), *The Frontier of National Sovereignty: History and Theory, 1945-1991*, Routledge, London: 1994, pp. 20-21; A. Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 *Journal of Common Market Studies* 473 (1993), pp. 480-483, 485-486 and 507-517; P. Craig, *Competence and Member State Autonomy: Casualty, Consequence and Legitimacy*, in: H. Micklitz, B. de Witte (eds.), *The ECJ and the Autonomy of the Member States*, Intersentia, Antwerp: 2012, pp. 11-12 and 26-34; Y. Mény, *National Squares European Circles: the Challenge of Adjustment*, in: A. Menon et al. (eds.), *From the Nation State to Europe*, Oxford University Press, Oxford: 2001, pp. 31-32. See also Bartolini's overview of "rationalist" and "constructivist" approaches – divided along these lines – on EU-Member State relations, S. Bartolini, *Restructuring Europe*, Oxford University Press, Oxford: 2005, pp. 188 and 197-200. See further, in the context of the EU enlargement process, A. Moravcsik, M. Vachudova, *National Interests, State Power and EU Enlargement*, 17 *East European Politics and Societies* 42 (2003), and, in the context of a Member State left in a minority in EU decision-making to challenge an EU measure concerned on account of its incompatibility with national values, P. Craig, *Subsidiarity: A Political and Legal Analysis*, 50 *Journal of Common Market Studies* 72 (2012), p. 83.

<sup>3</sup> For more on the Union interest as a legal concept, see M. Cremona, *Defending the Community Interest: The Duties of Cooperation and Compliance*, in: M. Cremona, B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamental*, Hart Publishing, Oxford: 2008, p. 125. See also the manifestation of Member State interests in the distinguishable "European profile" developed by the Member States overtaking the task of the Council Presidency, which could combine domestic and EU priorities and bear the stamp of a political identity constructed for this particular purpose in O. Elgström (ed.), *European Union Council Presidencies: A Comparative Perspective*, Routledge, Abingdon: 2003.

<sup>4</sup> See Craig, *supra* note 2, pp. 11-12 and Mény, *supra* note 2, pp. 31-32.

<sup>5</sup> The inseparability of the interests of the Member States and the Union is analysed eloquently and somewhat controversially by Bartolini, who put forward the argument that "the national-European political elites are victims of the constraints they have imposed on themselves, on their countries, and on their citizens" so as "to force exogenous discipline on respective national communities", which followed from their original political intention to use European integration to "bypass the constraints of national political production" to the benefit of political and policy efficiency (Bartolini, *supra* note 2, p. 405).

<sup>6</sup> See the theories of state-formation which describe the multitude of factors, including private and public goods, which may bear political and social relevance within the boundaries of nation states, in Bartolini, *supra* note 2, pp. 12-31.

<sup>7</sup> See the similar assessment made in connection with international politics and its interplay with national politics by: J.N. Rosenau, *National Interest*, in: D.L. Sills (ed.), *International Encyclopaedia of the Social Sciences*, Macmillan, London: 1968, pp. 34 and 37-38; C.A. Beard, *The Idea of the National Interest*, Quadrangle, Chicago: 1934; D.W. Clinton, *The Two Faces of National Interest*, Louisiana State University Press, Baton Rouge: 1994; J. Frankel, *National Interest*, Pall Mall, London: 1970, pp. 31-38; J.S. Nye, *Redefining the National Interest*, 78 *Foreign Affairs* 22 (1999); S. Burchill, *The National Interest in International Relations Theory*, Palgrave, Houndmills: 2005, especially pp. 206-211.

<sup>8</sup> For realist definitions of the national interest, see, *inter alia*, H. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy*, Knopf, New York: 1951 and *Politics among*

If this entanglement of local interests and common policy frameworks in the EU is accepted as valid, then EU law's engagement with Member State interests necessitates a constant examination and validation as a matter of its legitimacy. More specifically, the robust political legitimacy of Member State interests, within and outside the EU political and legal framework, requires that an equally robust mandate is available for EU law and its application and enforcement. The interests of the Member States are products of national political processes and are represented under local political mandates and political responsibility towards the local electorate.<sup>9</sup> There is plenty of evidence that local interests, as well as their diversity, directly and fundamentally influence the EU decision-making process and the resulting common policy frameworks, as well as the legal obligations adopted for their implementation.<sup>10</sup> Viewed in this light, the authorisation for EU law – as applied by both the Court of Justice and by national authorities and courts – to interfere with Member State interests needs to come from a political process in which the Member States reach common agreements, and must be expressed clearly, preferably in specific legal provisions.

The EU legal order contains a wide variety of rules which express both general and more specific politically agreed undertakings by the Member States to realise shared objectives and develop and operate corresponding common policy frameworks. These legal rules, which are included in both the Treaties and in legislation adopted under the Treaties should, in principle, secure a sufficient mandate for EU law to interact with locally-rooted interests. The legitimacy they may lend to EU action is further enhanced by the circumstance that they originate from the local interests which were brought by the Member States themselves to the EU framework and were negotiated among them with a view toward reaching a common agreement on the objectives of EU policy actions and their implementation.<sup>11</sup> From this perspective, EU law's engagement with the particular interests of the Member States entails, in effect, the settling of conflicts

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*Nations: Struggle for Power and Peace*, Knopf: New York, 1978; K.W. Thompson, *Traditions and Values in Politics and Diplomacy: Theory and Practice*, Louisiana State University Press, Baton Rouge: 1992. For constructivist attempts, see, *inter alia*, P.J. Katzenstein, *The Culture of National Security*, Columbia University Press, New York: 1996, and M. Finnemore, *National Interests in International Society*, Cornell University Press, Ithaca: 1996. For a strong subjective definition of the national interest, see B. Brodie, *War and Politics*, Cassel, London: 1974, especially pp. 342-345.

<sup>9</sup> See from the political economy literature, B. Clift, C. Woll, *Economic Patriotism: Reinventing Control over Open Markets*, 19(3) *Journal of European Public Policy* 307 (2012), pp. 301-302.

<sup>10</sup> For more on the impact of different national economic interests on the content of EU harmonisation measures, see, *inter alia*, M. Höpner, A. Schäfer, *A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe*, 33 *West European Politics* 344 (2010) and B. Clift, *The Second Time as Farce? The EU Takeover Directive, the Clash of Capitalisms and the Hamstrung Harmonization of European (and French) Corporate Governance*, 47(1) *Journal of Common Market Studies* 55 (2009).

<sup>11</sup> The earlier mentioned mutuality of and overlap between national interests and EU obligations mean that the Member States are simultaneously interested in the EU being able to deliver the common policy objectives, if necessary by the enforcement of legal obligations imposed on the Member States themselves, and in safeguarding particular local interests from the restrictions arising from the implementation of those common objectives.

between prior agreed-upon common commitments based on local interests and the particular interests raised subsequently by individual Member States. This means that the interactions between EU law and Member State interests are not governed by according an automatic preference for European politics and decision-making over the national, and vice versa, but rather in a process where the competing political mandates should be continuously examined and validated.<sup>12</sup>

In the Treaties, the most general recognition of the role played by Member State interests in European integration, as well as in the construction and operation of the EU's policies, is found in Article 1(1) of the Treaty on European Union (TEU). It expresses primarily that the locally-defined interests of the Member States provide the basis of common actions and policies under the EU framework. It also indicates that the Member States have agreed, in general terms, to act (i.e. to pursue certain of their interests) under a common framework. This latter component of Article 1(1) may well be interpreted as offering EU law with the most general of mandates to engage with local interests. Article 1(1) TEU holds that the Member States created "among themselves" the European Union, on which they conferred competences "to attain objectives they have in common." This can be interpreted as referring to a prior act by the Member States which elevates their shared interests to the European level<sup>13</sup> and agreeing on common actions introduced under very real powers to realise those interests. As an important characteristic of that common agreement, Article 1(1) stresses that it was voluntary and that the obligation on the part of the Member States to cooperate under a common framework was self-imposed.<sup>14</sup>

The Treaties also contain so-called "constitutionalising elements",<sup>15</sup> which can be regarded as providing general bases, beyond Article 1(1) TEU, for the EU law's mandate to interact with the interests of individual Member States. This term was introduced by Dashwood to distinguish these provisions from the so-called "conservatory elements" of the Treaties, the latter of which were placed in the Treaties with the purpose of preserving the position of the Member States within the Union.<sup>16</sup> "Constitutionalising elements"

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<sup>12</sup> This may be particularly true when the mutual dependence of Member States and EU governance resulting from a manifest policy interdependencies is considered; see A. Dashwood, *States in the European Union*, 23 *European Law Review* 201 (1998), p. 202.

<sup>13</sup> A similar uploading of local considerations is evidenced in Article 2 TEU, which holds that the Member States also share common values, which values are also those of the Union, and operate local societies according to these values.

<sup>14</sup> The constraints on Member State interests and on Member States' conduct implementing those interests must be understood as self-imposed, see Weiler's analysis in J. H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in: J. Dickson, P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford University Press, Oxford: 2012, pp. 139-140. This decision by national governments and the domestic electorate finds support in the promised benefits of common policy actions, which are expected to materialise locally (e.g. reduction of transaction costs for home undertakings).

<sup>15</sup> Dashwood, *supra* note 12, p. 203.

<sup>16</sup> The Treaty framework manifestly regulates the desire to maintain local particularities. It appears that the choices made in this regard reflect fundamental preferences concerning the right level of governance in Europe and the adequate spatial distribution of functions within the EU (as it follows from the principle

were defined as covering provisions that are available to promote and consolidate the interests of the Union and protect them – in law – against the disintegrative effects of the Member States acting unilaterally in the pursuit of their own interests.<sup>17</sup> These Treaty components,<sup>18</sup> including the principle of loyalty under Article 4(3) TEU – which are interpreted and applied together with individual legal provisions that formulate specific Member State obligations in concrete policy areas – enable the policing of conduct of the Member States in the Union and authorise the scrutiny by the EU of those local interests which are formulated, often in contradiction with EU obligations, in the national political arena.

More specific manifestations of a common political will among the Member States to pursue together their shared interests can be found in other Treaty provisions, such as Article 18 of the Treaty on the functioning of the European Union (TFEU) or those containing the fundamental freedoms.<sup>19</sup> In essence, they exclude the unilateral promotion of the territorially-bound interests of individual Member States at the

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of subsidiarity). See C. Barnard, *Flexibility and Social Policy*, in: G. de Búrca, J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart Publishing, Oxford: 2000, p. 199, who argues that these fundamental preferences, together with flexibility, could justify solutions which confirm and which reduce Member State diversity and autonomy, see pp. 204-213 and 217. See also Scott on procedural forms of flexibility (procedurally constrained flexibility), J. Scott, *Flexibility, "Proceduralization", and Environmental Governance in the EU*, in: de Búrca & Scott (*ibidem*) pp. 259-260. Locally formulated interests are not subjected to an overwhelming requirement of uniformisation under the EU framework, and the Member States are allowed to pursue their own interests not only in the EU political domain but also in the law of core EU policies, see G. de Búrca, J. Scott, *Introduction*, in: de Búrca & Scott (*ibidem*), p. 2. In this context, even the core principle of compliance has been softened to one whereby the Member States are required to maintain a minimum level of conformity and to commit to maintaining the EU as a polity, G. de Búrca, *Differentiation within the Core: The Case of the Common Market*, in: de Búrca & Scott (*ibidem*), pp. 137-138.

<sup>17</sup> Dashwood, *supra* note 12, p. 203 ("conservatory elements" ensure that "Members survival as States in a full sense is a basic assumption of the constitutional order"). The constitutionalising elements could also be referred to as principles of "system maintenance" for the EU, as used by Klamert for the principle of loyalty (M. Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, Oxford: 2014). Their function is to indicate an equality and unity of interests among the Member States and ensure that there be an "equilibrium between advantages and obligations" flowing from EU membership for each Member State, *ibidem*, p. 37; raised in the context of the principle of solidarity among the Member States.

<sup>18</sup> Which find further support in the references in the Treaties to common roots and aspirations and common values and objectives in the EU and in the explicit programme of continuing "the process of creating an ever closer union among the peoples of Europe" and of taking further steps to "in order to advance European integration."

<sup>19</sup> They were declared by the Court to contain clear and unconditional legal commitments by the Member States. See, *inter alia*, Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1; and after the expiry of the transitional period provided in the Treaties, Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, EU:C:1988:456, para. 15; and with regard to the prohibition of discrimination on the basis of nationality, Case 2/74 *Jean Reyners v. Belgian State*, EU:C:1974:68, paras. 26-32. They were also recognised as specific manifestations of the general non-discrimination principle in, *inter alia*, Case 2/74 *Reyners*, paras. 15-16.

expense of either the shared interests embodied in EU policy frameworks, or to the disadvantage of the interests of the nationals of other Member States.<sup>20</sup>

An even more robust mandate may follow from EU legislation. EU secondary law is based on a clear political agreement among the Member States in a specific area, and on that basis formulates concrete commitments.<sup>21</sup> EU legislative measures may lend detail to the political will expressed at Treaty-level, or secure the necessary implementation foreseen in the Treaty provisions. Generally speaking, their provisions can secure a more enhanced legitimacy to EU law's intervention than legal mandates which require further clarification by means of judicial interpretation. The Court of Justice has recognised that when the Treaties regulate a detailed implementation strategy for a particular provision, as in case of freedom of establishment under Article 49 TFEU, the results to be achieved by EU law must primarily follow from the measures negotiated and agreed upon by the Member States.<sup>22</sup>

The earlier-mentioned “conservatory elements” of the Treaties, which focus on the position maintained by the Member States within the Union, in effect give further expression to the fundamental circumstance recognised in Article 1(1) TEU, i.e. that the shared interests pursued in the EU have been formulated in the national political process and are represented under territorially-defined political mandates.<sup>23</sup> The first of these – Article 4(2) TEU – anchors the relevance of the local by providing that the national identities (and essential state functions) formulated within the territorial confines of the Member States must be protected. The national political arena is given further recognition under the rules governing the EU's system of competences, including the principle of conferral in Article 5(1) TEU and the principle of subsidiarity in Article 5(3) TEU. These provisions were introduced in order to ensure that certain decisions concerning interests, policy priorities, or governance design continue to be taken at the national level. A similar conservatory role is played by the rules which allow the Member States to derogate from their EU obligations, or apply for an opt-out.<sup>24</sup> Local decision-making is favoured by other provisions as well, such as that permitting the

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<sup>20</sup> In the infringement case concerning the Luxembourgian single-practice rule for medical professionals, the Court of Justice made it clear that the “observance of the principle of equality of treatment cannot depend on the unilateral will of national authorities”, Case C-351/90 *Commission v. Luxembourg*, EU:C:1992:266, para. 17.

<sup>21</sup> The adoption of EU legislation was recognised by the Treaty in numerous policy areas, such as the free movement of capital, freedom of establishment, or transport services, as the politically and legally prioritised method of implementation of common policies. See, *inter alia*, Case 2/74 *Reyners*, paras. 18-23; Joined Cases C-163, C-165 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, EU:C:1995:451, paras. 41-47; Case 4/88 *Lambrechts Transportbedrijf PVBA v. Belgian State*, EU:C:1989:320, paras. 8-9; Case C-49/89 *Corsica Ferries France v. Direction générale des douanes françaises*, EU:C:1989:649, paras. 7-10.

<sup>22</sup> See Article 50 TFEU and Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, EU:C:2003:612, para. 55 (in connection with the applicability of the *Vlassopoulou*-principle).

<sup>23</sup> See the overview of the various principles and instruments available to safeguard the status of the Member States within the EU in Dashwood, *supra* note 12, pp. 206-213.

<sup>24</sup> See the analysis in the next section.

“switching off” of core Treaty rules in order to protect Member State public services (Article 106(2) TFEU), or those allowing for differentiation (flexibility) among the Member States in matters concerning their obligations.<sup>25</sup> The law explicitly recognises the discretion and the autonomy of Member States to make policy choices and regulate matters themselves in fields where the EU’s competences are limited.<sup>26</sup>

Having established the above-described analytical framework, it becomes possible to depart from idealistic legal accounts of the interplay between local interests and EU legal obligations. Clearly, more fundamental considerations are in play than those captured by the interpretation that Member State interests and EU obligations are engaged in an incessant process of balancing, in which the Court of Justice’s task is to create a fair and reasonable balance between them.<sup>27</sup> The dilemmas addressed in this article, in particular those arising from the constant necessity of validation for EU law’s interference in every instance, which could concern the choice between legitimate and illegitimate Member State interests or the decision to moderate local interests and the relevant national decision-making processes,<sup>28</sup> are similar to those raised by Azoulai as regards the respecting of “sensitive national interests” by the Court.<sup>29</sup> Our analysis will demonstrate that the Court’s task is not simply the “desensitization” of sensitive national interests addressed under the EU law framework. Its engagement using EU legal provisions goes beyond that of simply compelling national political actors and policies to unquestioningly integrate “European legal parameters” into national laws and policies and adhere to EU objectives.<sup>30</sup>

<sup>25</sup> See C.-D. Ehlermann, *How Flexible is Community Law? An Unusual Approach to the Concept of “Two Speeds”*, 82 Michigan Law Review 1274 (1984), and de Búrca, *supra* note 16, p. 133. The most relevant reason for flexibility is the diversity of economic and social development in the Member States, which could lead to non-negotiable conflicts and paralysed cooperation within the EU, E. Philippart, M. Sie Dhian Ho, *Flexibility and Models of Governance for the EU*, in de Búrca & Scott, *supra* note 16, p. 301.

<sup>26</sup> See Micklitz & de Witte, *supra* note 2.

<sup>27</sup> J. Schwarze, *Die Abwägung von Zielen der europäischen Integration und mitgliedstaatliche Interessen in der Rechtsprechung des EUGH*, *Europarecht* 253 (2013), p. 273, suggests that the convenient solution would be that all conflicts between the EU and the Member States should be resolved by the EU Court to the benefit of European integration, which in its general jurisdiction should create a “fair and reasonable” relationship (balance) between the requirements of EU membership and the interests of the Member States. See also the overview of the corresponding literature in Bartolini, *supra* note 2, pp. 406-407, which strongly criticises these balanced academic positions, arguing that EU legal obligations “have largely reduced the adaptation elasticity offered to Member States”, p. 407. He also states that constraint (leverage) and compliance are central to the functional offerings of the EU for the Member States, which, however, can also resort to EU law when seeking opportunities for utilising EU policy tools so as to address national policy concerns (*ibidem*, pp. 305-306).

<sup>28</sup> See the carefully constructed legal reasoning in Case C-177/94 *Criminal proceedings against Gianfranco Perfili*, EU:C:1996:24, paras. 10-15.

<sup>29</sup> See L. Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, in: B. de Witte et al. (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar: Cheltenham: 2013, pp. 168-171.

<sup>30</sup> *Ibidem*.



## 2. ENGAGING WITH MEMBER STATE INTERESTS: EXAMPLES FROM THE SINGLE MARKET

The questions concerning the legitimacy of EU law's interferences with Member States' interests are perhaps most acutely raised in the law of the Single Market. In the policy and regulatory conflicts generated by the fundamental freedoms and their implementing legislation, the legal obligations of the Member States and their particular interests, often formulated in contravention of those obligations, interact particularly intensively. While the scrutiny of Member State interests can, in most cases, rely on clear and unconditional Treaty provisions and numerous detailed legislative rules which express concrete commitments by the Member States, EU legal provisions are nevertheless very often confronted with interests that are deeply embedded in the local socio-economic environment and/or are implemented under national competences or in the discretion of national authorities. These interests, and their implementation in national law, enjoy a high degree of legitimacy, which means that EU law's engagement with them necessitates the availability of a clear and sufficient mandate.

EU law interacts with the Member State interests primarily in the context of assessing national restrictions on the fundamental freedoms. Their justification in law involves examining the proportionality of the national measure and/or the national policy action being challenged, in the course of which the Court of Justice, which usually decides such cases, has the competence to filter and/or moderate those interests, and potentially to transform them. The Court's performance in this regard has been subject to intensive criticism, mainly for failing to observe the boundaries of its mandate.<sup>31</sup> It has been claimed that there has been a "hemming in" of the derogation possibilities – which are available in EU law to protect legitimate local interests – via imposing ever more wide-ranging requirements and principles, which has had the consequence of putting EU law firmly in charge of deciding which Member State interests may be raised and how they may be protected.<sup>32</sup> Others have argued that the strict scrutiny of national measures under the fundamental freedoms is propelled by a "prior assumption" that market integration as a core EU "value" must be given a strong weight "in the balance", which means that market integration is regularly prioritised over "state sovereignty."<sup>33</sup>

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<sup>31</sup> See Azoulai's criticisms of instances when EU law was responsive to locally formulated interests, and also when it trivialised Member State efforts to defend sensitive national interests (Azoulai, *supra* note 29, pp. 168-187). Significant differences in the treatment of Member State interests have also been pointed out in the different strands of the jurisprudence as developed by the Court (*ibidem*). See further G. Davies, *Free Movement, the Quality of Life and the Myth that the Court Balances Interests*, in: P. Koutrakos, N. Nic Shuibhne, P. Syropis (eds.), *Exceptions from EU Free Movement Law*, Hart Publishing, Oxford: 2016, pp. 218-219.

<sup>32</sup> C. Barnard, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in: C. Barnard, O. Odudu (eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford: 2009, pp. 273 and 289. The close scrutiny exercised by the Court of Justice allowed for the conclusion that "state interest is not, in fact, being protected by the justification jurisprudence" (*ibidem*).

<sup>33</sup> G.A. Bermann, *Proportionality and Subsidiarity*, in: C. Barnard, J. Scott (eds.), *The Law of the Single European Market*, Hart Publishing: Oxford: 2002, pp. 76-77. See also J. Scott, *Mandatory or Imperative Requirements in the EU and the WTO*, in: Barnard & Scott (*ibidem*), p. 270.

It has also been highlighted, from the perspective of the failing social dimension of the Single Market, that not all local interests are internalised adequately or in a politically desirable way by EU law.<sup>34</sup>

## 2.1. Filtering Member State interests

In the law of the Single Market, the first interaction with Member State interests occurs when the interests which can be pursued legitimately under the EU framework are separated from those which cannot.<sup>35</sup> This filtering of Member State interests already raises controversies from the perspective of the legitimacy of the EU's intervention.<sup>36</sup> First of all, according to standard case law the Member States are not allowed to justify their actions on the basis that the "national interest" *in general* requires protection. The Court of Justice will reject such claims on the grounds that they aim to secure a blanket justification for Member State policies which violate EU requirements, and that they are too general and unsubstantiated in their content to qualify as transparent, clear and certain, and non-discriminatory representations of legitimate local interests.<sup>37</sup> Member States' claims for the protection of their "national interest" frequently relate to national policies which are poorly explained and equally poorly designed, which pursue objectives that are either invalid or lack objectivity, or which are implemented using inadequately targeted, excessive, or unsuitable means.<sup>38</sup> However, the Court of Justice must make its distinctions carefully, as particular circumstances may require that

<sup>34</sup> C. Kaupa, *Maybe Not Activist Enough? On the Court's Alleged Neoliberal Bias in its Recent Labor Cases*, in: de Witte et al., *supra* note 29, pp. 57-58, where he argued that the most relevant reason for this is the lack of an "operational framework" before the Court to assess and deal with the socio-economic conflicts at stake. See further C. Kaupa, *The Pluralist Character of the European Economic Constitution*, Hart Publishing, Oxford: 2016.

<sup>35</sup> The literature on differentiation within the EU distinguishes, as grounds for differentiation, between the categories of legitimate socio-economic differences between the Member States and illegitimate subjective political preferences represented by national governments (e.g. domestic partisanship, political obstructionism, national profiteering), de Búrca, *supra* note 16, pp. 135-136.

<sup>36</sup> It has been remarked, in this context, that EU law's choices can be compromised by the usage of uncertain and "slippery" terms, which enable the moving of boundaries, or by the dressing up Member State preferences, local policy priorities and national commercial advantages as objective interests, see W. Wallace, H. Wallace, *Flying Together in a Larger and More Diverse EU*, Netherlands Scientific Council for Government Working Documents No. W 87 1995.

<sup>37</sup> See Case C-112/05 *Commission v. Germany*, EU:C:2007:625, paras. 79-80 and Joined Cases C-282/04 and 283/04 *Commission v. the Netherlands*, EU:C:2005:712, paras. 33-35. See also the Greek crisis management judgment, Case C-244/11 *Commission v. Greece*, EU:C:2012:694, paras. 76-77, and the Italian helicopter procurement judgment, Case C-337/05 *Commission v. Italy*, EU:C:2008:203, paras. 42-54. See further Commission Communication on certain legal aspects concerning intra-EU investment, [1997] OJ C220/15, pt 8.

<sup>38</sup> See e.g. the judgment in Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden v. Essent NV and Others*, EU:C:2013:677, where EU legislation on electricity markets provided a rather convenient background for a decision approving national policy, and the judgment in Case C-271/09 *Commission v. Poland*, EU:C:2011:855, where a much lesser restriction on capital movements serving a public interest aim was found incompatible with the Treaties.

national governments act in the national interest in a manner which does not comply with the benchmarks that seem to be applicable to normal governance situations. It must also be borne in mind that they alone bear political responsibility for these actions. It is also uncertain whether legal scrutiny, as implemented by the Court of Justice, will be able to make defensible distinctions between legitimate and illegitimate manifestations of the local interest, especially in situations wherein they are rather crudely expressed political desires covered with a light veneer of native unilateralism.<sup>39</sup>

The case law also excludes the unilateral advancement of “purely economic” interests<sup>40</sup> by the Member States, which raises similar concerns about the boundaries of EU law’s intervention. The Court has consistently denied that aims such as reinforcing the structure and operation of competitive markets at the national level, the modernisation of national markets, or increasing the effectiveness of national markets could be legitimately protected in opposition to the fundamental freedoms.<sup>41</sup> The Member States will also be prevented from relying – when interfering with the operation of competitive markets – on considerations of expediency that arise from the general state of a given sector of the national economy.<sup>42</sup> The rationale for barring such claims is that they concern the interests of a single national economy within the Single Market, and have a clear potential for disadvantaging the economies of other Member States as well as undermining the Union’s own economic policy. Allowing national governments to defend “purely economic” interests would not only pose a threat to the competitive equality of the Member States but would also directly jeopardise the multilateral economic arrangement that is the Single Market.<sup>43</sup>

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<sup>39</sup> Judicially constructed formulas, such as the “sufficient link” clause (*see, inter alia*, Case C-103/08 *Arthur Gottwald v. Bezirkshauptmannschaft Bregenz*, EU:C:2009:597; Case C-213/05 *Wendy Geven v. Land Nordrhein-Westfalen*, EU:C:2007:438; Case C-158/07 *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630) may allow, in particular circumstances, for the recognition of Member State practices as legitimate which otherwise would qualify as illegitimate on account of the territorially-linked, possibly protectionist aims pursued by them.

<sup>40</sup> *E.g.* interests which relate to the financial interests of the Member State concerned or to the development of the national economy. *See* Case C-367/98 *Commission v. Portugal*, EU:C:2002:326, para. 52; Case C-35/98 *Staatsecretaris van Financiën v. B.G.M. Verkooijen*, EU:C:2000:294, para. 47; and in the context of the free movement of goods, Case C-265/95 *Commission v. France*, EU:C:1997:595, para. 62; and as to the free movement of services, Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxiidiotikon Grafeion v. Ypourgos Ergasias*, EU:C:1997:282, para. 23 and Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, EU:C:2011:124, para. 52. Purely (national) economic interests may also fail the requirements imposed during moderation by EU law under the proportionality test, as they may be extremely broad as a matter of substance, reduce the transparency and accessibility of policy-making, or offer uncontrollably broad discretion at the national level.

<sup>41</sup> Case C-367/98 *Commission v. Portugal*, para 52; Case C-174/04 *Commission v. Italy*, EU:C:2005:350, para. 37; Case C-274/06 *Commission v. Spain*, EU:C:2008:06, para. 44, in which the strengthening of the structure of competition meant reinforcing the ability of the market to resist anti-competitive practices.

<sup>42</sup> Case C-162/06 *International Mail Spain SL v. Administración del Estado and Correos*, EU:C:2007:681, paras. 41-42.

<sup>43</sup> Its implementation depends on the Member States mutually excluding territorially-linked economic advantages available to nationals, as well as territorially-linked restrictions concerning non-nationals. *See* Barnard, *supra* note 32, p. 274.

The Court needs to carefully decide when making these choices and pay close attention to what makes a local interest “purely” economic. Many of the economic interests raised by the Member States may only have indirect links with a Member State’s competitive position, and when examined closely it may turn out that their non-economic policy dimension (e.g. public health, public security, media pluralism etc.) may, in the national context, be more prevalent.<sup>44</sup> A narrow assessment by the Court may fail to acknowledge the recognisable social and industrial policy implications of the economic interest raised (e.g. the protection of small traders).<sup>45</sup> In the case of non-economic interests, a similar judicial scrutiny may overlook their significant commercial implications (e.g. the protection of national cinematographic culture, the protection of the national film industry, or the protection of small printed media).<sup>46</sup> Also, there is a particularly fine line – especially in terms of the legal assessment – between the Member States being unwilling to sacrifice domestic resources for the implementation of EU policies on the grounds of purely economic interests, and the claim that a departure from EU obligations is justified by the interests of economy and efficiency in administration and governance at the national level.<sup>47</sup>

<sup>44</sup> See, *inter alia*, Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner*, EU:C:2002:442, para. 43; Case 96/85 *Commission v. France*, EU:C:1986:189, para. 10; Case C-351/90 *Commission v. Luxembourg*, para. 13; Case C-108/96 *Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA*, EU:C:2001:67, para. 30; Case C-117/97 *Commission v. Spain*, EU:C:1998:519, paras. 36-38 and 45-46; Case C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, EU:C:1993:45, para. 9. When the economically relevant Member State interest in question coincides with the relevant EU policy objectives (e.g. protecting public service values, promoting regional development, or strengthening innovation), this can further decrease EU law’s mandate for intervention. See Case C-209/98 *Entreprenorforeningens Affalds/ Miljøsektion (FFAD) v. Københavns Kommune*, EU:C:2000:279, paras. 78-80; Case 36/73 *Nederlandse Spoorwegen v. Minister van Verkeer en Waterstaat*, EU:C:1973:130, paras. 20-22; Joined Cases C-105/12 to C-107/12 *Essent*, paras 49-52.

<sup>45</sup> See the order in Case C-343/12 *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA*, EU:C:2013:54, in which the protection of consumers triumphed over the protection of the interests of small traders via banning commercial practices which would have enabled small traders to compete with retail giants.

<sup>46</sup> Case 60/84 *Cinéthèque SA and Others v. Fédération nationale des cinémas français*, EU:C:1985:329; Case C-17/92 *Federación de Distribuidores Cinematográficos v. Spanish State*, EU:C:1993:172, para. 17; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, EU:C:1997:325. See also the judgment in Case C-452/01 *Margarethe Ospelt and Schlössl Weissenberg Familienstiftung*, EU:C:2003:493, where it was unclear whether both the economic and the non-economic aspects of maintaining a distribution of land ownership, “which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives” were adequately taken into account. See, in contrast, Case C-202/11 *Anton Las v. PSA Antwerp NV*, EU:C:2013:239 concerning the diffuse national interest of protecting national languages in the domain of employment contracts and Joined Cases C-197/11 & C-203/11 *Libert and Others*, EU:C:2013:288, where a housing policy addressing local housing shortages was considered in the context of the free movement of capital.

<sup>47</sup> See e.g. Joined Cases C-501/12 to C-506/12, C-540/12 & C-541/12 *Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland*, EU:C:2014:2005. See also the case law confirming as le-

In the event there is a strong and clear legal mandate, the Court of Justice can act more confidently when filtering Member State interests. For example, Article 18 TFEU provides a solid basis for separating discriminatory Member State measures and policies from those which refrain from discriminating on the basis of nationality or establishment. The same Treaty article also makes it possible to limit the grounds available to justify such measures and subject them to a particularly exacting scrutiny under the proportionality principle.<sup>48</sup> In contrast, when the EU lacks the competences to act in a particular policy domain, the filtering of Member State interests will be more confined. This is expressed first and foremost in the general formula which states that – having regard to the state of EU law at the time and in the absence of necessary EU legislative measures – the Member States are entitled (i.e. “remain competent”; “have the power”) to regulate national policy matters affected by EU obligations, for example access to social security entitlements, the criterion for taxation, criminal law, access to the professions, or the taking up of certain economic activities.<sup>49</sup>

## 2.2. Moderating and transforming Member State interests

The fundamental freedoms impose direct and legally enforceable restrictions on Member States in their pursuit of their respective interests. The law, as applied, subjects Member State interests to rather intensive moderation, which may even lead to the eventual transformation of those interests in the national political arena. Under the principle of proportionality, the central legal principle for deciding whether Member States can legitimately depart from the fundamental freedoms in pursuit of locally defined interests Member States are required to demonstrate that their national policy intervention is based on a genuine need, is suitable for attaining the relevant local interest(s), and does not go beyond what is necessary to achieve them. In general terms, the proportionality principle gives effect to the assumption that national governments, when acting under their political mandates in areas covered by the rules on free movement, will use the least restrictive means possible.<sup>50</sup> While, on average, it serves

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gitimate the protection of the financial equilibrium of national public services in, *inter alia*, Joined Cases C-11/06 & C-12/06 *Rhiannon Morgan v. Bezirksregierung Köln*, EU:C:2007:626; Case C-8/02 *Ludwig Leichtle v. Bundesanstalt für Arbeit*, EU:C:2004:161; and Case C-303/02 *Peter Haackert v. Pensionsversicherungsanstalt der Angestellten*, EU:C:2004:128.

<sup>48</sup> See, *inter alia*, Case 182/83 *Robert Fearon & Company Limited v. Irish Land Commission*, EU:C:1984:335, para. 10; Case C-351/90 *Commission v. Luxembourg*, para. 14; Case 96/85 *Commission v. France*, EU:C:1986:189, para. 12.

<sup>49</sup> See, *inter alia*, Case C-15/90 *David Maxwell Middleburgh v. Chief Adjudication Officer*, EU:C:1991:377, paras. 14-15; Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, EU:C:1999:438, para. 56; Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi*, EU:C:1998:521, para. 25; Case 352/85 *Bond van Adverteerders and Others v. The Netherlands State*, EU:C:1988:196, para. 38; Case C-71/76 *Jean Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*, EU:C:1977:65, para. 15. This general formula, beyond confirming the limited nature of the EU's competence system, implies that obligations for the Member States which were not agreed upon and set out previously require subsequent political agreement among the Member States in the EU legislative process.

<sup>50</sup> T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford: 2007, p. 152.

as an effective instrument in judicial decision-making, in controversial instances, for example when a choice between competing values or policy objectives of the same importance needs to be made, the legitimacy of the judicial assessment and the decision-making it enables becomes more dubious.<sup>51</sup>

Considering its directness and intensity, in order to ensure the legitimacy of any interference with locally-defined interests it is of paramount importance to examine the proportionality of the related Member State (policy) action. The choices made with respect to the application of the proportionality test must be principled and stay within the boundaries of the mandate provided under EU law. The legitimacy of controls over national policies naturally raises less controversy when such controls are carried out under an EU legal provision which sets out Member State obligations clearly, based on a manifest agreement among the Member States as to the interests and objectives to be achieved. Such legal provisions include the EU non-discrimination principle, both on its own or as implemented through the fundamental freedoms,<sup>52</sup> or a clearly expressed rule in a piece of EU legislation agreed to by the Member State. In instances when the application of EU requirements in the specific circumstances is less certain, or interference with national policies and policy action(s) lacks a detailed legal basis, the engagement of EU law with Member State interests must demonstrate self-restraint.

Under the principle of proportionality, EU law imposes requirements such as that Member State actions pursuing local interests must relate to a particular purpose and objective (i.e. they must be targeted at achieving a particular objective); must pursue genuine policy objectives that are determined clearly and transparently in advance; must be limited to what is necessary to achieve the policy objectives identified; and must avoid the use of excessive administrative discretion.<sup>53</sup> It may further be demanded

<sup>51</sup> See T. Harbo, *The Function of Proportionality Analysis in European Law*, Brill-Nijhoff, Leiden: 2015 and *The Function of the Proportionality Principle in EU Law*, 16 *European Law Journal* 158 (2010).

<sup>52</sup> It, nevertheless, needs to be applied with restraint as it is capable of excluding a broad range of Member State actions which would normally form part of the toolkit of national governments, and it can impose far-reaching obligations contradicting local political intentions. See, *inter alia*, Case C-412/04 *Commission v. Italy*, EU:C:2008:102, para. 106; Case 90/76 *S.r.l. Ufficio Henry van Ameyde v. S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)*, EU:C:1997:101. The principle contains openness and transparency requirements of its own; see Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari and AMTAB Servizio SpA*, EU:C:2006:237, paras. 22-23 and Case C-458/03 *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, EU:C:2005:605, paras. 50-51.

<sup>53</sup> See, *inter alia*, Case C-265/08 *Federutility and Others v. Autorità per l'energia elettrica e il gas*, EU:C:2010:205, para. 44; Case C-242/10 *Enel Produzione SpA v. Autorità per l'energia elettrica e il gas*, EU:C:2011:861, para. 48; Case C-503/99 *Commission v. Belgium*, EU:C:2002:328, paras. 48-52. The Member States could be required to produce a regulation that is able to differentiate between the various groups of persons affected, provides specific guarantees in order to avoid jeopardising the operation of the persons affected, offers mechanisms to compensate or reduce the potential negative impact of national intervention, applies measures which are limited in time and which are subject to revision in regular time intervals, and which was introduced as part of a complex policy package aiming to introduce positive mid- and long-term changes in the sector, Case C-242/10 *ENEL Produzione*, paras. 66-80 and Case C-265/08

that the realisation of local interests be carried out with due regard for the fundamental requirements of accessible and transparent regulation and comply with formal rule of law requirements. The latter include, in particular, the requirements that the legal position of the individuals affected is determined with precision and clarity, that adequate information on the rights and obligations of the persons affected is provided, that effective judicial protection and remedies are available, and that the effects of the applicable measures and policies are delimited in law adequately (objectively).<sup>54</sup> This set of principles places serious limitations as to which local interest and under what circumstances, as pursued by the Member States, may be accepted under EU law. As a result, Member States seeking approval for their policies under EU law may have to transform national processes and frameworks which were put in place for the formulation and the realisation of local interests.<sup>55</sup>

The legitimacy of EU law's intervention under these requirements depends foremost on the intensity of the legal scrutiny and how it is calibrated in the circumstances of a given case. The controls imposed under the proportionality principle depend on numerous factors, such as the nature of the EU competence affected, the scope of the Member State competence involved, and/or the availability, as well as the nature, of EU regulatory and harmonisation efforts in the given domain.<sup>56</sup> Arguably, when focusing on these elements of the law, the Court of Justice (and national courts) in effect explore whether intervention with the Member State interest in question has been legitimised by the availability of a prior political agreement at the EU level expressed in some form of law. When the EU's competences are limited and EU legislative efforts have been restricted, or where the relevant policy objectives (or values) are expected to be secured

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*Federutility*, paras. 17-21 and 35-46. For rather similar conditions in connection with the compensation of public service obligations, see Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, paras. 89-93.

<sup>54</sup> E.g. Case C-320/91 *Criminal proceedings against Paul Corbeau*, EU:C:1993:198, paras. 16-19; Case C-475/99 *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz*, EU:C:2001:577, paras. 57-65. The Member States could be required to introduce compensatory mechanisms or regulatory systems to control the operation of a Member State policy or remedy its unlawful (economic) impacts, Case C-340/99 *TNT Traco SpA v. Poste Italiane SpA and Others*, EU:C:2001:281, paras. 56-62.

<sup>55</sup> In general terms, EU law requires that the Member States avoid (bad) routines and practices in national governance and ensure that their conduct is able withstand legal and policy scrutiny. Narrow-minded, badly designed, erroneously prepared, potentially unfair and unsustainable expressions of local interests and considerations will be deemed as unacceptable. See Case C-162/06 *International Mail Spain*, para. 35; Case C-320/91 *Corbeau*, paras. 14-16. See also the requirement of consistent and systematic regulatory intervention at the national level as a condition for finding national measures suitable to achieve their aim, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, EU:C:2009:519, paras. 59-61, and the cases cited therein.

<sup>56</sup> Also, there may be a temporal dimension to these legal possibilities, such as that experienced in case of Services of General Economic Interest, where the protection of public service values was first an interest formulated at the national level, which later found its way as a Union objective into the Treaties, see Protocol No. 26 on Services of General Interest, [2012] OJ C326/1.

within Member State competences, Member State interests and the corresponding local policies will be accorded a rather broad leeway.<sup>57</sup>

The Court of Justice's case law offers a number of examples of such restrained scrutiny of the national interests pursued and the relevant national policy frameworks. In the early electricity market liberalisation judgments, the Court recognised – as a matter of principle – that a broad discretion was available to the Member States when they interfere in a market which is essentially a public service market, in pursuit of both national public service objectives as well as the related local economic, fiscal, social etc. policy objectives.<sup>58</sup> In those instances where a Member State's action in the national public service market effectively complemented the EU's policy efforts in the social domain, especially when the operation of fundamental public services and the meeting of fundamental social needs were under threat,<sup>59</sup> the Court again opted for a light-touch review of the Member State's interests and demanded only that the relevant national policies comply with some basic good governance requirements.<sup>60</sup>

In other circumstances, the legitimacy of EU law's engagement with locally-rooted interests may be much more uncertain. The case law dealing with the fundamental political choice that certain activities in what is perceived as a market must be provided on a not-for-profit basis introduced requirements towards Member State actions which may be difficult to link with a clear mandate under EU law expressing an unquestionable political agreement among the Member States. The requirements imposed by the Court in *Sodemare* included, in particular, that choices made in the local interest must follow from a logical and sound policy decision, which was made without discrimination at the national level, and that the policy objectives formulated by the national government must be genuine and must "necessarily" imply that the expectation of a not-for-profit

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<sup>57</sup> A fitting, and maybe the only, example is the EU created concept of Services of General Economic Interest, the content and application of which will be determined primarily at the national level. The "switch rule" of Article 106(2) TFEU concerning the application of EU economic law as regards such services is closely linked to the principle of subsidiarity, the constitutional ability of the Member States to exercise local competences, and to the individual responsibility of the Member States for most components of local public service policy; see Protocol No. 26, *supra* note 56. See also the assessment of Member State action under public morality considerations, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614 or, to a somewhat lesser extent, in pursuit of public policy objectives; Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*, EU:C:2000:124.

<sup>58</sup> Case C-157/94 *Commission v. the Netherlands*, EU:C:1997:499, paras. 37-40; Case C-159/94 *Commission v. France*, EU:C:1997:501, paras. 52-55. It readily confirmed that the Member States may implement the objective of ensuring the undisturbed and sufficient, reliable and effective, efficient and socially responsible provision of public services. See Case C-157/94 *Commission v. the Netherlands*, paras. 41-42; Case C-159/94 *Commission v. France*, paras. 57-58.

<sup>59</sup> Case C-159/94 *Commission v. France*, paras. 57-58; Case C-503/99 *Commission v. Belgium*, paras. 45-47; Case C-207/07 *Commission v. Spain*, EU:C:2008:428, paras. 50-54.

<sup>60</sup> Case C-117/97 *Commission v. Spain*, para. 82; Case C-207/07 *Commission v. Spain*, para. 56; Case C-244/11 *Commission v. Greece*, paras. 69-75.



operation can be enforced in the particular local circumstances.<sup>61</sup> As a further demand, national policy-makers must ensure that the not-for-profit nature of the activity forms part of a national policy framework which promotes and protects genuine non-economic objectives and which is operated under genuine non-economic principles and in circumstances which exclude for-profit operations.<sup>62</sup>

While some of the *Sodemare* requirements, such as non-discrimination, may find a solid basis in clear and specific EU legal provisions, others have the potential to unjustifiably narrow down national policy choices and excessively interfere with their actual implementation. For example, the strict demand for policy coherence at the national level, which was presumably introduced by the Court of Justice to ensure that the Member States do not abuse the not-for-profit label to secure illegitimate advantages in the Single Market, is difficult to connect to an actual provision or principle of EU law, and may be impossible to satisfy, when interpreted strictly, in an actual policy setting and in an actual market where considerable uncertainties prevail. However, the judgment in *Sodemare* is also capable of being read in a more forgiving manner. It seems that the Court, quite consistent with its light-touch jurisprudence, will readily defer to the national policy process and the interests represented therein provided that the local interest of a not-for-profit (non-commercial) operation is sufficiently embedded in domestic non-economic policies and is adequately linked to local non-economic value considerations, which may be expressed in terms of fundamental rights.<sup>63</sup>

The legitimacy of EU law's engagement with local interests is perhaps the weakest when the proportionality principle is applied with a view to demanding from the Member States that they adopt less restrictive alternative measures which are nonetheless sufficiently effective to ensure the realisation of the policy objectives pursued.<sup>64</sup> The root of the problem here is that the requirement of less restrictive national policy alternatives aims explicitly at delimiting Member State choices. It also interferes rather directly with the domestic policy-process whereby the instruments for policy-implementation are selected. As a more specific issue concerning the power of the Court of Justice and its scope, the assessment of potential alternative measures, no matter how abstract it may be, seems to be a matter for the domestic policy-maker and the national legislature.<sup>65</sup>

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<sup>61</sup> Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia*, EU:C:1997:301, paras. 31-33.

<sup>62</sup> *Ibidem*, paras. 28-30.

<sup>63</sup> Case C-23/93 *TV10 SA v. Commissariaat voor de Media*, EU:C:1994:362, paras. 23-25. In contrast, see Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media*, EU:C:1991:323, paras. 27-28; Case C-353/89 *Commission v. the Netherlands*, EU:C:1991:325, paras. 30-45.

<sup>64</sup> See, *inter alia*, Case C-157/94 *Commission v. the Netherlands*, paras. 56-58; Case C-158/94 *Commission v. Italy*, EU:C:1997:500, paras. 53-54; Case C-159/94 *Commission v. France*, paras. 100-101.

<sup>65</sup> Opinions differ over whether the application of the requirement of a less restrictive alternative means is desirable in connection with Article 106(2) TFEU. See T. Prosser, *The Limits of Competition Law*, Oxford University Press, Oxford: 2005, pp. 137-138; J. Baquero Cruz, *Beyond Competition: Services of General Interest and EC Law*, in: G. de Búrca (ed.), *EU Law and the Welfare State*, Oxford University Press, Oxford:

In practice, however, the application of this limb of the proportionality test by the Court of Justice is circumscribed by the limitations of the judicial mandate available under EU law. The scrutiny is carried out, and its intensity set, with regard to the circumstances of the given case, which involves an assessment of the relevant factors from the perspective of the legitimacy of EU law's interference with local interests. Such factors include, in particular, the scope of the EU competences available as well as the nature and scope of the relevant national policy action.<sup>66</sup> As a clear example of a constrained scrutiny, in the earlier-mentioned electricity market rulings – where the national government was held entitled to make the most fundamental policy choices – the Court ruled that the assessment of potential, less restrictive alternative measures must not be purely speculative and must take place having regard to the specificities of the domestic public service market.<sup>67</sup>

Under the proportionality principle, EU law may demand from the Member States – as alternative instruments that are less restrictive than the enforcement of strict legal prohibitions or the imposition of additional administrative burdens – the introduction and operation of alternative user-friendly administrative solutions<sup>68</sup> or administrative supervision arrangements.<sup>69</sup> These solutions can rely on a particularly strong source of legitimacy when the Member States have made common, legally-binding commitments to the same effect. Arguably, the Treaty provisions on the fundamental freedoms may themselves provide a sufficient mandate, as their underlying objective is to liberate cross-border economic activities from excessive regulatory and administrative constraints.<sup>70</sup> The availability of EU legislation, which regulates cross-border cooperation avenues among the Member States so that economic operators can avoid restrictive national administrative and regulatory frameworks, only reinforces the force of these Treaty rules.<sup>71</sup> In contrast, when the alternative trader-friendly instrument entails the

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2005, pp. 191-192; H. Schweitzer, *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States*, in: M. Cremona (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, Oxford: 2012, p. 42.

<sup>66</sup> See Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, intervener: *Raad van de Balies van de Europese Gemeenschap*, EU:C:2002:98, para. 105, where the Court made considerable efforts to establish that there was absolutely no other way in the domestic regulatory environment to achieve the desired result.

<sup>67</sup> Case C-157/94 *Commission v. the Netherlands*, paras. 56-58; Case C-159/94 *Commission v. France*, paras. 100-101.

<sup>68</sup> See e.g. Case C-39/11 *VBV — Vorsorgekasse AG v. Finanzmarktaufsichtsbehörde (FMA)*, EU:C:2012:327, para. 33; Case C-311/08 *Société de gestion industrielle (SGI) v. Belgian State*, EU:C:2010:26, para. 71; Case C-326/12 *Rita van Caster and Patrick van Caster v. Finanzamt Essen-Süd*, EU:C:2014:2269, paras. 49-54; Case C-262/09 *Wienand Meilicke and Others v. Finanzamt Bonn-Innenstadt*, EU:C:2011:438, paras. 45-52.

<sup>69</sup> See e.g. Case C-299/02 *Commission v. the Netherlands*, EU:C:2004:620, paras. 25-36; Case C-101/94 *Commission v. Italy*, EU:C:1996:221, paras. 21-24.

<sup>70</sup> E.g. Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para. 38; Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others*, EU:C:2003:597, para. 73.

<sup>71</sup> *Ibidem*.

introduction of market-based solutions, such as resorting to private law arrangements or solutions which do not restrict the choices of the individuals (market operators) affected,<sup>72</sup> the legitimacy of EU law's interference, which assumes the existence of a common agreement among the Member States, is less obvious. The same holds true for imposing the requirement under the proportionality principle that Member States, instead of imposing direct legal prohibitions on individuals, should regulate the risks associated with the conduct in question,<sup>73</sup> resort to risk mitigation solutions,<sup>74</sup> or switch to a risk-based approach in economic regulation.<sup>75</sup>

Overall, the jurisprudence of the Court of Justice concerning the proportionality of policy actions adopted by the Member States in the pursuit of locally-formulated interests includes obvious, as well as controversial, instances of judicial interference. Even the minimum requirements enforced, such as the clarity of legal rules or the genuineness and coherence of the domestic policy framework, have the potential for moderating the processes of national policy-making and the realisation of local interests. The law has made clear what domestic practices are preferred and what may qualify as unacceptable. The scrutiny under EU law may also involve the transformation of how Member State interests are formulated and realised in the national domain. This may manifest itself through the requirement of a less restrictive alternative solution, the application of which may lead to changing the policy direction pursued by the Member State concerned. In every case, the legitimacy of EU law's engagement with Member State interests depends first and foremost on whether it can point to a common agreement among the Member States as expressed in a provision of law, lacking which the political opportunity, as well as the responsibility for realising their interests, must remain with national governments.

## CONCLUSIONS

The political legitimacy enjoyed by Member State interests, fed into the EU integration framework as its fundamental building blocks and also as the political limitations of the common policies developed and operated therein, requires that their treatment under EU law relies on a clear source of legitimacy. The legitimacy for EU law's interferences flows first foremost from the prior agreements among the Member States, which are expressed in general and specific provisions of law, to achieve particular common (policy) objectives as they emerge from the interests they share. However,

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<sup>72</sup> See Case C-171/02 *Commission v. Portugal*, EU:C:2004:270, paras. 43 and 55; Case C-442/02 *CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie*, EU:C:2004:586, para. 22.

<sup>73</sup> E.g. Case C-9/02 *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, EU:C:2004:138, para. 54; Case C-436/00 *X and Y v. Riksskatteverket*, EU:C:2002:704, para. 59.

<sup>74</sup> E.g. Case C-493/09 *Commission v. Portugal*, EU:C:2011:635, para. 50; Joined Cases C-197/11 and C-203/11 *Eric Libert and Others v. Gouvernement flamand*, EU:C:2013:288, para. 56.

<sup>75</sup> E.g. Case 3/88 *Commission v. Italy*, EU:C:1989:606, para. 11.

the mandate thus provided for EU law, as well as its boundaries, requires constant examination and validation when applied in individual cases by the Court of Justice or by national courts. This is particularly true for the law of the Single Market, where local interests are filtered and moderated, and may even be transformed, under the proportionality principle. The choices taken with regard to the local interests represented must be defended in judicial reasoning. The judicial decisions must demonstrate that they understand the legitimacy dilemmas caused by the fundamental circumstance that the interests raised by the Member States are the products of national political processes and respond to specific local needs.