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Multilevel Governance Applied to the Case Law of the Court of Justice

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Contents

SUMMARY **1**

SAMMANFATTNING **2**

PREFACE **3**

ABBREVIATIONS **4**

1 INTRODUCTION **5**

1.1 Purpose, Research Questions and Delimitation **6**

1.1.1 Purpose *6*

1.1.2 Research Questions *7*

1.1.3 Delimitation *7*

1.2 Method and Materials **8**

1.2.1 Method *8*

1.2.1.1 Using the Theory of Multilevel Governance as an Analytical Tool 8

1.2.1.2 Using a Case Study as a Method 9

1.2.1.3 The Area of Case Law Chosen 9

1.2.2 Materials *10*

1.2.2.1 Materials Describing Multilevel Governance 10

1.2.2.2 Selection of Cases 10

1.2.2.3 Other Materials 11

1.3 Previous Research **11**

2 THE THEORY OF MULTILEVEL GOVERNANCE **13**

3 APPLICATION OF MULTILEVEL GOVERNANCE ON THE CASE LAW OF THE COURT OF JUSTICE **17**

3.1 Introductory Remarks on the Legal Framework **17**

3.1.1 Free Movement of Goods in the EU Treaties *17*

3.1.2 Environmental Protection in the EU Treaties 18

3.2 Environmental Protection as a Justification to Limitations to Free Movement of Goods 19

3.2.1 The Nature and Application of Art 36 TFEU 19

3.2.2 The Creation and Application of Environmental Protection as a Mandatory Requirement 22

3.2.2.1 Creation and Legitimization of Environmental Protection as a Mandatory Requirement 23

3.2.2.1.1 Creation and Nature of Mandatory Requirements 23

3.2.2.1.2 Environmental Protection as a Mandatory Requirement 25

3.2.2.2 Mandatory Requirements as Applicable Only to Non-Discriminatory Measures? 29

3.3 The Proportionality Test 31

4 ANALYSIS 36

4.1 Strengths of Applying the Theory of Multilevel Governance on Case Law of the Court of Justice 36

4.2 Weaknesses of Applying the Theory of Multilevel Governance on Case Law of the Court of Justice 38

5 CONCLUDING REMARKS 41

BIBLIOGRAPHY 43

TABLE OF CASES 47

Summary

This thesis identifies the strengths and weaknesses of multilevel governance when the theory is applied to the case law of the Court of Justice. The method used is thus first and foremost a case law study. Materials from various scholars have been used to identify relevant cases and provide legal analyses of the case law, as well as provide a description of the theory. Through the description of the theory, three main pillars of multilevel governance are identified; (1) the notion of various actors at different levels, (2) influencing authoritative decision making, (3) though interactions in a reflexive process. These key concepts of the theory are applied when studying the case law of the Court of Justice.

The case law studied in this thesis is that of environmental protection as a justification to limitations to free movement of goods. In order to further understand the case law of the Court of Justice on the subject, a short introduction to how free movement of goods and environmental protection are incorporated in the Treaty framework is provided. Subsequently the two grounds of justification are described and discussed; Art 36 TFEU, and the justification of mandatory requirement, which is created by the Court of Justice. Subsequently the proportionality test is described and discussed.

It is argued that the analysis of the case law of the Court of Justice, using the theory of multilevel governance, shows that the theory has several strengths. Instances of various actors, shaping the law in a reflexive process can be identified. However, some weaknesses can also been observed. It is argued that these weaknesses are foremost due to the nature of case law, and the way that the Court of Justice formulates its judgments. Although the weaknesses must be kept in mind, it is argued that the theory can serve as a tool to understand the creation of law though the case law of the Court of Justice. Such understanding of the creating and shaping of law can subsequently serve as a steppingstone to analyze the former from e.g. a perspective of democratic legitimacy in further research.

Sammanfattning

Detta examensarbete identifierar styrkor och svagheter i multilevel governance-teorin, när denna appliceras på EU-domstolens rättspraxis. Metoden som används är alltså främst en rättsfallsanalys. Material från ett flertal författare har använts för att identifiera relevanta rättsfall och ge juridiska analyser av rättspraxisen, samt även ge en beskrivning av teorin. Genom beskrivningen av teorin har tre huvudpelare identifierats; (1) uppfattningen om flera aktörer på olika nivåer, (2) som påverkar auktoritativt beslutsfattande, (3) genom interaktioner i en reflexiv process. Dessa nyckelkoncept i teorin appliceras vid undersökningen av EU-domstolens rättspraxis.

Den rättspraxis som studeras i detta examensarbete rör miljöskydd som ett berättigande, vid inskränkningar i fria rörligheten för varor. För att få ytterligare förståelse för EU-domstolens rättspraxis på området ges först en kort introduktion kring hur fria rörligheten för varor, samt miljöskydd är skyddade i fördragen. Sedan beskrivs och diskuteras de två grunderna för berättigande; artikel 36 FEUF, och det av EU-domstolen skapade berättigandet *tvingande hänsyn*. Därefter beskrivs och diskuteras proportionalitetstestet.

I analysen argumenteras att analysen av EU-domstolens rättspraxis visar att teorin har åtskilliga styrkor, då flera exempel av olika aktörer som formar rätten i en reflexiv process kan identifieras. Dock kan även några svagheter observeras. Det argumenteras att dessa svagheter är framförallt på grund av rättspraxisens natur, och hur EU-domstolen formulerar sina domar. Även om svagheterna ska hållas i minnet, så argumenteras det för att teorin kan användas som en metod för att förstå hur lag skapas genom EU-domstolens praxis. Sådan förståelse av skapandet av lag kan därefter användas som ett första steg för att sedan i kommande studier analysera skapandet och formandet av lag från t.ex. ett demokratiskt legitimitets-perspektiv.

Preface

I wish to thank my supervisor, Julian Nowag. He has been very generous in giving both encouragement and constrictive critique. I am very grateful for all his help during this process.

To my colleagues at the faculty, I apologize for turning our office into a library during several months. At least I didn't cover the ping-pong table with books…

During my time at the law program, I have come to known some truly inspiring people. Amongst all of them I wish to particularly thank Karin, Frida and Frederick for their friendship and support. I also wish to thank Annie for being such a great study partner last semester, and for taking the time to proofread this thesis.

I have been graced with a fantastic family. As time goes by, I realize more and more how lucky I am.

And finally to Morgan. Mon amour.

Abbreviations

EU	European Union
FEUF	Fördraget om Europeiska Unionens Funktionssätt
MEE	Measure of equivalent effect to quantitative restrictions on imports
SEA	Single European Act
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1 Introduction

At the time of writing this essay (spring of 2017) the strength and future of the EU is more uncertain than a year ago. For example, the formal initiation of Brexit has taken place,[1] and several anti-EU movements have been shown able to challenge the existing political landscape.[2] One destabilizing factor, in regards of the trust in the EU, is the perceived democratic deficit of the latter.[3] It can be argued that the EU needs to come to term with such issues of democratic legitimacy and accountability, in order to subsist.

In order to further understand *how* law is created and shaped, it can be useful to apply a theory. In this thesis the theory of *multilevel governance* will be assessed. In short, the key concepts of multilevel governance include the idea of various actors, influencing authoritative decision making, in a reflexive process.[4] More specifically, the thesis will assess how well the theory can be used to understand how law is made and shaped in the case law of the Court. By applying the theory on the case law of the Court, strengths and weaknesses of the theory will be identified. The thesis will thus help to further research how well the theory of multilevel governance can be used as a tool to understand how law is made and shaped in the case law of the Court. Such understanding of the lawmaking processes in the EU can be seen as steppingstone to subsequently analyze and evaluate the former, e.g. in the light of democratic legitimacy and accountability.

The rest of this first chapter will be dedicated to further describe the purpose, research questions and delimitation of the thesis, in section 1.1. Thereafter, in

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[1] See e.g. Carmona, Jesús et al. (2017) *UK Withdrawal from the European Union: Legal and Procedural Issues.* European Parliamentary Research Service. p. 1.
[2] For example, the anti-EU extreme right wing candidate, Marine Le Pen, went to the second round in the French presidential election, see e.g. Faye, Olivier (2017) "Présidentielle : Marine Le Pen se qualifie pour un difficile second tour" in: *Le Monde* 23 april 2017. Retrieved from http://www.lemonde.fr/election-presidentielle-2017/article/2017/04/23/presidentielle-marine-le-pen-se-qualifie-pour-un-difficile-second-tour_5116042_4854003.html
[3] See Fossedal, Andreas & Hix Simon (2006). "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik" in: *Journal of Common Market Studies*, Vol 44 Issue 3, pp. 533-562. p. 556.
[4] See Chapter two.

section 1.2., the method and materials will be described and discussed. In Chapter two, the theory of multilevel governance will be briefly described, focusing on the key elements of that theory. In the following Chapter three, the theory of multilevel governance will be applied in order to analyze the case law of the Court concerning environmental protection as a justification to measures limiting the free movement of goods. Chapter three consists of four main parts, the first one giving a short introduction of the field of law, the second and third parts both concern possible grounds of justification, art 36 and mandatory requirements respectively, and the fourth part concerns the proportionality test. Thereafter, in Chapter four, the use of multilevel governance as a theory when analyzing case law of the Court, will be discussed and assessed. Finally, in Chapter five some concluding remarks will be made.

1.1 Purpose, Research Questions and Delimitation

1.1.1 Purpose

Multilevel governance is a theory that can be used in order to understand the creation and shaping of law.[5] The theory of multilevel governance has been used to analyze e.g. development and implementation of policy and law, primarily within the context of the EU.[6] Furthermore, the theory can serve as a steppingstone to subsequently analyze how law is made and shaped from e.g. a perspective of democratic legitimacy and accountability.[7] The wide possibilities of using the theory as an analytical tool, has however not been completely explored.[8]

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[5] Pagoulatos, George & Tsoukalis, Loukas (2013). "Multilevel Governance" in Jones, Erik et al (ed.) *The Oxford Handbook of the European Union* pp. 63-72. Oxford: Oxford University Press. p. 64.

[6] See e.g. Fairbrass, Jenny & Jordan, Andrew (2004). "Multi-level Governance and Environmental Policy" in: Backe & Flinders (eds) *Multi-level Governance* pp 147-164. Oxford: Oxford University Press.

[7] See chapter 2.

[8] See e.g. Kjaer, Poul F. (2010). *Between Governing and Governance: on the Emergence, Function and Form of Europe's Post-national Constellation.* Oxford: Hart. p. 8ff.

In light of the above, the purpose of this thesis is to assess how the theory of multilevel governance can be used to deepen or broaden the understanding of how law is made and shaped in the case law of the Court of Justice.[9]

1.1.2 Research Questions

In light of the purpose of the thesis as described above, this thesis aims at answering the following questions:

> *(1) Which are the strengths of the theory of multilevel governance when applied to case law of the Court of Justice?*
>
> *(2) Which are the weaknesses of the theory of multilevel governance when applied to case law of the Court of Justice?*

The research questions are analytical, and will be answered in the analysis in Chapter four, using the application of the theory on the case law in Chapter three as a basis for identifying weaknesses and strengths to the theory when applied in a case law study. In order to be able to answer the questions, a description of the theory will be given in Chapter two.

1.1.3 Delimitation

It is outside of the scope of this thesis to describe and apply all formulations of the theory of multilevel governance. Some key concepts from multilevel governance will be described in Chapter two, and will subsequently be used to analyze the case law in Chapter three.

Moreover the case law analyzed through the perspective of multilevel governance will be limited to the case law of the Court concerning free movement of goods, and how limitations to the latter can be justified due to environmental protection. Since the focus will be on case law concerning environmental protection as a justification, the nature of free movement of goods, and the definition of measures of *equivalent effect to quantitative restrictions*

[9] Henceforth ”the Court”.

on imports (MEE:s) will only be briefly described in section 3.1. in order to understand the area in question.

1.2 Method and Materials

1.2.1 Method

This section will briefly describe and discuss the method used in this thesis. Before discussing certain aspects of the method, the method applied will be generally described.

This thesis is a qualitative study, evaluating strengths and weaknesses of multilevel governance when applied to the case law of the Court.[10] In order to answer the research questions above, key concepts of the theory of multilevel governance will be described and subsequently applied to case law of the Court.[11] Using the application on the case law,[12] weaknesses and strengths of the theory will be described and analyzed.[13]

In order to describe the legal framework of the case law studied; a EU legal method will be applied. In light of the purpose and research questions, relevant primary law will be described.[14]

In the subsections hereunder, some specific aspects of the method applied will be discussed.

1.2.1.1 Using the Theory of Multilevel Governance as an Analytical Tool

Multilevel governance is widely used in studies on policy and law regarding environmental protection.[15] Due to the scope of the present thesis, as well as

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[10] On the use of multilevel governance as a theory in the study of EU law, see e.g. Craig, Paul & De Búrca, Gráinne (2015). *EU Law: Text, Cases, and Materials*. 6. ed. Oxford: Oxford Univ. Press. p. 25.
[11] See Chapter two.
[12] See Chapter three.
[13] See Chapter four.
[14] Hettne, Jörgen & Otken Eriksson, Ida (eds.) (2011). *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*. 6 ed. Norstedts juridik. p. 40.

of the various formulations of the theory, only the basic notion of selected key concepts of the theory of multi-level governance will be used as descriptive tools when analyzing the case law.[16] Key concepts from the theory will be described in Chapter two, and subsequently used to highlight relevant elements of the case law.

In order to assess the theory of multilevel governance, the latter will be used to analyze the case law of the Court. It is thus worth to note that this study is done with the presupposition that it is possible to apply the theory in such a study, and that such analysis can be fruitful. Regarding the application it should be clarified that the theory will be used in order to highlight, to the theory relevant, aspects of the case law and then assess the strengths and weaknesses of the theory in such an application.

1.2.1.2 Using a Case Study as a Method

As is shown in the purpose and research question above, this thesis constitutes primarily of applying the theory of multilevel governance on a case study. Brief descriptions of e.g. the historical background to the law and analyses of the law by legal scholars will be made as needed in order to contextualize the case study and get a deeper understanding of the area of law.

1.2.1.3 The Area of Case Law Chosen

The case law of the Court studied in this thesis concerns limitations to the free movement of goods, and how such can be justified due to environmental protection. Multilevel governance has proven to be a viable theory when analyzing environmental policy and legislation,[17] which could thus also be the case for analyzing case law on the same subject.

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[15] See e.g. Fisher, Elizabeth, Lange, Bettina & Scotford, Eloise (2013). *Environmental Law: Text, Cases, and Materials*. Oxford University Press. p. 1037 ff.
[16] The theory of multilevel governance can also be used as a normative theory, see e.g. Jachtenfuchs, Markus (2001). "The Governance Approach to European Integration" in *Journal of Common Market Studies*. Vol 39, Issue 2, pp. 245-285. Oxford: Blackwell Publishers. p. 251.
[17] See e.g. Fairbrass & Jordan (2004).

1.2.2 Materials

1.2.2.1 Materials Describing Multilevel Governance

In order to give a wide description, and identify key concepts, of the theory, the work of various scholars on multilevel governance has been used in this thesis. Amongst other, this thesis uses the description of multilevel governance as provided by Hooghe and Marks,[18] two scholars who are central in the formulation of the theory.[19] Moreover, the works of e.g. Piattoni[20], and Jachtenfuchs[21], as well as various chapters from *Multi-level Governance* by editors Backe & Flinders,[22] are used.

1.2.2.2 Selection of Cases

This thesis analyses a number of selected cases from the Court in the field of free movement of good and limitation to the latter due to protection of the environment. Because of the limited scope of the thesis, I have chosen to study "classical" case law in the relevant area, seeking inspiration regarding the selection of the cases from e.g. de Sadeleer[23], Jacobs[24], and Nowag[25]. The cases studied constitute a valid selection in relation to the purpose and research question for two primary reasons.

Firstly, the purpose of this thesis (as described above) is to assess how multilevel governance can be applied to case law of the Court. Thus the cases at hand can provide an understanding of such mechanism, just as well as any

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[18] Hooghe, Liesbeth & Marks, Gary (2000). "Optimality and Authority: A Critique of Neoclassical Theory" in *Journal of Common Market Studies*. Vol. 38 Issue 5, pp. 795-815.; Hooghe, Liesbeth & Marks, Gary. (2001a) *Multi-level Governance and European Integration*. Lanham: Rowman & Littlefield; Hooghe, Liesbeth & Marks, Gary (2001b). "Types of Multi-Level Governance" in *European Integration Online Papers*. Vol. 5, Issue 11, pp. 1-16.

[19] Pagoulatos & Tsoukalis (2013). p. 65.

[20] Piattoni, Simona. (2010). *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges*. Oxford: Oxford University Press.

[21] Jachtenfuchs (2001).

[22] Backe, Ian & Flinders, Matthew (eds) (2004b). *Multi-level Governance*. Oxford: Oxford University Press.

[23] De Sadeleer, Nicolas (2014). *EU Environmental Law and the Internal Market*. Oxford: Oxford University Press.

[24] Jacobs, Francis (2006). "The Role of the European Court of Justice in the Protection of the Environment " in *Journal of Environmental Law*. Vol 18, Issue 2, pp. 185-206.

[25] Nowag, Julian. (2017). *Environmental Integration in Competition and Free-Movement Laws*. Oxford: Oxford University Press.

other cases. Secondly, being "classical" case law, these cases are frequently studied to understand the legal position of the question at hand.

1.2.2.3 Other Materials

In order to deepen the understanding of the case law, and also to present former interpretations of the case law, continuous references to former analyses of the case law will be made in Chapter 3, as provided by e.g. Gormley[26], de Sadeleer[27], Nowag[28], and Poncelet[29].

1.3 Previous Research

Multilevel governance is widely used in studies on environmental protection. The theory is often used in order to assess the creation and application of secondary legislation in EU, as well as environmental policy in individual states.[30] One example of this is a study of *Fairbrass & Jordan*[31], focusing on environmental policy in the United Kingdom.[32]

The case law of the Court regarding environmental protection as a justification to limitations to free movement of goods has been widely studied. Scholars have for example studied the field from various perspectives, such as those of legal certainty,[33] environmental integration,[34] and realism.[35]

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[26] Gormley, Laurence W. (2005) "The Genesis of the Rule of Reason in the Free Movement of Goods" in: Schrauwen, Anette. (ed) *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Groningen: Europa Law Publishing.; Gormley, Laurence W. (2011). "Free Movement of Goods within the EU: Some Issues and an Irish Perspective" in *Irish Jurist*. Vol. 46, pp. 74-95.
[27] De Sadeleer (2014).
[28] Nowag (2017).
[29] Poncelet, Charles. (2014). "Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship?" in *International Community Law Review*. Vol. 15, Issue 2, pp. 171-210.
[30] See e.g. Fisher et al. (2013) p. 1037 ff.
[31] Fairbrass & Andrew (2004).
[32] Ibid, p. 154ff.
[33] Jacobs (2006).
[34] Nowag (2017).
[35] Engle, Eric (2008). "Environmental Protection as an Obstacle to Free Movement of Goods: Realist Jurisprudence in Articles 28 and 30 or the E.C. Treaty" in *Journal of Law and Commerce*, Vol. 27, Issue 1 pp. 113-136.

In this thesis I will thus use previous studies on free movement of goods and environmental protection to be able to give a description of the legal position of the areas in question. Moreover I will use previous research in order to identify key cases.[36] I will furthermore draw inspiration from previous studies using multilevel governance as a perspective or theory, in order to fruitfully use the theory in this study on the case law of the Court regarding free movement of goods and environmental protection.

This study will thus contribute to the study of multilevel governance, insofar as it will assess its weaknesses and strengths when applied to the case law of the Court.

[36] See section 1.2.2.2.

2 The Theory of Multilevel Governance

In this chapter the theory of multilevel governance will be presented. First, a brief background of the theory will be given. Thereafter the key concepts of multilevel governance will be identified and described, in order to use these key concepts to analyze the case law in the next Chapter.

Multilevel governance is a theory first formulated in the 1990s by Marks[37] and subsequently developed by e.g. the latter and Hooghe.[38] Multilevel governance was initially used to conceptualize how law is made and shaped in the EU,[39] but has later also been used to study the legal processes within other contexts.[40] Multilevel governance as a theory has been applied to three areas: political mobilization, polity structuring and policy-making.[41] In this thesis, the role of multilevel governance within the sphere of policy-making will be described, insomuch as the process of how the Court "actually functions and produces authoritative decisions"[42] will be studied. The theory can be seen as a reaction towards intergovernmentalism, and neo-functionalism. Intergovernmentalism focuses on the Member States as the main actors in lawmaking, and integration.[43] Neo-functionalism on the other hand sees the EU as central.[44]

Having provided a short overview of the background of the theory, the theory itself will now be described. Multilevel governance has been defined as a "dispersion of authoritative decision-making across multiple […] levels".[45]

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[37] Marks, Gary (1992). "Structural Policy in the European Community," in A. Sbragia, ed., *Europolitics: Institutions and Policymaking in the "New" European Community*. pp. 191-224. Washington D. C.: Brookings Institute.
[38] See e.g. Hooghe & Marks (2000).; Hooghe & Marks (2001b)."
[39] Piattoni (2010). p. 18.
[40] Welch, Stephen & Kennedy-Pipe, Caroline (2004). "Multi-level Governance and International Relations" in Backe, Ian & Flinders, Matthew (eds) *Multi-level Governance*. pp. 127-144. Oxford: Oxford University Press.
[41] Piattoni (2010). p. 19.
[42] ibid.
[43] Stone Sweet, Alec (2010). "The European Court of Justice and the judicialization of EU governance" in *Living Reviews in European Governance,* Vol. 5, Issue. 2, pp. 5-39. p. 19.
[44] Piattoni (2010) p. 18. See also Peters, B. Guy & Pierre, Jon. (2004) "Multi-level Governance and Democracy: a Faustian Bargain?" in Backe, Ian & Flinders, Matthew (ed) *Multi-level Governance*. Oxford: Oxford University Press. p. 82.
[45] Hooghe & Marks (2001a). p xi.

According to the theory, various actors have decision-making competencies and are thus able to create and shape law.[46] According to the multilevel governance theory, it is thus not only states that decide upon, and shape, law;[47] sub-national as well as intra-national and supra-national actors also govern law making.[48] Apart from identifying different actors in such *territorial* levels, actors can also be identified in *jurisdictional* levels, thus rendering citizens, the legislative and executive organizations, the judicial institutions as well as third party intermediaries potential actors in the making and shaping of law.[49]

The idea of *governance* in the theory implies the notion of steering and shaping authoritative decision-making. Governance can moreover be contrasted with the idea of *government*, the latter being based on a unifying authority.[50] Multilevel governance is descriptive, insomuch as it primarily shows how governance is done, and not why.[51] The idea of governance thus implies the coordination of social relations in the absence of a unifying authority.[52] It is useful to distinguish between formal and informal governance. Formal governance includes the official recognition of the capacity of creating and shaping law and policy. Informal governance is the ability to create and shape law and policy though non-formal means.[53]

Multilevel governance can be carried out both vertically, i.e. between central and lower levels of actors, and horizontally, i.e. between actors on the same level, such as between governments.[54] As emphasized by *Delanty*,[55] it is not possible to identify a specific mechanism through which different actors create

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[46] DeBardeleben, Joan & Hurrelmann, Achim (2007). "Introduction" in DeBardeleben, Joan & Hurrelmann, Achim (eds) *Democratic Dilemmas of Multilevel Governance: Legitimacy, Representation and Accountability in the European Union*. pp. 1-14. Basingstoke: Palgrave Macmillan. p. 1-3.
[47] Hooghe & Marks (2000) p. 795.
[48] Hooghe & Marks (2001b) p. 1.
[49] Piattoni (2010) p. 28.
[50] Petersmann, Ernst-Ulrich (2017). *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law*. Oxford: Hart Publishing. p. 22-23.
[51] Kjaer (2010) p. 9.
[52] Welch, & Kennedy-Pipe (2004) p. 129.
[53] Hooghe & Marks (2001b). p. 3.
[54] Petersmann (2017) p. 33.
[55] Delanty, Gerard (2007). "Europeanization and Democracy: the Question of Cultural Identity" in DeBardeleben, Joan & Hurrelmann, Achim *Democratic Dilemmas of Multilevel Governance: Legitimacy, Representation and Accountability in the European Union*. Basingstoke: Palgrave Macmillan

and shape law in a multilevel governance context. Rather, the relevant aspect is the "mutual interactions of the various levels" - the reflexivity of the process.[56] According to the theory of multilevel governance, law making is furthermore characterized by non-hierarchical interactions between the actors.[57]

From the description of multilevel governance as provided above, one can thus group the key concepts of the theory into three pillars: (1) the notion of various actors at different levels, (2) influencing authoritative decision making, (3) though interactions in a reflexive process.

The three pillars of the theory of multilevel governance identified above will, in the upcoming Chapter, be applied to the case law of the Court. First however, some comments will be made on how the theory of multilevel governance can be used, more than identifying the creation of law and policy.

As can be seen above, the theory of multilevel governance is mainly descriptive. It can thus be used to further understand how law and policy are created and shaped. However, as *Petersmann* emphasizes, it is furthermore possible to weigh the empirical application of multilevel governance against normative standards.[58] For example, the theory of multilevel governance can serve as an effective way of describing the process, a description that can later be used to assess the democratic legitimacy, and accountability of the lawmaking process.[59]

In the case of EU law, there is an ongoing debate on the democratic deficit of the former.[60] Connecting the theory of multilevel governance with this notion of democratic deficiency, *DeBardeleben & Hurrelmann* have described three main dimensions of the tension between multilevel governance and democracy in the EU. The first dimension focuses on the notion of the people of the EU

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[56] Delanty (2007). p. 78.
[57] Papadopoulos, Yannis. (2007). "Problems of Democratic Accountability in Network and Multilevel Governance" in *European Law Journal*. Vol. 13, Issue 4. p. 469.
[58] Petersmann (2017) p. 20.
[59] Backe, Ian & Flinders, Matthew (2004a). "Conclusions and Implications" in Backe, Ian & Flinders, Matthew (eds) *Multi-level Governance*. pp. 195-206. Oxford University Press. p. 202.
[60] See e.g. Fossedal & Hix (2006).

being socially and culturally diverse, which creates weak conditions for democratization. The second dimension regards the tension between a strong capacity of solving common problems, which can be weighed against a difficulty to secure accountability of the decision makers. The third dimension problematizes how representation can be valid both for citizens, as well as Member States of the union.[61]

As can be seen from the research questions, it is out of the scope of this thesis to assess the democratic legitimacy of the law and policy process regarding environmental protection as a justification to measures limiting free movement of goods. The purpose of this thesis is to assess the strengths and weaknesses of the theory of multilevel governance when applied to the case law of the Court. Understanding such weaknesses and strengths of the theory regarding its applicability of the case law of the Court is thus vital both to understand the law making processes, but also to subsequently criticize such law making processes, e.g. from the perspective of democratic legitimacy and accountability.

[61] DeBardeleben & Hurrelmann (2007) p. 6.

3 Application of Multilevel Governance on the Case Law of the Court of Justice

This chapter will use the key concepts from multilevel governance, identified in Chapter two, to analyze the case law of the Court of Justice.[62] In the respective subsections, the relevant legal questions will be identified and described. Moreover, the key concepts of multilevel governance will be applied to the case law of the Court, and thus highlight how the case law is interpreted when applying this theory.

First some introductory remarks will be made on the legal framework studied; free movement of goods and how limitations to the latter can be justified by environmental protection. Thereafter the two grounds of justification - Art 36 and mandatory requirements - will be presented and analyzed. Finally the Court's use of the proportionality test will be described and analyzed by applying the theory of multilevel governance.

3.1 Introductory Remarks on the Legal Framework

This section gives a short introduction of the legal frameworks of the free movement of goods, and environmental protection in the EU Treaties.

3.1.1 Free Movement of Goods in the EU Treaties

The internal market is a cornerstone in the EU.[63] The legal basis for the internal market can be found in Art 3(3) TEU, and the further definition of the former is incorporated in Art 26(2) TFEU, which states that the internal market shall consist of "free movement of goods, persons, services and capital".

[62] Hereinafter "the Court"
[63] See Oliver, Peter (2010). "Introduction" in Oliver, Peter (ed.) *Oliver on Free Movement of Goods in the European Union*, 5th ed. pp. 1-14. Oxford: Hart. p.1.

Free movement of goods is thus one of the four freedoms, as stated in Art 26(2) TFEU, and it is primarily regulated in Title II TFEU. Free movement of goods has in case law been described as one of the fundamental principles of the Treaty.[64] For the free movement of goods to be realized, Art 34 TFEU states that all "quantitative restrictions of imports and all measures having equivalent effect shall be prohibited […]".[65] The concept of "measures having equivalent effect" (MEE:s) has been broadly interpreted by the Court,[66] which renders a wide variety of measures to fall within this definition.[67] Moreover no *de minimis* rule applies, which further enhances the width of MEE:s.[68]

3.1.2 Environmental Protection in the EU Treaties

Environmental protection was not incorporated in the first treaties. One of the first important steps in introducing environmental protection into the legal framework of the community was the adoption of the Community Environmental Policy in 1972. Environmental protection was subsequently incorporated in EU Treaties through the SEA in 1987.[69]

In 3(3) TEU, where the internal market is defined, it is also stated that the latter should be based on *inter alia* "a high level of protection and improvement of the quality of the environment". Regarding justifications to limitations on free movement of goods, Art 36 TFEU includes specific grounds which can indirectly be applied to justify MEE:s concerning environmental protection. This will be further described in section 3.2.1. Other relevant Treaty legislation regarding environmental protection includes the integration principle in Art 11 TFEU.[70]

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[64] C-320/03 *Commission of the European Communities v Republic of Austria* [2005] EU:C:2005:684 para 63.
[65] Art 34 TFEU is subject to justifications, which are described in Chapter 3.
[66] C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] EU:C:1974:82 para 5.
[67] For measures outside the scope of MEE:s see e.g. C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] EU:C:1993:905 para 12ff.
[68] See e.g. C-67/97 *Criminal proceedings against Ditlev Bluhme* [1998] EU:C:1998:584 para 16.
[69] De Sadeleer (2014). p. 8ff.
[70] See Nowag (2017).

3.2 Environmental Protection as a Justification to Limitations to Free Movement of Goods

This chapter presents the two ways in which environmental protection can serve as a justification to a limitation of the free movement of goods within the EU; (1) the explicit justification in Art 36 TFEU, and (2) mandatory requirements, a justification which is created though the case law of the Court.[71]

3.2.1 The Nature and Application of Art 36 TFEU

This section will describe and analyze the nature and application of Art 36 TFEU. It is herein argued that by using the theory of multilevel governance on the case law, the active role of the Court in shaping the law can be observed. However, other instances of explicit multilevel governance are seen only sparsely in the case law of the Court regarding this provision.

Art 36 TFEU[72] provides an exhaustive list of grounds of justifications to limitations to free movement of goods. In order for Art 36 TFEU to be applicable, the Article states that the measure cannot be "a means of arbitrary discrimination or a disguised restriction on trade between Member States". Moreover the measure needs to be proportionate.[73]

Environmental protection as such is not listed as a justification under Art 36 TFEU. However, other justifications in the Article, most prominently the ground of "protection of health and life of humans, animals or plants" can

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[71] Furthermore, protection of fundamental rights can be used as a justification to limitations to free movement of goods. However, this ground is still developing in case law, and will not be further treated in this thesis. See e.g. de Sadeleer (2014) p. 300 ff.

[72] Formerly Art 36 EC Treaty, thereafter Art 30 EC. In this thesis, reference will be made consistantly to Art 36 TFEU, and thus references in former case law to Art 30 EC will as applicable be translated to Art 36 TFEU in order to facilitate for the reader. Article 36 TFEU reads in full: *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

[73] Regarding proportionality, see section 3.3.

constitute a ground of protection of the environment.[74] Thus, various measures, though not all, aiming to protect the environment can be indirectly justified under the provision of Art 36 TFEU.[75]

As has been described above, the most relevant justification in Art 36 TFEU, in the light of environmental protection, is that of the protection of health and life of humans, animals or plants. There are various interesting cases concerning the possibility of justification of measures for environmental protection under Art 36 TFEU. They regard everything from keeping of bees[76] to restrictions of the use of a certain chemical.[77] The Court has in its case law underlined the importance of this justification, by stating that "the health and life of humans rank foremost among the property or interests protected by Article 36".[78] Although justifications under Art 36 TFEU are in general interpreted strictly,[79] it can be argued that the Court though the statement above creates a larger space for itself to interpret such measures more generously.[80]

In the case law of the Court concerning Art 36 TFEU, specific actors and legal orders can in some cases be identified. These actors are used by the Court to legitimize its reasoning. *Toolex*[81] was a preliminary ruling concerning a Member State measure regarding a general prohibition on the use of a certain chemical, with a connected system of individual temporary exemptions. In this case the Court commented on the nature of Art 36 TFEU, arguing that the latter constituted a "fundamental [requirement] recognized by community law".[82] The Court thus links the Treaty provision to the wider legal context of the community. Regarding the Court's statement on the nature of Art 36 TFEU as

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[74] See e.g. Enchelmaier, Stefan (2010). "Art 36 TFEU: General" in: Oliver, Peter *Oliver on Free Movement of Ggoods in the European Union*. 5. ed. Oxford: Hart. p. 302; Nowag (2017) p. 161.
[75] See e.g. C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] EU:C:2000:279 para 46.
[76] C-67/97 para 14.
[77] C-473/98 *Kemikalieinspektionen v Toolex Alpha AB* [2000] EU:C:2000:379 para 34.
[78] C-320/93 *Lucien Ortscheit GmbH contre Eurim-Pharm Arzneimittel GmbH* [1994] EU:C:1994:379 para 16. See also C-473/98 para 38.
[79] De Sadeleer (2014) p. 285.
[80] ibid. p. 293.
[81] C-473/98.
[82] ibid para 25.

quoted above, it is also worth to note that the wording "fundamental requirements" reminds of the legitimization of mandatory requirements, which will be discussed in next section.

In *Bluhme,*[83] a preliminary ruling regarding the prohibition of keeping bees on a Danish island, other than a specific native subspecies of bees,[84] the Court concluded that the measure hindered the free movement of goods.[85] In its assessment of the applicability of Art 36 TFEU, the Court stated that the measure aimed at protecting the life of the bees in question.[86] The Court also discussed whether the fact that the measure only concerned a subspecies of bees should be relevant in relation to the applicability of Art 36 TFEU.[87] In this discussion, no references were made to other actors, or legal orders. The Court concluded that the measure fell within the scope of Art 36 TFEU.[88]

The lack of explicit references to actors or legal orders, as showed in *Bluhme*, can also be seen in other cases concerning the applicability of Art 36 TFEU. One example is *Aher-Waggon,*[89] a preliminary reference regarding a measure regulating the noise emissions of airplanes, in which the Court merely stated that the measure fell within the justification of Art 36 TFEU.[90] Another example is *Nijman*,[91] a preliminary reference regarding the prohibition of the selling of a plant-protection product in particular.[92] Although no references to other actors were made, the Court in this last case referred to its own case law in the assessment of the measure.[93]

In the case law on Art 36 TFEU, few references to other actors than the Court itself are made, although the Court has legitimized its reasoning with reference to the EU legal order in one of the cases included in this study. By the

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[83] C-67/97.
[84] ibid para 14.
[85] ibid para 23.
[86] ibid para 33.
[87] ibid para 34.
[88] ibid para 38.
[89] C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland* [1998] EU:C:1998:357.
[90] ibid para 19.
[91] C-125/88 *Criminal proceedings against H. F. M. Nijman* [1989] EU:C:1989:401.
[92] ibid para 2.
[93] ibid para 13.

references to its own case law, as well as its assertions of the nature of Art 36, the Court confirms its own position as an actor capable of shaping the law.

3.2.2 The Creation and Application of Environmental Protection as a Mandatory Requirement

This section describes and analyzes environmental protection as a mandatory requirement. First, mandatory requirements as a justification to limitations of the free movement of goods will be described, both regarding its creation and interpretation by the Court. Thereafter, the inclusion of environmental protection as a mandatory requirement will be described as well as how the Court has reasoned regarding which measures can constitute an environmental protection mandatory requirement. Connected to the latter, the issue of whether environmental protection as a mandatory requirement can justify discriminatory measures will be discussed.

As will be argued in this section, the application of multilevel governance on the case law of these topics highlights the active role of the Court in creating and shaping the law. Moreover, the case law shows how the Court further legitimizes its reasoning with reference to various actors and legal orders. Moreover, the unclear case law regarding which kinds of measures environmental protection as a mandatory requirement can justify, can be understood as a way of creating a larger room for the Court to continuously shape the law.

3.2.2.1 Creation and Legitimization of Environmental Protection as a Mandatory Requirement

3.2.2.1.1 Creation and Nature of Mandatory Requirements

In addition to Art 36 TFEU as a justification for limiting free movement of goods, as discussed above, the Court in its case law has created another ground of justification; mandatory requirements.[94]

The justification of mandatory requirements was first introduced in the classic case of *Cassis de Dijon*.[95] The case concerned a German legislation requiring a certain alcohol level for a beverage to be named liqueur.[96] The Court stated that this measure constituted a limitation to free movement of goods.[97] However, it was possible for such measure to be justified if it was necessary due to "mandatory requirements" recognized by Community law.[98] In the case of *Cassis de Dijon*, the German state argued that the measure was aimed at protecting public health[99] and consumer protection.[100] However, the Court argued that the measure at hand did not have the aims claimed by the state, and thus could not justify the limitation to free movement of goods.[101]

Following case law has confirmed the justification of mandatory requirements, and has also held that mandatory requirements can only be applied if the measure applies to domestic and imported products without distinction (i.e. being non-discriminatory)[102], and is proportionate.[103] Furthermore, mandatory requirements has in subsequent case law come to include various aims

[94] Mandatory requirements have also been refered to as e.g."overriding requirements" (see e.g. C-573/12 *Ålands vindkraft AB v Energimyndigheten* [2014] EU:C:2014:2037 para 76) and "the rule of reason" (see e.g. Gormley (2005). In this thesis the term "mandatory requirements" will be used.
[95] C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42.
[96] ibid para 1.
[97] ibid para 15.
[98] ibid para 8.
[99] ibid para 9.
[100] ibid para 12.
[101] ibid para 14.
[102] C-788/79 *Criminal proceedings against Herbert Gilli and Paul Andres* [1980] EU:C:1980:171 para 6.
[103] C-6/81 *V Industrie Diensten Groep v J.A. Beele Handelmaatschappij BV* [1982] EU:C:1982:72 para 10.

(including environmental protection, as discussed in section 3.2.2.1.2), and has justified a wide variety of measures limiting the free movement of goods. Mandatory requirements as a justification is entirely created by the Court and has no explicit basis in the Treaties.[104] We can thus see how the Court is taking an active role in creating the law. As has been presented, the Court justifies the creation by referring to the internal logic of the community legal order since the mandatory requirements need to be "recognized by Community law". Thus, both the Court itself, but also the wider EU legal order are important in the creation of mandatory requirements.

The nature of mandatory requirements has been much debated. How does the mandatory requirements relate to the framework of free movement of goods? In the doctrinal debate, three propositions on the nature of mandatory requirements have been made. These will here be presented and analyzed. Mandatory requirements are seen as either (1) taking the measure at hand out of the scope of Art 34 TFEU,[105] or (2) expanding the justifications in Art 36 TFEU, or (3) an equity rule not changing the free movement law as such, but rather its applicability, and thus working as an interim relief on a case-by-case basis.[106]

The different ways of understanding the nature of mandatory requirements does in turn give different views on the action of the Court, when creating the ground of justification. If seeing the nature of mandatory requirement as in proposition (1) or (2), it can be argued that the Court has gone quite far in shaping the Treaties. Applying the theory of multilevel governance, the creation of the Court thus highlights the tension in governance between the Member States, and EU and in particular the Court.

If considering the nature of mandatory requirements to be as in proposition (3), that is as tools of equity, and thus temporary justification applicable as long as the legislator does not choose to explicitly include environmental protection

[104] Gormley (2005) p. 22.
[105] See section 3.1.
[106] Gormley (2005) p. 26. See also Gormley (2011) p .85.

as a justification in the Treaty text, the creation of mandatory requirements consists of a more reflexive process on part of the Court. On the one hand, the Court creates the (temporary) measure, mandatory requirement. At the same time the Court leaves space for the Member States to introduce its own measures, and when these are accepted as justified measures, they thus shape the content and understanding of the EU law, insofar as these are compatible with the Treaties. On the other hand, with the understanding of mandatory requirements being a temporary justification, the Court also leaves space for the Member States to explicitly include environmental protection as a justification in the Treaties.

The nature of the mandatory requirement thus strongly impacts on how to perceive the role of the Court itself, in creating and shaping EU law on this matter, but also how this affects other actors, especially the Member States.

3.2.2.1.2 Environmental Protection as a Mandatory Requirement

Above, mandatory requirements as a justification has been described and discussed in general. In this section, *environmental protection* as a mandatory requirement will be discussed. The fact that environmental protection could constitute a mandatory requirement was first implied by the Court in *ADBHU*,[107] and later explicitly confirmed in *Danish Bottles*.[108]

The preliminary reference of *ADBHU* concerned a national implementation of an EU directive. The measure regarded restrictions of handling waste oils, insofar as only certain entities were allowed to burn such oils.[109] The aim of the directive, on which the measure was based, was environmental protection.[110] Even though environmental protection was not a part of the Treaty framework at the time of the judgments (it was included in the Treaties two years later),[111] the Court still stated that environmental protection constituted "one of the

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[107] C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] EU:C:1985:59.
[108] C-302/86 *Commission of the European Communities v Kingdom of Denmark* [1988] EU:C:1988:421.
[109] C-240/83 para 4.
[110] ibid para 25.
[111] Jacobs (2006) p. 187.

community's essential objectives".[112] The conclusion of the Court can possibly be attributed to the fact that environmental considerations had at the time become increasingly important within the Community.[113] However, such development was not discussed in the judgment of the Court, although it had been raised by the parties and intervening parties.[114] The inclusion of environmental protection as a mandatory requirement can thus be seen as the Court continuing to create the law, and exercising formal governance, without recognition of other entities also influencing in the creation and shaping of the law.

In *Danish Bottles* the Court confirmed the existence of environmental protection as a mandatory requirement, which was only implicitly affirmed in *ADBHU*.[115]

> *"The Court has already held in [ADBHU] that the protection of the environment is 'one of the Community's essential objectives', which may as such justify certain limitations of the principle of the free movement of goods.[…] [I]t must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty."*[116]

In justifying its explicit inclusion of environmental protection as a mandatory requirement, the Court in *Danish Bottles* strengthened this assertion by referring to the SEA, implemented after the settling of the *ADBHU* case.[117]

Environmental protection as a mandatory requirement is thus created by the Court, and has no explicit foundation in treaty law. By adding environmental protection as one such mandatory requirement, the Court can be seen to affirm its own position in creating and shaping EU law. In order to justify the creation of environmental protection as a mandatory requirement, the Court refers to various actors.

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[112] C-240/83 para 13.
[113] Jacobs (2006) p. 187ff.
[114] see e.g. C-240/83, Facts and Issues para 2.1.
[115] C-302/86 para 8.
[116] C-302/86 para 8f.
[117] C-302/86 para 8.

After having described the reasoning of the Court when including environmental protection as a mandatory reqirement, the focus will now shift to how the Court has assessed various measures, and on which grounds such measures have been deemed to protect the environment, and thus being capable of falling within the justification of environmental protection as a mandatory requirement.

In order for a measure protecting the environment to be used as a justification, the underlying aim of the Member State applying the measure must be assessed. The Court has stated that measures taken for purely economic reasons cannot serve as justifications to a restriction of free movement of goods.[118] In *Dusseldorp*,[119] a preliminary ruling concerning a Member State measure regulating the export of waste, the Court stated that the "object [...] of such a provision is to restrict export and to provide a particular advantage for national production".[120] Although a measure thus would *de facto* protect the environment, as consistent with the Treaty provisions of environmental protection, the measure would be impermissible. The Court thereby emphasizes the importance of the internal logic of the EU market.[121]

When assessing whether the objective of the measure at hand could be seen as protecting the environment, the Court in *Ålands Vindkraft,*[122] a preliminary ruling regarding a national implementation of a directive on the promotion of green enegry, stated that the objective was an important part of achieving the Union's combat against climate change.[123] The Court referred to the *Kyoto Protocol* as well as "other Community and international greenhouse gas emission reduction commitments".[124]

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118 See e.g. Snell, Jukka (2005) "Economic Aims as Justification for Restrictions on Free Movement" in: Schrauwen, Anette. (ed) *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Groningen: Europa Law Publishing.
119 C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] EU:C:1998:316
120 ibid para 42.
121 See Snell (2005) p. 48.
122 C-573/12.
123 ibid 78.
124 ibid para 79.

Ålands Vindkraft was followed by the *Essent*[125] judgment, a preliminary ruling also concerning a measure regarding the promotion of use of renewable energy sources for the production of electricity. In the case, the Court primarily evaluated the measure at hand within the framework of mandatory requirements, but also made reference to Art 36 TFEU. In *Essent*, the Court referred to the aim of combatting climate change, and underlined that this is a pledge that both the EU and its Member States have taken.[126] Moreover the Court makes references to the *Kyoto Protocol*, and linked the measure at hand to this international agreement. The Court furthermore referred to that the measure also protects the health and life of humans and animals, as stated in Art 36 TFEU.[127] Lastly the Court made reference to provisions in EU primary and secondary law. Based on the abovementioned considerations, the Court stated that the measure could in principle justify barriers to the free movement of goods.[128]

The Court has in some cases referred to the EU legal order when assessing the aim of the measure. Examples of this is *Sydhavens sten & grus,*[129] in which the Court gave a general comment on the justifications based on the protection of the environment, that such justifications, in particular if they concern the principle that environmental damage should be rectified at source, as stated in Art 130r(2) of the Treaty.[130]

When assessing the aim of measures, in the respect of whether they can be seen as protecting the environment, the references of the Court to other actors and legal orders show how this area is shaped by various interests.

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[125] C-204/12 to C204/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* [2014] EU:C:2014:2192.
[126] ibid para 91.
[127] ibid para 92.
[128] ibid para 95.
[129] C-209/98.
[130] C-209/98 para 48.

3.2.2.2 Mandatory Requirements as Applicable Only to Non-Discriminatory Measures?

According to the *Cassis de Dijon* formula of the mandatory requirements, the latter can only justify a measure if the measure in question is non-discriminatory.[131] However, as various authors have observed, there is a general problem of consistency in the case law of the Court on this matter,[132] especially in the case of environmental protection as a mandatory requirement.[133]

The requirement of the measure being non-discriminatory has arguably been sidestepped in some cases. This has been done in two ways: firstly the Court has in some cases deemed a measure to be non-discriminatory, although the measures indeed seem to be discriminatory. Secondly, the Court has in some cases chosen not to assess the (non)discriminatory nature of the measure, and gone straight to a proportionality test.[134]

One example of the Court deeming seemingly discriminating measures to be non-discriminatory is the case of *Wallonian Waste*.[135] *Wallonian Waste* was an infringement case regarding a Member State measure prohibiting waste not coming from the region of Wallonia to be the dumped or recycled in that region.[136] As many scholars have observed, this measure indeed seemed discriminatory.[137] However, the Court came to the conclusion that this measure was not, basing its reasoning regarding the non-discriminatory nature on the "differences between waste produced in different places". [138] The Court justified its conclusion by referring to Art 130r(2) of the Treaty, stating that environmental protection should be remedied at source.[139] The Court furthermore related the principle in the Treaty, to the corresponding principle

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131 There are various etiquettes to such measures. Some authors refer to meaures as applicable with or without distinction, whereas other authors refer to the same chategories as discriminatory and non-discriminatory measures. See e.g. De Sadeleer (2012) p. 297.
132 See e.g. Poncelet (2014) p. 189.
133 Gormley (2011) p. 86ff.
134 See e.g. Jacobs (2006) p. 190ff.
135 C-2/90 *Commission of the European Communities v Kingdom of Belgium* [1992] EU:C:1992:310.
136 ibid para 1.
137 Gormley (2011) p. 86. For a slightly different approach, see Nowag (2017) p. 133-34.
138 C-2/90 para 36.
139 ibid para 34.

in the *Basel Convention*, which the Court notes that the Community is a party to.[140]

As has been said, the reasoning of the Court in *Wallonian Waste* has been widely criticized for being internally illogical .[141] Moreover, some have criticized the arguing of the case of being result-oriented, and influenced by political, rather than legal considerations.[142] From a multilevel governance perspective, such political influences, leading to an outcome affecting the law is of great interest. However, apart from the dubious reasoning of the Court, direct references to such political considerations are (naturally) not made in the argumentation of the Court.

Dusseldorp[143] is another example of an environmental protection case where the Court deemed a seemingly discriminatory measure[144] to be non-discriminatory and thus, in principle, able to be justified by mandatory requirements.[145]

Moreover, the Court has omitted to make an assessment if the measure at hand is discriminatory or not. One example of such an instance is *PreussenElektra*,[146] a preliminary ruling concerning the obligation on operators to buy electricity from renewable sources from their area of supply, and at a fixed minimum price.[147] After confirming that the measure limited the free movement of goods,[148] the Court, instead of assessing whether the measure was discriminatory or not, went straight to assess the proportionality of the measure. The proportionality assessment of the case will be analyzed in section 3.3.

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140 ibid para 35.
141 See e.g. Poncelet (2013) p. 186.
142 Gormley (2005) p. 31.
143 C-203/96.
144 Poncelet (2013) p. 187.
145 C-203/96 para 43.
146 C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [2001] EU:C:2001:160.
147 ibid para 20.
148 C-379/98 para 69ff.

One possible way of explaining the dispersive case law is to see environmental protection as a special mandatory requirement. Environmental protection differs from other mandatory requirements, both in the type of interests that such measures want to protect – often being interests which transcend national boundaries – and also due to the strong position of environmental protection within the EU law.[149]

As has been shown above, the case law of the Court regarding which kinds of measures are capable of being justified though environmental protection as a mandatory requirement is not clear. The Court in some cases legitimizes its reasoning with references to e.g. the EU legal framework and international conventions. Apart from such direct references, it can be argued that the inconsistence in case law gives the Court a wide margin to shape the law, and creating a position for itself to be a strong actor.

3.3 The Proportionality Test

As has been described in sections 3.1 and 3.2, there are two ways of justifying measures limiting the free movement of goods due to environmental protection; Art 36 TFEU and mandatory requirements. If a measure falls under one of these provisions, it must moreover be proportionate. In this section the proportionality test will be described.

When assessing the proportionality of a measure protecting the environment, questions of the level of protection may arise, although such level of protection rests within the discretion of the Member States.[150] The Court has confirmed that Member States may choose the level of protection they want to pursue, as long as they are "taking into account the requirements of the Treaties".[151] However, the Court has indirectly assessed the level of protection chosen by

[149] Nowag (2017) p. 158ff.
[150] See Langer, Jurian and Wiers, Jochem (2000). "Danish Bottles and Austrian Animal Transport: The Continuing Story of Free Movement, Environmental Protection and Proportionality" in *Review of European Community & International Environmental Law*. Vol. 9 Issue 2, pp. 188-192. p. 192.
[151] Nijman para 14; C-272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] EU:C:1981:312 para 12.

the Member States.[152] In the Case of *Danish Bottles*,[153] the Court stated that one part of the measure at hand protected the environment to a "very considerable degree".[154]

The proportionality test is often conceptualized as a three step test; (1) assessment of the suitability of the measure in relation to the aim,[155] (2) assessment of whether less restrictive measures could reach the aim,[156] and (3) a proportionality test *stricto sensu*.[157] However, in practice the proportionality test is done in various ways. In some cases a very short proportionality assessment is done,[158] while in others a fuller assessment is done.[159] Hereunder, the proportionality assessment in some selected cases will be described and analyzed.

In the proportionality assessment in *Mickelson & Roos*,[160] a preliminary ruling concerning the restriction of watercrafts in Swedish waters,[161] the Court left a wide margin of appreciation for the Member State to choose a suitable measure to protect the environment. Although there were alternative measures available that would achieve the same level of protection of the environment, the alternatives were administratively more complex and costly. The Court deemed the measure of the Member State to be proportional.[162]

Toolex[163] was a preliminary ruling regarding a Member State measure prohibiting the use of a certain chemical, with a system of individual exemptions.[164] When doing the proportionality assessment in the case, the Court noted that individual exemptions were possible to obtain for a limited period, in case that the applicant could provide a plan for eventually

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152 C-302/86. See also Langer and Wiers (2000) p. 188.
153 C-302/86.
154 C-302/86 para 20.
155 de Sadeleer (2012) p. 309.
156 ibid p. 310.
157 ibid p. 320.
158 see e.g. C-443/02 *Nicolas Schreiber* [2004] EU:C:2004:453 para 48.
159 See e.g. C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] EU:C:2009:336 para 9.
160 ibid.
161 ibid para 14.
162 C-142/05 para 36ff; see also Poncelet (2013) p. 196.
163 C-473/98.
164 ibid para 34.

substituting the chemical in question with another substance. The Court concluded that the individual exemption system was appropriate and proportionate.[165] To support this conclusion the Court noted that the system was in line with the *substitution principle*, as incorporated in, *inter alia*, various EU directives.[166] The Court in this case uses the internal logic of the EU legal system to deem a Member State measure proportionate.

In *PreussenElektra*[167], a preliminary ruling concerning the obligation on operators to buy electricity from renewable sources from their area of supply, and at a fixed minimum price,[168] the Court started its proportionality assessment of the measure by stating that account should be taken both of the aim of the measure, and of the "particular features of the electricity market".[169] When assessing the aim of the measure - protection of the environment -, the Court noted that the measure lead to the reduction of greenhouse gas emissions, "which the European Community and its Member States have pledged to combat".[170] Furthermore the Court connected this reduction to the implementation of the "objectives which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change".[171] When assessing the aim of the measure the Court also noted the connection of the aim to the EU legal order by linking the aim to the interests covered by Art 36 TFEU - in this case "the health and life of humans, animals and plants" – as well as the environmental integration principle as incorporated in EU primary law.[172] Regarding the features of the electricity market, the Court noted that it is difficult to determine where the electricity was made, once in the grid.[173] It also noted that the Commission, in its proposal for a directive relating to electricity, had underlined the importance of creating a

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165 ibid para 46.
166 ibid para 47.
167 C-379/98.
168 ibid para 20.
169 ibid para 72.
170 ibid para 73.
171 ibid para 74.
172 ibid para 75f.
173 ibid para 80.

"system of certificates of origin".[174] Based on the abovementioned considerations regarding the aim of the measure and the features of the electricity market, the Court deemed the measure to be proportional.[175]As can be seen the Court does not make a classic proportionality assessment, and the weighing of different interests is not explicit. Moreover, in legitimizing its reasoning, the Court refers to various actors and legal spheres in its proportionality test undertaken in *PreussenElektra.* In the assessment of the aim, the references to Member States, the EU and their obligations regarding the international convention highlights how the reasoning in this case can be seen as influenced in various steps since the obligations of the EU in accordance with the convention, as approved by the Member States, has implications for how the Court assesses the measures at hand.

References to international conventions in the proportionality test, as in *PreussenElektra*, can also be found in other cases.[176] For example, in *Bluhme*,[177] the Court made a more explicit proportionality test, stating that the measure at hand, the prohibition of keeping of bees other than a species of bees native to the specific island in question,[178] needed to be necessary and proportionate in relation to its aim.[179] In order to assess the measure, the Court thereafter said that the method used in the measure was recognized in the *Rio Convention,* which in turn was (regarding this aspect) incorporated in Community law.[180] Such reference was also made in *Ålands Vindkraft,*[181] a preliminary ruling regarding a Member State measure concerning the issuing of certificates (used to indicate to the customers the proportion of energy made from renewable sources)[182] only to electricity produced in that Member State.[183] The Court started the proportionality assessment by stating that the measure needed to be "appropriate for securing the attainment of the legitimate objective pursued

[174] ibid para 79f.
[175] ibid para 81.
[176] see Nowag (2017) p. 174.
[177] C-67/97.
[178] ibid para 2.
[179] ibid para 35.
[180] ibid para 36.
[181] C-573/12.
[182] ibid para 52.
[183] ibid para 32.

and it must be necessary for those purposes".[184] In the proportionality assessment, the Court referred to the importance of ensuring the implementation of the international environmental commitments entered into by the European Union".[185]

Moreover the Court has underlined the importance of the Member State to consider alternative measures, as a part of the proportionality test.[186] In *Commission v Austria*,[187] the measure at hand consisted of a restriction of certain kinds of vehicles to use a particular part of the highway.[188] The Court stated that the state was "under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established."[189] The Court notes that this is in line with what the Advocate-General held in his Opinion.[190]

As has been shown above, the Court in its proportionality assessment frequently legitimizes its reasoning with reference to different actors, such as the Commission and Member States, as well as to different legal spheres, such as the EU legal order and international agreements. The formal governance of the Court can be highlighted in the proportionality assessment. However, the proportionality assessment of the Court is, naturally, shaped by the notion of different interests being weighed against each other.

[184] ibid para 83.
[185] ibid para 97.
[186] C-320/03 para 87.
[187] C-320/03.
[188] ibid para 1.
[189] ibid para 87.
[190] ibid para 89.

4 Analysis

In this chapter, the application of multilevel governance to the case law of the Court will be analyzed. The strengths and weaknesses of the theory when doing such an application will be identified and analyzed in sections 4.1. and 4.2, respectively.

4.1 Strengths of Applying the Theory of Multilevel Governance on Case Law of the Court of Justice

In this section the strengths of the theory of multilevel governance when applied to the case law will be discussed. It will herein be argued that the theory highlights the active role of the Court, as an actor both creating and shaping law. Moreover it shows how the Court uses references to both other actors as well as legal orders in order to legitimize its reasoning.

When applying the theory of multilevel governance on the case law of the Court, the notion of various actors shaping the law in question is highlighted. As has been seen in Chapter three, the Court makes references to e.g. its own case law, the EU legal framework, international conventions, the Commission, and the Advocates-General.

Regarding how these actors influence the law, the application of the theory of multilevel governance on the case law highlights mainly two ways through with such influence is done. Firstly the Court itself can be seen to formally create and shape law. Secondly the references of the Court to other actors and legal spheres can arguably be seen as these actors indirectly shaping the law.

When applying the theory of multilevel governance on the case law, the active role of the Court of creating and shaping the law in question is highlighted. In the field of free movement of goods and environmental protection as a justification to limitations of the former, the Court creates the law insofar as it

creates the mandatory requirement, and subsequently includes environmental protection in that ground of justification.

Moreover the Court shaping the law is emphasized, both in regards of how it interprets Art 36 TFEU, and mandatory requirements. As has been discussed in Chapter Three, the rather unclear case law regarding the justifiability of discriminatory measures under the provision of mandatory requirements can be seen as a way of the Court to indirectly shape the law. The lack of clarity furthermore gives the Court the possibility to further shape the law in future case law. The proportionality test is another example of how the Court shapes the law, the weighing of interests is inherent to the test, however, which interests the Court chooses to highlight, as well as the various differences in how the test is applied, gives room for the Court to shape the law.

The application of multilevel governance also highlights how the Court legitimizes its creation and shaping of the law by referring to various actors and legal spheres. Through such references in the legitimization of the Court, the actors and legal orders mentioned can thus be understood as indirectly shape the law, and thus exercise governance. Such references are arguably vital for understanding the case law, thus indirectly influencing the law itself. Moreover, the Court by these references shows how it deems these actors and legal orders to be important when understanding the law.

Using the theory of multilevel governance on the case law of the Court, three main processes of governance can be identified in the case law studied. These are the explicit creation of law, the references shaping the law, and the ambiguity of the case law. Firstly, regarding the explicit creation of the law, this process can be understood as reflexive insomuch as that other actors and legal spheres are taken into account when creating the law. The creation of mandatory requirement, and the inclusion of environmental protection in the former, shows how the Court creates the law with references to e.g. the EU legal order. By taking legitimizing its reasoning in such a way, the process arguably show signs of reflexivity.

Secondly, as has been discussed above, the references of the Court are one of the processes through which the law is shaped in the case law. This process can be seen as reflexive insomuch as it in various cases involves various references to different actors.

Thirdly, as has been pointed out in Chapter three, the case law of the Court is in some cases ambiguous. The clearest example of this is the question of whether both discriminatory and non-discriminatory measures can be used as justifications as mandatory requirements. Through the unclear case law, the Court arguably leaves room for itself to further shape the law in future cases. Moreover, these three processes can be seen as together creating a reflexive process through which the law in the field is shaped.

Apart from the more concrete ways that the Court creates and shapes the law, itself and thorough references to other actors, the "silences" in the case law can be interpreted as leaving the room for Member States, alternatively the EU to indirectly shape the law, insomuch as that the Court does not shape the law, on such matters.

The theory of multilevel governance thus has various strengths when applied to the case law of the Court. The application of the theory on the case law of the Court can highlight the direct and indirect influence of various actors in the creating shaping of the law, as exemplified above.

4.2 Weaknesses of Applying the Theory of Multilevel Governance on Case Law of the Court of Justice

Applying the theory of multilevel governance as a method in a case study is not unproblematic. This section of the analysis will be dedicated to discussing the weakness of the theory regarding its applicability on the case law of the Court. It will herein be argued that the weaknesses of the application can be foremost related to the inherent nature of judgments of the Court.

The very nature of case law is a weakness when assessing it through the theory of multilevel governance. Due to the position of the Court, it is arguably not in its interest to make explicit references to how other actors and legal orders influence the judgments. Although we can see references to such other actors and legal orders, it is possible that the Court in many cases does not mention, at least not explicitly, how the law is created and shaped through the case law. Thus it is worth to keep in mind the possibility of "silences" of the case law, as well as observe the implicit references to law making as expressed through the case law.

As has been seen in the previous section, by applying the theory of multilevel governance on the case law of the Court, various actors and legal spheres are highlighted. However, all actors relevant within the theory cannot be identified in the case law of the Court. As has been described in Chapter two, a key element of multilevel governance is that it recognizes that various actors, on different levels, shaping the creation and shaping of law. Examples of such levels are sub-national, national, and supra-national actors. When the case law studied has been analyzed it has been apparent that the Court makes few explicit reference to e.g. sub-national actors when creating and shaping the law. If such sub-national actors thus shape the law, it is not explicit in the judgments of the Court, since it does not seem to refer to such actors in order to legitimize the creation and shaping of the law in question.

As has been discussed in the Chapter above, some scholars argue that the Court in certain cases has been influenced by political reasons in its judgments. This can arguably sometimes be seen implicitly in the case law of the Court. However, studying the argumentation of the Court in the judgments does not necessarily always reveal such political considerations, nor for that matter other actors or legal spheres that the Court uses to legitimize its reasoning.

It can furthermore be noted that the analysis regarding mandatory requirements highlighted the influence of more actors than the analysis regarding Art 36 TFEU. This is possibly due to the fact that art 36 TFEU is enshrined within the Treaties, and has thus a different legal basis.

Moreover, the exact relation between the different actors is not necessarily made explicit in the case law. Many times, only indirect references to such dynamics can be identified, through the legitimization of the Court in its judgments. The process in which various actors shape the law, though the case law, is thus not always clear. Although such processes can be identified, as exemplified in section 4.1., some caution must be taken insofar how well processes can be understood, since they are not explicit.

As has been described above, there are weaknesses of using the theory of multilevel governance on the case law of the Court. These weaknesses concern, amongst other, the issue of the silences left in the case law, but also how the governance processes are not always clearly explained. These weaknesses can arguably be the consequence of the very nature of case law. These weaknesses must be taken into account when applying the theory on the case law of the Court.

5 Concluding Remarks

This thesis has identified key concepts of the theory of multilevel governance. The theory has subsequently been applied to the case law of the Court regarding environmental protection as a justification to limitations to free movement of goods. Thereafter the weaknesses and strengths of the theory as applied to the case law of the Court have been identified and analyzed.

It has been argued that when analyzing the case law of the Court using the theory of multilevel governance, the analysis shows that the theory has various strengths when applied to the case law of the Court. When applying the theory, instances of various actors, shaping the law in a reflexive process can be identified. However, some weaknesses have also been observed when the theory has been applied to the case law of the Court. These weaknesses are foremost due to the nature of case law, and the way that the Court formulates its judgments.

Keeping the weaknesses of the applicability of the theory of multilevel governance in mind, the theory can thus be applied to widen and deepen the understanding of how the law is created and shaped in the EU through the case law of the Court. Once the law making process though the case law has been identified, using the theory, it can subsequently be analyzed e.g. regarding the democratic legitimacy of the process creating the law, as was discussed in Chapter two.

In order to deepen the understanding of the applicability of the theory of multilevel governance on the case law of the Court, further research would be welcomed. Such further research could include applying the method on the case law of other fields of EU law. Another way to deepen the understanding of the applicability, weaknesses and strengths of the theory on the case law of the Court could be done by applying it not only on the judgments of the Court, but also on arguments of the parties and the opinions of the Advocates-General, thus placing the case law in a wider context. Moreover, as has been

underlined above, the theory of multilevel governance can be used as a steppingstone to understand how law is created and shaped through the case law of the Court and thereafter analyzed. Such future research would be welcomed.

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