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The coherence within EU Law between the Free Movement of Goods and the Common Agricultural Policy: a Case Study about State Intervention in the Romanian Food Industry

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Contents

SUMMARY

Following the launch of the infringement procedure against Romania for enacting measures in the food trade industry, the public debate has been whether the rule compelling large retailers to acquire 51% of certain food products placed for sale from a short supply chain that involves a limited number of intermediaries and close geographical and social ties is compatible with EU law. The research addresses the realities of the industry, the current legal framework governing the Internal Market, the role of the Common Agricultural Policy and an attempt to anticipate the approach of the European Court of Justice.

Key words: Short supply chains, Common Agricultural Policy, Law 150/2016, state intervention, Romania, free movement of goods, food industry.

ABBREVIATIONS

AG	Advocate General
CAP	Common Agricultural Policy
Court	the Court of Justice of the European Union and the two separate courts it consists of: the European Court of Justice and the General Court
Commission	European Commission
ECHR	European Convention on Human Rights and Fundamental Freedoms
EU	European Union
EUR	the unit of single currency for the time being of the participating member nations of the European Union
GATT	General Agreement on Tariffs and Trade
IM	Internal Market of the European Union
IPR	Intellectual Property Right
Main Provision	the obligation on large retailers to acquire at least 51% of the total volume of certain food products placed for sale from a short supply chain, as provided by the National Law and further detailed in Section 4.3
MEE	Measure having equivalent effect to quantitative restrictions
Member State(s)	Member State(s) of the European Union
MP	Member of the Romanian Parliament
National Law	Law no. 321/2009 on trading food products, as amended by Law no. 150/2016
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union.
RCC	Romanian Competition Council
RON	Romanian Leu, the official currency of Romania

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaties of the European Union
UK	United Kingdom of Great Britain and Northern Ireland

1 INTRODUCTION

1.1 Background

In July 2016, Romania enacted a law[1] modifying the legislative framework for regulating the trade of food products. The law contains a number of provisions that allegedly infringe some of the four fundamental freedoms that stand at the core of the European Union and its Internal Market.

The focus of the paper will be on the provision stating that 51% of the foodstuff placed for sale by large retailers in Romania should be obtained from a short supply chain (also referred to as the Main Provision) of Law 321/2009[2] on trading food products, as amended in 2016, since these provisions bring the highest degree of novelty to the relationship between national legislation and EU law. In addition, since the public debate in Romania revolved around this same provision during the process that led to the enactment of the National Law, an assessment of the Main Provision's compatibility with EU law is of higher interest.

1.2 Outline

To ensure that a comprehensive analysis is performed, the pillars for establishing a solid conclusion must be set first. Therefore, the second chapter of the paper will expose the normative framework of the Internal Market, with a special focus on the free movement of goods in the EU. As it will be shown, the Court has established the key principles of the four freedoms through its case law, thus the analysis will comprise in principle in sketching the main cases.

Secondly, the third chapter will outline the Common Agricultural Policy, with a focus on its most recent reform. This is necessary for establishing its importance from both an economic and political perspective.

The fourth chapter will describe the status of the Romanian agricultural industry, as well as the Romanian Government's approach to resolve the main issues identified by the stakeholders. It will also exhibit the National Law together with the corresponding legislative process and its implications.

Finally, the fifth chapter aims to foreshadow the Court's approach towards a possible referral for an examination of the National Law's compatibility with the principles governing the Internal Market, including possible scenarios as well as likely approaches of the Romanian Government.

[1] Law no. 150/2016 on the amendment and supplementation of Law no. 321/2009 on trading food products, published in the Official Gazette of Romania no. 534 of 15 July 2016.
[2] Law no. 321/2009 on trading food products, published in the Official Gazette of Romania no. 705 of 20 October 2009.

Besides the Main Provision, the National Law also contains articles regulating aspects that have already been examined by the Court across its jurisprudence. Thus, such measures will be examined in subsidiary, with a direct reference to the Court's case law, which provides the clear solution to whether these national measures infringe EU law.

1.3 Aim and Research Questions

The aim of this paper is to assess the compatibility of the recent Romanian measures in the food-trading sector with the legislative framework of the free movement of goods in the EU, while observing the current status of the latter. In subsidiary, the paper aims to reflect the role of the European Court of Justice in outlining the Internal Market, since reaching a viable conclusion requires having in view the particularities of the Court.

Also, the research aims to discuss the apparent conflict between the Common Agricultural Policy and the treaty provisions regulating the Internal Market, as the Commission started the infringement procedure with regards to a national law that borrows notions from key regulations of the Common Agricultural Policy.

Therefore, the research aims to answer the following questions: (i) does the Main Provision of the National Law fall within the prohibitions laid down in Article 34 TFEU? and (ii) can the Main Provision be justified in a manner that makes it compatible with the rules governing the Internal Market?

1.4 Method

For achieving its aim, the paper will use the legal dogmatic research method. First, the paper will outline the framework of the rules governing the EU Internal Market, the Common Agricultural Policy, as well as the Romanian law that is the object of the study. Secondly, the paper will aim to apply the key principles and concepts developed by the EU Court for assessing whether the National Law is compatible with the EU legislation.

The research will rely mainly on the case law of the Court, but also on Romanian and European legislation, while insights will be provided by journal articles and academic books.

1.5 Delimitation

This paper will only assess the compatibility of the National Law with the free movement of goods as one of the four freedoms governing the Internal Market, but will not extend to an assessment of the National Law's compatibility with the freedom of establishment or the freedom to provide services.

Also, the introduction into the free movement of goods will not cover the sections involving duties and taxes and the focus will be on quantitative restrictions and measures having equivalent effect concerning imports.

2 THE FREE MOVEMENT OF GOODS

2.1 Introduction

The Free Movement of Goods is one of the four freedoms governing the Internal Market of the European Union. Together with the freedom to provide services, the free movement of persons and of capital, it stands at the heart of the EU Treaties; they are the means to achieve the aims of the EU, respectively a highly competitive social market and a free single market.[3]

The strategy for creating an internal market consists of eliminating barriers to trade, such as customs duties on imports, which make imported products more expensive, as well as quotas that limit the quantity of foreign goods that enter a national market. Therefore, Articles 28-30 TFEU deal with the elimination of customs duties and charges having equivalent effect, whereas Articles 34-37 TFEU deal with quantitative restrictions or measures having an equivalent effect. Finally, Articles 110-113 TFEU cover the ban on taxes that discriminate against imports.

2.2 Free Movement of Goods: Quantitative Restrictions

"The free movement of goods is a fundamental principle of the [EU] Treaty which finds expression in the prohibition laid down in Article [34 TFEU] of quantitative restrictions on intra-Community imports and all measures having equivalent effect".[4] The Court has defined quantitative restrictions as "measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit"[5].

Articles 34 and 35 contain mirrored provisions prohibiting restrictions on imports and on exports respectively. Article 36 provides the exceptions to the prohibitions mentioned in Articles 34 and 35. Therefore, these three articles must be read together.

The object of Articles 34-37 TFEU is to prevent Member States from placing quotas on the amount of goods that are traded from another Member State or from imposing measures that are not *per se* quantitative restrictions but have the same effect on imported goods.[6]

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[3] Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedom,* Oxford University Press, 2002, p 1.
[4] Case C-147/04 *De Groot en Slot Allium and Bejo Zaden* [2006] ECR I-245, para 70.
[5] Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECR 865 para 7.
[6] Paul Craig, Grainne de Burca, *EU Law, Text Cases and Materials*, Sixth Edition, Oxford University Press, 2015, p 665.

The European courts have dealt with straightforward quantitative restrictions in a number of cases. For example, the Court argued in *Delhaize*[7] that national rules that limit the amount of wine that can be exported were contrary to free movement of goods provisions. Similarly, in *Rosengren*[8], the Court did not agree with national rules that restricted Swedish citizens from buying alcohol from another Member State through mail order.

In a case[9] concerning UK's prohibition on the import of pornographic material, the Court ruled that the notion of quantitative restrictions also includes the complete ban on importing or exporting a certain product.

Measures having an equivalent effect to quantitative restrictions

MEEs generally include rules concerning the shape, content, packaging or labelling goods, which can in fact hinder trade between Member States.[10] The first jurisprudential definition of MEEs was given in the *Dassonville* case[11], where the Court held that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions".

At first glance, it appears that any national rule that *indirectly* or *potentially* hinders trade falls within the "formula" and that it includes a "huge range of restrictions"[12]. This is the reason the Court decided to refine its definition in subsequent judgements.

The wording of the Court's definition, besides being very broad, is not very clear and certain aspects need to be elaborated. By "all trading rules", the Court means that Article 34 only applies to the marketing stage of the economic process, with no imposition of any restrictions to production.[13] In addition, the Court underlined in *Buy Irish*[14] that the measures need not be legally binding. Therefore, even a practice at the Irish Government level to actively encourage Irish citizens to buy goods produced in Ireland falls within the restriction since such a campaign can have the effect of a legally

[7] Case C-47/90 [1992], ECR I-3669, para 27: "national provisions applicable to wine of designated origin which limit the quantity of wine that may be exported in bulk but otherwise permit sales of wine in bulk within the region of production constitute measures having equivalent effect to a quantitative restriction on exports which are prohibited by Article [35]".
[8] Case C-170/04 [2007] ECR I-4071.
[9] Case 34/79 *Henn and Darby* [1979] ECR 3795.
[10] Catherine Barnard, The Substantive Law of the EU: The Four Freedoms, Fifth Edition, Oxford University Press, 2016, p 73-74.
Press 2013).
[11] Case 53/76 *Dassonville* [1974] ECR 837, para 5.
[12] Margot Horspool, Matthew Humphreys, *European Union Law*, Fifth Edition, Oxford University Press, 2008, pp 316–317.
[13] C. Barnard, *op.cit.*, p 75.
[14] Case 249/81 [1982] ECR 4005.

binding obligation. Moreover, the wording of Directive 70/50[15] states that, in addition to laws, regulations and administrative provisions, even recommendations issuing from a public authority should be considered "measures" in the sense of Article 34.

About the measure being *enacted* by a Member State, it is sufficient that there is a consistent policy or practice at state level (which includes the local or regional level) or by a body that is controlled by the Government or which regulates the conduct of a profession[16].[17] The conduct of trade unions is included in the definition as well.[18] The consensus is that Article 34 is directed at Member States and does not have horizontal direct effect, therefore a private undertaking's behaviour cannot breach free movement of goods provisions, but Member States might be held responsible for the actions of private individuals.[19]

The phrase "directly or indirectly, actually or potentially" refers to the Court's concern in relation to the effect of the measure and not with the intention behind it.[20] This means that the definition includes measures that are discriminatory and measures that hinder market access besides strictly protectionist rules. This also means that Article 34 covers both measures that directly discriminate against imports and measures that only affect imports indirectly. The former are called *distinctly applicable measures*, while the latter are known as *indistinctly applicable measures.*

2.2.1 Distinctly Applicable Measures

Distinctly applicable measures refer to those measures enacted by a Member State that treat imported goods less favourably than goods produced within the Member State, more exactly where there is a different burden in law and in fact concerning the goods.

Distinctly applicable measures may comprise of imposing additional requirements for foreign goods, limiting distribution channels or simply rules that give preference to national goods.[21] The Court has dealt with the latter in a number of rulings: in *Dundalk Water*[22], the public authority involved in a public procurement process required that the goods that were to be acquired needed to comply with an Irish standard. Also, that the firm supplying them had to be approved by a national body, while the only firm participating in the public tender that met these criteria was an Irish

[15] The Preamble of Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, published in the OJ L 013, 19/01/1970 p. 0029 - 0031.
[16] Joined Cases 266 and 267/87 *Ex p API* [1989], ECR 1295.
[17] C. Barnard, *op.cit.*, p 76.
[18] Case C-438/05 *Viking* [2007] ECR I-10779.
[19] C. Barnard, *op.cit.*, pp 77-79.
[20] *Ibidem.*
[21] C. Barnard, *op.cit.*, pp 80-85.
[22] Case 45/81 [1982] ECR 4929.

company. The Court held that the imposition of such requirements had the effect of limiting the supply to national producers.

In two other cases, *Buy Irish*[23] and *Buy British fruit*[24], the Court examined the conduct of quasi-governmental bodies actively promoting national products. It concluded that state-sponsored promotion of national goods is generally not compatible with EU law, but promoting certain goods for their specific qualities is permissible[25].

In another line of cases which concerned requirements such as labelling the origin of products[26], the Court held that imposing such obligations is not justified unless the origin of the product implies a specific quality. It continued that this could trigger certain consumer prejudices with regards to foreign products, which can be an obstacle to the creation of an Internal Market; however, it also held that producers can unilaterally decide to mark the origin of their products. Similarly, in *Weinbrand*[27], the Court considered that German legislation reserving the names 'Sekt' and 'Weinbrand' to goods produced in German-speaking countries was incompatible with free movement provisions because nothing proved that such products were specifically German.

Price fixing as discrimination

Another form of discrimination against foreign products is price fixing in situations where this is not economically justified.

Fixing maximum prices can hinder market penetration of foreign goods since it might not be economically viable to import a product that must be sold at a price that does not cover the costs (transport costs are usually higher for foreign goods). The Court held in *Tasca*[28] and *Danis*[29] that fixing a maximum price can have an effect equivalent to quantitative restrictions when the price for sugar is set so low that importers can only sell the product at a loss or when it prevents the higher price to be passed on to the consumer.

In *van Tiggele*[30] the Court ruled that fixing a minimum price can constitute a measure having equivalent effect to quantitative restrictions when the minimum price is set so high that much cheaper foreign products lose their competitive advantage in front of domestic goods.

[23] Case 249/81 [1982] ECR 4005.
[24] Case 222/82 [1983] ECR 4083.
[25] C. Barnard, *op.cit.*, p 83.
[26] Case 113/80 *Commission v Ireland* [1981] ECR 1625 and Case 207/83 *Commission v UK* [1985] ECR 1202.
[27] Case 12/74 [1975] ECR 181.
[28] Case 65/75 [1976] ECR 291.
[29] Joined Cases 16-20/79 [1979] ECR 3327.
[30] Case 82/77 [1978] ECR 25.

2.2.2 Indistinctly Applicable Measures

These measures consist of rules enacted by Member States which have the same burden in law with regards to domestic and foreign goods, but a different burden in fact.[31]

Indistinctly applicable rules have been broadly defined in the *Cassis de Dijon* case[32], but have now been limited by the Court only to 'product requirement' rules, as the case law of the Court regarding this particular issue has constantly developed in time.

The Court has defined product requirements as "*rules that lay down requirements to be met by [goods coming from other Member States] (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging)*"[33]. *Cassis de Dijon* concerned a German rule that set a minimum alcohol content for alcoholic beverages sold within the country; it did not allow liqueurs to have alcohol content below 25% and German authorities banned the sale of Cassis de Dijon, a French fruit liqueur with lower alcohol content.

The Court ruled that Member States can impose such rules on imported goods as long as they can be "recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer".[34] This way, the Court expanded the list of possible justifications previously limited to those originally provided in Article 36 TFEU. The Court rejected the German Government's public health and consumer protection defences and found that the rule was incompatible with free movement provisions. It also established the *mutual recognition* principle: Member States must recognize standards from other Member States and thus permit the marketing of products lawfully manufactured in other Member States (unless the national restriction can be justified by a mandatory requirement).[35]

The ruling in *Cassis de Dijon* can be interpreted as a compromise between the interest of traders, who wanted to be able to sell the same product in various Member States without the need to adapt it to the different rules in

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[31] C.Barnard, *op.cit.*, pp 90-91.

[32] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein* [1979] ECR 649.

[33] Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, para 15.

[34] *Cassis de Dijon*, para 8; The Court subsequently added a proportionality test to the conditions above in Case 261/81 *Rau* [1982] ECR 3961, a case regarding the packaging of margarine.

[35] '[T]here is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the member states, alcoholic beverages should not be introduced into any other member state; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules', *Cassis de Dijon*, para 14.

different states, and the interest of Member States to protect their regulatory traditions.[36]

Keck and market circumstances rules

Market circumstances rules refer to who, when, where and how a product can be sold.[37] They do not aim to be protectionist and neither have such effect. But some rules may fall within the *Dassonville* definition regarding rules that may indirectly or potentially hinder inter-state trade.

The Court appears to be concerned in some cases with allowing companies to pursue EU-wide marketing and advertising strategies in order to achieve its aim of creating a full-fledged common market. This can be seen in *Mars*[38], where it struck down a German law regulating the wrapping of products, which prevented Mars GmbH from adopting a uniform presentation for distribution throughout Europe for products such as Mars, Bounty, Snickers and Milky Way. Also, in *Oosthoek*[39], the Court observed the following: "*the possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one member state to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction"*.

In *Familiapress*[40], the Court considered that such rules can even affect marketing strategies that are part of the product itself[41]; the case was about a German magazine sold in Austria which included crossword puzzles and rewarded the customers who solved them with prizes, which was contrary to Austrian regulations. In *Pall*[42], German legislation restricted the marketing of a product that contained the registered trademark symbol only to trademarks actually registered in Germany. The Court considered that such a rule "*is capable of impeding intra-Community trade because it can force the proprietor of a trade mark that has been registered in only one Member State to change the presentation of his products according to the place where it is proposed to market them and to set up separate distribution channels in order to ensure that products bearing the symbol (R) are not in circulation in the territory of Member States which have imposed the prohibition at issue*"[43]. The Court found that such measures limited the opening of markets to undertakings from other Member States.

[36] C.Barnard, *op.cit.*, p 91.
[37] K.Mortelmans, *apud* C.Barnard, *op.cit.*, p 117.
[38] Case C-470/93 [1995] ECR I-1923.
[39] Case 286/81 [1982] ECR 4575, para 15.
[40] Case C-368/95 [1997] ECR I-3689.
[41] P.Craig, G.de Burca, *op.cit.*, p 683-684.
[42] Case C-238/89 [1990] ECR I-04827.
[43] *Idem*, para 13.

On the other hand, it did not find that national rules strictly regulating the times when shops must be closed[44] or during which hours bread can be delivered[45] breach free movement of goods legislation.

In 1993, the Court gave its groundbreaking judgement[46] delimiting more clearly which national rules fall indeed within the free movement of goods provisions. The judgement in *Keck* came as an answer to a preliminary question asked by the Tribunal de Grande Instance in Strasbourg in a case where criminal proceedings were brought against Mr Keck and Mr Mithouard for breaching a French rule prohibiting reselling goods at a price lower than their actual purchase price. The parties considered that such a rule deprives them of a method of sales promotion which had a subsequent impact on their sales volume. The Court found that such national rules restricted '*certain selling arrangements'* and that they do not fall within the *Dassonville* formula of rules that hinder directly or indirectly, actually or potentially trade between Member States[47]. It observed that such rules affect all traders equally and that they do not impede access to the market of foreign goods.[48]

The judgement is significant because it shows that the Court is not concerned with situations where no discrimination against foreign goods takes place and it relied on a market access test to come to this conclusion.[49] It also reconsidered its case law and left the *Dassonville* formula applicable only to product requirement cases, thus limiting this case's applicability.

In later cases, the Court qualified market circumstances rules as *certain selling arrangements* and thus excluding them from the application of Article 34.[50] However, in certain cases, such as *De Agostini*[51], the Court correctly observed that specific rules concerning certain sales arrangements regarding television advertising did not affect all traders in the same manner in law and in fact and had a greater impact on foreign goods because it precluded them from effectively penetrating a new market. It was then for Sweden, the host state, to justify it. Similarly, in *Heimdienst*[52], where an Austrian rule, which imposed a territorial proximity obligation for food delivery was analysed, the Court again found that this geographic condition affected foreign goods in a higher proportion than domestic goods since it imposed the obligation to establish a shop in the geographic area where the delivery would take place. Finally, the Court gave another important judgement in *DocMorris*[53], where a German rule did not permit the delivery

[44] '*Sunday Trade'* Case C-145/88 *Torfaen Borough Council v B&Q plc*[1989] ECR 3851.
[45] Case 155/80 *Summary Proceedings against Sergius Oebel* [1981] ECR 1993.
[46] Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.
[47] *Idem*, para 16.
[48] *Idem*, para 17.
[49] C.Barnard, *op.cit.*, pp 122-124.
[50] *Idem*, p. 125-126.
[51] Joined Cases C-34-36/95 *Konsumentombudsmannen v De Agostini* [1997] ECR I-3843, para 42-43.
[52] Case C-254/98 [2000] ECR I-151.
[53] Case C-322/01, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*. [2003] ECR I-14887.

of medicine through mail; the Court found that this especially affects foreign medicine and breached Article 34. The burden was then on the German government to justify such a measure. The Court accepted the justification on grounds of public health only for prescription medicines, while considering that such a rule concerning non-prescription medicine was disproportionate.

Market access and use restrictions

Two cases, concerning the prohibition of using motorcycle trailers in Italy[54] and a restriction on using personal watercraft such as jet-skis[55] paved the way for a market access test concerning Article 34. The Court considered that a rule (that was not *per se* discriminatory) banning or restricting the use of a product would have a significant influence on consumers in those countries in that they will not buy that product anymore since they could not use it for its specific purpose. This in turn hinders the market access of goods that are lawfully produced in another Member State to the market where the rule is eforced. Such rules should be considered MEEs and the burden to justify them lies on the Member State.

These two more recent rulings come to limit the application of the rationale behind *Keck* only to certain selling arrangements and to confirm the principles laid in *Cassis de Dijon* in relation to goods lawfully produced in another Member State.[56]

2.3 Derogations and Justifications

There are currently two possible defences to a national rule breaching Article 34: the exhaustive list of justifications found in Article 36 and the mandatory requirements that were first accepted by the Court in *Cassis de Dijon.*

2.3.1 Article 36 Derogations

Article 36[57] TFEU provides an exhaustive list of derogations to save a discriminatory national rule. It was transposed from Article XX of GATT

[54] Case C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519.
[55] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos (Mickelsson)* [2009] ECR I-4273.
[56] C.Barnard, *op.cit.*, pp 107, 136-138.
[57] Article 36 TFEU states that "*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".*

and therefore reflected the economic reality of the middle of the 20th century.[58]

For Member States to use these justifications, certain conditions must be fulfilled: first, they must pass a proportionality test[59] and they must serve an important public interest[60]. Also, Member States cannot use such justifications to pursue their economic interests, as the Court observed in a case where Italy tried to justify restricting the import of pig meat by arguing that it had taken the temporary measure to 'remedy the artificially low prices prevailing in the pig meat sector'[61].

Public morality

The two most relevant cases where the Court had to deal with a public morality justification revolved around the sale of pornography. In *Henn and Darby*[62], the Court stated as a principle that the UK could justify its ban of imported pornography. However, in *Conegate*[63], the Court found that '*a Member State may not rely on grounds of public morality to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory*'[64]. Although the two solutions seem to contradict each other, the main difference is that in *Henn and Darby* similar products were not also produced within the UK.

Public policy

This particular justification is one that the Court did not wish to interpret too broadly.[65] Thus, such a justification is difficult to use, but in *Ringelhan*[66] the Court accepted it in a case where the UK prohibited the export of silver coins in order to prevent them from being melted, taking into consideration that this was also a criminal offence within the country.

There is a close connection with using this justification and linking it with the right to protest or with preventing public unrest. AG Verloren van Themaat states the principle, in his Opinion for *Cullet v Centre Leclerc*, that if fear from certain behaviours from interest groups are accepted as a justification, then the existence of the four fundamental freedoms is compromised. [67] Still, even if the facts of *Schmidberger*[68] are similar, the

[58] C.Barnard, *op.cit.*, pp 149-150.
[59] Craig, de Burca, *op.cit.*, p 696.
[60] C.Barnard, *op.cit.*, p 150.
[61] Case C-7/61 *Commission v Italy* [1961] ECR 317, p 328-329.
[62] Case 34/79 [1979] ECR 3795.
[63] Case 121/85 [1986] ECR 1007.
[64] *Idem*, para 16.
[65] Craig, de Burca, *op.cit.*, p 697.
[66] Case 177/83 [1984] ECR 3651.
[67] Case 231/83 [1985] ECR 305.
[68] AG Opinion to Case C-112/00 [2003] ECR I-5659, section 5.3.

Court found that the right to protest is a fundamental right and therefore such right is a free-standing public interest.[69]

Public security

In *Campus Oil,* the Court accepted Ireland's argument that forcing importers of petrol to buy 35% of their needs from state-owned refineries at fixed prices is a matter of public security since '*ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations'*[70].

Protection of health and life of humans, animals or plants

When using such a justification, the Court is particularly concerned with whether the protection of public health is the real purpose of the national measure or whether, on the contrary, it actually aims to protect domestic producers.[71] For example, in *Commission v United Kingdom*[72], it correctly observed that the measure to ban poultry meat imports from other Member States was commercially motivated and the justification that the measure was necessary to protect against the spread of a particular disease did not stand. Another case[73] concerning the German beer purity law is also relevant: the German law from 1517 reserved the name *Bier* to beer that only contained the four basic ingredients (barley, water, hops and yeast), and Germany prohibited the marketing of beer that contained additives. The German government argued that this is a matter of public health because the long-term harmful effects of such additives are unknown, but the Court did not buy it, observing that the use of the same additives was permitted in other beverages.

Public health is also the justification used for second checking imported products. The Court stated that any derogation from the mutual recognition principle must be necessary and proportionate and that dual checks should not impose technical tests that have already been done in the Member State of origin.[74]

Protection of national treasures possessing artistic, historic or archaeological value

This justification has only been used by Italy in *Art treasures*[75] when Italy imposed a tax on the export of national art treasures, but the Court found that the tax falls outside of the limits of Article 36.[76]

[69] C.Barnard, *op.cit.*, p 155.
[70] Case 72/83 [1984] ECR 2727, para 35.
[71] Craig, de Burca, *op.cit.*, p 699.
[72] Case 40/82 [1982] ECR 2793.
[73] Case 178/84 *Commission v Germany (German beer)* [1987] ECR 1227.
[74] Craig, de Burca, *op.cit.*, pp 701-702.
[75] Case 7/68 *Commission v Italy* [1968] ECR 617.
[76] C.Barnard, *op.cit.*, p 163.

Protection of industrial and commercial property

This derogation concerns trademarks, patents, copyrights and other IPRs, which are territorial and exclusive by nature. Such rights present a challenge because their characteristics can practically create barriers to inter-state trade, but their existence is necessary as they stimulate innovation.

2.3.2 Mandatory Requirements

The Court in *Cassis de Dijon* exemplified a list of justifications for indistinctly applicable measures *in addition* to Article 36 derogations. They are called mandatory requirements or public interest requirements and they concern, *inter alia*, fiscal supervision, consumer protection or fairness of commercial transactions and usually rely on EU recognized policies, secondary legislation or even international obligations.[77] They can also be considered a *rule of reason* since they justify acceptable trade rules where harmonization is missing.[78]

The Court has recognized a number of mandatory requirements over the years and has set out conditions in order to find national regulations compatible with the free movement of goods, such as proportionality. The evolution of the Court's case law in this area also proves that the EU is not just an economic union and that the union also recognizes and promotes non-commercial values, thus national measures can fall within the mandatory requirements category, as long they do not have a purely economic aim.[79]

Originally, mandatory requirements were aimed to defend non-discriminatory measures, but later the Court practically recognised them for distinctly applicable measures as well, at least with regards to environmental protection[80].[81]

The Court has accepted many different mandatory requirements over the years, such as the protection of cultural expression, protection of animal welfare, protection of working conditions or road safety, but the following examples deserve special attention.

Consumer protection

The Court accepted consumer protection as a mandatory requirement for justifying national measures, but it did so in connection with the "mature and prudent consumer" model in an area where legislation is also partly harmonized at EU level. As shown in its case law, *e.g.* the *German beer* and *Mars* cases discussed earlier, the Court refers to a reasonably informed,

[77] *Idem*, p 172.
[78] Craig, de Burca, *op.cit.*, p 704.
[79] C.Barnard, *op.cit.*, p 174.
[80] Case C-2/90 *Commission v Belgium (Walloon Waste)* [1992] ECR I-4431.
[81] C.Barnard, *op.cit.*, pp 86-87.

circumspect and observant consumer.[82] On the other hand, it rejected consumer protection defences when product-labelling requirements could have better achieved the objective proposed by the Member State.[83]

Environmental protection

The Court observed in different cases that the EU together with its Member States aim to combat climate change and accepted a directly discriminatory measure taken by Sweden to stimulate the use of renewable energy sources for producing electricity[84] as well as a Danish rule requiring all beverage containers to be recyclable[85]. In *Mickelsson* it accepted the environmental protection justification, but underlined that the measures need to be proportionate to the aim pursued.[86]

Pluralism of the press

The Court noted in *Familiapress*[87] that '*maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the [ECHR], which is one of the fundamental rights guaranteed by the Community legal order'*, thus accepting Austria's argument that a restricting measure is necessary for the protection of small publishers. This case and *Schmidberger* are examples of using the protection of human rights for justifying a measure that hinders inter-state trade.

2.3.3 Harmonization

It is important to mention that in the areas harmonized by EU law, justifications such as the Article 36 derogations and mandatory requirements cannot be relied on.[88] When harmonization measures only impose a minimum standard, Member States can impose stricter rules as long as their aim is compatible with the Treaties

Usually EU-wide harmonization requires Member States to trust the conduct of other Member States in areas such as public health inspections. The Court emphasized that it is not for a Member State to decide if another Member State does not fulfil its obligations under harmonized EU legislation, thus it cannot invoke public health or public policy arguments to justify enforcing supplementary restricting measures for imported products.[89]

[82] *Idem*, pp174-176.
[83] Craig, De Burca, *op.cit.*, p 707.
[84] C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037.
[85] Case 302/86 *Commission v Denmark* [1988] ECR 4607.
[86] *Mickelsson*, para 32.
[87] Case C-368/95 [1997] ECR I-3689, para 18.
[88] Craig, de Burca, *op.cit.*, pp 703-704, 711.
[89] C.Barnard, *op.cit.*, p 196.

3 THE COMMON AGRICULTURAL POLICY

3.1 Overview

The Common Agricultural Policy (the 'CAP') was created in 1962 by the original six Member States of the EU as a response to the food shortages consequent to the Second World War. Its aim is to 'to provide a stable, sustainably produced supply of safe food at affordable prices for Europeans, while also ensuring a decent standard of living for farmers and agricultural workers'.[90]

According to the data published[91] by the Commission, the CAP accounted for around 38% of the total EU expenditure in 2015, although the shares have overall dropped from more than 70% in 1985[92]. These amounts are mainly spent on direct payments to farmers, on rural development programs and on market measures such as helping farmers negotiate with undertakings further down in the supply chain. It addresses 22 million farmers and 44 million EU citizens working in the food related industries and its annual budget is around EUR 59 billion.

Such data and the level of EU harmonization show that the CAP is one of the core policies of the EU. Since its establishment, it went through three major reforms, the most recent taking place in 2013.

3.2 Main Legal Instruments, Aims and Reform

The main sources of law for the CAP are found in Articles 38-44 TFEU. According to Article 39 TFEU, the main objectives of the CAP are increasing agricultural productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the availability of supplies and ensuring reasonable prices for consumers. The objectives are both economic and social.[93]

For achieving the aims of the CAP, Article 38 TFEU provides that the rules governing the Internal Market also apply to agricultural products, save as otherwise provided by TFEU.

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[90] European Commission, *The history of the common agricultural policy*, available at https://ec.europa.eu/agriculture/cap-overview/history_en, accessed 31.05.2017.

[91] European Commission, *EU agriculture spending - focused on results*, September 2015 Issue, available at https://ec.europa.eu/agriculture/sites/agriculture/files/cap-funding/pdf/cap-spending-09-2015_en.pdf, accessed on 05.06.2017.

[92] European Commission, *CAP Expenditure in the Total EU Expenditure*, March 2017 Issue, available on https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1_en.pdf, accessed on 05.06.2017.

[93] *Ibidem.*

The rationale behind establishing the CAP resided in the need to apply the principles of the Internal Market to the free movement of agricultural goods in a period when interventionism in agriculture was a common practice among the original Member States. Thus, the solution consisted in the transfer of competences to the EU for elaborating a common, coherent policy coordinated at EU level.[94] Such measures were taken considering the particularities of the agricultural sector, which is heavily dependent on external factors such as the climate and known for systemic imbalances between supply and demand.[95]

The importance of agriculture cannot be overestimated. A poorly managed agricultural system can lead to famines and the deaths of millions of people, as seen in recent history all over the world, including within Europe. Therefore, considering the market instability, state intervention in agriculture is arguably justified and this has been the consensus ever since the establishment of the EU.

3.3 Rural Development and the Short Supply Chains

State intervention under the CAP takes place through two pillars. The First Pillar consists in a system of direct payments to farmers for subsidizing their economic activity. The Second Pillar represents the rural development policy. [96]

The purpose of the Second Pillar is to promote a sustainable rural development and one of the means is promoting the organisation of the food production chain by ensuring that Member States draft rural development programmes, adapted to each Member State' agricultural reality.

One of the main sources of law for implementing the Second Pillar is Regulation 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development[97].

Recital (8) of Regulation 1305/2013 provides that "Member States should be able to include in their rural development programmes thematic sub-programmes to address specific needs in areas of particular importance to them". Thematic sub-programmes should envisage young farmers, small farms or *the creation of short supply chains*. Also, in Recital (29), Regulation 1305/2013 provides that "[s]upport to small operators for

[94] European Parliament, *Fact Sheets on the European Union: The Common Agricultural Policy (CAP) and the Treaty*, available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.2.1.html (accessed on 05.06.2017).
[95] *Ibidem.*
[96] Albert Massot, *Fact Sheets on the European Union: Second pillar of the CAP: rural development policy*, June 2017, available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.2.6.html (accessed on 05.06.2017).
[97] OJ L 347, 20.12.2013, p. 487–548.

organising joint work processes and sharing facilities and resources should help them to be economically viable despite their small scale. Support for horizontal and vertical co-operation among actors in the supply chain, as well as for promotion activities in a local context, should catalyse the economically rational development of *short supply chains*, local markets and local food chains".

Similarly, Article 5 of Regulation 1305/2013, titled *Union priorities for rural development*, provides that achieving the objectives of rural development should be pursued through the six Union priorities for rural development, among which promoting food chain organisation with a focus on "improving competitiveness of primary producers by better integrating them into the agri-food chain through quality schemes, adding value to agricultural products, promotion in local markets and *short supply circuits*, producer groups and organisations and inter-branch organisations".

In addition, Article 35 of the same regulation, titled *Co-operation*, provides that support should be granted to promote forms of co-operation and in particular "horizontal and vertical co-operation among supply chain actors for the establishment and the development of *short supply chains* and local markets" and "promotion activities in a local context relating to the development of *short supply chains* and local markets".

Therefore, European policy makers recognized that one of the means for addressing the most pressing issues in connection to European farmers is promoting and further developing local markets and short food supply chains.

But what are short supply chains? According to the definition provided in Regulation 1305/2013, a *short supply chain* means "a supply chain involving a limited number of economic operators, committed to co-operation, local economic development, and close geographical and social relations between producers, processors and consumers". As described by the Commission, they involve a very small number of intermediaries between the producer and the consumer. [98] The notion revolves around the proximity between the farmer and the final consumer, which encompasses geographic proximity, but also economic proximity (a more direct relationship with fewer intermediaries) and a short travel time between the production stage and the final purchase by the consumer.[99]

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[98] European Commission, S*hort Food Supply Chains*, available at https://ec.europa.eu/agriculture/organic/consumer-trust/certification-and-confidence/short-supply-chain_en (accessed 05.06.2017).

[99] Moya Kneafsey, Laura Venn, Ulrich Schmutz, Bálint Balázs, Liz Trenchard, Trish Eyden-Wood, Elizabeth Bos, Gemma Sutton, Matthew Blackett, *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics*, JRC Scientific and Policy Reports 2013, pp. 23-24 and pp. 109-110, available at https://www.researchgate.net/profile/Balint_Balazs4/publication/264388299_Short_Food_Supply_Chains_and_Local_Food_Systems_in_the_EU_A_State_of_Play_of_their_Socio-

But how would short supply chains improve the current status of agriculture? A number of authors observed that in certain situations, short supply chains could secure "a higher share of added value by eliminating intermediaries".[100] Another consequence of using short supply chains is that the product reaches the final consumer with value-added information about its quality and origin. It would also enhance connecting farmers with markets that are currently unavailable to them. Also, according to the Commission, implementing short supply chains could result in boosting local economies with side benefits in areas such as tourism, transport and environment.[101]

The importance of short supply chains from an economic perspective was also stressed by the Commission in a staff working document[102] from 28 October 2009. It observed that non-processed food producers cannot avoid large, stronger buyers (who are actually intermediaries such a logistic services providers and not directly large retailers) due to their buyer power. It rightfully observed that the structural issues of the supply chain affect end consumers mainly due to inefficiencies. The situation is different however on the processed foods markets, at least considering leading brands producers, whose bargaining power is similar to that of large retailers and therefore negotiations are carried out directly. In its conclusions, the Commission did not suggest state intervention, but suggested that the European Competition Network should develop a policy for ensuring proper competition in such markets across the EU.[103]

In the more recent period, the Commission launched a public debate called the *Initiative to improve the food supply chain*.[104] It addresses in particular to stakeholders in the food supply chain, such as farmers, processors, retailers and trade unions, asking them to submit their standpoints. In exposing the initiative's objectives, the Commission states that farmers "are important strategic and economic players in the food supply chain", acknowledging that they have a much lower bargaining power compared to retailers or processors, a situation that leads to the existence of unfair

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Economic_Characteristics/links/53db47480cf2631430cb2238.pdf (accessed on 20.08.2017).

[100] Jan Douwe van der Ploeg, Henk Renting, Gianluca Brunori, Karlheinz Knickel, Joe Mannion, Terry Marsden, Kees de Roest, Eduardo Sevilla-Guzman, Flaminia Ventura, *Rural Development: From Practices and Policies towards Theory*, Sociologia Ruralis, Vol 30, No 4, October 2000, p. 399.

[101] European Commission, *Short Food Supply Chains*, https://ec.europa.eu/agriculture/organic/consumer-trust/certification-and-confidence/short-supply-chain_en (accessed on 05.06.2017).

[102] Commission (EC), *Competition in the Food Supply Chain* (Commission Staff Working Document) SEC(2009) 1449, 28 October 2009), available at http://ec.europa.eu/economy_finance/publications/pages/publication16065_en.pdf (accessed on 05.06.2017).

[103] *Ibidem.*

[104] The consultation takes place between 16 August 2017 and 17 November 2017; more information available at https://ec.europa.eu/info/consultations/food-supply-chain_en (accessed on 21.08.2017).

contractual practices. In the Consultation Strategy[105] related to the initiative, the Commission considers that measures need to be taken due to the specific imperfections of the market.

One of the results expected following the input of the stakeholders could be a legal proposal. Thus, the Commission indirectly notes that it is possible that the sector faces structural problems and not only behavioural problems. While the latter can usually be addressed through the enforcement of existing law, structural problems can also be addressed through regulatory intervention.

The short supply chains were introduced following the 2014 CAP reform that was driven by economic, environmental and territorial factors and aimed to improve the competitiveness and sustainability of the agricultural sector.[106]

[105] Directorate-General for Agriculture and Rural Development (EC), Initiative to Improve the Food Supply Chain – Consultation Strategy, 2017, available at https://ec.europa.eu/info/sites/info/files/2017_07_31_consultation_strategy_en.pdf (accessed on 21.08.2017).

[106] European Commission, *Overview of CAP Reform 2014-2020*, December 2013, p. 2, available at https://ec.europa.eu/agriculture/sites/agriculture/files/policy-perspectives/policy-briefs/05_en.pdf (accessed on 05.06.2017).

4 A CASE STUDY: ROMANIA

4.1 The Agricultural Reality, Market Overview and Main Concerns

According to the data provided by the Romanian National Statistics Institute, as of 2016, the contribution of agriculture to the Gross Domestic Product of Romania was 5.6%, of which around 68% was crop production and around 30% animal production.[107] Agriculture in Romania's economy represents 6.6% of the Gross Value Added, while the EU average is 1.7%.[108]

There are 3.9 million farms across the territory, which means around a third of the total farms in the EU are located in Romania. The number of very small farms is very high, therefore large and medium sized farms account for 70% of the cropped land, but represent only 7% of the total number of farms. The remaining 93% are small or very small farms. Thus, productivity is low at 30% of the EU average.[109]

The lack of performance of the Romanian agriculture has many roots, from incoherent agricultural reforms during the past century to the shortage of technically advanced equipment and even to the problematic legislative framework regulating land ownership.[110]

However, around 57% of the territory is comprised of agricultural land. Therefore, the country is also the largest exporter of certain food products in the EU, such as cereals.[111]

In connection to the food trading sector, the Romanian Competition Council observed, in a report published in 2012[112] concerning the 2005-2011 period, that the majority of food products sold by retailers were acquired from

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[107] Mircea Adrian Grigoras, *Trends in Romania's agricultural production*, Scientific Papers Series Management, Economic Engineering in Agriculture and Rural Development, Vol. 16, Issue 1, 2016, p. 183, available at http://managementjournal.usamv.ro/pdf/vol.16_1/Art28.pdf (accessed on 20.08.2017).

[108] European Commission, Factsheet on 2014-2020 Rural Development Programme for Romania, available at https://ec.europa.eu/agriculture/sites/agriculture/files/rural-development-2014-2020/country-files/ro/factsheet_en.pdf (accessed on 20.08.2017).

[109] *Ibidem*.

[110] Paun Ion Otiman, *Romania's current agrarian structure: a great (and unsolved) social and economic problem*, The Romanian Sociology Journal, new series, year XXIII, no. 5-6, Bucharest, pp. 344-356.

[111] Mircea Adrian Grigoras, *Trends in Romania's agricultural production*, Scientific Papers Series Management, Economic Engineering in Agriculture and Rural Development, Vol. 16, Issue 1, 2016, p. 185, available at http://managementjournal.usamv.ro/pdf/vol.16_1/Art28.pdf (accessed on 20.08.2017).

[112] Romanian Competition Council, *Report on the Development of Competition in Key Economic Sectors*, 2012, pp. 42-56, available at http://www.consiliulconcurentei.ro/uploads/docs/items/bucket8/id8081/consiliul_concurentei_raport.pdf, accessed on 29.07.2017.

suppliers established in Romania, with certain exceptions such as fruits and vegetables, and that the share of Romanian products sold was on an ascending trend as of 2011.

However, the overall share of foreign food products in the Romanian economy is very high compared to the situations in other Member States with lower agricultural potential and Romanian consumers spend more than 40% of their income on food, which represents more than twice of the EU average.[113]

The Competition Council in its report performed a market assessment and also observed that there are many competitors in the retail sector, therefore the competition is intense, and also that the expansion of large retailers to smaller cities had a dynamic effect on the market which brought benefits to final consumers.

In its assessment, RCC pointed that the low share of Romanian fruits and vegetables on the shelves of retailers, despite their lower overall costs, is because Romanian producers did not abide the minimum standards required for supplying large retailers, such as technical requirements (using certain equipment or facilities for sorting or storing products) or packaging requirements. This led to a situation where Romanian products represented a large share among fruits and vegetables during the summer, but their share is insignificant during other periods of the year. Therefore, the lack of Romanian products in supermarkets during spring, autumn and winter is a matter of quality and price. Still, the share of Romanian products has been increasing since 2011 due to the producers' efforts to implement European standards, as well as due to the increasing demand of consumers for Romanian products.

In a paper[114] published by the OECD on 15 May 2014, which envisaged the food retail trends of various countries, RCC pointed out a series of issues concerning the industry. Among these, the low bargaining power of raw materials producers due to the existence of a high number of very small producers in areas such as dairy and bakery products which led to sector inquiries and a number of investigations. Also, local producers accused retailers for artificially increasing prices to final consumers, but the issue could not be addressed through competition law means due to the low market share of modern commerce (shopping with large retail chains), which only represented 40% of the entire market. However, as of 2013, the proportion of modern commerce increased to 50%.

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[113] Paun Ion Otiman, *Romania's current agrarian structure: a great (and unsolved) social and economic problem*, The Romanian Sociology Journal, new series, year XXIII, no. 5-6, Bucharest, pp. 341-342.

[114] OECD, *Competition Issues in the Food Chain Industry 2013*, DAF/COMP(2014)16, 15 May 2014, pp. 321-328, available at https://www.oecd.org/daf/competition/CompetitionIssuesintheFoodChainIndustry.pdf (accessed on 20.08.2017).

4.2 'The Supermarkets Law'

On 15 July 2016, Law no. 150/2016 on the amendment and supplementation of Law no. 321/2009 on trading food products was published in the Official Gazette of Romania no. 534.

The law amends a law enacted in 2009[115] which regulates the conditions for trading food products. The conditions address to all economic entities that trade food products and they consist in imposing certain deadlines for payments between suppliers and retailers, the prohibition of resale at a loss or the prohibition of tying services that are not directly linked to the sale of food products.

Thus, the original Law 321/2009 had already contained provisions aimed to balance the relationship between retailers and suppliers. RCC however had already suggested in 2012 that the original provisions of Law 321/2009 should be repealed, stating that they already exceeded what was necessary for securing a functioning market economy in the agricultural economic sector and that such *de facto* protectionist measures have a detrimental impact on the final consumer, since the general competition law provisions in the national legislation were already sufficient to achieve the pursued objective.[116]

The Main Provision

The National Law's Main Provision, in its current form, aims to promote local products by imposing an obligation on retailers to acquire at least 51% of the total volume of goods placed for sale from a *short supply chain*. This provision only addresses a limited amount of goods, namely meat products, eggs, vegetables, fruits (except exotic fruits), honey, dairy products and bakery and only addresses to retailers with turnovers exceeding EUR 2 million.

The *short supply chain* is defined as a supply chain that involves a limited number of economic entities involved in local businesses, as well as strong geographic and social ties between producers, processors and consumers. This definition does not expressly refer to domestic products or to domestic economic entities and is in line with the definition provided by Regulation 1305/2013 on support for rural development. However, the law also provides that the Government shall develop a methodology for the course of action to be taken in relation to the short supply chains, which has not been published as of August 2017.

The National Law includes an exception to the obligation to secure 51% of the total volume of goods from local products in case there is a shortage of supply; in this case, the Minister of Agriculture can issue an order after

[115] Law 321/2009 on trading food products, published in the Official Gazette of Romania no. 705 of 20 October 2009.
[116] *RCC report 2012*, p 43.

consulting the economic entities involved to increase the amount of products that do not fall within the definition of the short supply chain.

Other provisions

Another obligation imposed on traders is to provide special areas for displaying and selling Romanian products, besides organizing promotions and events for them on a frequency decided by local authorities. These obligations specifically refer to Romanian products, which are defined as products obtained on the territory of Romania from raw materials sourced 100% from Romanian farms. The definition also contains the statement that such a product is based on the interest granted by the producers for securing food safety.[117]

The National Law also contains special obligations for labelling meat products and for displaying the phrase *Romanian meat* for products falling within the provisions of EU Regulation 1169/2011[118], EU Regulation 1760/2000[119] and EU Regulation 1308/2015[120].

Finally, another amendment envisages the services and the fees retailers may charge. In comparison with the previous version of the law, when retailers could impose such contractual obligations as long as they were directly linked to the sale of food products, the current version forbids tying any services, irrespective of their link to the sale of food products. Thus, since the enactment of Law 150/2016, any contractual obligations including fees or services related to marketing or logistic services are now illegal.

The sanctions for not respecting the obligations imposed by the National Law consist in fines of up to 150,000 RON (approximately 34,000 EUR).

The National Law is an example of state intervention in the economy. In a note[121] exposing the reasons behind the legislative proposal, the MPs who initiated the legislative proposal in 2015 stated that lately there have been concerns around Europe about the abuses practiced by large retailers and that other EU countries have already taken measures to remedy such developments.

Similarly, during the debates that took place on 8 June 2016 in the Chamber of Deputies before the legislative proposal was voted, the president of the Committee for Agriculture, Nini Săpunaru, stated that the main purpose of the National Law is to "revitalize the facile access for national producers on

[117] There are no sources available expressing the reasons for including such a statement in the definition for Romanian products, but it is possible that such a reference was included to enable a justification for restrincting the free movement of goods across the EU on grounds of public health.
[118] OJ L 304, 22.11.2011, p. 18–63.
[119] OJ L 204, 11.8.2000, p. 1–10.
[120] OJ L 347, 20.12.2013, p. 671–854.
[121] Available at http://www.cdep.ro/proiecte/2015/700/90/8/em1013.pdf (accessed on 29.07.2017).

the retail market in accordance with the legislative framework in the area of sanitary safety".[122]

4.3 Background

As a matter of background, the legislative process that led to the enactment of the law debuted on 11 May 2015. However, the original proposal[123] was substantially different compared to the version enacted: it only contained provisions regulating that supermarkets larger than 2,500 sqm should be closed on Sundays and during legal holidays. In an official statement[124], the Government did not endorse this proposal, arguing that such provisions restrained consumption and referred to certain studies[125] that concluded that Romanian consumers obtain their supplies during the weekends, as well as that such measures discriminated against large retailers. Subsequently, the Romanian Senate rejected[126] the legislative proposal on 3 November 2015 and the bill was forwarded to the Chamber of Deputies.[127] Again, the Government did not endorse the same version after it was forwarded to the Chamber of Deputies.[128]

However, on 26 April 2016, the Committee for Agriculture of the Chamber of Deputies substantially modified the text of the bill, including amendments from three other bills and compiled a consolidated version aimed to amend Law no. 321/2009 on trading food products, but interestingly removed the original provisions that regulated the schedules of large retailers.[129]

[122] Video displaying the parliamentary debates preceding the vote on the legislative proposal, available on http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=14920 (accessed 29.07.2017).

[123] Romanian Chamber of Deputies, Legislative proposal Pl-x nr. 798/2015, available on http://www.cdep.ro/proiecte/2015/700/90/8/pl1013.pdf (accessed on 29.07.2017).

[124] Romanian Government Address no. 1452 of 21 September 2015, available at https://senat.ro/legis/PDF/2015/15L431APV.pdf,

[125] There are no references to the studies mentioned by the Government.

[126] Romanian Senate Address to the Romanian Chamber of Deputies, 3 November 2015, available at https://senat.ro/legis/PDF/2015/15L431AM.pdf (accessed 29.07.2017).

[127] The Romanian Parliament is a bicameral Parliament consisting of the Chamber of Deputies and the Senate, both popularly elected; according to Article 75 paragraph (3) of the Romanian Constitution, after the first notified chamber adopts or rejects a legislative proposal, the proposal is then forwarded to the other chamber that shall make the final decision.

[128] No official reasons for refusing to endorse the legislative proposal were given this time; Romanian Government Representative for Parliamentary Affairs Statement no. 1908/DRP of 1 March 2017, available at http://www.cdep.ro/proiecte/2015/700/90/8/PVG%203%20martie.pdf, p. 26 (accessed on 29.07.2017).

[129] Committee for Agriculture of the Romanian Chamber of Deputies, Report no. 4c-4/253 of 26 April 2016, available at http://www.cdep.ro/comisii/agricultura/pdf/2016/rp798_15.pdf (accessed 29.07.2017).

The Main Provision of the National Law was introduced from a different bill[130] that was finally rejected on 10 May 2016. In a note[131] exposing the reasons behind the amendment, the MP who initiated it argued that such amendments are required in order to stimulate production, to create jobs and to ensure that large retailers will sell Romanian products. In the same document, the MP recalls a private initiative called "Longing for taste"[132] (in Romanian, *Dor de gust*) that took place in 2014 where an association of local farmers established partnerships with certain large retailers to sell mostly Romanian products.[133] The private initiative was deemed successful by the media[134] and thus the MP argues that such arrangements should be regulated.

Initially, the draft Main Provision expressly referred to Romanian products instead of using the *short supply chain* notion. In an opinion[135] issued on 28 March 2016, the Romanian Competition Council argued that, overall, the proposed amendments to Law 321/2009 on trading food products could lead to an increase in the demand for Romanian food products and to the strengthening of competition on the supply of food products market. It also stated that the initiative might lead to local economic growth and to stronger economic ties between local producers and final consumers. It concluded that benefits to the health of consumers should be observed following the enactment of such amendments due to the increase in the offer of fresh products. On the other hand, RCC argued in the same document that the measures are discriminatory for favouring national producers and that this kind of state intervention may actually lead to a shortage of supply and to a reduced variety of products. Also, that securing an outlet to a limited number of competitors causes disruptions in that particular economic sector. Finally, RCC concluded that the draft Main Provision that expressly referred to Romanian products possibly infringes the free movement of goods provisions in TFEU. RCC suggested that there are better alternatives to solving the problems of local producers, such as taking measures to increase their storage capacities or stimulating their association for an increase in their bargaining power.

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[130] Romanian Chamber of Deputies, Legislative Proposal PL-x nr. 642/2015, available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=15185 (accessed 29.07.2017).

[131] Available at http://www.cdep.ro/proiecte/2015/600/40/2/em829.pdf (accessed 29.07.2017).

[132] According to the press, the program was initiated by the Romanian Association of Vegetables Haversters; more information is availble at http://www.retail-fmcg.ro/fmcg/programul-lansat-sub-denumirea-dor-de-gust-o-initiativa-a-asociatiei-cultivatorilor-de-legume.html (accessed 06.08.2017).

[133] More information about a similar initiative is available at http://www.capital.ro/produsele-romanesti-cuceresc-rafturile-hipermarketurilor-toate-fructele-si-legumele-de-sezon-vandute-la-cora-sunt-autohtone.html (accessed 06.08.2017).

[134] For example, the news article available at https://www.gazetadeagricultura.info/plante/legume/16261-legume-romanesti-in-hipermarket-uri-din-luna-iunie.html (accessed 06.08.2017).

[135] Romanian Competition Council, Opinion of 28 March 2016, available at http://www.consiliulconcurentei.ro/uploads/docs/items/bucket10/id10951/opinie_comisia_agric_lg_321_dd.pdf (accessed on 06.08.2017).

The position of RCC had an impact in modifying the text of the bill prior to its enactment, as shown above.

4.4 The Commission's Position

On 15 February 2017, the Commission issued a statement about launching the infringements procedure against Romania in connection to the recent developments in the retail trade of agricultural and food products.

The formal notice was issued in accordance with art. 258 TFEU in the area of Internal Market, Industry, Entrepreneurship and SMEs and concerns the commercialisation of foodstuff in Romania.[136]

According to the press release[137], the decision was taken on the grounds that the Romanian national rules on trading food products run against EU Law. The Commission straightforwardly refers to the Main Provision of the National Law, finding that national legislation compelling retailers to purchase a minimum of 51% of agricultural products from local producers raises concerns in conjunction with the free movement of goods. Also, that the new provisions of the National Law requiring retailers to promote Romanian products "[restrict] their commercial decision of which products to place on offer, which in turn runs counter to the freedom of establishment (Article 49 of TFEU)".

Finally, the Commission mentions the conditions under EU law that allow such restrictions and urges the Romanian authorities to respond to the Commission's arguments within two months.

As of August 2017, any exchange of information between the Romanian Government and the Commission has not been made public, but, according to the media[138], the Romanian Government did submit its observations on 16 June 2017.

In its brief press release, the Commission also observed that Romania did not provide any evidence that the provisions in the National Law are justified and proportionate. It points out that restrictions to the fundamental freedoms of the EU "are only permitted when there is a justified need to protect an overriding public interest".

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[136] European Commission, Infringement Procedure no 20162148 of 15 February 2017; more information available at http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=20162148&noncom=0&decision_date_from=&decision_date_to=&active_only=1&EM=RO&DG=MARK&DG=GROW&title=&submit=Search (accessed on 06.08.2017).

[137] European Commission Press Release Database, Press Release issued on 15 February 2017, available at http://europa.eu/rapid/press-release_MEMO-17-234_EN.htm (accessed on 06.08.2017).

[138] For example, the news article available at http://www.economica.net/lege-321_140006.html#n (accessed on 12.08.2017).

Following the Formal Notice issued by the Commission, a number of MPs suggested amendments to the National Law such as replacing the term *short supply chain* with *partnership* or replacing *Romanian products* with *in-house products* (which would include products from the territory of the EU); also, following the debates in the Committee for Agriculture of the Chamber of Deputies, according to the media[139], there appears to a consensus that the provision containing the obligation imposed on retailers to promote Romanian products should be repealed. Still, as of August 2017, no new amendments to the National Law have entered into force.

[139] For example, the news article available at http://www.romaniajournal.ro/lower-chamber-no-special-shelves-for-local-foodstuff-romanian-term-ban-pending/ (accessed on 06.08.2017).

5 ASSESSMENT OF COMPATIBILITY WITH EU LAW

5.1 Introduction

Since the Commission started the infringement procedure in connection to the National Law on 15 February 2017 and if the National Law is not amended or repealed, there is a possibility that the issue concerning its compatibility with EU law will be examined by the Court.

Under Article 258 TFEU, the infringement procedure consists of several steps. First, the Commission issues a letter of formal notice to the Member State, requesting detailed information. If the Member State does not submit information or if the information does not change the Commission's view, the latter sends a reasoned opinion, formally requesting the Member State to comply with EU law. If the Member State still does not comply, the Commission can refer the matter to the Court, which examines whether the Member State complied with its obligations under EU law. Finally, if the Member State still does not comply pursuant to the Court's judgement, the Commission may ask the Court to impose financial penalties on the Member State.

5.2 The Court's Role in the Development of EU Law

The Court had a significant role in achieving single market integration through the case law developed to interpret articles 34-37 TFEU.[140] Some authors[141] even described it as "the dark horse of European integration".

The same authors argue[142] that the level of European integration as it is today does not originate in the provisions of the European treaties as they were originally drafted. Integration became possible due to the actions of individual actors such as lawyers, litigants or interest groups, who pursued different interests and had different objectives (not necessarily European integration) and who turned to the Court when they could not achieve their objectives by the means provided by national law. Consequently, the role of Member States in furthering European integration fades away in comparison to the role of the Court and the role of individual actors. Having the ultimate political power, Member States still complied with and accepted the judgements of the Court they criticised, for political and strategic reasons related to other more pressing issues. Also, the heterogeneity of the interests

[140] P.Craig, G.de Burca, *op.cit.*, p. 665.
[141] Anne-Marie Burley and Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, International Organization, vol. 47, Issue 1, Winter 1993, in the abstract of the article.
[142] *Idem*, pp. 52-56.

of Member States usually led to deadlocks in decision making, and the Court fulfilled its role as a mediator where the Member States could not make any compromises, but a common stand was necessary.

The main powers of the Court, as provided in TFEU, are to hear various types of actions, such as actions for annulment (Article 264), references for preliminary rulings (Article 267) or actions related to the infringement procedure (Article 258). It can be noted, by observing the means at its disposal, that the Court is the institution to be referred by the many actors involved for securing their interests deriving from EU law: the Commission asks the Court to impose penalties when Member States do not comply with EU law, Member States ask the Court to nullify an act of EU institutions through the action for annulment and national courts refer preliminary ruling to the Court for securing the interests of private actors. Therefore, the main objective of the Court is to secure the interests of the European Union, while balancing the interests of the other entities involved.

The approach described above is confirmed by but also originates in the ground-breaking case of *Van Gend en Loos*[143]. The Court issued the judgement in 1963 despite of the strong opposition from Member States and gave private actors the means for addressing EU law-related issues by stating that nationals of Member States can lay claims of individual rights sourced in EU legislation in front of national courts.[144] Thus, the Court gave litigants a personal stake in enforcing EU law and proactively "coached" them in using the available means.[145]

Still, for its effective pursuit of the pro-integration agenda, the Court arguably did not go beyond the limits of the law.[146] Of course, it sourced its rulings on the text of the Treaties, but not on a particular provision: it used the Preamble and referred to the general scheme, the wording and the spirit of the provisions to fundament its argument that the EU is a particular legal community, "a new legal order of international law", where not only Member States and public bodies, but also individuals have rights, thus legitimating the private enforcement of EU law.[147] Such legitimation was grounded in the belief that individuals could most effectively hold the Member States accountable and ensuring that Member States commit to their obligations under EU law.[148]

Since the establishment of the European Union, its dominant economic character has lessened and EU law has "spilled over" to various domains such as social security, work safety, consumer protection and education and the Court had an important role in such developments. Interestingly, the Court grounded much of its case law in these areas on achieving its aim of

[143] Case 26/62 [1963] ECR 1.
[144] P.Craig, G.de Burca, *op.cit.*, pp. 187-190.
[145] Anne-Marie Burley and Walter Mattli, *op.cit.*, pp. 60-62.
[146] Anne-Marie Burley and Walter Mattli, *op.cit.*, p 57.
[147] P.Craig, G.de Burca, *op.cit.*, pp. 185-189.
[148] Anne-Marie Burley and Walter Mattli, *op.cit.*, p 62.

furthering the Internal Market.[149] The peak of distancing from the concept that the EU is an economic union must have been the development of the Charter of Fundamental Rights of the European Union, which was given the same legal value as that of the Treaties.

In free movement law, which developed mainly through case law, the Court applies a number of principles for developing a coherent jurisprudence, such as non-discrimination, market access, abuse of rights or remoteness.[150] Yet the Court has given judgements where it had to balance the textual application of EU law with protecting other legitimate ideals.

Such was the case in the recent *Dano*[151] case, where the Court had to take into consideration the political unrest with regards to benefit tourism while ruling on certain aspects of the free movement of persons. The judgement reduced the existing tensions in some Member States and therefore a number of academics considered it had a political side.[152]

Similarly, the Court balanced legitimate interests with EU law in *Viking Line*[153]. A Finnish transport company decided to reflag a vessel it operated under the flag of Estonia, a decision which would lead to a lessening of costs for the company. However, a Finnish union of workers put on a strike to prevent applying the company's decision. The Court ruled that the actions of the union hindered the freedom of establishment in Estonia, but that the national court should assess whether the collective action was justified, proportionate and necessary. Also, in paragraph 75 of the judgement, the Court reaffirmed the following: "[i]t is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty *and is justified by overriding reasons of public interest.* But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it" and in paragraph 45 is confirmed that the protection of fundamental rights is a legitimate interest.

In another relevant case, *Laval*[154], the Court states in paragraph 105 that "[s]ince the [EU] has thus *not only an economic but also a social purpose*, the rights under the provisions of the [TFEU] on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article [151 TFEU], *inter alia*, improved living and working conditions,

[149] Anne-Marie Burley and Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, International Organization, vol. 47, Issue 1, Winter 1993, pp. 66-67.
[150] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford Scholarship Online, 2014, p 3.
[151] Case C‑333/13 [2014] ECLI:EU:C:2014:2358.
[152] For example, Xavier Groussot, *Opening address and introduction* to the Dano Case Seminar organized by the Swedish Network for European Legal Studies in collaboration with the Faculty of Law at Lund University on 9 October 2015 in Lund, Sweden.
[153] Case C-438/05 [2007] ECR I-10779.
[154] Case C-341/05 [2007] ECR I-11767.

so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour". The case concerned a blockade by Swedish labour unions against a Latvian company that posted 35 workers for constructing a school in Vaxholm, Sweden. Since the workers were posted from Latvia, their contracts did not fall within the collective labour agreements for construction workers in Sweden, thus their wages were lower which helped the company reduce its costs and win the contract for constructing the school. The actions of the Swedish unions were aimed to force the Latvian company to sign the collective agreement in Sweden. The Court ruled that the actions of the Swedish unions hindered the freedom of establishment and found that the actions were not justified.

5.3 The Main Provision and the Internal Market

The first question that the Court should answer is if the Main Provision, holding that large retailers must acquire 51% of the total volume of certain goods placed for sale from a short supply chain, hinders the free movement of goods.

In light of the current framework of the free movement of goods, the answer should be *Yes*, for the following reasons: as the Court previously held in its jurisprudence and reaffirmed in *Campus Oil*[155], any national rule which requires certain undertakings to purchase a certain proportion of their requirements for certain products from producers located in the national territory constitutes a measure having equivalent effect to a quantitative restriction on imports.

It is true that the Main Provision does not contain a specific reference to national producers, since it indirectly refers to producers who can meet a number of conditions, such as having strong geographic and social ties with, *inter alia*, consumers. But it is hard to believe that producers located in distant EU Member States, such as Portugal or the UK, would meet such criteria, and Article 34 covers any national measure which is capable of hindering, even potentially and indirectly, intra-EU trade, as explained in Section 2. Also, obliging undertakings to buy their supplies in a certain amount only from neighbouring Member States is a measure which results in the division of the Internal Market, which is against the basic principles of the EU.

5.4 Justification

As seen in Section 2, a measure that falls within the provisions of Article 34 TFEU can under certain conditions be justified and thus be regarded compatible with EU law.

[155] Case 72/83 [1984] ECR 2727, para 12-20.

Taking into consideration the cases mentioned in Section 5.2, the question is whether the Court could apply the same reasoning as in *Laval*, *Viking Line* or *Dano* in relation to the Main Provision of the National Law. We have seen that the Court balanced fundamental rights and legitimate aims of the EU with the free movement provisions. Since the Main provision uses a notion borrowed from the CAP and thus imposes the application of such provisions to private entities, the question lies on whether the Court could take into consideration the fact that the geographical restriction to the free movement of goods around the territory of the EU is actually an implementation of the objectives of the CAP.

As mentioned in Section 3, the Common Agricultural Policy is one of the original policies of the EU to which a large amount of EU's budget is dedicated, and rural development is a key policy of the CAP. Therefore, creating a viable CAP and making it effective should be considered a legitimate aim.

The conclusion in Section 4 is that the Romanian Government attempted to enact a law that would protect national producers. There is no doubt about such conclusion, taking into consideration the context in which the law was adopted, as well as the reasons mentioned by MPs, as discussed in Section 4.3 and 4.4.

But apparently there are two possible readings on how the Court decided to interpret the Treaties in relation to the four freedoms: the first relies on interpreting the four freedoms as a method to counter state protectionism, thus verifying whether state measures are motivated by protectionism. The second approach consists in ensuring that a state measure does not make trade more difficult, irrespective of discrimination or protectionism. The main difference between the two readings is that the first allows state intervention to take place as long as it does not have a protectionist motivation, while the second requires placing a balance between economic freedom and other legitimate interests, since the second reading is strongly tied to a *laissez-faire* economic policy. The Court has been seen to apply both readings in various cases across its jurisprudence[156], but the *Laval* and *Viking* cases redirect towards the second reading, therefore the Court does not only look at the will behind the national measures, but to their practical implications as well.

Hence, the Court may very well find that the free movement of goods originating from distant EU countries is somewhat restricted within the territory of Romania, but that the measure pursues a legitimate aim, such as enhancing the CAP through helping local producers sell their products to large retailers, an aim which derives from of the recent CAP reform, as detailed in Section 3.3.

[156] Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedom*, Oxford University Press, 2002, p 2-3.

Furthermore, there are enough arguments to conclude that the Court does surprise in rulings concerning matters that it finds important. Guarding the most important particularities of the EU has recently been observed when the Court issued Opinion 2/13[157] concerning the accession of the EU to the European Convention on Human Rights. The Court rejected the draft agreement for EU's accession to ECHR on grounds that the document is incompatible with the current institutional framework of the EU and a threat to the autonomy of EU law and thus postponed the fulfilment of the obligations set out in Article 6(2)[158] TEU.[159] The negative opinion was heavily criticized and issued during a time when most stakeholders expected a positive outcome.[160]

Following the reasoning mentioned in paragraph 45 in *Viking*, the Court may accept a restriction on the free movement of food products if it pursues a legitimate aim. The aim of the Main Provision in the National is arguably similar to the aim of the CAP as provided in Regulation 1305/2013: promoting a sustainable rural development through promoting food chain organisation, including short supply circuits. As provided in Article 7 of the Regulation, Member States may include within their rural development programmes thematic sub-programmes that may relate to *short supply chains* with the aim of contributing to the achievement of EU priorities for rural development. Since, within the CAP, achieving rural development is a legitimate aim, the Court could balance such legitimate policies with the economic interest of perfecting the Internal Market.

Similarly, the fact that the struggles of small local farmers are of major importance of EU institutions has recently been proven through the Initiative to improve the food supply chain launched by the Commission on 16 August 2017.[161] According to the media, the need to find a solution to their issues was discussed by the Agriculture Commissioner Phil Hogan: "Farmers are the first link in the chain and without them, there would not be food to process, sell and consume. However, we notice that they often remain the weakest link"[162].

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[157] Opinion 2/13 of the Court (Full Court) of 18 December 2014 on the EU Accession to the ECHR, ECLI:EU:C:2014:2454.

[158] Article 6 (2) TEU: *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*.

[159] Stefan Reitemeyer and Benedikt Pirker, *Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back*, available at http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/ (accessed on 14.08.2017).

[160] Sionaidh Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, available at http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/#.VRGRofmG9uw (accessed on 14.08.2017).

[161] As detailed in Section 3.3.

[162] For example, the news article available at http://www.euractiv.com/section/agriculture-food/news/commission-launches-public-consultation-on-food-chain-fairness/ (accessed on 21.08.2017).

In addition to the cases already mentioned, the ruling in *Essent Belgium*[163] is very relevant due to its resemblance to the situation in Romania: the case concerned an energy scheme in Belgium which required energy suppliers to demonstrate the use of locally produced green energy while not being allowed to use green energy certificates originating from other Member States to fulfil their obligations. Hence, it imposed an obligation on undertakings to acquire a proportion of their supplies (green energy) from the territory Belgium. Renewable energy is also a highly regulated sector, even at EU level, and the Court considered that the reduction of greenhouse gas emissions through the use of green energy is a major objective of the EU and found that the measure hindering the trade of renewable energy "is in principle capable of justifying barriers to the free movement of goods".[164] Subsequently, the Court performed a proportionality analysis and ruled that the measure was compatible with EU law.

If such is the case, then the compatibility of the National Law with EU law is a matter of proportionality.

5.5 About Necessity and Proportionality

The proportionality test that the Court applies when assessing national measures infringing free movement provisions mainly comprises of a suitability test and a necessity test.

As the Court put it in *Familiapress*, the proportionality test applicable for state measures that are incompatible with the provisions of free movement consists in a determination of "whether the provisions of national law in question [are] proportionate to the objective pursued" and also that "the objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade".[165]

The burden lies on the national authorities to prove that their measures are proportionate, but the measure must be assessed by also taking into consideration the context which led to its enactment.[166]

Perhaps the most comprehensive guide to applying the Court's proportionality test can be found in AG Poiares Maduro's Opinion of 13 July 2006.[167] He summarizes the test as a "a consideration of the costs and benefits of a measure enacted by a Member State in the light of the different interests which [EU] rules deem worthy of protection". Thus, Romania must demonstrate that the benefits brought by the Main Provision to rural development justify the costs it imposes on the free movement of goods.

[163] Joined Cases C‑204/12 to C‑208/12 [2014] ECLI:EU:C:2014:2192.
[164] *Idem*, para 90-95.
[165] Case C-368/95 [1997] ECR I-3689, para 19.
[166] Catherine Barnard, *op.cit.*, pp. 179-180.
[167] Opinion of AG Poiares Maduro delivered in Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-09171, para 23-28.

The AG further describes the steps in applying the proportionality test. First, the Court must assess whether the measure actually contributes to achieving the legitimate aim pursued (*the suitability test*). Regarding the National Law, as RCC observed in its opinion[168] issued on 28 March 2015, the measures could lead to local economic growth and to stronger economic ties between local producers and final consumers, but it also mentioned possible negative consequences to the economic sector. Also, in a study focusing on short supply chains, the authors argue that the economic benefits of short supply chain spread well beyond the immediate benefits to local producers, showing that they generate employment and capital in rural areas, they reduce food waste and even counter emigration[169] from disadvantaged areas.[170] Moreover, researchers within the European Parliament expressed support for implementing short supply chains as a way of resolving the problems of the industry.[171]

Therefore, Romania should provide more evidence as to the actual benefits of the measure not only to local producers and to the implementation of CAP objectives, but also in relation to the greater national or EU-wide legitimate aims.

Secondly, the Court must assess the necessity of the measure (*the necessity test*). AG Maduro point out that more precisely the necessity test "concerns the question whether an alternative measure is realistically available that would protect the Member State's legitimate interests just as effectively, but would be less restrictive of the free movement of goods". Hence, the question is whether Romania could have achieved the same result through different measures that have a lower impact on the Internal Market. Again, as RCC showed in its opinion issued on 28 March 2015, that stimulating the association of local producers and supporting them in increasing their storage capacities could be better alternatives to the enactment of the National Law. For observing the complaints of large retailers with regards to contracting with national producers, as described in Section 4.2, another solution could be providing aid in improving their technological capabilities for creating economies of scale and thus competing more effectively with foreign producers. Similarly, Romania must show the necessity of the

[168] Romanian Competition Council, Opinion of 28 March 2016, discussed in Section 4.4.
[169] Moya Kneafsey, Laura Venn, Ulrich Schmutz, Bálint Balázs, Liz Trenchard, Trish Eyden-Wood, Elizabeth Bos, Gemma Sutton, Matthew Blackett, *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics*, JRC Scientific and Policy Reports 2013, p. 80, available at https://www.researchgate.net/profile/Balint_Balazs4/publication/264388299_Short_Food_Supply_Chains_and_Local_Food_Systems_in_the_EU_A_State_of_Play_of_their_Socio-Economic_Characteristics/links/53db47480cf2631430cb2238.pdf (accessed on 20.08.2017).
[170] *Idem*, pp. 29-32.
[171] Marie-Laure Augère-Granier, *Briefing on the Short food supply chains and local food systems in the EU*, Member's Research Service, European Parliament, 2 September 2016, available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)586650 (accessed on 21.08.2017).

National Law and why the means described above are or were not a better alternative.

An interesting approach would be to show that the Commission itself agreed to certain restrictions to the free movement of goods by including the reference to geographical ties in its definition[172] of short supply chains. Why would the institutions of the EU enact such a provision if restrictions of this kind were not deemed proportionate? The definition is not further detailed, thus the interpretation of "close geographical and social relations" is left to the appreciation of Regulation 1305/2013's addressees. If that is the case, then the Main Provision could pass the proportionality test described above; however, the Main Provision also contains supplementary conditions which are also relevant to the proportionality test.

5.6 Why 51%?

The Main Provision specifies that the obligation to acquire at least 51% of the total volume of goods placed for sale from a short supply chain. It is applicable only for meat products, eggs, vegetables, fruits (except exotic fruits), honey, dairy products and bakery. The question is, also, if the percentage chosen by the legislator is proportionate to the aim pursued.

In *Campus Oil*, the Irish Government also imposed the obligation on importers of petrol to buy 35% of the quantities they require from a refinery owned by the state. The Court found the measure to be justified on grounds of public security, but subjected the measure to a proportionality test.

In the assessment, the Court held that the regulated quantities (*i.e.* the percentage in the amount of 35% of the importers' requirements of petroleum oils) "must in no case exceed the minimum supply requirements of the State concerned without which its public security (...) would be affected"[173]. However, the Court also ties the amounts to certain technical reasons and to the data provided by the Irish Government and other interested parties for proving the reasons behind the chosen percentage.[174]

About the percentage of 51% mentioned in the National Law, there is no public information available as to the reasons behind choosing such number. For passing the proportionality test, the Romanian Government should provide empirical evidence. If a lower quantity would secure the aim pursued or if the percentage was chosen randomly, then the measure cannot be deemed necessary anymore, thus being incompatible with the free movement of goods.

[172] According to Article 2 of Regulation 1305/2013, the short supply chain is defined as "a supply chain involving a limited number of economic operators, committed to co-operation, local economic development, and *close geographical and social relations*".
[173] Case 72/83 [1984] ECR 2727, para 47.
[174] *Idem*, para 48-49.

In *Campus Oil*, the Court left it to the national courts to decide if the data provided falls within the limits set out by the Court for passing the proportionality test, but this was possible because the Court was referred by means of a preliminary ruling based on current Article 267 TFEU. However, if the Commission under Article 258 TFEU refers to the Court in connection to the National Law, the Court will have to do the test by itself, since there is no national court involved to be delegated with performing the proportionality test.[175]

5.7 Buy Irish *et co*.

The National Law also includes provisions compelling retailers to actively promote Romanian products and to secure special shelf space for such products.

The measure resembles the facts of the *Buy Irish*[176] and *Buy British fruit*[177], cases, discussed in Section 2.2, where the Court concluded that state-sponsored promotion of national products is not compatible with EU law.

Intervening in the decision-making process of private entities for encouraging the purchase of domestic products to the detriment of foreign goods is a measure capable of influencing the conduct of consumers towards raising the sales of Romanian products.

Moreover, the measure does not aim to promote the goods for certain outstanding qualities, but just because of their Romanian origin, therefore this measure is a plain form of state protectionism that goes against the principles of the Internal Market, as well as against the principle of loyal cooperation, as set out in Article 4(3) TEU[178].

5.8 Other Possible Approaches

Public health justification

As seen in Sections 4.3 and 4.4, the National Law contains certain references to sanitary safety and to improving the health of final consumers. In addition, RCC argued that the National Law would benefit final

[175] Unless, of course, the Court is referred to by means of a preliminary question by a Romanian court following an action brought up by an undertaking concerned with the provisions of the National Law.
[176] Case 249/81 [1982] ECR 4005.
[177] Case 222/82 [1983] ECR 4083.
[178] Article 3(4) TEU: *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

consumers by providing them with fresh products that undergo minimum processing. This appears to be the pavement for using public health as a justification in case the Commission find a restriction to the free movement of goods.

However, as seen in Section 2.3.1, the Court is reluctant to consider public health as a suitable justification unless there are strong, grounded reasons behind the national measure. It is improbable that the Court will ever consider that processed foods harm consumers in such a manner that restricting the free movement of goods through the National Law could be considered a proportionate measure. Moreover, taking into consideration the principle of mutual recognition, there is no proof so far that local food is produced in a more adequate way than products originating from other Member States.

However, it is worth mentioning that a number of Member States from Eastern Europe, including Romania, complained[179] that foodstuff produced in other Member States and sold on Eastern European markets are of lower quality than the corresponding products sold in Western Europe. In Romania, certain sample products were analysed by the national sanitary authority, but the results were inconclusive as per the claims made.

Similarly, the freshness of food products cannot be taken into consideration as an adequate reason since the Main Provision also refers to other products besides fruits and vegetables.

[179] More information available at http://www.rri.ro/pages/foodstuff_quality_under_investigation-2567326 (accessed on 12.08.2017).

6 CONCLUSION

The first research question of the paper was whether the Main Povision of the National Law consisting in an obligation for large retailers to purchase at least 51% of the total volume of certain food products placed for sale from a short supply chain falls within the prohibitions laid down in Article 34 TFEU, or, more clearly, if the measure is a restriction on the free movement of goods. As seen in *Dassonville*, any measure that is capable of hindering, directly or indirectly, actually or potentially, trade within the EU is a measure having equivalent effect to quantitative restrictions. Hence, even if the measure does not specifically refer to Romanian products or to domestic products, the law still imposes an obligation on retailers to acquire local products, thus hindering the trade of EU products that do not fall within the definition.

The second question was whether the same measure can be justified under EU law standards. In its jurisprudence, the Court does not find measures hindering trade compatible with EU law unless they can be justified by an overarching public interest. However, there is no statutory definition of what a public interest in the context of free movement law is, therefore the Court identifies legitimate public interests on a case-by-case basis and has done so previously with issues such as environmental protection or the protection of human rights. It is worth remembering that environmental protection and the protection of human rights were not included in the original list of justifications provided by Article 36 TFEU, thus the Court adapted to the economic and social realities of the time and considered that the original list was not exhaustive.

The question is then if the Court could find that the protection of the economic viability of small farmers is a legitimate interest for hindering trade within the Internal Market. The answer could be *Yes*, for the following reasons:

(i) This would not be a form of classic state protectionism since even the EU institutions recently recognized the structural problems of the industry; the current public debates launched by the Commission could even lead to a form of market regulation and enforcing short supply chains has been proposed as a viable solution;

(ii) State intervention, by certain means, in the agricultural sector is generally accepted and even recognised as a necessity at EU level;

(iii) The situation of Romanian agriculture is perhaps the gravest because the number of farmers is the largest among any Member State (around a third of all EU farms are located in Romania), hence this could show why this is an overriding interest for this particular country;

(iv) Historically, the Court had an important role in the development of EU law and is known for delivering surprising judgements in connection with pressing issues.

Still, the fact that the Court recognizes that the public interest in sustaining local farmers is legitimate and thus capable of justifying barriers to trade does not mean that the measure is compatible with EU law: it still needs for "pass" the proportionality test.

This could be problematic, as the national measure needs to pass both the suitability and the necessity test. There are arguments for finding the measure suitable, but for solving the issues identified in the long-term, the measure does not appear sufficient: securing an outlet for small local producers does not provide them with an incentive to improve their business models, but can even act on the contrary. In addition, complementary measures need to be taken for ensuring that farmers will adapt to the technological and logistical requirements of the 21st century, but the National Law does not contain any.

Consequently, is it *possible* that the Court finds the Main Provision justified in such a manner to be compatible with the rules governing the Internal Market? Such a solution is indeed possible, considering the above. But is it *likely* that the Court would find it justified? Perhaps not.[180]

[180] The questions were answered taking into account that any communication between the Romanian Government and the Commission following the issuance of the formal notice have not been made public as of August 2017, thus any arguments brought up by the national authorities could only be anticipated, but not conclusively upheld or refuted by this study.

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